

## Consistency: The key to easing Kentucky's prevailing-wage problem

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### Executive Summary

The Bluegrass State's prevailing-wage policies were among the most hotly debated issues during the 2006 session of the Kentucky General Assembly, and for good reason.

Historically, Kentucky's prevailing-wage laws are based on the noble idea of protecting workers from unethical contractors. Unfortunately, these policies have degenerated into simple protectionism for labor unions.

This report examines the following major problems with Kentucky's process of determining prevailing wages and offers alternatives based on reasonable policies employed by other states, primarily Tennessee.

- **The process Kentucky's Department of Labor (DOL) uses to determine prevailing-wage rates often yields inaccurate findings and imprecise pay scales.**

The process allows for innumerable hearings, irregularly timed, in 38 different locations that result in inaccurate wage rates comparable to labor unions' pay scales in those communities surrounding public projects.

Instead, the commonwealth should emulate Tennessee's policy of reviewing wage rates annually for highway work and every two years for building construction. This way, contractors can better plan for projects as a result of reliable pay scales.

- **The system of classifying employees is flawed.**

The state's current process of determining prevailing-wage rates is filled with uncertainty, particularly as it relates to employees' labor classifications that change from one area to the next.

This adds to the uncertainty faced by contractors who, while earnestly endeavoring to comply with state law, often have little or no guidance about which rate to pay employees. If a worker uses a wrench to tear out old pipes, will he, under state law be considered a general laborer performing a demolition or a plumber working on pipes?

Establishing one standard set of job definitions for the entire commonwealth by using state-granted licenses for skilled trades would be a vast improvement compared to Frankfort's current labor policies, which offer contractors little or no guidance about which rate to pay employees.

An example of how current policy creates confusion among contractors happened last year when a prevailing-wage hearing in Fayette County determined that roofers using sheet metal on public projects in that community were skilled sheet-metal workers who should receive an hourly rate of \$26.35. However, a hearing board considering the classification of laborers doing the exact same work in Christian, Logan and Todd counties ruled that those employees were roofers who deserved \$10 an hour.

- **As a result of these arbitrary systems, investigators have broad powers over contractors in the commonwealth.**

Once a labor investigator classifies a worker, the employer has no recourse. If the investigator decides that a worker carrying a pipe is a plumber, he must be paid accordingly.

Not only are contractors forced to abide by investigators' subjective findings, but they can also be held liable for the perceived indiscretions of subcontractors they may have hired for help on large public projects. A DOL investigator who determines that a subcontractor has violated the state's prevailing-wage law on a past job can force the project's general contractor to pay that partner's back wages.

Some employers have complained that investigators abuse their power. One prominent contractor remarked that: "They are not investigators, they are intimidators."

Reasonable solutions do exist to adequately address the problems with Kentucky's prevailing-wage practices.

Many states set their wage rates annually, reducing the uncertainty faced by Kentucky contractors bidding for state construction projects. Clear employee classifications that rarely change would assist employers and protect workers from unprincipled contractors. A fair and

independent hearing board should be established to resolve differences over charges that contractors failed to properly compensate workers.

These common-sense reforms would benefit our state’s construction-related employers as well as skilled tradesmen, who deserve the opportunity to participate in the construction of state projects – even if they choose not to join a labor union. The time to implement them is now.

*Editor’s note: This report contains some statements made by contractors and state workers who requested that their identities not be revealed. While this is not a standard practice of the Bluegrass Institute, these sources agreed to open discussions of Kentucky’s prevailing-wage policies only on the condition that they would not be identified. The institute agreed to this demand because the information they provided will significantly contribute to the reader’s understanding of Kentucky’s prevailing-wage policies.*

## Introduction

Along with several other labor issues, debate over the state’s confusing prevailing-wage laws became very contentious during the 2006 session of the Kentucky General Assembly.

Most Kentuckians don’t understand how prevailing wages – rates paid to employees on public projects – are determined. Neither are most taxpayers aware of the impact the process has on the cost of these projects and employment opportunities for workers across the state, especially those employed in the construction trades.

Enacted in 1940, Kentucky’s prevailing-wage laws are the commonwealth’s version of the federal Davis-Bacon statutes – the first of which was implemented in 1931 – that were meant to prevent blacks from obtaining jobs on federal public-works projects<sup>1</sup>. While one of the original intentions of the law had to do with racial prejudice, its effect in more recent decades has resulted in a subjective, overt bias against nonunion firms.

The stated objectives of the original prevailing-wage laws dealt with ensuring that construction workers on federal facilities would be paid a fair wage commensurate with private-sector employees who have the same skills in communities where these public projects were being built.

Protecting workers from unscrupulous contractors who seek to undercut the market and pay workers as little as possible is a noble goal. However, both federal policies and Kentucky’s statutes have devolved into a form of protectionism for union laborers and the construction firms that employ them. The result has been the serious distortion of what, in at least some aspects, was a well-intentioned policy<sup>2</sup>.

Frankfort’s prevailing-wage laws contain policies that make it difficult for nonunion contractors to compete with their unionized counterparts. Plus, there are serious problems with the manner in which Kentucky administers its prevailing-wage laws, including the lack of a reasonable appeals process for contractors hindered by the state’s labor policies.

While no single publication can cover all of the deficiencies in Kentucky’s labor policies and remain a reasonable length, this report examines the most serious problems with the commonwealth’s prevailing-wage practices. It concludes by suggesting alternatives for making the process fairer.

Implementing these recommendations could significantly reduce the price tag of public projects while offering expanded employment opportunities for more hard-working construction employees.

## Prevailing problems

### Setting wage rates

Kentucky’s practice of conducting hearings and gathering surveys in 38 different locations across the state to determine wage rates for roofers, plumbers and other tradesmen is not only time-consuming, but often results in inaccurate findings and skewed wage rates.

A report by the state’s Legislative Research Commission (LRC) in 2001 concluded: “Prevailing wages are not designed, nor are they implemented, in a manner that would yield wage determinations that are representative of local wages.”<sup>3</sup>

To establish their wage rates, the Kentucky Department of Labor (DOL) holds hearings across the state during which it allows “interested parties” to submit wage data for their skilled trades’ employees. However, no contractors or employers are compelled to submit information about their payrolls. Neither are official state tax or employment records utilized by the department to determine pay rates.

Since organized labor groups have strong incentives to keep wages artificially inflated and prevent nonunion contractors from winning state contracts, they normally submit as many employee records as possible at each prevailing-wage hearing.

Labor unions target these hearings and are well-organized, often to the point that many private contractors who would prefer to bid on state contracts don’t even show up. There is little motivation for private contractors to endure the hassle of submitting data – often sensitive information that employers are wary of making available to competitors – about their wage rates if they have no chance of securing contracts.

The unions prefer it that way. According to the LRC, union workers who comprise only 21 percent of non-residential construction workers in Kentucky, actually account for 81 percent of the wage data submitted at hearings to establish prevailing-wage rates. As a result, these rates are often lopsided and much higher than pay scales for similar positions in the private sector.<sup>4</sup>

One contractor suggests that showing up at these hearings can make nonunion employers and their companies a target for labor groups. Kentucky employers don’t want – or need – that type of hassle. And it also should be obvious that such labor policies will not be attractive to companies that may be thinking about expanding in, or relocating to, the Bluegrass State.

In 1997, then-state auditor Edward B. Hatchett recognized the problem, as indicated in a report by his office concluding: “... the Labor Cabinet lacks procedures necessary to assure that accurate and sufficient information is provided to the Cabinet by its prevailing wage determination hearings.”<sup>5</sup>

Other states, including some of Kentucky’s neighbors, have much sounder prevailing-wage policies. Tennessee’s process, for example, is more consistent and fair. It makes wage rates well-known and predictable and adequately protects workers from unprincipled contractors.

Kentucky’s labor policies also hinder the ability of employers and contractors to plan for future projects by allowing any “interested party” to call for a hearing to establish new wage rates at any time. Any “interested party” includes almost any construction trades worker or union representative in the state.

The likelihood of unpredictable changes in wage rates hinders the ability of employers and contractors to plan for future projects. Other states have solved this problem by setting wage rates once a year or even more infrequently.

Also creating uncertainty for contractors and employers is the fact that prevailing-wage rates are determined in 38 different localities across the state. The wage for plumbers, for example, in one county may be drastically different from the compensation required for plumbers working on a public project several miles away in another county. How can the hearing and survey processes be accurate if workers several miles apart in similar communities command such varying pay rates?

Few contractors attempt to subvert prevailing-wage laws. Most, in fact, wish to comply but find themselves in a real conundrum when the same employee working on various projects in separate locations must be paid vastly different wages – often for work performed in the same week.

“I want to comply, but they won’t let me,” said one prominent Kentucky contractor. “It’s like trying to hit a moving target.”

Kentucky’s current labor policies are not working. Serious reforms are needed, including ending the practice of using only volunteered data – most of which are offered by labor unions – and holding multiple hearings in so many different locations.

## Classifying employees

Even labor classifications can change from one area to the next. This adds to the uncertainty faced by contractors who, while endeavoring to comply with state laws, often have little or no guidance about which rate to pay employees.

If a worker uses a wrench to tear out old pipes, will he be considered a general laborer performing a demolition or a plumber working on pipes? If an employee is installing a roof made of sheet metal, will the labor department’s investigator visiting the job site that day consider him a roofer or a sheet-metal worker?

In 2005, two different decisions were rendered at hearings held to determine wage rates for roofers. In Fayette County, roofers installing sheet-metal roofs were considered skilled workers who should be paid a base hourly rate of \$26.35.<sup>6</sup> However, a hearing board in a different location ruled that laborers performing the same identical work in Christian, Logan and Todd counties were roofers deserved a \$10 hourly rate.<sup>7</sup>

There are simpler ways of classifying employees. The state licenses skilled tradesmen such as plumbers and roofers. Why not use those licenses to determine workers’ classifications and corresponding wage rates? If an employee is a licensed plumber, then pay him as a plumber. But if he is not licensed as a skilled tradesman, why pay him for that work?

Our state’s wage-setting policy is subjective and largely determined by DOL investigators who visit public construction sites to verify that employees performing certain jobs are compensated according to pay rates determined by the classification system.

Problems arise when various inspectors

assign different classifications for the same work. For example, one inspector may determine that an employee unloading wire from the back of a truck is an electrician; another may classify him as a general laborer. One contractor observed that: “The labor department contends that a laborer, without a license, performing menial tasks such as cleaning, cutting holes, hauling or unloading materials makes them a skilled mechanic.”

Not helping matters any is an organized campaign being conducted by labor unions across the state encouraging nonunion employees to protest their job classifications and wage rates. Union organizers frequently resort to a campaign of misinformation by handing out fliers on job sites that contain faulty job classifications. One flier states:

“If you are working on installation, demolition, or tear out of plumbing (waste, vents, water lines, and fixtures) ... you cannot be classified as a laborer ... when doing the above work you must be classified as a plumber, pipe fitter or welder ... if you are not an apprentice then the contractor must pay the following wage: \$25.67 per hour.”<sup>8</sup>

Such tactics are in direct opposition to the stated intent of prevailing-wage laws – ensuring workers are paid a fair wage similar to jobs requiring corresponding skills in the community where the public project is located.

## Enforcement

The responsibility for enforcing Kentucky’s confusing prevailing-wage laws belongs to the DOL’s Division of Employment Standards, Apprenticeship and Training (DES), which divides its 24 investigators into two groups. One group monitors the eastern part of the state; the other is responsible for western Kentucky.<sup>9</sup>

As a result of the state’s highly subjective method of establishing wage rates and determining employee classifications, DOL investigators have very broad powers in enforcing regulations and punishing violations. Employers often complain about investigators abusing their power.

“They are not investigators; they are intimidators,” said one prominent contractor. “These people have tried trick questions, leading questions, harassment tactics, calling unrelated employees at home at night trying to get them to give any information they could use. In some cases, the conversations can become very heated.”

In a letter to the Environmental and Public Protection Cabinet, one employee who had been on the receiving end of intimidation by an investigator states:

“(The investigator) has tried twisting the definition of laborer in your labor scale in every way possible ... He has bullied and threatened my fellow employees ... We are tired of being harassed by his employees and hoped this would end the investigation. ... (He) is trying to twist our statements (into) personal attacks on our employer.”

Once a labor investigator classifies a worker, the employer has no recourse. If the investigator decides that a worker carrying a pipe is a plumber, he must be paid accordingly.

Investigators can even scrutinize time sheets from past construction projects. They can go back years during their investigation and impose fines and sanctions on contractors based on work done in the distant past. It’s next to impossible to appease an investigator determined to find wage violations about the type of work performed by an employee in past years.

Kentucky’s labor laws also allow employees to call upon DOL inspectors to verify their job classifications. Obviously, this creates a perverse incentive for some workers who feel they can secure a quick raise by moving into the higher pay scale that accompanies a different job classification. Neither employees nor investigators are required to prove that workers making these claims were actually underpaid.

Even following a project’s completion, workers can complain that they deserved higher wages on jobs from past months or even years in order to receive back pay. Once an investigation determines employees were misclassified and im-

properly compensated, contractors have little recourse but to pay the fines and back wages levied against them. Because the state affords contractors no appeals process, their only option is to pay up or face a lengthy, expensive court battle to dispute the findings.

Not only are contractors forced to abide by the subjective findings of investigators, they can also be held liable for the perceived indiscretions of subcontractors they may have hired for help on large public projects. A DOL investigator who determines that a subcontractor has violated the state’s prevailing-wage law on a past job can force the project’s general contractor to pay those back wages, too.

One letter from a general contractor ordered to pay a subcontractor’s back wages states:

“We have received a letter from the Kentucky Department of Labor informing us that we should pay some of your employee’s back wages for scale rates that were not paid properly. ... Should we have to pay your employees, we are going to be extremely upset and hesitate about working with you on future jobs.”

Contractors may even be barred from bidding on future state contracts during an investigation before having been found guilty of any wrongdoing. Such lack of recourse, including no opportunity to appeal, clearly violates employers’ due-process rights.

“I knew I would have to make some personal sacrifices when I went into business – but I didn’t anticipate it being my constitutional rights,” said one well-known contractor.

## Prevailing costs for taxpayers

Uncertainties in the state’s prevailing-wage rates make it needlessly difficult for employers to bid on state roads, schools and buildings. It’s nearly impossible for contractors on these jobs to determine how many skilled tradesmen and general laborers will be needed for public projects and what these jobs will cost. Kentucky taxpayers benefit most when the greatest return is gained from every

tax dollar spent on the construction of public projects. Local school boards, county governments and small cities in Kentucky rarely have the time or manpower to comply with the commonwealth’s confusing and random prevailing-wage policies.

Our state’s current labor practices make it nearly impossible to build roads, schools and government buildings funded by taxpayers in a cost-effective manner.

## Best prevailing-wage practices

Some of the commonwealth’s thorniest prevailing-wage problems could be easily resolved by looking to other states for guidance. In his 1997 report, former state auditor Ed Hatchett recommended the commonwealth “examine practices in other states that have adopted prevailing wage legislation and adapt the best practices for Kentucky.”<sup>10</sup>

Other states’ policies offer reasonable – and proven – alternatives to each of the main problems with our state’s prevailing-wage process. In offering the following solutions, we highlight a few of the labor practices in Tennessee, Kentucky’s neighbor to the south.

## Needed: Consistency in determining wage rates

Among the 31 states with prevailing-wage policies, a variety of methods are employed to establish pay scales for public projects, including using a community’s average wage or the pay rate of the majority of workers.

Some states abandon all pretenses and simply use collectively bargained union wages. Prevailing wages across Kentucky are, essentially, union-level wage rates. However, because the state allows arbitrary and numerous hearings and surveys, employers cannot even rely on wage rates to be the same as union pay scales.

If Kentucky would quit feigning objectivity and just flatly declare that, like Ohio, those union rates determined by

collective-bargaining agreements will also serve as the state's prevailing wages, at least contractors could better plan and have the necessary information – including more accurate data for determining cost – to bid on public projects.

Of course, labor unions may respond by negotiating new collective-bargaining agreements. Still, those rates would be published and contractors would know better what to expect when submitting bids.

The frequency of surveys also varies widely among states. Some limit surveys to only once or twice a year. Tennessee, which takes surveys once each year to establish wage rates for highway construction, offers an effective model for Kentucky to consider. The Volunteer State conducts its surveys every two years to determine prevailing wages on all other public building projects.<sup>11</sup>

## Needed: Clear job classifications

The manner in which Kentucky classifies employees is one of the most irksome aspects of our state's labor policy. The ambiguity of the process makes it nearly impossible for contractors working on public projects to fully comply with the law.

Tennessee has a straightforward 20-page manual containing job descriptions for each skilled trade required for public projects across the state.<sup>12</sup> Even labor-cozy Michigan does not classify or identify workers on construction sites. Its prevailing-wage guidelines indicate that the state's Wage and Hour Division “... does not classify workers or resolve classification disputes. The contracting agent has the right and responsibility for the quality of work and for determining the work classifications needed on a project.”<sup>13</sup>

Considering the arbitrary nature of Kentucky's public-jobs classifications, even the federal government's approach would provide a welcome change. The feds publish the Dictionary of Occupational Titles, a comprehensive listing of thousands of job titles and their descriptions.

## Needed: Due process for contractors

While dishonest contractors surely exist, the vast majority attempt to comply with the law and perform quality work on public projects. Too many of these employers are stymied as a result of the state's labor policy, which offers perverse incentives for construction trades workers and power-hungry DOL inspectors.

Tennessee, on the other hand, requires its contractors to submit their weekly payroll records to the state's labor department, which may then send the project's assigned inspector to the job site to address discrepancies.

Contractors are given the opportunity to either dispute alleged wrongdoing or remedy the problem. If discrepancies are not adequately addressed, Tennessee cancels the construction firm's contract and re-opens bidding for that public project. However, according to Kelly Jo Dyer, an administrator for the Tennessee Department of Labor, no violation has resulted in the cancellation of a firm's contract “in recent memory.”

At the very least, Kentucky needs a policy to handle disagreements about compensation, employee classifications and other issues arising from prevailing-wage enforcement that is less time-consuming and expensive for all parties involved than circuit courts, which currently offer the only legitimate option for contractors who have been wronged.

## Conclusion

The arbitrary and haphazard applications of Kentucky's prevailing-wage laws harm contractors, confuse workers and cost taxpayers by increasing the price tags for public projects. The current policies could also lead to fewer employment opportunities in the future for those who work in construction trades.

The best action, of course, would be to abolish prevailing-wage laws altogether, which 19 states – including Virginia, North Carolina, South Carolina, Missis-

sippi, Florida, Georgia, Louisiana and Alabama in the south – have already done. However, eliminating the commonwealth's prevailing-wage laws may not be politically feasible at this time.

Nevertheless, Kentucky should consider implementing prevailing-wage policies that are consistent and based on other states' practices highlighted in this report. Most states with prevailing-wage laws have more predictable – and much fairer – policies of establishing wages, classifying workers and addressing alleged violations.

Borrowing workable ideas from other states – especially Tennessee – could go a long way toward restoring some reasonableness to the enforcement of prevailing-wage laws in Kentucky while maintaining their original objective of protecting employees from unprincipled employers.

State lawmakers could benefit a large number of commonwealth citizens by thoroughly investigating some of these other states' best practices and incorporating them into Kentucky's labor policies.

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## Endnotes

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