



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

Prevailing Wage
PO Box 44540 • Olympia, Washington 98504-4540
360/902-5335 Fax 360/902-5300

February 28, 2013

Katherine Cowin
Bulldog Plumbing & Design LLC
1407 Willows Road E
Suite D
Fife, WA 98424

Re: Types of Payments Considered Usual Benefits

Dear Ms. Cowin:

This is a determination of the Industrial Statistician regarding coverage of the referenced work under Washington's prevailing wage laws and is made pursuant to RCW [39.12.015](#). See the attached document, "Prevailing Wage Determination Request and Review Process."

Thank you for your request for a determination about what types of payments may be considered "usual benefits" under prevailing wage law. In response to your request, I reviewed the program's prior communications on this subject as well as the applicable legal provisions. Additionally, I attempted to establish some details of the specific programs about which you inquired. Please note that whether a fund is of a type that may be recognized as a usual benefit is only one of the relevant inquiries in evaluating usual benefits; others include the method and timing of contributions, and whether the hourly rate of benefits have been reasonably and accurately calculated. I will address here only whether certain funds are a recognized type of usual benefits.

Usual benefits are defined under RCW [39.12.010](#) in terms of certain criteria. Paragraph (3)(a) speaks of "contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program." Paragraph (3)(b) discusses costs which "may be reasonably anticipated in providing benefits to workers, laborers, and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing..." In addition, the latter paragraph lists a series of specific types of benefits, including "medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs..." The statute also lists "other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state, or local law to provide any of such benefits."

These terms are elaborated upon under WAC [296-127-014](#). Under those provisions, “usual benefits” are limited to five specific categories: (a) health and welfare payments, (b) retirement payments, (c) vacation payments, (d) payments into an apprenticeship training fund, and (e) paid holidays.

Although inclusive, these provisions provide a number of limiting standards. For one, a payment must reasonably be described as a “usual benefit.” The term implies both that a payment is customary in the industry (“usual”), and that the payment must provide an added value (“benefit”) to the worker. Second, if a benefit is not one specifically listed under the statute, it should be of the same general type as those which are listed. Third, where questions arise, the limitations of WAC [296-127-014](#) are relevant and will be considered.

In your e-mail you inquire about five types of benefit payments: 1) Clean Card, 2) Industry Fund, 3) ITI, 4) NW Supp and 5) Organizational Trust. You were not able to provide specific information about these plans, or by what employer they were claimed as usual benefits. Based on the information I have been able to obtain, it appears most likely that the funds refer to the following:

- 1) Clean Card: Usually this refers to a plan under which individuals undergo drug testing in order to receive a card which certifies their ability to comply with a drug-free work place.
- 2) Industry Fund: The specific purposes of an industry fund may vary. Such funds may provide for training. However, such funds may also disburse monies to signatory contractors to improve competitiveness.
- 3) ITI: I cannot confirm what specifically “ITI” refers to. Likely it refers to an International Training Institute which provides training to workers, or which serves to support local training programs.
- 4) NW Supp: I understand that this is a supplemental retirement fund.
- 5) Organizational Trust: Like the Industry fund, the purposes of funds going under this name may vary.

While some of the above plans would likely qualify under the statute, some are more questionable, and some likely do not. For the retirement fund, I believe it is clear that such payments may qualify since they are listed expressly under prevailing wage statute and rule. However, I will address three other categories for which questions may arise: 1) drug testing, 2) funds directed to the employer to improve competitiveness, and 3) central training funds.

1) Drug Testing

A fund dedicated to drug testing of employees is not specifically listed under the statute or regulations; nevertheless, workers may consider that such funds are provided as a benefit. I understand that such programs are relatively common in the industry. Specifically, a “clean card” fund may allow a worker to receive certification, pursuant to drug testing, that they will meet certain conditions of a drug-free work environment. Workers who possess these cards reflecting such certification may subsequently be called up for work without a requirement to

undergo further drug testing. Alternatively, drug testing may be conducted on an employer-by-employer basis.

For prevailing wage purposes, drug testing can be seen as a benefit both to the worker and to the employer. Where payments are predominantly for the sake of the employer, the Department may be inclined to disallow them as usual benefits. However, under certain circumstances, a “clean card” service may provide a benefit to a worker which extends beyond any single employer, in the form of that employee’s increased qualifications to work on certain kinds of jobs. Such a plan may meet the meaning and spirit of the statute’s reference to “defraying costs of apprenticeship or other similar programs.” Additionally, such funds may be collectively bargained by employees. Including each of these factors, I would not foreclose recognition of such a plan as a usual benefit. On the other hand, drug testing on an individualized basis would be unlikely to qualify as a usual benefit for the worker, since the benefit falls predominantly to the employer and relates to issues that are traditionally an employer’s responsibility. An evaluation of a drug testing program would require the department to consider the specifics of the program.

2) Funds Directed Toward Employer Competitiveness

Plans going by the title of “Industry Fund” or “Organizational Trust” may suit disparate purposes. Accordingly, it may be necessary to look at each use separately in order to evaluate a plan. Certain purposes, such as training, may qualify. However, one use of such funds that has been observed is the awarding of monies to union signatory employers for the sake of increasing their competitiveness in the bidding process. Such funds may be negotiated on behalf of employees, and in the past, the prevailing wage program has allowed these payments as a “bona fide” usual benefit. Like the other benefits discussed in this letter, the amounts have generally been under \$1/hr.

Since you’ve not provided me with details about a particular plan, and those details may make a difference, I cannot give you a definitive answer on this issue, but would need to evaluate the specific plan.

3) Central Training Funds

As noted above, the statute refers specifically to “defraying costs of apprenticeship or other similar programs.” Although such programs are required to be approved by the State Apprenticeship Council for purposes of using the apprenticeship wage scales on public works contracts (see RCW [39.12.021](#)), the statute suggests that supplementary funds to assist with defraying the costs of such programs are usual benefits. For training that is entirely unrelated to an approved apprenticeship plan, individualized review may be necessary.

In summary, certain types of payments – for medical, retirement, holiday, vacation, and apprenticeship – are clearly allowed under prevailing wage law. For other types of payments, the question of whether or not they constitute “other bona fide fringe benefits” may require a specific factual evaluation. Additionally, whether or not a specific benefit may be included under any of these categories may require a specific factual evaluation.

Katherine Cowin
February 28, 2013
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If you would like more specific information about any particular plan that is being reported by a subcontractor, I would encourage you to provide me with additional factual information about the plan so that I can evaluate the plan in further detail.

Sincerely,



L. Ann Selover
Industrial Statistician/Program Manager
(360) 902-5330
Ann.Selover@Lni.wa.gov

Attachment

Prevailing Wage Determination Request and Review Process

RCW 39.12.015 is the basis for requesting a determination, since it provides:

All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.

If you disagree with a determination the industrial statistician provides, WAC 296-127-060(3) provides for a review process:

(3) Any party in interest who is seeking a modification or other change in a wage determination under RCW [39.12.015](#), and who has requested the industrial statistician to make such modification or other change and the request has been denied, after appropriate reconsideration by the assistant director shall have a right to petition for arbitration of the determination.

(a) For purpose of this section, the term "party in interest" is considered to include, without limitation:

(i) Any contractor, or an association representing a contractor, who is likely to seek or to work under a contract containing a particular wage determination, or any worker, laborer or mechanic, or any council of unions or any labor organization which represents a laborer or mechanic who is likely to be employed or to seek employment under a contract containing a particular wage determination, and

(ii) Any public agency concerned with the administration of a proposed contract or a contract containing a particular wage determination issued pursuant to chapter [39.12](#) RCW.

(b) For good cause shown, the director may permit any party in interest to intervene or otherwise participate in any proceeding held by the director. A petition to intervene or otherwise participate shall be in writing, and shall state with precision and particularity:

(i) The petitioner's relationship to the matters involved in the proceedings, and

(ii) The nature of the presentation which he would make. Copies of the petition shall be served on all parties or interested persons known to be participating in the proceeding, who may respond to the petition. Appropriate service shall be made of any response.

If you choose to utilize this review process, please submit your request within 30 days of the date of the applicable industrial statistician's determination or response to your request for modification or other change. Include with your request any additional information you consider relevant to the review.

Direct requests for determinations, and for modification of determinations via email or letter to the prevailing wage industrial statistician:

L. Ann Selover
Industrial Statistician/Program Manger
Department of Labor & Industries
Prevailing Wage
P O Box 44540
Olympia, WA 98504-4540
Ann.Selover@Lni.wa.gov

Prevailing Wage Determination Request and Review Process

Direct requests via email or letter seeking reconsideration (redetermination) by the assistant director to:

José Rodriguez, Assistant Director
Department of Labor & Industries
Specialty Compliance Services
P O Box 44400
Olympia, WA 98504-4400
Rodr235@Lni.wa.gov

Direct petitions for arbitration to:

Joel Sacks, Director
Department of Labor & Industries
P O Box 44001
Olympia, WA 98504-4001

If you choose to utilize this arbitration process, please submit your request within 30 days of the date of the applicable assistant director's decision on reconsideration (redetermination). Submit an original and two copies of your request for arbitration to the Director personally, or by mail. The physical address for the Director is 7273 Linderson Way, SW, Tumwater, WA 98501.

WAC 296-127-061 also contains the following provisions regarding petitions for arbitration:

In addition, copies of the petition shall be served personally or by mail upon each of the following:

- (a) The public agency or agencies involved,
 - (b) The industrial statistician, and
 - (c) Any other person (or the authorized representatives of such person) known to be interested in the subject matter of the petition.
- (2) The director shall under no circumstances request any administering agency to postpone any contract performance because of the filing of a petition. This is a matter which must be resolved directly with the administering agency by the petitioner or other party in interest.
- (3) A petition for arbitration of a wage determination shall:
- (a) Be in writing and signed by the petitioner or his counsel (or other authorized representative), and
 - (b) Identify clearly the wage determination, location of project or projects in question, and the agency concerned, and
 - (c) State that the petitioner has requested reconsideration of the wage determination in question and describe briefly the action taken in response to the request, and
 - (d) Contain a short and plain statement of the grounds for review, and
 - (e) Be accompanied by supporting data, views, or arguments, and
 - (f) Be accompanied by a filing fee of \$75.00. Fees shall be made payable to the department of labor and industries.

Loomis, Deborah (LNI)

From: Katherine Cowin <katherine@bulldogplumbing.com>
Sent: Wednesday, September 19, 2012 12:18 PM
To: Selover, Ann (LNI)
Cc: Ehrlander, Marcus (LNI); Peppin, Nathan B (LNI)
Subject: RE: RE: Fringe benefits question

Ann,

My question is how has LNI determined that deductions such as Clean Card, Industry Fund, ITI, NW Supp & Organizational Trust qualify as "other bona fide fringe benefit" as defined under RCW 39.12.010 and permitted to be deducted from prevailing wage rates?

Best Regards,

Katherine Cowin
Member / Office Manager
Bulldog Plumbing & Design, LLC
P: 253-922-1100
F: 253-922-1102

From: Selover, Ann (LNI) [mailto:sela235@LNI.WA.GOV]
Sent: Wednesday, September 19, 2012 10:31 AM
To: Katherine Cowin
Cc: Ehrlander, Marcus (LNI); Peppin, Nathan B (LNI)
Subject: RE: RE: Fringe benefits question

Ms. Cowen,

Thank you for including me on your 9/17 communication to Marcus Ehrlander. If you would like a formal determination, please provide me with the specific details of your request and I will respond accordingly. I believe I understand the gist of the concern from the email thread below. However, I would appreciate receiving from you a clear statement concerning what it is you want me to decide, if in fact you are seeking such a determination.

Regards,

Ann

L. Ann Selover
Industrial Statistician/Program Manager
Prevailing Wage
Department of Labor and Industries
(360) 902-5330
sela235@Lni.wa.gov

From: Katherine Cowin [<mailto:katherine@bulldogplumbing.com>]
Sent: Monday, September 17, 2012 10:44 AM
To: Ehrlander, Marcus (LNI)
Cc: Selover, Ann (LNI); Peppin, Nathan B (LNI)
Subject: RE: RE: Fringe benefits question

We formally request a written decision as to how these qualify as a deductible benefit.

Best Regards,

Katherine Cowin
Member / Office Manager
Bulldog Plumbing & Design, LLC
P: 253-922-1100
F: 253-922-1102

From: Ehrlander, Marcus (LNI) [<mailto:ehrm235@LNI.WA.GOV>]
Sent: Monday, September 17, 2012 10:39 AM
To: Katherine Cowin
Cc: Selover, Ann (LNI); Peppin, Nathan B (LNI)
Subject: RE: RE: Fringe benefits question

Katherine,

It appears that some years ago the issue of collectively bargained benefit contributions was discussed, and an assessment was made that if they are collectively bargained then they may be presumed to be an "other bona fide fringe benefit" as defined under RCW 39.12.010. I do not believe that the issue has been reviewed since that time, and I am not aware that the assessment was placed in writing. However, I will ask the program manager about this when I get an opportunity.

If you have any further questions, please let me know.

Marcus Ehrlander
Industrial Relations Specialist
Prevailing Wage
Department of Labor & Industries
(360) 902-5334

From: Katherine Cowin [<mailto:katherine@bulldogplumbing.com>]
Sent: Thursday, September 13, 2012 3:19 PM
To: Ehrlander, Marcus (LNI)
Cc: Selover, Ann (LNI); Peppin, Nathan B (LNI)
Subject: RE: RE: Fringe benefits question

Marcus,

Which RCW/WAC states that collectively bargained benefits are permissible to be deducted from the prevailing wage rate? Do you have an LNI determination letter that states these are "bona fide" usual benefits and therefore allowed to be deducted or is this just an LNI practice not law? From the brief description on the reports we have been provided (Clean Card, Industry Fund, ITI, NW Supp, Organizational Trust) these do not appear to be for health & welfare, retirement, vacation, apprentice training, or paid holidays which are the only usual benefits allowed to be deducted from the prevailing wage rate per WAC 296-127-014. Please advise.

Best Regards,

Katherine Cowin
Member / Office Manager
Bulldog Plumbing & Design, LLC
P: 253-922-1100
F: 253-922-1102

From: Ehrlander, Marcus (LNI) [<mailto:ehrm235@LNI.WA.GOV>]
Sent: Thursday, September 13, 2012 2:44 PM
To: Katherine Cowin
Cc: Selover, Ann (LNI); Peppin, Nathan B (LNI)
Subject: RE: RE: Fringe benefits question

Katherine,

Thank you for your e-mail. I received your e-mail on September 4, and asked the program manager for clarification. I have not yet been able to discuss the matter with her. That said, it appears the general answer is that the program has generally considered benefit amounts which are collectively bargained to be a "bona fide" usual benefit under the statute. Thus, I am not aware of collectively bargained benefits being excluded when the program evaluates compliance with prevailing wage. However, I am not clear what purpose all five of the funds you list are serving. Thus, if you would like to clarify the nature of these plans, I may be able to provide additional information as to whether this would be a problem.

If you need any additional information, please let me know.

Marcus Ehrlander
Industrial Relations Specialist
Prevailing Wage
Department of Labor & Industries
(360) 902-5334

From: Katherine Cowin [<mailto:katherine@bulldogplumbing.com>]
Sent: Thursday, September 13, 2012 2:14 PM
To: LNI RE Prevailing Wage Worker 1
Cc: Ehrlander, Marcus (LNI)
Subject: RE: RE: Fringe benefits question

When was this email forwarded?

Best Regards,

Katherine Cowin
Member / Office Manager
Bulldog Plumbing & Design, LLC
P: 253-922-1100
F: 253-922-1102

From: Peppin, Nathan B (LNI) [<mailto:pepn235@LNI.WA.GOV>] **On Behalf Of** LNI RE Prevailing Wage Worker 1
Sent: Thursday, September 13, 2012 2:13 PM
To: Katherine Cowin
Cc: Ehrlander, Marcus (LNI)
Subject: RE: RE: Fringe benefits question

Katherine,

Your email has been forwarded to a specialist for review and direct reply. There is no specific timeline for a response but he is working on providing an answer.

Nathan Peppin

From: Katherine Cowin [<mailto:katherine@bulldogplumbing.com>]
Sent: Thursday, September 13, 2012 11:25 AM
To: 'Katherine Cowin'; LNI RE Prevailing Wage Worker 1
Cc: 'Jill Holmly'
Subject: RE: RE: Fringe benefits question

I have not received a response to this question. When will I receive a written response?

Best Regards,

Katherine Cowin
Member / Office Manager
Bulldog Plumbing & Design, LLC
P: 253-922-1100
F: 253-922-1102

From: Katherine Cowin [<mailto:katherine@bulldogplumbing.com>]
Sent: Tuesday, September 04, 2012 3:35 PM
To: 'LNI RE Prevailing Wage Worker 1'
Cc: 'Jill Holmly'
Subject: RE: Fringe benefits question

To Whom It May Concern:

We have a sheet metal subcontractor who has submitted prevailing wage reports with benefits that we are unclear are allowed by prevailing wage laws. Therefore, please establish which RCW/WAC allows for the following fringe benefit deductions so that we can properly review their reports:

Clean Card
Industry Fund
ITI
NW Supp
Organizational Trust

We understand WAC 296-127-014 allows for the following but are unclear on the above listed benefit deductions.

Apprentice Fund
National Pension
NW Health Care
NW Pension

Thank you.

May certified payroll reports be filed on any form as long as all information is provided or must they be filed on form F700-065-000?

Best Regards,

Katherine Cowin
Member / Office Manager
Bulldog Plumbing & Design, LLC
P: 253-922-1100
F: 253-922-1102