

EMERGENCY

See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-09)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-	REGULATORY ACTION NUMBER	EMERGENCY NUMBER 2011-0422-01EE
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For use by Office of Administrative Law (OAL) only

NOTICE	REGULATIONS
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2011 APR 22 AM 8:58
 OFFICE OF ADMINISTRATIVE LAW

AGENCY WITH RULEMAKING AUTHORITY Department of Industrial Relations	AGENCY FILE NUMBER (If any)
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A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	NOTICE REGISTER NUMBER	PUBLICATION DATE

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Fee-based Compliance Monitoring by Department of Industrial Relations	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S) 2010-1028-01E
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2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT
	AMEND 16423
TITLE(S) 8	REPEAL 16450, 16451, 16452, 16453, 16454, 16455, 16460, 16461, 16462, 16463, and 16464

3. TYPE OF FILING

<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.	<input checked="" type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1).	<input type="checkbox"/> File & Print	<input type="checkbox"/> Print Only
<input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))		<input type="checkbox"/> Other (Specify) _____	

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)
 Notice of Proposed Extension of Emergency Action required under Gov't. Code sec. 11346.1(a) sent on April 14, 2011

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

<input type="checkbox"/> Effective 30th day after filing with Secretary of State	<input checked="" type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> §100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify) _____
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6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal
<input type="checkbox"/> Other (Specify) _____		

7. CONTACT PERSON John Cumming	TELEPHONE NUMBER (415) 703-4265	FAX NUMBER (Optional) (415) 703-4277	E-MAIL ADDRESS (Optional) jcumming@dir.ca.gov
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8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE <i>Christine Baker</i>	DATE 4/20/2011
TYPED NAME AND TITLE OF SIGNATORY Christine Baker, Acting Director of Department of Industrial Relations	

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Subchapter 4. Labor Compliance Programs

Article 1. Operation of Labor Compliance Program and Contracts Subject to Labor Compliance Program Jurisdiction

* * *

§16423. Approved Labor Compliance Program Required by Statute.

(a) Whenever an Awarding Body is required by statute to enforce or contract to enforce a Labor Compliance Program that contains or meets the requirements of Labor Code section 1771.5, the Awarding Body must have its own program that has been approved by the Director pursuant to section 16425 below, unless it ~~either (1) fully contracts out its responsibilities and decision-making authority to a third party program that has been approved by the Director pursuant to section 16426 below, or (2) has agreed to pay a fee to the Department of Industrial Relations for monitoring and enforcement pursuant to Subchapter 4.5 below.~~

(b) The governing board of any Awarding Body that is required to enforce a Labor Compliance Program under subpart (a) above shall make a written finding that the Awarding Body has

(1) established its own Labor Compliance Program in accordance with the requirements of Labor Code Section 1771.5(b) and this subchapter; or

(2) has contracted with a third party that has been approved by the Director to operate a Labor Compliance Program in accordance with the requirements of Labor Code Section 1771.5(b) and this subchapter; ~~or~~

(3) ~~has entered into an agreement with the Labor Commissioner for monitoring and enforcement pursuant to Subchapter 4.5 below.~~

Copies of the finding required by this subpart (b) together with (A) notice of whether or not the Awarding Body intends to initiate and enforce its Labor Compliance Program ~~either for (i) all public works projects in which the Awarding Body participates or (ii) only those public works projects in which the Awarding Body participates that are subject to the notice, fees, and fee waiver provisions of Article 1 of Subchapter 4.5 (beginning with section 16450) below, and, if applicable, (B) notice of any contract or agreement with a third party to operate a Labor~~

Compliance Program shall be provided promptly to the Director and prior to certifying to any other entity that the Awarding Body has complied with the statutory requirement to have a Labor Compliance Program.

(c) For purposes of these regulations, an approved program refers to the entity that has applied for and received approval by the Director based on a consideration of the factors in sections 16425, 16426, or 16427 below, and not to that entity's manual or methodology for conducting labor compliance enforcement.

(d) Unless otherwise required by statute, an Awarding Body is not required to have separate Labor Compliance Programs, and a third party Labor Compliance Program is not required to have separate approvals from the Director for different types of projects or funding sources, provided that (1) the Awarding Body has provided all notices required by subpart (b) above, (2) the Labor Compliance Program has timely filed all reports required by this subchapter, and (3) the Director has not otherwise limited the approved scope of operation for the Labor Compliance Program.

(e) The limited exemption from payment of prevailing wages provided by Labor Code Section 1771.5(a) shall *not* apply unless the Awarding Body elects to initiate and enforces a Labor Compliance Program for every public works project under the authority of the Awarding Body.

(f) A list of statutes that require Awarding Bodies to have a Labor Compliance Program as a condition of project authorization, project funding, or use of specified contracting authority shall be maintained on the Department of Industrial Relations' website.

Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5, Labor Code.

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~~Subchapter 4.5 Compliance Monitoring and Enforcement by Department of Industrial Relations~~

~~Article 1. Notices, Fees, and Fee Waivers.~~

~~§16450. Applicability.~~

~~The regulations in this subchapter shall apply to all of the following:~~

- ~~(a) any public works project awarded on or after August 1, 2010 that is funded in whole or in part from any bond issued by the state to fund public works projects;~~
- ~~(b) any public works project that is subject to a statutory requirement to pay a fee to the Department of Industrial Relations for the monitoring and enforcement of prevailing wage requirements on that project;~~
- ~~(c) any public works project that is subject to a statutory requirement to operate or enforce a labor compliance program or to contract with a third party to operate or enforce a labor compliance program, and for which, in lieu of contracting with another third party, the Awarding Body agrees to pay and the Labor Commissioner agrees to receive a fee for the monitoring and enforcement of prevailing wage requirements on that project; and~~
- ~~(d) all other public works projects undertaken by an Awarding Body that has elected to comply with the requirements of Labor Code Section 1771.55(a).~~

~~NOTE: Authority cited: Sections 54, 55, 1771.3, 1771.55 and 1773.5, Labor Code. Reference: Sections 17250.30 and 81704, Education Code; Section 6531, Government Code; Sections 1771.3, 1771.5, 1771.55, 1771.7, 1771.75, 1771.8, 1771.85, and 1771.9, Labor Code; and Sections 6804, 20133, 20175.2, 20193, 20209.7, 20688.6 and 20919.3, Public Contract Code.~~

~~§16451. Notice of Projects Subject to Fees.~~

~~(a) The Awarding Body shall provide the Director with notice of any project that is subject to the requirements of this subchapter as follows:~~

- ~~(1) For any project funded in whole or in part from a bond issued by the state to fund public works projects, the Awarding Body shall provide notice at the time it receives~~

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~~notice that the funding agency has awarded or released the funds, whichever is later.~~

~~(2) For any other project that is not subject to subpart (1) above, the Awarding Body shall provide notice at the time it awards the design-build contract, if using design-build contracting authority, or at the time it awards the initial prime contract, if using any other contracting authority.~~

~~(3) The notice required by this section shall be sent to the Office of the Director of Industrial Relations, Attention: Special Assistant, 455 Golden Gate Avenue, 10th Floor, San Francisco, CA 94102, and shall include the following information:~~

~~(A) The date of the contract;~~

~~(B) The names and contact information for the parties to the contract;~~

~~(C) A brief description of the work to be performed;~~

~~(D) The precise location or locations where the work will be performed;~~

~~(E) The estimated starting date of work on the project;~~

~~(F) The source or sources of any state-issued public works bond funding for the project, and the amounts paid or estimated to be paid by each source of that funding;~~

~~(G) The estimated total project costs, exclusive of amounts paid for land acquisition; and~~

~~(H) The name, title, and contact information for the Awarding Body representative who will be responsible for carrying out the Awarding Body's obligations under this subchapter.~~

~~(4) In the case of an ongoing project for which the Awarding Body is seeking to pay a fee to the Department of Industrial Relations for monitoring and enforcement in lieu of contracting with a third party for continued enforcement of a labor compliance program, the Awarding Body shall comply with the requirements of section 16453 below.~~

~~(b) The Director may provide for the submission of a single notice to comply with the requirements of subpart (a) above and the notification requirements of Section 1773.3 of the~~

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Labor Code.

~~(e) The Call for Bids, Design-Build Request, and the contract or purchase order shall contain appropriate language concerning the requirements of Division 2, Part 7, Chapter 1 of the Labor Code and shall also state that the project is subject to the requirements of this subchapter, including the obligation to furnish certified payroll records directly to the Labor Commissioner in accordance with section 16461 below.~~

~~(d) On each job site that is subject to compliance monitoring and enforcement by the Department of Industrial Relations under this subchapter, the Awarding Body shall post or require the prime contractor to post a Notice containing the following language:~~

~~"This public works project is subject to monitoring and investigative activities by the Compliance Monitoring Unit (CMU) of the Division of Labor Standards Enforcement, Department of Industrial Relations, State of California. This Notice is intended to provide information to all workers employed in the execution of the contract for public work and to all contractors and other persons having access to the job site to enable the CMU to ensure compliance with and enforcement of prevailing wage laws on public works projects.~~

~~"The prevailing wage laws require that all workers be paid at least the minimum hourly wage as determined by the Director of Industrial Relations for the specific classification (or type of work) performed by workers on the project. These rates are listed on a separate job site posting of minimum prevailing rates required to be maintained by the public entity which awarded the public works contract. Complaints concerning nonpayment of the required minimum wage rates to workers on this project may be filed with the CMU at any office of the Division of Labor Standards Enforcement (DLSE).~~

Local Office Telephone Number: _____

~~"Complaints should be filed in writing immediately upon discovery of any violations of the prevailing wage laws due to the short period of time following the completion of the project that the CMU may take legal action against those responsible.~~

~~"Complaints should contain details about the violations alleged (for example, wrong rate paid, not all hours paid, overtime rate not paid for hours worked in excess of 8 per day or 40 per week, etc) as well as the name of the employer, the public entity which awarded the public works contract, and the location and name of the project.~~

~~"For general information concerning the prevailing wage laws and how to file a complaint concerning any violation of these prevailing wage laws, you may contact any DLSE office. Complaint forms are also available at the Department of Industrial~~

Relations website found at www.dir.ca.gov/dlse/PublicWorks.html.²²

NOTE: Authority cited: Sections 1771.3, 1771.55 and 1773.5, Labor Code. Reference: Sections 17250.30 and 81704, Education Code; Section 6531, Government Code; Sections 1771.3, 1771.5, 1771.55, 1771.7, 1771.75, 1771.8, 1771.85, 1771.9, 1773.2, and 1773.3, Labor Code; and Sections 6804, 20133, 20175.2, 20193, 20209.7, 20688.6, and 20919.3, Public Contract Code.

~~§16452. Fees for Compliance Monitoring and Enforcement by Department of Industrial Relations.~~

~~(a) The fee for services under this subchapter shall be as follows:~~

~~(1) For any project subject to the requirements of this subchapter solely by reason of the receipt of state-issued bond funds, the fee shall be one-fourth of one percent of the funds released by the funding agency for the project;~~

~~(2) For any other project, the fee shall be equal to the greater of the following:~~

~~(A) one-fourth of one percent of the proceeds of any state-issued bond funds that have been provided for the project, or~~

~~(B) one-fourth of one percent of the total project costs.~~

~~(3) For purposes of this subchapter, the term "total project costs" shall include all costs that are incident to the construction of a public works project, including but not limited to financing, engineering, architecture, surveying, testing, legal, and construction management expenses, but shall not include amounts paid for land acquisition.~~

~~(4) In the case of an ongoing project for which the Awarding Body is seeking to pay a fee to the Department of Industrial Relations for monitoring and enforcement in lieu of contracting with a third party for continued enforcement of a labor compliance program, the Department may agree to accept a lesser or pro rata fee, depending upon the projected volume of monitoring and enforcement that remains to be done on the project.~~

~~(b) The fees required by this section shall be paid at the time the Awarding Body is required to provide the notice specified in section 16451(a) above and, if applicable, at the time of each successive release of state-issued bond funding from which an additional fee is due.~~

~~(c) For projects subject to the payment of a fee based on total project costs under subparts (a)(2) and (a)(3) of this section, the fee shall be calculated based on the total estimated costs as~~

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determined at the time the Awarding Body is required to provide notice under section 16451(a)(2) above. This fee shall constitute the entire fee due for the project and shall not be subject to further augmentation or reduction except as follows:

(1) The Department may require verification of items included in the estimate and may require the fee to be recalculated if the Awarding Body's estimate was not based on total project costs as defined in subpart (a)(3) of this section or was otherwise inaccurate.

(2) If the Awarding Body receives state-issued bond funding that makes it subject to a fee in excess of one-quarter of one percent of the total project costs, the Awarding Body shall pay the additional fee due up to the maximum fee specified in subpart (a)(2) of this section.

(3) If the Department receives duplicative payments that cause the amounts paid to exceed the maximum fee due under subpart (a)(2) of this section, the Department shall refund the excess amount.

(d) Fees collected pursuant to this section shall be deposited in the State Public Works Enforcement Fund and shall be used only for the monitoring and enforcement of prevailing wage requirements on projects subject to the fee.

(e) The Director may enter into agreements with any agency that awards state bond funds for public works projects for the purpose of receiving notice and direct payment of the fee specified in subpart (a)(1) or (a)(2)(A) above at the time the funds are released.

NOTE: Authority cited: Sections 54, 55, 1771.3, 1771.55 and 1773.5, Labor Code. Reference: Sections 17250.30 and 81704, Education Code; Section 6531, Government Code; Sections 1771.3, 1771.5, 1771.55, 1771.7, 1771.75, 1771.8, 1771.85, and 1771.9, Labor Code; and Sections 6804, 20133, 20175.2, 20193, 20209.7, 20688.6, and 20919.3, Public Contract Code.

~~§16453. Voluntary Payment of Fees for Compliance Monitoring and Enforcement by Department of Industrial Relations in Lieu of Enforcing Labor Compliance Program.~~

(a) An Awarding Body that is required by any existing statute to operate or enforce a labor compliance program or to contract with a third party to operate or enforce a labor compliance program may request the Labor Commissioner to provide the services specified in this

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~~subchapter in lieu of operating or enforcing its own labor compliance program or contracting with another third party program for the labor compliance program services specified in subchapter 4.~~

~~(b) The fee for services provided pursuant to this section shall be determined in the manner specified in section 16452 above, including any negotiated reduction, as authorized by subpart (a)(4) of section 16452.~~

~~(c) Services shall be provided under this section only by agreement, in writing, between the Awarding Body and the Labor Commissioner. The Labor Commissioner may decline to enter into an agreement where the available fee will not provide adequate funding or the Labor Commissioner lacks sufficient staff or resources to provide the services contemplated by this subchapter for the project in question.~~

~~(d) Notwithstanding subpart (c) of this section, for any project that requires both the use of a labor compliance program under Public Resources Code Section 75075 and the payment of a fee for compliance monitoring and enforcement by the Department under any other statute, the Labor Commissioner shall enter into an agreement to provide these services upon the request of an Awarding Body that agrees to pay a fee of no less than one quarter of one percent of the funds provided from the Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006 [Proposition 84] in addition to the fee that is otherwise due under section 16452(a) above.~~

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 17250.30 and 81704, Education Code; Section 6531, Government Code; Sections 1771.3, 1771.5, 1771.7, and 1771.8, Labor Code; Sections 6804, 20133, 20175.2, 20193, 20209.7, 20688.6, and 20919.3, Public Contract Code; and Section 75075, Public Resources Code.

~~§16454. — Payment of Fees for Compliance Monitoring and Enforcement by Department of Industrial Relations by an Awarding Body that Elects to Comply with the Requirements of Labor Code Section 1771.55(a).~~

~~An Awarding Body that elects to comply with the requirements of Labor Code Section 1771.55(a) for all public works projects that it undertakes shall do all of the following:~~

~~(a) Provide the notices required under section 16451 above.~~

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~~(b) Conduct a prejob conference before commencement of the work with contractors and subcontractors listed in the bid or who are required to be identified or prequalified in a Design-Build Contract. At the prejob conference applicable federal and state labor law requirements shall be discussed, and copies of suggested reporting forms furnished. A checklist, showing which federal and state labor law requirements were discussed, shall be kept for each conference. A checklist in the format of Appendix A (following section 16421 in subchapter 4 of these regulations) presumptively meets this requirement.~~

~~(c) Pay the fee prescribed by section 16452 above.~~

NOTE: Authority cited: Sections 1771.3, 1771.55 and 1773.5, Labor Code. Reference: Sections 1771.3 and 1771.55, Labor Code.

~~§16455. Fee Waivers; Exemption from Requirements of this Subchapter.~~

~~(a) An Awarding Body that operates an approved Labor Compliance Program for all public works projects in which the Awarding Body participates shall not be subject to the fees, notices, or compliance monitoring provisions of this subchapter, provided that it remains in compliance with the requirements of subchapter 4 (sections 16421 through 16439) and continues to monitor and enforce compliance on all of its projects, including projects that otherwise would be subject to this subchapter.~~

~~(b) An Awarding Body that operates an approved Labor Compliance Program only for those public works projects in which the Awarding Body participates that are subject to this subchapter pursuant to subparts (a) or (b) of section 16450 above, shall be exempt from the fees due under section 16452 above and shall not be subject to the compliance monitoring provisions of Article 2 of this subchapter (commencing with section 16460), provided that (1) it has provided the notices required by sections 16423(b) and 16451 above; (2) it remains in compliance with the requirements of subchapter 4 (sections 16421 through 16439); and (3) it continues to monitor and enforce compliance on all projects subject to this subchapter.~~

~~(c) Notwithstanding subparts (a) and (b), an Awarding Body shall lose its exemption and be subject to the fees and other requirements of this subchapter if it contracts with a third party to initiate and enforce labor compliance programs on its projects. This subpart shall not be construed as precluding the use of consultants under the following circumstances:~~

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~~(1) for legal representation or other licensed professional services that are directly related to the operation of the labor compliance program and that require special expertise that is not available among the Awarding Body's own employed staff;~~

~~(2) to augment employed staff in the performance of tasks required under section 16432 above, provided that the consultants exercise no discretionary authority on behalf of the Awarding Body and are under the direct day to day control and supervision of Awarding Body employees who are principally and primarily engaged in performing duties on behalf of the labor compliance program;~~

~~(3) for the purpose of reviewing program operations or providing other assistance on a purely advisory basis in which the consultant has no authority to act or withhold action on behalf of the Awarding Body nor the authority to compel, withhold, or delay any action by the Awarding Body; or~~

~~(4) for any project or purpose that would not be subject to a fee under this subchapter or require the use of an approved labor compliance program under section 16423 above.~~

~~(d) An Awarding Body that is exempt from the requirements of this subchapter, as specified in this section, shall be entitled to obtain or withhold the fees specified in section 16452 above for the purpose of funding its own labor compliance monitoring and enforcement activities to the extent authorized by any funding agency and any other applicable law.~~

~~(e) The fee waiver provided by this section shall apply automatically to any Awarding Body Labor Compliance Program that has been approved pursuant to sections 16425, 16426, or 16427 above and that has provided notice under section 16423(b) above with respect to whether it intends to enforce or continue enforcing its Labor Compliance Program for all its public works projects or only those projects that are subject to a fee under this subchapter. The Director shall maintain a list of Awarding Body Labor Compliance Programs that are exempt under either subpart(a) or subpart(b) of this section and may post this list on the Department of Industrial Relations' website.~~

NOTE: Authority cited: Sections 1771.3, 1771.55 and 1773.5, Labor Code. Reference: Sections 17250.30 and 81704, Education Code; Section 6531, Government Code; Sections 1771.3, 1771.5, 1771.55, 1771.75, 1771.85, and 1771.9, Labor Code; and Sections 6804, 20133, 20175.2, 20193, 20209.7, 20688.6, and 20919.3, Public Contract Code.

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~~Article 2. Compliance Monitoring by Labor Commissioner~~

~~§16460. Establishment of Compliance Monitoring Unit.~~

~~(a) For the purposes of carrying out the specific labor compliance monitoring and enforcement responsibilities prescribed by Labor Code Section 1771.55 and the regulations in this Article, the Labor Commissioner shall establish a Compliance Monitoring Unit within the Division of Labor Standards Enforcement. The functions carried out by the Compliance Monitoring Unit shall be in addition to and shall not limit or supplant the other public works investigation and enforcement responsibilities and authority of the Labor Commissioner and the Division of Labor Standards Enforcement under any other statute or regulation.~~

~~(b) Nothing in this subchapter shall be construed as (1) limiting the responsibility and authority of an Awarding Body to take cognizance of prevailing wage violations under Labor Code Section 1726 and take any appropriate action pursuant to and in accordance with that responsibility and authority, or (2) precluding any other remedies otherwise authorized by law to remedy violations of Division 2, Part 7, Chapter 1 of the Labor Code.~~

~~(c) The failure of the Compliance Monitoring Unit, the Division of Labor Standards Enforcement, or any other part of the Department of Industrial Relations to comply with any requirement imposed by this subchapter shall not of itself constitute a defense to the failure to pay prevailing wages or to comply with any other obligation imposed by Division 2, Part 7, Chapter 1 of the Labor Code.~~

NOTE: Authority cited: Sections 54, 55, 1771.55 and 1773.5, Labor Code. Reference: Sections 1726, 1741, 1771.2, 1771.5, 1771.55, and 1781, Labor Code.

~~§16461. Review of Payroll Records and other Monitoring and Investigative Activities of Compliance Monitoring Unit.~~

~~(a) The function of the Compliance Monitoring Unit is to ensure that public works contractors performing work in the execution of a contract, on projects for which a fee is paid to the Department of Industrial Relations, comply with the prevailing wage requirements found in the Division 2, Part 7, Chapter 1 of the Labor Code. Among other things, this section is intended to~~

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~~(1) provide the Compliance Monitoring Unit, Awarding Bodies, public works contractors, and representatives of the Department of Industrial Relations and the Division of Labor Standards Enforcement with common terminology as they perform their respective roles in prevailing wage compliance, and (2) set forth the manner in which the Compliance Monitoring Unit will ensure compliance with and enforcement of prevailing wage laws on public works projects.~~

~~(b) Contractors and subcontractors shall keep accurate payroll records in accordance with Labor Code Section 1776, and such records shall be furnished to the Compliance Monitoring Unit at times designated by the Awarding Body in the contract, which shall be at least monthly, or within 10 days of any separate request by the Compliance Monitoring Unit. Payroll records shall be furnished in a format prescribed by section 16401 of Title 8 of the California Code of Regulations, with use of the current version of DIR's "Public Works Payroll Reporting Form" (A-1-131) and "Statement of Employer Payments" (DLSE Form PW26) constituting presumptive compliance with this requirement, provided the forms are filled out accurately and completely. In lieu of paper forms, the Compliance Monitoring Unit may provide for and require the electronic submission of certified payroll reports.~~

~~(c) Payroll records timely furnished by contractors and subcontractors in accordance with this section shall be reviewed by the Compliance Monitoring Unit as promptly as practicable after receipt thereof, but in no event more than 30 days after such receipt. "Review" for this purpose means the inspection of the records furnished to determine whether (1) all appropriate data elements identified in Labor Code Section 1776(a) have been reported; (2) certification forms have been completed and signed in compliance with Labor Code Section 1776(b); and (3) no less than the correct prevailing wage rates have been reported as paid for each classification of labor listed thereon.~~

~~(d) On a random basis and at such other times as it deems appropriate, the Compliance Monitoring Unit may also confirm the accuracy of payroll reports. "Confirmation" for this purpose means the corroboration of information in payroll reports through independent sources, including without limitation worker interviews, examination of any time and pay records found within the definition of "Payroll Records" in section 16000 of Title 8 of the California Code of Regulations, direct verification of "Employer Payments" (as defined at section 16000 of Title 8 of the California Code of Regulations) through third party recipients of those payments, or any~~

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~~other legal and reasonable method of corroboration. As part of its confirmation process, the Compliance Monitoring Unit may require contractors and subcontractors to furnish for inspection itemized statements prepared in accordance with Labor Code Section 226. The Compliance Monitoring Unit may conduct random confirmation based on a recognized statistical sampling of the records submitted.~~

~~(e) Representatives of the Compliance Monitoring Unit may conduct in person inspection(s) at the site or sites at which the contract for public work is being performed ("On Site Visits"). On Site Visits may be undertaken randomly or as deemed necessary by the Compliance Monitoring Unit. On Site Visits may include visual inspection of required job site notices, including but not limited to (1) the determination(s) of the Director of Industrial Relations of the prevailing wage rate of per diem wages required to be posted at each job site in compliance with Labor Code Section 1773.2; (2) the Notice of pay days and time and place of payment required by Labor Code Section 207; and (3) the form prescribed by section 16451(d) above. On Site Visits may also include inspections of records, inspections of the work site and observation of work activities, interviews of workers and others involved with the project, and any other activities deemed necessary by the Compliance Monitoring Unit to ensure compliance with prevailing wage requirements. In accordance with Labor Code Section 90, the Compliance Monitoring Unit shall have free access to any construction site or other place of labor and may obtain any information or statistics pertaining to the lawful duties of the Labor Commissioner, including but not limited to evidence of compliance with Labor Code Section 226 [itemized wage statements for employees] and any other laws enforced by the Labor Commissioner.~~

~~(f) An Audit shall be prepared by the Compliance Monitoring Unit upon determining that there has been a violation of Division 2, Part 7, Chapter 1 of the Labor Code resulting in the underpayment of wages. An "Audit" for this purpose means as a written summary reflecting prevailing wage deficiencies for each underpaid worker, and including any penalties to be assessed under Labor Code Sections 1775 and 1813.~~

NOTE: Authority cited: Sections 54, 55, 1771.55 and 1773.5, Labor Code. Reference: Sections 90, 207, 226, 1771.5, 1771.55, 1773.2, 1775, 1776, and 1813, Labor Code.

~~§16462. — Complaints.~~

Emergency Regulation(s) Amending Text in Section 16423 and Deleting Regulations in Subchapter 4.5 of Chapter 8, Title 8, California Code of Regulations [10-20-10]

~~(a) The Compliance Monitoring Unit shall accept complaints from workers or members of the public alleging nonpayment of the required minimum rates of pay to workers or other violations of the prevailing wage laws on projects that are subject to this subchapter. Complaints shall be filed in writing with the Division of Labor Standards Enforcement as soon as the alleged violation is known, and the Division may provide for complaints to be filed electronically. A complaint need not conform to any technical requirements as long as it contains sufficient information to identify the project, affected parties and dates, and describes the subject matter of the complaint in enough detail to enable the Division to commence an investigation into whether a violation occurred.~~

~~(b) The Compliance Monitoring Unit shall notify the contractor and subcontractor of any non-compliance as soon as practicable where such notice may enable the contractor or subcontractor to correct the non-compliance. This early notice may describe the nature of the violation only, and it is not necessary that the notice include a full summary of any unpaid wages due.~~

NOTE: Authority cited: Sections 54, 55, 1771.55 and 1773.5, Labor Code. Reference: Sections 1741, 1771.55, and 1775, Labor Code.

~~**§16463. Withholding of Contract Payments When Payroll Records are Delinquent or Inadequate.**~~

~~(a) "Withhold" means to cease payments by the Awarding Body, or others who pay on its behalf, or agents, to the general contractor. Where the violation is by a subcontractor, the general contractor shall be notified of the nature of the violation and reference made to its rights under Labor Code Section 1729.~~

~~(b) "Contracts." Except as otherwise provided by agreement, only contracts under a single master contract, including a Design-Build contract, or contracts entered into as stages of a single project, may be the subject of withholding.~~

~~(c) "Delinquent payroll records" means those not submitted on the date set in the contract.~~

~~(d) "Inadequate payroll records" are any one of the following:~~

~~(1) A record lacking any of the information required by Labor Code Section 1776;~~

~~(2) A record which contains all of the required information but is not certified, or is certified by~~

Emergency Regulation(s) Amending Text in Section 16423 and Deleting Regulations in Subchapter 4.5 of Chapter 8, Title 8, California Code of Regulations [10-20-10]

~~someone who is not an agent of the contractor or subcontractor;~~

~~(3) A record remaining uncorrected for one payroll period after the Labor Commissioner has given the contractor or subcontractor notice of inaccuracies detected by audit or record review. However, prompt correction will stop any duty to withhold if such inaccuracies do not amount to one (1) percent of the entire Certified Weekly Payroll in dollar value and do not affect more than half the persons listed as workers employed on that Certified Weekly Payroll, as defined in Labor Code Section 1776 and section 16401 of Title 8 of the California Code of Regulations.~~

~~(e) The Labor Commissioner may require the Awarding Body to withhold contract payments when payroll records are delinquent or inadequate. The amount withheld shall be limited to those payments due or estimated to be due to the contractor or subcontractor whose payroll records are delinquent or inadequate, plus any additional amount that the Labor Commissioner has reasonable cause to believe may be needed to cover a back wage and penalty assessment against the contractor or subcontractor whose payroll records are delinquent or inadequate; *provided that* a contractor shall be required in turn to cease all payments to a subcontractor whose payroll records are delinquent or inadequate until the Labor Commissioner provides notice that the subcontractor has cured the delinquency or deficiency.~~

~~(f) When contract payments are withheld under this section, the Labor Commissioner shall provide the contractor and subcontractor, if applicable, with immediate written notice that includes all of the following: (1) a statement that payments are being withheld due to delinquent or inadequate payroll records, and that identifies what records are missing or states why records that have been submitted are deemed inadequate; (2) specifies what amounts the Awarding Body has been directed to withhold; and (3) informs the contractor or subcontractor of the right to request an expedited hearing to review the withholding of contract payments under Labor Code Section 1742, limited to the issue of whether the records are delinquent or inadequate or the Labor Commissioner has exceeded his or her authority under this section.~~

~~(g) No contract payments shall be withheld solely on the basis of delinquent or inadequate payroll records after the required records have been produced.~~

~~(h) In addition to withholding contract payments based on delinquent or inadequate payroll records, penalties may be assessed under Labor Code Section 1776(g) for failure to timely~~

comply with a written request for certified payroll records.

~~(i) This section does not apply to the withholding of contract payments based upon the issuance of a civil wage and penalty assessment which finds a contractor liable for unpaid wages or penalties under Sections 1775, 1776(g), or 1813 of the Labor Code.~~

NOTE: Authority cited: Sections 1771.55 and 1773.5, Labor Code. Reference: Sections 1729, 1771.5, 1771.55, 1742, 1775, 1776, and 1813, Labor Code.

~~§16464. — Issuance of Civil Wage and Penalty Assessment upon Determination that Contractor or Subcontractor has Violated Prevailing Wage Requirements.~~

~~If the Compliance Monitoring Unit determines that there has been any violation of Division 2, Part 7, Chapter 1 of the Labor Code, the Labor Commissioner shall issue and serve a Civil Wage and Penalty Assessment to the contractor or subcontractor or both, in accordance with the requirements of Labor Code Section 1741.~~

NOTE: Authority cited: Sections 1771.55 and 1773.5, Labor Code. Reference: Section 1741, Labor Code.

TITLE 8. DEPARTMENT OF INDUSTRIAL RELATIONS

NOTICE OF PROPOSED EXTENSION OF EMERGENCY ACTION

The Acting Director (“Acting Director”) of the Department of Industrial Relations (“Department”) proposes to extend the emergency regulatory action taken on November 4, 2010, in OAL File No. 2010-1028-01 E, for an additional ninety (90) days pursuant to section 11346.1 of the Government Code.

Emergency Regulatory Action: On November 4, 2010, the Office of Administrative Law approved the former Director’s emergency rulemaking action to repeal Subchapter 4.5 (commencing with section 16450) of Chapter 8 of Division 1 of Title 8 of the California Code of Regulations and to amend section 16423 (within Subchapter 4 of the same chapter and division) in order to eliminate references to Subchapter 4.5. The Acting Director proposes to extend this action in order to provide additional time to commence a regular rulemaking to repeal or amend all or some of the regulations in Subchapter 4.5.

Basis for Prior Action: Emergency action was taken for the purpose of suspending and postponing the commencement of fee-based compliance monitoring and enforcement by the Department on public works projects pursuant to sections 1771.3 and 1771.55 of the Labor Code and related statutes. It was necessary to take this action on an immediate emergency basis due to questions raised over the legality of using bond funds to pay the fees set forth in section 16452, which in turn prevented the state from selling bonds to fund public works construction due to bond counsel’s unwillingness to write an unqualified opinion for the sale of any bond that may be subject to the fee. Because the applicability of sections 1771.3 and 1771.55 of the Labor Code and related statutes were conditioned upon the Director’s adoption of implementing regulations, the suspension and postponement of the effective date of those regulations had the effect of suspending and postponing implementation of the underlying statutes and removing the impediment to selling bonds until the legal questions were addressed.

Basis for Extension of Emergency Action: The situation described above continues to exist; that is, questions are still being raised over the legality of using bond funds to pay the fees set forth in section 16452, and these questions in turn prevent bond counsel from issuing the unqualified opinion letters that are needed in order for the state to be able to sell bonds to fund public works construction. Although bond counsel now agrees that bond funds may be spent to monitor and enforce prevailing wage requirements on bond-funded public works projects, bond counsel remains unwilling to write unqualified opinion letters due to questions over some of the terminology in sections 1771.3 and 1771.55 of the Labor Code and related statutes, and in the Subchapter 4.5 regulations. The Acting Director in consultation with bond counsel and other interested parties is now in the process of drafting and sponsoring proposed legislation that will fully resolve these issues. However, until such legislation is proposed and adopted, and the implementing regulations revised, the previously adopted regulations must remain in suspense or be repealed.

Substantial Progress and Due Diligence Toward Repeal or Replacement of Suspended Regulations through Regular Rulemaking: The legal questions that prevented bond counsel from writing unqualified opinion letters were first raised in oral conversations during the last week of July of 2010 and first expressed writing in correspondence to the State Treasurer and the Director of Finance dated October 19, 2010. (A copy of this letter was included along with other correspondence related to the emergency in the record for the emergency regulatory action taken on November 4, 2010.) In response to the issues raised by bond counsel, the Department prepared a “white paper” on the historical development of California’s Prevailing Wage Law, the obligations of awarding bodies in public works construction, and industry-recognized construction practices. The purpose of this white paper, which was transmitted by the former Director to the Attorney General on December 10, 2010, was to establish that the monitoring and enforcement of prevailing wage requirements was a long-recognized activity and cost attendant to public works construction rather than a new obligation imposed by SBX2-9.

In a formal response letter dated February 9, 2011,¹ bond counsel accepted the white paper’s central premise that prevailing wage enforcement was an expense associated with public works construction and accordingly that bond funds legally could be used for this purpose. However, bond counsel also expressed the belief that statutory and regulatory revisions were still “necessary to the issuance of unqualified general bond opinions in the future by the Attorney’s General Office.” The Department has followed up by drafting proposed statutory amendments to address specific concerns raised by bond counsel. These proposals were forwarded to bond counsel for review on February 25, 2010, and were the subject of a follow-up meeting on April 6, 2011, with bond counsel anticipating providing a written response to the Department by approximately April 22, 2011.

Because any regulatory changes are necessarily subordinate to and dependent upon whatever amendments are made to the statutes, the Acting Director cannot at this time predict what substantive regulatory changes will be proposed or their precise timing. Since Government Code section 11346.1(h) limits an agency to a maximum of two 90 day extensions of an emergency regulatory action, there is no reasonable possibility of first having statutory changes introduced and enacted and then being able to propose and adopt substantive regulatory revisions through the regular rulemaking process, all within the maximum effective period for the emergency repeal. What the Acting Director anticipates instead is commencing a regular rulemaking within the next month to permanently repeal any regulatory provisions within Subchapter 4.5 (commencing with section 16450) of Chapter 8 of Division 1 of Title 8 of the California Code of Regulations, that continue to be an impediment to the issuance of unqualified bond opinions by the Attorney General’s Office.

FINDING OF CONTINUING EMERGENCY

The Director finds that the emergency described in the Notice of Proposed Emergency Action issued on October 21, 2010 and incorporated herein by reference continues. For the reasons explained in that Notice and underlying correspondence, as supplemented by bond coun-

¹ The conclusion reached in the letter was first expressed orally and tentatively in a meeting on December 15, 2010.

sel's letter of February 9, 2011 (referred to above), bond counsel will be unwilling to provide unqualified bond opinions if Subchapter 4.5 goes back into effect or if revisions are not made to the underlying legislation. Without unqualified bond opinions, the state's public works bonds will be unmarketable, which will leave the state unable to pay for public works projects and result in a loss of employment and economic stimulus to the community at a time of continuing stress to the local, state, and national economies.

INCORPORATION OF PRIOR EMERGENCY REGULATORY ACTION

In further support of this Notice of Proposed Extension of Emergency Action, the Acting Director incorporates herein by reference the Notice of Proposed Emergency Action and documentation submitted in support of the emergency regulatory action that was approved by the Office of Administrative Law on November 4, 2010 in OAL File No. 2010-1028-01 E.

STATEMENT UNDER TITLE 1, CALIFORNIA CODE OF REGULATIONS, §48

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

Title 1, California Code of Regulations, section 55(b) sets forth the requirements for submitting comments to the Office of Administrative Law on the proposed emergency action. Comments must be in writing, must identify the topic of this rulemaking, and must be submitted directly to the Office of Administrative Law as follows:

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814-4339
Fax: (916) 323-6826
e-mail: staff@oal.ca.gov

In addition, a copy of the comments must be transmitted to the Department's contact person for this rulemaking. To ensure prompt receipt and consideration of your comments, the Department requests that you transmit a copy either by e-mail to SBX2-9comments@dir.ca.gov, or by fax, to the attention of John Cumming, at 415/703-4277.

AUTHORITY AND REFERENCE

Authority: Sections 54, 55, 1771.55(b), and 1773.5, Labor Code.

Reference: Sections 17250.30 and 81704, Education Code; section 6531, Government Code; sections 1771.3, 1771.55, 1771.75, 1771.85, and 1771.9, Labor Code; sections 6804, 20133, 20175.2, 20193, 20209.7, 20688.6, and 20919.3, Public Contract Code; and section 75075, Public Resources Code.

UPDATED INFORMATIVE DIGEST AND DISCLOSURES

The Acting Director readopts and incorporates by reference the Informative Digest/Policy Overview Statement and the Disclosures Regarding the Proposed Action as set forth in the Notice of Proposed Emergency Action issued on October 21, 2010. Since the issuance of that Notice, the Department has suspended any and all activities of the Compliance Monitoring Unit (“CMU”) and has returned any and all fees that had been submitted by awarding bodies to pay for CMU services.