

Chapter Ind 92

STATE CONTRACT BUILDINGS AND PUBLIC WORKS PROJECTS, EXCEPT BRIDGES AND HIGHWAYS

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Note: See explanatory note at the end of this chapter.

Ind 92.01 Definitions. The following definitions shall apply in wage rate determinations made by the department pursuant to section 103.49, Wis. Stats.:

(1) EMPLOYER, as used in these rules and in section 103.49 (3) Wis. Stats., includes any contractor, subcontractor; agent or other person, doing or contracting to do all or a part of the work.

(2) AREA means the county or other locality from which labor for any project would normally be secured.

(3) LOCALITY means the geographical area from which the persons in the trades or occupations to be used in the performance and execution of the project will normally be secured for employment on such public works or other similar projects.

(4) TRADE OR OCCUPATION means one of the job classifications that identifies the specific work regularly done by laborers, workmen and mechanics in the erection, construction, remodeling or repairing of any building or any other works projects, on a contract basis on projects that are similar to the contract work in the area. The duties, kinds of work, and other component elements envisioned by the department for job classifications of trades and occupations are those which prevail and are historically recognized in the construction industry for work on projects of a character similar to the contract work.

(5) LABORERS, WORKMEN AND MECHANICS include properly registered and indentured apprentices but exclude clerical, supervisory, and other personnel not performing manual labor.

(6) THE PREVAILING WAGE RATE included in a wage determination for any given trade or occupation is the hourly basic rate plus the hourly contributions for the types of economic or fringe benefits for that trade or occupation.

(7) PREVAILING HOURLY BASIC PAY RATES are the hourly wage rates on which overtime payments are computed, and represent regular straight-time hourly wage rates before deductions or withholdings.

(8) **HOURLY CONTRIBUTIONS** are the hourly contributions, or equivalent, for economic or fringe benefits in addition to the hourly basic rates. Payments for food, lodging, mileage, riding time, waiting time, call-in pay, overtime and other similar items are excluded. The rate of contribution or cost which is ordinarily an hourly rate, and the number of hours of work on which it is payable, will be reflected in the wage determination as such. If the contributions or costs for certain economic or fringe benefits are expressed in a formula or method of payment other than an hourly rate, the department may, at its discretion, express in the wage determination the rate of contribution or cost used in the formula or method of payment. The equivalent converted per hour value of the contribution or cost expressed in a formula or method of payment other than an hourly rate will be included in the prevailing hourly wage rate.

(a) *Contribution irrevocably made by an employer to a trustee or to a third person.* Contributions for economic or fringe benefits made to a trustee or to a third person irrevocably will be considered in ascertaining hourly contributions. The "third person" must be one who is not affiliated with the employer. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund, except those used for apprenticeship training, must be set up in such a way that in no event will the employer be able to recapture any of the required contributions paid in or in any way to divert the funds.

(b) *Fund, plan or program.* The contributions for economic and fringe benefits must be made pursuant to a bona fide fund, plan, or program.

(c) *Unfunded plans.* 1. The reasonable anticipated costs to an employe pursuant to an enforceable written commitment to carry out a financially responsible plan or program, will be considered economic and fringe benefits.

2. No type of economic or fringe benefit is eligible for consideration as a so-called unfunded plan unless:

a. A copy has been supplied to the department;

b. It could be reasonably anticipated to provide benefits described in section 103.49, Wis. Stats., and Wis. Adm. Code section Ind 92.01 (9);

c. It is a bona fide commitment; and

d. The plan or program providing the benefits has been communicated in writing to the laborers, workmen and mechanics affected.

(9) **WAGE DETERMINATION** includes the original certification and subsequent certifications modifying, superseding, correcting or otherwise changing the provisions of the original decision or certification.

(10) **PUBLIC BUILDING OR ANY OTHER PROJECT OF PUBLIC WORKS** includes building or work involving the erection, construction, remodeling or repairing, under contract with the state of Wisconsin, any department thereof, or any public building corporation.

(11) **BUILDING OR WORK** includes construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work, excepting for the delivery of mineral aggregate such as sand, gravel or stone which is incorporated into the work under the contract by depositing the material substantially in place, directly or through spreaders, from the transporting vehicle.

(12) **ERECTION, CONSTRUCTION, REMODELING OR REPAIRING** means all types of work done on a particular building or work at the site thereof in the construction or development of the project, including, without limitation, erecting, construction, remodeling, repairing, altering, painting, and decorating, the transporting of materials and supplies to or from the building or work done by the employes of the contractor, subcontractor or agent thereof, and the manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work, by persons employed by the contractor, subcontractor or agent thereof.

(13) **SITE OF THE WORK** means the premises and vicinity upon which any building or work is to be performed under the contract.

(14) **DEPARTMENT** means the state of Wisconsin department of industry, labor and human relations.

(15) **CONTRACTOR**, under section 103.49(1) Wis. Stats. means a person, including a construction manager or consultant, who has entered into a contract with the state, any department thereof or any public building corporation for a project of public works.

(16) **SUBCONTRACTOR** means any subcontractor of a contractor and subcontractor of a subcontractor, regardless of tier of subcontractor.

(17) **THE PREVAILING HOURS OF LABOR**, included in a wage determination for any given trade or occupation, are the hours per day and per calendar week for which hourly basic rates of pay are paid.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; am. (intro.), (4), (8) (a), (c) 1, (c) 2a, (c) 2d, (9), (12), r. and recr. (1), (7), (8) (intro.), cr. (14) to (17), Register, January, 1976, No. 241, eff. 2-1-76.

Ind 92.02 Apprentices. Prevailing wage rates are those prescribed in their indentures as approved by the department under state of Wisconsin apprenticeship law, chapter 106, Wis. Stats., or under a bona fide apprenticeship program of an out-of-state employer which is registered with a state apprenticeship council recognized by the federal committee on apprenticeship, United States department of labor, or registered directly with the bureau of apprenticeship, United States department of labor.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; am. Register, January, 1976, No. 241, eff. 2-1-76.

Ind 92.03 Wages. Wages paid for work done in any given trade or occupation shall be computed at a wage rate not less than the prevailing wage rate listed in the certification. The type of work done for the most similar trade or occupation, and not a previously assigned occupational title, shall determine the required minimum prevailing wage rate payable. The applicable rate for the type of work

done shall be determined according to prevailing labor standards or local practices for the area.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; am. January, 1976, No. 241, eff. 2-1-76.

Ind 92.04 Meeting wage determination obligations. (1) An employer performing work subject to a department wage determination may discharge his minimum wage obligations for the payment of straight time wages and economic and fringe benefits by paying in cash, making payments or incurring costs for bona fide economic or fringe benefits (a) identical to, or of the same type as the ones found prevailing by the department and included in the wage determination, or (b) not of the type found prevailing by the department, but filed with and regulated by either the United States secretary of labor under the Employe Retirement Income Security Act of 1974, or State of Wisconsin commissioner of insurance under Chapter 211, Wis. Stats., or by a combination thereof. Before an employer can be given credit for any other unfunded economic or fringe benefit plan, he must supply a copy of the plan to the department and comply with all of the other provisions of Wis. Adm. Code section Ind 92.01 (8) (c). ✓

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; r. and recr. January, 1976, No. 241, eff. 2-1-76.

(2) Unconventional plans must be approved by the department before credit will be given for costs under section 103.49. ✓

Ind 92.05 Overtime payments. All hours worked by a laborer, workman or mechanic in excess of the prevailing hours of labor per day or per calendar week, must be paid at a rate at least 1-1/2 times his hourly basic rate of pay. Sums paid by an employer for fringe and economic benefits shall be excluded in the computation of overtime premium. In no event can the rate upon which the overtime premium is calculated be less than the amount determined by the department as the hourly basic rate of pay (i.e., cash rate). Nor can the rate upon which overtime premium is calculated be less than the straight time cash payment made to the laborer, workman or mechanic, or be less than his hourly basic rate of pay, if it is higher. Contributions by employes are not excluded from the rate upon which overtime premium is computed; that is, an employe's overtime premium rate is computed on his taxable earnings before any deductions are made for the employe's contributions to economic and fringe benefits. The employer's contributions, costs or cash payments for economic and fringe benefits may be excluded in computing the overtime premium rate so long as the exclusions do not reduce the overtime premium rate below the hourly basic rate contained in the wage determination. ✓

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; r. and recr. Register, January, 1976, No. 241, eff. 2-1-76.

Ind 92.06 Laborers, workmen and mechanics subject to section 103.49, Wis. Stats. Every laborer, workman or mechanic employed directly upon the site of the work by the employer shall be subject to section 103.49, Wis. Stats., regardless of the contractual relationship alleged to exist.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; am. Register, January, 1976, No. 241, eff. 2-1-76.

Register, January, 1976, No. 241

Ind 92.07 Payrolls and records. Every employer shall keep, and, upon request of the department promptly furnish copies of any or all payrolls and records relating to work done, hours worked, and wages paid to laborers, workmen or mechanics, and shall allow the department to examine the original records relating to any and all work to which section 103.49, Wis. Stats., applies.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; am. Register, January, 1976, No. 241, eff. 2-1-76.

Ind 92.08 Procedure for review of wage determination if a request for review is filed with the department.* (1) From information on file and submitted by interested persons, the department shall select projects of a character similar to the project covered by the wage determination under review. Such selections shall be made from projects located in the city, village or township in which the contemplated project is located, and, if necessary, also from contiguous cities, villages and townships as described in Wisconsin Administrative Code section Ind 92.08 (2) below; from projects on which contract construction work was done in the time period including the current and preceding 12 months; from projects on which the department has, or is furnished, needed wage rate, hours of labor and hourly contribution data; and from projects containing similar erection, construction, remodeling or repairing characteristics.

(2) (a) If 3 or more projects selected under section Ind 92.08 (1), above, are located in the city, village or township in which the project covered by the wage determination under review is located, and if this group of projects provides wage rate and hourly contribution data for the major trades or occupations under review, the department will compute the modal wage rates and hourly contributions as set forth in section Ind 92.08 (3), below.

(b) If the selection standards set forth in section Ind 92.08 (2) (a), above, are not met, the department will repeat the selection steps under section Ind 92.08 (1) for all cities, villages and townships contiguous with the city, village or township in which the project covered by the wage determination under review is located. If 3 or more selected projects are located in the city, village or township in which the project covered by the wage determination under review is located and all cities, villages and townships contiguous thereto, and if this group of projects provides wage rate and hourly contribution data for the major trades or occupations under review, the department will compute the modal wage rates and hourly contributions, as set forth in section Ind 92.08 (3) below.

(c) If the selection standards set forth in section 92.08 (2) (a) and (b), above, are not met, the department shall continue the same procedures by selecting and including projects from each subsequent tier of contiguous cities, villages and townships, until the standards set forth in section Ind 92.08 (2) (a) and (b) are met.

(3) (a) From the most current data available on the projects finally selected under section Ind 92.08 (1) and (2), above, the department shall prepare a tabulation showing each trade or occupation under review, the hourly basic rate of pay plus the hourly contributions paid for each trade or occupation, the total number of workers employed at each different rate, and the total number of manhours worked at each different rate if such manhour figures are available.

(b) If the manhour figures are available for the majority of workers in a given trade or occupation, the manhours may be estimated for the remaining workers in such trade or occupation.

(c) If the hourly basic rate of pay plus the hourly contributions paid figure which has the largest number of manhours represents a collectively bargained rate for any given trade or occupation, then the department shall accept the comparable current collectively bargained rate for such trade or occupation in the jurisdictional area wherein the project covered by the wage determination under review is located as the prevailing wage rate."

(d) If the hourly basic rate of pay plus the hourly contributions paid figure which has the largest number of manhours represents a rate other than a collectively bargained rate for any given trade or occupation, the department shall accept such rate as the prevailing wage rate."

(e) If the number of manhours is not available for a given trade or occupation, the department shall accept prevailing wage rates in the same manner as set forth in section Ind 92.08 (3) (c) and (d) above, but on the basis of the largest number of workers employed rather than on the basis of the largest number of manhours worked."

(f) If a wage report does not specify the actual hourly basic rates of pay and the hourly contributions paid for any given trade or occupation, but merely indicates a collectively bargained rate, the department may include the manhours and employment included in such report for such trade or occupation at the current collectively bargained rate in effect in the jurisdictional area wherein the contemplated project is located.

(g) Wis. Adm. Code section Ind 92.08 shall be limited to information reflecting the experience in the contract construction industry. The following are explicitly excluded:

1. Operative builders who build on their own account for resale or lease.
2. Investment builders who build structures on their own account for rental.
3. Force account construction (construction work performed by an establishment, primarily engaged in some business other than construction, for its own account and use and by its own employees).

(4) If a request for review is filed with the department which involves only the prevailing hours of labor, the department will follow the same procedures and use the same criteria in computing the modal hours of labor as set forth in sections Ind 92.08 (1), (2) and (3) above.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67, r. and recr. January, 1976, No. 241, eff. 2-1-76.

Ind 92.09 Posting of wage rates and hours. A clearly legible copy of the determination issued by the department for the project, together with the provisions of sections 103.49(1) and (4), Wis. Stats., shall be kept posted in at least one conspicuous and easily accessible place at the project site by the employer engaged on the

project and such notice shall remain posted during the full time any of his laborers, workmen or mechanics are employed on the project.

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76.

Ind 92.10 Date of notification. The date of notification by mail shall be the date entered on the document unless established otherwise by proof.

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76.

EXPLANATORY FOOTNOTES FOR CHAPTER IND 92

¹ Specific economic and fringe benefits. (Interpretation)

(a) The term "other economic benefit" as used in section 103.49, Wis. Stats., is the so-called "open end" provision. This was included so that new fringe benefits may be recognized by the department as they become prevailing. A particular fringe benefit need not be recognized beyond a particular area in order for the department to find that it is prevailing in that area.

(b) To insure against considering and giving credit to any and all economic and fringe benefits some of which might be illusory or not genuine, the qualification required by the department is that such economic and fringe benefits must be bona fide. No difficulty is anticipated in determining whether a particular economic or fringe benefit is bona fide in the ordinary case where benefits are those common in the construction industry and which are established under a usual fund, plan or program. The following are typical conventional economic and fringe benefits: medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, vacation and holiday pay, defrayment of costs of apprenticeship or other similar programs, or other bona fide economic and fringe benefits, but only where the employer is not required by other federal, state, or local law to provide any of such benefits. Employers may take credit for contributions made under such conventional plans without requesting the approval of the department.

(c) Economic and fringe benefits which an employer is obligated to provide under other federal, state, or local law are excluded. No credit may be taken under section 103.49, Wis. Stats., for the payments made for such benefits. For example, payments for workmen's compensation insurance under either a compulsory or elective state statute are not payments for economic or fringe benefits under section 103.49, Wis. Stats. The omission in section 103.49, Wis. Stats., of any expressed reference to these payments, which are common in the construction industry, suggests that these payments should not normally be regarded as bona fide economic and fringe benefits under section 103.49, Wis. Stats.

² Although contributions made to a trustee or third person pursuant to a benefit plan must be irrevocably made, this does not prevent return to the employer of sums which he had paid in excess of the contributions actually called for by the plan, as where such excess payments result from error or from the necessity of making payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained. For example, a benefit plan may provide for definite insurance benefits for employes in the event of the happening of a specified contingency such as death, sickness, accident, etc., and may provide that the cost of such definite benefits, either in full or any balance in excess of specified employe contributions, will be borne by the employer. In such case the return by the insurance company to the employer of sums paid by him in excess of the amount required to provide the benefits which, under the plan, are to be provided through contributions by the employer, will not be deemed a recapture or diversion by the employer of contributions made pursuant to the plan.

³ The phrase "fund, plan or program" is intended merely to recognize the various types of arrangements commonly used to provide economic and fringe benefits through employer contributions. In interpreting this phrase, the department will be guided by the experience of the United States department of labor and United States treasury department in administering the employe retirement income security act of 1974, of the United States department of labor in administering other related programs, and of the Wisconsin state insurance commissioner in administering employe welfare funds under Chapter 211, Wis. Stats.

"These provisions are intended to permit the consideration of economic and fringe benefits meeting the requirements and which are provided from the general assets of an employer.

⁵ As is the case of other economic and fringe benefits payable under section 103.49, Wis. Stats., an unfunded plan or program must be "bona fide" and not a mere simulation or sham for avoiding compliance with section 103.49, Wis. Stats.

⁶ (a) Types of wage determinations:

1. When economic and fringe benefits are prevailing for various classes of laborers, workmen and mechanics in the area, such benefits are includable in any department determination. Illustrations contained in footnote * Ind 90.04 and 90.05 set forth some of the different types of wage determinations which may be made in such cases.

2. When economic and fringe benefits for various classes of laborers, workmen and mechanics do not prevail in the area, the wage determination will contain only the hourly basic rates of pay, that is, only the cash wages which are prevailing for the various classes of laborers, workmen and mechanics.

(b) Subsequent certifications:

1. Subsequent certifications by the department modifying, superseding, correcting, or otherwise changing the provisions of the original decision or certification for a given wage determination request, must be made within 30 days after the department receives the request for the wage determination.

2. If bids are not solicited or if the project is rebid after 120 days after the date of the original certification, then the department or officer having the authority to prescribe the specifications must request a new determination prior to soliciting bids.

3. Requests for prevailing wage rates for trades or occupations which are required in the work contemplated, but which are not included in the original certification, should be requested before bids are solicited.

⁷ The terms include without limitation, buildings, structures, and improvements of all types such as sanitary sewer or sewerage works, garbage incinerators, swimming pools, tennis courts, parks, playgrounds, golf links, bathing beaches, bathhouses, city halls, courthouses, jails, schools, hospitals, homes for the aged or indigent, dams, plants, parkways, subways, tunnels, sewers, mains, power lines, pumping stations, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing and landscaping. The manufacture or furnishing of materials, articles, supplies or equipment whether or not a municipal agency acquires title to such materials, articles, supplies or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished is not a "building" or "work" within the meaning of these rules and regulations unless conducted in connection with and at the site of such a building or work as is described in the foregoing sentence. Section 103.49, Wis. Stats., does not apply to wage rates and hours of employment of laborers, workmen or mechanics engaged in the processing or manufacture of materials or products or to the delivery thereof by or for commercial establishments which have a fixed place of business from which they regularly supply such processed or manufactured materials or products; except that this section does apply to laborers, workmen or mechanics who deliver mineral aggregate such as sand, gravel or stone which is incorporated into the work under the contract by depositing the material substantially in place, directly or through spreaders, from the transporting vehicle. Ready-mix concrete is not a mineral aggregate under the provisions of section 103.49, Wis. Stats. Labor employed by a producer or commercial establishment which, although having a fixed place of business of the kind in some location, operates in a location specifically established in order to supply a particular job within the purview of section 103.49, Wis. Stats., or in a location used only sporadically when a project happens to be close at hand, comes under the provisions of section 103.49, Wis. Stats. Incidental or casual sale of material from such plants to others does not classify the same as a fixed commercial establishment.

⁸ The term "site of the work" normally contemplates a larger area than that which the completed building or work will actually occupy and will vary in size with the nature of the work required to be done on the project. Obviously, on some projects all of the work may be performed within a few feet from where the installation or work is or will be located, while on others requiring elaborate facilities such as a dam or flood control project, the area may be quite extensive. In order to apply the phrase "site of work" in a sound and realistic manner, it is important to examine both the geographical and functional aspects of the work in question with some care.

* See Footnote* in Sections Ind 90.04 and 90.05 for specific examples of ways to meet wage determination obligations.

" The purpose of using a sample of projects—if a request for a review is filed with the department—is to reflect the source of labor and prevailing wage rates of trades or occupations having types of work and skills comparable to the trades or occupations under review objectively and efficiently.

" In order for any wage changes to become effective under this procedure they must be made within 30 days after the department receives the request for the wage determination. See footnote * of section Ind 92.01 (9). ✓