

A Performance Audit of the

Pennsylvania Department of Labor and Industry's

Prevailing Wage Program

February 2002

Auditor General Robert P. Casey, Jr.

February 25, 2002

The Honorable Mark S. Schweiker
Governor
Commonwealth of Pennsylvania
225 Main Capitol Building
Harrisburg, Pennsylvania 17120

Dear Governor Schweiker:

This report contains the results of the Department of the Auditor General's performance audit of the Pennsylvania Department of Labor and Industry's prevailing wage program for the period of July 1, 1998, through June 30, 2001. The audit was conducted pursuant to Section 402 of The Fiscal Code and in accordance with *Government Auditing Standards* as issued by the Comptroller General of the United States.

Our audit found that the Department of Labor and Industry (L&I) was seriously deficient in the operation of the prevailing wage program despite the requirements of Pennsylvania's Prevailing Wage Act. In fact, it is questionable whether an actual "program" even exists, given L&I's serious deficiencies in failing to maintain records, documents, or policies. As pointed out in Chapter Four of the report, L&I took every opportunity to deliberately keep our auditors from performing their duties. L&I consistently implemented delaying tactics, refused to allow auditors to meet privately with staff, did not allow auditors to have access to original documents, and generally attempted to prevent our auditors from performing their duties.

As a result of these limitations, we were able to conclude that the Department of Labor and Industry is not operating the program as intended. In Chapter One of the report, we describe how complaint case records are prematurely destroyed, prevailing wage violations are not tracked, and prevailing wage settlements are inappropriately made without the input of the complainants. It is clear that L&I management is not involved in the process of planning, directing, and controlling complaint investigations.

Chapter Two of the report discusses contract monitoring and reveals additional weaknesses. Contractor compliance with the Prevailing Wage Act is not effective and reporting is ineffective.

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Finally, Chapter Three discusses past inefficiencies with respect to how prevailing wage rates are determined.

We submitted a draft of this report to L&I on November 6, 2001, and agreed to an exit conference with management on November 20, 2001. Unfortunately, after L&I gathered numerous officials for the meeting, not one offered any comment to the draft report. L&I subsequently provided a written response to the report, which is included in its entirety at the end of the report.

Unfortunately, the dilatory conduct of L&I officials, and their lack of cooperation, obstructed our audit and prevented its timely release.

Throughout our report, we have made recommendations that, if implemented, will help improve the prevailing wage program. I hope that you will instruct L&I to act on these recommendations, and that you will commit the staff resources necessary to better protect Pennsylvania workers in the future.

Sincerely,

Robert P. Casey, Jr.
Auditor General

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Executive Summary

The Pennsylvania Department of Labor and Industry (L&I) was seriously deficient in its oversight of the Prevailing Wage Act, as evidenced by the results of a performance audit covering the period of July 1, 1998, through June 30, 2001.

We have determined that L&I exhibited significant shortcomings in the following areas:

- L&I management is divorced from the process of planning, directing, and controlling the complaint and investigation process leading to numerous program and accountability deficiencies.
- L&I management instituted a program of informal “field adjustments” that has resulted in prevailing wage settlements without input or testimony of the workers who filed the complaints.
- Complaint case records were prematurely discarded or destroyed in violation of L&I record retention policies.
- L&I did not track violations of the Prevailing Wage Act, making it difficult to identify and classify intentional violations in order to apply appropriate sanctions provided by the Act.
- L&I does not effectively monitor compliance with the Prevailing Wage Act.
- L&I failed to maintain adequate monthly administrative reports, and those reports that were maintained did not provide sufficient information to evaluate investigator performance.

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- There were errors, inefficiencies, and inconsistencies in L&I's processing and compilation of the 1999 prevailing wage survey data.

In addition, there were four conclusions added regarding L&I's compliance with the audit process whereby we determined that:

- L&I management influenced the free exchange of information by requiring that all audit interviews be conducted in the presence of a departmental attorney.
- L&I did not provide requested information in a timely and consistent manner.
- L&I did not provide auditors with access to original documents.
- L&I withheld case file information from auditors.

Based on our audit work, we are compelled to conclude that the Department of Labor and Industry (L&I) has completely failed to demonstrate it is adequately enforcing the Prevailing Wage Act or that the program is operating effectively. Indeed, it is difficult to conclude an actual "program" is in place in light of L&I's serious deficiencies in failing to maintain records, documents, or policies pertaining to the operations of the program. In fact, we conclude this failure to maintain records is a recurring root cause for a number of other deficiencies we have found in the program.

The Governor's State Records Management Manual states as follows:

Records should be viewed as resources that provide evidence of the organization, functions, policies, decisions, procedures, operations, and other activities of state government. They constitute the memory of executive branch departments, boards, and commissions. From these records, agency staff glean information, establish policies, and make decisions. **Records, and the information they**

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contain, are the lifeblood of government activity and one of the keys to making government more responsive and efficient. Records management is a critical element in satisfying increasing public demands for responsiveness, accountability, effectiveness, and efficiency from state government.¹

Our audit has disclosed that L&I has ignored this critical and basic principle of good government by failing to maintain reliable and accurate records regarding the operation of the prevailing wage program.

To that end, we have determined that L&I routinely destroys complaint files soon after a case is “resolved” in violation of its own records retention policies; no legitimate and accurate means is used to track the number, type, or nature of complaints filed, or the resolution of the same. Investigators’ files are haphazardly maintained at their homes, if at all, thereby leaving no trace of how a case was investigated and the justification for action or inaction. No policies exist to document the investigative activity, and there is no administrative oversight of the investigative process. Documentation is so scarce that L&I cannot verify with any certainty whether complainants received the money they were owed.

We further found that no policies exist to distinguish intentional from unintentional violations, nor is there anything documenting the Department’s justification and actions in making such distinctions. Consequently, it is difficult, if not impossible, to evaluate whether the debarment process is working as it should (although as set forth in more detail in the report, our audit work has disclosed it is not). These same administrative and operational deficiencies are also present in regards to L&I’s process for setting the appropriate prevailing rate.

¹Commonwealth of Pennsylvania, Governor’s Office, *State Records Manual*, M210.7 Amended, December 7, 1999.

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Given the absolute lack of any meaningful records memorializing its administering, oversight, and enforcement of the Prevailing Wage Act, L&I chose to engage in numerous dilatory tactics to delay and interfere with the auditing process. This included failing to provide information in a timely manner; failing, on occasion, to provide any information; forcing auditors to provide all requests for interviews, follow-up interviews, and records in writing; and, having an attorney present at all meetings. These tactics, in conjunction with the failure to maintain adequate records or internal controls, at best raises doubts about L&I's commitment to the Prevailing Wage Program; and at worst, suggests L&I was not entirely forthcoming about its lax oversight and enforcement of the Prevailing Wage Program.

It is incomprehensible and highly disturbing that a state agency such as L&I would maintain so little documentation about its handling and oversight of a government program (much less one that helps ensure quality public construction), particularly in today's day and age of intense public scrutiny and expectations of accountability. The failure to do so is completely contrary to notions of good government, accountability, and sound management practices.

In a performance audit, the burden to establish that a program is working effectively is on the auditee; it is not for this office to prove the contrary. Otherwise, an auditee could potentially use its failure to maintain adequate records, the decision to discard certain records prior to the audit, or its failure to produce certain records, to deliberately avoid any scrutiny by an auditing agency or the public. In this case, L&I's record keeping deficiencies forced us to assume the worst when addressing complaints or concerns received by outside parties about the operation of the program. In the absence of an adequate record, there is no meaningful way for us, or L&I for that matter, to address the complaints and concerns received from taxpayers.

In sum, L&I has demonstrated a complete lack of commitment to the Prevailing Wage Program. Its administration, oversight, and enforcement of the Prevailing Wage Act has failed those

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individuals that it was designed to protect, as well as the test of “satisfying . . . public demands for responsiveness, accountability, effectiveness, and efficiency from state government” as set forth in the *State Records Manual*.

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Introduction and Background

Public construction projects comprise a substantial portion of this country's overall construction activity. In 1992, the Congressional Budget Office estimated that federal construction represented about one-fifth of all construction in the United States.² Some estimate that after including state and local government construction, the percentage is closer to 30 percent of all construction.³ More recent figures reflect an overall percentage of somewhere between 20 and 25 percent.⁴ The economic boom of the last five years has resulted in Pennsylvania state and local governments spending increasing amounts in construction outlays as reflected in the graph in Figure 1.

² Daniel P. Kessler and Lawrence F. Katz, "Prevailing Wage Laws and Construction Labor Markets," *Industrial and Labor Relations Review*, Cornell University, January 2001.

³ Dale Belman and Paula Voos, *Prevailing Wage Laws in Construction: The Costs of Repeal to Wisconsin*, The Institute for Wisconsin's Future, University of Wisconsin, January 1996 (revised), p.5.

⁴ Thus, as of May 2001, the estimated seasonally adjusted annual rate of public construction was \$214.1 billion out of a total of \$881.6 billion (24.3 percent). For the year 2000, public construction comprised \$183.6 billion out of a total of \$807.6 billion of construction dollars (22.7 percent). United States Census Bureau, Construction Expenditures Branch, Manufacturing and Construction Division, July 2, 2001, Press Release, <http://www.census.gov/pub/const>.

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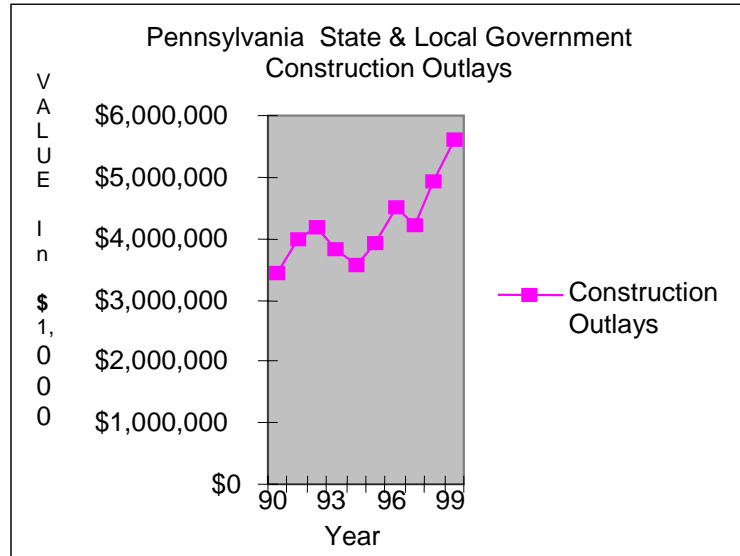


Figure 1. Pennsylvania State and Local Government Construction Outlays. Source: U.S. Census Bureau, Annual Survey of Government Finance

The bulk of this construction is for schools, highways, and human services.⁵ Since these segments of government activity have a substantial impact on the citizenry at large, it is especially imperative for health and safety reasons that the skill and workmanship going into the construction of these projects is of the highest quality possible. Furthermore, since public construction projects are funded by an ever increasingly smaller tax base (particularly at the local level), taxpayers expect that when government engages in a construction project, it will strive to secure the best quality for the dollars spent.

As pointed out in a recent audit conducted by the Department of Housing and Urban Development (HUD), the Inspector General of HUD stated:

⁵ Public construction is broken down into the following types of projects (using May 2001 as an example): housing and redevelopment \$6.9 billion; industrial \$1.3 billion; educational \$56.5 billion; hospital \$4.4 billion; other public buildings \$33.9 billion; highways and streets \$62.4 billion; military facilities \$2.3 billion; conservation and development \$7 billion; sewer systems \$12.8 billion; water supply facilities \$9.4 billion; and miscellaneous public projects \$17.1 billion. *Id.*

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Poor workmanship quality, in our opinion, results from the use of inexperienced or unskilled workers and shortcut construction methods. Roofing shortcuts result in leaks and costly roof and ceiling repairs. While shortcuts in painting may not be as serious, it does require future maintenance expense by requiring repainting sooner than anticipated. Electrical shortcut deficiencies are not as readily detected but may lead to serious problems such as fires and shocks . . . Poor quality work led to excessive maintenance costs and increased risk of defaults and foreclosures . . . this systematic cheating costs the public treasury hundreds of millions of dollars, reducing workers' earnings, and driving the honest contractor out of business or underground.⁶

The Genesis of Prevailing Wage Laws

Prevailing wage laws have been in existence throughout the country for over one hundred years. They were established as a means to ensure public construction meets certain quality and cost standards.

The construction industry is unique in that it regularly involves an intermittent and short-lived relationship between construction firms and workers due to weather and industry cycles, and the project-by-project nature of the construction business. Workers frequently will work for one firm on one project, then move on to another project, often with another firm. Because material costs are relatively stable, contractors can gain a competitive advantage when bidding on construction projects by reducing labor costs and paying substandard wages.⁷

⁶ Belman and Voos, p.5, *citing Audit Report on Monitoring and Enforcing Labor Standards*, Department of Housing and Urban Development, Office of Inspector General.

⁷ See Belman and Voos, p.1-2.

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Since the government is a major purchaser of construction services, and given that most government procurement laws generally require that construction contracts go to the lowest bidder,⁸ government could potentially use its bargaining power to force down wage rates.⁹ This likely exposes public construction to the inherent risks of poor workmanship, resulting from the use of inexperienced or unskilled workers.¹⁰

Prevailing wage laws are designed to protect wage levels under this competitive bid system by identifying wage rates that already prevail in a community on all construction projects and using those rates in the form of mandatory minimum wage levels on publicly funded construction projects. By doing this, workers on government contracts can be assured their wages will not be depressed below customary levels by competition among contractors for government work. It also minimizes the possibility local workers will lose their jobs to outsiders from low-wage areas who might be willing to come into the community, work for less than local standards, and compromise the quality of the project.¹¹ Thus, prevailing wage laws are intended to help minimize local unemployment by preventing contractors from recruiting labor from outside the locality where less skilled labor may be cheaper to secure.¹²

As the federal government became more active in public construction, it too believed that it must set an example by not undermining the wages of workers on federal construction projects. On March 3, 1931, the Davis-Bacon Act was signed into law by President Herbert Hoover.¹³ It requires private contractors to pay workers the prevailing wage/benefit package on all

⁸ See for example Commonwealth Procurement Code, 62 Pa. C.S.A. § 3911(a).

⁹ Peter Philips, *Losing Ground: Lessons from the Repeal of Nine "Little Davis-Bacon" Acts*, University of Utah, February 1995, p. 3; Belman and Voos, *citing* HUD Audit Report.

¹⁰ See Belman and Voos, p. 1-2;

¹¹ See generally Comment, *Pennsylvania's Prevailing Wage Act: An Appropriate Target for ERISA Preemption*, 100 Dick. L. Rev. 919 (1996), 924-925.

¹² *Id.*; Armond J. Thieblot, Jr., "Prevailing Wage Legislation," *Labor Relations and Public Policy Series*, The Wharton School, University of Pennsylvania, September 1985, p. 13.

¹³ 40 U.S.C. § 276(a).

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contracts of more than \$2,000 for construction, alteration, or repair of federal public buildings or public works.¹⁴

Thirty-five states currently have what are referred to as “little Davis-Bacon acts.” These statutes differ as to scope. Some are non-binding; others set wages at the rate of collectively bargained wages; some states defer to the rates established by the Davis-Bacon Act; others set the rate at the federal rate or state rate, depending on which is higher.¹⁵ All of the state statutes are alike in that they all set some level of minimum wage rates for construction workers on public projects to minimize the use of cheap, unskilled labor.

The Pennsylvania Prevailing Wage Act

In 1961, Pennsylvania adopted its own prevailing wage law to protect workers employed on public projects of more than \$25,000 from receiving substandard wages.¹⁶ To achieve this goal, the Pennsylvania Prevailing Wage Act (PWA) provides that contractors retained by the Commonwealth to perform certain construction or repair work must pay their workers the prevailing minimum wage rate for the locality in which the work is performed.¹⁷ The PWA does not contain a definition of

¹⁴ *Id.* Under the law as originally drafted, the federal prevailing wage rate was to be the rate of wages/benefits paid to the majority of workers employed in a particular job classification in a local area. If no majority rates/benefits existed, then it was the rates/benefits paid to 30 percent or more of workers in a classification and area. If less than 30 percent of workers were paid the same wages/benefits, then the average rate applied. 29 C.F.R., Part I (1952). In 1985, the 30 percent threshold was raised to 50 percent. So, for practical purposes, the current prevailing wage rate under federal law is either the rate paid to a majority of the workers in a particular class or (if there is no majority rate) it is the average rate.

¹⁵ Kessler and Katz, p. 261.

¹⁶ 43 P.S. §§ 165-1 through 165-11 (1961); *Kulzer Roofing v. Department of Labor and Industry*, 450 A.2d 259, 261 (Pa. Commw. 1982).

¹⁷ Specifically, the PWA provides “not less than the prevailing minimum wages as determined hereunder shall be paid to all workmen employed on public works.” 43 P.S. § 165-5 (1961). Public work is defined as “construction, reconstruction, demolition, alteration and/or repair work other than maintenance work, done under contract and paid for in whole or in part out of the funds of a public body where the estimated cost of the total project is in excess of twenty-five thousand dollars (\$25,000), but shall not include work performed under a rehabilitation or manpower training program.” 43 P.S. § 165-2.

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prevailing wages. Prevailing wages are defined by the PWA's accompanying regulation as "rates . . . payable in the locality in which the public work is to be performed, for the respective crafts and classifications, including the amount of contributions for employee benefits as required by the Act."¹⁸ Thus, the prevailing wage rates in Pennsylvania include both the amounts of cash wages paid to employees, as well as the fringe benefits to be paid to the workmen.

The Department of Labor and Industry has the responsibility of administering and enforcing the Act. Specifically, the Secretary of Labor and Industry for Pennsylvania is responsible for determining the prevailing wage for each locality in which the projects are performed and for each craft or classification of workers doing work on a project.¹⁹ To make this determination, the Secretary may consult numerous sources, including wage and benefit rates included in collective bargaining agreements. Indeed, the Secretary is authorized to designate the collectively bargained rate as the prevailing wage rate where that rate is the most frequently used rate in the given locality.²⁰ The Secretary may also seek advice from the Prevailing Wage Advisory Board, which consists of seven members, charged with the responsibility of assisting the Secretary in carrying out the duties under the PWA.²¹

Once the wage rate is established, construction contractors who are awarded public contracts must guarantee that they will pay the prevailing wage to workers.²² They have a duty to post the general prevailing minimum wage rates at their work sites to inform workers of their wage and benefit rights under the Act.²³ The public body is charged with certifying that employers have paid the prevailing wage rate to workers on the project.²⁴

¹⁸ 34 Pa. Code § 9.102.

¹⁹ 43 P.S. § 165-7 (1961).

²⁰ 34 Pa. Code § 9.105; *See Keystone Chapter of Associated Builders and Contractors, Inc. vs. Department of Labor and Industry*, 414 A.2d 1129 (Pa. Commw. 1980).

²¹ 43 P.S. § 165-2.1(a).

²² *See* 34 Pa. Code § 9.103.

²³ 43 P.S. § 165-9.

²⁴ *Id.* § 165-10(a).

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Should the public body determine that an employer has failed to pay the prevailing minimum wage, the public body must notify the Secretary in writing, giving the name of the person or employer failing to pay the prevailing wage.²⁵ The Secretary is obligated to investigate such matters to determine whether the employer/contractor has indeed violated the Prevailing Wage Act.²⁶ The Secretary may direct those in the public body in charge of disbursement of funds to deduct from the public body's payment to the contractor the amount owed to employees on the project. Additionally, those who are found by the Secretary to have **unintentionally** failed to pay the prevailing minimum wage are afforded an opportunity to make payment or provide adequate security for payment of the amounts required to be paid to the workers affected.²⁷

If the Secretary determines that an employer's failure to pay prevailing wages was **intentional**, the Secretary must notify all public bodies of "the name or names of such persons or firms, and no contracts shall be awarded to such persons or firms or to any firm, corporation or partnership in which such persons or firms have an interest until three years have elapsed from the date of the notice to the public bodies aforesaid."²⁸ Additionally, where violations are intentional, the contractor is liable to the Commonwealth for liquidated damages, as well as for breach of contract, in the amount of underpayment of the wages that were due to workers under the contract.²⁹

The Protest Process - Labor and Industry's Authority to Independently Police Compliance with the Prevailing Wage Act

If the public body fails to identify noncompliance by contractors, workers are permitted to file a protest with the Secretary objecting to the payment.³⁰ The Secretary of Labor and Industry is charged

²⁵ *Id.* § 165-11(a).

²⁶ *Id.* § 165-11(c).

²⁷ *Id.* § 165-11(d).

²⁸ *Id.* § 165-11(e).

²⁹ *Id.* § 165-11(f).

³⁰ *Id.* § 165-11(b).

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with investigating allegations of wage rate violations when a worker files a charge alleging that he or she has not been paid the prevailing rate. Section 165-11(b) provides:

Any workman may, within three months from the date of the occurrence of the incident complained of, file a protest, in writing, with the secretary objecting to the amount of wages paid for services performed by him on public work as being less than the prevailing wages for such services.

The Act further provides:

[W]henver any workman employed upon public work shall have filed a timely protest objecting that he has been paid less than prevailing wages as required by this act, it shall be the duty of and the Secretary shall forthwith investigate the matter and determine whether or not there has been a failure to pay the prevailing wages and whether any such failure was intentional or otherwise. In any such investigation, the secretary shall provide for an appropriate hearing upon due notice to interested parties, including the workmen, the employer and the respective representative, if any.³¹

Thus, the Secretary has a mandatory duty to investigate all timely protests filed by workmen alleging that they have been paid less than the prevailing wage as required by the Act. This investigation must include a hearing, the nature of which is within the discretion of the Department to determine.³² If it is determined the contractor violated the Prevailing Wage Act, the rules relative to intentional and unintentional violations referred to above apply.

The three-month period for filing a protest pertains **only to workmen filing protests**; it does not bar the Department from

³¹ *Id.* § 165-11(c).

³² See *Department of Labor and Industry, Bureau of Labor Law Compliance v. Ganc*, 729 A.2d 668 (Pa. Commw.1999).

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instituting enforcement proceedings against a contractor.³³ Moreover, the Secretary possesses the statutory authority to conduct self-initiated, spontaneous inspections of wage records, as well as to authorize field inspectors to make “routine checkups” at the sites and to audit payroll records independently to determine whether a contractor failed to pay the prevailing wage rate.³⁴ Additionally, the PWA requires the parties to make their payroll records available to the Secretary for inspection.³⁵

Accordingly, the Department of Labor and Industry has the plenary power to enforce compliance with the PWA.³⁶ It need not wait until either a protest is filed or a public entity reports a violation in order to enforce the Act.³⁷

Recent Developments

Prevailing Wage Survey

In 1993, L&I submitted to the Independent Regulatory Review Commission (IRRC) comprehensive proposed revisions to the existing prevailing wage regulations.³⁸ As part of its objections

³³ *Linde Enterprises, Inc. v. Prevailing Wage Appeals Board*, 676 A.2d 310, 312 (Pa. Commw. 1996).

³⁴ *See Commonwealth of Pennsylvania, Department of Labor and Industry v. Altemose Construction Company*, 368 A.2d 879 (Pa. Commw. 1977); *See also* Section 2203 of the Administrative Code of 1929, which states, “The Department of Labor and Industry shall have the power to make investigation surveys upon any subject within the jurisdiction of the department, either upon its own initiative or upon the request of the Industrial Board.” 71 P.S. § 563.

³⁵ 43 P.S. § 165-6.

³⁶ *A.R. Scalise Co. v. Commonwealth of Pennsylvania Prevailing Wage Appeals Board, Department of Labor and Industry*, 393 A.2d 1306 (Pa. Commw. 1978).

³⁷ Workers are also provided a private right of action to challenge violations of the Prevailing Wage Act. Section 9.112(b) of the prevailing wage regulations entitled “Workmen’s Rights” states as follows:

(b) Any workmen paid less than the rates specified in the contract shall have a right of action for the difference between the wage paid and the wages stipulated in the contract, which right of action must be exercised within 6 months from the occurrence of the event creating the right.

34 Pa. Code § 9.101, *et seq.*; *See also* 43 P.S. § 165-11(b).

³⁸ The purposes of the proposed rulemaking were: [T]o update, modify and improve the substantive and procedural regulations adopted by the Department under the act, to foster efficient administration of the act, to clarify the rights and duties of private and public entities under the act and to ensure the protection of workers employed on public work from substandard pay. 23 Pa. Bull. 1460, 1460 (March 27, 1993).

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and comments to the regulations, the IRRC observed that the Department relied primarily on collectively bargained rates to establish the prevailing wage.³⁹ It recommended the Department explore other options for identifying the prevailing wage rates on public construction projects.

In the fall of 1995, the Secretary of Labor and Industry decided to conduct a statewide survey to gather information to be used to evaluate prevailing minimum wages. The Department entered into an agreement with Penn State University to conduct a statewide wage survey to determine prevailing wage rates for Pennsylvania on a county-by-county basis.⁴⁰ Survey forms were distributed to contractors across the state and to labor unions upon request. The Department decided that wage data for public work projects would **not** be included on the survey. This resulted in the

³⁹ *Comments of the Independent Regulatory Review Commission on Pennsylvania Department of Labor and Industry # 12-32 Prevailing Wage Regulations*, June 25, 1993, at p. 7, 14. While the wage and benefit rates of non-union workers often vary from job to job, rates in the unionized sector are generally uniform for each specific trade in a given locality. "For this reason, the prevailing wage and benefit rate was usually the collectively bargained wage and benefit rate." Howard Wial, *Do Lower Prevailing Wages Reduce Public Construction Costs?*, Keystone Research Center, July 1999. See also *Keystone Chapter of Associated Builders and Contractors, Inc. vs Department of Labor and Industry*, 414 A.2d 1129 (Pa. Commw. 1980).

⁴⁰ The prevailing wage regulations provide for the use of surveys, conducted by the Secretary's field staff, as part of a "continuing program" to assist in the calculation of the prevailing minimum wage. Specifically, the regulations state:

The Secretary will conduct a continuing program for obtaining and compiling of wage rate information and shall encourage the voluntary submission of wage rate data by contractors, contractors' associations, labor organizations, public officials and other interested parties, reflecting wage rates paid to workmen in the various types of construction in the locality. Rates shall be determined for varying types of projects within the entire range of work performed by the building and construction industry. Information submitted shall reflect not only the specified wage rate or rates paid to a particular craft in the locality but also the type or types of construction on which the wage rate or rates have been paid. **If the Secretary deems that the data at hand is insufficient to make a determination with respect to the crafts or classifications necessary to perform the proposed public work, he may have a field survey conducted by his staff representative for the purpose of obtaining additional information upon which to make a determination of the wage rates, and also the customs, usages and practice as to the type of work to which the wage rates apply and the size of available force of qualified workmen within the locality in which the public work is to be performed.** [Emphasis added]

34 Pa. Code § 9.105(d).

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exclusion of wage rates for the “heavy” and “highway” categories of construction projects, which generally involve higher hourly rates. In addition, the Department decided to use a majority (50% + 1) method for identifying the prevailing wage (rather than just the rate most frequently paid) and a weighted average where no one rate was the majority rate.

Based on these changes in methodology, including its decision to focus on a smaller county-by-county analysis to set the rates, the Department predicted the new rates would be lower and save taxpayers at least \$100 million per year because it would be less likely under this methodology that collective bargaining rates would be deemed prevailing.⁴¹ The cost to the Commonwealth for conducting the survey itself was approximately \$108,000.⁴² On March 3, 1997, the Department started issuing new rates based on the survey results. In those trades and counties where a large share of workers were covered by a collective bargaining agreement, the new survey rates continued to be tied to collective bargaining rates, since those rates were the majority rates. However, in those trades and counties with a lower union presence, the prevailing rate was lowered because, in many instances, the collectively bargained rate was not the majority rate and the weighted average methodology was used.⁴³

The Pennsylvania State Building and Construction Trades Council (the “Council”) brought suit challenging the Secretary’s authority to conduct the survey, as well as the methodology used (including the failure to include public work projects in the survey). On January 11, 1999, the Commonwealth Court ruled in the Council’s favor, concluding that the survey was defective

⁴¹ See *New Prevailing Wage Rates Will Save Taxpayers Millions*, Department of Labor and Industry, Press Release, February 27, 1997.

⁴² This amount did not include the internal personnel and other overhead costs realized by L&I in its implementation of the new survey.

⁴³ Howard Wial, *Do Lower Prevailing Wages Reduce Public Construction Costs?*, Keystone Research Center, July 1999, p. 6.

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based on its failure to include public projects in the survey results.⁴⁴

Reorganization of the Prevailing Wage Division

In July 1996, L&I implemented a reorganization plan that changed the Department's enforcement of the PWA. It took the Prevailing Wage Division (PWD), a self-standing and discreet department operation, and merged it into the Bureau of Labor Standards and Division of Apprenticeship and Training (BLS).⁴⁵ The new bureau was titled the Bureau of Labor Law Compliance (BLLC). The twelve investigators that were previously assigned to the Prevailing Wage Division were added to the 15 investigators who had been working in the BLS. The total complement of 27 investigators was cross-trained to be used interchangeably to investigate violations of any law that had previously fallen under the jurisdiction of the old PWD and BLS.

Purpose of the Audit

A great deal has been written concerning the continued need for prevailing wage laws, both at the federal and state levels. In particular, significant focus has been placed on the question of whether prevailing wage laws increase the cost of public construction.⁴⁶

On balance, prevailing wage laws – including Pennsylvania's – continue to provide a necessary safeguard to ensure that public construction meets the requisite quality workmanship standards

⁴⁴ *Pennsylvania State Building and Construction Trades Council, AFL-CIO, and its Affiliated Labor Organizations v. Commonwealth of Pennsylvania, Prevailing Wage Appeals Board; and Commonwealth of Pennsylvania, Department of Labor and Industry*, 722 A.2d 1139 (Pa. Commw. 1999).

⁴⁵ Prior to the changes, the Bureau of Labor Standards had sole responsibility for enforcing the Pennsylvania Minimum Wage Act, the Wage Payment Collection Law, Child Labor Law, Equal Pay Law, Industrial Homework Law, Personnel File Law, and Seasonal Farm Labor Laws.

⁴⁶ See Philips, p.25-31; Belman and Voos, p.7; Kessler and Katz, p.259; Wial, p.7; Thieblot, p.2; Richard Vedder, Ph.D., *Michigan's Prevailing Wage Law and Its Effects on Government Spending and Construction Employment*, Mackinac Center for Public Policy, Midland, Michigan, September 1999, p.1; Eleanor D. Craig, *The Impact of Pennsylvania's Prevailing Wage Law on Public Construction Costs*, Prepared for the Commonwealth Foundation (1994).

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that taxpayers demand and that such construction does not undercut the local economy and wage base. Furthermore, the more persuasive evidence indicates that prevailing wage laws do not substantially add to the overall cost of construction.⁴⁷

However, the primary purpose of this audit is not to debate the continued necessity for prevailing wage laws, nor is it to assess whether enforcing prevailing wage laws is a constructive exercise of governmental authority. Rather, the audit is specifically intended to assess whether the Department of Labor and Industry is meeting its statutory and regulatory responsibilities and obligations to enforce the Prevailing Wage Act and whether the prevailing wage program is operating efficiently and effectively.

⁴⁷ We reach these conclusions for several reasons. First, the Congressional Budget Office has concluded that for federal purposes, the Davis-Bacon Act adds only 1.5 percent to overall construction costs – costs which are offset by the hiring of more skilled and productive workers. Statement of Robert D. Reischauer, Congressional Budget Office Testimony (May 4, 1993), p.42. This finding is also supported by an independent analysis of Federal Highway Administration data which determined that lower hourly wage rates for highway construction workers leads to higher highway construction costs per mile. Construction Labor Research Council, *Evaluation of Highway Costs Analysis* (1995). Second, several thorough and well-researched articles focusing on the impact on construction costs in states where the prevailing wage laws were repealed provide strong evidence that the repeals did not generate cost savings and/or led to higher construction costs or other negative impacts. Specifically, these studies demonstrated that repeal of prevailing wage laws led to: 1) a major loss of tax revenues which exceed the minimal savings in construction costs; 2) an increase in occupational injuries; 3) higher costs resulting from less skilled workers performing the work (project cost overruns, repairs, etc.); and/or 4) loss of established apprenticeship training programs. Philips, p.16, 58-59; Belman and Voos, p.5-6; Mark Prus, *Prevailing Wage Laws and School Construction Costs: An Analysis of Public School Construction in Maryland and the Mid-Atlantic States*, study prepared for Prince Georges County Council, Maryland, January 1999.

Finally, we find most persuasive a study conducted by Keystone Research Center indicating that the cost of public school construction in Pennsylvania increased after the revised lower wage rates went into effect in 1997. The study attributes the higher costs to the loss of productivity and skilled workers resulting from the payment of a reduced wage. Howard Wial, *Do Lower Prevailing Wages Reduce Public Construction Costs?*, Keystone Research Center, July 1999, p.9-10.

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Objectives, Scope, and Methodology

The Department of the Auditor General conducted this performance audit in order to provide an independent assessment of the Pennsylvania Department of Labor and Industry (L&I), specifically as it performed its role of monitoring and enforcement of compliance with the Prevailing Wage Act and Regulations. Our expectation is that the findings presented here will improve public accountability and facilitate corrective action where necessary. Accordingly, we began with the following general audit objectives:

1. Determine the adequacy and propriety of L&I's enforcement of the Prevailing Wage Act, including, but not limited to, its investigation of protests, holding of hearings, and collection of penalties and damages.
2. Determine the sufficiency of L&I's efforts to ensure that contractors and contracting agencies are meeting their responsibilities under the Prevailing Wage Act.
3. Evaluating the prevailing wage rate determination process.

More specific objectives for this audit are detailed in the body of the report.

To accomplish the above objectives, we interviewed various L&I staff and management; reviewed pertinent laws and regulations, policies, guidelines, and other documents; reviewed the operations of L&I; and interviewed or surveyed building and construction workers, representatives of public agencies, and representatives of contractors. Our data and conclusions are based on objective and systematic examination of evidence gathered during our field work.

This audit report presents our assessment of the administration and oversight of the program, along with our recommendations for improvement. The audit was conducted in accordance with

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Government Auditing Standards as issued by the Comptroller
General of the United States.

Unless otherwise indicated in the body of this report, our audit
covered the period of July 1, 1998, through June 30, 2001.

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Chapter One – Complaints, Collections, and Contractor Debarments

Background

According to the Prevailing Wage Act and regulations, it is the duty of the Department of Labor and Industry (L&I) to perform four major duties regarding “protests,” more conventionally referred to as complaints. Complaints are filed with the Bureau of Labor Law Compliance (BLLC).⁴⁸

The four required duties include:

- To promptly and thoroughly investigate prevailing wage complaints;
- To determine whether the appropriate wage was paid or not by affording due process to both the worker and the contractor;
- To assess and collect wage amounts owed to workers from contractors and disburse any amounts due the worker, or ensure that those amounts are settled and paid; and,
- In the event that a contractor has been found to be in violation of the Prevailing Wage Act, L&I must also determine whether the violation was committed intentionally or unintentionally and whether a finding of intent to violate the Act deserves debarment.

In short, L&I is entrusted with the responsibility of fairly and impartially carrying out the duties conferred upon the Department by the Prevailing Wage Act and regulations as they relate to prevailing wage complaints.

⁴⁸ From this point forward, we will refer to Protests as complaints, a term utilized by L&I to refer to the Protest process.

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Objectives and Methodology

Our objectives for this Chapter were:

1. To determine whether complaints were thoroughly and promptly investigated.
2. To determine whether workers filing complaints received all wages and other relief they were entitled to.
3. To determine whether penalties for non-compliance were imposed and enforced against employers in accordance with law and regulation.

In order to reach conclusions on our objectives we:

1. Reviewed the Prevailing Wage Act, L&I regulations, and policies and procedures regarding oversight of the Prevailing Wage Act;
2. Interviewed appropriate L&I management, staff, and complainants;
3. Documented the complaints investigation process;
4. Selected a sample of complaint case files and examined them to determine if the cases were investigated properly and timely; and
5. Examined a sample of debarred contractor files to determine the appropriateness of debarment decisions.

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Conclusion 1: Department of Labor and Industry management is divorced from the process of planning, directing, and controlling the complaint and investigation procedures, leading to numerous program and accountability deficiencies.

Testing of BLLC files and records disclosed inconsistencies in the tracking and logging of complaints, insufficient segregation of duties, sparse or missing documentation, and errors and inaccuracies throughout the entire complaint process.⁴⁹ These exceptions occurred because L & I management maintained little supervision over the complaint process and failed to communicate prescribed guidelines through the issuance of written policies and procedures.

As a result, L&I could not verify that all worker prevailing wage complaints were actually reviewed and that back wages collected and owed to workers (totaling more than \$970,000) were ever paid.

These conclusions and recommendations address a seriously flawed effort by L&I to decentralize and administer the Prevailing Wage Act complaint process in field offices. In addition, we found significant management problems in the oversight and operations of the Prevailing Wage collection program.

L & I management failed to adequately direct and control the intake, assessment, and tracking of complaints, making it difficult, if not impossible, to determine the status of a case.

L&I routinely dismissed complaints as untimely without written procedures to guide the process. We examined a total of 143 complaint forms and discovered that 24 of them (17%) were marked as untimely. Out of the 24 rejected complaints, none of them could be traced to the computer tracking system.

⁴⁹ Complaints process includes complaint intake, investigations, and collections processes.

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According to L&I, complaints are considered untimely if they are received more than 90 days following the date of occurrence of the incident on the complaint form.⁵⁰

Section 11(b) of the Prevailing Wage Act provides that:

(b) Any workman may, within three months from the date of the occurrence of the incident complained of, file a protest, in writing, with the secretary objecting to the amount of wages paid for services performed by him on public work as being less than the prevailing wages for such services.

In 1996, the Commonwealth Court issued a decision in *Linde v. Prevailing Wage Appeals Board*⁵¹ that recognizes that L&I may still have an obligation to investigate a complaint whether it is timely or not because the complaint may signify that a violation of the Prevailing Wage Act has occurred.

L&I admitted that it has the discretion to investigate complaints received outside of three months of the incident. However, no written policies and procedures are in place outlining when an investigation might be warranted and no documentation is maintained as to the disposition of a rejected complaint form. Therefore, we could not determine if all potential Prevailing Wage Act violations and worker underpayments were addressed.

L&I has not adequately segregated duties of personnel in the complaint process.

The BLLC Scranton Regional Supervisor has been designated as the sole decision-making authority – statewide – for determining whether a complaint should be accepted or rejected. This position controls the intake of complaints, and at the same time controls which complaints are logged, filed, investigated, or dismissed.

⁵⁰ Note that section 11(b) of the Act states three months.

⁵¹ *Linde Enterprises., Inc. v. Prevailing Wage Appeals Board*, 676 A.2d 310 (Pa. Commw. 1996).

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If left unchecked, this lack of segregation of duties presents opportunities for abuse and divorces L&I management from any meaningful role in overseeing the complaints and investigation process. In fact, the audit team noted that the Director of the BLLC and headquarters staff are not directly engaged in the oversight or management of Prevailing Wage complaints and investigations. In addition, there was no log of complaints taken over the telephone and no written procedures for judging the merits of complaints before they are rejected as untimely or incomplete.

Of particular concern to us are complaints from workers that L&I does not maintain the confidentiality of complainants. The allegations of breach of confidentiality have also spawned related allegations of contractor retaliation against employees who make prevailing wage complaints. Effective segregation of duties would allow complaints to be adequately investigated, especially serious complaints such as contractor retaliation.

Management control systems are unreliable due to inconsistent methods for tracking and documenting complaints.

The purpose of the L & I computer tracking system is to track complaint and investigation activity. Unfortunately, we discovered that the computer tracking system is riddled with inconsistencies and inaccuracies that lead to unpredictable results.

Our auditors made four separate attempts to determine the total number of complaints and investigations that occurred during the audit period. However, the L & I tracking system was unable to provide even this most basic information.

These inconsistencies lead to inaccurate and unreliable reports generated by the computer tracking system, making it difficult to interpret the information contained in reports. This condition also increases the workload for L&I staff and management who must rely on the system to control operations.

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L&I claimed to have collected and paid \$970,000 to workers, which could not be substantiated because records were either missing or destroyed.

During the 1999 and 2000 calendar years, L&I claimed to have collected more than \$1.5 million in back wages for workers who filed Prevailing Wage Complaints. While wages totaling \$530,000 were properly distributed to workers by the L&I Comptroller, approximately \$970,000 in collections for back wages owed workers could not be substantiated because case file documentation was missing or destroyed.⁵²

The majority of the alleged \$970,000 in collections occurred as a result of field adjustments completed by regional field investigators. The regional offices claimed that the contractors made payments directly to the workers who filed the complaints and such payments were not processed through the L&I Comptroller's Office.

We could not verify that the \$970,000 in collections and payments properly occurred on a case-by-case basis. L&I was also unable to provide a report detailing the names of workers who were paid or were entitled to be paid with the collected funds.

L&I held over \$250,000 in back wage payments for months instead of paying them to workers.

Our comparison of financial reports prepared by the Comptrollers Office revealed that L&I collected \$258,612 in back wage payments from at least nine contractors that have not been distributed to workers. These collections occurred during the period of April 1996 through May 2001, and the funds have earned over \$15,000 in interest over this period.

Audit test work also disclosed six other recording exceptions totaling \$22,865. In four instances, contractor collections were

⁵² See Chapter 1, Conclusion 3 for additional information regarding L&I's failure to maintain Prevailing Wage Act documentation.

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listed on the Comptroller's Office collection report but not on the L&I collection report. In two other instances, contractor payments listed on the L&I collection report did not agree with the amount listed on the Comptroller's report.

These exceptions were caused by a general lack of written policies and procedures governing the distribution of wage collections. This has resulted in inaccurate reporting of collected contractor payments and delays in the distribution of back wages to workers.

L&I is responsible for keeping an accurate record of contractor payment transactions to ensure that wage collection and distribution errors do not occur. Unfortunately, BLLC staff failed to maintain adequate documentation to support the collection and distribution of approximately \$970,000 in worker wages.

A \$10,000 payment of back wages from a contractor collected by the Attorney General was mistakenly treated as a fine owed to L&I and deposited in the General Fund.

In February 2001, the Pennsylvania Attorney General's office collected and transmitted a \$10,000 payment from a debarred contractor to the Commonwealth's Treasury for deposit. The L&I account credited with the payment was created to hold miscellaneous fines.

The L&I Comptroller's office was not aware that the payment pertained to the Prevailing Wage collection. According to staff from the Comptroller's office, there are no specific procedures regarding contractor's payments that are collected through the Office of Attorney General to pay workers. The Comptroller indicated that L&I should have brought this matter to their attention when the file was referred to the Attorney General for follow-up collection activities.

At the end of the fiscal year (June 30, 2001), all funds remaining in the miscellaneous fines account reverted to the

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Commonwealth's General Fund. Consequently, there were no funds available to pay back wages to those workers.

The Bureau of Labor Law Compliance (BLLC) within the Department of Labor and Industry is responsible for the investigation, collection, and eventual distribution of contractor payments resulting from Prevailing Wage Act violations. To fulfill its obligations, BLLC must maintain records supporting all facets of the Prevailing Wage complaint, collection, and distribution process.

As noted throughout this report, L&I management has failed to adequately direct and control the intake, assessment, and tracking of complaints, making it difficult, if not impossible, to determine the status of individual cases. Equally disturbing is the fact that L&I could not document that approximately \$970,000 in back wages that the Department claims to have collected for workers filing Prevailing Wage complaints was ever distributed.

In short, L&I could not consistently document wage collections or provide information supporting the number of Prevailing Wage complaints received and investigations launched over the audit period.

Recommendations

L&I's lack of written policies and procedures governing the contractor collection process contributed to program shortcomings.

Therefore, Department of Labor and Industry management should:

- Establish statewide written policies and procedures for the receipt, review, and disposition of complaints. Include procedures for complaint intake; telephone logs; third party complaints; and untimely complaints, consistent with the provisions of the *Linde* case.

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- Develop contractor collection procedures that will ensure accountability over the contractor payments and the subsequent distribution of payments to workers. The procedures should address documentation of wage collections as well as the timely distribution of collected funds.
- Develop a policy requiring that contractors pay back wages to L&I, which in turn makes payment to the worker. This will provide accountability over collections and subsequent distribution of payments to workers. This procedure would also maintain some level of confidentiality between the workers involved and their employer. However, the procedure requires careful coordination between the contractor, the worker, and L&I to ensure that fringe benefit payments to qualified plans occur and that withholdings for taxes and other purposes are accounted for.

In addition to improving the Prevailing Wage complaint and collections process through the development of written policies and procedures, L&I needs to provide additional program improvements by:

- Ensuring that management provides sufficient oversight so that all regions consistently follow procedures for receipt, review, documentation, and disposition of complaints;
- Maintaining documentation of all Prevailing Wage collection and payment transactions;
- Segregating the current duties of the Scranton regional supervisor relative to complaint intake, and assign these duties to appropriate headquarters and regional personnel; and
- Researching all undistributed collections to assure that the affected workers receive the Prevailing Wage Act payments to which they are entitled.

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L&I Response

In response to both the content and tone of this draft audit report, the bureau points out its increased collections as demonstrative of its commitment to the enforcement of Pennsylvania's Prevailing Wage Act and the protection of workers' wages. Between 1995 and 2001, the Bureau of Labor Law Compliance reports wage collections of \$5,955,894.67 for Pennsylvania workers under the Prevailing Wage Act ("ACT"). In contrast, under previous management, between 1991 and 1994 only \$629,483.77 was collected.

**PREVAILING WAGE
STATISTICS SUMMARY**

Updated 11/19/01

Year	Collected
1991	\$ 82,642.75
1992	\$ 113,013.98
1993	\$ 257,714.54
1994	\$ 176,112.50
Total	\$ 629,483.77
Year	Collected
1995	\$ 176,844.44
1996	\$ 1,886,776.51
1997	\$ 388,924.70
1998	\$ 364,567.01
1999	\$ 458,062.02
2000	\$ 1,270,386.69
2001	\$ 1,410,333.30
Total	\$ 5,955,894.67

"Conclusion 1" of this report is completely wrong. Bureau management is extremely involved in the process of collecting wages under the Prevailing Wage Act. During the past six and a half years, management has helped develop and implement new methods of collections that have resulted in unprecedented levels of collections on the behalf of Pennsylvania workers.

The audit report also incorrectly states the function of the supervisor in determining whether a claim is valid and will be

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investigated. In reality, the supervisor merely reviews the complaints for accuracy, completeness and timeliness according to the Prevailing Wage Act and established Bureau policy. The supervisor also may review claims with the director if claim viability requires further discussion.

The Act requires workers to file protests within three months. By automatically excusing untimely protests, the bureau could be diverting resources from investigating claims from those workers who comply with the statute. Older claims also may be more difficult to investigate.

The bureau has discretion, of course, to investigate any contractor, whether an untimely complaint or no complaint is received. Therefore, the bureau may use its discretion to investigate a contractor as the result of an untimely claim on an individual case basis. Indeed, investigations may be started based on project inspections or third party complaints. The bureau, however, is hesitant to adopt formal procedures for untimely claims. First, those procedures might encourage workers to disregard the Act's three month filing period. Second, contractors actually could use those procedures to challenge the bureau's authority to investigate particular cases.

The bureau is not aware of any instance where breach of confidence occurred. While the bureau cannot guarantee absolute confidentiality (especially if a case goes to hearing), it is very concerned about unnecessary disclosure of complainant identities. Consequently, the bureau will remind its investigators not to disclose the identities of complaining workers.

The bureau acknowledges the inadequacy of the tracking system currently in use. However, the report fails to mention that this system is a vast improvement over the hand-written record keeping that existed when the bureau was created in 1996. In fact the tracking system has only become inadequate because of the extensive changes that have taken place in the bureau that have resulted in new investigation practices and quicker collection of wages (see collections statistics listed above). Corrective

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measures are already underway, and are being developed in conjunction with the overall process of establishing common communication systems for all employees.

In some instances, the bureau's collections were accomplished by direct payment from contractors to employees, which bureau personnel verified through documentation from the contractor or follow-up inquiries of the workers. Therefore, those collections would not show up in the Comptroller's Office's reports. The absence of back-up documentation at the bureau level for these collections will be addressed under a new records retention schedule.

The draft audit report is wrong in its reference to a \$10,000 payment of back wages from a contractor collected by the Attorney General and deposited in the General Fund. The auditors apparently overlooked the fact that statutory liquidated damages are payable to the Commonwealth. 43 P.S. § 165-11(e). L&I has no authority to order restitution under the Prevailing Wage Act in unintentional cases,⁵³ while the PW Act does not provide for restitution to employees in intentional cases.⁵⁴

To help facilitate payments to employees, the Secretary of Labor and Industry has historically agreed to forgo statutory liquidated damages in intentional cases where the contractor voluntarily agrees to restitution. The bureau prefers to see this money go to the workers who earned it, and without whose testimony a debarment may not have been possible. Nonetheless, collections by the Attorney General -- unless authorized by that office to go directly to the workers -- must go to the Commonwealth's General Fund.⁵⁵

⁵³ *All-Weld, Inc. v. Department of Labor and Industry*, 383 A.2d 982 (Pa. Cmwlth. 1978).

⁵⁴ *Commonwealth v. Dual Temp, Inc.*, Pred. Serial #s 62231(12), 71420(13), 68262(10) (Sec'y of L&I; Oct. 23, 1998), hearing examiner's report at p. 6.

⁵⁵ The courts have recognized that while it may not be the most efficient method of ensuring compliance with the Act, the procedures for imposing penalties are unambiguously set forth in section 11 of the Act. *All-Weld*, supra.

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Department of the Auditor General Comments

Due to the lack of written procedures and case file documentation, it was clear to us that the Department of Labor and Industry (L&I) management was disconnected from the process of collecting wages. Despite numerous requests and opportunities to do so, L&I failed to provide the necessary documentation to corroborate its claims that significant amounts of money had been collected and distributed to workers. In addition, in its response, L&I is silent as to how it intends to begin to document these collections.

L&I's assertion that it "is extremely involved in the process of collecting wages under the Act" simply cannot be supported. This lack of documentation, along with the lack of a complaint tracking system, failure to ensure that complaints are investigated timely, and poor segregation of duties within the complaint process, are all clear indications of L&I's ineffectiveness in enforcing the Prevailing Wage Act.

With respect to the timeliness of filing worker protests, L&I fails to address how the bureau evaluates the merits of a claim. Although we recognize that timeliness is a consideration, we believe that the merits of a claim and the number of workers involved should be of primary concern to L&I. L&I further states that investigations "may be" started based on project inspections and third party complaints. Again, due to the lack of formal procedures and claim documentation, we were unable to obtain support for this statement.

It should be pointed out that the *Linde* decision affords L&I the discretion of investigating contractors whether a complaint is untimely, or even where no complaint has been received at all. Nevertheless, records of the actions taken by the investigators to determine the merit of the claim should be consistent as well as maintained. The audit report also points out that investigators only visited 36 percent of public project sites during the audit period, thus leaving the door open for violations under the Act to go undetected. Therefore, all claims either formally or informally received by L&I should, at a minimum, be properly evaluated.

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L&I asserts that, "In some instances, the bureau collections were accomplished by direct payment from contractors to employees, which bureau personnel verified through documentation from the contractor or follow-up inquiries of the workers." Although L&I disagrees with our conclusion regarding collections, the real problem is that L&I does not know exactly how many collections were accomplished through this process. Further, L&I does not even know how many workers were involved, the amount of back wages owed to workers, or what was actually paid by the contractors. In addition to the lack of documentation supporting the collections, the collections were also performed without formal written procedures, which would promote consistency and propriety in the process. Further, the direct payment to workers does not facilitate an environment of confidentiality between the worker and employer. We reiterate the fact that L&I collected over \$970,000 in this manner.

In reference to the \$10,000 payment of back wages, we acknowledge the Prevailing Wage Act provides that statutory liquidated damages are "for the Commonwealth of Pennsylvania" (43 P.S. § 165-11(e)). We do not contend that penalties must be paid to the workers. Rather, our finding is centered on L&I's complete failure to account for the money collected.

We disagree, however, with L&I's rigid interpretation that the Prevailing Wage Act does not provide for workers to be made whole in intentional cases. L&I overlooks that under Section 165-11(f) of the Prevailing Wage Law, it provides that *in addition* to liquidated damages or penalties being awarded to the Commonwealth, those engaged in an intentional violation shall be liable "for any other breach of the contract in the amount of the underpayment of wages due any workmen engaged in the performance of such contract." Therefore, we believe there is statutory authority for the Attorney General to collect *both* the penalties and the back wages.

We believe L&I's interpretation of the Prevailing Wage Act contravenes both public policy and the intent of the law. It results

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in an absurd remedial scheme whereby in an unintentional case a worker can be made whole, but in an intentional case a contractor is only required as a penalty to reimburse the Commonwealth. To the extent L&I “prefers to see this money go to the workers who earn it,” it should be taking a more proactive role in seeing to it that the Attorney General carries out this authority to collect both liquidated damages and back wages.⁵⁶

In any event, L&I's legal argument is inconsistent with its own practice. Indeed, we are aware of at least one intentional case wherein the moneys collected by the Attorney General were furnished to L&I and remitted to the workers.

Moreover, we recommend that the penalties collected by the Attorney General be specifically earmarked to be used by L&I to enforce the Prevailing Wage Act, rather than have them revert to the Commonwealth's General Fund.

We are pleased that L&I intends to make improvements to its existing tracking system. L&I's assertions about any system that existed before 1996 are totally irrelevant, as our audit focused on the poor tracking system which exists today.

Finally, we acknowledge and appreciate Labor and Industry's commitment to ensure that the names of individuals filing prevailing wage protests are maintained in a discrete way to avoid incidents of retaliation.

However, during the course of our audit work there was some evidence that workers were “chilled” from filing protests out of fear of reprisal or retaliation by their contractor. Additionally, as set forth later in Conclusion 3, workers claimed they were fired or laid off, or knew of others who were, for having filed a complaint. As a matter of public policy, we do not believe workers should be forced to choose between exercising their statutory right to seek compensation for unpaid wages under the Prevailing Wage Act

⁵⁶ Nothing in the All -Weld, Inc. case cited by Labor and Industry restricts L&I from requesting the Attorney General to collect back wages in addition to penalties as set forth in Section 165-11(f).

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and foregoing these legal rights in an effort to maintain their livelihood. The Pennsylvania Minimum Wage Act provides for criminal fines and imprisonment for employers who discriminate against individuals who exercise rights under the minimum wage law. There is no similar language under the Prevailing Wage Act. We recommend that the General Assembly take action to amend the Prevailing Wage Act to provide anti-retaliation provisions similar to those found under the Pennsylvania Minimum Wage Act.⁵⁷

⁵⁷ 43 P.S. § 333.112(a). Anti-retaliation language is also found in other Pennsylvania employment-related statutes. See Pennsylvania Human Relations Act, 43 P.S. § 955; Pennsylvania Equal Pay Act, 43 P.S. § 336.8; Pennsylvania Labor Relations Act, 43 P.S. § 211.6(1)(d); Public Employees Relations Act, 45 P.S. § 1101.1201(a)(4); Pennsylvania Whistleblower Law, 43 P.S. § 1421.

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Conclusion 2: The Department of Labor and Industry instituted a program of informal "field adjustments" that has resulted in prevailing wage settlements without the input or testimony of the workers who filed the complaint.

During the 1999 and 2000 calendar years, L&I activity reports reflect a significant increase in an informal settlement process referred to as "field adjustments." The process of field adjustments significantly increased in calendar year 2000, going from just 16 in 1999 to 140, as illustrated in the following chart.

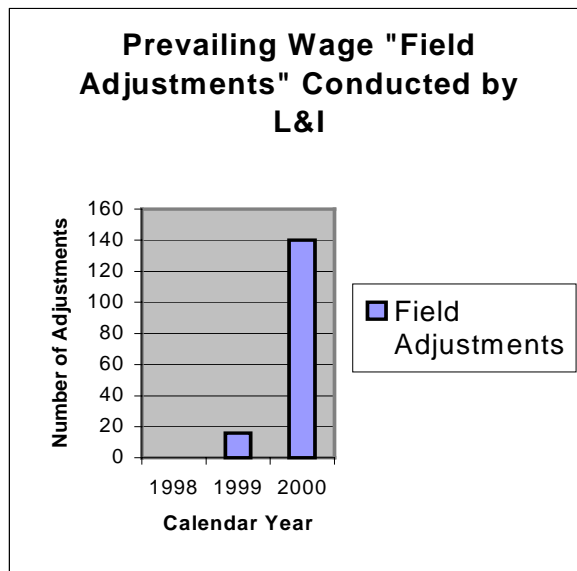


Figure 2. Field Adjustments Conducted by L&I

During this period, L&I records reflect that \$1.04 million was allegedly collected from contractors by regional investigators to pay more than 590 workers their back wages.

Unfortunately, all of these adjustments occurred without benefit of a fact-finding hearing for contractors and workers, in violation of the Act. In addition, there were no written policies and procedures governing the process. This condition resulted in workers receiving settlements of their

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prevailing wage claims without the opportunity of providing testimonial or documentary evidence supporting their complaint.

In addition, L&I could not consistently provide records substantiating that workers ever received notice of the results of a field adjustment, much less received a check. Indeed, complainants that responded to audit inquiries provided information to the contrary.

In one case, a complainant volunteered that L&I approved a settlement agreement without any input from the eight complainants. The settlement agreement resulted in the payment of fractions on the dollar, yielding one worker only \$2,000 for a \$10,000 claim. To compound our concern, L&I was unable to locate this case file, and had no evidence to determine whether or not the eight complainants should or should not have been paid the full amount of their claims.

L&I's completion of these informal field adjustments disregards provisions of the Prevailing Wage Act, specifically Section 11(c), which provides:

Whenever a fiscal or financial officer of any public body shall notify the Secretary that any person or firm required to pay its workmen the prevailing wage under this act has failed so to do, or whenever any workman employed upon public work shall have filed a timely protest objecting that he has been paid the prevailing wage as required by this act, it shall be the duty of and the Secretary shall forthwith investigate the matter and determine whether or not there has been a failure to pay the prevailing wages and whether such failure was intentional or otherwise. **In any such investigation the Secretary shall provide for an appropriate hearing upon due notice to interested parties including the workmen, the employer and their respective representative if any** [Emphasis added];

Additionally, in 1999 the Commonwealth Court issued a decision in *L&I v. Ganc*⁵⁸ that provided the following guidance:

⁵⁸ *Department of Labor and Industry v. Ganc*, 729 A.2d 671 (Pa. Commw. 1999)

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The language of the Act is not ambiguous. Section 11(c) is but one part of a procedure detailing how the Department is to address protest and violations under the Act. Section 11(c) calls for an investigation and hearing. Both Section 11(d) and Section 11(e) state, “In the event that the secretary shall determine, **after notice and hearing as required by this section....**” [Emphasis added]. The use of the word “required” in conjunction with “hearing” in each of these subsections leaves little doubt that the Legislature did not intend hearings to be merely optional.

L&I's completion of informal field adjustments without affording due process to workers and contractors ignores the clear language set forth in the Prevailing Wage Act and the 1999 Commonwealth Court decision, and is merely a pretense for denying workers' due process. The Court emphasized throughout its opinion that the hearing provided for by the Act is required.

Recommendations

- L&I should comply with the provisions of the Act and the *Ganc* decision and provide a hearing for all parties involved in a wage protest. In addition, L&I should develop written policies and procedures that address every aspect of the contractor settlement process.

L&I Response

Contrary to the recommendation in “Conclusion 2,” the *Ganc*⁵⁹ decision only applies to timely, written worker protests. The bureau will redouble its efforts to ensure that such workers are provided with notice and an opportunity for a hearing where the investigation does not fully substantiate, their protests. The workers, however, must avail themselves of this opportunity and support their respective claims at these hearings.

⁵⁹ *Department of Labor and Industry v. Ganc*, 729 A.2d 668 (Pa. Cmwlth. 1999).

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Department of the Auditor General Comments

We clearly disagree with L&I's interpretation of the *L&I v Ganc* decision, which requires an investigation and hearing for all parties involved in a wage protest. Nevertheless, the fact of the matter is that we found that more than 590 workers did not have the benefit of a fact-finding hearing for potential violations of the Act. In light of L&I's failure to maintain any meaningful records regarding these complaints, it is disingenuous to claim that hearings were not required in any of these 590 cases due to alleged untimeliness. We believe that these workers are entitled to the due process that the law allows. We are pleased to note that L&I will attempt to improve their efforts in this area.

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Conclusion 3: Complaint case records were prematurely discarded or destroyed in violation of Department of Labor and Industry record retention policies.

L&I investigators engage in the routine practice of discarding or destroying records shortly following the closure of complaint cases, in violation of L&I document retention requirements. The widespread systematic nature of this practice indicates that it was implicitly, if not explicitly, condoned by senior management responsible for administering the Prevailing Wage Program. Consequently, audit efforts to verify that complaints were thoroughly and promptly investigated could not be completed.

Interviews conducted with regional staff indicate that there was no consistent policy or procedure governing records management. For instance, the Scranton regional supervisor indicated in an interview that closed complaint, investigation, and settlement files are disposed of at his discretion. The Philadelphia regional supervisor said in an interview that he retains closed case files for three to six months. The Pittsburgh regional supervisor indicated that he retains closed case files for three months. Then, in a subsequent interview, regional supervisors and investigators inexplicably contradicted prior statements. A Philadelphia investigator stated that complaint and investigation files are maintained at his home for six months after a decision is rendered. The Scranton regional supervisor stated that settlement case files are discarded two to four weeks after a settlement.

Labor and Industry's latest records retention and disposition schedule, obtained from the State Records Center, states that complaint and investigation records should be retained for a total of 15 years.⁶⁰ Despite the existence of these L&I records retention policies for prevailing wage records, L&I investigative field staff discarded these records well before the retention period had expired, in most cases in less than a year.

The problems with records retention were so pervasive that L&I could not provide sufficient documentation to support a small sample of cases generated for this audit. We selected a sample of 85 complaint cases to

⁶⁰ Historical and Museum Commission, *Records Retention and Disposition Schedule*, Department of Labor and Industry, Schedule Item Number 217 and 220.

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determine if complaints were properly investigated. L&I could only produce 20 of the files supporting these cases and, upon further examination, we found significant omissions in the file contents.⁶¹ For example:

- Investigator notes could not be located in 18 of 20 case files;
- Project wage rate determinations were missing in 10 of 20 case files;
- Certified payroll reports were not present in 11 of 20 files; and,
- Case summaries were missing in 12 of 20 case files;

The extent of missing records and information prevented our auditors from thoroughly evaluating the effectiveness of the complaint investigation process. In addition, it prevented us from corroborating or refuting testimonial evidence presented by complainants regarding the complaint and investigation process.

For example, testimonial evidence from building and construction worker complainants, coupled with L&I's systematic practice of destroying and discarding complaint investigation files, raises serious issues regarding whether or not complaints have been adequately resolved.

A significant percentage of complainants that we interviewed alleged serious wrongdoing by contractors and by L&I. Specifically, workers claimed they were fired or laid off, or knew of others who were fired or laid off for having filed a complaint.

Complainants further alleged that L&I officials disclosed the identity of workers filing complaints to contractors, which immediately led to worker discharges or layoffs. Other complainants claimed that investigators "tipped off" contractors before they visited construction sites.

⁶¹ See Appendix B for a complete inventory of case file contents from the 20 case files provided.

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The Department's failure to maintain any case files and to require investigators to maintain an investigative file rendered it impossible for L&I to refute these allegations.

The Governor's Office has provided explicit direction to agencies within its jurisdiction on the importance of maintaining adequate records.⁶² The State Records Management Manual states:

Records, and the information they contain, are the lifeblood of government activity and one of the keys to making government more responsive and efficient. Records management is a critical element in satisfying increasing public demands for responsiveness, accountability, effectiveness, and efficiency from state government.⁶³

L&I clearly ignored the intent and requirements of these directives. This significant failure in management control and oversight made it impossible to track the investigation process from receipt to resolution of the complaint.

It is readily apparent that L&I management effectively undermined the operation and integrity of the prevailing wage program by cultivating an environment where records that would have provided accountability for L&I's actions in investigating and resolving complaints in the field were continuously and systematically destroyed.

Recommendations

Department of Labor and Industry management should:

- Require a suspension of records destruction by BLLC until L&I can ensure that BLLC personnel at headquarters and in the field understand current records retention schedules, policies, and

⁶² Office of Administration, *Management Directive 210.5 Amended, Records Management*, June 1, 1999.

⁶³ Commonwealth of Pennsylvania, Governor's Office, *State Records Management Manual, M210.7 Amended*, December 7, 1999.

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procedures and that appropriate safeguards are in place to manage records accordingly.

- Implement a uniform records management policy consistent with management directives.
- Establish statewide documentation standards for complaint and investigation files, including standards for cases file contents.

L&I Response

The bureau agrees to the need for a uniform record retention schedule. However, the prevailing wage record schedule on file with the Department's Bureau of Administrative Services pre-dates the establishment of the Bureau of Labor Law Compliance. Furthermore, that schedule does not take into account the fact that many records now are kept electronically. Therefore, the bureau will request revisions to its retention schedules consistent with present needs and capacities.

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The problem of records retention is one that exists throughout this report and is one where L&I has severe weaknesses and deficiencies. We are pleased that L&I will be working towards making improvements.

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Conclusion 4: The Department of Labor and Industry did not track violations of the Prevailing Wage Act, making it difficult to identify and classify intentional violations in order to apply appropriate sanctions provided by the Act.

L&I investigators do not regularly implement debarment proceedings against contractors that violate the provisions of the Prevailing Wage Act. Therefore, contractors can repeatedly violate the Act, including continuing to pay workers less than the prevailing wages to which they are entitled. This weakness occurs because L&I has failed to establish a system of monitoring contractors that habitually violate the provisions of the Prevailing Wage Act.

The Prevailing Wage Act provides that intentional violations can lead to the debarment of the involved contractors. A review of the applicable case law in this area disclosed at least 12 court cases that provide clear guidance regarding criteria for classifying intentional violations.

Audit testing and staff interviews, however, disclosed that L&I investigators do not regularly pursue contractor debarments. Additionally, L&I did not have written policies and procedures for determining whether violations of the Prevailing Wage Act were intentional and failed to emphasize the importance of debarring contractors that habitually violated the provisions of the Prevailing Wage Act.

Consequently, L&I debarred just 14 contractors during the two calendar years of 1999 and 2000 out of a total of 210 contractors cited for violating the Act. Out of the two fiscal years that we examined, L&I debarred just 15 contractors. During the same period, there were 11,757 prevailing wage projects filed with L&I.

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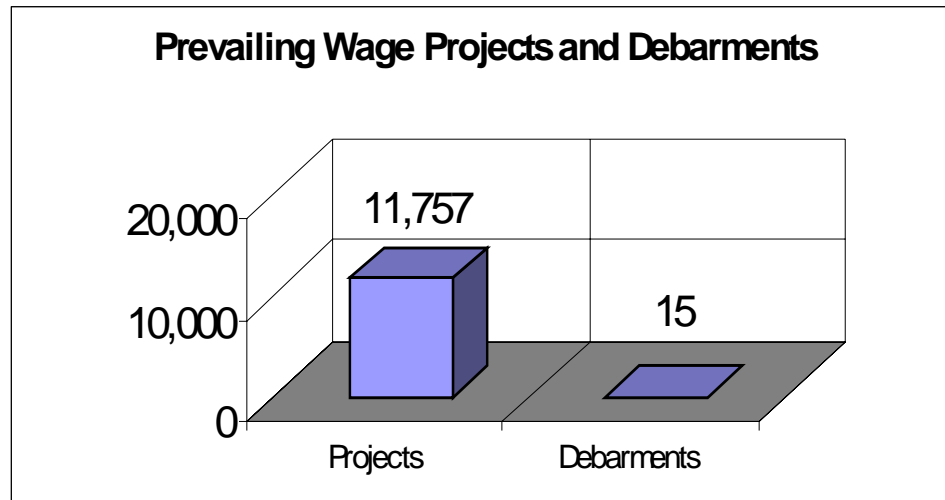


Figure 3 Fiscal Years ending 1999 and 2000 - Projects to Debarments

L&I also failed to document and maintain records to substantiate two contractor debarments. As of June 30, 2001, the two contractors were still listed as debarred on L&I's Prevailing Wage website, but there are no records supporting the reasons for the debarment.

Contractors who repetitively violate the Prevailing Wage Act certainly fall within the category of intentional violators; however, L&I does not track important factors about contractor violations that would be useful in determining intent, as demonstrated by the following examples:

- Prior violations committed by contractors are not considered when determining intent. A contractor may have been cited two or three times over a five-year period for violating the Act, but according to regional office staff, the previous infractions are not counted when determining intent for a current violation. Only when a contractor refuses to cooperate or agree to a settlement offer is the violation classified as intentional.
- L&I does not track the number of workers involved in a complaint, the type of violation committed (i.e., fringe benefits improperly paid,

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classification issues, and wage issues) and the impact the violation had on the workers.

L&I's failure to pursue debarment actions can contribute to an unhealthy pattern of conduct by some contractors. By not fully enforcing provisions of the Act, contractors might conclude that if an investigator does visit the work site, and violations are uncovered, then L&I will simply require an adjustment to make workers whole without the threat of additional fines and penalties.

There are excessive time delays within BLLC and L&I's Chief Counsel's office in debarring contractors.

A review of contractor debarments that occurred during the period July 1, 1998, to July 30, 2000, indicated that the average time from the start date of the investigation to the issuance of the debarment order is 3.6 years. The longest was 7.5 years (2 cases) and the shortest was 9 months (2 cases).

We recognize that the process of litigating a case may involve numerous time delays attributable to both sides. However, 7.5 or even 3.6 years from the date violations were cited to the date L&I issued the final determination ordering the debarment appears excessive.

Since contractors are permitted to participate in prevailing wage projects while litigation is ongoing, it is in the best interest of the Commonwealth to process the case in as expeditious a manner as possible.

L&I failed to comply with Management Directives governing the Contractor Responsibility Program.

Fifteen debarred contractors are not listed on the Commonwealth Contractor Responsibility File in violation of the provisions of Management Directive 215.9.

Management Directive 215.9 was issued to comply with Commonwealth Procurement laws and requires that L&I immediately notify the Contractor Responsibility Program office at the Department of General Services (DGS) when a contractor is debarred. The officials at DGS

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must then immediately authorize the placement of the contractor into the Contractor Responsibility File.

L&I's own debarment listing, which can be viewed on their Internet website, contained 15 debarred contractors that were not listed on the Contractor Responsibility File.⁶⁴ Eight of the fifteen contractors had been debarred before January 1, 2001, with the oldest debarment dating back to August of 1999.⁶⁵

This omission is a direct violation of the provisions of Management Directive 215.9. In addition, contractors who have been found to have intentionally violated the Prevailing Wage Act are not prevented from continuing to participate in other Commonwealth contracts unrelated to prevailing wage projects.

Recommendations

Department of Labor and Industry management should:

- Develop written policies and procedures for classifying and maintaining records of violations of the Prevailing Wage Act. The classification system should include the following information: the date, time, place, and nature of the violation; the name of the contractor(s) and worker(s) involved; an indication of whether the violation was intentional or unintentional; and the type of violation committed (i.e., violation of fringe benefits; wage payments; worker(s) misclassified, etc.)
- Develop a mechanism to historically track contractor violations of the Prevailing Wage Act.
- Develop a standard protocol that would conclude debarment proceedings in a more timely manner.

⁶⁴ A database containing contractors who are debarred or suspended from doing business with the Commonwealth. The file is open to public view through the Department of General Services website.

⁶⁵ Subsequent to conversations with DGS officials, the DGS website was updated in late July 2001 to reflect all but one debarment on the Contractor Responsibility File.

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- Update the Department of General Services Contractor Responsibility program whenever a contractor is debarred, in compliance with Management Directives.

L&I Response

Contrary to the implications in the audit report, the bureau director and coordinator for Prevailing Wage review collection reports, which may help identify repeat offenders. Additionally, the bureau will explore creating an electronic file of prior violators to assist investigators. However, experience has shown that a prior violation is not necessarily determinative of an intentional violation.

In response to accusations regarding a lax approach to debarring contractors, the audit report ignored the following points:

- Since 1995, a total of 66 contractors were debarred;
- An annual comparison of debarments shows that the number of debarments is consistent with prior years (see chart below);

Year	Number of Debarments
1991	5
1992	11
1993	9
1994	11
Total	36
1995	9
1996	13
1997	7
1998	15
1999	6
2000	8
2001	8
Total	66

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- In 1999, the bureau took the unprecedented step of publishing the debarment list on the Internet so that it would be immediately available to awarding authorities, contractor groups, employee groups, and the public; and
- The bureau now routinely keeps the Department of General Services contractor responsibility list up to date with prevailing wage debarments.

With regard to the length of time debarment cases require, the audit report focuses on two cases that represent extreme examples rather than the norm. In one case cited, the contractor obtained federal court injunctions, thereby substantially delaying the administrative proceeding. These injunctions were appealed to the Third Circuit Court of Appeals. That court waited until the U.S. Supreme Court decided the identical issue in a California case before reversing the district court.⁶⁶ In the second case, criminal charges were filed against the contractor; the bureau's administrative action was held until the criminal charges were resolved.

Hearing protocols were issued on October 13, 1999, to expedite the debarment process. Significantly, the new protocols eliminate the extra steps of a hearing examiner's reports, exceptions and briefing on exceptions. Additionally, guidelines for the hearing examiner to use in scheduling cases were announced at the same time. While delays are inevitable in any type of litigation, the new protocols have reduced delays. Contested cases brought subsequent to October 13, 1999, generally have proceeded through the pleading stage to hearing and decision in under a year.

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In this conclusion, there is no "implication" at all. We clearly and emphatically stated that L&I does not have a tracking system to identify and classify those contractors that intentionally violate the Prevailing Wage Act. In addition, L&I states in its response that 66 contractors have been debarred. It should be noted that 52 of those debarments

⁶⁶ See *Ferguson Electric, Inc. v. Foley*, 115 F.3d 237 (3d Cir. 1997).

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occurred outside the time frame of our audit, and 14 occurred during our audit period. Moreover, L&I's response completely disregards the primary point of our conclusion, which is that they do not track repeat violators – regardless of how many contractors are debarred.

Our conclusion was based on a review of interviews with bureau field staff and an examination of all related documentation provided by L&I. Based on this review, we found no evidence supporting the review of collection reports by the director or communications to regional staff regarding repeat violators. Further, the position of "Coordinator for Prevailing Wage" was not listed on the bureau's organizational chart provided to auditors by L&I, and the audit team could not substantiate whether the position even existed during the time of audit field work.

With respect to the length of time that it takes to debar contractors, we clearly indicate that the average time is 3.6 years. We restate the scope of our review in this area to be the 1999 and 2000 calendar years. A review or comparison of contractor debarments made prior to or after the period were not part of the audit.

L&I's response fails to address the core issue addressed in the conclusion, which is that it lacks written policy and procedures for classifying and maintaining records of violations and violators under the Prevailing Wage Act. L&I simply failed to develop guidelines or criteria for investigators to use in their determination of intentional violations. While we did not observe any improvements subsequent to October 1999, we hope that the new hearing protocols will improve the timeliness of the debarment process.

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Chapter Two – Contract Monitoring

This Chapter examines L&I's effectiveness in monitoring compliance with the Act. Our conclusions and recommendations address ineffective and inefficient procedures employed during site visits, the absence of written policies and procedures, and inadequate enforcement of the Act.

In our introduction to this report, we established that L&I has the plenary power to enforce compliance with the Prevailing Wage Act. The Department possesses statutory authority to conduct self-initiated, spontaneous inspections of wage records, as well as to make project site visits to monitor compliance.⁶⁷

A review of the limited documents available, as well as interviews with L&I officials and project site visit records, disclosed that L&I is grossly ineffective in monitoring contractors and local public bodies to ensure compliance with the Prevailing Wage Act. As a result, L&I was unable to adequately ensure that workers are being paid the hourly rates which they are entitled to under the Prevailing Wage Act.

Objectives and Methodology

Our overall objective for this Chapter was to determine if L&I effectively monitors compliance with the provisions of the Prevailing Wage Act. In order to complete this objective, we:

- Reviewed the Prevailing Wage Act and its Regulations, as well as various other documents pertaining to the Prevailing Wage Program enforced by the Bureau of Labor Law Compliance (BLLC);
- Interviewed appropriate staff regarding the program's operating processes and procedures;

⁶⁷ *A.R. Scalise Co. v. Commonwealth of Pennsylvania Prevailing Wage Appeals Board, Department of Labor and Industry*, 393 A.2d 1306 (38 Pa. Commw. 549, 1978).

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- Reviewed a sample of 81 available worker interview sheets⁶⁸ completed by 27 different investigators from April, May, and June of 2000;
- Traced a sample of complaint investigations recorded on investigator monthly reports to the computer tracking reports for complaints;
- Completed site visits at four state-owned universities, one state-aided university, and four school districts, where contractors were reported to be working on prevailing wage projects.

⁶⁸ The original sample size was 138. However, L&I could only provide 81 for our review.

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Conclusion 1: The Department of Labor and Industry does not effectively monitor compliance with the Prevailing Wage Act.

The results of audit testing disclosed that L&I failed to monitor local public bodies such as school districts, municipal authorities, and townships to determine if these agencies were properly supervising contractors to ensure compliance with the Prevailing Wage Act. Regulations require that:

The fiscal officer of the public body, or the treasurer, or other officer of the public body, charged with the custody and disbursement of funds of the public body, must ascertain that the wage rates as determined by the Secretary are paid and that the job classifications are maintained.⁶⁹

Both the Act and the Regulations require public bodies to verify the completeness and accuracy of certified payrolls before releasing final payment.

The failure of L&I to require public bodies to properly supervise contractors resulted in L&I assuming the bulk of the responsibility for contractor compliance monitoring. Test work and observation of L&I's efforts to monitor contractors subject to the provisions of the Prevailing Wage Act indicated that the Bureau was not very effective in its attempts to ensure compliance. The following program weaknesses were noted:

L&I's investigators completed an inadequate number of site visits.

In May of 1998, the Director of the BLLC issued a memorandum to his staff indicating that throughout the history of the prevailing wage program, most violations were uncovered through job site inspections. He went on to say that it is critical that the prevailing wage projects be inspected at least once.

A review of 259 monthly reports from July 1999 to June 2000 found that investigators performed only 2,200 site visits – just 36 percent of the 6,149 projects filed during this same period – and well short of site-visit

⁶⁹ 34 Pa Code § 9.104(b).

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goals established by L&I management. The completion of project site visits is necessary to ensure that workers are not being paid less than the prevailing wage and that contractors comply with other provisions of the Act.

When site visits were completed, monitoring techniques used by L&I investigators were inadequate.

Our review of L&I site visit procedures disclosed that investigators did not routinely review certified payroll reports. A review of a sample of 60 entries on 30 certified payroll reports disclosed that information required by the Prevailing Wage Act was missing on 22 of these reports.

A listing of contractors at project sites was not regularly obtained to determine if there were debarred contractors working on the contract. Representatives of local public bodies and project managers that we interviewed indicated that investigators did not request or compare a listing of on-site contractors to the latest debarment list. This review is needed to ensure that contractors who were previously debarred for violating the PWA were not permitted to continue to work on prevailing wage projects.

Investigators also failed to ensure that prevailing wage rates and worker disclosure information was posted on the job site. Our review of a sample of 81 interview sheets completed by investigators disclosed that prevailing wage rates were not posted on the project site during 20 of these visits. However, there was no indication that the investigators informed the contractors to take corrective action, or that investigators filed a complaint. In addition, there was no worker disclosure information posted at any of the nine project sites we visited. The Act requires that this information be posted on the job site. The posted information is required to inform workers of current prevailing wage rates, that they have a right to file a complaint, where to file the complaint, and where to call for prevailing wage information.

Finally, investigators routinely failed to review hours worked to ensure those employees working in more than one craft or job were paid the proper wage rate. Regulations require that contractors who assign workers to perform work in more than one craft or job must document the

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number of hours each day that the workers split time between crafts or jobs.⁷⁰ This review is important to ensure that workers are paid correctly. Testimonial evidence from complainants indicated that contractors were circumventing the system by not properly classifying the work they performed.

For instance, one complainant was an electrician who claimed that he should have been paid the electrician prevailing wage rate for all 40 hours worked that week. Instead, the contractor attributes only 30 hours of work to the electrician's rate and the other 10 hours to the laborer rate, although electrical work was done for all 40 hours.

These deficiencies occurred because of a number of significant failures in management control and oversight. Contributing to these significant failures are the lack of formal written policies and procedures, poor supervision, inadequate training of local public agencies, poor coordination of work schedules, and an inadequate site visit tracking system.

In addition, we question whether the reorganization in 1996 eliminating the Prevailing Wage Division may have diluted the effectiveness of investigations when it assigned to investigators additional areas of responsibility outside of the Prevailing Wage Act.⁷¹

Written policies and procedures documenting the day-to-day operations of field investigators was not maintained.

During the course of the audit, we noted that L&I maintained little or no written policies or procedures outlining the duties of Field Investigators.

For example, we requested a sample of 138 interview sheets prepared by investigators during site visits in April, May, and June of 2000. L&I was able to provide only 81 of the interview sheets requested. Twenty-four of the 81 interview sheets we reviewed for the period did not indicate that investigators had documented whether or not the prevailing wage rates were posted at the project sites. Twelve of the 24 interview sheets also

⁷⁰ 34 PA Code 9.109(2).

⁷¹ See page 19 regarding reorganization.

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did not have a "wages posted" caption imprinted on the sheet. Regulations stipulate that the rates must be posted.⁷²

In addition, the interview sheets do not reflect what activities investigators performed during site visits, such as reviewing certified payroll reports, verifying the authenticity of credits taken by contractors for fringe benefits, and other compliance items.

Supervision of field investigators was not adequate.

The audit disclosed that L&I's regional supervisors did not routinely review investigator monthly reports to ensure that they were on-track to meet Bureau goals. Consequently, field investigators who failed to meet Bureau goals or failed to complete monitoring reviews were not identified in order to improve work performance.

Education of local public agencies was not adequate.

Prevailing Wage Investigators performed an inadequate number of educational visits (less than 1 percent of all projects). According to the position description for a Labor Law Investigator, one of the duties is to "educate contractors, organizations, and public officials of the requirements of the Prevailing Wage Act and other laws" Representatives of six of the eight local public agencies visited indicated that prevailing wage training would be very beneficial in their efforts to monitor contractor compliance.

Our review of investigator monthly reports for July 1999 through June 2000 indicated that investigators made 56 educational visits. This represents less than 1 percent of the 6,149 prevailing wage projects filed during the same period. Investigators in Philadelphia and Scranton made 44, or nearly 80 percent, of all the visits.

L&I has also stopped providing helpful educational materials to public bodies and contractors, according to testimonial evidence from public body representatives. In the past, L&I provided an informative document for public agencies entitled *Guidelines for Awarding Agencies Under the*

⁷² 34 Pa Code § 9.103(g).

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Pennsylvania Prevailing Wage Act. However, L&I staff informed us that they had discontinued sending these guidelines to public bodies in 1997.

Investigators spent unnecessary time and expense attempting to complete site visits because of a lack of coordination of project work schedules.

We noted 162 instances between July 1999 and June 2000 when investigators drove to a project site, often at great distances, and discovered upon arrival that the project had been completed, had not started, or the project site was vacant.

The Philadelphia and Harrisburg regions accounted for nearly 50 percent of these instances. This has resulted in an inefficient use of investigator time and taxpayers funds. This situation is also a contributing cause for not meeting internal site visit goals.

L&I lacked a system to track project site visits.

L&I management informed the auditors that there is no adequate way to track site visits. The *Request for Prevailing Minimum Wage Determination* sheets located in county field files are used to determine which project sites to visit and, through the use of a tickler file, the estimated start date of each project.

In an attempt to correct this deficiency, L&I management informed the auditors that effective in October 2000, a Prevailing Wage Inspection Log was imprinted on the reverse side of the wage predetermination sheets. The purpose of the inspection log was to record site visits and alert investigators as to which sites have been visited. However, this procedure is deficient, because, while L&I can determine how many times a specific project has been visited, it still does not provide L&I with the ability to track site visits by investigator, region, and statewide.

In addition, there are no policies and procedures regarding the compilation and maintenance of county project files; therefore, the use of the Inspection Log procedure would be difficult to implement because county project files are routinely exchanged between investigators. It is conceivable that the predetermination sheet and corresponding Inspection Log on the reverse side could be inadvertently removed from a county

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project file, which would preclude future visits to that project site by other investigators.

L&I's failure to properly monitor prevailing wage projects makes it difficult for L&I to determine if the mandates of the Prevailing Wage Act are being fulfilled. Since the intent of the Act is to assure that workers receive fair wages, L&I's failure to monitor the program could be detrimental to ensuring that workers receive these wages.

Recommendations

Department of Labor and Industry management should:

- Develop a Field Investigator Manual to ensure that monitoring and supervision of prevailing wage projects is completed consistent with provisions of the Act. This manual should cover the Prevailing Wage Act in detail, describe the practices and procedures used in the project site visit and investigative process, and provide example forms and reports, as well as instructions on how to complete them. The manual should be distributed to all Field Investigators, and L&I Supervisors should enforce compliance with established policies and procedures.
- Develop written procedures for the proper completion of Interview Sheets, including an example of a properly completed sheet. These sheets should be forwarded to supervisors for their review to ensure compliance with written procedures, and to ensure that appropriate action is taken against contractors who fail to post rates as required by the Act. Further, interview sheets should be filed in the county files, along with the wage determination forms used in the site visit documentation process.
- Develop a procedural site-visit checklist to aid in documenting procedures performed by investigators during visits to project sites. The checklist combined with interview sheets would provide sufficient documentation to support the project site visit. The interview sheets and site-visit checklist should be maintained in county files. This information would enable future investigators to follow up on violations and concerns noted on previous visits. A copy of the

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checklist should also be submitted to regional supervisors for review and to support time allocated on the monthly report.

- Supervise investigators to ensure that they perform a sufficient number of site visits, complete site reviews in accordance with guidelines, and properly document the results of their reviews. Increased supervision should also include reviews to ensure field investigators complete the following:
 - Review certified payrolls during site visits to ensure that they are properly completed in accordance with the Act and regulations;
 - Compare the list of project site contractors with the latest debarment list as a safeguard to ensure against ineligible contractors working on prevailing wage projects;
 - Provide the appropriate worker disclosure information to awarding agencies and ensure that this information is routinely posted at the outset of all projects;
 - Report contractors who fail to properly complete certified payrolls, and post prevailing wage rates and worker disclosure information, as required by the Act and regulations; and
 - Ensure that contractors adequately document payments to workers for hours worked in more than one craft or classification.
- Develop, publish, and distribute educational information about the Prevailing Wage Act for public bodies and contractors.⁷³
- Establish the practice of completing educational site visits at the beginning of each major project. Require local public agencies to submit monthly project status reports to enable investigators to better

⁷³ The U.S. Department of Housing and Urban Development prepared a guide that could serve as an example for production of a state guide. It is entitled, "*Making Davis-Bacon Work, A Contractors Guide to Prevailing Wage Requirements for Federally-Assisted Construction Projects.*"

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coordinate site visits and develop a Field Investigator Procedures Manual.

- Develop a technology-based site visit tracking system that records and sorts site visits by project, investigator, region and statewide. Development of this system will allow management to respond more rapidly in its efforts to ensure that there is adequate coverage of prevailing wage project sites and that goals are being met.
- Consider developing a dedicated group of investigators for Prevailing Wage.

L&I Response

The audit report's implication regarding the bureau's effective monitoring of the Prevailing Wage Act does not adequately appreciate the bureau's collection of \$ 5,995,894.67 in worker wages since 1995. Additionally, the bureau's continued willingness to do educational and out-reach programs upon request has not been considered.

Contrary to implications in the audit report, under the Act, the bureau has no statutory enforcement power against public bodies. The Act contains no penalties for public bodies not complying with the Act, nor does it give the bureau authority to formally audit public bodies' compliance with the Act. Nevertheless, the bureau investigates a public body's failure to request prevailing wages. To that end, the bureau has successfully settled at least two cases through direct payments by public bodies or their instrumentalities. Moreover, the bureau is currently engaged in litigation with project owners in two other cases over project coverage questions. The bureau's ultimate enforcement authority where the public body does not request wage rates, however, lies with the contractor, and not with the public body. *See DiLucente Corp. v. Prevailing Wage Appeals Board*, 692 A.2d 295 (Pa. Cmwlth. 1997). Therefore, while the bureau may request, for example, that the public body post the wage rates on a public project or collect certified payrolls, its enforcement resources, by necessity, must be focused on the actual contractors and subcontractors.

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The audit report attempts to cause alarm by citing that investigators visited “only” 36% of the total number of projects issued. However, the report fails to point out the bureau’s emphasis on visiting major construction projects where the highest number of workers could benefit. In this regard, the auditors seem to read too much into the Director’s May 7, 1998 memorandum, when they assume that 100% project visitations to be a realistic goal. Rather, the bureau has clarified that investigators are to concentrate on making site visits for projects over \$100,000. Moreover, 36% of total projects is a substantial amount by any means.

Every public construction project of \$25,000 or more is covered under the Act. This means that even the smallest of construction projects are covered. These projects are known to the bureau only because of the request for wage rates that is made to the bureau. That request includes a brief description of the work, and general time parameters for when the work is to be done. Frequently, small contracts are awarded and a contractor has a short timeframe to complete the work. Bureau investigators attempt to ascertain when the work will be conducted so that a site visit may be made, however, that information may be impossible to pin down on small jobs. A contractor may easily be in one county on a given day and a second or third county a day later. While the bureau will remind its investigators to call the project owner ahead of time to ensure work is on going, experience has shown that the information provided to the bureau is not always accurate.

Contrary to the audit narrative, the bureau has in place a system where the site visits are recorded and passed on to a different investigator each month. This helps to ensure that no single investigator is the only person visiting the larger projects. The system also creates an opportunity for a fresh pair of eyes to view that project. The bureau will explore the possibility of establishing an electronic tracking system.

As noted in the audit report, investigators do not review the certified payroll records on every site visit. Since most projects include multiple contractors, this task would severely limit the number of site visits an investigator is able to complete. However, the Act requires the public officials from the awarding authority to ensure that those certifications are turned in and the wages paid.

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The bureau concurs with the recommendation to develop a “manual” of procedures. However, the audit report fails to acknowledge written bureau policies, which were provided to the auditors. When the extensive development and enhancements in the bureau are complete, a manual will be developed. In fact, currently the Bureau is compiling information to form a handbook for all investigators while development is ongoing.

Department of the Auditor General Comments

L&I's response is plainly inconsistent with the documented evidence that we obtained and from interviews with L&I officials. Further, we fail to see what bureau collections has to do with monitoring contractors for compliance since, as is stated throughout our report, L&I cannot corroborate that such collections actually occurred.

Although we agree that L&I has no enforcement power against public bodies, it does have enforcement power over contractors. The point of this finding is that L&I does not ensure that contractors – not public bodies – are complying with the Prevailing Wage Act.

Our report is not intended to “cause alarm,” as stated in L&I's comments, but instead, is intended to show that there is very little contract monitoring by L&I. In addition, the audit staff did not read too much into the Director's May 7, 1998, memorandum. The bureau's 100 percent project visit coverage was expressed directly to the auditors during an interview with the bureau director, where he stated that there were approximately 6,000 projects filed per year and that there was a complement of 30 investigators with a goal of performing 16 visits per month. The director further suggested that we “do the math.” L&I's 100 percent coverage goal was also addressed in Deputy Secretary Acker's testimony before the House Labor Relations Committee on August 15, 2001.

In regard to the investigator's review of certified payroll on every site visit, based on the audit team's own on-site examinations and interviews, we believe that reviews of certified payroll should be an integral part of site visit procedures. We again restate Section 6 of the Act, which requires contractor and subcontractor wage and project payroll

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information to be preserved for two years and the records to be open at all reasonable hours for inspection by L&I.

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Conclusion 2: The Department of Labor and Industry failed to adequately maintain monthly administrative reports, and those reports that were maintained contained errors and did not provide sufficient information to evaluate investigator performance.

L&I did not comply with record retention schedules and, therefore, L&I was not able to provide numerous requested documents.

L&I was unable to locate 28 monthly investigator reports selected for review. In addition, L&I could not locate any of the monthly reports for retired investigators who performed site visits from July 1, 1998, to June 30, 2000. These monthly investigator reports contain a listing of the site visits and other monitoring activities the investigator completed during the month. These reports should be used as a management tool to monitor employee field activities. In addition to investigator reports, L&I could not locate 57 (41 percent) of the 138 interview sheets we requested. Interview sheets are used by investigators to document job site visit interviews.

An Administrative Officer for the BLLC indicated that there is no requirement to keep investigator monthly activity reports and interview sheets. However, L&I subsequently provided the auditors with a record retention and disposition schedule indicating that investigator monthly activity reports should be retained for a minimum of three years.

Investigator monthly reports actually reviewed were incomplete, resulting in the omission of essential information required by L&I management to adequately monitor investigators' field activities.

In March 2001, L&I provided the auditors with an example of a properly completed monthly investigator activity report. The form contains entries for multiple project site visits that would typically occur in a month. Our review of 365 investigator monthly activity reports prepared between January 1999 and June 2000 showed that a significant amount of site visit information was missing. The missing information included project numbers (missing 789 times), project names (missing 225 times), the date of visit (missing 1,562 times), and the time of visit (missing 2,519 times). For the same period, we attempted to trace a sample of 76 complaint investigations that were recorded on monthly reports to the L&I computer

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tracking report. Only 42 complaints, or 55 percent, could be traced to the tracking report. In addition, 67 of the 76 complaints were not identified by an appropriate tracking number, making it difficult to trace information from the monthly activity report to the computer tracking report.

The investigator monthly reports were not consistently or properly completed to clearly reflect the activities investigators perform during job site visits.

The deficiencies noted in this conclusion occurred because L&I provided no formal training for prevailing wage investigators. In addition, interviews with L&I staff and our test work indicated that there are no written guidelines for the preparation of interview sheets and that these reports are not sent to regional offices for review, but are filed at the investigator's home office.

Program goals and compliance objectives are best accomplished through the education of field investigators. Knowledge of the statutes and regulations provides the basis for enforcement of the Prevailing Wage Act. Additionally, the proper completion and retention of monthly investigator reports is needed to provide management with the tools necessary to evaluate work performance and determine the degree of achievement of the goals and objectives of the monitoring program.

Recommendations

Management of the Department of Labor and Industry should:

- Develop procedures for the preparation of monthly reports. These should be circulated to investigators, together with an example of a properly completed report.
- Develop and conduct formal training to assist the field investigators in the completion of monthly reports.
- Require that supervisors ensure that monthly reports are properly prepared, and be held accountable by management for improperly prepared reports.

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- Require L&I to adhere to the current records retention and disposition schedule, which requires that investigator monthly activity reports be retained for three years.
- Ensure that record retention and disposition policies become part of a Field Investigator Procedures Manual referred to earlier in this chapter.
- Develop a monthly report format that is more consistent with an itinerary/time sheet to show the actual period (time started and time finished) that investigators performed each activity in the field. In addition, the site-visit checklist (recommended earlier) and the interview sheets should be attached to the report. The monthly reports, including the attached checklists and interview sheets, would provide information so that management can more effectively monitor investigator performance. Procedures for the proper preparation of the proposed report, together with examples, should be incorporated into the Procedures Manual referenced earlier.

L&I Response

The bureau concurs with the audit report regarding deficiencies in monthly reports. However, before 1995 there was no oversight of project visits and a county rotation process was not in place to prevent a single investigator from maintaining complete control in certain areas.

The current management undertook a commitment to create more accountability on the part of investigators without significantly burdening them with paperwork and decreasing efficiency of investigations. This has been a work in progress, both because the type and depth of information needed must be continually reassessed, and also because individual investigators learn and adapt to change at different rates.

Department of the Auditor General Comments

Since the scope of our audit did not go as far back as 1995, we cannot conclude on the adequacy of the system at that time. As stated in the report, the existing system of records management and reporting procedures is clearly inadequate.

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Chapter Three - Evaluating the Rate Determination Process

The Prevailing Wage Act assigns the duty of determining general prevailing minimum wage and benefit rates to the Secretary of Labor and Industry in conjunction with the Advisory Board.⁷⁴ In order to accomplish this task in accordance with prevailing wage regulations,⁷⁵ the Secretary may consider the following:

1. Wage rates and employee benefits established by collective bargaining agreements;
2. Wage rates and employee benefits of expired collective bargaining agreements until a new one is executed;
3. The Secretary may also consider the following:
 - a) Information obtained from Federal agencies charged with the administration of labor standards provisions of federal acts applicable to contracts on public work and work financed in whole or part by the United States;
 - b) The number of skilled, competent, and experienced workmen within the locality who are generally available for employment on public work;
 - c) Statements signed and certified by contractors and subcontractors and union representatives showing wage rates paid on projects, within particular localities;
 - d) Any other information pertinent to the determination of prevailing minimum wage rates.

There is also a requirement in the regulations for the Secretary to conduct a **continuing program**, which reads as follows:

⁷⁴ 43 P.S. § 165-7.

⁷⁵ 34 Pa.Code § 9.105.

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The Secretary will conduct a continuing program for obtaining and compiling of wage rate information and shall encourage the voluntary submission of wage rate data by contractors, contractors' associations, labor organizations, public officials and other interested parties, reflecting wage rates paid to workmen in the various types of construction in the locality (Emphasis added). Rates shall be determined for varying types of projects within the entire range of work performed by the building and construction industry. Information submitted shall reflect not only the specified wage rate or rates paid to a particular craft in the locality but also the type or types of construction on which the wage rate or rates have been paid. **If the Secretary deems that the data at hand is insufficient to make a determination with respect to the crafts or classifications necessary to perform the proposed public work, he may have a field survey conducted by his staff representative for the purpose of obtaining additional information upon which to make a determination of the wage rates,** (Emphasis added) and also the customs, usages and practices as to the type of work to which the wage rates apply and the size of available force of qualified workmen within the locality in which the public work is to be performed.⁷⁶

As indicated in the regulations, a continuing program may include a survey if the data at hand is insufficient to make a determination of the wage rate.

History of the 1996 Rate Survey

Prior to 1996, L&I relied on voluntary submissions of wage data to determine prevailing wage rates as provided by the regulations, and defined the prevailing wage rate as the rate most frequently paid in the locality.

Several factors led the Department to consider a different method to determine prevailing wage rates beginning in 1996. First, in late 1993, the Independent Regulatory Review Commission (IRRC) issued extensive comments on proposed prevailing wage regulations. The comments indicated that L&I had relied primarily on collective

⁷⁶ 34 Pa Code § 9.105(d).

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bargaining agreements to establish prevailing wage rates. It recommended that the Department initiate a program to compile wage information from other sources. Secondly, in response to concerns from public bodies and lawmakers that prevailing wage determinations in some areas were inflated – unfairly increasing taxpayers' costs on public construction projects – in 1995 Governor Ridge directed L&I to thoroughly examine the methods used to determine prevailing wages to ensure they were fair and accurate.⁷⁷

In April of 1996, the Department entered an agreement with the Pennsylvania State Data Center to design and implement a statewide survey.

The survey's purpose was to determine rates on a county-by-county basis, and, according to L&I, to ensure that prevailing wages and benefits were determined through fair, objective, and impartial analysis and are reflective of regional economies.

L&I took two actions that significantly influenced the survey results. First, they excluded publicly funded projects of all types from the survey, including building, heavy and highway construction. Secondly, they changed the methodology for determining the prevailing wage rate. Instead of using the rate most frequently occurring in the locality, the Department used a majority (50% + 1) method or a weighted average when there was no majority rate.

The survey was voluntary and covered all classifications of workers except the excluded public undertakings. The projects had to have a total cost in excess of \$25,000 and the work had to take place between January 1, 1995, and May 31, 1996. The survey requested contractors to submit wage and benefit data only on employees who participated in the projects meeting the above criteria.

As a consequence of the new methodology, prevailing wage rates in certain localities went down following the imposition of the survey-based

⁷⁷ See *New Prevailing Wage Rates Will Save Taxpayers Millions*, Department of Labor and Industry, Press Release, February 27, 1997; *Ridge Administration Moves to Reinstate Prevailing Wage Rates*, Department of Labor and Industry, Press Release, April 23, 1997.

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wage rates. However, in many cases, when the wage rates went down, construction costs went up, particularly in public school construction.⁷⁸

The effects of the 1996 survey were examined in a report published by the Keystone Research Center entitled, "Do Lower Prevailing Wages Reduce Public Construction Costs?"⁷⁹ The report maintains that construction costs escalated after the survey because of the increased use of less skilled labor resulting from the payment of substandard wages.⁸⁰ Consequently, the cost savings sought by the administration never materialized.

Following the completion of the 1996 survey, the Pennsylvania State Building and Construction Trades Council, AFL-CIO, and its affiliated labor organizations brought suit against L&I in Commonwealth Court.⁸¹ The Court ruled in the Council's favor, concluding that the survey was defective based on its failure to include public projects in the survey results. The decision by the Commonwealth Court led L&I to conduct a second survey that same year, which was the primary focus of our audit.

The 1999 Rate Survey Process

The 1999 survey excluded "heavy" and "highway" construction projects and focused solely on projects in the "building" type of construction. It covered 55 counties and a total of 436 trade classifications.

The 1999 survey was conducted in-house by L&I and utilized staff from the Bureau of Labor Law Compliance (BLLC) and the Center for Workforce Information and Analysis. L&I began the survey process by developing a data collection plan (See Appendix C for further details) outlining how certain aspects of the process were to be conducted. Finally, L&I indicated that the methodology used for this survey closely followed the Davis-Bacon survey methodology.

⁷⁸ Wial, Howard, *Do Lower Prevailing Wages Reduce Public Construction Costs?*, Keystone Research Center, Harrisburg, Pa, July 1999.

⁷⁹ See Wial.

⁸⁰ This finding is consistent with similar studies conducted in other states and with analyses conducted under the federal Davis-Bacon law. See N. 4

⁸¹ *Pennsylvania State Building and Construction Trades Council v. Commonwealth of Pennsylvania*, No. 3291 C.D. 1997, May 6, 1998.

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Objectives and Methodology

The overall objective of this Chapter was to evaluate the quality and accuracy of the 1999 rate survey and prevailing wage determination process:

To accomplish this objective, the following detailed procedures were completed:

- Reviewed the Prevailing Wage Act and its Regulations, as well as various other documents pertaining to the Prevailing Wage Program enforced by the Bureau of Labor Law Compliance (BLLC).
- Interviewed appropriate staff regarding the program's operating processes and procedures.
- Selected a sample of counties from the 1999 survey and reviewed the classifications chosen and compared these to the criteria set forth by L&I.
- Selected a sample of classifications and reviewed the associated surveys to determine if our analysis agrees with the department's report for number of employers, projects, and employees, and if the rates were set in a consistent manner and in accordance with the guidelines in the data collection plan.
- Reviewed available documentation pertaining to the response rate calculation.
- Reviewed all available documentation pertaining to the verification process and performed interviews to evaluate if the process was conducted adequately and in accordance with the data collection plan.
- Selected a sample of counties and classifications and reviewed the available documentation to determine the source for each rate.

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- Reviewed the collective bargaining agreements on file with L&I to ensure that these agree with the rates determined to be collective bargaining rates.
- Evaluated the survey process for inefficiencies and areas for improvement.

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Conclusion 1: There were errors, inefficiencies, and inconsistencies in the Department of Labor and Industry's processing and compilation of the 1999 survey data.

The 1999 survey only covered 436 classifications when it should have included at least 1,057 classifications.

The Department of Labor and Industry issues prevailing wage rates for approximately 23 classifications for each of the 67 counties if sufficient data is available to set a rate. The 1999 survey should have covered at least 1,057 of the approximately 1,541 statewide classifications.

Testing disclosed, however, that at least 621 classifications were omitted from the 1999 survey. Although the survey should have included a minimum of 1,057 classifications, only 436 were surveyed – less than half the classifications intended.

There were undocumented changes made to approximately 20 to 25 non-union rate classifications between the 1996 and 1999 surveys.

L&I staff indicated that approximately 20 to 25 classification rates might have been changed to collective bargaining agreement rates. However, staff was unable to identify the specific classifications that were changed or provide documentation as to why the remaining non-union rates were not included in the 1999 survey. Therefore, we were unable to determine which rates were affected by these changes, or the impact on these rates.

Surveys were incorrectly utilized during the 1999 survey.

During the 1999 survey process, L&I investigators accepted and used numerous surveys that did not meet the survey criteria. The investigator's use of judgment in accepting these surveys was not documented on the survey form or as a procedure in the data collection plan. There was no documentation that these decisions by investigators were ever reviewed or approved by L&I management.

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A review of 201 surveys submitted from a single contractor disclosed that 168 of the surveys were clearly marked as having project costs equal to or lower than \$25,000, yet all 168 were coded and put into the computer system. The data collection plan, as well as the survey itself, both set forth a project cost threshold of greater than \$25,000 for inclusion in the survey process.

While 120 of the 168 surveys were later filtered out by the computer system because the classifications were not included in the survey, 48 were utilized for setting rates, although they appear to not meet the criteria. Although this example was highlighted here in detail, there were numerous other surveys found during our testing that were accepted and utilized to establish prevailing wage rates that did not appear to meet the criteria to be included in the survey. Despite the fact that follow-up telephone calls may have been made, and/or investigator judgment used, the lack of documentation limited our ability to determine if these surveys were properly accepted.

There were inefficiencies in the 1999 survey evaluation process.

As the surveys were submitted to L&I, the investigators reviewed them for content, sorted them according to county, and numbered them sequentially. They then filled out a code sheet for various pieces of data from the survey. These code sheets were attached to the survey, which was then sent to data processing for entry into the computer system.

During the reviewing and coding process, the investigators did not evaluate if the surveys were for classifications that were requested by the survey. Therefore, the investigators were coding data on classifications that may not have even been requested for that county. For example, in one county they received 201 surveys from a single contractor. Of the 201 noted above, 145 were for classifications that were not being surveyed. However, all of these surveys were coded by the investigators and entered into the computer system by data processing.

Although the survey process only covered the building type of construction, the investigators did code and process information on 121 surveys that were for either heavy or highway construction projects.

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According to L&I staff, surveys received for heavy or highway construction projects were to be put in the unusable pile.

This process results in the inefficient and unproductive use of time of both the investigators in coding the surveys and data processing personnel in entering the information. L&I staff stated that, at the time, they felt it best not to break stride and continue coding surveys because they knew the computer would kick out information on classifications not being surveyed.

There were inconsistencies in the classification for elevator constructor that could lead to inaccurate rates for this class during the 1999 survey process.

During the 1999 survey process, there were submissions for the following job titles related to elevator work: elevator mechanic, elevator helper, elevator foreman, elevator constructor, and elevator tender. We found instances where all of these titles, except elevator helper, were included under the elevator constructor classification and instances where the helper and foremen titles were excluded.

Interviews with L&I staff revealed that the intention was for all workers that had the word "elevator" in their title to be included in the survey process under the elevator constructor classification. L&I staff noted that there was no intention of surveying for a separate elevator helper or tender rate. According to L&I, there was some obvious confusion regarding the instructions for this classification.

L&I's intentions of how the classification was to be handled does not reflect the differences in job duties and pay ranges between workers, such as the case between elevator mechanics and elevator helpers, and between elevator constructors and elevator tenders. The variance in the hourly rate between an elevator constructor and an elevator tender was as much as \$11.00 per hour. The inconsistencies and combining of job titles with different duties and rates of pay can lead to improper data being used to set various rates, which, unfortunately, leads to inaccurate rates.

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There were errors in the computer application used for calculating prevailing wage rates.

The computer system failed to remove workers not receiving benefits from the benefits calculations. Failing to properly remove workers not receiving benefits from the calculation results in a lower benefit rate being paid to workers.

There were duplicate surveys included in the wage rate calculations for the 1999 survey.

During our review of 22 counties and 37 classifications, we found 5 classifications that had duplicate surveys included in their calculations. There were 45 exact duplicate surveys included across these 5 classifications. There were also occasions where the information being submitted on separate surveys was very similar. This could be from a large project that is divided into phases, which are considered separate projects. This could also result from both the contractor and a third party, such as a labor union, submitting information on the same project. However, interviews with staff revealed that no steps were taken to ensure that the projects appearing similar were indeed separate.

The data collection plan states that the surveys were to be checked for potential duplicates. According to staff interviews, a list of potential duplicate surveys was provided to L&I by the Center for Workforce Information and Analysis; however, this list was not maintained and, therefore, this step could not be verified. Using duplicate surveys could result in inaccurate rates being established and paid to workers.

The response rate calculation was poorly documented.

The 1999 survey data collection plan sets criteria for the number of employers and employees that are needed to establish prevailing wage rates based upon the overall survey response rate. We requested documentation to determine if the minimum number of surveys necessary to establish wage rates had been received. L&I staff involved in the rate calculation indicated that some of the requested documentation had not been retained. In addition, the limited documentation we did receive did

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not support the response rate calculation. For instance, the supporting documentation for the total number of projects and contractors did not match the numbers used by L&I. The limited documentation available inhibited our ability to determine the exact response rate calculation.

The original surveys were not properly maintained during the 1999 survey process.

Audit testing disclosed instances where surveys were filed in the incorrect county folders and where surveys were missing. While the surveys were numbered sequentially as they were received, they were not maintained sequentially after they were entered into the system by data processing.

Upon discovering discrepancies, we were permitted to look through the packets of original surveys in the presence of an L&I staff member. Through this process, the auditors located only 7 of a possible 19 surveys that were needed for our testing. These surveys were omitted from the original copied packets provided by L&I. Accordingly, we were not able to determine the accuracy of the wage rate calculations for 5 of the 37 classifications we reviewed during our testing.

The 1999 survey verification process was inadequately documented and all verifications were done via telephone.

The data collection plan states that a sample of 2 to 5 percent of submitted surveys were to be given to L&I staff to verify the project time frame, employees, and wages as reported. The only documentation L&I staff provided to support that these verifications were completed was a three-page listing of 125 survey numbers (some without a contractor name, telephone number, etc.) that were to be verified.

Of the 125 listed surveys, 48 had the word "OK" by them. There is no notation of who performed the verifications, who they spoke to, date of the review, time, etc. L&I staff indicated that, at one time, there may have been additional documentation, however, this three-page listing was the only document the Bureau had kept.

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According to L&I staff, all verifications performed during the 1999 survey process were completed by telephone. The data collection plan does not state any methods to be utilized for the verifications, only the percentages to be sampled. However, the methodology from the 1996 survey process stated that the verifications should be by site visit, personal, or telephone interview. Prudent business practices would also call for varying the techniques used to complete the verifications.

These deficiencies compromise the purpose of the verification process to ensure that errors are identified and corrected and as a deterrent to submitting falsified information.

There is no documentation to support sources for prevailing wage rates.

L&I does not maintain a listing to show the sources for all of the rates in use. While the rates established from the surveys may be traced to the survey results files (if changes have not been made), there is no documentation to show what rates were established from sources other than the survey, such as from adjacent counties, which county was utilized, or if federal Davis-Bacon Act rates were used. This lack of documentation compromises L&I's ability to justify how and why the rates were established and could further hinder the updating process.

There are no regular reviews of Davis-Bacon rates.

If L&I does not receive enough information to set a rate from a survey and there are no adjacent counties that have a rate, they use federal rates established under the Davis-Bacon Act, if available. However, L&I does not perform any regular reviews of Davis-Bacon rates to evaluate for updated rates or to determine if there are newly established rates that could be utilized. Due to this lack of review, the rates in use may not be the most up to date available.

L&I has not established a continuing program for setting the prevailing wage rates or updating rates currently in use.

The Prevailing Wage regulations state that the Secretary shall conduct a

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continuing program for obtaining and compiling wage rate information. As of July 13, 2001, L&I did not have a continuing program in place.

Failing to have a written plan for updating the rates does not comply with the regulations. In addition, some rates currently in use have not been updated since their inception in 1999. A documented continuing program will ensure that L&I is basing their rates on current information.

A continuing program should also include regular comparative analyses of counties to help identify areas where data is insufficient or where a survey may be helpful in eliminating large variances in rates between counties. L&I could also use a documented plan to receive data and input from the public and stakeholders.

A lack of written procedures, poor supervision, and the failure to maintain documentation are contributing factors in the deficiencies noted above.

The primary factor affecting the calculation of prevailing wage rates is a lack of written policies and procedures governing aspects of the survey and rate-setting process not covered by the data collection plan. There are no written procedures for how L&I sets the rates.

There was also no written documentation for how the classifications were to be chosen for the 1999 survey, other than the Commonwealth Court's decision against the exclusion of public projects.

Additionally, L&I inadequately monitored the 1999 survey process.

Finally, the failure of L&I to retain documentation supporting rate calculations hindered the auditors' attempts to verify the validity of selected prevailing wage rates.

In order to ensure the reliability of established rates, written procedures must be developed to provide staff responsible for establishing the rates with the guidance necessary to complete their assigned task. A lack of supervision can also lead to inconsistencies with how rates are set. Additionally, the lack of documentation supporting the 1999 survey compromises the verification process by failing to provide the support necessary to ensure that established prevailing wage rates are accurate.

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Continuing Validity of Surveys

The results of our audit testing and analysis of L&I's survey process in 1999 causes us to question whether a statewide survey continues to be warranted to determine prevailing wage rates. To that end, notwithstanding two statewide surveys conducted by L&I in order to arrive at prevailing rates lower than collectively bargained rates -- with the attendant expenditure of money, time and resources to conduct the surveys -- over 96 percent of the current prevailing wage rates still reflect collective bargaining rates.

The prevailing wage laws and regulations contemplate a survey be used only when there is insufficient information to determine an appropriate prevailing wage rate.⁸² L&I failed to establish this insufficiency as required by law. The only apparent reason for conducting these statewide surveys was a desire to lower prevailing wages, thinking that this would also reduce public construction costs. As we pointed out earlier in this report, there is no evidence that public construction costs went down. In fact, it appears that costs went up when wage rates were lowered following the 1996 survey.

In addition, the surveys conducted in 1996 and 1999 were invalid for a number of reasons. With respect to the 1996 survey, Commonwealth Court found that it was defective because it did not consider public projects. Regarding the 1999 survey, we have already provided a number of findings in the preceding pages that address weaknesses in that process.

Finally, we question the overall utility of a statewide rate survey performed by BLLC staff considering the overall cost in terms of dollars and human resources. To conduct an appropriate survey requires much more care and attention to detail than is now displayed by L&I. We believe that the money and resources currently devoted to statewide surveys would be better spent improving the enforcement of the Act.

⁸² 34 Pa Code § 9.105(d).

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Concerning setting prevailing wage rates in the future, we believe that absent justification that the use of collective bargaining rates and voluntary submissions is not producing an accurate rate, the Department should continue to use such measures. As concluded by the Courts,⁸³ it is appropriate for collective bargaining rates to be utilized if they are the most frequently paid rate. Stronger efforts should also be made to encourage voluntary submissions of work performed by non-union contractors.

Recommendations:

In order to correct the deficiencies noted above, we recommend that L&I establish a continuing program for determining prevailing wage rates in conformity with regulations that consist of voluntary filings of collective bargaining and non-collective bargaining rates. The use of a survey should be reserved only for those local jurisdictions where voluntary filings are not producing sufficient information to establish rates. When a survey is justified to produce data, L&I should first develop written policies and procedures governing the survey process. At a minimum, written guidelines for a survey should include:

- Procedures for establishing prevailing wage rates. If future surveys only cover certain categories or classifications, the guidelines should establish specific criteria for how classifications are to be chosen and reviewed to ensure that all appropriate classifications are included;
- Procedures requiring that any changes to established rate and/or rate surveys be documented and approved;
- Policies concerning the use of investigator judgment and required documentation supporting the survey verification process;
- Requirements that a minimum number of survey verifications be completed through site visits;

⁸³ *Keystone Chapter of Associated Builders and Contractors, Inc. v. Department of Labor and Industry*, 414 A.2d 1129 (Pa. Commw. 1980).

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- Procedures outlining steps to filter out duplicate surveys;
- Policies on record retention and documentation practices;
- Processes for the regular review of rates established under the federal Davis-Bacon Act; and
- Procedures establishing ongoing efforts to regularly update existing rates in line with cost of living adjustments.

Finally, the Department should document the source for each rate that is in use, review the list on a regular basis, and update it as necessary.

L&I Response

- The 436 classifications covered by the 1999 survey were selected based on the 1999 court decision and data needs. All of those classifications identified were included in the data collection. Little or no data was received in the data collection for many of those classifications, but this is expected and does not present a problem in use of the data that was received.
- The 1999 data collection was used to fill in the gaps left by a Commonwealth Court decision of that same year. If a CBA rate was determined to be a prevailing wage, either under the 1996 survey or post-survey, that rate was not affected by the Court's decision. Accordingly that classification would not have been resurveyed in 1999. Although the bureau was generally able to explain the post-1996 survey changes, the auditors' recommendation for backup documentation will be taken into consideration and the Bureau will document future changes in wage rates.
- Bureau investigators did have reasons for making include/exclude decisions, and they may have tried to err on the side of inclusion. In many cases they knew of the projects listed on the submittals, and knew the overall project value was over \$25,000 even if the particular contractor's cost was less. Submittals are to list the overall project cost, but responding subcontractors frequently misunderstand this item, or do not know the overall cost. While better documentation

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and written procedures would be preferred in this area, there is no reason to believe there was an adverse effect on the results.

- The bureau is always looking for ways to improve efficiencies in processes and will take the audit recommendations under advisement.
- The bureau, based on its data needs and knowledge of Prevailing Wage administration, made decisions on which crafts should be included in the data collection. The Center for Information and Analysis did not analyze responses for the elevator constructor classification as described in the audit report. The alleged inconsistency described is insignificant for accurate determination of wages. As the experts in Prevailing Wage administration, bureau staffs are in the best position to know about construction crafts and their application on public projects.
- Errors in the computer application affected only the benefit rates for no more than 2 rates in the entire 1999 data collection, which covered 436 classifications. Steps have been taken to ensure that the error is not repeated in future surveys.
- Given the nature of Prevailing Wage data collection projects, it is expected that some duplicates may be included. There were steps taken during the project to eliminate or reduce duplicate submissions, and those steps were documented. These steps improved the final determinations.
- Response rate documentation was sufficient, although not exhaustive. Using Davis-Bacon methodology for the response rate calculation, the response clearly exceeded that required. At the time of the survey there seemed to be little need to go into meticulous calculation and record-keeping for this item. This issue did not have an effect on results.
- The bureau maintained the original responses. The example noted in the audit report is an isolated case.
- The bureau recognizes that there may well be room for improvement in its verification of submissions.

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- The bureau has the responsibility for maintaining current rates. Just because there is not a comprehensive, ready list of rates with their respective sources does not mean there is a problem. Although it is rarely necessary to do so, given time for research, bureau staff can identify the source of rates. The bureau traditionally has not needed documentation to identify the source of rates. The bureau will consider the value of suggested enhancements.
- The bureau does regularly review and incorporate Davis-Bacon information and rates in its Prevailing Wage Determinations. Because the information is now available via the Internet, the bureau is better able to monitor the rates.
- To a large extent the formalization of procedures in establishing a continuing program for setting the Prevailing Wage rates has been delayed due to ongoing change initiatives at the federal level. Prevailing Wage and wage data collection programs do not exist in a vacuum. Federal Davis-Bacon data collection procedures and schedules have undergone many changes in the last 5 years, which have an impact on the necessity for and feasibility of data collection activities at the state level. A comprehensive Davis-Bacon survey of Pennsylvania construction rates is to take place in 2002, after which it would make sense for Pennsylvania to update or finalize its plans for obtaining data to set and maintain Prevailing Wage rates.
- Prevailing Wage surveys are a relatively new process and improvement often comes with experience. The argument would be in whether there are really 'deficiencies' and 'inconsistencies' in the data that constitute a problem. The draft audit report does not describe anything of much significance in this area.
- The bureau disagrees with the audit report regarding the setting of prevailing wages. The draft audit report fails to recognize that the Secretary of L&I has statutory authority independent of the PW [Prevailing Wage] Act to conduct surveys. He or she is not mechanically limited by regulations to conducting "field surveys" only where there is insufficient information to determine a prevailing wage. Rather, the regulations are open-ended in terms of the type of

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information that may be sought and used. Indeed, it may be difficult in some cases to determine if the data on hand is sufficient without doing a survey.

- Experience has shown that passive receipt of wage data often results in information from only the unionized segment of the construction industry. Moreover, it is almost impossible to integrate CBA submittals with data from non-union contractors. Union submittals frequently lack historical information as to the specific projects and number of workers actually paid CBA rates, while voluntary submittals from non-union employers are rare.

The suggestion that the modal rates (most frequently paid rates) be used to determine prevailing wages could prove problematic. Modal rates “tend to favor union rates – generally the highest rates in any given locality – because other than the federal minimum wage, only union rates are likely to be identical to the penny and paid to any substantial number of employees.” The Prevailing Wage Appeals Board approved the use of majority/averaging concepts to set prevailing wages. This methodology is used by the federal government in setting Davis-Bacon wage rates, and is consistent with a “common and reasonable reading of the term” “prevailing.” Additionally, this methodology is necessary to effectuate the court’s pronouncement in *Keystone Chapter of Associated Builders and Contractors v. Department of Labor and Industry*, 414 A.2d 1129, 1134 (Pa. Cmwlth. 1980), that “[i]f the collected data shows non-union construction to be the dominating segment of the industry, its wage rates should prevail as the general minimum wage rates. . . .” Significantly, the court did not say that non-union rates prevail only if they are the most frequently paid wages down to the exact penny.

The bureau is concerned that the passive receipt of wage data, coupled with the across-the-board adoption of modal rates as prevailing wages, will virtually preordain CBA rates as the prevailing wages – thereby exposing the Prevailing Wage Act to possible constitutional challenge. It is safer to defend prevailing wage rates based on recent surveys, rather than relying on passive receipt of data as justification for adopting particular wage rates.

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Finally, the Act does not contemplate absolute perfection at the predetermination stage of the rate-making process. Rather, it gives the Secretary of L&I two opportunities to determine the prevailing wages. First, he or she issues a predetermination, after “gathering information about prevailing wage rates...from various sources.” One source could be a wage survey. If the predetermined rates are challenged by a “petition to review,” the Secretary must hold a hearing, receive evidence as to the prevailing wage rates and reconsider his or her predetermination in light of this evidence. Therefore, any perceived errors in the survey process are subject to correction through the statutory wage-rate appeal process.

Department of the Auditor General Comments

In its response to this finding, L&I makes numerous assertions regarding many of the issues that we discuss in the conclusion. Consistent with much of our report, however, L&I has no documentation to support these claims. We have, nonetheless, chosen to respond to each one.

Bullet 1: The classifications that were chosen fell short of the 1057 that should have been surveyed. The fact that little or no data was received for many of the 436 classifications that were surveyed in no way changes the fact that the other 621 classifications should have been included and contractors given the opportunity to submit data and have rates issued that are more specific to their locality.

Bullet 2: Although we were given an oral explanation that there were approximately 20-25 changes made after the 1996 survey, there was no documentation to show the justification for such changes. The 621 classifications that were omitted did not include any classifications that were listed as CBA rates in 1996.

Bullet 3: Due to the lack of documentation, it cannot be determined if these surveys were appropriately utilized. Furthermore, many of these projects are private construction projects which are not subject to the prevailing wage laws and which would not necessarily be visited by the bureau. It is doubtful that the investigators would be familiar with every construction project being completed in a locality, particularly when there are multiple projects taking place at the same location.

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Bullet 4: We are pleased that L&I will take this recommendation under consideration.

Bullet 5: While each elevator constructor classification would need to be evaluated individually to determine the true effect of these inconsistencies on the 1999 survey results, the approach taken by the bureau in combining job classifications which vary in duties and pay by as much as \$11 can lead to rates which are not in line with the duties being completed.

Bullet 6: While this error may have affected a limited number of classifications, these workers were paid a lower benefit rate as a result of the error. Furthermore, if the 1999 survey had covered the 1057 classifications that it should have included, this error could have affected many more classifications. We are pleased that steps have been taken to ensure that this error will not reoccur.

Bullet 7: In L&I's response, they noted that steps were taken to eliminate or reduce duplicate submissions and that those steps were documented. However, this documentation was not maintained and, therefore, we were unable to review the steps taken and the surveys that were to be checked for duplicates. Therefore, we were unable to determine how effective any steps taken may have been in identifying duplicates. The number of exact duplicates found in our sample, as well as the number of similar submissions, would lead us to believe that more could have been done to help identify duplicates.

Bullet 8: While it does appear that the response rate was adequate to establish prevailing wage rates, the documentation of the response rate was very poor. Some of the documentation was not retained, and the supporting documentation for the calculation did not match the numbers used in calculation.

Bullet 9: If the auditors had been granted access to the original surveys in the first place, some of the discrepancies and associated time delays could have been avoided. However, even after review of the original files, there were still surveys that were misfiled and missing, which affected our ability to determine the accuracy of five rates. In addition, if the

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surveys had been maintained in their sequential order, it would have also made it much easier to identify duplicates.

Bullet 10: We are pleased that L&I recognizes the need for improvement in its verification process.

Bullet 11: The lack of documentation for the sources of rates cannot only hinder the updating process, but may also have been part of the cause for the large number of classifications that were omitted from the 1999 survey process. With better documentation, it may have been easier for L&I to have identified the classifications that should have been included in the 1999 survey in its attempts to fill in the gaps left by the Commonwealth Court decision.

Bullet 12: At the time of our audit, the bureau did not routinely review Davis-Bacon rates, except as needed after a rate survey.

Bullet 13: While there are outside factors such as Davis-Bacon that L&I would like to consider in its decision-making process for a continuing program, there are rates that were put in place in 1999 that have not received any type of rate increase since that time. In addition, although rates that are determined to be CBA rates are not affected, rates that are not CBA rates have gone without any rate increases.

Bullet 14: While none of the problems identified may be considered significant by L&I, the number and combination of multiple deficiencies show cause for concern regarding the rate survey process.

Bullet 15: While L&I may disagree with the audit report, it is important to note that the Courts have never addressed the issue of determining whether the Secretary acted properly when conducting the wage rate surveys. Therefore, the issue of whether the Secretary can use his general authority under the Administrative Code to "make investigations and surveys" for the purpose of establishing prevailing wage rates remains in question.

Bullet 16: Contrary to L&I's contention, we are recommending a rate determination process that is active, not passive. As we state in the report, stronger efforts should be made to encourage voluntary

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submissions of work performed by non-union contractors. While a process of voluntary submissions of rates is not perfect, it is certainly less costly than the survey processes which, ultimately, have had little impact on prevailing wage rates.

We are not suggesting that CBA rates should be “preordained.” We are merely questioning the use of an expensive, flawed statewide survey process under the guise of saving taxpayers money by reducing wage rates. In reality, the statewide survey has failed to generate any tax savings and CBA rates invariably continue to prevail.

We reiterate our position that the use of a survey process should be reserved only for those local jurisdictions where voluntary filings are not producing sufficient information to establish rates. We are pleased to note that L&I does plan to implement some of the recommendations outlined in this conclusion.

Chapter Four – Audit Limitations

At the outset of the Prevailing Wage Audit, L&I established a series of impediments to completion of an independent performance audit. These unprecedented and unwarranted procedures restricted our ability to determine the completeness and reliability of records, and prevented us from completing the audit in a more timely manner.

In this Chapter, we present our conclusions regarding L&I's conduct during the course of this audit and provide facts regarding L&I's responses to our requests for access and information.

Conclusion 1: The Department of Labor and Industry management influenced the free exchange of information by requiring that all audit interviews be conducted in the presence of a departmental attorney.

Throughout the entire audit engagement, L&I management, inclusive of the Office of Chief Counsel, prevented the free exchange of information between the auditors and L&I staff, including the staff of the Bureau of Labor Law Compliance. Consequently, the bureau staff may have been less inclined to express themselves freely in this environment.

An April 18, 2001, memo from L&I stated that “. . . attorneys and staff have devoted countless hours helping with the audit and responding to auditors requests.” We hold the contrary view that the extensive involvement of L&I attorneys in the audit process was an unnecessary, burdensome, and inefficient use of resources.

The audit protocol enforced by L&I placed considerable constraints on the auditors time, created delays in obtaining requested information and prevented auditors from having independent access to bureau personnel for audit-related discussions.

The following provision of *Government Auditing Standards* speaks directly to testimonial evidence obtained under compromising conditions:

Section 6.54(e). Testimonial evidence obtained under conditions where a person may speak freely is more competent than

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testimonial evidence obtained under compromising conditions (for example, where the persons may be intimidated).

It is our belief that the presence of an L&I attorney in interviews with bureau staff compromised the validity of the responses being provided. The possibility that the free exchange of information may have been affected during the interviews raised serious concerns, which were presented to L&I at an administrative meeting on November 20, 2000. However, the interview protocol continued without modification.

Recommendation:

- During future audits, L&I should ensure that the free exchange of information occurs between L&I staff and the auditors. This will allow audits to be conducted more efficiently and beneficial conclusions to be reached.

L&I Response

The bureau disagrees with the audit report's assessment of free exchange of information that occurred during this audit.

L&I legal counsel worked tirelessly with the auditors to extend every courtesy in accommodating the auditors' schedules for witness interviews.

Department of the Auditor General Comments

L&I completely misses the point of this finding. We did not question the work effort or the courtesy shown by L&I legal counsel. Instead, we contend that the mere presence of L&I legal counsel compromised the validity of the responses provided to the auditors by those being interviewed. Under Yellow Book standards or auditing guidelines, testimonial evidence obtained under conditions where persons may speak freely is more competent than testimonial evidence obtained under compromising conditions (for example, where persons may be intimidated by another person, i.e., an attorney).

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As is discussed in Conclusion 3 of Chapter 4, it is interesting as well as disturbing that L&I would not allow the auditors to accompany an investigator to a project site visit “in order to protect the integrity of the investigator’s ongoing work and to prevent any compromise of potential investigations initiated via site visits,” but yet consciously failed to appreciate our concern in protecting the integrity and credibility of our audit protocol and report. We reiterate our position and strongly encourage L&I to allow auditors to meet with L&I staff in a manner that will encourage open discussion.

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Conclusion 2: The Department of Labor and Industry did not provide requested information in a timely and consistent manner.

The Department of Labor and Industry did not provide requested information to the auditors in a timely and consistent manner. The time lapses between the date of request and the date of receipt delayed completion of planned audit procedures, and extended the time necessary to conduct the performance audit of the Prevailing Wage program.

L&I was also unable to provide audit-related information necessary for the auditors to form conclusions on investigations and collections performed during the period. Further, when information was received, it did not contain the specific information recorded on the request form. The time delays associated with the information requests are documented in the following table:

Information Requested	Date Requested	Date Received	Elapsed Time
Complaint log or report 7/98 – 6/00, listing the total number of complaints received during the period	7/24/00	4/13/01	263 days
Response to concerns relating to L&I's responsibilities for prevailing wage regulatory oversight and collection procedures.	2/2/01	4/30/01	87 days
Response to concerns relating to obtaining clarification of L&I operational procedures (Compliance and Complaint Related)	2/09/01	3/16/01	35 days
Collection data for 1998 and 1999, reporting the name of the contractor involved, investigation start and close date, amount paid by the contractor, and parties involved in the distribution of payments.	11/2/00	12/18/00	46 days
Department/Bureau collection/distribution data for intentional violators of the Prevailing Wage Act.	2/16/01	4/30/01	73 days
Sample of complaints, case files, and related documents selected for detailed test work.	12/18/00 12/29/00 1/9/01	1/15/01- 2/15/01 ⁸⁴	From 6 days to 59 days
Explanation regarding the large increase in the number of monetary payment adjustments made by contractors for the 2000 calendar year	11/21/00	DNP ⁸⁵	323 days ⁸⁶

⁸⁴ A majority of the case files provided by L&I were received during the 59-day period; however, fragments of case file information continued to be provided as late as 6/5/01.

⁸⁵ DNP – L&I did not provide the requested material.

⁸⁶ Using October 10, 2001, as an ending date.

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Information Requested	Date Requested	Date Received	Elapsed Time
Request for L&I county files selected for detailed review.	10/3/00	10/13 – 12/4/00	From 10 days to 62 days
Request for specifics regarding what case file documentation was deemed privileged and withheld from the auditors.	4/26/01	DNP ⁸⁷	167 days ⁸⁸

In addition, audit information received from L&I did not meet the requirements of the original request for information in the following instances:

- **Computer Tracking Report:** Exceptions were found between the number of bureau investigations conducted and not recorded on the Computer Tracking Report (Mapper Report). This report contained all Bureau prevailing wage complaints and investigations from 7/1/98 to 6/30/00.
- **Complaint Case Files.** Requested files were either not provided at all or the information was compiled and presented haphazardly by L&I. Because we were not able to verify the sources of the information, we could not determine how the compilation was completed by L&I.
- **Collections.** The department was unable to provide documentation to support monetary collections from contractors and subsequent distribution of funds made to workers involved in the investigations.
- **Survey wage rate data** provided by L&I was insufficient to support the number of valid responses used by the department to set rates.

On August 15, 2001, L&I presented testimony to the House Labor Relations Committee regarding the Prevailing Wage program. L&I officials touted accomplishments including increases in collections and debarment activity, technology enhancements to prevailing wage determinations and other processes, and personnel increases to conduct more site visits and enforce the Prevailing Wage Act.

⁸⁷ DNP – L&I did not provide the requested material.

⁸⁸ Using October 10, 2001 as an ending date.

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Our auditors examined this testimony and asked L&I to furnish us with the information that contributed to its development. Given the difficulties we had in obtaining information from L&I as outlined herein, we wanted to be sure that the testimony was not based on information that L&I had not yet provided pursuant to our various requests. Unfortunately, L&I's response to our request failed to adequately address our concerns. Additionally, many of the statements in the testimony are not consistent with our audit findings. Thus, L&I's response simply reinforced our conclusions regarding their inadequate performance and lack of public accountability.

Recommendation:

- Management of the Department of Labor and Industry should ensure during future audits that all information is provided in a timely and consistent manner.

L&I Response

To the contrary, staff went to great lengths to try to locate records and other information for the auditors, including reconstructing files for older cases and contacting individual investigators for records they might have maintained at their home offices. Unfortunately, these measures did take time.

The chart, printed under "Conclusion" 2 in Chapter 4 of the draft audit report, is not representative of the sheer volume of informational requests from the auditors. Legal counsel estimates receiving approximately 67 written informational or interview requests from the auditors, many of which requested extensive or multiple items of information or research. Legal counsel continually met with the auditors and reviewed information requests with them to make sure that the requests had been fully addressed. The November 21, 2000, request for information referenced in the draft report was responded to by the department's provision of amended collection reports. These reports speak for themselves. Furthermore, staff was left with the impression, from its May 18, 2001 meeting with representatives from the Auditor General's office, that the reconstructed investigation files were no longer an issue.

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Rather, the auditors' concern in terms of case files focused on 57 files for which little or no records had been located. Accordingly, staff immediately concentrated on identifying the investigators assigned to those 57 cases, contacting them to make sure that they did not have any additional records, and making them available for interviews by the auditors about these cases.

Legal counsel discussed with the auditors the legal privileges that it claimed for the reconstructed legal case files. The bureau also disagrees with the auditors' suggestion that attorney/client and work product privileges did not apply to audit requests. Moreover, legal counsel had actually started case inventories for the auditors. However, when counsel checked back with the Auditor General's audit supervisor, counsel was told not to worry about them.

Department of the Auditor General Comments

There is obvious disagreement as to the amount of time that it took L&I officials to provide our auditors with documents. As stated in the finding, L&I consistently took an excessive amount of time to fulfill the auditors' requests for documents. Further, the information that was provided often did not meet the requirements of the original request.

We would also like to clear up any misunderstandings regarding the audit supervisor's comments. L&I states that the [Department of the Auditor General's] audit supervisor told L&I counsel "not to worry about" giving us certain files. The audit supervisor's intent was to remind L&I that we had waited, in some cases, months to receive files and documents and the audit team needed to move forward with the engagement. The supervisor further stated that additional files and documents would be accepted, but that the [audit] team would move forward with the limited items provided by L&I.

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Conclusion 3: The Department of Labor and Industry did not provide auditors with access to original documents.

L&I refused to provide access to original files and documents. An October 26, 2000, memorandum from L&I in response to an audit request regarding access to investigator case files stated, "We can not give free access to complaint files. Copies of any investigation files of closed cases will be provided."

In addition, all requests for information and interviews had to be prepared in writing and submitted to the L&I Chief Counsel's office. The requested information was then compiled by either L&I or BLLC staff and submitted back to the Chief Counsel's office for distribution to the auditors.

As a result of this protocol, auditors could not determine:

- What sources were used and how the information was compiled;
- Who provided the information;
- When it was compiled; and
- Completeness as to total contents of files requested.

The actions taken by L&I seriously hampered the auditors' ability to determine the reliability and completeness of the information provided. The procedures also prevented the auditors from verifying that the department provided all available information in relation to requests.

L&I also prohibited auditors from accompanying a bureau investigator to a prevailing wage project site. According to L&I, this was to protect the integrity of the investigators' ongoing work and to prevent any compromise of the potential investigations initiated through a site visit. The result of this decision by L&I was that all information obtained from bureau investigators about bureau procedures and operations was through testimonial evidence rather than firsthand observation and confirmation by auditors. Compounding the issue was the fact that the audit team was unable to obtain documentation supporting the site visits performed by investigators during the audit period.

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Recommendation:

- Management of the Department of Labor and Industry should ensure during future audits that auditors are provided with timely access to original documents.

L&I Response

The bureau agreed to work with the auditors and provide access to original documentation when possible. In fact, the bureau offered the auditors the opportunity to review an original complaint file in Scranton; it allowed the auditors to review original files from the 1999 data collection; and it arranged for the auditors to review computer-screen data. However, the bureau could not simply turn over privileged legal file content to the auditors. Instead, it tried to accommodate the auditors by reconstructing investigative files from legal files.

Additionally, many of the investigative case records were not retained in a hard copy, file format in either the central or district offices. Rather, the bureau had to retrieve these records from individual investigators, in whatever form they existed. Significantly, the auditors, however, did not ask to see the original copies of records, which the bureau ultimately retrieved for them from the individual investigators.

Department of the Auditor General Comments

We reiterate that L&I refused to provide us with access to original documents. Evidence of L&I's failure to do so is discussed in the conclusion regarding the memorandum where they state that they "cannot give free access to complaint files. Copies of any investigation files of closed cases will be provided."

We also note here that L&I did not address our concern regarding their unwillingness to allow our auditors to accompany an L&I investigator to a prevailing wage project. This greatly limited our auditing functions, and we hope that L&I will reconsider its position on this point.

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Conclusion 4: The Department of Labor and Industry withheld case file information from auditors.

During the process of compiling our requested case file documentation, L&I characterized certain case records and documents to be “privileged documents” and “reconstructed files.” We were not provided with documents deemed “privileged” but were provided with “reconstructed files.” Despite a written request from the auditors, the department failed to provide specific information regarding information they deemed privileged, nor did they furnish a privileged document log. No instructions or information was provided regarding procedures involved with reconstructing case files.

Due to L&I's failure to provide the auditors with a listing of the specific information withheld from investigation case files, the auditors were unable to determine how the investigation was handled or resolved.

Recommendation:

- Where information is deemed to be privileged, L&I should provide auditors with descriptions of the withheld information, together with the reasons for withholding it.

L&I Response

As noted above, the bureau made its position clear to the auditors regarding ongoing open cases and files reconstructed from privileged legal files. The bureau did not want to compromise the integrity – or the confidentiality – of ongoing active investigations by having the auditors getting in the way of investigators or divulging confidential information to unauthorized parties. Nevertheless, the bureau did supply documentation to the auditors to allow them to verify that certain cases were, in fact, active. Moreover, as cases closed, the bureau endeavored to furnish the auditors with file records, even after the audit supervisor told legal counsel not to worry about them further.

When the auditors used the debarment list for case sampling purposes, they were in effect looking back as far as three years, and in some cases,

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longer — given the often extensive legal process preceding a debarment. In one instance, a sampled case dated back to 1991. In many instances the only remaining records of cases like these existed in the legal case files. To try to accommodate these requests, counsel retrieved legal files, and offered to reconstruct investigative files from those otherwise privileged and confidential files. Counsel generally discussed the legal privileges claimed and even offered to allow the auditors to examine public records, such as hearing transcripts. Legal counsel had started to prepare file inventories for these files, but was left with the impression that they would no longer be needed in light of the May 18, 2001, meeting, and subsequent comments from the audit supervisor.

The bureau understands the auditors' concerns on one hand; yet, feels that it went out of its way to assist the auditors on the other hand. These files were not the actual investigative case files, but litigation files maintained by the attorneys during the course of preparing cases for hearing. The legal office had an ethical obligation to maintain the confidentiality and privilege of its legal files. While bureau staff and legal counsel look forward to greater mutual understanding on this point for the future, it is hoped that this issue will become a moot one. When the bureau implements a standardized record keeping and retention schedule, the need to resort to legal files to reconstruct investigators' work product will be unnecessary.

Department of the Auditor General Comments

Although we were appreciative of L&I's efforts in attempting to reconstruct files, we were disappointed that these files were so poorly maintained that they had to be reconstructed in the first place. L&I, nonetheless, misses the point of this conclusion. While we agree that certain documents may have contained privileged information, when we requested that L&I provide us with a list of the documents being withheld, they failed to do so. We would strongly encourage L&I to consider our recommendation concerning privileged information.

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Appendix A – Department of Labor and Industry Response to Audit Report

December 4, 2001

Mr. Peter Speaks
Deputy Auditor General For Performance Audits
Department of the Auditor General
229 Finance Building
Harrisburg, PA 17120-0018

Dear Mr. Speaks:

Attached is the Bureau of Labor Law Compliance's response to the draft performance audit report regarding the oversight of the prevailing wage program.

The bureau is deeply committed to ensuring the appropriate enforcement of all the state's labor laws, including the Prevailing Wage Act. Since 1995 the bureau has developed extensive upgrades and enhancements in this regard.

Given that this audit report overlooks the many improvements that have been brought about in this area by hard working bureau employees, allow me to provide a brief summary that you can include in your final audit report:

- Today cases are being resolved within 2-4 months.
- In 1999, the department issued hearing protocols designed to streamline and expedite the prevailing wage hearing process.
- Three Bureaus: Labor Standards, Prevailing Wage, and Apprenticeship were merged into one -- the Bureau of Labor Law Compliance. All investigators have been cross-trained, allowing management to have over 30 investigators available to enforce the Prevailing Wage Act – almost three times the number available pre-1996.

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- From 1995 through November 2001, the bureau collected almost \$6 million in wages owed to workers. **That marks a dramatic increase in what was collected over the previous 4 years.**
- During that same time, **the bureau debarred 66 contractors or their principals** for intentionally violating the Prevailing Wage Act.
- Due to technology initiatives within our bureau, prevailing wage pre-determinations are available for review 24 hours after posting.
- The increased use of technology has allowed the bureau to improve customer service and offer enhanced enforcement while reducing operating expenses. Once relegated to a phone and a manual typewriter, investigators now are mobile satellite offices with a desktop computer, e-mail, fax and cellular phone.
- For the first time, prevailing wages are being set based on information voluntarily provided by the entire construction industry as opposed to establishing rates without consideration as to whether they are actually prevailing in their respective locales.

As noted above, the commitment to enforcing the Prevailing Wage Law since 1995 has been demonstrated in very tangible terms through enhanced enforcement and education of employers, the implementation of technological enhancements, the elimination of backlogs, increases in collections, and improvements in the adjudication time frame.

That said, the bureau recognizes that there is always room for improvement and already has taken several recommendations under advisement.

Obviously though, we have a different view of the level of cooperation extended to the audit team by Department personnel. Our staff offered assistance and endeavored to provide information as expeditiously as possible in light of the volume of requests.

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Should you have any questions regarding this response, please contact John Thomas, Director, Bureau of Financial Management at 717-787-1705 or johnthomas@state.pa.us.

Sincerely,

Robert E. Moore
Deputy Secretary for Safety and Standards

Enclosure

cc: Harvey C. Eckert
William A. Hardenstine
Barbara L. Shelton
Robert E. Moore
John Judge

**A Performance Audit of the Pennsylvania Department of Labor and Industry
Pennsylvania Department of the Auditor General**

Complaints, Collections & Contractor Debarments

Conclusion 1

L&I management is divorced from the process of planning, directing and controlling the complaint and investigation process leading to numerous program and accountability deficiencies.

Recommendation

L&I's lack of written policies and procedures governing the contractor collection process contributed to program shortcomings.

Therefore, L&I should:

- Establish statewide written policies and procedures for the receipt, review and disposition of complaints. Include procedures for complaint intake; telephone logs; third party complaints; and untimely complaints, consistent with the provisions of the *Linde* case.
- Develop contractor collection procedures that will ensure accountability over the contractor payments and the subsequent distribution of payments to workers. The procedures should address documentation of wage collections as well as the timely distribution of collected funds.

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- Develop a policy requiring that contractors pay back wages to L&I, who in turn makes payment to the worker. This will provide accountability over collections and subsequent distribution of payments to workers. This procedure would also maintain some level of confidentiality between the workers involved and their employer. However, the procedure requires careful coordination between the contractor, the worker, and L&I to ensure that fringe benefit payments to qualified plans occur and that withholdings for taxes and other purposes are accounted for.

In addition to improving the Prevailing Wage complaint and collections process through the development of written policies and procedures, L&I needs to provide additional program improvements by:

- Ensuring that management provides sufficient oversight so that all regions consistently follow procedures for receipt, review, documentation and disposition of complaints;
- Maintaining documentation of all Prevailing Wage collection and payment transactions;
- Segregating the current duties of the Scranton regional supervisor relative to complaint intake and assign these duties to the appropriate headquarters and regional personnel; and
- Researching all undistributed collections to assure that the effected workers receive the Prevailing Wage Act payments to which they are entitled.

Bureau's Response

In response to both the content and tone of this draft audit report, the bureau points out its increased collections as demonstrative of its commitment to the enforcement of Pennsylvania's Prevailing Wage Act and the protection of workers' wages. Between 1995 and 2001, the Bureau of Labor Law Compliance reports wage collections of \$5,955,894.67 for Pennsylvania workers under the Prevailing Wage Act ("ACT"). In contrast, under previous management, between 1991 and 1994 only \$629,483.77 was collected.

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**PREVAILING WAGE STATISTICS
SUMMARY**

Updated 11/19/01

Year	Collected
1991	\$ 82,642.75
1992	\$ 113,013.98
1993	\$ 257,714.54
1994	\$ 176,112.50
Total	\$ 629,483.77
Year	Collected
1995	\$ 176,844.44
1996	\$ 1,886,776.51
1997	\$ 388,924.70
1998	\$ 364,567.01
1999	\$ 458,062.02
2000	\$ 1,270,386.69
2001	\$ 1,410,333.30
Total	\$ 5,955,894.67

“Conclusion 1” of this report is completely wrong. Bureau management is extremely involved in the process of collecting wages under the Prevailing Wage Act. During the past six and a half years, management has helped develop and implement new methods of collections that have resulted in unprecedented levels of collections on the behalf of Pennsylvania workers.

The audit report also incorrectly states the function of the supervisor in determining whether a claim is valid and will be investigated. In reality, the supervisor merely reviews the complaints for accuracy, completeness and timeliness according to the Prevailing Wage Act and established Bureau policy. The supervisor also may review claims with the director if claim viability requires further discussion.

The Act requires workers to file protests within three months. By automatically excusing untimely protests, the bureau could be diverting resources from investigating claims from those workers who comply with the statute. Older claims also may be more difficult to investigate.

The bureau has discretion, of course, to investigate any contractor, whether an untimely complaint or no complaint is received. Therefore, the bureau may use its discretion to investigate a contractor as the result of an untimely claim on an

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individual case basis. Indeed, investigations may be started based on project inspections or third party complaints. The bureau, however, is hesitant to adopt formal procedures for untimely claims. First, those procedures might encourage workers to disregard the Act's three month filing period. Second, contractors actually could use those procedures to challenge the bureau's authority to investigate particular cases.

The bureau is not aware of any instance where breach of confidence occurred. While the bureau cannot guarantee absolute confidentiality (especially if a case goes to hearing), it is very concerned about unnecessary disclosure of complainant identities. Consequently, the bureau will remind its investigators not to disclose the identities of complaining workers.

The bureau acknowledges the inadequacy of the tracking system currently in use. However, the report fails to mention that this system is a vast improvement over the hand-written record keeping that existed when the bureau was created in 1996. In fact the tracking system has only become inadequate because of the extensive changes that have taken place in the bureau that have resulted in new investigation practices and quicker collection of wages (see collections statistics listed above). Corrective measures are already underway, and are being developed in conjunction with the overall process of establishing common communication systems for all employees.

In some instances, the bureau's collections were accomplished by direct payment from contractors to employees, which bureau personnel verified through documentation from the contractor or follow-up inquiries of the workers. Therefore, those collections would not show up in the Comptroller's Office's reports. The absence of back-up documentation at the bureau level for these collections will be addressed under a new records retention schedule.

The draft audit report is wrong in its reference to a \$10,000 payment of back wages from a contractor collected by the Attorney General and deposited in the General Fund. The auditors apparently overlooked the fact that statutory liquidated damages are payable to the Commonwealth. 43 P.S. § 165-11(e). L&I has no authority to order restitution under the Prevailing Wage Act in unintentional cases,⁸⁹ while the PW Act does not provide for restitution to employees in intentional cases.⁹⁰

⁸⁹ *All-Weld, Inc. v. Department of Labor and Industry*, 383 A.2d 982 (Pa. Cmwlth. 1978).

⁹⁰ *Commonwealth v. Dual Temp, Inc.*, Pred. Serial #s 62231(12), 71420(13), 68262(10) (Sec'y of L&I; Oct. 23, 1998), hearing examiner's report at p. 6.

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To help facilitate payments to employees, the Secretary of Labor and Industry has historically agreed to forgo statutory liquidated damages in intentional cases where the contractor voluntarily agrees to restitution. The bureau prefers to see this money go to the workers who earned it, and without whose testimony a debarment may not have been possible. Nonetheless, collections by the Attorney General -- unless authorized by that office to go directly to the workers -- must go to the Commonwealth's General Fund.⁹¹

Conclusion 2

L&I instituted a program of informal "field adjustments" that resulted in prevailing wage settlements without the input or testimony of the workers who filed the compliant.

Recommendation

L&I should comply with the provisions of the Act and the *Ganc* Decision and provide a hearing for all parties involved in a wage protest. In addition, L&I should develop written policies and procedures that address every aspect of the contractor settlement process.

Bureau's Response

Contrary to the recommendation in "Conclusion 2," the *Ganc*⁹² decision only applies to timely, written worker protests. The bureau will redouble its efforts to ensure that such workers are provided with notice and an opportunity for a hearing where the investigation does not fully substantiate, their protests. The workers, however, must avail themselves of this opportunity and support their respective claims at these hearings.

Conclusion 3

Complaint case records were prematurely discarded or destroyed in violation of L&I record retention policies.

Recommendation

L&I should:

- Require a suspension of records destruction by BLLC until L&I can ensure that BLLC personnel at headquarters and in the field understand

⁹¹ The courts have recognized that while it may not be the most efficient method of ensuring compliance with the Act, the procedures for imposing penalties are unambiguously set forth in section 11 of the Act. *All-Weld*, supra.

⁹² *Department of Labor and Industry v. Ganc*, 729 A.2d 668 (Pa. Cmwlth. 1999).

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current records retention schedules, policies and procedures and that appropriate safeguards are in place to manage records accordingly.

- Implement a uniform records management policy consistent with management directives.
- Establish statewide documentation standards for complaint and investigation files, including standards for cases file contents.

Bureau's Response

The bureau agrees to the need for a uniform record retention schedule. However, the prevailing wage record schedule on file with the Department's Bureau of Administrative Services pre-dates the establishment of the Bureau of Labor Law Compliance. Furthermore, that schedule does not take into account the fact that many records now are kept electronically. Therefore, the bureau will request revisions to its retention schedules consistent with present needs and capacities.

Conclusion 4

L&I did not track violations of the Prevailing Wage Act making it difficult to identify and classify intentional violations in order to apply appropriate sanctions provide by the Act.

Recommendation

L&I should:

- Develop written policies and procedures for classifying and maintaining records of violations of the Prevailing Wage Act. The classification system should include the following information: the date, time, place and nature of the violation; the name of the contractor(s) and worker(s) involved; an indication of whether the violation was intentional or unintentional; and, the type of violation committed (i.e., violation of fringe benefits; wages payments; worker(s) misclassified, etc.)
- Develop a mechanism to historically track contractor violations of the Prevailing Wage Act.
- Develop a standard protocol that would conclude debarment proceedings in a timelier manner.
- Update the Department of General Services Contractor Responsibility program whenever a contractor is debarred in compliance with Management Directives.

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Bureau's Response

Contrary to the implications in the audit report, the bureau director and coordinator for Prevailing Wage review collection reports, which may help identify repeat offenders. Additionally, the bureau will explore creating an electronic file of prior violators to assist investigators. However, experience has shown that a prior violation is not necessarily determinative of an intentional violation.

In response to accusations regarding a lax approach to debarring contractors, the audit report ignored the following points:

- Since 1995, a total of 66 contractors were debarred;
- An annual comparison of debarments shows that the number of debarments is consistent with prior years (see chart below);

Year	Number of Debarments
1991	5
1992	11
1993	9
1994	11
Total	36
1995	9
1996	13
1997	7
1998	15
1999	6
2000	8
2001	8
Total	66

- In 1999, the bureau took the unprecedented step of publishing the debarment list on the Internet so that it would be immediately available to awarding authorities, contractor groups, employee groups, and the public; and
- The bureau now routinely keeps the Department of General Services contractor responsibility list up to date with prevailing wage debarments.

With regard to the length of time debarment cases require, the audit report focuses on two cases that represent extreme examples rather than the norm. In one case cited,

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the contractor obtained federal court injunctions, thereby substantially delaying the administrative proceeding. These injunctions were appealed to the Third Circuit Court of Appeals. That court waited until the U.S. Supreme Court decided the identical issue in a California case before reversing the district court.⁹³ In the second case, criminal charges were filed against the contractor; the bureau's administrative action was held until the criminal charges were resolved.

Hearing protocols were issued on October 13, 1999, to expedite the debarment process. Significantly, the new protocols eliminate the extra steps of a hearing examiner's reports, exceptions and briefing on exceptions. Additionally, guidelines for the hearing examiner to use in scheduling cases were announced at the same time. While delays are inevitable in any type of litigation, the new protocols have reduced delays. Contested cases brought subsequent to October 13, 1999, generally have proceeded through the pleading stage to hearing and decision in under a year.

Contract Monitoring

Conclusion 1

The Department of Labor and Industry does not effectively monitor compliance with the Prevailing Wage Act.

Recommendation

L&I should:

- Develop a Field Investigator Manual to ensure that monitoring and supervision of prevailing wage projects is completed consistent with provision of the Act. This manual should cover the Prevailing Wage Act in detail, describe the practices and procedures used in the project site visit and investigative process, and provide example forms and reports, as well as instructions on how to complete them. The manual should be distributed to all Field Investigators and L&I Supervisors should enforce compliance with established policies and procedures.
- Develop written procedures for the proper completion of Interview Sheets, including an example of a properly completed sheet. These sheets should be forwarded to supervisors for their review to ensure compliance with written procedures, and to ensure that appropriate action is taken against contractors who fail to post rates as required by the Act. Further,

⁹³ See *Ferguson Electric, Inc. v. Foley*, 115 F.3d 237 (3d Cir. 1997).

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interview sheets should be filed in the county files along with the wage determination forms used in the site visit documentation process.

- Develop a procedural site-visit checklist to aid in documenting procedures performed by investigators during visits to project sites. The checklist combined with interview sheets would provide sufficient documentation to support the project site visit. The interview sheets and site visit checklist should be maintained in county files. This information would enable future investigators to follow-up on violations and concerns noted on previous visits. A copy of the checklist should also be submitted to regional supervisors for review and to support time allocated on the monthly report.
- Supervise investigators to ensure that they perform a sufficient number of site visits, complete site reviews in accordance with guidelines and properly document the results of their reviews. Increased supervision should also include reviews to ensure field investigators complete the following:
 - Review certified payrolls during site visits, to ensure that they are properly completed in accordance with the Act and Regulations;
 - Compare the list of project site contractors with the latest debarment list as a safeguard to ensure against ineligible contractors working on prevailing wage projects;
 - Provide the appropriate worker disclosure information to awarding agencies and ensure that this information is routinely posted at the outset of all projects;
 - Report contractors who fail to properly complete certified payrolls, and post prevailing wage rates and worker disclosure information, as required by the Act and Regulations; and
 - Ensure that contractors adequately document payments to workers for hours worked in more than one craft or classification.
- Develop, publish and distribute educational information about the Prevailing Wage Act for public bodies and contractors. (NOTE: The U. S. Department of Housing and Urban Development prepared an outstanding guide that could serve as an example for production of a state guide. It is entitled "*Making Davis-Bacon Work, A Contractors Guide to*

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Prevailing Wage Requirements for Federally-Assisted Construction Projects".)

- Establish the practice of completing educational site visits at the beginning of each major project. Require local public agencies to submit monthly project status reports to enable investigators to better coordinate site visits and develop a Field Investigator Procedures Manual.
- Develop a technology-based site visit tracking system that records and sorts site visits by project, investigator, region and statewide. Development of this system will allow management to respond more rapidly in its efforts to ensure that there is adequate coverage of prevailing wage project sites and that goals are being met.
- Consider developing a dedicated group of investigators for Prevailing Wage.

Bureau's Response

The audit report's implication regarding the bureau's effective monitoring of the Prevailing Wage Act does not adequately appreciate the bureau's collection of \$ 5,995, 894.67 in worker wages since 1995. Additionally, the bureau's continued willingness to do educational and out-reach programs upon request has not been considered.

Contrary to implications in the audit report, under the Act, the bureau has no statutory enforcement power against public bodies. The Act contains no penalties for public bodies not complying with the Act, nor does it give the bureau authority to formally audit public bodies' compliance with the Act. Nevertheless, the bureau investigates a public body's failure to request prevailing wages. To that end, the bureau has successfully settled at least two cases through direct payments by public bodies or their instrumentalities. Moreover, the bureau is currently engaged in litigation with project owners in two other cases over project coverage questions. The bureau's ultimate enforcement authority where the public body does not request wage rates, however, lies with the contractor, and not with the public body. *See DiLucente Corp. v. Prevailing Wage Appeals Board*, 692 A.2d 295 (Pa. Cmwlth. 1997). Therefore, while the bureau may request, for example, that the public body post the wage rates on a public project or collect certified payrolls, its enforcement resources, by necessity, must be focused on the actual contractors and subcontractors.

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The audit report attempts to cause alarm by citing that investigators visited “only” 36% of the total number of projects issued. However, the report fails to point out the bureau’s emphasis on visiting major construction projects where the highest number of workers could benefit. In this regard, the auditors seem to read too much into the Director’s May 7, 1998 memorandum, when they assume that 100% project visitations to be a realistic goal. Rather, the bureau has clarified that investigators are to concentrate on making site visits for projects over \$100,000. Moreover, 36% of total projects is a substantial amount by any means.

Every public construction project of \$25,000 or more is covered under the Act. This means that even the smallest of construction projects are covered. These projects are known to the bureau only because of the request for wage rates that is made to the bureau. That request includes a brief description of the work, and general time parameters for when the work is to be done. Frequently, small contracts are awarded and a contractor has a short timeframe to complete the work. Bureau investigators attempt to ascertain when the work will be conducted so that a site visit may be made, however, that information may be impossible to pin down on small jobs. A contractor may easily be in one county on a given day and a second or third county a day later. While the bureau will remind its investigators to call the project owner ahead of time to ensure work is on going, experience has shown that the information provided to the bureau is not always accurate.

Contrary to the audit narrative, the bureau has in place a system where the site visits are recorded and passed on to a different investigator each month. This helps to ensure that no single investigator is the only person visiting the larger projects. The system also creates an opportunity for a fresh pair of eyes to view that project. The bureau will explore the possibility of establishing an electronic tracking system. As noted in the audit report, investigators do not review the certified payroll records on every site visit. Since most projects include multiple contractors, this task would severely limit the number of site visits an investigator is able to complete. However, the Act requires the public officials from the awarding authority to ensure that those certifications are turned in and the wages paid.

The bureau concurs with the recommendation to develop a “manual” of procedures. However, the audit report fails to acknowledge written bureau policies, which were provided to the auditors. When the extensive development and enhancements in the bureau are complete, a manual will be developed. In fact, currently the Bureau is compiling information to form a handbook for all investigators while development is ongoing.

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Conclusion 2

L&I failed to adequately maintain monthly administrative reports and those reports that were maintained contained errors and did not provide sufficient information to evaluate investigator performance.

Recommendation

L&I should:

- Develop procedures for the preparation of monthly reports. These should be circulated to investigators, together with an example of a properly completed report.
- Develop and conduct formal training to assist the field investigators in the completion of monthly reports.
- Require that supervisors ensure that monthly reports are properly prepared and be held accountable by management for improperly prepared reports.
- Require L&I to adhere to the current records retention and disposition schedule. Which requires that investigator monthly activity reports be retained for 3 years.
- Ensure that record retention and disposition policies become part of a Field Investigator Procedures Manual referred to earlier.
- Develop a monthly report format that is more consistent with an itinerary/time sheet to show the actual period (time started and time finished) that investigators performed each activity in the field. In addition, the site visit checklist (recommended earlier) and the interview sheets should be attached to the report. The monthly reports, including the attached checklists and interview sheets, would provide information so that management can more effectively monitor investigator performance. Procedures for the proper preparation of the proposed report, together with examples, should be incorporated into the Procedures Manual referenced earlier.

Bureau's Response

The bureau concurs with the audit report regarding deficiencies in monthly reports. However, before 1995 there was no oversight of project visits and a county rotation process was not in place to prevent a single investigator from maintaining complete control in certain areas.

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The current management undertook a commitment to create more accountability on the part of investigators without significantly burdening them with paperwork and decreasing efficiency of investigations. This has been a work in progress, both because the type and depth of information needed must be continually reassessed, and also because individual investigators learn and adapt to change at different rates.

Evaluating the Rate Determination Process

Conclusion 1

There were errors, inefficiencies, and inconsistencies in L&I's processing and compilation of the 1999 survey data.

Recommendation

In order to correct the deficiencies noted above, we recommend that L&I establish a continuing program for determining prevailing wage rates in conformity with regulations that consists of voluntary filings of collective bargaining and non-collective bargaining rates. The use of a survey should be reserved only for those local jurisdictions where voluntary filings are not producing sufficient information to establish rates. When a survey is justified to produce data, L&I should first develop written policies and procedures governing the survey process. At a minimum written guidelines for a survey should include:

- Procedures for establishing prevailing wage rates. If future surveys only cover certain categories or classifications, the guidelines should establish specific criteria for how classifications are to be chosen and reviewed to ensure that all appropriate classifications are included;
- Procedures requiring that any changes to established rate and/or rate surveys be documented and approved;
- Policies concerning the use of investigator judgment and required documentation supporting the survey verification process;
- Requirements that a minimum number of survey verifications be completed through site visits;
- Procedures outlining steps to filter out duplicate surveys;
- Policies on record retention and documentation practices;
- Processes for the regular review of rates established under the Federal Davis-Bacon Act; and

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- Procedures establishing on-going efforts to regularly update existing rates in line with cost of living adjustments.

Finally, the Department should document the source for each rate that is in use, review the list on a regular basis, and update it as necessary.

Bureau's Response

- The 436 classifications covered by the 1999 survey were selected based on the 1999 court decision and data needs. All of those classifications identified were included in the data collection. Little or no data was received in the data collection for many of those classifications, but this is expected and does not present a problem in use of the data that was received.
- The 1999 data collection was used to fill in the gaps left by a Commonwealth Court decision of that same year.⁹⁴ If a CBA rate was determined to be a prevailing wage, either under the 1996 survey or post-survey, that rate was not affected by the Court's decision. Accordingly that classification would not have been resurveyed in 1999. Although the bureau was generally able to explain the post-1996 survey changes, the auditors' recommendation for backup documentation will be taken into consideration and the Bureau will document future changes in wage rates.
- Bureau investigators did have reasons for making include/exclude decisions, and they may have tried to err on the side of inclusion. In many cases they knew of the projects listed on the submittals, and knew the overall project value was over \$25,000 even if the particular contractor's cost was less. Submittals are to list the overall project cost, but responding subcontractors frequently misunderstand this item, or do not know the overall cost. While better documentation and written procedures would be preferred in this area, there is no reason to believe there was an adverse effect on the results.
- The bureau is always looking for ways to improve efficiencies in processes and will take the audit recommendations under advisement.

⁹⁴ *Pennsylvania State Building and Construction Trades Council v. Prevailing Wage Appeals Board*, 722 A.2d1139 (Pa. Cmwlth. 1999)

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- The bureau, based on its data needs and knowledge of Prevailing Wage administration, made decisions on which crafts should be included in the data collection. The Center for Information and Analysis did not analyze responses for the elevator constructor classification as described in the audit report. The alleged inconsistency described is insignificant for accurate determination of wages. As the experts in Prevailing Wage administration, bureau staffs are in the best position to know about construction crafts and their application on public projects.
- Errors in the computer application affected only the benefit rates for no more than 2 rates in the entire 1999 data collection, which covered 436 classifications. Steps have been taken to ensure that the error is not repeated in future surveys.
- Given the nature of Prevailing Wage data collection projects, it is expected that some duplicates may be included. There were steps taken during the project to eliminate or reduce duplicate submissions, and those steps were documented. These steps improved the final determinations.
- Response rate documentation was sufficient, although not exhaustive. Using Davis-Bacon methodology for the response rate calculation, the response clearly exceeded that required. At the time of the survey there seemed to be little need to go into meticulous calculation and record-keeping for this item. This issue did not have an effect on results.
- The bureau maintained the original responses. The example noted in the audit report is an isolated case.
- The bureau recognizes that there may well be room for improvement in its verification of submissions.
- The bureau has the responsibility for maintaining current rates. Just because there is not a comprehensive, ready list of rates with their respective sources does not mean there is a problem. Although it is rarely necessary to do so, given time for research, bureau staff can identify the source of rates. The bureau traditionally has not needed documentation to identify the source of rates. The bureau will consider the value of suggested enhancements.
- The bureau does regularly review and incorporate Davis-Bacon information and rates in its Prevailing Wage Determinations. Because the

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information is now available via the Internet, the bureau is better able to monitor the rates.

- To a large extent the formalization of procedures in establishing a continuing program for setting the Prevailing Wage rates has been delayed due to ongoing change initiatives at the federal level. Prevailing Wage and wage data collection programs do not exist in a vacuum. Federal Davis-Bacon data collection procedures and schedules have undergone many changes in the last 5 years, which have an impact on the necessity for and feasibility of data collection activities at the state level. A comprehensive Davis-Bacon survey of Pennsylvania construction rates is to take place in 2002, after which it would make sense for Pennsylvania to update or finalize its plans for obtaining data to set and maintain Prevailing Wage rates.
- Prevailing Wage surveys are a relatively new process and improvement often comes with experience. The argument would be in whether there are really 'deficiencies' and 'inconsistencies' in the data that constitute a problem. The draft audit report does not describe anything of much significance in this area.
- The bureau disagrees with the audit report regarding the setting of prevailing wages. The draft audit report fails to recognize that the Secretary of L&I has statutory authority independent of the PW Act to conduct surveys.⁹⁵ He or she is not mechanically limited by regulations to conducting "field surveys" only where there is insufficient information to determine a prevailing wage. Rather, the regulations are open-ended in terms of the type of information that may be sought and used. Indeed, it may be difficult in some cases to determine if the data on hand is sufficient without doing a survey.

Experience has shown that passive receipt of wage data often results in information from only the unionized segment of the construction industry. Moreover, it is almost impossible to integrate CBA submittals with data from non-union contractors. Union submittals frequently lack historical information as to the specific projects and number of workers actually paid CBA rates, while voluntary submittals from non-union employers are rare.

95 71 P.S. § 563; Pennsylvania State Building and Construction Trades Council, *supra*.

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The suggestion that the modal rates (most frequently paid rates) be used to determine prevailing wages could prove problematic. Modal rates “tend to favor union rates – generally the highest rates in any given locality – because other than the federal minimum wage, only union rates are likely to be identical to the penny and paid to any substantial number of employees.”⁹⁶ The Prevailing Wage Appeals Board approved the use of majority/averaging concepts to set prevailing wages.⁹⁷ This methodology is used by the federal government in setting Davis-Bacon wage rates, and is consistent with a “common and reasonable reading of the term” “prevailing.”⁹⁸ Additionally, this methodology is necessary to effectuate the court’s pronouncement in *Keystone Chapter of Associated Builders and Contractors v. Department of Labor and Industry*, 414 A.2d 1129, 1134 (Pa. Cmwlth. 1980), that “[i]f the collected data shows non-union construction to be the dominating segment of the industry, its wage rates should prevail as the general minimum wage rates. . . .” Significantly, the court did not say that non-union rates prevail only if they are the most frequently paid wages down to the exact penny.

The bureau is concerned that the passive receipt of wage data, coupled with the across-the-board adoption of modal rates as prevailing wages, will virtually preordain CBA rates as the prevailing wages – thereby exposing the PW Act to possible constitutional challenge.⁹⁹ It is safer to defend prevailing wage rates based on recent surveys, rather than relying on passive receipt of data as justification for adopting particular wage rates.

Finally, the Act does not contemplate absolute perfection at the predetermination stage of the rate-making process. Rather, it gives the Secretary of L&I two opportunities to determine the prevailing wages. First, he or she issues a predetermination, after “gathering information about prevailing wage rates...from various sources.”¹⁰⁰ One source could be a wage survey. If the predetermined rates are challenged by a “petition to review,” the Secretary must hold a hearing, receive

96 Armand J. Thieblot, *Prevailing Wage Legislation: The Davis-Bacon Act, State “Little Davis-Bacon” Acts, the Walsh-Healey Act, and the Service Contract Act*, Lab. Relations and Pub. Pol’y Series, No. 27, p. 19 (1986).

97 *In re Pennsylvania State Building and Construction Trades Council*, PWAB-66-1999 (Dec. 31, 1997) rev’d on other grounds, *Pennsylvania State Building and Construction Trades Council v. Prevailing Wage Appeals Bd.*, 722 A.2d 1139 (Pa. Cmwlth. 1999).

98 *Building and Construction Trades Council v. Donovan*, 712 F.2d 611 (D.C. Cir. 1983), cert. denied, 464 U.S. 1069 (1984).

99 *See, e.g., General Electric Co., Inc. v. New York State Department of Labor*, 936 F.2d 1448 (2d Cir. 1991).

100 *Pennsylvania Associated Builders and Contractors’ Appeal*, 51 Pa. D&C.2d 246, 248 (1970).

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evidence as to the prevailing wage rates and reconsider his or her predetermination in light of this evidence. Therefore, any perceived errors in the survey process are subject to correction through the statutory wage-rate appeal process.

Audit Limitations

Conclusion 1

L&I management influenced the free exchange of information by requiring all audit interviews be conducted in the presence of a departmental attorney.

Recommendation

During future audits, L&I should ensure that the free exchange of information occurs between L&I staff and the auditors. This will allow audits to be conducted more efficiently and beneficial conclusions to be reached.

Bureau's Response

The bureau disagrees with the audit report's assessment of free exchange of information that occurred during this audit.

L&I legal counsel worked tirelessly with the auditors to extend every courtesy in accommodating the auditors' schedules for witness interviews.

Conclusion 2

L&I did not provide requested information in a timely and consistent manner.

Recommendation

L&I should ensure during future audits that all information is provided in a timely and consistent manner.

Bureau's Response

To the contrary, staff went to great lengths to try to locate records and other information for the auditors, including reconstructing files for older cases and contacting individual investigators for records they might have maintained at their home offices. Unfortunately, these measures did take time.

The chart, printed under "Conclusion" 2 in Chapter 4 of the draft audit report, is not representative of the sheer volume of informational requests from the auditors. Legal counsel estimates receiving approximately 67 written informational or interview requests from the auditors, many of which requested extensive or multiple items of information or research.

Legal counsel continually met with the auditors and reviewed information requests with them to make sure that the requests had been fully addressed. The November

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21, 2000, request for information referenced in the draft report was responded to by the department's provision of amended collection reports. These reports speak for themselves. Furthermore, staff was left with the impression, from its May 18, 2001 meeting with representatives from the Auditor General's office, that the reconstructed investigation files were no longer an issue. Rather, the auditors' concern in terms of case files focused on 57 files for which little or no records had been located. Accordingly, staff immediately concentrated on identifying the investigators assigned to those 57 cases, contacting them to make sure that they did not have any additional records, and making them available for interviews by the auditors about these cases.

Legal counsel discussed with the auditors the legal privileges that it claimed for the reconstructed legal case files. The bureau also disagrees with the auditors' suggestion that attorney/client and work product privileges did not apply to audit requests. Moreover, legal counsel had actually started case inventories for the auditors. However, when counsel checked back with the Auditor General's audit supervisor, counsel was told not to worry about them.

Conclusion 3

L&I did not provide auditors with access to original documents.

Recommendation

L&I should ensure during future audits that auditors are provided with timely access to original documents.

Bureau's Response

The bureau agreed to work with the auditors and provide access to original documentation when possible. In fact, the bureau offered the auditors the opportunity to review an original complaint file in Scranton; it allowed the auditors to review original files from the 1999 data collection; and it arranged for the auditors to review computer-screen data. However, the bureau could not simply turn over privileged legal file content to the auditors. Instead, it tried to accommodate the auditors by reconstructing investigative files from legal files.

Additionally, many of the investigative case records were not retained in a hard copy, file format in either the central or district offices. Rather, the bureau had to retrieve these records from individual investigators, in whatever form they existed. Significantly, the auditors, however, did not ask to see the original copies of records, which the bureau ultimately retrieved for them from the individual investigators.

Conclusion 4

L&I withheld case file information from auditors.

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Recommendation

Where information is deemed to be privileged, L&I should provide auditors with descriptions of the withheld information together with the reasons for withholding it.

Bureau's Response

As noted above, the bureau made its position clear to the auditors regarding ongoing open cases and files reconstructed from privileged legal files. The bureau did not want to compromise the integrity – or the confidentiality – of ongoing active investigations by having the auditors getting in the way of investigators or divulging confidential information to unauthorized parties. Nevertheless, the bureau did supply documentation to the auditors to allow them to verify that certain cases were, in fact, active. Moreover, as cases closed, the bureau endeavored to furnish the auditors with file records, even after the audit supervisor told legal counsel not to worry about them further.

When the auditors used the debarment list for case sampling purposes, they were in effect looking back as far as three years, and in some cases, longer — given the often extensive legal process preceding a debarment. In one instance, a sampled case dated back to 1991. In many instances the only remaining records of cases like these existed in the legal case files. To try to accommodate these requests, counsel retrieved legal files, and offered to reconstruct investigative files from those otherwise privileged and confidential files. Counsel generally discussed the legal privileges claimed and even offered to allow the auditors to examine public records, such as hearing transcripts. Legal counsel had started to prepare file inventories for these files, but was left with the impression that they would no longer be needed in light of the May 18, 2001 meeting, and subsequent comments from the audit supervisor.

The bureau understands the auditors' concerns on one hand; yet, feels that it went out of its way to assist the auditors on the other hand. These files were not the actual investigative case files, but litigation files maintained by the attorneys during the course of preparing cases for hearing. The legal office had an ethical obligation to maintain the confidentiality and privilege of its legal files. While bureau staff and legal counsel look forward to greater mutual understanding on this point for the future, it is hoped that this issue will become a moot one. When the bureau implements a standardized record keeping and retention schedule, the need to resort to legal files to reconstruct investigators' work product will be unnecessary.

Pennsylvania Department of
the Auditor General

Appendix B – Case File Contents

PA DEPARTMENT OF LABOR & INDUSTRY
BUREAU LABOR LAW COMPLIANCE

DATE: rev. 7/25/01

Appendix B: CASE FILES RECEIVED FROM BLLC

	Case REF # (A1)	Case REF # (A6)	Case REF # (A10)	Case REF # (A12)	Case REF # (A14)	Case REF # (A16)	Case REF # (A19)	Case REF # (A19)	Case REF # (A23)	Case REF # (A24)	Case REF # (A25)	Case REF # (A26)	Case REF # (A26)	Case REF # (A31)	Case REF # (A32)	Case REF # (A33)	Case REF # (A33)	Case REF # (B23)	Case REF # (C1)	Case REF # (C1)	
1-	COMPLAIN T FORM	Y	N/A	Y	N/A	Y	N/A	N/A	N/A	Y	N/A	Y	N/A	N/A	Y	Y	N/A	Y	Y	N/A	N/A
2-	COMPLAIN ANT PAYROLL I NFORMATION	Y	N/A	Y	N/A	Y	Y	N/A	N/A	Y	Y	N/A	N/A	N/A	Y	Y	N/A	Y	Y	N/A	Y
3-	I NVESTI GATIVE SUMMARY	Y	N/A	Y	N/A	Y	Y	N/A	N/A	N/A	N/A	Y	N/A	N/A	Y	Y	N/A	N/A	N/A	N/A	Y
4-	P R O J E C T C O N T R A C T S P E C S	N/A	N/A	Y	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Y	N/A	N/A	N/A	N/A	N/A	N/A	N/A
5-	P R E V A I L I N G W A G E R A T E I N F O R M A T I O N	Y	N/A	Y	N/A	Y	N/A	Y	N/A	Y	Y	Y	N/A	Y	N/A	N/A	N/A	N/A	Y	Y	N/A
6-	S E L F A U D I T D O C U M E N T A T I O N	Y	N/A	N/A	N/A	Y	N/A	N/A	Y	Y	N/A	Y	Y	N/A	N/A	N/A	N/A	N/A	Y	Y	N/A
7-	C O R R E S P O N D E N C E S E L F A U D I T	N/A	Y	N/A	Y	N/A	N/A	N/A	Y	Y	Y	Y	Y	Y	Y	N/A	N/A	N/A	Y	Y	Y
8-	C O N T R A C T O R C E R T I F I E D P A Y R O L L	Y	N/A	N/A	N/A	Y	N/A	Y	Y	Y	Y	N/A	Y	N/A	Y	N/A	N/A	N/A	Y	N/A	N/A
9-	B L L C R E S P O N S E T O S E L F A U D I T	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Y	N/A	N/A	Y	N/A	Y	N/A	N/A	N/A	Y	N/A	N/A
10-	B L L C W A G E C A L C U L A T I O N	Y	N/A	N/A	N/A	N/A	N/A	Y	N/A	N/A	N/A	N/A	N/A	N/A	Y	N/A	N/A	N/A	N/A	N/A	N/A
11-	I N T E R V I E W N O T E S	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Y	N/A	Y	N/A	N/A	N/A	N/A	N/A	N/A
12-	B L L C I N F O R M A T I O N S H E E T S	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Y	N/A	N/A
13-	B L L C A U D I T C O R R E S P O N D E N C E	N/A	N/A	N/A	N/A	N/A	N/A	Y	N/A	Y	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Y
14-	S E T T L E M E N T C H E C K L I S T	Y	N/A	Y	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Y	Y	Y	Y	N/A	N/A	N/A
15-	S E T T L E M E N T C O R R E S P O N D E N C E (L e g a l)	N/A	Y	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Y	N/A	N/A	N/A	Y	N/A	N/A
16-	S E T T L E M E N T A G R E E M E N T	Y	N/A	Y	N/A	N/A	N/A	N/A	N/A	Y	N/A	N/A	N/A	N/A	N/A	Y	Y	Y	N/A	N/A	N/A
17-	V E R I F I C A T I O N O F P A Y M E N T	N/A	N/A	N/A	N/A	N/A	Y	N/A	N/A	Y	N/A	Y	Y	N/A	N/A	N/A	N/A	N/A	Y	N/A	N/A
18-	C O L L E C T I O N T R A N S M I T T A L S (L & I C o m p t r o l l e r)	Y	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Y	N/A	Y	N/A	N/A	N/A
19-	P L E A D I N G S	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
20-	L E G A L N O T I C E S	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
21-	L E G A L T R A N S M I T T A L S	Y	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Y	N/A	N/A	N/A	N/A
22-	F I N A L D E T E R M I N A T I O N	Y	N/A	Y	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Y	Y	N/A	N/A	N/A
23-	B L L C A D J U S T M E N T L E T T E R	N/A	Y	N/A	N/A	Y	Y	N/A	Y	Y	Y	Y	Y	N/A	N/A	N/A	N/A	N/A	Y	N/A	N/A
24-	S I T E V I S I T D O C U M E N T A T I O N	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Y	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

NOTES:

Note 1: "N/A" indicates document was not available in the case file received by the Auditors from the BLLC.

Note 2: At the time the Auditors evaluated the 20 case files sent from L&I, no description of case file contents was provided by the BLLC. Consequently, the Auditors used some judgement in determining the document names that should be maintained in a Prevailing Wage case file.

Note 3: The Auditors do not contend that all case files should contain all 24 different documents listed in the case file evaluation table. For instance, if the Prevailing Wage case did not go to the Office of Chief Counsel (OCC) there is no expectation by the Auditors the case file should contain legal transmittals and/or pleadings. On-the-other-hand, the Auditors feel there are certain documents that should be maintained in every case file. The first 18 document types listed in the case file evaluation table (with the exception of the complaint form, this case could have been generated by an investigation) should be maintained in every case file.

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Appendix C - Data Collection Plan

Appendix C

Draft: March 10, 1999

THE DATA COLLECTION PLAN

Introduction

Step 1. Plan the Data Collection: Designate Counties and Trades for Data collection

Designate the county(ies) and type of construction to be included in the data collection and the reference period for the construction projects to be considered "active". The reference period refers to the calendar time frame during which projects must be under construction (active) in order to be included in the data collection.

For the 1999 data collection, the counties, type of construction, and classifications by county to be included are designated by the Bureau of Labor Law Compliance (BLLC) based on the need for wage data. Type of construction will be limited to Building. The reference period of one year (calendar year 1998) was chosen by R&S based on a review of the Dodge project database. Since very few projects were active in some of the counties to be surveyed, it is necessary to use the entire one-year period allowed. And since the collection will include a great many counties at one time, it is helpful to respondents if one reference period is used for all.

Note that the data collection reference period refers to the time when the projects were active. A project is considered active from the time onsite work begins until it is released to and accepted by the owner. Peak employment for many contractors associated with active projects will often occur before the reference period and some will occur after the period. Their wage data would, however, be included in the data collection analysis.

Step 2. Identify Projects Using the Dodge Reports

R&S accesses the Dodge database to identify all active construction projects for the type/geographic area/time reference frame requested.

Consideration of project data may be extended out geographically (to include other counties) to the extent necessary to produce a sound, objective basis for the issuance of a determination of prevailing rates in the particular locality. Current research indicates that several counties, namely Cameron, Forest, Sullivan, Potter, Fulton and Juniata have too few projects identified in Dodge to expect adequate response data. It may be necessary to combine data with adjacent counties' in some cases.

A metropolitan county cannot be used as a source of data for a rural county (or vice versa); nor should counties with known distinctly different wage patterns be grouped together.

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Step 3. Determine the Projects to be included: Build the Project Database

The project file is the starting point for development of the data collection database. The file will identify projects valued at \$25,000 or more in the counties specified, and estimated to be active during 1998. R&S and the Bureau of Management Information Services (BMIS) will construct the project database.

Since the Dodge reports may not cover all eligible projects, the data collection procedure contains additional steps to uncover construction within the scope of the boundary frame. For example, general contractors are asked to supply information on additional projects that meet the data collection criteria. Also, public projects on file with BLLC will be added to the project file, if not already identified by Dodge or other sources. This work will be performed by R&S and BLLC.

BLLC inspectors will review the project file to identify projects that are clearly not "building". Those projects will be deleted from the file.

The file will then be sorted by prime contractor so that only one mailing will be made to each contractor.

Step 4. Train BLLC Staff

R&S will train staff to be involved in the data collection. Staff will be trained in the overall methodology, effective procedures for contacting potential respondents, use of the database system, and editing and correction procedures.

Step 5. Announce the Data Collection to Stakeholders

As the project begins, State House and Senate Caucuses and local parties who should be interested in the data collection will be notified. BLLC and the Legislative Liaison will coordinate this. A complete record will be maintained of correspondence concerning wage data collections.

In addition, staff responsible for the data collection met on February 18, 1999 with representatives of organizations such as: Associated Builders and Contractors, Associated General Contractors, Building Trades Councils and specialty trade contractor associations. A thorough explanation of the data collection procedure was provided to all parties, including the following information:

- The data collection boundary frame (emphasizing the reference period of January 1-December 31, 1998),
- The fact that wage/employment information will be solicited by the *Report of Construction Wage Rates* from contractors-general, prime, and subcontractors. Data

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will be accepted from labor unions and contractor associations. Information will be verified where appropriate.

- The period in which the data collection will be conducted, March 11- April 16, and;
- The active project file – the data collection is seeking data on building projects costing \$25,000 or more.

Projects will be identified in the database by the Dodge ID number. When additional projects are added it is important to assure that they are provided with an ID number and entered into the system. New projects identified by interested parties or from other sources will be assigned project identification numbers outside the scope of Dodge numbers. A record for each project will include a name or description of the project, including street address, end-use type, date project began, approximate value, and general contractor (including city, state and telephone number). Interested parties are asked to encourage contractors associated with the active projects to respond to the data collection when contacted.

Step 6. Mail Data Collection Instrument to Prime Contractors

Since the Dodge Reports do not contain the identity of all subcontractors (SCs), it is necessary to contact the general contractor (GC) or low bidder in some cases for the projects to obtain the names and addresses of their SCs. R&S will produce a file of Dodge projects and their contractors sorted by GC or prime contractor so that each firm will be contacted only once to provide information on all their active projects.

The GCs will be contacted first by a letter requesting an SC list, with a *Report of Construction Wage Rates* form enclosed for their own employees, and contacted by telephone as a follow-up for non-response or data clarification. In the event the GC is unknown, construction owners will be called and requested to provide any subcontractor information. BLLC will perform this phase. Respondents will send completed contractor lists and wage report forms to BLLC for processing.

The cut-off date of April 16 will be included in the letter requesting data to be used in the data collection. A five-week period will be allowed for submission of data.

Step 7. Handling Response

As prime contractors return data collection data, their responses are tracked in the database so that they will not be contacted for follow-up efforts. Project wage submittals will be separated from subcontractor lists.

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Step 8. Subcontractor Handling

After subcontractor lists are received and entered into the database, R&S will sort the subcontractors to identify those involved in more than one project. Wage report forms will then be mailed to the subcontractors. If subcontractor address data is incomplete, BLLC will call the subcontractors to obtain the necessary information. An accurate record of each telephone call (completed and not completed) and letter sent should be maintained on file.

Responses from subcontractors will also be tracked so that those that have submitted data will not be contacted in follow-up.

Step 9. Conduct Follow-Up

If responses to mailed wage report forms have not been received within two weeks, follow-up will be made to non-respondents. Repeated attempts will be made to contact each non-responding contractor (unless the contractor has stated explicitly that he does not wish to participate in the data collection). Also at this time, the clarification process will begin with contractors who submitted ambiguous or incomplete responses. Up to two weeks of intensive effort will be required after the response cut-off date to reconcile ambiguities and incompleteness in the data and to investigate unique "area practice" issues, if any, that are indicated by the data collection responses or other sources. BLLC investigators will perform this task and R&S staff will advise and consult.

All parties furnishing wage payment data in response to the data collection are to be sent a copy of a form letter acknowledging receipt of the information.

Step 10. Code and Enter Wage Data

Submittals will be sorted by County and sight-checked for potential duplicates. On exact duplicate submittals, the first submitted will be retained and others will be excluded. Data from the valid wage report forms will be recorded by BMIS, after BLLC has edited and clarified the data.

Step 11. Analyze and Summarize Response Data

The overall usable response rate for the data collection must meet or exceed 25 percent. The usable response rate is computed by dividing the number of responses received that provide usable data collection data by the total number of contacts made with GCs and SCs. Processing of the results file will be done by R&S.

If the data collection response rate proves inadequate, consideration will be given to further follow-up efforts.

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A wage rate for an individual class is to be recommended only when information on at least six workers is received from three or more contractors, none of which accounts for 60 percent or more of total reported employment. However, if the overall data collection usable response rate is 50 percent or more, data on only three workers, from two contractors may be utilized.

Step 12. Compute Prevailing Wage Rates

1. **Basic Rate.** If more than 50 percent of the employees in a single trade are paid at one rate, that rate prevails. Otherwise, the average mean rate prevails.
2. **Fringe Rate.** If it is found that a majority of the employees in any one craft are receiving the same basic hourly rate and the same amount of fringe benefits, that rate and fringe package will be determined as prevailing. If more than 50 percent of the employees in a single classification are paid any fringe benefits then fringe benefits prevail. If fringe benefits prevail in a classification and more than 50 percent of the employees receiving fringe benefits are paid the same total fringe benefit rate then that total rate prevails. If fringe benefits prevail, but 50 percent or less of the employees receiving benefits are paid at the same total rate, then the average of fringe benefits weighted by the number of workers who received fringe benefits prevails.

Fringe benefits are to be calculated collectively. Payments to be included in the calculations may be for any bona fide fringe benefits or those designated as cash payment made in lieu of fringes.

R&S will be responsible for all calculations.

Step 13. Investigate Outliers and Verify Response

Once the data are summarized, R&S will review results of computer statistical analysis that will indicate wage, benefit or employment data from responses that are outside the pattern of other submitted data. Such cases may be the result of data entry or other error. These outliers will be listed for investigation and possible follow-up by BLLC. BLLC will determine whether there was an error in transcribing the data and follow up with the reporting entity if necessary.

At this time a sample of responses will be drawn for verification. Between 2 and 5 percent of the submittals will be listed and given to BLLC staff to verify that the projects were done in the time frame described, and that employees and wages were as reported.

Submitted responses from debarred contractors will be subject to verification.

Corrections identified in this step will be applied to the database and wage rates recalculated.

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Step 14. Transmit Data collection Results to BLLC Web Site

Final wage results may be presented to the Prevailing Wage Advisory Board when complete, approximately May 21. Final wages will then be incorporated onto the BLLC web site.

All original records are to be preserved intact. The hard copies will be kept on file by BLLC and electronic copies will be retained by R&S and BLLC.

Index of Abbreviations and Glossary of Terms

BLLC – Bureau of Labor Law Compliance

R&S – Bureau of Research & Statistics

BMIS – Bureau of Management Information Services

ID – Identification, as in Dodge ID Number

SC – Subcontractor

GC – General, or prime, project contractor. In this document, a reference to general contractor means general and prime contractors.

Reference period – the period of time during which projects were to have been active in order to be considered for the data collection.

Peak Week – The week during a construction project when the most employees in a craft are employed on the project. This generally varies from classification to classification.

Dodge Reports – Construction project information compiled by the F.W. Dodge Division of the McGraw-Hill Companies.

Outliers – In a collection of data being studied, outliers are individual observations that lie outside normal range of the other observations.

Appendix D – Audit Report Distribution List

This report was initially distributed to the following:

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The report is also available from the Pennsylvania Department of the Auditor
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Pennsylvania 17120.*