



Prosecution Handbook

Prevailing Wage Cases



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Introduction to Missouri's Prevailing Wage Law

The policy of the state of Missouri is clear: labor provided on public works projects by workers employed by or on behalf of a public body must be paid at least the applicable prevailing wage. § 290.220 RSMo.

Prevailing wage laws are intended to stabilize local wages and industry standards and to ensure fair rates of pay on public works projects and sustainable standards of living for citizens. The federal government has its own prevailing wage law, as do 32 states and the District of Columbia.

Missouri's prevailing wage law applies to workers employed *on behalf of* any public body engaged in the construction of public works. A private entity may be subject to the prevailing wage law if it constructs a public work on behalf of a public body, even if it is not considered an agent of the public body. A public body constructing public works may not circumvent the prevailing wage by a "carefully constructed legal façade." *Division of Labor Standards v. Friends of the Zoo*, 38 S.W.3d 421 (Mo. 2001); *State ex inf. Webster ex rel. Division of Labor Standards v. City of Camdenton*, 779 S.W.2d 312, 316 (Mo. App. 1989).

"Public works" are defined as all construction projects for "public use and benefit." § 290.210. The term "public use or benefit" includes construction that has a public body as the ultimate beneficiary, though the applicability of the prevailing wage law is determined by the role of the public body throughout the entire process – from bidding through construction.

No contracts for public works may be awarded, nor funds disbursed, unless the public body has first asked the Department of Labor and Industrial Relations ("Department") to determine the prevailing wage for the relevant workers in the locality where the work is to be performed, and the Department's determination has been made a part of the contract. § 290.325.

The prevailing wage law does not apply to "maintenance work," which is defined as the repair (but not the replacement) of existing facilities, when the size, type, or extent of the existing facilities is not changed or increased thereby. §§ 290.220, 290.210(7). Maintenance is the regular day-to-day, or periodic, work necessary to maintain a facility, including cleaning the grounds and buildings, and keeping existing features in good working order. "Construction," on the other hand, includes construction, reconstruction, improvement, alteration, painting and decorating, or major repair. § 290.210(3).



Missouri Department of Labor's Investigative Process

Prevailing wage cases referred for prosecution begin as complaints submitted to the Department by a member of the public. Pursuant to § 290.240, the Department must inquire diligently into any alleged violation of §§ 290.210 to 290.340, institute actions for prescribed penalties, and enforce the provisions of §§ 290.210 to 290.340.

As part of the Department's investigation, its representative is permitted to administer oaths and subpoena witnesses to testify and produce any materials relevant to the investigation. Failure to comply with issued subpoenas is addressed by application of §§ 536.077, 290.280.

The following pages in this section contain the Department's Prevailing Wage Investigative Guidelines. These guidelines are prepared and followed by the Department's Division of Labor Standards in its investigation of every potential prevailing wage violation.

Questions regarding the Department's procedure should be directed to the Department's Division of Labor Standards at (573) 751-3403.



Prevailing Wage Investigative Guidelines

I. COMPLAINT RECEIVED

1. Acknowledgement letter is sent to the complainant informing them to forward any additional information that may help in our review process.
2. Complaint is reviewed for completeness, compliance, and authenticity.
3. Support staff communicates with complainant to obtain additional information necessary for making decisions and/or referrals. Such as certified payrolls, cancelled checks, field logs, time cards, contracts, project wage order, and confirmed date of final project payments.
4. Supervisor evaluates complaint on a monthly bases and forwards recommendation to assign an Investigator or to close.
5. If closed, a letter is sent to the complainant informing them of the Divisions decision and their rights under 290.527.
6. If assigned, a letter is sent to the complainant and the assigned Investigator informing them of the newly generated case.

II. INVESTIGATOR REVIEW

1. Investigator receives and reviews the complaint.
2. Contact complainant for any additional information.
3. Contact public body to inform them of complaint and request additional information.
4. Contact contractor in question to inform them of complaint and request additional information.
5. Collect and review all documents from complainant, public body and contractor such as certified payroll, cancelled checks, field logs, time

cards, contract, and project wage order and confirm date of final project payments.

6. Conduct labor interviews when possible.

IF NO APPARENT VIOLATION FOUND

1. Investigator contacts complainant, public body, and contractor to inform them that no violation was found or to see if there is any additional information available to show a violation.
2. Final Report is submitted to supervisor for review.
3. Division sends Close-Out letter to affected parties.

IF VIOLATION OF PREVAILING WAGE IS FOUND

1. Investigator prepare computations and assess penalty amount.
2. Contacts contractor to review determination, computations, and procedure.
3. Contacts complainant and public body to explain determination, and procedure.
4. Final Report is submitted to supervisor for review.
5. Division sends a Notice of Violation letter to contractor.

NOTICE OF VIOLATION LETTER/OPTIONS

1. If the contractor provides restitution within the required 45 days, the Department is precluded from pursuing penalty and the case is closed. Division sends Close-Out letter to affected parties.



2. If the contractor disputes the notice of the violations within the required 45 days of being notified, then the Division will notify the employer of the right to resolve such dispute through arbitration.
3. If contractor request arbitration, the Division and the contractor shall submit to the arbitration process as established by Department rule.
4. If the contractor fails to pay all restitution or request arbitration within the required 45 days of being notified, the Division may then pursue an enforcement action to enforce the monetary penalty provisions against the contractor.
5. The case will be referred to the AG to pursue penalty.

III. DIVISION REVIEW FOR POSSIBLE FURTHER ACTION

The Division Director, Program Manager and Supervisor will review all repetitive and egregious violations to determine if there is evidence of willful violations for possible referral to the PA.





Prevailing Wage Prosecution Outline

If probable cause exists that a prevailing wage violation has occurred in a particular case, the Department will refer the case, with its draft probable cause statement and full investigative file to the prosecuting attorney in the county where the crime occurred. Responsibility then falls to the prosecuting attorney to determine whether to file charges. If the prosecuting attorney files charges, he or she will then be required to prove beyond a reasonable doubt that a “willful” violation of the prevailing wage law has occurred.

Section 290.340 requires the specific intent of “willfully” violating the prevailing wage law. “The term ‘willfully’ predates statehood and is still used despite its omission from the levels of scienter in the Criminal Code.” *State of Missouri v. Lee Mechanical Contractors, Inc.*, 938 S.W.2d 269, 272 (Mo. 1997). In criminal offenses, “willfully” means “knowingly,” as defined in § 562.016.3 RSMo *Id.* (A copy of this decision is included in this handbook.)

A willful violation of Missouri’s prevailing wage law is **punishable by a fine up to \$500 and imprisonment for up to six months.** § 290.340. In addition, employers who violate the prevailing wage law are assessed a penalty, payable to the public body on whose behalf the work is performed, of \$100 per worker for each day the worker is underpaid. § 290.250.1 Each day a violation continues is a separate offense. § 290.340.

Establishing “willfulness” can be a considerable challenge. While past violations may be evidence of willfulness, the older the past violation, the weaker the evidence. Also, the smaller the underpayment, the greater the likelihood that it may simply be explained as a mistake rather than a willful effort to violate the prevailing wage law. Contractor experience, reliance on past wage rates, and past violations are all factors to be considered.

The Department of Labor is required to file with the Secretary of State a list of contractors and subcontractors prosecuted and convicted for violating the prevailing wage law. This list is known as the “Debarment List.” Contractors and subcontractors on the Debarment List are prohibited from contracting with any public body on public works projects for one year from the date of their first conviction. Each subsequent violation and conviction earns contractors an additional three years on the Debarment List. Public bodies are prohibited from awarding a contract for public works to any contractor or subcontractor while its name appears on the Debarment List. § 290.330.

In this section of the handbook, you will find an outline of key points and considerations identified by the Attorney General’s Office in the organization and prosecution of a prevailing wage case. A number of associated criminal charges may also be pursued in connection with a prevailing wage hourly pay-rate violation. Some are violations of other prevailing wage laws, and some are standard criminal infractions that often accompany prevailing wage violations. This section will identify and address the most common of these additional charges.

The Attorney General’s Office is always available to discuss any questions you may have regarding prosecuting prevailing wage violations. We are also willing to, and regularly do, aid local prosecutors in these cases. Prosecutors interested in this assistance should contact the **Attorney General’s Public Safety Division** to coordinate requesting that the Governor appoint the Attorney General to serve as special prosecutor in a particular case.



1. JURISDICTION

- a. **Investigation** - Pursuant to § 290.240, the Department of Labor and Industrial Relations “shall inquire diligently as to any violation of §§ 290.210 to 290.340, shall institute actions for penalties herein prescribed, and shall enforce generally the provisions of §§ 290.210 to 290.340.”
- b. **Prosecution** - The prosecuting attorney of the county in which the prevailing wage violation occurs has jurisdiction to prosecute the offense. The Attorney General has no original or concurrent jurisdiction to investigate or prosecute prevailing wage violations. If the local prosecutor needs assistance or has a conflict of interest, he or she must request the appointment of the Attorney General as special prosecutor pursuant to § 27.030.

2. VENUE

Chapter 290 has no special venue statute. Prosecution of prevailing wage violations may be prosecuted according to § 541.033, which provides that prosecution shall occur:

- i. In the county in which the offense is committed; or
- ii. If the offense is committed partly in one county and partly in another, or if the elements of the crime occur in more than one county, then in any of the counties where any element of the offense occurred.

3. OFFENSES

- a. **Offenses---in general** - Section 290.340 provides that “any officer, official, member, agent or representative of any public body, contractor or subcontractor who willfully violates and omits to comply with any of the provisions and requirements of §§ 290.210 to 290.340” has committed a criminal offense. Each day such violation or omission continues shall constitute a separate offense as contemplated by this section.
- b. **Class of Offense/Range of Punishment:**
 - i. In General - Section 290.340 specifies that each violation shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding six months, or by both such fine and imprisonment. This puts violations of the prevailing wage law in the range of a class B misdemeanor, but the statute leaves the offense unclassified.
 - ii. Debarment - Section 290.330 provides that contractors or subcontractors, “or simulations thereof” who have been “prosecuted and convicted of violations of §§ 290.210 to 290.340 . . . shall be prohibited from contracting directly or indirectly with any public body for the construction of any public works or from performing any work on the same as a contractor or subcontractor for a period of one year from the date of the first conviction for such violation and for a period of three years from the date of each subsequent violation and conviction thereof. No public body shall award a contract for public works to any contractor or subcontractor, or simulation thereof, during the time that its name appears on said list. The filing of the notice of conviction with the secretary of state shall be notice to all public bodies and their officers, officials, members, agents and representatives.”



iii. Restitution for Underpaid Workers - Pursuant to § 559.021.2(1), the State may seek restitution for the workers in the amount of the unpaid wages. Prosecutors should take note of whether DOLIR has already obtained this restitution.

c. Statute of Limitations-in general: The provisions on prevailing wage have no special statute of limitations and default to § 556.036, which provides that prosecution of a misdemeanor must be commenced within one year of the offense. Be advised of special exceptions to the one year limitation under § 556.036 (e.g., if the defendant absents himself from the state.)

d. Specific Offenses

i. Failure to Pay Prevailing Wage - Section 290.230

1. Elements

- a. Existence of a prevailing wage project:
 - i. A public body - Section 290.210(6),
 - ii. engaged in the construction - Section 290.210(1),
 - iii. of public works - Section 290.210(7).
- b. Employer willfully (knowingly) paid worker less than prevailing wage - Sections 290.220, 290.230, and 290.340.
- c. Underpaid worker was directly employed by or on behalf of the public body - Sections 290.210(8), 290.220, 290.230.
- d. Worker was employed in construction of public works, meaning worker was engaged in actual construction work on the site of the construction job - Sections 290.210(1) and 290.230.

2. Statute of Limitations

- a. The violation occurs when the worker is paid less than the prevailing wage i.e. when the employer issues payment to the worker for less than what the worker is owed. In general, this will be the pay day at the end of the week. This may create some confusion because prevailing wage violations are based on the day the worker was underpaid, but workers are not generally paid every day. It is only clear from the weekly wages that the worker was not paid what he was owed that week. It is not likely one will be able to pinpoint the particular day for which the worker was underpaid.

ii. Unapproved Deductions - Section 290.315

1. Elements

- a. There shall be no deduction in wages for food, sleeping accommodations, transportation, use of small tools, or any other thing;
- b. Unless employer and employee enter agreement:
 - i. In writing
 - ii. At beginning of employment
 - iii. Covering such deductions
- c. And such agreement:
 - i. Is submitted by employer to the public body awarding the contract;
 - ii. And the public body approves the agreement as fair and reasonable.



- e. **Non-prevailing wage offenses** - the conduct constituting a prevailing wage violation may also constitute more conventional offenses. Consider the following:
 - i. **Forgery - Section 570.090** - this offense may be present if the defendant has attempted to falsify records such as cancelled checks or payroll records.
 - ii. **Perjury- Section 575.040**
 - iii. **False Affidavit - Section 575.050** - as part of compliance with the prevailing wage laws § 290.290, RSMo, the contractor must submit an affidavit stating he has complied with prevailing wage laws.
 - iv. **False Declaration- Section 575.060** - similar to forgery but with the added element that the misrepresentation is to mislead a “public servant.” Because the prevailing wage laws require contractors to submit their payroll records to representatives of the public body and DOLIR, people who may be considered “public servants,” submitting falsified reports to these entities could be considered a false declaration.

4. SOURCES OF PROOF

- a. Evidence to establish the existence of a prevailing wage project and that the defendant knew prevailing wage applied may include the following documents:
 - i. **Affidavit of compliance** - Upon completion of the project and before receiving final payment, the contractor files with the public body an affidavit of compliance stating the contractor fully complied with the provisions of chapter 290. § 290.290.2.
 - ii. **Annual wage orders** - DOLIR determines the prevailing wages for a variety of occupations, which are recorded in the annual wage order. § 290.260.
 - iii. **Call for bids** - The public body issues a call for bids specifying the prevailing wage. § 290.250.1.
 - iv. **Contract for the project** - Contracts for construction on the project shall include a stipulation that prevailing wage will be paid. § 290.250.1.
 - v. **Determination or schedule of the prevailing hourly rate of wages** - Before advertising a request for bids for construction of public works, the public body must request DOLIR determine the prevailing wage. DOLIR will determine the wage based on the locality and the type of work to be performed. This determination or schedule of the prevailing hourly rate of wages is attached to and made a part of the specifications for work. § 290.250.1.
 - vi. **Ordinances or resolutions** - The public body passes an ordinance or resolution specifying the prevailing wage for the project. § 290.250.1.

Witness with personal knowledge - Any witness who may hear defendant make admissions regarding his belief or awareness that prevailing wage applied.



- b. Evidence to establish that a worker was directly employed by or on behalf of the public body in the construction of public works may include:**
- i. Contractor’s payroll records** - Contractors must accurately record the names, occupations, and crafts of every worker employed on the project. § 290.290(1). Such payroll records are submitted on a specific form and signed by a representative of the contractor.
 - ii. Division of Employment Security quarterly contribution and wage reports** - In order to calculate unemployment security taxes, certain employers must quarterly report the names and wages paid to their employees. See chapter 288.
 - iii. Witness with personal knowledge** - Any witness who personally observed the worksite can testify who was employed on the project and what type of work a worker was engaged in.
- c. Evidence that the worker was underpaid may include:**
- i. Certified payroll records** - The contractor must keep full and accurate records of how many hours each worker worked and the actual wages paid. These records must be kept open to inspection by the public body or DOLIR at any reasonable time and as often as may be necessary. Such records must be maintained for one year after completion of the project. § 290.290.1. Proof of payment may be compared with those records to verify whether worker was underpaid.
 - ii. Copies of cancelled checks from the contractor**
 - iii. Copies of cancelled checks subpoenaed from contractor’s bank account** - DOLIR has subpoena power to obtain cancelled checks from the employer’s bank account in conjunction with a prevailing wage investigation. § 290.280.
 - iv. Division of Employment Security quarterly contribution and wage reports** - In order to calculate unemployment security taxes, certain employers must quarterly report the names and wages paid to their employees. See chapter 288.
 - v. Financial records** - Records of any other form of payment such as cash, money orders, wire transfers, etc., may be a source of how much the worker was actually paid.
 - vi. Tax returns**
 - vii. Witness with personal knowledge** - Anyone with personal knowledge of what the workers were paid, such as the workers themselves or the person responsible for paying workers.

5. VOIR DIRE ISSUES

a. Bias against prevailing wage laws

Some jurors who may see prevailing wage as an unwarranted intrusion by government into wage determination would have trouble following the law. Here are some examples of issues that prosecutors may want to explore in voir dire.

- i. “Does anyone think prevailing wage laws are unfair?”



- ii. “Does anyone think they force employers to pay excessive wages?”
- iii. “Does anyone think this should not be a crime?”
- iv. “Does anyone believe it is acceptable for an employer to enter an agreement with a worker to pay the worker less than the law requires?”
- v. “Does anyone think it is acceptable for an employer to pay an employee less than the law requires because perhaps the worker finds it a satisfactory wage?”
- vi. “Does anyone think it is acceptable for an employer to pay an employee less than the law requires because perhaps you find that wage to be satisfactory for the area and the work performed?”

b. Anti-minimum wage law bias

- i. “Does anyone think that laws setting minimum wages are unfair?”
- ii. “Would anyone have trouble following a law that set a minimum wage?”

c. Anti-union or pro-management alignment

6. JURY INSTRUCTIONS - In order to avoid a *Celis-Garcia* problem regarding which date to charge for the prevailing wage violation, consider the instructions on use from MAI-CR 304.02. See also *State v. Celis-Garcia*, 344 S.W.3d 150, 159 (Mo. 2011).



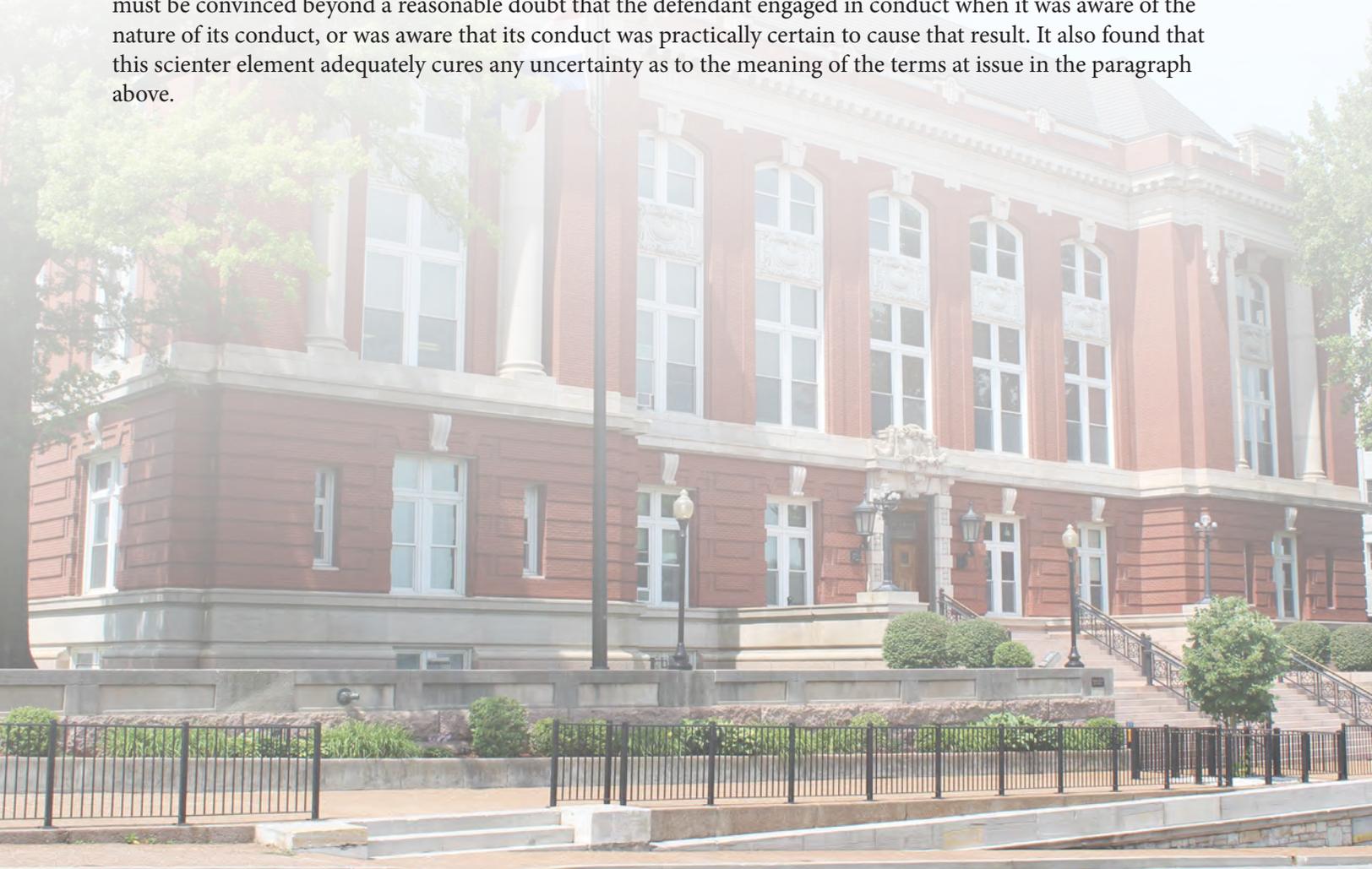
State of Missouri v. Lee Mechanical Contractors, Inc., 938 S.W. 2d 269 (Mo. 1997)

The following opinion is included in this packet not only because it addresses elements and issues important to the prosecution of prevailing wage violations in Missouri, but also because, at the time of this printing, it has the distinction of being the **only** Missouri appellate court decision dealing with prevailing wage enforcement in a criminal context.

The Court in *Lee Mechanical* confirmed two important points:

First, the Court declared that the terms “prevailing hourly rate of wages” and “work of a similar character,” as used in the Prevailing Wage Act, provide adequate notice of the prohibited conduct, and are therefore not unconstitutionally vague, as *Lee Mechanical* had contended. These criminal statutes are sufficiently specific to give notice to a potential offender, so that persons of common intelligence do not have to guess at its meaning.

Second, the Court addressed the degree of knowledge required to make an individual legally responsible for the consequences of his or her actions with respect to prevailing wage projects. Section 290.340 requires the specific intent of “willfully” violating the prevailing wage law. “The term ‘willfully’ predates statehood and is still used despite its omission from the levels of scienter in the Criminal Code.” The Court stated that in criminal offenses, “willfully” means “knowingly,” as defined in § 562.016.3. In order to convict, the fact finder must be convinced beyond a reasonable doubt that the defendant engaged in conduct when it was aware of the nature of its conduct, or was aware that its conduct was practically certain to cause that result. It also found that this scienter element adequately cures any uncertainty as to the meaning of the terms at issue in the paragraph above.





938 S.W. 2d 269, 3 Wage & Hour Cas.2d (BNA) 1225
 (Cite as: 938 S.W.2d 269)

H

Supreme Court of Missouri, EnBanc.

STATE of Missouri, Appellant,

v.

LEE MECHANICAL CONTRACTORS, INC.,

Respondent.

No. 78893.

Jan. 21, 1997.

Rehearing Denied Feb. 25, 1997.

Contractor filed motion to dismiss information, charging contractor with violation of statutory offense of willful violation of prevailing wages on public works. The Circuit Court, St. Louis County, Carolyn C. Whittington, J., sustained, holding statute unconstitutional. State appealed. The Supreme Court, Benton, J., held that statute proscribed comprehensible course of conduct and could constitutionally be applied to facts charged.

Reversed and remanded.

*270 John J. Duepner, Jr., Clayton, for Appellant.

David W. Harlan, Bradley G. Kafka, Valerie Held, St. Louis, for Respondent.

BENTON, Judge.

The State charged:

That Lee Mechanical Contractors, Inc., in violation of Section 290.250 RSMO., committed the class B **misdemeanor** of willful violation of the **prevailing wages** on public works, punishable upon conviction under Section 290.340 RSMO., in that on or about [18 specific dates between October 12 and November 4, 1993], in the City of Clarkson Valley, in the County of St. Louis, State of Missouri, Lee Mechanical Contractors, Inc., knowingly and will-

fully paid an employee, Robert House, to work for less than the rate of wages so fixed on the Marquette (Northeast) High School project*271 located in the Rockwood School District by paying him at the rate of \$21.51 per hour when the **prevailing wage** for a sheet metal worker was \$27.06 per hour.

The circuit court sustained Lee's motion to dismiss the information, holding a statute unconstitutional. The State appeals. *Mo. Const. art. V, § 3; §547.200.2.* FNI Reversed and remanded.

FN1. All statutory citations are to RSMo1994 unless otherwise indicated.

I.

Before undertaking any construction, a public body shall obtain, from the Department of Labor and Industrial Relations, a schedule of the prevailing hourly rate of wages for each type of worker required. § 290.250. The call for bids and the resulting contract must include this schedule. *Id.* "Prevailing hourly rate of wages" means "the wages paid generally, in the locality in which the public works is being performed, to workmen engaged in *work of a similar character...*" § 290.210(5) (emphasis added). "It shall be mandatory upon the contractor to whom the contract is awarded and upon any subcontractor under him, to pay not less than the specified rates to all workmen employed by them in the execution of the contract." § 290.250. Any contractor who "willfully violates and omits to comply with" this requirement is criminally liable. § 290.340.

Lee contends that §§ 290.250, 290.210(5), and 290.340 violate the due process clause of the Fourteenth Amendment to the United States Constitution and article I, section 10 of the Missouri Constitution. Specifically, Lee claims that these sections are unconstitutionally vague because the terms "prevailing hourly rate of wages" and "work of a similar character" do not give adequate notice of the conduct prohibited.

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938 S.W. 2d 269, 3 Wage & Hour Cas.2d (BNA) 1225
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II.

Lee consistently emphasizes the Department's difficulty in enforcing the prevailing wage law, particularly in convincing courts what is "work of a similar character." See Essex Contracting, Inc. v. City of DeSoto, 775 S.W.2d 208, 215-16 (Mo.App.1989); Essex Contracting, Inc. v. City of DeSoto, 815 S.W.2d 135, 138-39 (Mo.App.1991). Before the trial court, Lee introduced statements by two former directors of the Division of Labor Standards that an administrative rule was needed to describe the work of each type of worker, so that contractors could understand the law. As a result, effective March 15, 1994, the Department promulgated a work description rule to remedy these "longstanding deficiencies." See Associated General Contractors of Missouri v. Department of Labor and Industrial Relations, 898 S.W.2d 587, 590 (Mo.App.1995), discussing 8 CSR 30-3.060. Because this rule took effect after its alleged violations, Lee concludes that it cannot be prosecuted under the prevailing wage law.

[1][2] Lee's conclusion, however, relies on statements about the situation in general. "On a challenge that a statute or ordinance is unconstitutionally vague it is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing; the language is to be treated by applying it to the facts at hand." State v. Young, 695 S.W.2d 882, 883-84 (Mo. banc 1985), citing Prokopf v. Whaley, 592 S.W.2d 819, 824 (Mo. banc 1980). The issue here is whether Lee paid the prevailing wage for a "sheet metal worker" to an employee doing "work of a similar character." To this point in the case, there is no evidence of the scope of the employee's work, nor that of a sheet metal worker. For Lee to succeed, sections 290.250, 290.210(5), and 290.340 must be facially invalid, that is, they must proscribe no comprehensible course of conduct and cannot be applied to any set of facts. See State v. Hatton, 918 S.W.2d 790, 792-93 (Mo. banc 1996), citing Village

of Hoffman Estates v. Flipside, 455 U.S. 489, 498, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362, 371 (1982).

III.

A.

"Work of a similar character"-a linchpin to determine "prevailing hourly rate of wages" for each type of worker-is not defined in the prevailing wage law. In the context of a civil suit, this Court stated:

*272 The contention that the phrase 'work of a similar character' is too vague to permit definition would seem to be without substantial merit. The character of the work to be performed on the proposed road or any of the construction work to be done by the district in carrying out the object of its creation would not appear to be so extraordinary as not to permit a ready classification of the employees by resort to means of common knowledge and experience in this state.

City of Joplin v. Industrial Commission of Missouri, 329 S.W.2d 687, 691 (Mo. banc 1959), quoting Metropolitan Water District of Southern California v. Whitsett, 215 Cal. 400, 10 P.2d 751, 757 (1932). Cf. City of Kennett v. Labor and Industrial Relations Commission, 610 S.W.2d 623, 626 (Mo. banc 1981).

[3][4] The criminal context requires more careful scrutiny. State v. Shaw, 847 S.W.2d 768, 774 (Mo. banc), cert. denied, 510 U.S. 895, 114 S.Ct. 260, 126 L.Ed.2d 212 (1993). A criminal statute must convey adequate warning of the proscribed conduct when measured by common understanding and practices. Id. at 774-75 quoting In re Trapp, 593 S.W.2d 193, 202 (Mo. banc 1980); State v. Allen, 905 S.W.2d 874, 877 (Mo. banc 1995). A statute imposing criminal penalties must be sufficiently specific to give notice to a potential offender so that people of common intelligence do not have to guess at its meaning.

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938 S.W. 2d 269, 3 Wage & Hour Cas.2d (BNA) 1225
(Cite as: 938 S.W.2d 269)

Young, 695S.W.2d at 884; Shaw, 847 S.W.2d at 774. citing Connaly v. General Construction Company, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, 328 (1926).

[5] The constitutionality of statutes is not addressed in isolation, but by construing the whole statute with a strong presumption toward validity. Shaw, 847 S.W.2d at 776. In Shaw, this Court held that the term “unfair practices” was not unconstitutionally vague because the scienter element of the statute -- “willfully and knowingly ... with the intent to defraud” -- sufficiently cured any uncertainty as to the meaning of the term. *Id.* at 776, citing Scrows v. United States, 325 U.S. 91, 102, 65 S.Ct. 1031, 1036, 89 L.Ed. 1495, 1503 (1945). “A defendant cannot be found guilty unless the fact finder determines that he willfully and knowingly engaged in conduct that is unfair and that he did so with the specific intent to defraud his victim by means of the unfair practice.” Shaw, 847 S.W.2d at 776.

B

[6] In this case, section 290.340 requires the specific intent of “willfully” violating the prevailing wage law. The term “willfully” predates statehood and is still used despite its omission from the levels of scienter in the Criminal Code. See, e.g., Territorial Laws Missouri 1804-1822, ch. 64, p. 208 (1808); §236.500; Comment to 1973 Proposed Code, 40 V.A.MS. 234 (1979). Appellate courts in Missouri have generally held that in criminal offenses, “willfully” means “knowingly.” See State v. Mannon, 637 S.W.2d 674, 678 (Mo. banc 1982); State v. Marston, 479 S.W.2d 481, 484 (Mo.1972); State v. Foster, 355 Mo. 577, 592, 197 S.W.2d 313, 321 (1946); State v. Holliday, 353 Mo. 397, 398, 182 S.W.2d 553, 554 (1944); State v. Dumke, 901 S.W.2d 100, 103 (Mo.App.1995). But see Carter County School District v. Palmer 582 S.W.2d 347, 349-50 (Mo.App.1979). The General Assembly, in updating a pre-Code offense, has substituted “knowingly” for “willfully,” implying that the terms are synonymous. Compare § 374.280 with

§ 374.280 RSMo 1986. Under the Criminal Code’s scheme of culpable mental states, “willfully” as used in section 290.340 means “knowingly.” See § 562.016.

[7] Here, the State charged Lee with eighteen “willful” violations by “knowingly and willfully” paying an employee less than the prevailing wage for a sheet metal worker. In order to convict, the fact finder must be convinced beyond a reasonable doubt that Lee engaged in this conduct when it was aware of the nature of its conduct, or was aware that its conduct was practically certain to cause that result. This scienter element adequately cures any uncertainty as to the meaning of the terms “prevailing hourly rate of wages” and “work of a similar character” in sections 290.250, 290.210(5), and 290.340. See Shaw, 847 S.W.2d at 776; Hatton, 918 S.W.2d at 793; State v. Mahurin, 799 S.W.2d 840, 842 (Mo. banc 1990), cert. denied, 502 U.S. 825, 112 S.Ct. 90, 116 L.Ed.2d 62 (1991); *273 State v. Dale, 775 S.W.2d 126, 131 (Mo. banc 1989). The statute, on its face, proscribes a comprehensible course of conduct and can constitutionally be applied to the facts charged. See Hatton, 918 S.W.2d at 792-93.

IV.

The circuit court’s judgment is reversed and the cause remanded for proceedings consistent with this opinion.

All concur.

Mo., 1997.

State v. Lee Mechanical Contractors, Inc.
938 S.W.2d 269, 3 Wage & Hour Cas.2d (BNA) 1225

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Relevant Statutes

Missouri Revised Statutes Chapter 290 Wages, Hours and Dismissal Rights Section 290.210

August 28, 2014

Definitions.

290.210. As used in sections 290.210 to 290.340, unless the context indicates otherwise:

- (1) “Adjacent county”, any Missouri county of the third or fourth classification having a boundary that, at any point, touches any boundary of the locality for which the wage rate is being determined;
- (2) “Collective bargaining agreement” means any written agreement or understanding between an employer or employer association and a labor organization or union which is the exclusive bargaining representative of the employer’s or employer association’s employees pursuant to the terms of the National Labor Relations Act and which agreement or understanding or predecessor agreement or understanding has been used to determine an occupational title wage rate;
- (3) “Construction” includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair;
- (4) “Department” means the department of labor and industrial relations;
- (5) “Labor organization” or “union” means any entity which has been designated pursuant to the terms of the National Labor Relations Act as the exclusive bargaining representative of employees of employers engaged in the construction industry, which entity or affiliated entity has ever had a collective bargaining agreement which determined an occupational title wage rate;
- (6) “Locality” means the county where the physical work upon public works is performed;
- (7) “Maintenance work” means the repair, but not the replacement, of existing facilities when the size, type or extent of the existing facilities is not thereby changed or increased;
- (8) “Prevailing hourly rate of wages” means the wages paid generally, in the locality in which the public works is being performed, to workmen engaged in work of a similar character including the basic hourly rate of pay and the amount of the rate of contributions irrevocably made to a fund, plan or program, and the amount of the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workmen and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the workmen affected, for 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, accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal or state law to provide any of the benefits; provided, that the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the department, insofar as sections 290.210 to 290.340 are concerned, may be discharged by the making of payments in cash, by the making of irrevocable contributions by the assumption of an enforceable commitment to bear the costs of a plan or program as provided herein, or any combination thereof, where the aggregate of such payments, contributions and costs is not less than the rate of pay plus the other amounts as provided herein;



(9) “Previous six annual wage order reporting periods” means the current annual wage order reporting period under consideration for wage rate determinations and the five immediately preceding annual wage order reporting periods*;

(10) “Public body” means the state of Missouri or any officer, official, authority, board or commission of the state, or other political subdivision thereof, or any institution supported in whole or in part by public funds;

(11) “Public works” means all fixed works constructed for public use or benefit or paid for wholly or in part out of public funds. It also includes any work done directly by any public utility company when performed by it pursuant to the order of the public service commission or other public authority whether or not it be done under public supervision or direction or paid for wholly or in part out of public funds when let to contract by said utility. It does not include any work done for or by any drainage or levee district;

(12) “Workmen” means laborers, workmen and mechanics.

(L. 1957 p. 574 § 1, A.L. 1965 p. 438, A.L. 1969 S.B. 142, A.L. 2013 H.B. 34)

*Word “period” appears in original rolls.

Section 290.220

Policy declared.

290.220. It is hereby declared to be the policy of the state of Missouri that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed shall be paid to all workmen employed by or on behalf of any public body engaged in public works exclusive of maintenance work.

(L. 1957 p. 574 § 2)

Section 290.230

Prevailing wage rates required on construction of public works.

290.230. 1. Not less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed, and not less than the prevailing hourly rate of wages for legal holiday and overtime work, shall be paid to all workmen employed by or on behalf of any public body engaged in the construction of public works, exclusive of maintenance work. Only such workmen as are directly employed by contractors or subcontractors in actual construction work on the site of the building or construction job shall be deemed to be employed upon public works. Any such workman who agrees in writing to volunteer his or her labor without pay shall not be deemed to be employed upon public works, and shall not be entitled to the prevailing hourly rate of wages. For the purposes of this section, the term “workman who agrees in writing to volunteer his or her labor without pay” shall mean a workman who volunteers his or her labor without any promise of benefit or remuneration for such voluntary activity, and who is not a prisoner in any jail or prison facility and who is not performing community service pursuant to disposition of a criminal case against him, and is not otherwise employed for compensation at any time in the construction or maintenance work on the same public works for which the workman is a volunteer. Under no circumstances may an employer force, compel or otherwise intimidate an employee into performing work otherwise paid by a prevailing wage as a volunteer.

2. When the hauling of materials or equipment includes some phase of construction other than the mere transportation to the site of the construction, workmen engaged in this dual capacity shall be deemed employed directly on public works.

(L. 1957 p. 574 § 3, A.L. 2014 H.B. 1594)



Section 290.250

Prevailing wage, incorporation into contracts-- failure to pay, penalty--complaints of violation, public body or prime contractor to withhold payment--determination of a violation, investigation required--employer's right to dispute--enforcement proceeding permitted, when.

290.250. 1. Every public body authorized to contract for or construct public works before advertising for bids or undertaking such construction shall request the department to determine the prevailing rates of wages for workmen for the class or type of work called for by the public works, in the locality where the work is to be performed. The department shall determine the prevailing hourly rate of wages in the locality in which the work is to be performed for each type of workman required to execute the contemplated contract and such determination or schedule of the prevailing hourly rate of wages shall be attached to and made a part of the specifications for the work. The public body shall then specify in the resolution or ordinance and in the call for bids for the contract what is the prevailing hourly rate of wages in the locality for each type of workman needed to execute the contract and also the general prevailing rate for legal holiday and overtime work. It shall be mandatory upon the contractor to whom the contract is awarded and upon any subcontractor under him to pay not less than the specified rates to all workmen employed by them in the execution of the contract. The public body awarding the contract shall cause to be inserted in the contract a stipulation to the effect that not less than the prevailing hourly rate of wages shall be paid to all workmen performing work under the contract. The employer shall forfeit as a penalty to the state, county, city and county, city, town, district or other political subdivision on whose behalf the contract is made or awarded one hundred dollars for each workman employed, for each calendar day, or portion thereof, such workman is paid less than the said stipulated rates for any work done under said contract, by him or by any subcontractor under him, and the said public body awarding the contract shall cause to be

inserted in the contract a stipulation to this effect. It shall be the duty of such public body awarding the contract, and its agents and officers, to take cognizance of all complaints of all violations of the provisions of sections 290.210 to 290.340 committed in the course of the execution of the contract, and, when making payments to the contractor becoming due under said contract, to withhold and retain therefrom all sums and amounts due and owing as a result of any violation of sections 290.210 to 290.340. It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of said subcontractor's failure to comply with the terms of sections 290.210 to 290.340, and if payment has already been made to him, the contractor may recover from him the amount of the penalty in a suit at law.

2. In determining whether a violation of sections 290.210 to 290.340 has occurred, and whether the penalty under subsection 1 of this section shall be imposed, it shall be the duty of the department to investigate any claim of violation. Upon completing such investigation, the department shall notify the employer of its findings. If the department concludes that a violation of sections 290.210 to 290.340 has occurred and a penalty may be due, the department shall notify the employer of such finding by providing a notice of penalty to the employer. Such penalty shall not be due until forty-five days after the date of the notice of the penalty.

3. The employer shall have the right to dispute such notice of penalty in writing to the department within forty-five days of the date of the notice. Upon receipt of this written notice of dispute, the department shall notify the employer of the right to resolve such dispute through arbitration. The state and the employer shall submit to an arbitration process to be established by the department by rule, and in conformance with the guidelines and rules of the American Arbitration Association or other arbitration process mutually agreed upon by the employer and the state. If at any time prior to the department pursuing an enforcement action to enforce the monetary penalty provisions of



subsection 1 of this section against the employer, the employer pays the back wages as determined by either the department or the arbitrator, the department shall be precluded from initiating any enforcement action to impose the monetary penalty provisions of subsection 1 of this section.

4. If the employer fails to pay all wages due as determined by the arbitrator within forty-five days following the conclusion of the arbitration process, or if the employer fails to exercise the right to seek arbitration, the department may then pursue an enforcement action to enforce the monetary penalty provisions of subsection 1 of this section against the employer. If the court orders payment of the penalties as prescribed in subsection 1 of this section, the department shall be entitled to recover its actual cost of enforcement from such penalty amount.

5. Nothing in this section shall be interpreted as precluding an action for enforcement filed by an aggrieved employee as otherwise provided in law.

(L. 1957 p. 574 § 4, A.L. 1969 S.B. 142, A.L. 2007 S.B. 339)

Section 290.265

Wage rates posted, where.

290.265. A clearly legible statement of all prevailing hourly wage rates to be paid to all workmen employed in order to execute the contract and employed on the construction of the public works shall be kept posted in a prominent and easily accessible place at the site thereof by each contractor and subcontractor engaged in the public works projects under the provisions of this law and such notice shall remain posted during the full time that any such workman shall be employed on the public work.

(L. 1969 S.B. 142)

Section 290.280

Administration of oaths--subpoenas--enforcement of subpoenas.

290.280. The authorized representative of the department may administer oaths, take or cause to be taken the depositions of witnesses, and require by subpoena the attendance and testimony of witnesses and the production of all books, records, and other evidence relative to any matter under investigation or hearing. The subpoena shall be signed and issued by the department's authorized representative. In case of failure of any person to comply with any subpoena lawfully issued under this section, or on the refusal of any witness to produce evidence or to testify to any matter regarding which he may be lawfully interrogated, the authorized representative of the department may proceed to enforce obedience to the subpoenas in the manner provided by section 536.077 for administrative agencies. The authorized representative of the department shall have the power to certify to official acts.

(L. 1957 p. 574 § 9, A.L. 1961 p. 438)

Section 290.290

Contractor's payroll records, contents--affidavit of compliance required--signs on motor vehicles and equipment, requirements--temporary stationary sign, when--exception.

290.290. 1. The contractor and each subcontractor engaged in any construction of public works shall keep full and accurate records clearly indicating the names, occupations and crafts of every workman employed by them in connection with the public work together with an accurate record of the number of hours worked by each workman and the actual wages paid therefor. The payroll records required to be so kept shall be open to inspection by any authorized representative of the contracting public body or of the department at any reasonable time and as often as may be necessary and such records shall not be destroyed or removed from the state



for the period of one year following the completion of the public work in connection with which the records are made.

2. Each contractor and subcontractor shall file with the contracting public body upon completion of the public work and prior to final payment therefor an affidavit stating that he had fully complied with the provisions and requirements of this chapter, and no public body shall be authorized to make final payment until such affidavit is filed therewith in proper form and order.

3. Each contractor and subcontractor engaged in any construction of public works shall have its name, acceptable abbreviation or recognizable logo and the name of the city and state of the mailing address of the principal office of the company, on each motor vehicle and motorized self-propelled piece of equipment which is used in connection with such public works project during the time the contractor or subcontractor is engaged on such project. The sign shall be legible from a distance of twenty feet but the size of the lettering need not be larger than two inches. In cases where equipment is leased or where affixing a legible sign to the equipment is impractical, the contractor may place a temporary stationary sign, with the information required pursuant to this subsection, at the main entrance of the construction project in place of affixing the required information on the equipment so long as such sign is not in violation of any state or federal statute, rule or regulation. Motor vehicles which are required to have similar information affixed thereto pursuant to requirements of a regulatory agency of the state or federal government are exempt from the provisions of this subsection.

4. The provisions of subsection 3 of this section shall not apply to construction of public works for which the contract awarded is in the amount of two hundred fifty thousand dollars or less.

(L. 1957 p. 574 § 5, A.L. 1969 S.B. 142, A.L. 1993 H.B. 416 & 417)

Section 290.305

Rebates by workmen prohibited, exception.

290.305. No person, firm or corporation shall violate the wage provisions of any contract contemplated in sections 290.210 to 290.340 or suffer or require any employee to work for less than the rate of wages so fixed, or violate any of the provisions contained in sections 290.210 to 290.340. Where workmen are employed and their rate of wages has been determined as provided in sections 290.210 to 290.340, no person, either for himself or any other person, shall request, demand or receive, either before or after such workman is engaged, that such workman pay back, return, donate, contribute, or give any part or all of said workman's wages, salary, or thing of value, to any person, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent such workman from procuring or retaining employment, and no person shall, directly or indirectly, pay, request or authorize any other person to violate this section. This section does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.

(L. 1969 S.B. 142)

Section 290.315

Deductions from wages, agreement to be written, approval of public body required.

290.315. All contractors and subcontractors required in sections 290.210 to 290.340 to pay not less than the prevailing rate of wages shall make full payment of such wages in legal tender, without any deduction for food, sleeping accommodations, transportation, use of small tools, or any other thing of any kind or description. This section does not apply where the employer and employee enter into an agreement in writing at the beginning of said term of employment covering deductions for food, sleeping



accommodations, or other similar items, provided such agreement is submitted by the employer to the public body awarding the contract and the same is approved by such public body as fair and reasonable.

(L. 1969 S.B. 142)

Section 290.320

Advertising for bids before prevailing wage is determined prohibited.

290.320. No public body, officer, official, member, agent or representative authorized to contract for public works shall fail, before advertising for bids or contracting for such construction, to have the department determine the prevailing rates of wages of workmen for each class of work called for by the public works in the locality where the work is to be performed as provided in sections 290.210 to 290.340.

(L. 1969 S.B. 142)

Section 290.325

Awarding contract or payment without prevailing wage determination prohibited.

290.325. No public body, officer, official, member, agent or representative thereof authorized to contract for public works shall award a contract for the construction of such improvement or disburse any funds on account of the construction of such public improvement, unless such public body has first had the department determine the prevailing rates of wages of workmen for the class of work called for by such public works in the locality where the work is to be performed and such determination has been made a part of the specifications and contract for such public works.

(L. 1969 S.B. 142)

Section 290.330

Convicted violators of sections 290.210 to 290.340 listed, effect of.

290.330. The department after investigation, upon complaint or upon its own initiative, shall file with the secretary of state a list of the contractors and subcontractors who it finds have been prosecuted and convicted for violations of sections 290.210 to 290.340 and such contractor or subcontractor, or simulations thereof, shall be prohibited from contracting directly or indirectly with any public body for the construction of any public works or from performing any work on the same as a contractor or subcontractor for a period of one year from the date of the first conviction for such violation and for a period of three years from the date of each subsequent violation and conviction thereof. No public body shall award a contract for a public works to any contractor or subcontractor, or simulation thereof, during the time that its name appears on said list. The filing of the notice of conviction with the secretary of state shall be notice to all public bodies and their officers, officials, members, agents and representatives.

(L. 1969 S.B. 142)

Section 290.335

Notice of violation, failure to comply, attorney general shall sue, injunctive relief authorized.

290.335. If it is found that a public body, contractor or subcontractor has not complied with any of the terms of sections 290.210 to 290.340, the department shall give notice of the precise violation in writing to such public body, contractor or subcontractor. Sufficient time may be allowed for compliance therewith as the department deems necessary. After the expiration of the time prescribed in said notice, the department may in writing inform the attorney general of the fact that such notice has been given and that the public body, contractor or subcontractor



or the authorized representative or agent thereof to whom it was directed has not complied with such notice. Upon receipt thereof, the attorney general shall at the earliest possible time bring suit in the name of the state in the circuit court of the county in which such public body is located or where any such contractor or subcontractor is engaged in any public works to enjoin the award of such contract for a public works, or any further work or payments thereunder if the contract has been awarded, until the requirements of such notice are fully complied with. The court may issue a temporary restraining order with due notice to the defendant in such action. The plaintiff shall in any such injunctive action post an adequate bond to be set by the circuit judge. Upon final hearing thereof, if the court is satisfied that the requirements of the notice by the department to the defendant were not unreasonable or arbitrary, it shall issue an order enjoining the awarding of such contract for a public works, or any further work or payments thereunder if the contract has been awarded, until the notice is fully complied with. Such injunction shall continue operative until the court is satisfied that the requirements of such notice have been complied with and the court shall have and exercise with respect to the enforcement of such injunctions all the power in it in other similar cases. Both the plaintiff and defendant in such action have the same rights of appeal as are provided by law in other injunction proceedings.

(L. 1969 S.B. 142)

Section 290.340

Penalty for violation.

290.340. Any officer, official, member, agent or representative of any public body, contractor or subcontractor who willfully violates and omits to comply with any of the provisions and requirements of sections 290.210 to 290.340 shall be punished for each violation thereof by a fine not exceeding five hundred dollars, or by imprisonment not exceeding six months, or by both such fine and imprisonment.

Each day such violation or omission continues shall constitute a separate offense as contemplated by this section.

(L. 1969 S.B. 142)

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3. The facts supporting this belief are as follows:

On or about November 8, 2011 the Waynesville R-VI School District contracted with Bales Construction of Waynesville, MO to engage in public works construction on the Waynesville Sixth Grade Center. On or about November 9, 2011 Bales Construction subcontracted a portion of the public works construction to Floorcraft Carpet of Springfield, MO. On an unknown date Floorcraft Carpet verbally subcontracted their portion of the public works construction to Norman Schafer of Hartville, MO.

During interviews Schafer admitted to paying wages less than those required under 290.230 RSMo. and Annual Wage Order #18 throughout the project. According to Schafer he had spoken to Farmer in regard to his not receiving enough money to pay the workers prevailing wage to which Farmer replied not to worry about it, that he was taking care of the paper work. Despite knowing of the prevailing wage requirement, Schafer willfully continued working and underpaying workers wages. Schafer further advised he kept track of the hours worked by him and his workers and reported the hours accordingly to Farmer. Schafer indicated Farmer misrepresented the hours worked on the certified payroll forms submitted by Floorcraft to be less than those reported. Schafer provided the Division with accurate certified payroll forms which resulted in \$44,399.58 restitution due five workers to include Schafer. In addition, no payroll taxes were being withheld.

On or about July 11, 2012 Farmer provided Waynesville R-VI School District with certified payroll under penalty of law attesting to paying or overseeing the proper payment of wages. Farmer reflected 40 hours per week, proper hourly payments and tax deductions. Despite the initial claim by Farmer that he had in fact withheld and paid taxes on the workers, he later admitted in an interview he did not withhold or pay taxes. Farmer indicated he did not make payment directly to the workers, only Norman Schafer. Farmer claimed ignorance to Missouri's prevailing wage law, however, claimed to understand and have read the law. Despite Farmer's claim of ignorance, Farmer was aware of the prevailing wage requirement, intentionally reduced the hours reported on the certified payroll to avoid overtime issues, misrepresented the hourly rate of pay to be that which was required by law rather than the rate paid by Schafer, misrepresented the withholding of taxes to hide additional improprieties, and then certified the payrolls to be accurate.

In a January 24, 2013 interview with Schafer he advised he had spoken to Farmer on January 23, 2013 and Farmer asked him to claim checks written by Floorcraft to Schafer for unrelated projects to be for the Waynesville project- should the Division ask. Schafer indicated he told Farmer he would not lie to reflect he had been paid more than he had.

Mitch Volkart

Print name

2/7/13

Signature

Date



Division of Labor Standards - Investigative Report

Case Number: 2012060129

Report Date: 2/4/2013

Nature: PRWG Prevailing Wage

Finding: Substantiated Criminal

Project: Waynesville 6th Grade Center

Restitution Identified: \$44,399.58

Investigator: Volkaj4 Mitch

Penalty identified: \$17,200.00

Number of Violations: 2

OSHA Penalty Identified: \$4,800.00

Number Workers-Impacted: 5

Subject #: 1	Name/Title (Last, First): Schafer, Norman			Email: n/a
Type: Suspect	DOB: unknown	SSN: unknown	Address: [REDACTED]	Phone: [REDACTED]
Subject #: 2	Name/Title (Last, First): Floorcraft Carpet			Email: [REDACTED]
Type: Suspect	DOB: n/a	SSN: n/a	Address: [REDACTED]	Phone: [REDACTED]
Subject #: 3	Name/Title (Last, First): Schafer, Seth			Email: unknown
Type: Victim	DOB: unknown	SSN: unknown	Address: unknown	Phone: unknown
Subject #: 4	Name/Title (Last, First): Dugger, Harlin			Email: n/a
Type: Victim	DOB: unknown	SSN: unknown	Address: [REDACTED]	Phone: [REDACTED]
Subject #: 5	Name/Title (Last, First): Jones, Bobby			Email: unknown
Type: Victim	DOB: unknown	SSN: unknown	Address: unknown	Phone: [REDACTED]
Subject #: 6	Name/Title (Last, First): McPhearson, Truman			Email: unknown
Type: Victim	DOB: unknown	SSN: unknown	Address: unknown	Phone: [REDACTED]
Subject #: 7	Name/Title (Last, First): Farmer, Keith / Floorcraft Owner			Email: [REDACTED]
Type: Suspect	DOB: unknown	SSN: unknown	Address: [REDACTED]	Phone: [REDACTED]
Subject #: 8	Name/Title (Last, First): Nipples, Alan / Floorcraft Accountant			Email: [REDACTED]
Type: Witness	DOB: unknown	SSN: unknown	Address: [REDACTED]	Phone: [REDACTED]
Subject #: 9	Name/Title (Last, First): Bales, Brandon / Bales Construction			Email: [REDACTED]
Type: Witness	DOB: unknown	SSN: unknown	Address: [REDACTED]	Phone: [REDACTED]
Subject #: 10	Name/Title (Last, First): Allen, Angel / Waynesville Public			Email: [REDACTED]
Type: Witness	DOB: unknown	SSN: unknown	Address: [REDACTED]	Phone: [REDACTED]



On or about June 18, 2012 the Division of Labor Standards received a complaint from Harlen Ray Dugger alleging the underpayment of prevailing wage by Norman Schaeffer on two projects; Police Training Building in Springfield, MO (2012060128) and a school in Waynesville, MO. According to the complaint, work was performed on the Waynesville Project between March 2012 and May 2012.

On July 16, 2012 and July 23, 2012 I received requested records to include the contract with Bales Construction (General Contractor), OSHA 10 documentation and certified payroll records for Floorcraft and Norman Schafer, from Angel Allen, Project Bid Specialist with Waynesville Public Schools. According to Allen the certified payrolls for Floorcraft were received on July 11, 2012.

Upon reviewing the certified payroll I discovered Floorcraft Carpet had listed three (3) employees on their certified payroll, however, none of the names were that of Dugger.

On September 10, 2012 I contacted Dugger via telephone. Dugger advised the underpayment of prevailing wages had not been resolved. Dugger described his work on the Waynesville project as floor prep, wherein he applied floor leveler in preparation for finished flooring. Dugger indicated he informed Schafer it was a prevailing wage job, but Schafer refused to pay him such.

On September 12, 2012 I conducted an interview with Schafer in Marshfield, MO. Schafer indicated he has been in business for 38 years (since 1975), but had only performed 2 prevailing wage projects. Schafer indicated he mostly does residential. According to Schafer, he, Seth Schafer, Harlen Dugger, and Bobby Jones all worked on the Waynesville school project, however, he did not pay prevailing wage. Schafer indicated he had always treated the workers as 1099 Independent Contractors. Upon further discussion it appeared the workers were employees and Schafer agreed they belonged on his certified payroll forms. Schafer was then educated on the prevailing wage requirements and was provided a Contractor's Guidebook on prevailing wage. Schafer indicated he is his own employer and does not belong on

Floorcraft's payroll. During this meeting Schafer was thoroughly educated as to Missouri's prevailing wage requirements.

On September 24, 2012 Schafer provided completed certified payroll forms to the Division reflecting hours and days worked as well as amounts paid to workers. Upon review of the records it was apparent Norman Schafer underpaid workmen on the project the following amounts:

Dugger, Harlin Total	\$128.12
Jones, Bobby Total	\$19,549.96
McPhearson, Truman Total	\$706.59
Schafer, Norman Total	\$16,528.61
Schafer, Seth Total	\$7,486.31

On November 27, 2012 I conducted an interview with Keith Farmer of Floorcraft Carpet. Based on certified payroll forms previously provided by Farmer; he indicated Norman and Seth Schafer, and Bobby Jones were employees of Floorcraft, and went so far as to show Federal and State tax withholdings. Farmer advised he paid employer payroll taxes on both the Schafer's and Jones to include worker's compensation coverage and unemployment insurance. Farmer advised carpet layers are generally independent contractors, however, his accountant, Alan Nippes, advised him that because the project was prevailing wage he would need to treat them as employees of Floorcraft. Farmer indicated he made payment to Norman Schafer who was then to make payment to the other workers, however, he could not recall if he paid net amounts or gross amounts. Farmer indicated on more than one occasion he would need to speak with his accountant in order to properly answer my questions. Farmer advised he has owned Floorcraft for approximately one year having moved from Texas to Missouri. Farmer indicated he understands and has read Missouri's prevailing wage law as it is similar to Texas' prevailing wage law.

Prior to ending the meeting with Farmer I asked he provide me with worker's time cards, evidence of federal and state tax payments based on withholdings, an indication of whether he paid net



or gross amounts as indicated on the certified payroll forms. This request was reiterated in a November 28, 2012 emailed request for records. Farmer also indicated he would contact me with a time he and his accountant could discuss the payroll and tax process.

On December 17, 2012 I placed a telephone call to Farmer regarding the requested records that were due December 8, 2012. Farmer indicated he had been gathering the information and provided to Alan Nippes, his Accountant. As of the date of this report no documentation requested has been provided.

On January 3, 2013 I conducted a follow up interview with Keith Farmer, Floorcraft, and Allan Nippes, Accountant for Floorcraft. According to Nippes, Farmer approached him before the job started regarding a prevailing wage project and indicated he did not know how to fill out forms. Nippes indicated he looked up the prevailing wage and estimated the tax withholdings and filled out one certified payroll form based on estimated hours and cost. He indicated he informed Farmer that if he were to hire employees the sample form is what it would look like, and if they were to sub it out that is what the sub contractors payroll would look like. Nippes indicated he understood the form to be completed by whoever had the employees. Nippes stated he believed it was a misunderstanding between he and Farmer. Nippes indicated he planned, as the accountant, to issue Schafer a 1099 and not a W-2.

During the interview Farmer indicated he knew it was a prevailing wage applicable job when he bid it. Farmer advised when bidding it he had to take the number of yards or feet and “configure” it as number of hours. Farmer indicated he doesn’t know how anyone could bid it properly without the company knowing what they are getting into until they are there. According to Farmer, the bid rate of a prevailing wage job versus a non prevailing wage job is about the same, though he acknowledged wages are typically higher. After further discussion, Farmer admitted he would bid a prevailing wage job higher than a non-prevailing wage job. Farmer indicated he told Schafer before the project started that he was going to need certified payroll and that it was a

prevailing wage project. Farmer indicated he thought he needed to do the certified payroll to report Schafer’s hours. Farmer indicated he could not recall if his contract with Bales Construction required certified payroll and he did not have a written contract with Schafer. Farmer admitted he completed the forms and it was his writing (should be noted the certified payroll forms were the front of the federal form and the back of the state form). Farmer indicated Norm called him and reported the hours to him, a contradiction to his previous interview wherein he indicated Schafer submitted time sheets. Farmer indicated he did not receive time sheets. Farmer indicated he “thinks” the amount of the bid was equal to or greater than the amount reflected in the submitted certified payroll. Farmer indicated Seth Schafer was “never there”, however, the payroll he submitted reflected Seth being on site every hour Norman Schafer was on site. Farmer could not give an explanation.

Prior to leaving the meeting I requested Farmer provide me with a copy of the contract he had with Bales Constuction, a copy of checks made payable to Schafer on the project and the bank name and routing number (previously requested and not provided). Farmer indicated it wouldn’t take long to get the information and he would have the information to me by January 10, 2013. As of the date of this report Farmer has failed to provide the information requested.

On January 14, 2013 I conducted a follow up interview with Schafer based on a previous phone conversation in which Schafer indicated he did report his and other worker hours to Farmer. During the interview Schafer provided copies of the previously submitted certified payroll forms, copies of “checks” paid to him by Floorcraft, and the write ups that he paid the “guys”. Schafer indicated he had recorded the hours worked in his notebook. Schafer indicated he called his hours in to Farmer and would read from his sheet. Schafer indicated he would give the total hours, days, square footage of VCT. Schafer indicated Farmer was paying the floor prep on an hourly basis and therefore he only reported the floor



prep hours. The floor prep was separate from the installation because it was above and beyond the bid work. Schafer indicated he asked Farmer the first week why he wasn't paying prevailing wage so he (Schafer) could pay "the guys" prevailing wage to which Farmer replied, "Don't worry about it, I do the paperwork, it's on me."

Schafer further advised "I asked the guys, I said, look you know, I don't know what to do here. We can either work, um, you know, or go home and sit for a month. I said, it's going to come out in the wash in the end." "So, we chose to go ahead and work." "As you can see the hours and stuff we put in, there's just no way I could pay prevailing wages on them." Schafer indicated he believes Farmer paid him on the floor prep based on the number of hours worked by each worker at the applicable rate. Schafer indicated he received \$20/hr, Seth \$15/hr, Bobby \$9-10/hr.

Schafer reiterated he reported the hours he recorded to Farmer. Schafer indicated he does not know why Farmer reduced the number of hours to 40. Schafer said he met with Farmer "yesterday" and showed him everything he is showing me now. Schafer indicated the certified payroll hours submitted by Farmer and Floorcraft are not accurate. Schafer indicated this information was not relayed in our first interview because that interview focused primarily on the Springfield project.

Schafer provided additional information regarding his discussion on January 23, 2013 with Farmer. Schafer indicated Farmer had copies of checks from other jobs that he wanted to bundle in with the checks written to him for the prevailing wage job (Waynesville School). Schafer indicated he told Farmer it was fair to him, Schafer, because it would show him making more money than he did and then not paying what he was expected to pay. Schafer indicated Farmer wanted him to indicate the checks were for the Waynesville project if I were to come and ask him.

Norman Schafer, acting in concert with Floorcraft's Keith Farmer, underpaid five workers noted above, to include himself, on 172 occasions between the

dates of April 25, 2012 and September 8, 2012 on the Waynesville School project appears to be in violation of 290.340 RSMo. which states, "Any officer, official, member, agent or representative of any public body, contractor or subcontractor who willfully violates and omits to comply with any of the provisions and requirements of sections 290.210 to 290.340 shall be punished for each violation thereof by a fine not exceeding five hundred dollars, or by imprisonment not exceeding six months, or by both such fine and imprisonment. Each day such violation or omission continues shall constitute a separate offense as contemplated by this section." While Schafer initially claimed ignorance to the prevailing wage requirement he later indicated he had confronted Floorcraft about the need to pay workers prevailing wage but did not do so. Floorcraft in turn submitted falsified certified payroll under penalty of law to reflect 40 hours a week, proper wage rates, tax deductions, etc. to reflect compliance with the law.

In addition, Norman Schafer failed to have the proper OSHA 10 certification pursuant to 292.675 RSMo. A separate investigation (2012060128) shows Schafer to have been on a prevailing wage project as early as February 6, 2012. Pursuant to 292.675 Schafer had 60 days from that date to obtain his OSHA 10 training. Failure to have the training within 60 days, or by April 6, 2012 results in a \$2,500.00 fine and \$100 per day penalty. Schafer started on the Waynesville School project on April 25, 2012 and worked on the project 23 days until obtaining his certification on July 13, 2012. As a result, an OSHA penalty amount of \$4,800.00 has been assessed.

Keith Farmer's, d/b/a Floorcraft Carpet, submission of false certified payroll to the Waynesville R-VI School District on or about July 11, 2012 appears to be in violation of RSMo. 575.060 which states in part, "A person commits the crime of making a false declaration if, with the purpose to mislead a public servant in the performance of his duty, he...(1) Submits any written false statement, which he does not believe to be true...(b) On a form bearing notice, authorized by law, that false statements made therein are punishable."



Evidence/Supporting Documentation

Item #1	Date Collected: 6/2/2012	Obtained From: Dugger
	Description: Complaint and Attachments (5 pages)	
	Stored Location: <input type="checkbox"/> Paper File <input checked="" type="checkbox"/> Electronic File	
Item #2	Date Collected: 6/18/2012	Obtained From: DLS
	Description: Public Body Request Record	
	Stored Location: <input type="checkbox"/> Paper File <input checked="" type="checkbox"/> Electronic File	
Item #3	Date Collected: 7/16/2012	Obtained From: Waynesville School District
	Description: Floorcraft Certified Payroll, Contract with PB and Bales Construction & Wage Order	
	Stored Location: <input type="checkbox"/> Paper File <input checked="" type="checkbox"/> Electronic File	
Item #4	Date Collected: 7/23/2012	Obtained From: Waynesville School District
	Description: OSHA 10	
	Stored Location: <input type="checkbox"/> Paper File <input checked="" type="checkbox"/> Electronic File	
Item #5	Date Collected: 8/7/2012	Obtained From: DLS
	Description: Schafer Records Request	
	Stored Location: <input type="checkbox"/> Paper File <input checked="" type="checkbox"/> Electronic File	
Item #6	Date Collected: 9/24/2012	Obtained From: Schafer
	Description: Schafer Certified Payroll	
	Stored Location: <input type="checkbox"/> Paper File <input checked="" type="checkbox"/> Electronic File	
Item #7	Date Collected: 11/27/2012	Obtained From: DLS
	Description: Recorded Interview Farmer	
	Stored Location: <input type="checkbox"/> Paper File <input checked="" type="checkbox"/> Electronic File	
Item #8	Date Collected: 11/28/2012	Obtained From: DLS
	Description: Floorcraft Records Request	
	Stored Location: <input type="checkbox"/> Paper File <input checked="" type="checkbox"/> Electronic File	



Item #9	Date Collected: 12/17/2012	Obtained From: DLS
	Description: Recorded Phone Conversation with Farmer	
	Stored Location: <input type="checkbox"/> Paper File <input checked="" type="checkbox"/> Electronic File	
Item #10	Date Collected: 12/17/2012	Obtained From: Alan Nippes
	Description: Letter from Alan Nippes, Floorcraft Accountant	
	Stored Location: <input checked="" type="checkbox"/> Paper File <input checked="" type="checkbox"/> Electronic File	
Item #11	Date Collected: 1/3/2013	Obtained From: DLS
	Description: Recorded Interview Farmer	
	Stored Location: <input type="checkbox"/> Paper File <input checked="" type="checkbox"/> Electronic File	
Item #12	Date Collected: 1/24/2013	Obtained From: DLS
	Description: Recorded Interview Farmer (x2)	
	Stored Location: <input type="checkbox"/> Paper File <input checked="" type="checkbox"/> Electronic File	
Item #13	Date Collected: 1/24/2013	Obtained From: Schafer
	Description: Certified payroll, check receipts, payroll receipts	
	Stored Location: <input checked="" type="checkbox"/> Paper File <input checked="" type="checkbox"/> Electronic File	
Item #14	Date Collected: 2/4/2013	Obtained From: Bales Construction
	Description: Contract between Bales and Floorcraft	
	Stored Location: <input checked="" type="checkbox"/> Paper File <input checked="" type="checkbox"/> Electronic File	
Item #15	Date Collected: 2/4/2013	Obtained From: Bales Construction
	Description: Prevailing wage rate information included in contractor packet.	
	Stored Location: <input checked="" type="checkbox"/> Paper File <input checked="" type="checkbox"/> Electronic File	

c: Pulaski County Prosecuting Attorney
Missouri Attorney General's Office



Misdemeanor Information

IN THE CIRCUIT COURT OF JASPER COUNTY, STATE OF MISSOURI
Associate Circuit Court

STATE OF MISSOURI,)	
)	
Plaintiff,)	
)	Case no. _____
v.)	
)	
JOHN SMITH d/b/a)	
Smith Contracting, Inc.)	
1234 Main Street)	
Joplin, MO 65102)	
SSN: ***_**_****)	
DOB: **/**/****)	
Phone: (***) ***_****)	
)	
Defendant.)	

MISDEMEANOR INFORMATION

The Prosecuting Attorney of the County of Jasper, State of Missouri, charges the defendant with the following offenses:

COUNT I: PREVAILING WAGE VIOLATION Charge Code: 5417199.0

The defendant, in violation of §§ 290.230 and 290.340, committed the unclassified misdemeanor of failure to pay prevailing wage, punishable upon conviction under § 290.340 in that between December 30, 2011, and March 9, 2012, in the County of Jasper, State of Missouri, the Joplin Public School District was a Public Body engaged in the construction of public works (the demolition of Irving Elementary School, Old South Middle School and Joplin High School) and defendant, acting knowingly in concert with Smith Contracting, Inc., and its employees, willfully failed to pay the prevailing hourly rate of wages to Jose R. Hernandez, a workman directly employed by Smith Contracting, Inc., on behalf of the Public Body in the construction of public works.



COUNT II: PREVAILING WAGE VIOLATION

Charge Code: 5417199.0

The defendant, in violation of §§ 290.230 and 290.340, committed the unclassified misdemeanor of failure to pay prevailing wage, punishable upon conviction under § 290.340, in that between January 16, 2012, and March 3, 2012, in the County of Jasper, State of Missouri, the Joplin Public School District was a Public Body engaged in the construction of public works, to wit: the demolition of Old South Middle School and Joplin High School, and defendant, acting knowingly in concert with Smith Contracting, Inc., and its employees, willfully failed to pay the prevailing hourly rate of wages to Catalino E. Ramirez, a workman directly employed by Smith Contracting, Inc., on behalf of the Public Body in the construction of public works.

COUNT III: PREVAILING WAGE VIOLATION

Charge Code: 5417199.0

The defendant, in violation of §§ 290.230 and 290.340, committed the unclassified misdemeanor of failure to pay prevailing wage, punishable upon conviction under § 290.340, in that between January 16, 2012, and March 2, 2012, in the County of Jasper, State of Missouri, the Joplin Public School District was a Public Body engaged in the construction of public works, to wit: the demolition of Old South Middle School and Joplin High School, and defendant, acting knowingly in concert with Smith Contracting, Inc., and its employees, willfully failed to pay the prevailing hourly rate of wages to Jose Colon, a workman directly employed by Smith Contracting, Inc., on behalf of the Public Body in the construction of public works.

COUNT IV: PREVAILING WAGE VIOLATION

Charge Code: 5417199.0

The defendant, in violation of §§ 290.230 and 290.340, committed the unclassified misdemeanor of failure to pay prevailing wage, punishable upon conviction under § 290.340, in that between January 16, 2012, and March 7, 2012, in the County of Jasper, State of Missouri, the Joplin Public School District was a Public Body engaged in the construction of public works, to wit: the demolition of Old South Middle School and Joplin High School, and defendant, acting knowingly in concert with Smith Contracting, Inc., and its employees, willfully failed to pay the prevailing hourly rate of wages to Jorge A. Trejo, a workman directly employed by Smith Contracting, Inc., on behalf of the Public Body in the construction of public works.

COUNT V: PREVAILING WAGE VIOLATION

Charge Code: 5417199.0

The defendant, in violation of §§ 290.230 and 290.340, committed the unclassified misdemeanor of failure to pay prevailing wage, punishable upon conviction under § 290.340, in that between January 16, 2012, and March 3, 2012, in the County of Jasper, State of Missouri, the Joplin Public School District was a Public Body engaged in the construction of public works, to wit: the demolition of Old South Middle School and Joplin High School, and defendant, acting knowingly in concert with Smith Contracting, Inc., and its employees, willfully failed to pay the prevailing hourly rate of wages to Abner A. Alvarado, a workman directly employed by Smith Contracting, Inc., on behalf of the Public Body in the construction of public works.



The facts that form the basis for this information and belief are contained in the attached Probable Cause Statement (Exhibit A), which statement is made a part hereof and submitted herewith as a basis upon which this Court may find the existence of probable cause.

WHEREFORE, the State respectfully requests that an arrest warrant be issued as provided by law.

Respectfully Submitted,

CHRIS KOSTER
Attorney General, by

Joseph R. Schlotzhauer
Assistant Attorney General
Missouri Bar No. 62138
P.O. Box 899
Jefferson City, MO 65102
(573) 751-8804 Phone
(573) 751-2096 Fax





Verdict Director

INSTRUCTION NO.

(As to Count _____, if) (If) you find and believe from the evidence beyond a reasonable doubt:

First, that (on) (on or about) [date], in the (City) (County) of _____, State of Missouri, [contracting entity e.g. Joplin Public School District] was a Public Body engaged in the construction of public works, to wit: [name of the project e.g. Demolition of Joplin High School], and

Second, the defendant willfully failed to pay the prevailing hourly rate of wages to [worker], and

Third, that [worker] was a workman employed by or on behalf of the Public Body, and

Fourth, [worker] was engaged in the construction of public works, then you will find the defendant guilty (under Count _____) of failure to pay prevailing wage.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, “Public Body” means the state of Missouri or any officer, official, authority, board or commission of the state, or other political subdivision thereof, or any institution supported in whole or in part by public funds.

As used in this instruction, “construction” includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair.

As used in this instruction, “public works” means all fixed works constructed for public use or benefit or paid for wholly or in part out of public funds. It also includes any work done directly by any public utility company when performed by it pursuant to the order of the public service commission or other public authority whether or not it be done under public supervision or direction or paid for wholly or in part out of public funds when let to contract by said utility. It does not include any work done for or by any drainage or levee district.

As used in this instruction, “prevailing hourly rate of wages,” means the wages paid generally, in the locality in which the public works is being performed, to workmen engaged in work of a similar character including the basic hourly rate of pay and the amount of the rate of contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan or program, and the amount of the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workmen and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the workmen affected, for 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, accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal or state law to provide any of the benefits; provided, that the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the department,



insofar as sections 290.210 to 290.340 are concerned, may be discharged by the making of payments in cash, by the making of irrevocable contributions to trustees or third persons as provided herein, by the assumption of an enforceable commitment to bear the costs of a plan or program as provided herein, or any combination thereof, where the aggregate of such payments, contributions and costs is not less than the rate of pay plus the other amounts as provided herein.

As used in this instruction, “workman,” means laborers, workmen and mechanics.

As used in this instruction, “locality” means the county where the physical work upon public works is performed, except that if there is not available in the county a sufficient number of competent skilled workmen to construct the public works efficiently and properly, “locality” may include two or more counties adjacent to the one in which the work or construction is to be performed and from which such workers may be obtained in sufficient numbers to perform the work, and that, with respect to contracts with the state highways and transportation commission, “locality” may be construed to include two or more adjacent counties from which workmen may be accessible for work on such construction.

As used in this instruction, “department” means the department of labor and industrial relations.

MAI-CR 304.02 (Modified); §§ 290.210, 290.230, RSMo

Submitted by State of Missouri



Contact Information

Missouri Attorney General's Office.....573-751-3321

Missouri Division of Labor Standards.....573-751-3403

Wage and Hour: 573-751-3403

On-Site Safety & Health Consultations: 573-522-SAFE(7233)

Mine and Cave Safety and Health: 573-52-MINE1(526-4631)

Missouri Workers' Safety Program: 573-522-SAFE(7233)

United States Department of Labor - Wage & Hour Section: (866) 4US-WAGE (487-9243)





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