

Chapter Ind 92

**STATE CONTRACT BUILDING AND PUBLIC WORKS
PROJECTS, EXCEPT BRIDGES AND HIGHWAYS**

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

(1) "Employer", as used in these rules and in s. 103.49 (3), 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, workers 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, workers and mechanics" include preapprentices, helpers, trainees, learners and 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. ¹

(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. ²

(b) *Fund, plan or program.* The contributions for economic and fringe benefits must be made pursuant to a bona fide fund, plan, or program. ³

(c) *Unfunded plans.* 1. The reasonable anticipated costs to an employer pursuant to an enforceable written commitment to carry out a financially responsible plan or program, will be considered economic and fringe benefits. ⁴

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 s. 103.49, Stats., and sub. (8);
- c. It is a bona fide commitment; and
- d. The plan or program providing the benefits has been communicated in writing to the laborers, workers and mechanics affected. ⁵

(9) "Wage determination" includes the original determination and subsequent determinations modifying or otherwise changing the provisions of the original determination. ⁶

(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. ⁷

(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. ⁸

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

(15) "Contractor", under s. 103.49 (2), 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; am. (4), (5), (8) (c) 1. and 2. d. and (9), Register, January, 1986, No. 361, eff. 2-1-86; am. (8) (c) 2.b., Register, June, 1987, No. 378, eff. 7-1-87; correction in (15) made under s. 13.93 (2m) (b) 7, Stats., Register, June, 1987, No. 378.

Ind 92.015 Collecting and compiling wage rate information. The methodology to be used for the collection and compilation of wage rate information shall be the same as described in s. Ind 90.015.

History: Cr. Register, January, 1986, No. 361, eff. 2-1-86.

Ind 92.02 Apprentices. (1) Apprentices may work at less than the prevailing wage rate for the work they perform when they are employed pursuant to and individually registered in a bona fide apprenticeship program administered by the U.S. department of labor, a state agency recognized by the U.S. department of labor, or under Wisconsin's apprenticeship law, ch. 106, Stats.

(2) Any employe who is not properly registered as an apprentice under sub. (1) shall be paid not less than the prevailing wage rate applicable to the work actually performed.

(3) Apprentices shall be paid a percentage of the applicable journeyman's hourly basic rate of pay specified in the wage determination issued for a project.

(4) The appropriate hourly basic rate percentage shall be obtained from each apprentice's indenture.

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(5) Except as provided in this subsection, apprentices shall receive all fringe benefits specified for the appropriate journeyman classification in the wage determination issued for a project. If the department determines that a different practice prevails for the payment of such benefits, then fringe benefits shall be paid in accordance with that determination.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; am. Register, January, 1976, No. 241, eff. 2-1-76; r. and recr. Register, January, 1986, No. 361, eff. 2-1-86.

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 determination. 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 the prevailing local practices in the area.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; am. Register, January, 1976, No. 241, eff. 2-1-76; am. Register, January, 1986, No. 361, eff. 2-1-86.

Ind 92.04 Meeting wage determination obligations. (1) An employer performing work subject to a department wage determination may discharge 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 Employee Retirement Income Security Act of 1974, or state of Wisconsin commissioner of insurance under ch. 211, Stats., or by a combination thereof. Before an employer can be given credit for any other unfunded economic or fringe benefit plan, the employer must supply a copy of the plan to the department and comply with all of the other provisions of s. Ind 92.01 (8) (c).⁹

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

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

Ind 92.05 Overtime payments. All hours worked by a laborer, worker or mechanic in excess of the prevailing hours of labor per day or per calendar week, must be paid at a rate at least 1½ times the hourly basic rate of pay. Sums paid by an employer for fringe and economic benefits shall be excluded in the computation of the 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 the overtime premium is calculated be less than the straight time cash payment made to the laborer, worker or mechanic, or be less than the hourly basic rate of pay, if it is higher. Contributions by employees are not excluded from the rate upon which the overtime premium is computed; that is, an employee's overtime premium rate is computed on the taxable earnings before any deductions are made for the employee'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 pre-

mium rate below the hourly basic rate contained in the wage determination. ⁹

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; r. and recr. Register, January, 1976, No. 241, eff. 2-1-76; am. Register, January, 1986, No. 361, eff. 2-1-86.

Ind 92.06 Laborers, workers and mechanics subject to s. 103.49, Stats. Every laborer, worker and mechanic employed directly upon the site of the work by the employer shall be subject to s. 103.49, 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; am. Register, January, 1986, No. 361, eff. 2-1-86.

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, workers or mechanics, and shall allow the department to examine original records relating to any and all work to which s. 103.49, Stats., applies.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; am. Register, January, 1976, No. 241, eff. 2-1-76; am. Register, January, 1986, No. 361, eff. 2-1-86.

Ind 92.075 Procedure for requesting wage determination. (1) The department or officer having the authority to prescribe the specifications shall request the department to ascertain the prevailing wage rate, hours of labor and hourly basic pay rates for all trades or occupations required to complete any project of public works which meets or exceeds the dollar thresholds provided in s. Ind 90.155.

(2) The request shall be made on the form numbered DILHR-ERD-5719, which shall be provided at no charge by the department.

(3) The department may be notified about ensuing projects as far in advance as possible. However, the official request to the department to ascertain and determine the prevailing wage rate, hours of labor and hourly basic pay rates for all trades and occupations required in the work contemplated shall be made between 50 and 60 days before soliciting bids.

Note: "Application For A Prevailing Wage Rate Determination", form DILHR-ERD-5719, may be obtained at no charge from the Department of Industry, Labor and Human Relations, Equal Rights Division, P.O. Box 8928, Madison, WI 53708.

History: Cr. Register, January, 1986, No. 361, eff. 2-1-86.

Ind 92.08 Procedure for an administrative review. The procedure to be followed by the department in conducting an administrative review of the prevailing wage rates or hours of labor determined for any project shall be the same as those prescribed for municipal public works projects in s. Ind 90.10.

History: Cr. Register, January, 1967, No. 133, eff. 2-1-67; r. and recr. Register, January, 1976, No. 241, eff. 2-1-76; r. and recr. Register, January, 1986, No. 361, eff. 2-1-86.

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 s. 103.49 (2) and (4), 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

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during the full time any laborers, workers or mechanics are employed on the project.

History: Cr. Register, January, 1976, No. 241, eff. 2-1-76; am. Register, January, 1986, No. 361, eff. 2-1-86; correction made under s. 13.93 (2m) (b) 7, Stats., Register, June, 1987, No. 378; correction made under s. 13.93 (2m) (b) 7, Stats., Register, June, 1987, No. 378.

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 s. 103.49, 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 qualifications 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 s. 103.49, Stats., for the payments made for such benefits. For example, payments for worker's compensation insurance under either a compulsory or elective state statute are not payments for economic or fringe benefits under s. 103.49, Stats. The omission in s. 103.09, 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 s. 103.49, 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 have been 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 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 Employee 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 ch. 211, Stats.

4 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 s. 103.49, Stats., an unfunded plan or program must be "bona fide" and not a mere simulation or sham for avoiding compliance with s. 103.49, Stats.

6 (a) Types of wage determinations:

1. When economic and fringe benefits are prevailing for various classes of laborers, workers and mechanics in the area, such benefits are includable in any department determination. Illustrations contained in footnote 9, ss. 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, workers and mechanics do not prevail in the area, the wage determination shall contain only the hourly basic rates of pay, that is, only the cash wages which are prevailing for the various classes of laborers, workers and mechanics.

(b) Subsequent determinations:

1. Except as provided in par. (b) 3., subsequent determinations by the department which modify or otherwise change the provisions of the original determination shall be made within 30 days after the department issued the determination.

2. If the contracts are not awarded or if the project is rebid more than 180 days after the date of the original determination, then the department or officer having the authority to prescribe the specifications shall 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 determination, may be requested before or after the contracts are awarded.

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 state 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. S. 103.49, Stats., does not apply to wage rates and hours of employment for laborers, workers 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, workers 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 s. 103.49, 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 s. 103.49, Stats., or in a location used only sporadically when a project happens to be close at hand, comes under the provisions of s. 103.49, 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 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.

9 See Footnote 9 in ss. Ind 90.04 and 90.05 for specific examples of ways to meet wage determination obligations.