

A-Engrossed
House Bill 2408

Ordered by the House April 15
Including House Amendments dated April 15

Introduced and printed pursuant to House Rule 12.00. Pre-session filed (at the request of House Interim Committee on Business and Labor)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Includes within definition of "public works" project for constructing, reconstructing or performing major renovation of privately owned road, highway, building, structure or improvement that is located in enterprise zone or for which qualified business firm received or will receive exemption from ad valorem property taxation and has total project cost estimated as equaling or exceeding \$20 million.

Defines "funds of a public agency," for purposes of applying prevailing rate of wage to projects for public works, to include tax credits or tax abatements that contractor engaged in public works project receives from state in connection with project.

Requires contractor or contractor's surety to file certified statements with, as appropriate, public agency that awarded contract for public works or sponsor of enterprise zone in which public works project is located.

[Becomes operative on January 1, 2020.]

[Takes effect on 91st day following adjournment sine die.]

Becomes operative 91 days after effective date of Act.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to the application of a prevailing rate of wage to public works projects; creating new pro-
3 visions; amending ORS 279C.800, 279C.810, 279C.827 and 279C.845; and declaring an emergency.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 279C.800 is amended to read:

6 279C.800. As used in ORS 279C.800 to 279C.870:

7 (1) "Fringe benefits" means:

8 (a) Contributions that a contractor or subcontractor makes irrevocably to a trustee or to a third
9 person under a plan, fund or program; and

10 (b) Costs that a contractor or subcontractor may reasonably be anticipated to incur in providing
11 the following items, except for items that federal, state or local law requires the contractor or sub-
12 contractor to provide:

13 (A) Benefits to workers pursuant to an enforceable written commitment to the workers to carry
14 out a financially responsible plan or program for:

15 (i) Medical or hospital care;

16 (ii) Pensions on retirement or death; or

17 (iii) Compensation for injuries or illness that result from occupational activity;

18 (B) Insurance to provide the benefits described in subparagraph (A) of this paragraph;

19 (C) Unemployment benefits;

20 (D) Life insurance;

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 (E) Disability and sickness insurance or accident insurance;

2 (F) Vacation and holiday pay;

3 (G) Costs of apprenticeship or other similar programs; or

4 (H) Other bona fide fringe benefits.

5 (2) "Housing" has the meaning given that term in ORS 456.055.

6 (3) "Locality" means the following district in which the public works, or the major portion of
7 the public works, is to be performed:

8 (a) District 1, composed of Clatsop, Columbia and Tillamook Counties;

9 (b) District 2, composed of Clackamas, Multnomah and Washington Counties;

10 (c) District 3, composed of Marion, Polk and Yamhill Counties;

11 (d) District 4, composed of Benton, Lincoln and Linn Counties;

12 (e) District 5, composed of Lane County;

13 (f) District 6, composed of Douglas County;

14 (g) District 7, composed of Coos and Curry Counties;

15 (h) District 8, composed of Jackson and Josephine Counties;

16 (i) District 9, composed of Hood River, Sherman and Wasco Counties;

17 (j) District 10, composed of Crook, Deschutes and Jefferson Counties;

18 (k) District 11, composed of Klamath and Lake Counties;

19 (L) District 12, composed of Gilliam, Grant, Morrow, Umatilla and Wheeler Counties;

20 (m) District 13, composed of Baker, Union and Wallowa Counties; and

21 (n) District 14, composed of Harney and Malheur Counties.

22 (4) "Prevailing rate of wage" means the rate of hourly wage, including all fringe benefits, that
23 the Commissioner of the Bureau of Labor and Industries determines is paid in the locality to the
24 majority of workers employed on projects of a similar character in the same trade or occupation.

25 (5) "Public agency" means the State of Oregon or a political subdivision of the State of Oregon,
26 or a county, city, district, authority, public corporation or public entity organized and existing under
27 law or charter or an instrumentality of the county, city, district, authority, public corporation or
28 public entity.

29 (6)(a) "Public works" includes, but is not limited to:

30 (A) Roads, highways, buildings, structures and improvements of all types, the construction, re-
31 construction, major renovation or painting of which is carried on or contracted for by any public
32 agency to serve the public interest;

33 (B) A project that uses \$750,000 or more of funds of a public agency for constructing, recon-
34 structing, painting or performing a major renovation on a road, highway, building, structure or im-
35 provement of any type;

36 (C) A project that uses funds of a private entity for constructing a privately owned road, high-
37 way, building, structure or improvement of any type in which a public agency will use or occupy
38 25 percent or more of the square footage of the completed project;

39 (D) Notwithstanding the provisions of ORS 279C.810 (2)(a), (b) and (c), a device, structure or
40 mechanism, or a combination of devices, structures or mechanisms, that:

41 (i) Uses solar radiation as a source for generating heat, cooling or electrical energy; and

42 (ii) Is constructed or installed, with or without using funds of a public agency, on land, premises,
43 structures or buildings that a public body, as defined in ORS 174.109, owns; [or]

44 **(E) A project for constructing, reconstructing or performing a major renovation of a**
45 **privately owned road, highway, building, structure or improvement of any type that:**

1 (i) Is located in an enterprise zone, as defined in ORS 285C.050;

2 (ii) Consists of or is sited on real property for which a qualified business firm, as defined
3 in ORS 285C.050, has received or will receive an exemption from ad valorem property taxation
4 under ORS 285C.170 or 285C.175 in connection with the project; and

5 (iii) Has a total project cost that the public agency that funds the project, or the lead
6 public agency, if more than one public agency participates in the project, reasonably esti-
7 mates will equal or exceed \$20 million; or

8 [(E)] (F) Notwithstanding paragraph (b)(A) of this subsection and ORS 279C.810 (2)(b) and (c),
9 construction, reconstruction, painting or major renovation of a road, highway, building, structure
10 or improvement of any type that occurs, with or without using funds of a public agency, on real
11 property that a public university listed in ORS 352.002 owns.

12 (b) "Public works" does not include:

13 (A) Reconstructing or renovating privately owned property that a public agency leases; or

14 (B) A private nonprofit entity's renovation of publicly owned real property that is more than 75
15 years old if:

16 (i) The real property is leased to the private nonprofit entity for more than 25 years;

17 (ii) Funds of a public agency used in the renovation do not exceed 15 percent of the total cost
18 of the renovation; and

19 (iii) Contracts for the renovation were advertised or, if not advertised, were entered into before
20 July 1, 2003, but the renovation has not been completed on or before July 13, 2007.

21 (7) "Sponsor" has the meaning given that term in ORS 285C.050.

22 **SECTION 2.** ORS 279C.810 is amended to read:

23 279C.810. (1) As used in this section:

24 (a) "Funds of a public agency" does not include:

25 (A) Funds provided in the form of a government grant to a nonprofit organization, unless the
26 government grant is issued for the purpose of construction, reconstruction, major renovation or
27 painting;

28 (B) Building and development permit fees [*paid or waived by the*] **that a public agency pays or**
29 **waives;**

30 (C) Tax credits or tax abatements, **except for exemptions from ad valorem property taxation**
31 **allowed under ORS 285C.170 or 285C.175;**

32 (D) Land that a public agency sells to a private entity at fair market value;

33 (E) The difference between:

34 (i) The value of land that a public agency sells to a private entity as determined at the time of
35 the sale after taking into account any plan, requirement, covenant, condition, restriction or other
36 limitation, exclusive of zoning or land use regulations, that the public agency imposes on the de-
37 velopment or use of the land; and

38 (ii) The fair market value of the land if the land is not subject to the limitations described in
39 sub-subparagraph (i) of this subparagraph;

40 (F) Staff resources [*of the*] a public agency [*used*] **uses to:**

41 (i) Manage a project or to provide a principal source of supervision, coordination or oversight
42 of a project; **or**

43 [(G)] (ii) [*Staff resources of the public agency used to*] Design or inspect one or more components
44 of a project;

45 [(H)] (G) Moneys derived from the sale of bonds that [*are loaned by*] a state agency **loans** to a

1 private entity, unless the moneys will be used for a public improvement;

2 [(I)] (H) Value added to land as a consequence of a public agency's site preparation, demolition
3 of real property or remediation or removal of environmental contamination, except for value added
4 in excess of the expenses the public agency incurred in the site preparation, demolition or remedi-
5 ation or removal when the land is sold for use in a project otherwise subject to ORS 279C.800 to
6 279C.870; or

7 [(J)] (I) Bonds, or loans from the proceeds of bonds, issued in accordance with ORS chapter 289
8 or ORS 441.525 to 441.595, unless the bonds or loans will be used for a public improvement.

9 (b) "Nonprofit organization" means an organization or group of organizations described in sec-
10 tion 501(c)(3) of the Internal Revenue Code that is exempt from income tax under section 501(a) of
11 the Internal Revenue Code.

12 (2) ORS 279C.800 to 279C.870 do not apply to:

13 (a) [Projects] **A project** for which the contract price does not exceed \$50,000. In determining the
14 price of a project, a public agency:

15 (A) May not include the value of donated materials or work [performed on the project by] **that**
16 individuals [volunteering] **who volunteer** to the public agency **perform on the project** without pay;
17 and

18 (B) Shall include the value of work [performed by every person paid by] **for which** a contractor
19 or subcontractor **pays a person** in any manner for the person's work on the project.

20 (b) Projects for which [no] funds of a public agency are **not** directly or indirectly used. In ac-
21 cordance with ORS chapter 183, the Commissioner of the Bureau of Labor and Industries shall adopt
22 rules to carry out the provisions of this paragraph.

23 (c) [Projects] **A project**:

24 (A) That [are] **is** privately owned;

25 (B) That [use] **uses** funds of a private entity;

26 (C) In which **a public agency will occupy or use** less than 25 percent of the square footage
27 of [a] **the** completed project [will be occupied or used by a public agency]; and

28 (D) For which less than \$750,000 of funds of a public agency are used.

29 (d) [Projects] **A project** for residential construction that [are] **is** privately owned and that pre-
30 dominantly [provide] **provides** affordable housing. As used in this paragraph:

31 (A) "Affordable housing" means housing that serves occupants whose incomes are [no] **not**
32 greater than 60 percent of the area median income or, if the occupants are owners, whose incomes
33 are [no] **not** greater than 80 percent of the area median income.

34 (B) "Predominantly" means 60 percent or more.

35 (C) "Privately owned" [includes] **means**:

36 (i) Affordable housing provided on real property owned by a public agency if the real property
37 and related structures are leased to a private entity for 50 or more years; and

38 (ii) Affordable housing owned by a partnership, nonprofit corporation or limited liability com-
39 pany in which a housing authority, as defined in ORS 456.005, is a general partner, director or
40 managing member and the housing authority is not a majority owner in the partnership, nonprofit
41 corporation or limited liability company.

42 (D) "Residential construction" [includes] **means** the construction, reconstruction, major reno-
43 vation or painting of single-family houses or apartment buildings not more than four stories in
44 height and all incidental items, such as site work, parking areas, utilities, streets and sidewalks,
45 pursuant to the United States Department of Labor's "All Agency Memorandum No. 130: Applica-

tion of the Standard of Comparison “Projects of a Character Similar” Under Davis-Bacon and Related Acts,” dated March 17, 1978. However, the commissioner may consider different definitions of residential construction in determining whether a project is a residential construction project for purposes of this paragraph, including definitions that:

(i) Exist in local ordinances or codes; or

(ii) Differ, in the prevailing practice of a particular trade or occupation, from the United States Department of Labor’s description of residential construction.

SECTION 3. ORS 279C.827 is amended to read:

279C.827. (1)(a) A *[person or]* public agency **or a person that under ORS 279C.800 to 279C.870 must pay a prevailing rate of wage on public works** may not divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279C.800 to 279C.870.

(b) If the Commissioner of the Bureau of Labor and Industries determines that a *[person or]* public agency **or person that under ORS 279C.800 to 279C.870 must pay a prevailing rate of wage on public works** has divided a public works project into more than one contract for the purpose of avoiding compliance with ORS 279C.800 to 279C.870, the commissioner shall issue an order *[compelling]* **to compel** compliance.

(c) In making determinations under this subsection, the commissioner shall consider:

(A) The physical separation of the project structures;

(B) The timing of the work on project phases or structures;

(C) The continuity of project contractors and subcontractors working on project parts or phases;

(D) The manner in which the public agency, **or the person that under ORS 279C.800 to 279C.870 must pay a prevailing rate of wage on public works**, and the contractors administer and implement the project;

(E) Whether a single public works project includes several types of improvements or structures; and

(F) Whether the combined improvements or structures have an overall purpose or function.

(2)(a) The commissioner may apply the considerations set forth in subsection (1)(c) of this section to determine whether to divide a public works project into more than one contract, regardless of whether the commissioner believes that a person or public agency divided the public works project for the purpose of avoiding compliance with ORS 279C.800 to 279C.870.

(b) If a project is a public works project of the type described in ORS 279C.800 (6)(a)(B) or (C), the commissioner, **after applying the considerations set forth in subsection (1)(c) of this section**, shall divide the project, if appropriate, *[after applying the considerations set forth in subsection (1)(c) of this section]* to separate the parts of the project that *[include]* **use** funds of a public agency or that *[will be occupied or used by]* a public agency **will occupy or use** from the parts of the project that do not *[include]* **use** funds of a public agency and that *[will not be occupied or used by]* a public agency **will not occupy or use**. If the commissioner divides the project, any part of the project that does not *[include]* **use** funds of a public agency and that *[will not be occupied or used by]* a public agency **will not occupy or use** is not subject to ORS 279C.800 to 279C.870.

(3) If a project includes parts that *[are owned by]* a public agency **owns** and parts that *[are owned by]* a private entity **owns**, the commissioner, **after applying the considerations set forth in subsections (1)(c) and (2) of this section**, shall divide the project, if appropriate, *[after applying the considerations set forth in subsections (1)(c) and (2)(b) of this section]* to separate the parts of the project that are public works from the parts of the project that are not public works. If the commissioner divides the project, parts of the project that are not public works are not subject to ORS

1 279C.800 to 279C.870.

2 **SECTION 4.** ORS 279C.845 is amended to read:

3 279C.845. (1) *[The]* **A** contractor or *[the]* **a** contractor's surety and *[every]* **each** subcontractor
4 or *[the]* subcontractor's surety shall file certified statements *[with the public agency]* in writing, on
5 a form *[prescribed by]* the Commissioner of the Bureau of Labor and Industries, *[certifying:]* **pre-**
6 **scribes, with one of the following, as appropriate:**

7 **(a) The public agency that awarded the contract for public works to which the contractor**
8 **is a party. If the project is a public works as defined in ORS 279C.800 (6)(a)(B) or (C), the**
9 **contractor shall submit the certified statements to the public agency that provided public**
10 **funds for the project or that will occupy or use 25 percent or more of the square footage of**
11 **the completed project. If more than one public agency provided public funds for the project**
12 **or will occupy or use 25 percent or more of the square footage of the completed project, the**
13 **public agencies involved shall agree upon which public agency will receive the certified**
14 **statements.**

15 **(b) The sponsor of the enterprise zone in which the public works project is located. If**
16 **more than one sponsor participated in designating the enterprise zone, the participating**
17 **sponsors shall agree upon which sponsor shall receive the certified statements.**

18 **(2) The certified statements must certify:**

19 (a) The hourly rate of wage paid each worker whom the contractor or the subcontractor has
20 employed upon the public works; and

21 (b) That no worker employed upon the public works has been paid less than the prevailing rate
22 of wage or less than the minimum hourly rate of wage specified in the contract.

23 *[(2)]* **(3) [The certified statement shall be verified by the oath of]** The contractor or the contractor's
24 surety or **the** subcontractor or the subcontractor's surety **shall verify certified statements by**
25 **oath, attesting** that the contractor or subcontractor has read the certified *[statement]*
26 **statements**, that the contractor or subcontractor knows the contents of the certified *[statement]*
27 **statements** and that to the contractor or subcontractor's knowledge the certified *[statement is]*
28 **statements are** true.

29 *[(3)]* **(4)** The certified statements shall set out accurately and completely the contractor's or
30 subcontractor's payroll records, including the name and address of each worker, the worker's cor-
31 rect classification, rate of pay, daily and weekly number of hours worked and the gross wages the
32 worker earned upon the public works during each week identified in the certified statement.

33 *[(4)]* **(5)** The contractor or subcontractor shall deliver or mail *[each]* **the** certified *[statement]*
34 **statements** required by subsection (1) of this section to the public agency **or to the sponsor.**
35 Certified statements for each week during which the contractor or subcontractor employs a worker
36 upon the public works *[shall]* **must** be submitted once a month, by the fifth business day of the fol-
37 lowing month. Information submitted on certified statements may be used only to ensure compliance
38 with the provisions of ORS 279C.800 to 279C.870.

39 *[(5)]* **(6)** Each contractor or subcontractor shall preserve the certified statements for a period
40 of three years from the date of completion of the contract.

41 *[(6)]* **(7)** Certified statements *[received by]* **that** a public agency **or a sponsor receives** are public
42 records subject to the provisions of ORS 192.311 to 192.478.

43 *[(7)]* **(8)** Notwithstanding ORS 279C.555 or 279C.570 (7), if a contractor *[is required to]* **must** file
44 certified statements **with a public agency** under this section, the public agency shall retain 25
45 percent of any amount *[earned by]* the contractor **earns** on the public works until the contractor

1 has filed with the public agency certified statements as required by this section. The public agency
2 shall pay the contractor the amount retained under this subsection within 14 days after the con-
3 tractor files the certified statements as required by this section, regardless of whether a subcon-
4 tractor has failed to file certified statements as required by this section. *[The public agency is not*
5 *required to verify the truth of the contents of certified statements filed by the contractor under this*
6 *section.]*

7 [(8)] (9) Notwithstanding ORS 279C.555, the contractor shall retain 25 percent of any amount
8 [earned by] a first-tier subcontractor **earns** on a public works until the subcontractor has filed with
9 the public agency certified statements as required by this section. The contractor shall verify that
10 the first-tier subcontractor has filed the certified statements before the contractor may pay the
11 subcontractor any amount **the contractor** retained under this subsection. The contractor shall pay
12 the first-tier subcontractor the amount retained under this subsection within 14 days after the sub-
13 contractor files the certified statements as required by this section. *[Neither the public agency nor*
14 *the contractor is required to verify the truth of the contents of certified statements filed by a first-tier*
15 *subcontractor under this section.]*

16 (10) **This section does not require:**

17 (a) **A public agency or sponsor to verify the truth of the contents of a contractor's cer-**
18 **tified statements; or**

19 (b) **A public agency, a sponsor or a contractor to verify the truth of the contents of a**
20 **subcontractor's certified statements.**

21 **SECTION 5. The amendments to ORS 279C.800, 279C.810, 279C.827 and 279C.845 by**
22 **sections 1 to 4 of this 2019 Act apply to contracts for public works that a public agency first**
23 **advertises or otherwise solicits or, if the public agency does not advertise or solicit the**
24 **contract for public works, to a contract for public works into which the public agency first**
25 **enters on or after the operative date specified in section 6 of this 2019 Act.**

26 **SECTION 6. (1) The amendments to ORS 279C.800, 279C.810, 279C.827 and 279C.845 by**
27 **sections 1 to 4 of this 2019 Act become operative 91 days after the effective date of this 2019**
28 **Act.**

29 (2) **A sponsor, as defined in ORS 285C.050, a public agency that adopts rules under ORS**
30 **279A.065 or 279A.070 or the Commissioner of the Bureau of Labor and Industries may take**
31 **any action before the operative date specified in subsection (1) of this section that is neces-**
32 **sary to enable the sponsor, the public agency or the commissioner to exercise or undertake,**
33 **on and after the operative date specified in subsection (1) of this section, all of the duties,**
34 **functions and powers conferred on the sponsor, the public agency or the commissioner by**
35 **the amendments to ORS 279C.800, 279C.810, 279C.827 and 279C.845 by sections 1 to 4 of this**
36 **2019 Act.**

37 **SECTION 7. This 2019 Act being necessary for the immediate preservation of the public**
38 **peace, health and safety, an emergency is declared to exist, and this 2019 Act takes effect**
39 **on its passage.**

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