ITEM 9

TEST CLAIM
FINAL STAFF ANALYSIS

Labor Code
Sections 1720, 1720.3, 1720.4, 1726, 1727, 1735, 1742, 1770, 1771, 1771.5, 1771.6, 1773.5

Statutes 1976, Ch. 1084 (SB 2010)
Statutes 1976, Ch. 1174 (AB 3365)
Statutes 1980, Ch. 992 (AB 3165)
Statutes 1983, Ch. 142 (AB 1390)
Statutes 1983, Ch. 143 (AB 1949)
Statutes 1989, Ch. 278 (AB 2483)
Statutes 1989, Ch. 1224 (AB 114)
Statutes 1992, Ch. 913 (AB 1077)
Statutes 1992, Ch. 1342 (SB 222)
Statutes 1999, Ch. 83 (SB 966)
Statutes 1999, Ch. 220 (AB 302)
Statutes 2000, Ch. 881 (SB 1999)
Statutes 2000, Ch. 954 (AB 1646)
Statutes 2001, Ch. 938 (SB 975)
Statutes 2002, Ch. 1048 (SB 972)

Title 8, California Code of Regulations,
Sections 16000-16802
(Register 56, No. 8; Register 72, No. 13; Register 72, No. 23; Register 77, No. 02; Register 78, No. 06; Register 79, No. 19; Register 80, No. 06; Register 82, No. 51; Register 86, No. 07; Register 88, No. 35; Register 90, No. 14; Register 90, No. 42; Register 91, No. 12; Register 92, No. 13; Register 96, No. 52; Register 99, No. 08; Register 99, No. 25; Register 99, No. 41; Register 00, No. 03; Register 00, No. 18)

Prevailing Wages

03-TC-13

City of Newport Beach, Claimant

TABLE OF CONTENTS

EXHIBIT A

State of California
COMMISSION ON STATE MANDATES
[illegible] Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 1 (2 91)

TEST CLAIM FORM

For Official Use Only

RECEIVED

SEP 2 6 2003

COMMISSION ON STATE MANDATES

Claim No. 03-TC-13

Local Agency or School District Submitting Claim

City of Newport Beach

Contact Person

Allan P. Burdick/Pamela A. Stone (MAXIMUS, INC.)

Telephone No.

(916) 485-8102

Fax (916) 485-0111

Address

4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Representative Organization to be Notified

League of California Cities

This test claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIIIB of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code section(s) within the chaptered bill, if applicable.

Chapters 1084 and 1174, Statutes of 1976; Chapter 992, Statutes of 1980; Chapters 142 and 143, Statutes of 1983; Chapters 278 and 1224, Statutes of 1989; Chapters 913 and 1342, Statutes of 1992; Chapters 82 and 220, Statutes of 1999; Chapters 881 and 954, Statutes of 2000; Chapter 938, Statutes of 2001; Chapter 1048, Statutes of 2002; Title 8, California Code of Regulations, Sections 16000-16802

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative

Glen Everroad, Revenue Manager

Telephone No.

949-644-3140

Signature of Authorized Representative

Date:

24 Sept 03

BEFORE THE
COMMISSION ON STATE MANDATES

Test Claim of:
City of Newport Beach

Prevailing Wages

Chapter 1084, Statutes of 1976
Chapter 1174, Statutes of 1976
Chapter 992, Statutes of 1980
Chapter 142, Statutes of 1983
Chapter 143, Statutes of 1983
Chapter 278, Statutes of 1989
Chapter 1224, Statutes of 1989
Chapter 913, Statutes of 1992
Chapter 1342, Statutes of 1992
Chapter 83, Statutes of 1999
Chapter 220, Statutes of 1999
Chapter 881, Statutes of 2000
Chapter 954, Statutes of 2000
Chapter 938, Statutes of 2001
Chapter 1048, Statutes of 2002
8 California Code of Regulations, Sections 16000-16802

Labor Code, Sections 1720, 1720.3, 1720.4, 1726, 1727, 1735, 1742, 1770, 1771, 1771.5, 1771.6, 1773.5, and 8 California Code of Regulations, Sections 16000 through 16802

A. STATEMENT OF THE CLAIM

The State of California has had prevailing wage legislation in effect since 1931. However, since the passage of Article XIIIB, Section 6, this legislation has been substantially expanded to include all sorts of works, with substantial consequences for non-compliance. The effect of the prevailing wage law is to require that the works be performed at union scale, whether or not the contractor is a union contractor, thus substantially increasing the cost of public works. These provisions are contained in Labor Code, Section 1720 *ff.*

One of the largest changes was the expansion of the definition of what constitutes a "public works" or a that which is "paid for in whole or in part out of public funds".

With the passage of the last amendment to Labor Code Section 1720 prior to the passage of Article XIIIIB, Section 6, Labor Code, Section 1720 read as follows:

§1720. Public works; use of public funds

As used in this chapter "public works" means:

(a) Construction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.
(b) Work done for irrigation, utility, reclamation and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.
(c) Street, sewer or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether such political subdivision or district operates under a freeholder's charter or not.
(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.
(e) The laying of carpet in a public building done under contract and paid for in whole or in part out of public funds.

With the passage of the intervening years, the scope of what constitutes a "public work" and what is "paid for in whole or in part out of public funds" has been expanded exponentially. As presently constituted, this provision reads as follows:

§ 1720. "Public works" defined; "paid for in whole or in part out of public funds" defined; exception for private residential projects; exclusions

(a) As used in this chapter, "public works" means:
(1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

(2) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" does not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(3) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(4) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(5) The laying of carpet in a public building done under contract and paid for in whole or in part out of public funds.

(6) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

(b) For purposes of this section, "paid for in whole or in part out of public funds" means all of the following:

(1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.

(2) Performance of construction work by the state or political subdivision in execution of the project.

(3) Transfer by the state or political subdivision of an asset of value for less than fair market price.

(4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.

(5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis.

(6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision.

(b) Notwithstanding subdivision (b):

(1) Private residential projects built on private property are not subject to the requirements of this chapter unless the projects are built pursuant to an agreement with a state agency, redevelopment agency, or local public housing authority.

(2) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

(3) If the state or a political subdivision reimburses a public developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

(4) The construction or rehabilitation of affordable housing units for low- or moderate-income persons pursuant to paragraph (5) or (7) of subdivision (3) of Section 33334.2 of the Health and Safety Code that are paid for solely with moneys from a Low and Moderate Income Housing Fund established pursuant to Section 33334.3 of the Health and Safety Code or that are paid for by a combination of private funds and funds available pursuant to Section 33334.2 or 33334.3 of the Health and Safety Code do not constitute a project that is paid for in whole or in part out of public funds.

(5) "Paid for in whole or in part out of public funds" does not include tax credits provided pursuant to Section 17053.49 or 23649 of the Revenue and Taxation Code.

(6) Unless otherwise required by a public funding program, the construction or rehabilitation of privately owned residential projects is not subject to the requirements of this chapter if one or more of the following conditions are met:

(A) The project is a self-help housing project in which no fewer than 500 hours of construction work associated with the homes are to be performed by the homebuyers.

(B) The project consists of rehabilitation or expansion work associated with a facility operated on a not-for-profit basis as temporary or transitional housing for homeless persons with a total project cost of less than twenty-five thousand dollars ($25,000).

(C) Assistance is provided to a household as either mortgage assistance, downpayment assistance, or for the rehabilitation of a single-family home.

(D) The project consists of new construction, or expansion, or rehabilitation work associated with a facility developed by a nonprofit organization to be operated on a not-for-profit basis to provide emergency or transitional shelter and ancillary services and assistance to homeless adults and children. The nonprofit organization operating the project shall provide, at no profit, not less than 50 percent of the total project cost from nonpublic sources, excluding real property that is transferred or leased. Total project cost includes the value of donated labor, materials, architectural, and engineering services.

(E) The public participation in the project that would otherwise meet the criteria of subdivision (b) is public funding the form of below-market interest rate loans for a project in which occupancy of at least 40 percent of the units is restricted for at least 20 years, by deed or regulatory agreement, to individuals or families earning no more than 80 percent of the area median income.

(d) Notwithstanding any provision of this section to the contrary, the following projects shall not, solely by reason of this section, be subject to the requirements of this chapter:

(1) Qualified residential rental projects, as defined by Section 142(d) of the Internal Revenue Code, financed in whole or in part through the issuance of bonds that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8869.80) of the Government Code on or before December 31, 2003.

(2) Single-family residential projects financed in whole or in part through the issuance of qualified mortgage revenue bonds or qualified veterans' mortgage bonds, as defined by Section 143 of the Internal Revenue Code, or with mortgage credit certificates under a Qualified Mortgage Credit Certificate Program, as defined by Section 25 of the Internal Revenue Code, that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8869.80) of the Government Code on or before December 21, 2003.

(3) Low-income housing projects that are allocated federal or state low-income housing tax credits pursuant to Section 42 of the Internal Revenue Code, Chapter 3.6 of Division 31 (commencing with Section 50199.4) of the

Health and Safety Code, or Section 12206, 17058, or 23610.5 of the Revenue and Taxation Code, on or before December 31, 2003.

(e) If a statute, other than this section, or a regulation, other than a regulation adopted pursuant to this section, or an ordinance or a contract applies this chapter to a project, the exclusions set forth in subdivision (d) do not apply to that project.

(f) For purposes of this section, references to the Internal Revenue Code mean the Internal Revenue Code of 1986 as amended, and include the corresponding predecessor sections of the Internal Revenue Code of 1954 as amended.

(g) The amendments made to this section by either Chapter 938 of the Statutes of 2001 or the act adding this subdivision[1] shall not be construed to preempt local ordinances requiring the payment of prevailing wages on housing projects.

This legislation has effectively overruled prior court decisions that had determined that a number of developments did not constitute public works. *See, McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, for example.

There are substantial consequences to a project being determined to be a "public work" for the purpose of the application of the prevailing wage law:

1. The first is that prevailing wages have to be paid to all workers on the project if it is greater than $1,000. (Labor Code, Sections 1771 and 1774; Title 8, California Code of Regulations, Section 16000.)
2. The prevailing rate of per diem wages must be posted at each job site. (Labor Code, Section 1773.2.)
3. Maintaining and making available for inspection certified payroll records containing detailed information on a per worker basis. (Labor Code, Section 1776 and Title 8, California Code of Regulations, Section 16400(e).
4. Compliance with statutory apprenticeship requirements. (Labor Code, Section 1777.5.)

These substantial changes have meant that those works that previously would not be considered "public works" subject to prevailing wages are now so classified. As this can have a substantial financial impact on the project, substantial training of not only the entity's counsel is needed, but also those in the department responsible for the work. If the effects of this chapter are not acknowledged from the beginning, not only will there be substantial additional costs, but an increased probability of expensive litigation as well.

[1] Stats. 2002, c. 1048 (S.B. 972), §1. [Footnote in statute.]

An additional consequence with having a project be defined as a "public work" in the effective increase in cost by 15-30%, due to the application of "prevailing wages".

Labor Code, Section 1720.3, enacted after the effective date of Article XIIIB, Section 6, has expanded the definition of a public work to include the hauling of refuse from a public works site to an outside disposal location. Thus, the disposal of refuse has an increased cost as a result of this program.

Labor Code, Section 1720.4 was enacted, which eliminates certain nonprofit volunteer projects, provided that the local unions of workers employed on public works projects agree that the work will not have an adverse impact on employment. In order to have this exemption, the local unions must so agree.

Changes to Labor Code, Section 1726 require the public agency, who makes the contract for public work, to notify the Labor Commissioner of any suspected violations of the provisions of this chapter.

In the event that there has been a violation, the procedures for redress have changed substantially since Labor Code, Section 1727 was originally enacted in 1937. As the section existed prior to the enactment of Article XIIIB, Section 6, it read as follows:

> § **Withholding forfeited amounts**
>
> Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Law Enforcement or by the awarding body.

The changes wrought since the passage of the requirement to reimburse local government for mandated programs places more burdens on local government, as follows:

> § **Withholding to satisfy wage and penalty assessments**
>
> (a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts

required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

(b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

These changes now require local government to track more carefully the amounts under the contract, as well as progress payments. This provision requires greater administrative costs and expenses. Additionally, the changes wrought by Chapter 954, Statutes of 2000 require training of the personnel required to administer the contract in order to make sure there is compliance with these withholding provisions.

Since originally enacted in 1939, the prohibition against discrimination provisions contained in Labor Code, Section 1735 have also been chanted. Since its original enactment, the categories of physical handicap, mental condition, marital status, sex, physical disability and mental disability have been added. These additional categories require additional administrative efforts with regard to the award of any such contract, as well as contract monitoring.

Labor Code, Section 1742 was enacted by Chapter 954, Statutes of 2000. It sets up the procedural methodology for determination of violations of the chapter, the effect of civil wage and penalty assessments as well as the service of same. This additional requirement means that there will be additional administrative expense in the tracking of such contracts and progress payments by the awarding body.

Labor Code, Section 1742 was also enacted with the passage of Chapter 954, Statutes of 2000. It contains one provision which is operative until January 1, 2005, with another provision in effect thereafter. This provision governs the hearing procedure to review wage and penalty assessments. Although these assessments are made against the contractor or subcontractor, there are requirements imposed for withholding such payments against the awarding body, generally the public entity. This requires additional training and knowledge for contract and payment management by the awarding entity which was not required prior to the enactment of this legislation.

The net effect of having a project declared a public work, is to be required to pay prevailing wage rates to the workers on the project. See Labor Code, Section 1771. The prevailing wage rates are determined by the Director of the Department of Industrial Relations, pursuant to Labor Code, Section 1770. Thus the expansion of the applicability

of prevailing wage legislation through the test claim legislation results in more public works having to be governed by the increased labor costs and administrative costs of this program.

With the passage of Chapter 1124, Statutes of 1989, and Chapter 83, Statutes of 1999, local government has been faced with a Hobson's choice: it can pay prevailing wages for all projects in excess of $1,000 pursuant to Labor Code, Section 1771, or it can establish a labor compliance program under Section 1771.5, in which event prevailing wages are not applicable for construction projects under $25,000 or renovation or maintenance projects under $15,000. However, the labor compliance program requires compliance with various conditions:

> (b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements:
> (1) All bid invitations and public works contracts shall contain appropriate language concerning their requirements of this chapter.
> (2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.
> (3) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.
> (4) The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chapter.
> (5) The awarding body shall withhold contract payments when payroll records are delinquent or inadequate.
> (6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

In addition, local government is required to enforce the provisions of prevailing wages by withholding of penalties or forfeitures from contract payments pursuant to Labor Code, Section 1771.6. This requires the awarding agency to serve the notice by first-class and certified mail to the contractor and/or subcontractors, as well as to any bonding agency or surety.

The Director of Industrial Relations was given the power to establish rules and regulations by virtue of Labor Code, Section 1773.5. However, this section was amended in 1989 with the passage of Chapter 1224 to authorize the Director to establish regulations to govern the responsibilities and duties of awarding bodies.

Additionally, the Director of Industrial Relations has issued regulations, contained at Title 8, California Code of Regulations, Sections 16000 through 16802, inclusive. These regulations detail further requirements imposed upon local government.

First of all, Section 16100 provides that any interested party may file a request to determine whether or not a particular work is covered by the prevailing wage law. This may be filed by the local governmental agency, as well as unions, a contractor or subcontractor, local organization or association, or worker, amongst others. See Section 16000. If the awarding body does not file the request, a copy of such must be served on it.

Furthermore, pursuant to Section 16002.5, any interested party may appeal to the Director of Industrial Relations a determination of whether there is coverage under the prevailing wage law. This notice of appeal must state all factual and legal grounds upon which the determination is sought, and whether a hearing is requested. The responding party also has the opportunity to so respond. The determination of the Director is deemed to be a quasi-legislative act, subject to writ of mandate pursuant to Code of Civil Procedure, Section 1085.

The foregoing two procedures involve an administrative determination, and if the awarding agency is the responding party, it must submit all documentation and legal arguments pertaining to the issue of whether such work is covered under prevailing wage laws.

Additionally, as noted above, if volunteer labor is to be used, the local governmental agency must serve a written request to so use pursuant to Section 16003 45 days prior to the commencement of work, setting for the basis for belief that same is authorized pursuant to Labor Code, Sections 1720.4(a), (b) and (c), and name all unions in the locality where work is to be performed.

The regulations further specify the requirements that must be undertaken by a local entity in Section 16100(b) which includes, but not limited to:

- Obtaining the prevailing wage rate from the Director of the Department of Industrial Relations.
- Specify the appropriate prevailing wage rates.
- Make sure the posting requirement is applied to each job site.
- If a wage for a particular craft, classification or type of worker is not available from the Director, the agency must make a request for a special determination by written application to the Division of Labor Statistics and Research at least 45 days prior to the project bid advertisement date.
- Notify the Division of Apprenticeship Standards.
- The agency must notify the prime contractors of the relevant public work requirements, which include:
    - Appropriate number of apprentices.
    - Workers' compensation coverage
    - Requirement to keep accurate records of work.
    - Inspection of payroll records.

- And other requirements imposed by law

The last requirement is extremely complex. As noted above, there are a plethora of requirements that are imposed upon local governmental entities when awarding a contract. The monetary amount of the contract can be quite small unless there is a labor compliance project in existence pursuant to Labor Code, Section 1771.5. Although this is a complicated program, the failure to have one means that all projects of $1,000 or greater are subject to the requirement of the prevailing wage law. Thus although voluntary, local government has no alternative other than to have such a labor compliance project since the $1,000 limit established decades ago, has not been increased to reflect inflation and the lessening of the value of money.

At this point in time, it is critical to keep in mind the fact that not all projects are discretionary to the local governmental entity. First of all, this law applies to maintenance of all buildings as well as infrastructure. Additionally, it applies to repairs as well as replacements. Thus, if a street needs to be fixed, a water main breaks, or a building because it has been used for years is in need of repair lest it become a hazard, these works are all subject to prevailing wages.

Additionally, under Section 16100, local government must also:

- Withhold monies.
- Ensure that public works are not split into smaller projects to evade prevailing wages.
- Must deny the right to bid on public contracts those who have violated public works laws.[2]
- Not permit workers to work more than 8 hours per day nor more than 40 hours per week unless paid not less than time and a half.
- Not take any portion of the workers' wages or fee.
- Comply with requirements as set forth in Labor Code, Sections 1776(g), 1777.5, 1810, 1813 and 1860.

If the Director has not set forth a general determination of prevailing wage for a particular craft or classification, the awarding party must request the Director to make such a determination. The request must be submitted at least 45 days prior to the award of the bid. Section 16202.

It should be noted that the format of a prevailing wage determination by the Director is set forth in excruciating detail in Section 16203. This includes everything from straight time, to what holidays are to be paid, as well as benefits, travel and subsistence payments, apprentice rates, and the dates to which the ruling is effective.

If an agency believes that the Director has not adopted appropriate prevailing wage rates for its area or for the classifications in question, it has the right to petition to

[2] Note that this provision does invite litigation from those who have been barred from bidding for public works contracts, to which the agency must respond lest it be court ordered to award the bid to the objecting party, thus creating liability both to the barred contractor as well as to the contractor awarded the work.

review the prevailing wage determination. This procedure is set forth in detail in Section 16302. This right is critical, as it is the local agency that will be paying for the work of improvement. In lean economic times, such as local agencies have been experiencing presently, it is particularly critical that there be no waste of local governmental resources. Thus, in the event that the Director errs with regard to the amount of a prevailing wage and is more than the general prevailing wage in the area, it is incumbent upon local government to challenge the determination. Although the amount may be small with regard to the hourly wage, when multiplied times the amount of hours that must be performed on a work of maintenance or repair, the amount could be extraordinary.

First of all, there is the content of the petition. It must include:

- The name, address and telephone number and job title of the person filing the petition and the person verifying the petition, as well as his or her attorney.
- Whether the petitioning party is the local governmental entity, prospective bidder, or a representative of one or more of the crafts.
- The nature of the petitioner's business.
- The name of the awarding body.
- The date on which the call for bids was first published.
- The name and location of the newspaper in which the publication was made and a copy thereof.
- If the petitioner is a local government, it shall describe the parent or principal organization and the statutory authority for the award of the work.
- The manner in which the wage determined failed to comply with Labor Code, Section 1773.
- The petitioner must set forth the rate that it believes to be accurate.
- If there are facts relating to a particular employer, the facts must identify the employer by name and address and give the number of workers involved.
- If the facts relate to rates actually paid on public or private projects in the area, the facts surrounding same must be included.
- If the Director has failed to consider rates, same must be alleged in detail.

If the petitioner is not the local governmental agency, a copy must be served on the local governmental body.

If the petitioner is not the local governmental body, the local governmental body has no alternative than to respond, particularly if the request is to increase the prevailing wage rate. This is imperative in order to make sure that public funds are not subject to waste.

The authority of the Director, again, is specified in Section 16303 as being quasi-legislative, subject to a writ of mandate pursuant to Code of Civil Procedure, Section 1085.

There are specific procedures detailed when the director has determined to conduct a hearing pursuant to Section 16304. This includes a hearing, for which notification is given in advance. All parties are to be afforded the opportunity to introduce evidence, and cross-examination is allowed in the discretion of the hearing officer.

Section 16400 specifies that any interest person may request detailed payroll records concerning anyone to the local governmental agency, which then must provide same. This means that if the payroll records can be requested of the local agency, they must have copies of all payroll records, although there is a procedure to request same of the contractor

Additionally, once such a request is made of the local agency, it must acknowledge the receipt of same, together with the estimated cost of providing same. However, the costs of handling the request are not specifically included in the authorization to charge a fee.

If the Director issues a decision to withhold, retain or forfeit any sum from the contractor as required by Labor Code, Section 1727, notice is provided to the local governmental entity, which shall specify the amount to be withheld, pursuant to Section 16411. When the notice is received, the local agency must retain the amount pursuant to Section 16412.

Procedures are afforded to the aggrieved contractor or subcontractor to challenge the determination by the Director. Once a decision is made by the Director, a copy of the decision is required to be transmitted by the Department to the local agency as set forth in Section 16414.

As mentioned above, the limits for prevailing wages are raised substantially if the local governmental agency has a labor compliance program. However, the Director has established substantial regulations for a local agency to comply with in order to have a program so determined pursuant to Section 16425. This section provides as follows:

> **§ 16425. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs**
>
> (a) No contracts shall be subject to LJP jurisdiction nor shall the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) apply to any contract of an awarding body until after the LCP has received initial or final approval under these regulations.
> (b) Contracts for which the Date of Notice or the Call for Bids are subsequent to the date of the initial or final approval of a LCP are subject to Labor Code Section 1771.(5). In the case of a contract for which there is no

Call for Bids, the applicable date shall be the date of execution of the contract.

(c) Revocation of approval of a LCP by the Director shall not affect the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) if the date of such revocation is subsequent to the Date of Notice or Call for Bids, subsequent to the date of execution of the contract.

(d) If the Director revokes the approval of a LCP, the Director shall give notice to the awarding body specifying enforcement responsibilities, including enforcement actions pending hearing, as of the date of revocation.

(e) An awarding body may voluntarily terminate its LCP. With respect to each contract pending on the date of termination, the awarding body shall:

(1) Notify the Director of its intention and the effective date of the termination;

(2) Notify the contractor(s) and the DLSE of the identify the agent who will carry out the compliance enforcement obligations of Labor Code Section 1771.5 on the remaining contracts; and

(3) Specify the general fund into which penalties or forfeitures withheld from any contract payments shall be deposited.

(f) The Labor Commissioner may, in writing, agree to assume enforcement obligations on pending contracts of an awarding body which has voluntarily terminated its LCP. In such case, penalties and forfeitures shall be deposited in the general fund of the state.

Additionally, in order to have approval of a labor compliance program[3], the requirements of Section 16426 must be met. There are substantial requirements in order to have such an authorized program. First of all, the local governmental entity must demonstrate it has the ability to operate an LCP, including:

- The experience of the entity's personnel on public works labor compliance issues.
- The average of public works contracts annually administered.
- Whether the LCP is a joint or cooperative venture amongst awarding responsibilities, and how the resources and responsibilities of the LCP compare to the awarding bodies involved.
- The awarding body's record of Labor Code violations and withholding in the preceding five years.
- The availability of an LCP of legal support.
- The availability and quality of a manual outlining the responsibilities of an LCP.

[3] Note that the regulations define this as an LCP.

- The methods by which the awarding body will transmit notice to the Labor Commissioner of willful violations.

The initial approval of an LCP is only good for one year, unless an extension is requested in writing and granted in writing.

After receipt of final approval and operation of an LCP for 11 months, pursuant to Section 16427, the Director may award final approval. However, the awarding body has the burden of producing evidence that it meets the following criteria: that the awarding body has satisfactorily demonstrated its ability to monitor compliance with the requirement of the Labor Code and the requirements of the regulations and has filed timely, complete and accurate reports as required by the regulations.

The Director has the authority to revoke final approval of an LCP pursuant to Section 16428. Basically, any interested party has the ability to request that the Commissioner revoke the LCP designation. The Director has the ability to require the local agency to provide a supplemental report containing the information required pursuant to Section 16431.

An LCP must comply with the requirements of Section 16430. This has a substantial number of requirements which the agency is required to enforce, including:

- The call for bids and the contract or purchase order must contain Labor Code requirements.
- A prejob conference must be conducted with the contractors and subcontractors in the bid, at which time the federal and state labor law requirements applicable to the contract are discussed and applicable forms are to be provided.
- Requirement that the contractor keep certified payroll records, and to that end, the agency may create a form which meets the minimum requirements.
- Program for orderly review of payroll records and, if required, audit of same.
- Prescribed routine for withholding penalties, forfeitures and underpayment of wages for violations.
- All contracts are required to have a provision that contract payments will not be made if payroll records are delinquent or inadequate.

Just to demonstrate that the obtaining of an LCP's approval is not easy, there is an Appendix A to Section 16429, which lists 14 points that are to be reviewed at the prejob conference with regard to state and federal labor law requirements for a contract.[4]

If there is an LCP allowed, pursuant to Section 16431, an annual report is required to be submitted by the local governmental agency to the Director within 60 days after the close of the agency's fiscal year. This report is to include, as minimum standards, the following:

- Number of contracts awarded and their total value.

[4] Appendix A is attached hereto and incorporated herein by reference in Exhibit 16 at pages 1414.2 and 1414.3.

- Number, description and total value of contracts which were exempt from prevailing wages.
- Summary of penalties and forfeitures imposed or withheld from any money due contractors as well as the amount recovered by court action.[5]
- A summary of wages due to employees resulting from contractors failing to pay prevailing wages, the amount withheld from money due contractors, and the amount recovered through court action.

Explicit in the last two items is the fact that if there is an order to withhold wages issued by the Director, it will result in litigation. Obviously, the party against whom the action will be initiated is the public agency which has withheld those funds.

Section 16432 requires that audits be conducted by the local agency at its discretion or when ordered by the Labor Commissioner. These audits are to consist of: a comparison of payroll records to the best available information concerning the hours worked and the classification of employees. It needs to be sufficiently detailed such that the Labor Commissioner and the LCP to draw reasonable conclusions as to whether there has been compliance with prevailing wage laws and ensure accurate computation of underpayment of wages to workers as well as applicable penalties and forfeitures.

Furthermore, Appendix B, contained in Exhibit 16 at Page 1414.3, details the "suggested" audit record form so that the local agency will discern what information is necessary in order to satisfy the requirements of the Labor Commissioner.

Section 16433 details the limited exemption to prevailing wages that exists, as detailed in Labor Code, Section 1771.5 if an LCP is approved.

Section 16434 provides the duties of the local governmental agency granted LCP status, to enforce the labor code and prevailing wages.

In order to have consistency with regard to the application of prevailing wages and LCP, Sections 16435 and 1635.5 contain the various definitions which govern.

Section 16436 details those forfeitures which must have the prior approval of the Labor Commissioner before they are allowed to be imposed.

Should the LCP desire for the Labor Commissioner to determine the appropriate amount of a forfeiture, Section 16437 details the report required to be filed by the agency in order to have such a determination. The report is required to be detailed and contain at the last the following information:

- Deadline by which contract acceptance of filing of notice of completion plus 90 days will occur.
- Other deadlines which could impede collection of the forfeiture.

[5] Thus there is explicit recognition that withholding or forfeiture will most likely result in litigation against the withholding agent; here, the public entity.

- Evidence of the violation in narrative form.
- Evidence that an audit or investigation according to section 16432 was conducted.
- Evidence that the contractor was given the opportunity to explain why there was no violation or that any such violation was caused by mistake, inadvertence or neglect before this filing is submitted to the Labor Commissioner.
- Where the LCP seeks not only the amount of wages but a penalty as part of the forfeiture, and the contractor has unsuccessfully contended that there was no violation or that any such violation was caused by mistake, inadvertence or neglect, the amount of the proposed forfeiture with a recommended penalty amount.
- If the LCP seeks only wages or a penalty less than $50 per day, and the contractor successfully contended that such violation was caused by mistake, inadvertence or neglect, the file should contain evidence that the contractor knew of his responsibilities under the act.
- The previous record of the contractor in meeting prevailing wage obligations.
- Whether the LCP was granted initial, extended initial or final approval.

The section further goes on to detail the procedural requirements as well as the proposed form of notice that is to be provided to the contractor when the filing is made with the Labor Commissioner.

Section 16438 details who is entitled to various penalties and forfeitures, depending upon whether it is accomplished by administrative action or litigation, and the parties thereto.

Contractors are given the ability to appeal an LCP enforcement action pursuant to Section 16439. In the event that the contractor does appeal, the local agency must provide to the Director within 30 days a full copy of the record of enforcement proceedings as well as any further documents, arguments or authorities it wishes the Director to consider. Additionally, the Director is given the authority to require a supplemental report, which is an update of the annual report required of the LCP.

Section 16801 details the rights and responsibilities of the Division of Labor Standards Enforcement concerning prevailing wages. If the DLSE determines there is a violation, it is empowered to serve on the awarding body and the contractor a Notice of Hearing and Statement of Alleged Violations. The section details the procedural requirements of such a hearing. There are additional requirements imposed upon the local agency as follows:

> Awarding bodies. Any awarding body which has awarded or let a contract or purchase order to be paid for in whole or in part from public funds calling for the construction, alteration, demolition, repair, maintenance, or improvement of any structure, building, road, property, or other improvement of any kind (including the laying of carpet and the hauling of refuse from a public works site to an

outside disposal location with respect to contracts involving any state agency, including the California State University and University of California) shall, in accordance with Labor Code section 1776(g), inform prime contractors of the requirements of Labor Code section 1776, and any other requirements imposed by law, in order to assist DLSE with an investigation pursuant to Labor Code 1777.1. The awarding body shall have the right to review the records from the from the investigative file of DSLE which are not covered by attorney-client or work product privileges, and which are not being utilized in the ongoing investigation of a criminal offense.

In summary, since the initial prevailing wage law was enacted in 1931, and more particularly since January 1, 1975, the prevailing wage law has been substantially expanded. Not only have wages increased, but the number of contracts and transactions to which prevailing wages have been applied has increased. The exemption from the payment of prevailing wage for small works are saddled with an extensive bureaucracy in order to be applicable.

A. LEGISLATIVE HISTORY PRIOR TO 1975

Prior to 1975, there were requirements governing each of the foregoing sections. Same has been recited at length hereinabove in the discussion as to how the test claim legislation impacted preexisting law.

B. SPECIFIC STATUTORY SECTIONS THAT CONTAIN THE MANDATED ACTIVITIES

The mandated activities are contained in Labor Code, Sections 1720, 1720.3, 1720.4, 1726, 1727, 1735, 1742, 1770, 1771, 1771.5, 1771.6, 1773.5, and 8 California Code of Regulations, Sections 16000 through 16802.

C. COST ESTIMATES

With regard to the cost estimates for complying with this program, the City of Newport Beach has been informed that not only is the cost of each contract increased by 15-30% for the increase in wages, but the administrative cost of monitoring as required by these laws runs many thousands of dollars on an annual basis.

REIMBURSABLE COSTS MANDATED BY THE STATE

The costs incurred by the claimant as a result of the statutes on which this test claim is based are all reimbursable costs as such costs are "costs mandated by the Sate" under Article XIII B (6) of the California Constitution, and Government Code § 17500 *et al.* of

the Government Code. Section 17514 defines "costs mandated by the state", and specifies the following three requirements:

1. There are "increased costs which a local agency is required to incur after July 1, 1980."
2. The costs are incurred "as a result of any statute enacted on or after January 1, 1975.:
3. The costs are as a result of "a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution."

All three of the above requirements for finding costs mandated by the State are met as described previously herein.

D. MANDATE MEETS BOTH SUPREME COURT TESTS

The mandate created by this statute clearly meets both tests that the Supreme Court in the *County of Los Angeles* v. *State of California* (1987) created for determining what constitutes a reimbursable state mandated local program. Those two tests, which the Commission on State Mandates relies upon to determine if a reimbursable mandate exists are the "unique to government" and the "carry out a state policy" tests. Their application to this test claim is discussed below.

Mandate is Unique to Local Government

Only local government is subject to the requirement to pay prevailing wages and all the attendant administrative requirements.

Mandate Carries Out a State Policy

The state policy is to pay prevailing wages in honor of the contributions of unions, and to assure that this is one area which guarantees workers union wages. Furthermore, the apprenticeship requirements has legislative findings of the necessity to have this type of education and training available in the state.

STATE FUNDING DISCLAIMERS ARE NOT APPLICABLE

There are seven disclaimers specified in Government Code § 17556 which could serve to bar recovery of "costs mandated by the State", as defined in Government Code § 17556. None of the seven disclaimers apply to this test claim:

1. The claim is submitted by a local agency or school district which requests legislative authority for that local agency or school district to implement the Program specified in the statutes, and that statute imposes costs upon the local agency or school district requesting the legislative authority.

2. The statute or executive order affirmed for the State that which had been declared existing law or regulation by action of the courts.
3. The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.
4. The local agency or school district has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service.
5. The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the State mandate in an amount sufficient to fund the cost of the State mandate.
6. The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a Statewide election.
7. The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

CONCLUSION

In conclusion, we respectfully request that the Commission find that those increased requirements imposed after January 1, 1975 to this program be found to be a reimbursable state mandated program.

E. CLAIM REQUIREMENTS

The following elements of this test claim are provided pursuant to Section 1183, Title 2 of the California Code of Regulations:

Exhibit 1: Chapter 1084, Statutes of 1976
Exhibit 2: Chapter 1174, Statutes of 1976
Exhibit 3: Chapter 992, Statutes of 1980
Exhibit 4: Chapter 142, Statutes of 1983
Exhibit 5: Chapter 143, Statutes of 1983
Exhibit 6: Chapter 278, Statutes of 1989
Exhibit 7: Chapter 1224, Statutes of 1989
Exhibit 8: Chapter 913, Statutes of 1992
Exhibit 9: Chapter 1342, Statutes of 1992
Exhibit 10: Chapter 83, Statutes of 1999
Exhibit 11: Chapter 220, Statutes of 1999
Exhibit 12: Chapter 881, Statutes of 2000
Exhibit 13: Chapter 954, Statutes of 2000
Exhibit 14: Chapter 938, Statutes of 2001
Exhibit 15: Chapter 1048, Statutes of 2002

Exhibit 16: 8 California Code of Regulations, Sections 16000-16802

CLAIM CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the Sate of California that the statements made in this document are true and complete to the best of my personal knowledge except as to those matters stated upon information and belief, and as to those matters I believe them to be true.

Executed this 24 day of September, 2003, at Newport Beach, California, by:

Glen Everroad, Revenue Manager

DECLARATION OF GLEN EVERROAD

I, Glen Everroad, make the following declaration under oath:

I am the Revenue Manager for the City of Newport Beach. As part of my duties, I am responsible for the complete and timely recovery of costs mandated by the State.

I declare that I have examined the City of Newport Beach's State mandated duties and resulting costs in implementing the subject law and guidelines, and find that such costs are, in my opinion, "costs mandated by the State", as defined in Government Code, Section 17514:

> "'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts, and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are stated upon information or belief, and as to those matters, I believe them to be true.

Executed this 24 day of September, 2003, at Newport Beach, California.

Glen Everroad
Revenue Manager
City of Newport Beach

cited for a violation of Section 21461.5, is, within 24 hours, again found upon the freeway in violation of Section 21461.5 and thereafter refuses to leave the freeway after being lawfully ordered to do so, by a peace officer, and having been informed that his failure to leave could result in his arrest.

(m) Section 2800, as it relates to a pedestrian who, after having been cited for a violation of Section 2800 for failure to obey a lawful order of a peace officer issued pursuant to Section 21962, is within 24 hours again found upon the bridge or overpass and thereafter refuses to leave after being lawfully ordered to do so by a peace officer and after having been informed that his failure to leave could result in his arrest.

SEC. 2. There are no state-mandated local costs in this act that require reimbursement under Section 2231 of the Revenue and Taxation Code because ~~there~~ are no new duties, obligations or responsibilities imposed on local government by this act.

CHAPTER 1083

An act to add Section 382.4 to the Penal Code, relating to drugs.

[Approved by Governor September 20, 1976. Filed with Secretary of State September 21, 1976.]

The people of the State of California do enact as follows:

SECTION 1. Section 382.4 is added to the Penal Code, to read:

382.4. No person, other than a licensed veterinarian, shall administer succinylcholine, also known as sucostrin, to any dog or cat.

Violation of this section shall constitute a misdemeanor.

SEC. 2. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be an appropriation made by this act because the Legislature recognizes that during any legislative session a variety of changes to laws relating to crimes and infractions may cause both increased and decreased costs to local governmental entities and school districts which, in the aggregate, do not result in significant identifiable cost changes.

CHAPTER 1084

An act to add Section 1720.3 to the Labor Code, relating to public works.

[Approved by Governor September 20, 1976. Filed with Secretary of State September 21, 1976.]

The people of the State of California do enact as follows:

SECTION 1. Section 1720.3 is added to the Labor Code, to read:

1720.3. For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and Colleges and the University of California.

SEC. 2. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

CHAPTER 1085

An act to add Section 31704 to the Water Code, relating to community redevelopment.

[Approved by Governor September 20, 1976. Filed with Secretary of State September 21, 1976.]

The people of the State of California do enact as follows:

SECTION 1. Section 31704 is added to the Water Code, to read:

31704. Taxes levied by the Coachella Valley County Water District for payment of the principal of, or interest on bonded indebtedness, where the proceeds of such bonds were used for the construction and installation of sewer facilities to provide sewer service to an area, including either wholly or in part a community redevelopment project area, shall not be apportioned as authorized by subdivision (b) of Section 33670 of the Health and Safety Code, but shall be allocated solely to the Coachella Valley County Water District.

SEC. 2. This section, applicable only to the Coachella Valley County Water District, is necessary because of the special and unique problems of debt service taxation for sewer facilities within such district in relation to tax apportionment within community redevelopment project areas within such district.

CHAPTER 1086

An act to amend Section 23428.20 of the Business and Professions Code, relating to alcoholic beverages, and making an appropriation

coverage in the event of termination of employment or membership, shall include in such conversion provisions the same conversion rights and conditions to a covered dependent spouse of the employee or member in the event the covered dependent spouse ceases to be a qualified family member by reason of termination of marriage or death of the employee or member. Such conversion rights shall not require a physical examination or a statement of health.

CHAPTER 1174

An act to amend Section 1735 of the Labor Code, and to amend Section 453 of the Public Utilities Code, relating to sex discrimination.

[Approved by Governor September 21, 1976. Filed with Secretary of State September 22, 1976.]

The people of the State of California do enact as follows:

SECTION 1. Section 1735 of the Labor Code is amended to read:

1735. No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of such persons, except as provided in Section 1420, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter.

SEC. 2. Section 453 of the Public Utilities Code, as amended by Chapter 447 of the Statutes of 1975, is amended to read:

453. (a) No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.

(b) No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, occupation, sex, marital status or change in marital status. A person who has exhausted all administrative remedies with the commission may institute a suit for injunctive relief and reasonable attorney's fees in cases of an alleged violation of this subdivision. If successful in litigation, the prevailing party shall be awarded attorney's fees.

(c) No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(d) No public utility shall include with any bill for services or commodities furnished any customer or subscriber any advertising or literature designed or intended (1) to promote the passage or defeat of a measure appearing on the ballot at any election whether

local, statewide, or national, (2) to promote or defeat any candidate for nomination or election to any public office, (3) to promote or defeat the appointment of any person to any administrative or executive position in federal, state or local government, or (4) to promote or defeat any change in federal, state, or local legislation or regulations.

(e) The commission may determine any question of fact arising under this section.

SEC. 3. Section 453 of the Public Utilities Code, as amended by Chapter 447 of the Statutes of 1975, is amended to read:

453. (a) No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.

(b) No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, occupation, sex, marital status or change in marital status. A person who has exhausted all administrative remedies with the commission may institute a suit for injunctive relief and reasonable attorney's fees in cases of an alleged violation of this subdivision. If successful in litigation, the prevailing party shall be awarded attorney's fees.

(c) No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(d) No public utility shall include with any bill for services or commodities furnished any customer or subscriber any advertising or literature designed or intended (1) to promote the passage or defeat of a measure appearing on the ballot at any election whether local, statewide, or national, (2) to promote or defeat any candidate for nomination or election to any public office, (3) to promote or defeat the appointment of any person to any administrative or executive position in federal, state or local government, or (4) to promote or defeat any change in federal, state, or local legislation or regulations; provided that until December 31, 1976, any such prohibitions shall not apply to any notice or statement relating to matters affecting rates or service to customers or subscribers where the public utility has requested and received the prior approval of the commission.

(e) The commission may determine any question of fact arising under this section.

SEC. 4. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to that section nor shall there be an appropriation made by this act because the Legislature recognizes that during any legislative session a variety of changes to laws relating to crimes and infractions may cause both increased and decreased costs to local governmental entities and school districts which, in the aggregate, do not result in

significant identifiable cost changes.

SEC. 5. It is the intent of the Legislature, if this bill and Senate Bill No. 1683 are both chaptered and become effective on or before January 1, 1977, both bills amend Section 453 of the Public Utilities Code, and this bill is chaptered after Senate Bill No. 1683, that Section 453 of the Public Utilities Code, as amended by Section 1 of Senate Bill No. 1683, be further amended on the effective date of this act in the form set forth in Section 3 of this act to incorporate the changes in Section 453 proposed by this bill. Therefore, if this bill and Senate Bill No. 1683 are both chaptered and become effective on or before January 1, 1977, and Senate Bill No. 1683 is chaptered before this bill and amends Section 453, Section 3 of this act shall become operative on the effective date of this act and Section 2 of this act shall not become operative.

SEC. 6. It is the intent of the Legislature, if this bill and Assembly Bill No. 497 are both chaptered and become effective on or before January 1, 1977, both bills amend Section 453 of the Public Utilities Code, and this bill is chaptered after Assembly Bill No. 497, that Section 453 of the Public Utilities Code, as amended by Section 1 of Assembly Bill No. 497, be further amended on the effective date of this act in the form set forth in Section 3 of this act to incorporate the changes in Section 453 proposed by this bill. Therefore, if this bill and Assembly Bill No. 497 are both chaptered and become effective on or before January 1, 1977, and Assembly Bill No. 497 is chaptered before this bill and amends Section 453, Section 3 of this act shall become operative on the effective date of this act and Section 2 of this act shall not become operative.

CHAPTER 1175

An act to add Section 3074.1 to the Labor Code, relating to apprenticeship.

[Approved by Governor September 21, 1976. Filed with Secretary of State September 22, 1976.]

The people of the State of California do enact as follows:

SECTION 1. Section 3074.1 is added to the Labor Code, to read:

3074.1. In compliance with the affirmative action requirements of California's plan for equal opportunity in apprenticeship, school districts maintaining high schools, community colleges districts, and apprenticeship program sponsors, shall provide students with information as to the availability of apprenticeship programs.

SEC. 2. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be an appropriation made by this act because the duties, obligations or responsibilities imposed on local

CHAPTER 992

An act to amend Sections 11139.5, 11340.2, 11501, 11554, 19702.5, 19704, and 50085.5 of, and to add Part 2.8 (commencing with Section 12900) to Division 3 of Title 2 of, the Government Code, to repeal Part 5 (commencing with Section 35700) of Division 24 of the Health and Safety Code, to amend Sections 56, 1735, and 3096 of, and to repeal Part 4.5 (commencing with Section 1410) of Division 2 of, the Labor Code, relating to the reorganization of the executive branch of the California state government.

[Approved by Governor September 19, 1980. Filed with Secretary of State September 21, 1980.]

The people of the State of California do enact as follows:

SECTION 1. Section 11139.5 of the Government Code is amended to read:

11139.5. The Secretary of the Health and Welfare Agency, with the advice and concurrence of the Fair Employment and Housing Commission, shall establish standards for determining which persons are protected by this article and guidelines for determining what practices are discriminatory. The secretary, with the cooperation of the Fair Employment and Housing Commission, shall assist state agencies in coordinating their programs and activities and shall consult with such agencies, as necessary, so that consistent policies, practices, and procedures are adopted with respect to the enforcement of the provisions of the article.

SEC. 1.5. Section 11340.2 of the Government Code is amended to read:

11340.2. (a) The Office of Administrative Law is hereby established in state government. The office shall be under the direction and control of an executive officer who shall be known as the director. There shall also be a deputy director. The director's term and the deputy director's term of office shall be coterminous with that of the appointing power, except that they shall be subject to reappointment.

(b) The director and deputy director shall have the same qualifications as a hearing officer and shall be appointed by the Governor subject to the confirmation of the Senate.

SEC. 2. Section 11501 of the Government Code is amended to read:

11501. (a) This chapter applies to any agency as determined by the statutes relating to that agency.

(b) The enumerated agencies referred to in Section 11500 are:

Accountancy, State Board of
Aging, State Department of
Air Resources Board, State
Alcohol and Drug Abuse, State Department of

Alcoholic Beverage Control, Department of
Architectural Examiners, California State Board of
Attorney General
Automotive Repair, Bureau of
Barber Examiners, State Board of
Behavioral Science Examiners, Board of
Cancer Advisory Council
Cemetery Board
Chiropractic Examiners, Board of
Collection and Investigative Services, Bureau of
Community Colleges, Board of Governors of the California
Conservation, Department of
Consumer Affairs, Director of
Contractors, Registrar of
Corporations, Commissioner of
Cosmetology, State Board of
Dental Examiners of California, Board of
Developmental Services, State Department of
Education, State Board of
Employment Agencies, Bureau of
Engineers, State Board of Registration for Professional
Fabric Care, State Board of
Fair Employment and Housing Commission
Fair Political Practices Commission
Fire Marshal, State
Fire Services, State Board of
Fish and Game Commission
Food and Agriculture, Director of
Forestry, Department of
Funeral Directors and Embalmers, State Board of
Geologists and Geophysicists, State Board of Registration for
Guide Dogs for the Blind, State Board of
Health Services, State Department of
Home Furnishings, Bureau of
Horse Racing Board, California
Insurance Commissioner
Labor Commissioner
Landscape Architects, State Board of
Medical Quality Assurance, Board of, Medical Quality Review Committees and Examining Committees
Mental Health, State Department of
Motor Vehicles, Department of
Navigation and Ocean Development, Department of
Nursing, Board of Registered
Nursing Home Administrators, Board of Examiners of
Optometry, State Board of
Osteopathic Examiners of the State of California, Board of
Pharmacy, California State Board of
Public Employees' Retirement System, Board of Administration of

the
Real Estate, Department of
Electronic and Appliance Repair, Bureau of
Resources Agency, Secretary of the
San Francisco, San Pablo and Suisun, Board of Pilot Commissioners for the Bays of
Savings and Loan Commissioner
School Districts
Shorthand Reporters Board, Certified
Social Services, State Department of
Statewide Health Planning and Development, Office of
Structural Pest Control Board
Tax Preparer Program, Administrator
Teacher Preparation and Licensing, Commission for
Teachers' Retirement System, State
Transportation, Department of, acting pursuant to the State Aeronautics Act
Veterinary Medicine, Board of Examiners in
Vocational Nurse and Psychiatric Technician Examiners of the State of California, Board of
Water Resources, Department of

SEC. 3. Section 11554 of the Government Code, is amended to read:

11554. An annual salary of twenty-seven thousand five hundred dollars ($27,500) shall be paid to each of the following:

(a) Director of Conservation
(b) Director of Fish and Game
(c) Executive Officer, Franchise Tax Board
(d) Director of Parks and Recreation
(e) Director of Rehabilitation
(f) Director of Veterans Affairs
(g) Director of Consumer Affairs
(h) Members of the Unemployment Insurance Appeals Board
(i) State Architect
(j) Director of Forestry
(k) Director of Fair Employment and Housing.

SEC. 4. Part 2.8 (commencing with Section 12900) is added to Division 3 of Title 2 of the Government Code, to read:

PART 2.8. DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

CHAPTER 1. GENERAL PROVISIONS

12900. This part may be known and referred to as the "California Fair Employment and Housing Act."

12901. There is in the state government, in the State and Consumer Services Agency, the Department of Fair Employment and Housing. The department is under the direction of an executive

officer known as the Director of Fair Employment and Housing, who is appointed by the Governor, subject to confirmation by the Senate, and who holds office at the pleasure of the Governor. The annual salary of the director is provided for by Chapter 6 (commencing with Section 11550) of Part 1 of Division 3 of Title 2.

12902. The provisions of Chapter 2 (commencing with Section 11150) of Part 1 of Division 3 of Title 2 apply to the director and the director is the head of a department within the meaning of such chapter.

12903. There is in the Department of Fair Employment and Housing the Fair Employment and Housing Commission. Such commission shall consist of seven members, to be known as commissioners, who shall be appointed by the Governor, by and with the advice and consent of the Senate, and one of whom shall be designated as chairman by the Governor. The term of office of each member of the commission shall be for four years. The members of the Fair Employment Practice Commission on the effective date of this section shall become the members of the Fair Employment and Housing Commission and shall serve the balance of the term they would have served on the Fair Employment Practice Commission.

12904. Any member chosen to fill a vacancy on the commission occurring otherwise than by expiration of term shall be appointed for the unexpired term of the member whom he or she is to succeed. Three members of the commission shall constitute a quorum for the purpose of conducting the business thereof.

12905. Each member of the commission shall serve without compensation but shall receive fifty dollars ($50) for each day actually spent in the performance of his or her duties under this part and shall also be entitled to his or her expenses actually and necessarily incurred in the performance of his or her duties.

12906. Any member of the commission may be removed by the Governor for inefficiency, for neglect of duty, misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard thereon.

CHAPTER 2. SUCCESSION TO FUNCTIONS AND RESPONSIBILITIES

12910. (a) The Department of Fair Employment and Housing and the Fair Employment and Housing Commission succeed to, and are vested with, all of the powers, duties, purposes, responsibilities, and jurisdiction of the Division of Fair Employment Practices and the State Fair Employment Practices Commission, respectively, in the Department of Industrial Relations, which are hereby abolished.

(b) All powers, duties, and responsibilities of the Chief of the Division of Fair Employment Practices are hereby transferred to the Director of Fair Employment and Housing.

(c) Any regulation or other action made, prescribed, issued, granted, or performed by the abolished Division of Fair Employment Practices or the State Fair Employment Practice

Commission in the administration of a function transferred pursuant to subdivision (a) shall remain in effect and shall be deemed to be a regulation or action of the Department of Fair Employment and Housing or the Fair Employment and Housing Commission, respectively.

12911. All persons serving in the state civil service, other than temporary employees, in the State Fair Employment Practice Commission and the Division of Fair Employment Practices in the Department of Industrial Relations, and engaged in the performance of a function transferred to the Fair Employment and Housing Commission and the Department of Fair Employment and Housing shall, in accordance with Sections 12080.3 and 19370 of the Government Code, remain in the state civil service and are hereby transferred to the Fair Employment and Housing Commission and the Department of Fair Employment and Housing, respectively. The status, positions, and rights of such persons shall not be affected by their transfer and shall continue to be retained by them pursuant to the State Civil Service Act, except as to positions the duties of which are vested in a position exempt from civil service.

The personnel records of all transferred employees shall be transferred to the new Department of Fair Employment and Housing.

12912. The Department of Fair Employment and Housing and the Fair Employment and Housing Commission shall have possession and control of all records, books, papers, offices, equipment, supplies, moneys, funds, appropriations, land, licenses, permits, agreements, contracts, claims, judgments, and other property, real or personal, held for the benefit or use of any state agency the functions of which are vested in the Department of Fair Employment and Housing or the Fair Employment and Housing Commission.

12913. All unexpended balances of appropriations and other funds available to the State Fair Employment Practice Commission shall be transferred to the Fair Employment and Housing Commission. All unexpended balances of appropriations and other funds available to the Division of Fair Employment Practices in the Department of Industrial Relations shall be transferred to the Department of Fair Employment and Housing in the State and Consumer Services Agency. All funds so transferred shall be for the use or the purpose for which the appropriations or other funds were originally available.

CHAPTER 3. FINDINGS AND DECLARATIONS OF POLICY

12920. It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age.

ransferred pursuant
ll be deemed to be
ir Employment and
using Commission,

service, other than
ployment Practice
ent Practices in the
in the performance
ment and Housing
yment and Housing
and 19370 of the
vice and are hereby
ng Commission and
g, respectively. The
not be affected by
y them pursuant to
the duties of which
ce.
mployees shall be
Employment and

t and Housing and
hall have possession
quipment, supplies,
rmits, agreements,
y, real or personal,
functions of which
ent and Housing or

riations and other
ractice Commission
ent and Housing
priations and other
ent Practices in the
transferred to the
in the State and
red shall be for the
or other funds were

NS OF POLICY

cy of this state that
and opportunity of
ployment without
ce, religious creed,
medical condition,

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general.

Further, the practice of discrimination because of race, color, religion, sex, marital status, national origin, or ancestry in housing accommodations is declared to be against public policy.

It is the purpose of this part to provide effective remedies which will eliminate such discriminatory practices.

This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.

12921. The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age is hereby recognized as and declared to be a civil right.

CHAPTER 4. DEFINITIONS

12925. As used in this part, unless a different meaning clearly appears from the context:

(a) "Commission" means the Fair Employment and Housing Commission and "commissioner" means a member of the commission.

(b) "Department" means the Department of Fair Employment and Housing.

(c) "Director" means the Director of Fair Employment and Housing.

(d) "Person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries.

12926. As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(a) "Age" refers to the chronological age of any individual who has reached his or her 40th birthday.

(b) "Employee" does not include any individual employed by his parents, spouse, or child, or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.

(c) "Employer," except as hereinafter provided, includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities.

"Employer" does not include a religious association or corporation not organized for private profit.

(d) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

(e) "Labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

(f) "Medical condition" means any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical evidence.

(g) "On the bases enumerated in this part" means or refers to discrimination on the basis of one or more of the following: race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age.

(h) "Physical handicap" includes impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services.

12927. As used in this part in connection with housing accommodations, unless a different meaning clearly appears from the context:

(a) "Affirmative actions" means any activity for the purpose of eliminating discrimination in housing accommodations because of race, color, religion, sex, marital status, national origin, or ancestry.

(b) "Conciliation council" means a nonprofit organization, or a city or county human relations commission, which provides education, factfinding, and mediation or conciliation services in resolution of complaints of housing discrimination.

(c) "Discrimination" includes refusal to sell, rent, or lease housing accommodations; includes refusal to negotiate for the sale, rental, or lease of housing accommodations; includes representation that a housing accommodation is not available for inspection, sale, or rental when such housing accommodation is in fact so available; includes any other denial or withholding of housing accommodations; includes provision of inferior terms, conditions, privileges, facilities, or services in connection with such housing accommodations; includes the cancellation or termination of a sale or rental agreement; and includes the provision of segregated or separated housing accommodations. The term "discrimination" does not include refusal to rent or lease a portion of an owner-occupied single-family house to a person as a roomer or boarder living within the household, provided that no more than one roomer or boarder is to live within the household.

(d) "Housing accommodation" includes any improved or unimproved real property, or portion thereof, which is used or occupied, or is intended, arranged or designed to be used or occupied, as the home, residence, or sleeping place of one or more human beings, but shall not include any accommodations operated by a religious, fraternal, or charitable association or corporation not organized or operated for private profit; provided, that such accommodations are being used in furtherance of the primary

rganization which exists
e or in part, of collective
concerning grievances,
of other mutual aid or

h impairment related to
which a person has been
t medical evidence.
part" means or refers to
e of the following: race,
estry, physical handicap,
ge.
ment of sight, hearing, or
ecause of amputation or
ther health impairment
d services.
nnection with housing
ing clearly appears from

tivity for the purpose of
ommodations because of
tional origin, or ancestry.
nprofit organization, or a
nission, which provides
conciliation services in
nination.
sell, rent, or lease housing
iate for the sale, rental, or
es representation that a
inspection, sale, or rental
fact so available; includes
ousing accommodations;
tions, privileges, facilities,
ousing accommodations;
on of a sale or rental
f segregated or separated
iscrimination" does not
on of an owner-occupied
r or boarder living within
n one roomer or boarder

des any improved or
ereof, which is used or
designed to be used or
ing place of one or more
commodations operated
iation or corporation not
it; provided, that such
herance of the primary

purpose or purposes for which the association or corporation was formed.

(e) "Owner" includes the lessee, sublessee, assignee, managing agent, real estate broker or salesman, or any person having any legal or equitable right of ownership or possession or the right to rent or lease housing accommodations, and includes the state and any of its political subdivisions and any agency thereof.

CHAPTER 5. POWERS AND DUTIES

Article 1. The Department

12930. The department shall have the following functions, powers and duties:

(a) To establish and maintain a principal office and such other offices within the state as are necessary to carry out the purposes of this part.

(b) To meet and function at any place within the state.

(c) To appoint attorneys, investigators, conciliators, and other employees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(d) To obtain upon request and utilize the services of all governmental departments and agencies and, in addition, with respect to housing discrimination, of conciliation councils.

(e) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the functions and duties of the department pursuant to this part.

(f) (1) To receive, investigate, and conciliate complaints alleging discrimination in employment on the bases enumerated in this part and discrimination in housing because of race, religious creed, color, sex, marital status, national origin, or ancestry.

(2) To receive, investigate, and conciliate complaints alleging a violation of Section 51 or 51.7 of the Civil Code. The remedies and procedures of this part shall be independent of any other remedy or procedure that might apply.

(g) To subpoena witnesses, compel their attendance, administer oaths, examine any person under oath or by sworn interrogatory, and, in connection therewith, to require the production of any books or papers relating to any matter under investigation or in question before the department.

(h) To issue accusations pursuant to Section 12965 or 12981 and to prosecute such accusations before the commission.

(i) To issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination in employment on the bases enumerated in this part and discrimination in housing because of race, religious creed, color, sex, marital status, national origin, or ancestry.

(j) To investigate, approve, certify, decertify, monitor, and

enforce nondiscrimination programs proposed by a contractor to be engaged in pursuant to Section 12990.

(k) To render annually to the Governor and to the Legislature a written report of its activities and of its recommendations.

12931. The department may also provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age which impair the rights of persons in such communities under the Constitution or laws of the United States or of this state. The services of the department may be made available in cases of such disputes, disagreements, or difficulties only when, in its judgment, peaceful relations among the citizens of the community involved are threatened thereby. The department's services are to be made available only upon the request of an appropriate state or local public body, or upon the request of any person directly affected by any such dispute, disagreement, or difficulty.

The assistance of the department pursuant to this section shall be limited to endeavors at investigation, conference, conciliation, and persuasion.

12932. (a) The Legislature recognizes that the avoidance of discriminatory practices in the employment of disabled persons is most effectively achieved through the ongoing efforts of state agencies involved in the vocational rehabilitation and job placement of the disabled. The department may utilize the efforts and experience of the Department of Rehabilitation in the development of job opportunities for the disabled by requesting the Department of Rehabilitation to foster good will and to conciliate on employment policies with employers who, in the judgment of the department, have employment practices or policies that discriminate against disabled persons. Nothing contained in this paragraph shall be construed to transfer any of the functions, powers, or duties from the department to the Department of Rehabilitation.

(b) The activities of the department in providing conciliation assistance shall be conducted in confidence and without publicity, and the department shall hold confidential any information acquired in the regular performance of its duties upon the understanding that it would be so held. No employee of the department shall engage in the performance of investigative or prosecuting functions of any department or agency in any litigation arising out of a dispute in which he acted on behalf of the department. Any employee of the department, who makes public in any manner whatever any information in violation of this subdivision, is guilty of a misdemeanor and, if a member of the state civil service, shall be subject to disciplinary action under the State Civil Service Act. When contacted by the department, employers, labor organizations, or employment agencies shall be informed whether a particular discussion, or portion thereof, constitutes either: (1) endeavors at

conference, conciliation and persuasion which may not be disclosed by the department or received in evidence in any formal hearing or court action; or (2) investigative processes, which are not so protected.

12933. The department shall maintain liaison with the human relations commissions of cities, counties, and any city and county, and shall provide any information not designated by law as confidential to such commissions on request.

Article 2. The Commission

12935. The commission shall have the following functions, powers and duties:

(a) To adopt, promulgate, amend, and rescind suitable rules, regulations, and standards (1) to interpret, implement, and apply Sections 12920, 12940, 12941, 12943, 12990, 12993, and 12994, as well as any other section of this part pertaining to unlawful employment practices, affirmative action, and public work contracts, (2) to interpret, implement, and apply Section 12955 pertaining to discrimination in housing and Section 12927 pertaining to affirmative action in housing, (3) to regulate the conduct of hearings held pursuant to Sections 12967 and 12980, and (4) to carry out all other functions and duties of the commission pursuant to this part.

(b) To conduct hearings pursuant to Sections 12967 and 12981.

(c) To establish and maintain a principal office within the state.

(d) To meet and function at any place within the state.

(e) To appoint an executive secretary, and such attorneys and other employees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(f) To hold hearings, subpoena witnesses, compel their attendance, administer oaths, examine any person under oath and, in connection therewith, to require the production of any books or papers relating to any matter under investigation or in question before the commission.

(g) To create or provide financial or technical assistance to such advisory agencies and conciliation councils, local or otherwise, as in its judgment will aid in effectuating the purposes of this part, and to empower them to study the problems of discrimination in all or specific fields of human relationships or in particular instances of employment discrimination on the bases enumerated in this part or in specific instances of housing discrimination because of race, religious creed, color, national origin, ancestry, marital status, or sex, and to foster, through community effort or otherwise, good will, cooperation, and conciliation among the groups and elements of the population of the state and to make recommendations to the commission for the development of policies and procedures in general. Such advisory agencies and conciliation councils shall be composed of representative citizens, serving without pay.

(h) With respect to findings and orders made pursuant to Section

12967, to establish a system of published opinions which shall serve as precedent in interpreting and applying Sections 12940, 12941, and 12990, as well as of any other section of this part relating to employment discrimination on which the commission is authorized to issue findings or orders.

(i) To issue publications and results of inquiries and research which in its judgment will tend to promote good will and minimize or eliminate unlawful discrimination. Such publications shall include an annual report to the Governor and the Legislature of its activities and recommendations.

CHAPTER 6. DISCRIMINATION PROHIBITED

Article 1. Unlawful Practices, Generally

12940. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge such person from employment or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

(1) Nothing in this part shall prohibit an employer from refusing to hire or discharging a physically handicapped employee, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of a physically handicapped employee, where the employee, because of his or her physical handicap, is unable to perform his or her duties, or cannot perform such duties in a manner which would not endanger his or her health or safety or the health and safety of others.

(2) Nothing in this part shall prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her duties, or cannot perform such duties in a manner which would not endanger the employee's health or safety or the health or safety of others. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her duties, or cannot perform such duties in a manner which would not endanger the employee's health or safety or the health or safety of others.

(3) Nothing in this part relating to discrimination on account of marital status shall either (i) affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or

morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission, or (ii) prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to exclude, expel or restrict from its membership such person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of such person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of the person discriminated against.

(d) For any employer or employment agency, unless specifically acting in accordance with federal equal employment opportunity guidelines and regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex, or any intent to make any such limitation, specification or discrimination. Nothing in this subdivision shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.

(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified or assisted in any proceeding under this part.

(f) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(g) For the governing board of a school district to violate Section 44066 or 87402 of the Education Code.

12941. (a) It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action. This section shall not be construed to make unlawful the rejection or termination of employment where the individual applicant or employee failed to meet bona fide requirements for the job or position sought or held, or to require any changes in any bona fide retirement or pension programs or existing collective-bargaining agreements during the life of the contract, or until January 1, 1980, whichever occurs first, nor shall this section preclude such physical and medical examinations of applicants and employees as an employer may make or have made to determine fitness for the job or position sought or held.

Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, and trade schools shall not, in and of themselves, constitute a violation of this section.

(b) This section shall not limit the right of an employer, employment agency, or labor union to select or refer the better qualified person from among all applicants for a job. The burden of proving a violation of this section shall be upon the person or persons claiming that the violation occurred.

(c) The age limitations of the apprenticeship programs in which the state participates shall not be deemed to violate this section.

12942. Every employer in this state, except a public agency, shall permit any employee who indicates in writing a desire in a reasonable time and can demonstrate the ability to do so, to continue his employment beyond the normal retirement date contained in any private pension or retirement plan.

Such employment shall continue so long as the employee demonstrates his ability to perform the functions of the job adequately and the employer is satisfied with the quality of work performed.

This section shall not be construed to require any change in funding, benefit levels, or formulas of any existing retirement plan, or to require any employer to increase such employer's payments for the provision of insurance benefits contained in any existing employee benefit or insurance plan, by reason of such employee's continuation of employment beyond the normal retirement date, or to require any changes in any bona fide retirement or pension programs or existing collective-bargaining agreements during the life of the contract, or until January 1, 1980, whichever occurs first.

Any employee indicating such desire and continuing such employment shall give the employer written notice in reasonable time, of intent to retire or terminate when such retirement or termination occurs after the employee's normal retirement date.

Nothing in this section or Section 12941 shall be construed to prohibit compulsory retirement of the following:

(a) Prior to July 1, 1982, of any employee who has attained 65 years of age and is serving under a contract of unlimited tenure, or similar arrangement providing for unlimited tenure at an institution of higher education as defined by Section 1201(a) of the Federal Higher Education Act of 1965.

On and after July 1, 1982, this subdivision shall only apply to an employee who has attained 70 years of age.

(b) Of any employee who has attained 65 years of age and who for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profitsharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least twenty-seven thousand dollars ($27,000).

12943. It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:

(a) For the governing board of any school district, because of the pregnancy of any female person, to refuse to hire or employ her, or to refuse to select her for a training program leading to employment, or to bar or to discharge her from employment or from a training program leading to employment, or to discriminate against her in compensation or in terms, conditions, or privileges of employment.

(b) For the governing board of any school district to terminate any employee who is temporarily disabled, pursuant to or on the basis of an employment policy under which insufficient or no leave is available, if the policy has a disparate impact on employees of one sex and is not justified by necessity of the public schools.

12944. (a) It shall be unlawful for a licensing board to require any examination or establish any other qualification for licensing which has an adverse impact on any class by virtue of its race, creed, color, national origin or ancestry, sex, age, medical condition, or physical handicap, unless such practice can be demonstrated to be job related.

Where the commission, after hearing, determines that an examination is unlawful under this subdivision, the licensing board may continue to use and rely on such examination until such time as judicial review by the superior court of the determination is exhausted.

If an examination or other qualification for licensing is determined to be unlawful under this section, that determination shall not void, limit, repeal, or otherwise affect any right, privilege, status, or responsibility previously conferred upon any person by such examination or by a license issued in reliance on such examination or qualification.

(b) It shall be unlawful for any licensing board, unless specifically acting in accordance with federal equal employment opportunity

guidelines or regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical handicap, medical condition, sex, or age, or any intent to make any such limitation, specification, or discrimination. Nothing in this subdivision shall prohibit any licensing board from making, in connection with prospective licensure or certification, an inquiry as to, or a request for information regarding, the physical fitness of applicants if that inquiry or request for information is directly related and pertinent to the license or the licensed position the applicant is applying for.

(c) It is unlawful for a licensing board to discriminate against any person because such person has filed a complaint, testified, or assisted in any proceeding under this part.

(d) It is unlawful for any licensing board to fail to keep records of applications for licensing or certification for a period of two years following the date of receipt of such applications.

(e) As used in this section, "licensing board" means any state board, agency, or authority in the State and Consumer Services Agency which has the authority to grant licenses or certificates which are prerequisites to employment eligibility or professional status.

12945. It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:

(a) For any employer, because of the pregnancy, childbirth, or related medical condition of any female employee, to refuse to promote her, or to refuse to select her for a training program leading to promotion, provided she is able to complete the training program at least three months prior to the anticipated date of departure for her pregnancy leave, or to discharge her from employment or from a training program leading to promotion, or to discriminate against her in compensation or in terms, conditions, or privileges of employment.

(b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions either:

(1) To receive the same benefits or privileges of employment granted by that employer to other persons not so affected who are similar in their ability or inability to work, including to take disability or sick leave or any other accrued leave which is made available by the employer to temporarily disabled employees. For purposes of this section, pregnancy, childbirth, and related medical conditions are treated as any other temporary disability. However, no employer shall be required to provide a female employee disability leave on account of normal pregnancy, childbirth, or related medical condition for a period exceeding six weeks. Nothing in this section shall be construed to require an employer to provide his or her

ission, to print or
publication, or to
through use of an
indirectly, any
e, religious creed,
medical condition,
ion, specification,
hall prohibit any
with prospective
r a request for
applicants if that
ted and pertinent
nt is applying for.
ninate against any
aint, testified, or

to keep records of
riod of two years

means any state
onsumer Services
ses or certificates
ty or professional

ctice unless based

ncy, childbirth, or
yee, to refuse to
program leading
training program
of departure for
ployment or from
criminate against
or privileges of

female employee
edical conditions

of employment
affected who are
to take disability
ade available by
For purposes of
edical conditions
ver, no employer
isability leave on
related medical
ng in this section
rovide his or her

employees with health insurance coverage for the medical costs of pregnancy, childbirth, or related medical conditions. The inclusion in any such health insurance coverage of any provisions or coverage relating to medical costs of pregnancy, childbirth, or related medical conditions shall not be construed to require the inclusion of any other provisions or coverage, nor shall coverage of any related medical conditions be required by virtue of coverage of any medical costs of pregnancy, childbirth, or other related medical conditions.

(2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions. Nothing herein shall be construed to limit the provisions of paragraph (1) of subdivision (b).

An employer may require any employee who plans to take a leave pursuant to this subdivision to give the employer reasonable notice of the date such leave shall commence and the estimated duration of such leave.

(c) (1) For an employer who has a policy, practice, or collective-bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions for the duration of the disability to refuse to transfer a pregnant female employee who so requests.

(2) For any employer to refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where such transfer can be reasonably accommodated, provided, however, that no employer shall be required by this section to create additional employment which the employer would not otherwise have created, nor shall such employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job.

(d) This section shall not be construed to affect any other provision of law relating to sex discrimination or pregnancy.

(e) The provisions of this section, except paragraph (2) of subdivision (b), shall be inapplicable to any employer subject to Title VII of the federal Civil Rights Act of 1964.

12946. It shall be an unlawful practice for employers, labor organizations, and employment agencies subject to the provisions of this part to fail to maintain and preserve any and all applications, personnel, membership, or employment referral records and files for a minimum period of two years after such records and files are initially created or received, or for employers to fail to retain personnel files of applicants or terminated employees for a minimum period of two years after the date of the employment action taken. For the purposes of this section, the State Personnel Board is exempt from the two-year retention requirement and shall instead, maintain

such records and files for a period of one year. Upon notice that a verified complaint against it has been filed under this part, any such employer, labor organization, or employment agency shall maintain and preserve any and all such records and files until such complaint is fully and finally disposed of and all appeals or related proceedings terminated. The commission shall adopt suitable rules, regulations, and standards to carry out the purposes of this section. Where necessary, the division, pursuant to its powers under Section 12974, may seek temporary or preliminary judicial relief to enforce this section.

12947. It shall not be an unlawful practice under this part for an employer or labor organization to provide or make financial provision for child care services of a custodial or other nature for its employees or members who are responsible for minor children.

12948. It shall be an unlawful practice under this part for a person to deny or to aid, incite, or conspire in the denial of the rights created by Section 51 or 51.7 of the Civil Code.

Article 2. Housing Discrimination

12955. It shall be unlawful:

(a) For the owner of any housing accommodation to discriminate against any person because of the race, color, religion, sex, marital status, national origin, or ancestry of such person.

(b) For the owner of any housing accommodation to make or to cause to be made any written or oral inquiry concerning the race, color, religion, sex, marital status, national origin, or ancestry of any person seeking to purchase, rent or lease any housing accommodation.

(c) For any person to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a housing accommodation that indicates any preference, limitation, or discrimination based on race, color, religion, sex, marital status, national origin, or ancestry or an intention to make any such preference, limitation, or discrimination.

(d) For any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing accommodations, as defined in this part, to discriminate against any person because of race, color, religion, sex, marital status, national origin, or ancestry with reference thereto.

(e) For any person, bank, mortgage company or other financial institution to whom application is made for financial assistance for the purchase, organization, or construction of any housing accommodation to discriminate against any person or group of persons because of the race, color, religion, sex, marital status, national origin, or ancestry of such person or persons, or of prospective occupants or tenants, in the terms, conditions, or privileges relating to the obtaining or use of any such financial assistance.

(f) For any owner of housing accommodations to harass, evict, or otherwise discriminate against any person in the sale or rental of housing accommodations when the owner's dominant purpose is retaliation against a person who has opposed practices unlawful under this section, informed law enforcement agencies of practices believed unlawful under this section, or has testified or assisted in any proceeding under this part. Nothing herein is intended to cause or permit the delay of an unlawful detainer action.

(g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts or practices declared unlawful in this section, or to attempt to do so.

CHAPTER 7. ENFORCEMENT AND HEARING PROCEDURES

Article 1. Unlawful Practices

12960. The provisions of this article govern the procedure for the prevention and elimination of practices made unlawful pursuant to Article 1 (commencing with Section 12940) of Chapter 6.

Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the department. The director or his or her authorized representative may in like manner, on his or her own motion, make, sign and file such complaint. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this part may file with the department a verified complaint asking for assistance by conciliation or other remedial action.

No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred; except that this period may be extended for not to exceed 90 days following the expiration of that year, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of their occurrence.

Complaints alleging a violation of subdivision (c) of Section 12940 shall be filed as provided in Section 3096 of the Labor Code.

12961. Where an unlawful practice alleged in a verified complaint adversely affects, in a similar manner, a group or class of persons of which the aggrieved person filing the complaint is a member, or where such an unlawful practice raises questions of law or fact which are common to such a group or class, the aggrieved person or the director may file the complaint on behalf and as representative of such a group or class. Any complaint so filed may be investigated as a group or class complaint, and, if in the judgment

of the director circumstances warrant, shall be treated as such for purposes of conciliation and accusation. Where an accusation is issued as a group or class accusation, the case shall be treated as a group or class case for all other purposes of this part, including, but not limited to, hearing, determination, reconsideration, and judicial proceedings.

12962. The department shall cause any verified complaint filed under the provisions of this part to be served, either personally or by certified mail with return receipt requested, upon the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of. Service shall be made at the time of initial contact with such person, employer, labor organization, or employment agency or the agents thereof, or within 45 days, whichever first occurs. At the discretion of the director, the complaint may not contain the name of the complaining party unless such complaint is filed by the director or his authorized representative.

12963. After the filing of any complaint alleging facts sufficient to constitute a violation of any of the provisions of Section 12940 or 12941, the department shall make prompt investigation in connection therewith. If the department determines after investigation that the complaint is valid; the department shall immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation and persuasion. The staff of the department shall not disclose what has transpired in the course of any endeavors to eliminate the unlawful employment practice through conference, conciliation, and persuasion.

Any member of the staff of the department who discloses information in violation of the requirements of this section is guilty of a misdemeanor. Such disclosure by an employee subject to civil service shall be cause for disciplinary action under the State Civil Service Act.

12964. Any agreement entered into by conference, conciliation and persuasion shall be reduced to writing, signed by all parties, and approved by the director or the authorized representative of the director. Within one year of the effective date of every such agreement, the department shall conduct a compliance review to determine whether such agreement has been fully obeyed and implemented. Whenever the department believes, on the basis of evidence presented to it, that any person is violating or about to violate any such agreement, the department may bring an action in the appropriate superior court of the State of California in the same manner as actions may be brought under Section 12973. In resolving allegedly unlawful practices through conciliation such resolutions may be in the nature of, but are not limited to, types of remedies that might be ordered after accusation and hearing.

12965. (a) In the case of failure to eliminate an unlawful practice under this part through conference, conciliation or persuasion, or in advance thereof if circumstances warrant, the director in his or her

discretion may cause to be issued in the name of the department a written accusation. The accusation shall contain the name of the person, employer, labor organization or employment agency accused, which shall be known as the respondent, shall set forth the nature of the charges, shall be served upon the respondent together with a copy of the verified complaint, as amended, and shall require the respondent to answer the charges at a hearing. An accusation shall be issued, if at all, within one year after the filing of a complaint.

(b) If an accusation is not issued within 150 days after the filing of a complaint, or if the department earlier determines that no accusation will issue, the department shall promptly notify, in writing, the person claiming to be aggrieved. Such notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization or employment agency named in the verified complaint within one year from the date of such notice. The superior courts of the State of California shall have jurisdiction of such actions. Such an action may be brought in any county in the state in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to such practice are maintained and administered, or in the county in which the aggrieved person would have worked or would have had access to the public accommodation but for the alleged unlawful practice, but if the defendant is not found within any such county, such an action may be brought within the county of defendant's residence or principal office. Such actions may not be filed as class actions or may not be maintained as class actions by the person or persons claiming to be aggrieved where such persons have filed a civil class action in the federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants. In actions brought under this section, the court, in its discretion may award to the prevailing party reasonable attorney fees and costs except where such action is filed by a public agency or a public official, acting in an official capacity.

12966. Where the department issues an accusation, or is about to do so, and the respondent accused of engaging in unlawful practices under this part is a state contractor or is a supplier of goods and services to the state, the director shall send a written notice of the issuance of the accusation and a copy of the accusation to the appropriate awarding agency and request a report of any action which the awarding agency takes in response to the department's notification and issuance of accusation.

12967. The commission shall hold hearings on accusations issued pursuant to Section 12965 and shall determine the issues raised therein.

12968. Hearings shall take place not more than 90 days after the issuance of the accusation upon which they are based.

12969. The case in support of the accusation shall be presented before the commission by the attorneys or agents of the department.

Any commissioner who, in regard to a particular case, shall have previously been assigned to engage in investigation or conciliation endeavors or shall otherwise have been or be personally or professionally connected with the parties or factual situation of the original complaint upon which the accusation is based, shall not participate in the hearing except as a witness and shall not give his or her opinion of the merits of the case, nor shall he or she participate in the deliberations of the commission in such case. In connection with complaints initiated by the director, the personal or professional association of the commissioners with the director shall not prohibit the commissioners from participating in the deliberations of such cases. In any hearing, the content of discussions or endeavors at conciliation shall not be received in evidence.

12970. (a) If the commission finds that a respondent has engaged in any unlawful practice under this part, it shall state its findings of fact and determination and shall issue and cause to be served on the parties an order requiring such respondent to cease and desist from such unlawful practice and to take such action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this part, and including a requirement for report of the manner of compliance.

(b) If the commission finds the respondent has engaged in an unlawful practice under this part, and the respondent is licensed or granted a privilege by an agency of the state to do business, provide a service, or conduct activities, and the unlawful practice is determined to have occurred in connection with the exercise of that license or privilege, the commission shall provide the licensing or privilege granting agency with a copy of its decision or order.

(c) If the commission finds that a respondent has not engaged in any such unlawful practice, the commission shall state its findings of fact and determination and shall issue and cause to be served on the parties an order dismissing such accusation as to such respondent.

(d) Any findings and determination made or any order issued pursuant to this section shall be written and shall indicate the identity of the members of the commission who participated herein.

(e) Any order issued by the commission shall have printed on its face references to the rights of appeal of any party to the proceeding to whose position the order is adverse.

12971. If, at any time during the proceedings described in this part, after a complaint has been served on a respondent, the complaint is withdrawn by the complainant or dismissed by the department, or an investigation is terminated or closed by the department, notice of this fact shall be given to the respondent and the complainant without undue delay.

12972. All actions and procedures of the commission shall be conducted pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

12973. Within one year of the effective date of every final order or decision issued pursuant to this part, the department shall conduct a compliance review to determine whether such order or decision has been fully obeyed and implemented.

Whenever the department believes, on the basis of evidence presented to it, that any person is violating or is about to violate any final order or decision issued pursuant to this part, the department may bring an action in the Superior Court of the State of California against such person to enjoin him from continuing the violation or engaging therein or in doing anything in furtherance thereof. In such action an order or judgment may be entered awarding such temporary restraining order or such preliminary or final injunction as may be proper. Such an action may be brought in any county in which actions may be brought under subdivision (b) of Section 12965.

12974. Whenever a complaint is filed with the department and the department concludes on the basis of a preliminary investigation that prompt judicial action is necessary ~~to carry out the purposes~~ of this part, the director or his authorized representative may bring a civil action for appropriate temporary or preliminary relief pending final disposition of such complaint. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with Section 527 of the Code of Civil Procedure. An action seeking such temporary or preliminary relief may be brought in any county in which actions may be brought under subdivision (b) of Section 12965.

12975. Any person who shall willfully resist, prevent, impede or interfere with any member of the department or the commission or any of its agents or employees in the performance of duties pursuant to the provisions of this part relating to employment discrimination, or who shall in any manner willfully violate an order of the commission relating to such matter, is guilty of a misdemeanor, punishable by imprisonment in a county jail, not exceeding six months, or by a fine not exceeding five hundred dollars ($500), or both.

12976. Any person who willfully violates Section 12946 concerning recordkeeping is guilty of a misdemeanor, punishable by imprisonment in a county jail, not exceeding six months, or by a fine not exceeding five hundred dollars ($500), or both.

Article 2. Housing Discrimination

12980. The provisions of this article govern the procedure for the prevention and elimination of discrimination in housing made unlawful pursuant to Article 2 (commencing with Section 12955) of Chapter 6.

(a) Any person claiming to be aggrieved by an alleged violation of Section 12955 may file with the division a verified complaint in writing which shall state the name and address of the person alleged

to have committed the violation complained of, and which shall set forth the particulars thereof and contain such other information as may be required by the department.

The filing of a complaint and pursuit of conciliation or remedy under this part shall not prejudice the complainant's right to pursue effective judicial relief under other applicable laws, but if a civil action has been filed under Section 52 of the Civil Code, the department shall terminate proceedings upon notification of the entry of final judgment unless such judgment is a dismissal entered at the complainant's request.

(b) The Attorney General, the commission, or the director may, in a like manner, make, sign, and file such complaints citing practices which appear to violate the purpose of this part or any specific provisions of this part relating to housing discrimination.

No complaint may be filed after the expiration of 60 days from the date upon which the alleged violation occurred. This period may be extended for not to exceed 60 days following the expiration of the initial 60 days, if a person allegedly aggrieved by such violation first obtained knowledge of the facts of such alleged violation after the expiration of the initial 60 days from date of its occurrence.

(c) The department may thereupon proceed upon such complaint in the same manner and with the same powers as provided in this part in the case of an unlawful practice.

(d) If an accusation is not issued within 150 days after the filing of a complaint, or if the department earlier determines that no accusation will issue, the department shall promptly notify the person claiming to be aggrieved. This notice shall, in any event, be issued no more than 30 days after the date of the determination or 30 days after the date of the expiration of the 150-day period, whichever date first occurs. Such notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person named in the verified complaint within one year from the date such notice is mailed. The superior courts of the State of California shall have jurisdiction of such actions. Such an action may be brought in any county in the state in which the violation is alleged to have been committed, or in the county in which the records relevant to such alleged violation are maintained and administered, but if the defendant is not found within any such county, such an action may be brought within the county of defendant's residence or principal office. In a civil action brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorney fees.

12981. (a) In the case of failure to eliminate a violation of Section 12955 through conference, conciliation or persuasion, or in advance thereof if circumstances warrant, the director in his discretion may cause to be issued in the name of the department a written accusation, in the same manner and with the same powers as provided in Section 12965.

(b) The commission shall hold hearings on accusations issued

pursuant to subdivision (a) in the same manner and with the same powers as provided in Sections 12967 to 12972, inclusive.

(c) Within one year of the effective date of every final order or decision issued pursuant to this part, the department shall conduct a compliance review to determine whether such order or decision has been fully obeyed and implemented.

Whenever the department believes, on the basis of evidence presented to it, that any person is violating or is about to violate any final order or decision issued pursuant to this part relating to housing discrimination, the department may bring an action in the Superior Court of the State of California against such person to enjoin the person from continuing the violation or engaging therein or in doing anything in furtherance thereof. In such action an order or judgment may be entered awarding such temporary restraining order or such preliminary or final injunction as may be proper. Such an action may be brought in any county in which actions may be brought under subdivision (d) of Section 12980.

12982. After a verified complaint has been filed with the department pursuant to Section 12980, and the preliminary investigation thereof has been carried out, or a 20-day period has elapsed from the filing of the verified complaint, if the preliminary investigation has not then been completed, an appropriate superior court may, upon the motion of the respondent, order the department to give to the respondent, within a specified time, a copy of any book, document, or paper, or any entries therein, in the possession or under the control of the department, containing evidence relating to the merits of the verified complaint, or to a defense thereto. The department shall comply with such an order.

12983. The department, at any time after a complaint is filed with it and it has been determined that probable cause exists for believing that the allegations of the complaint are true and constitute a violation of this part, may bring an action in the superior court to enjoin the owner of the property from taking further action with respect to the rental, lease, or sale of the property until the department has completed its investigation and made its determination; but a temporary restraining order obtained under this section shall not, in any event, be in effect for more than 20 days. In such action an order or judgment may be entered awarding such temporary restraining order or such preliminary or final injunction in accordance with Section 527 of the Code of Civil Procedure.

12984. All matters connected with any conference, conciliation, or persuasion efforts under this part are privileged and may not be received in evidence. The members of the department and its staff shall not disclose to any person what has transpired in the course of such endeavors to conciliate. Every member of the department or its staff who discloses information in violation of this section is guilty of a misdemeanor. Such disclosure by an employee subject to civil service shall be cause for disciplinary action under the State Civil Service Act.

12985. When a person is contacted by the department, a commissioner, or a member of the department's staff, following the filing of a complaint against that person, the person shall be informed whether the contact is for the purpose of investigation or conference, conciliation, or persuasion; and if it is for conference, conciliation, or persuasion, the person shall be informed that all matters relating thereto are privileged.

12986. The department shall without undue delay cause a copy of the verified complaint that has been filed under the provisions of this part to be served upon or mailed to the owner alleged to have committed the violation complained of.

12987. If the commission, after hearing, finds that a respondent has engaged in any unlawful practice as defined in this part, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such practice and to take such actions, as, in the judgment of the commission, will effectuate the purpose of this part, including, but not limited to, any of the following:

(1) The sale or rental of the housing accommodation if it is still available, or the sale or rental of a like housing accommodation, if one is available, or the provision of financial assistance, terms, conditions, or privileges previously denied in violation of subdivision (f) of Section 12955 in the purchase, organization, or construction of the housing accommodation, if available.

(2) The payment of actual and punitive damages to the aggrieved person in an amount not to exceed one thousand dollars ($1,000).

(3) Affirmative or prospective relief.

However, no remedy shall be available to the aggrieved person unless the aggrieved person waives any and all rights or claims under Section 52 of the Civil Code prior to receiving a remedy, and signs a written waiver to that effect.

The commission may require a report of the manner of compliance.

If the commission finds that a respondent has not engaged in any practice which constitutes a violation of this part, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said accusation as to such respondent.

Any order issued by the commission shall have printed on its face references to the provisions of the Administrative Procedure Act which prescribe the rights of appeal of any party to the proceeding to whose position the order is adverse.

12988. The commission may engage in affirmative actions with owners in furtherance of the purpose of this part as expressed in Section 12920.

department, a
aff, following the
shall be informed
on or conference,
e, conciliation, or
matters relating

ay cause a copy of
provisions of this
alleged to have

hat a respondent
in this part, the
issue and cause to
ch respondent to
ich actions, as, in
ie purpose of this
owing:
dation if it is still
mmodation, if one
terms, conditions,
subdivision (f) of
onstruction of the

s to the aggrieved
dollars ($1,000).

aggrieved person
ts or claims under
emedy, and signs

the manner of

ot engaged in any
t, the commission
cause to be served
ccusation as to such

printed on its face
ve Procedure Act
to the proceeding

native actions with
rt as expressed in

CHAPTER 8. NONDISCRIMINATION AND COMPLIANCE EMPLOYMENT PROGRAMS

12990. (a) Any employer who is, or wishes to become, a contractor with the state for public works or for goods or services is subject to the provisions of this part relating to discrimination in employment and to the nondiscrimination requirements of this section and any rules and regulations which implement it.

(b) Prior to becoming a contractor or subcontractor with the state, an employer may be required to submit a nondiscrimination program to the department for approval and certification and may be required to submit periodic reports of its compliance with such a program.

(c) Every state contract and subcontract for public works or for goods or services shall contain a nondiscrimination clause prohibiting discrimination on the bases enumerated in this part by contractors or subcontractors. The nondiscrimination clause shall contain a provision requiring contractors and subcontractors to give written notice of their obligations under such clause to labor organizations with which they have a collective-bargaining or other agreement. Such contractual provisions shall be fully and effectively enforced.

(d) The department shall periodically develop rules and regulations for the application and implementation of this section, and submit them to the commission for consideration and adoption in accordance with the provisions of Chapter 4.5 (commencing with Section 11371) of Part 3 of Division 3 of Title 2 of this code. Such rules and regulations shall describe and include, but not be limited to:

(1) Procedures for the investigation, approval, certification, decertification, monitoring, and enforcement of nondiscrimination programs.

(2) The size of contracts or subcontracts below which any particular provision of this section shall not apply.

(3) The circumstances, if any, under which a contractor or subcontractor is not subject to this section.

(4) Criteria for determining the appropriate plant, region, division, or other unit of a contractor's or subcontractor's operation for which a nondiscrimination program is required.

(5) Procedures for coordinating the nondiscrimination requirements of this section and its implementing rules and regulations with the California Plan for Equal Opportunity in Apprenticeship, with the provisions and implementing regulations of Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1 of Division 3 of Title 2 of this code, and with comparable federal laws and regulations concerning nondiscrimination, equal employment opportunity, and affirmative action by those who contract with the United States.

(6) The basic principles and standards to guide the department in administering and implementing this section.

(e) Where a contractor or subcontractor is required to prepare an

affirmative action, equal employment, or nondiscrimination program subject to review and approval by a federal compliance agency, that program may be filed with the department, instead of any nondiscrimination program regularly required by this section or its implementing rules and regulations. Such a program shall constitute a prima facie demonstration of compliance with this section. Where the department or a federal compliance agency has required the preparation of an affirmative action, equal employment, or nondiscrimination program subject to review and approval by the department or a federal compliance agency, evidence of such a program shall also constitute prima facie compliance with an ordinance or regulation of any city, city and county, or county which requires an employer to submit such a program to a local awarding agency for its approval prior to becoming a contractor or subcontractor with such agency.

(f) Where the department determines and certifies that the provisions of this section or its implementing rules and regulations are violated or where the commission, after hearing an accusation pursuant to Section 12967, determines a contractor or subcontractor is engaging in practices made unlawful under this part, the department or the commission may recommend appropriate sanctions to the awarding agency. Any such recommendation shall take into account the severity of the violation or violations and any other penalties, sanctions, or remedies previously imposed.

CHAPTER 9. MISCELLANEOUS

12993. (a) The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age.

(b) Nothing contained in this part relating to discrimination in employment on account of sex or medical condition shall be deemed to affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan, provided such terms or conditions are in accordance with customary and reasonable or actuarially sound underwriting practices.

(c) While it is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment and housing by any city, city and county, county, or other political subdivision of the state, nothing contained in this part shall be construed, in any manner or way, to limit or restrict the application of Section 51 of the Civil Code.

12994. Nothing in this part relating to discrimination in employment shall be construed to require an employer to alter his

premises to accommodate employees who have a physical handicap or medical condition, as defined in Section 12926, beyond safety requirements applicable to other employees.

12995. Nothing contained in this part relating to discrimination in housing shall be construed to:

(a) Affect the title or other interest of a person who purchases, leases, or takes an encumbrance on a housing accommodation in good faith and without knowledge that the owner or lessor of the property has violated any provision of this part.

(b) Prohibit any postsecondary educational institution, whether private or public, from providing housing accommodations reserved for either male or female students so long as no individual person is denied equal access to housing accommodations, or from providing separate housing accommodations reserved primarily for married students or for students with minor dependents who reside with them.

(c) Prohibit selection based upon factors other than race, color, religion, sex, marital status, national origin, or ancestry.

(d) Promote housing accommodations on a preferential or quota basis.

12996. If any clause, sentence, paragraph, or part of this part relating to discrimination in employment or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this part and the application thereof to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved.

SEC. 5. Section 19702.5 of the Government Code is amended to read:

19702.5. (a) The board shall provide to the Fair Employment and Housing Commission a copy of each affirmative action plan, and all subsequent amendments of such plans, adopted by each state agency, department, office or commission.

(b) The board shall annually, commencing January 1, 1975, submit to the Fair Employment and Housing Commission a statistical survey of the employment of each state agency, department, office or commission. The survey shall include, but not be limited to: sex, age, ethnic origin, current employment classification, salary, full-time or other employment status, department and administrative unit, and county of employment of employees.

(c) Such reports and information shall constitute public records.

SEC. 6. Section 19704 of the Government Code is amended to read:

19704. It is unlawful to require, permit or suffer any notation or entry to be made upon or in any application, examination paper or other paper, book, document, or record used under this part

indicating or in any wise suggesting or pertaining to the race, color, religion, sex, or marital status of any person. Notwithstanding the provisions of this section, subsequent to employment, ethnic, marital status, and gender data may be obtained and maintained for research and statistical purposes when safeguards preventing misuse of the information exist as approved by the Fair Employment and Housing Commission except that in no event shall any notation, entry, or record of such data be made on papers or records relating to the examination, appointment, or promotion of an individual.

SEC. 7. Section 50085.5 of the Government Code is amended to read:

50085.5. (a) Every local agency shall provide to the Fair Employment and Housing Commission a copy of any affirmative action plan and subsequent amendments to such plan adopted by the local agency.

(b) Every local agency which is required by federal law, rule or regulation to submit an annual statistical survey of the employment of the agency to the United States Equal Employment Opportunity Commission shall annually, commencing with January 1, 1975, submit a copy of such survey to the Fair Employment and Housing Commission.

(c) Such reports and information shall constitute public records.

SEC. 8. Part 5 (commencing with Section 35700) of Division 24 of the Health and Safety Code is repealed.

SEC. 9. Section 56 of the Labor Code is amended to read:

56. The work of the department shall be divided into at least six divisions known as the Division of Industrial Accidents, the Division of Occupational Safety and Health, the Division of Labor Standards Enforcement, the Division of Labor Statistics and Research, the Division of Apprenticeship Standards, and the State Compensation Insurance Fund.

SEC. 10. Section 1735 of the Labor Code is amended to read:

1735. No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of such persons, except as provided in Section 12940 of the Government Code, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter.

SEC. 11. Part 4.5 (commencing with Section 1410) of Division 2 of the Labor Code is repealed.

SEC. 12. Section 3096 of the Labor Code is amended to read:

3096. Complaints alleging discrimination against any person in the selection or training of that person in any apprenticeship training program because of the race, religious creed, color, national origin, ancestry, or sex of such person shall be filed with the Fair Employment and Housing Commission pursuant to Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code. Whenever such a complaint is filed with the

commission, the commission shall immediately send a copy of the complaint to the Administrator of Apprenticeship for investigation and action by the Division of Apprenticeship Standards pursuant to this chapter and rules and procedures prescribed by the California Apprenticeship Council. The division shall hold at least one open hearing relative to the complaint during the 21-day period following the day upon which the division receives a written copy of the complaint. If the commission finds that the complaint is not being processed in accordance with this chapter and such rules and procedures, or if the commission finds that the division has not taken action which has resolved the complaint within 30 days, the commission shall report such findings in writing to the administrator, who upon verification may cause the division to take conclusive action prior to the 61st day following the day upon which a written copy of the complaint was filed with the division. Notwithstanding any other provision of this section, the administrator shall, upon request of, and after written report by, the commission, relieve the division of the case and assign it to the commission, on or before the 61st day following the day upon which a written copy of the complaint was filed with the division. Upon receipt of such assignment, the commission shall immediately proceed to act upon the complaint. The commission shall hold at least one open hearing within 14 days following the day of assignment. The commission shall complete its investigations and any attempts to eliminate any unlawful practices discovered and shall issue an accusation thereon or advise the complainant that the evidence does not warrant further proceedings thereon, within 30 days after the complaint is assigned to the commission. The commission shall prepare such findings, determinations, and orders for issuance by the administrator, who shall notify the complainant and shall make available his findings within 10 days after review of such findings by the commission. Such findings, determinations and orders shall be subject to further legal processes as set forth in this chapter. In the event there is no action by the division or the commission within 101 days after the filing of a complaint with the commission, the person claiming to be aggrieved may bring a civil action under this part within one year after such 101st day.

The Division of Apprenticeship Standards shall inform the commission of the number and disposition of all complaints handled by the division pursuant to this section for inclusion in the commission's report to the Governor and the Legislature as required by law.

less than 30 days after
the court may allow for
rty to whom the request
co[illegible]nay allow for good
e[illegible] later than 60 days
n the request is directed
ission either (1) a sworn
of which an admission is
ons why the party cannot
(2) written objections on
equested admissions are
is otherwise improper in
a part of the request are
be answered within the
ial shall fairly meet the
when good faith requires
of which an admission is
her response thereto, the
and deny or qualify only
omitted the requests for
required, he or she may
her response. The motion
rom the date of service of
and notice, and for good
, the party submitting the
have waived the right to
nis section. Copies of all
es thereto shall be served
e appeared; but the court
ve this requirement if the
are[illegible]would be unduly
t a[illegible]ime prior to final
party originating requests
ovide within 30 days of the
r party for any reason not

admissions shall serve the
on the party serving the
he request for admissions
original proof of service
or at least six months after

requests for admissions
r to file objections within
as extended by the court,
e upon the other party a
ered mail, return receipt
at the genuineness of the
n deemed admitted. Once
the notice is served shall
r the provisions of Section

473 unless a motion requesting relief is served and filed within 30 days after service of the notice.

(b) The number of requests for admissions or of sets of requests for admissions to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of subdivision (b) of Section 2019 are applicable for the protection of the party from whom the admissions are requested under this section.

(c) Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by the party for any other purpose nor may be used against the party in any other action.

(d) Service upon a party of any request for admission or response under this section may be made upon any party or the party's attorney in the manner provided in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

CHAPTER 142

An act to amend Sections 8762 and 11003.4 of the Business and Professions Code, to amend Section 2981.7 of the Civil Code, to amend Sections 472, 472a, 585.5 and 587 of the Code of Civil Procedure, to amend Section 15527 of, to amend and renumber the heading of Chapter 2 (commencing with Section 21000) of Part 12 of, to amend and renumber the heading of Article 2 (commencing with Section 78230) of Chapter 2 of Part 48 of, and to repeal the heading of Chapter 1 (commencing with Section 21000) of Part 12 of, the Education Code, to amend Sections 15272, 22935, 23531, 23540.5, 23557, 27031, 27100, and 27341 of the Elections Code, to amend Sections 102, 6054, 6059, 6067, and 6085 of the Food and Agricultural Code, to amend Sections 3208, 3572, 3586, 8188, 8208, 8214.3, 8214.4, 8567, 8818, 9125, 11018, 11019, 11349.4, 11550, 14404, 14838, 14903, 14955, 16366.2, 16503, 19131, 19132, 20570, 20750.8, 20750.85, 20750.86, 22009, and 51110.2 of, to amend and renumber the headings of Article 1.8 (commencing with Section 16369) of Chapter 2 of Part 2 of Division 4 of, and Article 3 (commencing with Section 19570) of Chapter 8 of Division 5 of Title 2 of, to repeal Sections 14841, 14962, and 18801.1, of, to repeal the headings of Chapter 5 (commencing with Section 16170) of Division 4 of, and Chapter 6 (commencing with Section 18250) of Division 5 of Title 2 of, the Government Code, to amend Sections 4000 and 6201, of the Harbors and Navigation Code, to amend Sections 18029.5, 18030, 18031, 18942, 19820, 25651, 25803, 28744, 30001, 30002, 39601, 50701, 51005, and 51050 of, to amend and renumber Section 19026 of, to repeal Sections 18550.5, 25356, and 32130.7 of, the Health and Safety Code, to amend Sections 1190, 1210, 1350, 10499, 10500, 10507.2, 11512.21, 11512.25, 11527, 11528, 11555.2 and 12762 of, to amend and renumber Sections 11512.1 and 11512.2 of, the Insurance Code, to amend Sections 51, 103, 1144, 1700.36, 1720.3, 4650.5, 4700, 4702, 4706.5, 4721, 4723, 4903.2, 5455,

5600, 6304.4, 6396, 6403, 6410, 6413, 6454, 6500, 6650, and 7655 of the Labor Code, to amend Sections 987.8 and 1603 of, to amend and renumber Section 1170.8 of, the Penal Code, to amend Section 608 of the Probate Code, to amend Sections 4799.10 and 9965 of the Public Resources Code, to amend Sections 304, 705, 1906, 2702, 2703, 2707, 3904, 5162, 5164, 5392, 5504, 99314.3, 100055.4, 102304, and 102571 of the Public Utilities Code, to amend Sections 12631, 17056, 17063.3, 17112.5, 17155, 17299, 17524, 17530, 25951, and 26132 of, and to amend and renumber Sections 17052.4 and 23603 of, and to add Section 19356 to, the Revenue and Taxation Code, to amend Sections 188.8, 680, 701, and 724 of the Streets and Highways Code, to amend Sections 625, 3061, 3063, 4460, 4601, 4602, 9102.5, 9706, 9853.4, 11520, 23181, 25108, 27909, 34501.5, and 40000.7 of the Vehicle Code, to amend Sections 127, 259, and 2782 of the Water Code, to amend Sections 1722, and 16712 of the Welfare and Institutions Code, and to repeal Section 3 of Chapter 61 of the Statutes of 1978, as amended by Chapter 1055 of the Statutes of 1979, relating to maintenance of the codes.

[Approved by Governor June 28, 1983. Filed with Secretary of State June 28, 1983.]

The people of the State of California do enact as follows:

SECTION 1. Section 8762 of the Business and Professions Code is amended to read:

8762. After making a survey in conformity with the practice of land surveying, the surveyor or civil engineer may file with the county surveyor in the county in which the survey was made, a record of the survey.

Within 90 days after the establishment of points or lines the licensed land surveyor or registered civil engineer shall file with the county surveyor in the county in which the survey was made, a record of the survey relating to land boundaries or property lines, which discloses any of the following:

(a) Material evidence or physical change, which in whole or in part does not appear on any map or record previously recorded or filed in the office of the county recorder, county clerk, municipal or county surveying department or in the records of the Bureau of Land Management of the United States.

(b) A material discrepancy with the record.

(c) Evidence that, by reasonable analysis, might result in alternate positions of lines or points.

(d) The establishment of one or more lines not shown on any such map, the positions of which are not ascertainable from an inspection of the map without trigonometric calculations.

Any record of survey filed with the county surveyor shall after being examined by him or her be filed with the county recorder.

SEC. 2. Section 11003.4 of the Business and Professions Code is amended to read:

], and 7655 of the
of, to amend and
mend Section 608
and 9965 of the
, 1906, 2702, 2703,
02304, and 102571
31, 17056, 17063.3,
of, and to amend
add Section 19356
ons 188.8, 680, 701,
end Sections 625,
520, 23181, 25108,
o amend Sections
ections 1722, and
o repeal Section 3
. by Chapter 1055
f the codes.

with

fo

Professions Code

th the practice of
may file with the
vey was made, a

oints or lines the
shall file with the
vey was made, a
or property lines,

ch in whole or in
ously recorded or
erk, municipal or
e Bureau of Land

might result in

own on any such
om an inspection

veyor shall after
ounty recorder.
ofessions Code is

10 05

11003.4. (a) A "limited-equity housing cooperative" is a corporation which meets the criteria of Section 11003.2 and which also meets the criteria of Section 33007.5 of the Health and Safety Code. Except as provided in subdivision (b), a limited-equity housing cooperative shall be subject to all the requirements of this chapter pertaining to stock cooperatives.

(b) A limited-equity housing cooperative shall be exempt from the requirements of this chapter if the limited-equity housing cooperative complies with all the following conditions:

(1) The United States Department of Housing and Urban Development, the Farmers Home Administration, the National Consumers Cooperative Bank, the California Housing Finance Agency, or the Department of Housing and Community Development, alone or in any combination with each other, or with the city, county, or redevelopment agency in which the cooperative is located, directly finances or subsidizes at least 50 percent of the total development cost; or, the real property to be occupied by the cooperative was sold by the Department of Transportation for the development of the cooperative and has a regulatory agreement approved by the Department of Housing and Community Development.

(2) No more than 10 percent of the total development cost is provided by purchasers of membership shares.

(3) A regulatory agreement has been duly executed between the recipient of the financing or subsidy and one of the federal or state agencies described in paragraph (1) which covers the cooperative for a term of at least as long as the duration of the financing or subsidy. The regulatory agreement shall make provisions for at least all of the following:

(A) Assurances for completion of the common areas and facilities to be owned or leased by the limited-equity housing cooperative, unless a construction agreement between the same parties contains written assurances for completion.

(B) Governing instruments for the organization and operation of the housing cooperative by the members.

(C) The ongoing fiscal management of the project by the cooperative including an adequate budget, reserves, and provisions for maintenance and management.

(D) Distribution of a membership information report to any prospective purchaser of a membership share, prior to purchase of that share. The membership information report shall contain full disclosure of: the financial obligations and responsibilities of cooperative membership, the resale of shares, the financing of the cooperative including any arrangements made with any partners, membership share accounts, occupancy restrictions, management arrangements and any other information pertinent to the benefits, risks, and obligations of cooperative ownership.

(4) The federal or state agency named in paragraph (1) which executes the regulatory agreement shall satisfy itself that the bylaws,

10 015

articles of incorporation, occupancy agreement, subscription agreement, any lease of the regulated premises, any arrangement with partners, and arrangement for membership share accounts provide adequate protection of the rights of cooperative members.

(5) The federal or state agency shall receive from the attorney for the recipient of the financing or subsidy a legal opinion that the cooperative meets the requirements of Section 33007.5 of the Health and Safety Code and the exemption provided by this section.

(c) Any limited-equity cooperative which meets the requirements for exemption pursuant to subdivision (b) may elect to be subject to all provisions of this chapter.

(d) The developer of the cooperative shall notify the Department of Real Estate, on a form provided by the department, that an exemption is claimed under this section. The Department of Real Estate shall retain this form for at least four years for statistical purposes.

SEC. 3. Section 2981.7 of the Civil Code is amended to read:

2981.7. All contracts entered into between a buyer and a seller on or after January 1, 1983, shall provide for the calculation of the finance charge contemplated by item (A) of paragraph (1) of subdivision (j) of Section 2982 on the simple-interest basis, if the date on which the final installment is due, according to the original terms of the contract, is more than 62 months after the date of the contract.

SEC. 4. Section 472 of the Code of Civil Procedure is amended to read:

472. Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, and the time in which the adverse party must respond thereto shall be computed from the date of notice of the amendment.

SEC. 5. Section 472a of the Code of Civil Procedure is amended to read:

472a. (a) A demurrer is not waived by an answer filed at the same time.

(b) Except as otherwise provided by rule adopted by the Judicial Council, when a demurrer to a complaint or to a cross-complaint is overruled and there is no answer filed, the court shall allow an answer to be filed upon such terms as may be just. If a demurrer to the answer is overruled, the action shall proceed as if no demurrer had been interposed, and the facts alleged in the answer shall be considered as denied to the extent mentioned in Section 431.20.

(c) When a demurrer is sustained, the court may grant leave to amend the pleading and shall fix the time within which the amendment or amended pleading shall be filed, or entered in the docket.

SEC. 6. Section 585.5 of the Code of Civil Procedure is amended to read:

585.5. (a) Every application to enter default under subdivision

it, subscription
ny arrangement
share accounts
rative members.
the attorney for
opinion that the
17.5 of the Health
his section.
h meets the
on (b) may elect

the Department
artment, that an
partment of Real
ars for statistical

ended to read:
ver and a seller on
alculation of the
paragraph (1) of
st b[illegible] if the date
the [illegible]ginal terms
te of the contract.
edure is amended

e party of course,
demurrer is filed,
of law thereon, by
he adverse party,
ond thereto shall
dment.
edure is amended

swer filed at the

ed by the Judicial
ross-complaint is
rt shall allow an
If a demurrer to
s if no demurrer
answer shall be
Section 431.20.
ay grant leave to
ithin which the
r entered in the

dure is amended

r subdivision

(a) of Section 585 shall include, or be accompanied by, an affidavit stating facts showing that the action is or is not subject to Section 1812.10 or 2984.4 of the Civil Code or subdivision (b) of Section 395.

(b) When a default or default judgment has been entered without full compliance with Section 1812.10 or 2984.4 of the Civil Code, or subdivision (b) of Section 395, the defendant may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action in the proper court. The notice of motion shall be served and filed within 60 days after the defendant first receives notice of levy under a writ of execution, or notice of any other procedure for enforcing, the default judgment.

(c) A notice of motion to set aside a default or default judgment and for leave to defend the action in the proper court shall designate as the time for making the motion a date not less than 10 nor more than 20 days after filing of the motion, and it shall be accompanied by an affidavit showing under oath that the action was not commenced in the proper court according to Section 1812.10 or 2984.4 of the Civil Code or subdivision (b) of Section 395. The party shall serve and file with the notice a copy of the answer, motion, or other pleading proposed to be filed in the action.

(d) Upon a finding by the court that the motion was made within the period permitted by subdivision (b) and that the action was not commenced in the proper court, it shall set aside the default or default judgment on such terms as may be just and shall allow such a party to defend the action in the proper court.

(e) Unless the plaintiff can show that the plaintiff used reasonable diligence to avoid filing the action in the improper court, upon a finding that the action was commenced in the improper court the court shall award the defendant actual damages and costs, including reasonable attorney's fees.

SEC. 7. Section 587 of the Code of Civil Procedure is amended to read:

587. An application by a plaintiff for entry of default under subdivision (a) or (b) of Section 585 or Section 586 or an application for judgment under subdivision (c) of Section 585 shall include an affidavit stating that a copy of the application has been mailed to the defendant's attorney of record or, if none, to the defendant at his or her last known address and the date on which the copy was mailed. If no such address of the defendant is known to the plaintiff or plaintiff's attorney the affidavit shall state that fact.

No application for judgment under subdivision (c) of Section 585 shall be heard, and no default under subdivision (a) or (b) of Section 585 or Section 586 shall be entered, unless the affidavit is filed. The nonreceipt of the notice shall not invalidate or constitute ground for setting aside any judgment.

SEC. 8. Section 15527 of the Education Code is amended to read:

15527. No apportionment to a school district or community college district under this chapter shall become final, nor shall any agreement authorized by Section 15528 be entered into, unless at an

election called by the governing board of the district, two-thirds of the qualified electors of the district voting thereat have authorized the governing board to accept, expend, and repay an apportionment as provided in this chapter or, with respect to an agreement authorized by Section 15528, to obligate the district in an amount equal to or in excess of the maximum amount which the district could be obligated by the agreement, or by any act of its governing board, or for which it is responsible, contemplated, or permitted under the agreement. The election shall be called, held, and conducted in the same manner as are elections to authorize the issuance of district bonds, except that the ballot shall contain substantially the following words:

"Shall the governing board of the district be authorized (1) to accept and expend an apportionment from the State of California under and subject to the provisions of the State Project Area School Construction Law, a portion of which amount is subject to repayment as provided by said law, or (2) to enter into an agreement or agreements with the state pursuant to Section 15528 of the Education Code, which will at the time of such agreement or agreements (or at the time of any subsequent act of the governing board, or for which it is responsible, contemplated or permitted thereby) commit the district to a total expenditure in connection with all such agreements of not more than _____ dollars, or both. Yes _____ No _____."

SEC. 9. The heading of Chapter 1 (commencing with Section 21000) of Part 12 of the Education Code is repealed.

SEC. 10. The heading of Chapter 2 (commencing with Section 21100) of Part 12 of the Education Code is amended and renumbered to read:

CHAPTER 1. FOUNDATIONS, TRUSTS, AND INSTITUTIONS OF ARTS AND SCIENCES

SEC. 11. The heading of Article 2 (commencing with Section 78230) of Chapter 2 of Part 48 of the Education Code is amended and renumbered to read:

Article 2.5. Military Science

SEC. 12. Section 15272 of the Elections Code is amended to read:

15272. The clerk may count absent voter ballots by the use of a voting machine or vote tabulating device subject to all of the following:

(a) All interested persons shall be afforded the opportunity to be present.

(b) No vote shall be counted unless there are at least three persons observing the counting procedure.

(c) The voting machine or device shall be inspected, all of its registering counters set at zero (000) and locked.

(d) The clerk may appoint persons to assist in the counting of these ballots. No person shall be appointed who is not fully qualified to perform his or her duties.

(e) No vote shall be registered in the voting machine or device unless all persons present are in agreement that the voting machine or device reflects exactly the vote of the ballot being counted.

(f) When the votes of all absent voter ballots have been registered in the voting machine or device, the results of the votes cast shall be tabulated in the same manner as the results from other voting machines or devices.

SEC. 13. Section 22935 of the Elections Code is amended to read:

22935. Recount of votes in municipal elections shall be governed by the provisions of Chapter 13 (commencing with Section 17140) of Division 12.

SEC. 14. Section 23531 of the Elections Code is amended to read:

23531. Absent voting shall be allowed and conducted as nearly as practicable in accordance with Division 2 (commencing with Section 1000) pertaining to general elections, except in those districts in which voting by proxy is allowed unless a particular district shall, by resolution pursuant to Section 23511.1, provide for an all-mail ballot election.

SEC. 15. Section 23540.5 of the Elections Code is amended to read:

23540.5. Candidates' statements of their qualifications submitted in accordance with Section 10012 shall be filed with the county clerk who shall cause the voters' pamphlet, if any is required, to be mailed along with the notice required by Section 23540.

SEC. 16. Section 23557 of the Elections Code is amended to read:

23557. Notwithstanding Chapter 1 (commencing with Section 2500) of Division 4, no landowner voting district election shall be consolidated with any resident voter election whether or not it is held pursuant to this part or not. Except as specified in the preceding sentence, an election conducted by a district subject to the provisions of this part may be consolidated with any other election pursuant to Chapter 4 (commencing with Section 23300) of Part 2.

SEC. 17. Section 27031 of the Elections Code is amended to read:

27031. Before any signature may be affixed to a recall petition, each page of each section shall bear all of the following in no less than six-point type:

(a) A request that an election be called to elect a successor to the officer; or, in the case of a city recall, a request that an election be called to determine whether the officer shall be removed from office and whether the vacancy, if any, shall be filled by appointment or special election.

(b) A copy of the notice of intention, including the statement of grounds for recall.

(c) The answer of the officer sought to be recalled, if any. If the officer sought to be recalled has not answered, the petition shall so state.

SEC. 18. Section 27100 of the Elections Code is amended to read:

27100. This chapter applies only to the recall of state officers.

In addition to the provisions contained in this chapter, the provisions of Sections 13 to 18, inclusive, of Article II of the Constitution and the applicable provisions of Chapters 1 (commencing with Section 27000) and 4 (commencing with Section 27300) shall govern the recall of state officers.

SEC. 19. Section 27341 of the Elections Code is amended to read:

27341. Nominations of candidates to succeed the recalled officer shall be made in the manner prescribed for nominating a candidate to that office in a regular election insofar as that procedure is consistent with this article. The following exceptions shall be made to that procedure:

(a) The nomination papers and the declaration of candidacy shall, in each case, be filed no less than 59 days prior to the date of the election and not before the day the order of the election is issued.

(b) If the clerk is required to certify to the governing board the names of the candidates to be placed on the ballot, that shall be done by the 54th day prior to the election.

(c) No person whose recall is being sought may be a candidate to succeed himself or herself at a recall election.

SEC. 20. Section 102 of the Food and Agricultural Code is amended to read:

102. The department is under the control of a civil executive officer known as the Director of Food and Agriculture who shall receive the salary provided for by Chapter 6 (commencing with Section 11550) of Part 1 of Division 3 of Title 2 of the Government Code. The director shall be appointed by, and hold office at the pleasure of, the Governor. The director shall execute and deliver, as provided by law, an official bond in the sum of twenty-five thousand dollars ($25,000).

SEC. 21. Section 6054 of the Food and Agricultural Code is amended to read:

6054. The commissioner shall file the cottongrowers register within 60 days of receipt of the order from the board of supervisors or by March 1st, whichever date is the later. The commissioner shall file with the register of cottongrowers a report and recommendation to the board of supervisors on whether conditions of disease, insect, or other pests of cotton warrant the board of supervisors in proceeding with the organization of the district.

SEC. 22. Section 6059 of the Food and Agricultural Code is amended to read:

6059. The board of supervisors shall, at the next regular or special meeting following the hearing upon the question of the organization of the proposed district, meet and, if it determines that the evidence presented at the hearing was sufficient to warrant the organization of the district, shall, by order entered upon its minutes, declare the district duly organized under the name designated in the petition. The order shall describe the boundaries of the district so that all lands

Code is amended to read:
recall of state officers.
ed [illegible] this chapter, the
e, [illegible] Article 11 of the
visions of Chapters 1
commencing with Section
cers.
Code is amended to read:
cceed the recalled officer
r nominating a candidate
far as that procedure is
exceptions shall be made

aration of candidacy shall,
prior to the date of the
of the election is issued.
the governing board the
ballot, that shall be done

ght may be a candidate to
ion.
nd Agricultural Code is

ntrol of a civil executive
nd Agriculture who shall
er 6 (commencing with
itle 2 of the Government
y, and hold office at the
ll execute and deliver, as
[illegible] nty-five thousand

nd Agricultural Code is

e cottongrowers register
the board of supervisors
r. The commissioner shall
port and recommendation
nditions of disease, insect,
board of supervisors in
listrict.
nd Agricultural Code is

he next regular or special
estion of the organization
ermines that the evidence
warrant the organization
n its minutes, declare the
esignated in the petition.
he district so that all lands

included in it may be known, and a copy of the order shall be filed for record in the office of the county recorder of the county where the district is situated.

SEC. 23. Section 6067 of the Food and Agricultural Code is amended to read:

6067. Except as otherwise provided by this chapter, all acts of the board of directors shall be by resolution, and the adoption of a resolution shall require the affirmative vote of a majority of the board of directors.

SEC. 24. Section 6085 of the Food and Agricultural Code is amended to read:

6085. This chapter shall be known and may be cited as the Cotton Pests Abatement District Act.

SEC. 25. Section 3208 of the Government Code is amended to read:

3208. Except as provided in Section 19990, the limitations set forth in this chapter shall be the only restrictions on the political activities of state employees.

SEC. 26. Section 3572 of the Government Code is amended to read:

3572. This section applies only to the California State University.

The duty to engage in meeting and conferring requires the parties to begin meeting and conferring at least 60 days prior to the expiration of memoranda of understanding, or the May 1, if ~~earlier,~~ of any year in which a memorandum shall expire, or May 1, if there is no existing memorandum. The California State University shall maintain close liaison with the Department of Finance and the Legislature relative to the meeting and conferring on provisions of the written memoranda which have fiscal ramifications. The Governor shall appoint one representative to attend the meeting and conferring, including the impasse procedure, to advise the parties on the views of the Governor on matters which would require an appropriation or legislative action, and the Speaker of the Assembly and the Senate Rules Committee may each appoint one representative to attend the meeting and conferring to advise the parties on the views of the Legislature on matters which would require an appropriation or legislative action.

No written memoranda reached pursuant to this chapter which require budgetary or curative action by the Legislature or other funding agencies shall be effective unless and until such an action has been taken. Following execution of written memoranda of understanding, an appropriate request for financing or budgetary funding for all state-funded employees or for necessary legislation shall be forwarded promptly to the Legislature and the Governor or other funding agencies. When memoranda require legislative action pursuant to this section, if the Legislature or the Governor fail to fully fund the memoranda or to take the requisite curative action, the entire memoranda shall be referred back to the parties for further meeting and conferring. However, the parties may agree that

provisions of the memoranda which are nonbudgetary and do not require funding shall take effect whether or not the funding requests submitted to the Legislature are approved.

SEC. 27. Section 3586 of the Government Code is amended to read:

3586. The Trustees of the California State University shall continue all payroll assignments authorized by an employee prior to and until recognition or certification of an exclusive representative until notification is submitted by an employee to discontinue the employee's assignments.

SEC. 28. Section 8188 of the Government Code is amended to read:

8188. The judgment shall determine the validity or invalidity respectively of the matters specified in Section 8187. The judgment shall be subject to being reopened under Section 473 or 473.5 of the Code of Civil Procedure, or otherwise only within 90 days after the entry of the judgment, and the petitioner and any person who has appeared in the special proceeding may move for a new trial under proper circumstances and upon appropriate grounds and may appeal from the judgment.

SEC. 29. Section 8208 of the Government Code is amended to read:

8208. The protest of a notary public, under his or her hand and official seal, of a bill of exchange or promissory note for nonacceptance or nonpayment, specifying any of the following is prima facie evidence of the facts recited therein:

(a) The time and place of presentment.

(b) The fact that presentment was made and the manner thereof.

(c) The cause or reason for protesting the bill.

(d) The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

SEC. 30. Section 8214.3 of the Government Code is amended to read:

8214.3. Prior to a revocation or suspension pursuant to this chapter or after a denial of a commission, the person affected shall have a right to a hearing on the matter and the proceeding shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3, except that a person shall not have a right to a hearing after a denial of an application for a notary public commission in either of the following cases:

(a) The Secretary of State has, within one year previous to the application, and after proceedings conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3, denied or revoked the applicant's application or commission.

(b) The Secretary of State has entered an order pursuant to Section 8214.4 finding that the applicant has committed or omitted acts constituting grounds for suspension or revocation of a notary public's commission.

SEC. 31. Section 8214.4 of the Government Code is amended to

read:

8214.4. Notwithstanding this chapter or Chapter 5 (commencing with Section 11500) of Part 1 of Division 3, if the Secretary of State determines, after proceedings conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3, that any notary public has committed or omitted acts constituting grounds for suspension or revocation of a notary public's commission, the resignation or expiration of the notary public's commission shall not bar the Secretary of State from instituting or continuing an investigation or instituting disciplinary proceedings. Upon completion of the disciplinary proceedings, the Secretary of State shall enter an order finding the facts and stating the conclusion that the facts would or would not have constituted grounds for suspension or revocation of the commission if the commission had still been in effect.

SEC. 32. Section 8567 of the Government Code is amended to read:

8567. (a) The Governor may make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter. The orders and regulations shall have the force and effect of law. Due consideration shall be given to the plans of the federal government in preparing the orders and regulations. The Governor shall cause widespread publicity and notice to be given to all such orders and regulations, or amendments or rescissions thereof.

(b) Orders and regulations, or amendments or rescissions thereof, issued during a state of war emergency or state of emergency shall be in writing and shall take effect immediately upon their issuance. Whenever the state of war emergency or state of emergency has been terminated, the orders and regulations shall be of no further force or effect.

(c) All orders and regulations relating to the use of funds pursuant to Article 16 (commencing with Section 8645) shall be prepared in advance of any commitment or expenditure of the funds. Other orders and regulations needed to carry out the provisions of this chapter shall, whenever practicable, be prepared in advance of a state of war emergency or state of emergency.

(d) All orders and regulations made in advance of a state of war emergency or state of emergency shall be in writing, shall be exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, but shall be subject to the approval of the Emergency Council. As soon thereafter as possible they shall be filed in the office of the Secretary of State and with the county clerk of each county.

SEC. 33. Section 8818 of the Government Code is amended to read:

8818. The meetings of the commission shall be open and public in accordance with Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3.

SEC. 34. Section 9125 of the Government Code is amended to

read:

9125. (a) The Department of General Services shall cause the permanent relocating of the Treasurer's office in State Office Building No. 1 in Sacramento, and any necessary reconstruction and remodeling in connection therewith.

(b) Notwithstanding any other provisions of law, all work performed pursuant to this section shall be exempt from the State Contract Act (Chapter 1 (commencing with Section 10100) of Division 2 of the Public Contract Code) and from the Environmental Quality Act of 1970 (Division 13 (commencing with Section 21000), Public Resources Code).

SEC. 35. Section 11018 of the Government Code is amended to read:

11018. Every state agency which is authorized by any law to conduct administrative hearings but is not subject to Chapter 5 (commencing with Section 11500) shall nonetheless comply with subdivision (d) of Section 11513 relative to the furnishing of language assistance at any such hearing.

SEC. 36. Section 11019 of the Government Code is amended to read:

11019. (a) Any department specified in subdivision (b) may, upon determining that an advance payment is essential for the effective implementation of a program within the provisions of this section, and to the extent funds are available, and not more frequently than once each fiscal year, advance to a community-based private nonprofit agency with which it has contracted, pursuant to federal law and related state law, for the delivery of services, not to exceed 25 percent of the annual allocation to be made pursuant to the contract and such laws, during the fiscal year to the private nonprofit agency. Advances in excess of 25 percent may be made on contracts financed by a federal program when those advances are not prohibited by federal guidelines. Advance payments may be provided for services to be performed under any contract with a total annual contract amount of two hundred thousand dollars ($200,000) or less, or which the Department of Finance determines has been entered into with any community-based private nonprofit agency with modest reserves and potential cash flow problems. No advance payment shall be granted if the total annual contract exceeds two hundred thousand dollars ($200,000), without the prior approval of the Department of Finance.

The specific departments mentioned in subdivision (b) shall develop a plan to establish control procedures for advance payments. Each such plan shall include a procedure whereby the department determines whether or not an advance payment is essential for the effective implementation of a particular program being funded. Each such plan is required to be approved by the Department of Finance.

(b) Subdivision (a) shall apply to the Department of Aging, the State Department of Alcohol and Drug Programs, the Department

of Corrections, the Employment Development Department, the State Department of Health Services, the State Department of Mental Health, the Department of Rehabilitation, the State Department of Social Services, the Department of the Youth Authority, and the Department of Education.

Subdivision (a) shall also apply to the Health and Welfare Agency which may make advance payments, pursuant to the requirements of that subdivision, to multipurpose senior services projects as established in Sections 9400 to 9413, inclusive, of the Welfare and Institutions Code.

(c) A county may, upon determining that an advance payment is essential for the effective implementation of a program within the provisions of this section, and to the extent funds are available, and not more frequently than once each fiscal year, advance to a community-based private nonprofit agency with which it has contracted, pursuant to federal law and related state law, for the delivery of services, not to exceed 25 percent of the annual allocation to be made pursuant to the contract and such laws, during the fiscal year to the private nonprofit agency.

SEC. 37. Section 11349.4 of the Government Code is amended to read:

11349.4. A regulation returned to an agency because of failure to meet the standards of Section 11349.1, or because of an agency's failure to comply with this chapter, may be rewritten and resubmitted without complying with the notice and public hearing requirements of Sections 11346.4, 11346.5, and 11346.8 unless the substantive provisions of the regulation have been significantly changed. If the regulation has been significantly changed, the agency shall comply with Article 5 (commencing with Section 11346) prior to readopting the regulation.

The office shall expedite the review of a regulation submitted without significant substantive change.

SEC. 38. Section 11550 of the Government Code is amended to read:

11550. An annual salary of thirty-five thousand dollars ($35,000) shall be paid to each of the following:

(a) Director of Finance.
(b) Secretary of Business, Transportation and Housing Agency.
(c) Secretary of Resources Agency.
(d) Secretary of Health and Welfare Agency.
(e) Secretary of State and Consumer Services Agency.
(f) Director of Industrial Relations.
(g) Commissioner, California Highway Patrol.
(h) Secretary of Youth and Adult Correctional Agency.
(i) Director of Food and Agriculture.

SEC. 39. Section 14404 of the Government Code is amended to read:

14404. A filing of the claim pursuant to Part 3 (commencing with Section 900) of Division 3.6 of Title 1 is not required as a prerequisite

to the commencement of arbitration pursuant to Article 8.1 (commencing with Section 14410). The department shall have full authority to compromise or otherwise settle any claims arising from the contract at any time.

SEC. 40. Section 14838 of the Government Code is amended to read:

14838. In order to facilitate the participation of small business in state procurement and in construction contracts under the Office of the State Architect or other state agencies which contract for the construction (including alteration, demolition, repair or improvement) of state facilities, the directors of General Services and of such other agencies, each within their respective areas of responsibility, shall do all of the following:

(a) Establish goals for the extent of participation of small businesses in state procurement and in construction contracts.

(b) Provide for small business preference where responsibility and quality are equal. The preference to small business shall be 5 percent for the lowest responsible bidder meeting specifications. However, the small business preference shall not exceed fifty thousand dollars ($50,000) for any bid.

(c) Give special consideration to small businesses by doing all of the following:

(1) Reducing the experience required.

(2) Reducing the level of inventory normally required.

(d) Give special assistance to small businesses in their preparation and submission of the information requested in Section 14310.

(e) Under the authorization granted in Section 14311, make awards, whenever feasible, to small business bidders for each project bid upon within their prequalification rating. This may be accomplished by dividing major projects into subprojects so as to allow a small business contractor to qualify to bid on the subprojects.

SEC. 41. Section 14841 of the Government Code is repealed.

SEC. 42. Section 14903 of the Government Code is amended to read:

14903. As soon as practicable after deposit of the copies in the library stockroom, the State Printer shall forward of each publication other than the legislative bills, daily journals and daily or weekly histories, 50 copies to the State Library at Sacramento, 25 copies each to the University of California libraries at Berkeley and Los Angeles, and 50 copies to the California State University, to be allocated among the libraries thereof as directed by the Trustees of the California State University. Those copies in excess of the number required for the institutions themselves may be used for exchanges with other institutions or with agencies of other states and countries.

SEC. 43. Section 14955 of the Government Code is amended to read:

14955. Where work to be performed, excluding regular maintenance work, which would otherwise be subject to the State Contract Act (Chapter 1 (commencing with Section 10100) of

Division 2 of the Public Contract Code), does not lend itself to the preparation of plans and specifications to enable bids to be taken on a lump-sum or unit basis, and the director so finds, the department may perform the work by the use of rented tools or equipment, either with operators furnished or unoperated. Contracts for the work may include provision for equipment rental and in addition the furnishing of labor and materials necessary to accomplish the work. The contracts shall not be subject to the State Contract Act, but shall be subject to all of the provisions of Article 2 (commencing with Section 1770) of Chapter 1 of Part 7 of Division 2 of the Labor Code.

Whenever the total consideration of such a contract exceeds two thousand five hundred dollars ($2,500), it shall be awarded to the lowest responsible bidder, after competitive bidding on such reasonable notice as the department may prescribe, except in cases of emergency rental of tools or equipment as hereinafter provided. Posting of notice for five days in a public place in the Sacramento and Los Angeles offices of the Office of Architecture and Construction of the department is sufficient. Those contracts involving a consideration in excess of two thousand five hundred dollars ($2,500) shall be accompanied by labor and material bonds. The department may require faithful performance bonds when considered necessary. The notice for each contract shall state whether or not a bond shall be required. Where a faithful performance bond is required, labor and material bonds shall be required.

In cases of emergency work necessitated by the imminence or occurrence of a landslide, flood, storm damage, accident, or other casualty, tools or equipment may be rented for a period of not to exceed 10 days without competitive bidding.

SEC. 44. Section 14962 of the Government Code is repealed.

SEC. 45. The heading of Chapter 5 (commencing with Section 16170) of Division 4 of Title 2 of the Government Code, as added by Chapter 1406 of the Statutes of 1972, is repealed. The repeal of this heading made by this section shall not affect the existence or validity of Chapter 5 (commencing with Section 16180) of Part 1 of Division 4 of Title 2 of the Government Code, as added by Chapter 454 of the Statutes of 1982.

SEC. 46. Section 16366.2 of the Government Code is amended to read:

16366.2. As used in this article:

(a) "Service provider" means any public or private nonprofit agency which provides service directly to categorical populations.

(b) "Consolidated program" means any program which the state has the option to fund with the block grant.

(c) "Categorical populations" means those recipients of services provided pursuant to a program listed in Section 16366.4.

(d) "Block grant funds" shall have the same meaning as defined in federal law in existence on January 1, 1982.

SEC. 47. The heading of Article 1.8 (commencing with Section 16369) of Chapter 2 of Part 2 of Division 4 of Title 2 of the

Government Code, as added by Chapter 1453 of the Statutes of 1982, is amended and renumbered to read:

Article 1.9. Office of Long-Term Care

SEC. 48. Section 16503 of the Government Code is amended to read:

16503. Subject to the limitations of Article 4.5 (commencing with Section 16480) of Chapter 3, the Treasurer shall determine what amounts of money shall be deposited:

(a) As time deposits, and the rates of interest to be received.

(b) As demand deposits, and the rates of interest to be received, if any.

SEC. 49. The heading of Chapter 6 (commencing with Section 18250) of Division 5 of Title 2 of the Government Code is repealed.

SEC. 50. Section 18801.1 of the Government Code, as added by Chapter 938 of the Statutes of 1982, is repealed.

SEC. 51. Section 18801.1 of the Government Code, as added by Chapter 985 of the Statutes of 1982, is repealed.

SEC. 52. Section 18801.1 of the Government Code, as added by Chapter 1135 of the Statutes of 1982, is repealed.

SEC. 53. Section 19131 of the Government Code is amended to read:

19131. Any state agency proposing to execute a contract pursuant to subdivision (a) of Section 19130 shall notify the State Personnel Board of its intention. All organizations that represent state employees who perform the type of work to be contracted, and any person or organization which has filed with the board a request for notice, shall be contacted immediately by the State Personnel Board upon receipt of this notice so that they may be given a reasonable opportunity to comment on the proposed contract. Departments or agencies submitting proposed contracts shall retain and provide all data and other information relevant to the contracts and necessary for a specific application of the standards set forth in subdivision (a) of Section 19130. Any employee organization may request, within 10 days of notification, the State Personnel Board to review any contract proposed or executed pursuant to subdivision (a) of Section 19130. The review shall be conducted in accordance with subdivision (b) of Section 14831.6. Upon such a request, the State Personnel Board shall review the contract for compliance with the standards specified in subdivision (a) of Section 19130.

SEC. 54. Section 19132 of the Government Code is amended to read:

19132. The State Personnel Board, at the request of an employee organization that represents state employees, shall review the adequacy of any proposed or executed contract which is of a type enumerated in subdivision (b) of Section 19130. The review shall be conducted in accordance with subdivision (c) of Section 14831.6. However, a contract that was reviewed at the request of an

he Statutes of 1982,

Care

lode is amended to

(commencing with
ıll determine what

t to be received.
rest to be received,

encing with Section
ıt Code is repealed.
: Code, as added by

t C as added by
l.

t Code, as added by
ed.

Code is amended to

e a contract pursuant
the State Personnel
nat represent state
contracted, and any
board a request for
ate Personnel Board
e given a reasonable
act. Departments or
tain and provide all
tracts and necessary
th in subdivision (a)
ıy request, within 10
review any contract
a) of Section 19130.
th subdivision (b) of
ersonnel Board shall
andards specified in

Code is amended to

uest of an employee
all review the
which is of a type
The review shall be
of Section 14831.6.
the request of an

employee organization when it was proposed need not be reviewed again after its execution.

SEC. 55. The heading of Article 3 (commencing with Section 19570) of Chapter 8 of Division 5 of Title 2 of the Government Code is amended and renumbered to read:

Article 1. Disciplinary Proceedings

SEC. 56. Section 20570 of the Government Code is amended to read:

20570. Notwithstanding any other provision of this article, the board may enter into an agreement with the governing body of a contracting agency, other than a housing authority, and the governing body of a city with a population in excess of 2,000,000 and maintaining its own retirement system for termination of the contracting agency's participation in this system and inclusion of the employees in the city retirement system. The agreement shall contain such provisions as the board finds necessary to protect the interests of the system for determination of the amount, time, manner of transfer of cash or the securities, or both, to be transferred to the city system as representing the value of the interests in the retirement fund of the contracting agency and its employees by reason of contributions and interest credited to the agency and its employees. All liability of this system with respect to members and retired persons under the contract shall cease and shall become the liability of the city system as of the date of termination specified in the agreement. Liability of the city system shall be for payment of benefits to persons retired on the termination date and their beneficiaries and of beneficiaries of deceased members in at least the amount provided under the agency's contract as it was on that date. The termination shall not affect the contribution rate of any member in any other employment under the system on the date of termination or any retirement allowance or other benefit based on service. Any member who becomes a member of a city system upon the contract termination shall be subject to those provisions of this part extending rights to a member or subjecting the member to limitations because of membership in another retirement system to the same extent that the member would have been had he or she been a member of the city system during his or her membership in this system under the terminated contract.

SEC. 57. Section 20750.8 of the Government Code is amended to read:

20750.8. Each contracting agency and school employer which is an employer for purposes of this chapter shall make contributions in addition to those otherwise specified in this chapter in amounts to be fixed and determined by the board on account of unpaid liability for prior service and on account of liability for benefits under Sections 21263 to 21263.3, inclusive, and 21382 and benefits provided local safety members. Payments shall be under such arrangement as may

be agreed to by the board.

SEC. 58. Section 20750.85 of the Government Code is amended to read:

20750.85. Each employer included in a contract under Chapter 4.5 (commencing with Section 20580) shall make contributions on account of liability for prior service and benefits under Section 21382 in addition to those otherwise specified in this chapter in a sum equal to 0.11 percent of compensation paid miscellaneous members.

SEC. 59. Section 20750.86 of the Government Code is amended to read:

20750.86. Each employer included in a contract under Chapter 4.5 (commencing with Section 20580) and each school district which is a contracting agency shall make contribution on account of liability for benefits under Section 20862.5 in addition to those otherwise specified in this chapter in a sum equal to 0.072 percent of compensation paid the members by the employer.

SEC. 60. Section 22009 of the Government Code is amended to read:

22009. "Public agency" means the state, any city, county, city and county, district, municipal or public corporation or any instrumentality thereof, or boards and committees established under Chapter 1 (commencing with Section 58601) or 2 (commencing with Section 59501) of Part 1 of Division 21 of the Food and Agricultural Code, Chapter 754 of the Statutes of 1933, as amended, or Chapter 307 of the Statutes of 1935, as amended, the employees of which constitute one or more coverage groups or retirement system coverage groups.

SEC. 61. Section 51110.2 of the Government Code is amended to read:

51110.2. The county or city planning commission shall hold a public hearing on parcels referred to it for review by the board or council pursuant to subdivision (d) of Section 51110 and subdivision (c) of Section 51110.1 according to Section 65854, and shall render its decision in the form of a written recommendation to the board or council according to Section 65855. The planning commission shall include in its recommendation to the board or council considerations as to the exact zoning boundaries to be drawn within each assessors parcel contained in list A or list B.

SEC. 63. Section 4000 of the Harbors and Navigation Code is amended to read:

4000. The board of supervisors of any county may, upon approval of the Public Utilities Commission, grant authority to any person to construct a wharf, chute, or pier, on any lands bordering on any navigable bay, lake, inlet, creek, slough, or arm of the sea, situated in or bounding the county, with a license to take tolls for its use for the term of 20 years.

SEC. 64. Section 6201 of the Harbors and Navigation Code is amended to read:

6201. "Board," as used in this part, means the board of port

commissioners described in Chapter 2 (commencing with Section 6240).

SEC. 65. Section 18029.5 of the Health and Safety Code is amended to read:

18029.5. (a) The department may promulgate rules and regulations, which it determines are reasonably consistent with generally recognized fire protection standards, governing conditions relating to the prevention of fire or for the protection of life and property against fire in manufactured homes, mobilehomes, recreational vehicles, and commercial coaches. All mobilehomes manufactured on or after June 15, 1976, shall comply with the National Manufactured Housing Construction and Safety Act of 1974 (42 U.S.C., Sec. 5401, et seq.).

(b) The chief fire official of every city, county, city and county, fire protection district, or other local fire ~~protection~~ agency shall file a report of each manufactured home and mobilehome fire occurring within his or her jurisdiction with the State Fire Marshal. The report shall be made on forms provided by the State Fire Marshal.

The State Fire Marshal shall annually compile a statistical report of all manufactured home and mobilehome fires occurring within this state and shall furnish the department with a copy of the report. The annual report shall include, but need not be limited to, the number of manufactured home and mobilehome fires, the causes of the fires, the monetary loss, and any casualties or fatalities resulting from the fires.

SEC. 66. Section 18030 of the Health and Safety Code is amended to read:

18030. If the department determines that standards for commercial coaches and recreational vehicles, which have been prescribed by the statutes or regulations of another state, are at least equal to the standards prescribed by the department, the department may so provide by regulation. Thereafter, any commercial coaches or recreational vehicles which that other state has approved as meeting its standards shall be deemed to meet the standards of the department, if the department determines that the standards of the other state are actually being enforced.

SEC. 67. Section 18031 of the Health and Safety Code is amended to read:

18031. The department, by rules and regulations, may establish a schedule of fees to pay the costs of work related to administration and enforcement of this part. The fees collected shall be deposited in the Mobilehome-Manufactured Home Revolving Fund.

SEC. 68. Section 18550.5 of the Health and Safety Code, as added by Chapter 194 of the Statutes of 1979, is repealed. The repeal made by this section shall not affect the existence or validity of Section 18550.5 of the Health and Safety Code, as added by Chapter 1160 of the Statutes of 1979.

SEC. 69. Section 18942 of the Health and Safety Code is amended to read:

18942. (a) The commission shall publish, or cause to be published, bound editions of the code in its entirety once in every three years, commencing January 1, 1980. In each intervening year the commission shall publish, or cause to be published, annual bound supplements. In addition, the commission shall publish, for emergency standards defined in subdivision (a) of Section 18913, an emergency standards supplement whenever the commission determines it is necessary. The commission shall also publish, for emergency standards defined in subdivision (b) of Section 18913 and for building standards approved pursuant to subdivision (b) of Section 142.3 of the Labor Code, a semiannual supplement, or a more frequent supplement if required by federal law.

(b) All building standards approved shall be incorporated into the next applicable triennial edition or supplement thereto, and no building standards, except emergency standards and those approved pursuant to subdivision (b) of Section 142.3 of the Labor Code and published pursuant to subdivision (c) of Section 18943, shall become effective until its required approval by the commission and its publication in the triennial edition or annual supplement.

(c) Except emergency standards and building standards approved pursuant to subdivision (b) of Section 142.3 of the Labor Code, no building standards or regulations shall be published in the triennial edition of the code or annual supplement less than 90 days after approval by the commission.

(d) Emergency standards defined in subdivision (a) of Section 18913 shall become effective when approved by the commission, transmitted to the Office of Administrative Law, and filed with the Secretary of State, or upon any later date specified therein, and remain in effect as provided by Section 11346.1 of the Government Code and Section 18937 of this code. Emergency standards shall be distributed as soon as practicable after publication to all interested and affected parties. Notice of repeal pursuant to Section 11346.1 of the Government Code of emergency standards defined in subdivision (a) of Section 18913 within the period specified by that section shall also be given to the parties by the affected agencies promptly after the termination of the statutory period pursuant to Section 11346.1 of the Government Code.

(e) The commission may publish, stockpile, and sell at a reasonable price the code and any materials incorporated therein by reference if it deems the latter is insufficiently available to the public, or unavailable at a reasonable price. Each state department concerned and each city and county shall have an up-to-date copy of the code available for public inspection.

SEC. 70. Section 19026 of the Health and Safety Code is amended and renumbered to read:

15095. Any person who violates any provision of this chapter is guilty of a misdemeanor.

SEC. 71. Section 19820 of the Health and Safety Code is amended to read:

19820. (a) No person shall sell, or offer for sale, new children's sleepwear to and including size 14 which does not meet federal flammability standards for children's sleepwear to and including size 6X, and such other standards as may from time to time be adopted by the federal government. The requirements prescribed by this chapter shall be in addition to those prescribed by Chapter 8 (commencing with Section 19810).

(b) Violation of subdivision (a) is a misdemeanor.

(c) The State Fire Marshal shall promulgate, in accordance with the provisions of the Administrative Procedure Act (commencing with Section 11340 of the Government Code), flammability regulations covering such other articles of new children's clothing to and including size 14 as it shall determine to be in the public interest.

(d) Violation of any rule or regulation promulgated pursuant to subdivision (c) is a misdemeanor.

SEC. 72. Section 25356 of the Health and Safety Code, as added by Chapter 327 of the Statutes of 1982, is repealed. The repeal made by this section shall not affect the existence or validity of Section 25356 of the Health and Safety Code, as added by Chapter 496 of the Statutes of 1982.

SEC. 73. Section 25651 of the Health and Safety Code is amended to read:

25651. (a) The department, with the assistance of the Office of Emergency Services, the State Energy Resources Conservation and Development Commission, and the Department of the California Highway Patrol shall, with respect to any fissile radioactive material coming within the definition of "fissile class II," "fissile class III," "large quantity radioactive materials," or "low-level radioactive waste" provided by the regulations of the United States Department of Transportation (49 C.F.R. 173.389), do all of the following:

(1) Study the adequacy of current packaging requirements for radioactive materials.

(2) Study the effectiveness of special routing and timing of radioactive materials shipments for the protection of the public health.

(3) Study the advantages of establishing a tracking system for shipments of most hazardous radioactive materials.

(b) A report on these studies, together with recommendations for any necessary changes in transportation regulations, shall be submitted by the department to the Legislature on or before July 1, 1982.

(c) The department, with the assistance of the Office of Emergency Services, the State Energy Resources Conservation and Development Commission, and the Department of the California Highway Patrol, shall extend the nuclear threat emergency response plan to include radioactive materials in transit and provide training for law enforcement officers in dealing with those threats.

(d) Subject to Section 25611, the department, in cooperation with the Department of the California Highway Patrol, shall adopt, in

accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, reasonable regulations which, in the judgment of the department, promote the safe transportation of radioactive materials. The regulations shall (1) prescribe the use of signs designating radioactive material cargo; shall designate, in accordance with the results of the studies done pursuant to subdivision (a), the manner in which the shipper shall give notice of such shipment to appropriate authorities; (2) prescribe the packing, marking, loading, and handling of radioactive materials, and the precautions necessary to determine whether the material when offered is in proper condition to transport, but shall not include the equipment and operation of the carrier vehicle; and (3) be reviewed and amended, as required, pursuant to Section 25611. The regulations shall be compatible with those established by the federal agency or agencies required or permitted by federal law to establish the regulations.

(e) Subject to Section 25611, the Department of the California Highway Patrol, after consulting with the department, shall adopt regulations specifying the time at which shipments may occur and the routes which are to be used in the transportation of cargoes of hazardous radioactive materials, as those materials are defined in regulations of the department.

SEC. 74. Section 25803 of the Health and Safety Code is amended to read:

25803. Rules and regulations adopted under this chapter shall be adopted in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and Sections 25733 and 25734 of this code.

SEC. 75. Section 28744 of the Health and Safety Code is amended to read:

28744. The term "hazardous substance" shall not apply to any of the following:

(a) Foods, drugs, or cosmetics subject to the Federal Food, Drug, and Cosmetic Act (52 Stat. 1040) or Division 21 (commencing with Section 26000) of this code.

(b) Substances intended for use as fuels when stored in containers and used in the heating, cooking, or refrigeration system of a house.

(c) Source material, special nuclear material, or byproduct material, as defined in the Atomic Energy Act of 1954 (68 Stat. 919), as amended, and regulations issued pursuant thereto by the Atomic Energy Commission.

(d) Fertilizing materials regulated by Chapter 5 (commencing with Section 14501) of Division 7 of the Food and Agricultural Code.

(e) Livestock remedies regulated by Chapter 4 (commencing with Section 14200) of Division 7 of the Food and Agricultural Code.

(f) Economic poisons regulated by Chapter 2 (commencing with Section 12751) of Division 7 of the Food and Agricultural Code, except as provided in Section 28744.1.

(g) Economic poisons subject to the Federal Insecticide,

Section 11340) of
Code, reasonable
ient, promote the
gulations shall (1)
e material cargo;
the studies done
the shipper shall
ies; (2) prescribe
oactive materials,
ther the material
: shall not include
icle; and (3) be
ection 25611. The
ed by the federal
al law to establish

of the California
nent, shall adopt
s may occur and
ion cargoes of
ls a defined in

Code is amended

s chapter shall be
cing with Section
nment Code, and

Code is amended

t apply to any of

eral Food, Drug,
ommencing with

red in containers
stem of a house.
, or byproduct
54 (68 Stat. 919),
o by the Atomic

5 (commencing
gricultural Code.
4 (commencing
gricultural Code.
ommencing with
ric ral Code,

ral Insecticide,

10 05

Fungicide, and Rodenticide Act (61 Stat. 163), except as provided in Section 28744.1.

(h) Injurious substances as defined and regulated by Article 112 (commencing with Section 5225) of Group 16 of Subchapter 7 of Chapter 4 of Title 8 of the California Administrative Code.

SEC. 76. Section 30001 of the Health and Safety Code is amended to read:

30001. Unless the provisions or the context otherwise requires, these definitions, rules of construction, and general provisions shall govern the construction of this chapter. As used in this chapter:

(a) "Department" means the State Department of Health Services.

(b) "Household substance" means any substance which is customarily produced or distributed for sale for consumption or use, or customarily stored by individuals in or about the household and is one of the following:

(1) A hazardous substance as that term is defined in Section 28743.

(2) A food, drug, or cosmetic, as those terms are defined in Sections 26012, 26010, and 26005, which (i) is toxic, (ii) is corrosive, (iii) is an irritant, (iv) is a strong sensitizer, (v) is flammable or combustible, or (vi) generates pressure through decomposition, heat, or other means; if it may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.

(3) A substance intended for use as fuel when stored in a portable container and used in the heating, cooking, or refrigeration system of a residential dwelling.

(c) "Package" means the immediate container or wrapping in which any household substance is contained for consumption, use, or storage by individuals in or about the household, and, for purposes of household substances, also means any outer container or wrapping used in the retail display of any such substance to consumers.

"Package" does not include the following:

(1) Any shipping container or wrapping used solely for the transportation of any household substance in bulk or in quantity to manufacturers, packers, or processors, or to wholesale or retail distributors thereof.

(2) Any shipping container or outer wrapping used by retailers to ship or deliver any household substance to consumers unless it is the only container or wrapping.

(d) "Special packaging" means packaging that is designed or constructed to be significantly difficult for children under five years of age to open or obtain a toxic or harmful amount of the substance contained therein within a reasonable time and not difficult for normal adults to use properly, but does not mean packaging which all such children cannot open or obtain a toxic or harmful amount of within a reasonable time.

(e) "Labeling" means all labels and other written, printed, or

10 010

graphic matter upon any household substance or its package, or accompanying the substance.

(f) "Federal act" means the "Poison Prevention Packaging Act of 1970" (15 U.S.C. § 1471 et seq.).

SEC. 77. Section 30002 of the Health and Safety Code is amended to read:

30002. The department shall, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, adopt regulations establishing standards for the special packaging of any household substance in accordance with the provisions of this chapter if the regulations do not differ in substance or proscribe or require conduct which differs from the provisions of the federal act or regulations issued pursuant to the federal act and if the department finds as follows:

(a) The degree or nature of the hazard to children in the availability of the substance, by reason of its packaging, is such that special packaging is required to protect children from serious personal injury or serious illness resulting from handling, using, or ingesting the substance.

(b) The special packaging to be required by the standard is technically feasible, practicable, and appropriate for the substance.

SEC. 78. Section 32130.7 of the Health and Safety Code is repealed. The repeal of this section shall not affect the validity of any loan, indebtedness, or obligation incurred, or any agreement entered into pursuant to Section 32130.7 of the Health and Safety Code, prior to October 1, 1961.

SEC. 79. Section 39601 of the Health and Safety Code is amended to read:

39601. (a) The state board shall adopt standards, rules, and regulations in accordance with the provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, necessary for the proper execution of the powers and duties granted to, and imposed upon, the state board by this division and by any other provision of law.

(b) The state board, by rules and regulations, may revise the definitions of terms set forth in Chapter 2 (commencing with Section 39010) of Part 1 in order to conform those definitions to federal laws and rules and regulations.

(c) The standards, rules, and regulations adopted pursuant to this section shall, to the extent consistent with the responsibilities imposed under this division, be consistent with the state goal of providing a decent home and suitable living environment for every Californian.

SEC. 80. Section 50701 of the Health and Safety Code is amended to read:

50701. There is hereby created in the State Treasury the Land Purchase Fund. All money in the Land Purchase Fund is continuously appropriated to the department for the purpose of making loans to eligible sponsors of assisted housing for land

purchase costs incurred by them in connection with the provision of housing for low-income persons in rural areas.

All interest, dividends, and pecuniary gains from investments or deposits of moneys in the loan fund shall accrue to the fund notwithstanding Section 16305.7 of the Government Code.

There shall be paid into the fund all of the following:

(a) Any moneys appropriated and made available by the Legislature for purposes of the fund.

(b) Any moneys which the department receives in repayment or return of loans made from the fund, including any interest thereon.

(c) Any other moneys which may be made available to the department for the purposes of this chapter from any other source or sources.

SEC. 81. Section 51005 of the Health and Safety Code is amended to read:

51005. The agency shall, within 90 days following the close of each fiscal year, submit an annual report of its activities under this division for the preceding year to the Governor, the Secretary of the Business, Transportation and Housing Agency, the Director of Housing and Community Development, the Treasurer, and the Legislature. Within 90 days following the close of each fiscal year, the agency shall also submit an annual report to the Joint Legislative Budget Committee. Each report shall set forth a complete operating and financial statement of the agency during the concluded fiscal year. The report shall specify the number of units assisted, the distribution of units among the metropolitan, nonmetropolitan, and rural areas of the state, and shall contain a summary of statistical data relative to the incomes of households occupying assisted units, the monthly rentals charged to occupants of rental housing developments, and the sales prices of housing developments purchased during the previous fiscal year by housing sponsors who are persons or families of low or moderate income. The report shall also include a statement of accomplishment during the previous year with respect to the agency's progress, priorities, and affirmative action efforts. The agency shall specifically include in its report on affirmative action goals, statistical data on the numbers and percentages of minority sponsors, developers, contractors, subcontractors, suppliers, architects, engineers, attorneys, mortgage bankers or other lenders, insurance agents and managing agents. The agency shall cause an audit of its books and accounts with respect to its activities under this division to be made at least once during each fiscal year by an independent certified public accountant and the agency shall be subject to audit by the Department of Finance not more often than once each fiscal year.

Commencing with fiscal year 1981–82, the agency shall include in its annual report information with respect to the number of manufactured housing units assisted by the agency.

Within 90 days following receipt of the agency's annual report, the Joint Legislative Budget Committee shall submit a report on the

agency's activities under this division to the Legislature.

SEC. 82. Section 51050 of the Health and Safety Code is amended to read:

51050. The agency shall have all of the following powers:

(a) To sue and be sued in its own name.

(b) To have an official seal and to alter the same at pleasure.

(c) To have perpetual succession.

(d) To maintain offices at such place or places within the state as it may designate.

(e) To adopt, and from time to time amend and repeal, by action of the board, rules and regulations, not inconsistent with this part, to carry into effect the powers and purposes of the agency and the conduct of its business. Rules and regulations of the agency shall be adopted, amended, repealed, and published in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. With respect to regulations in areas specified in Section 50462, the agency may propose regulations, but those regulations shall become effective only upon concurrence of the Secretary of the Business, Transportation and Housing Agency, or the secretary's designated representative, or the Director of Housing and Community Development.

(f) Notwithstanding any other provision of law, to make and execute contracts and all other instruments necessary or convenient for the exercise of its powers and functions under this part with any governmental agency, private corporation or other entity, or individual, and to contract with any local public entity for processing of any aspect of financing housing developments. Contracts made or executed under the authority of this part shall not be subject to any provision of law requiring competitive bidding, but the agency shall take into consideration any applicable state policies respecting competitive bidding prior to letting a contract on a negotiated bid.

In exercising the powers set forth in this subdivision, the agency shall be subject to any applicable provisions of law requiring the supervision or approval of another division or officer of state government, except with respect to the following, which shall be exempt from these requirements:

(1) Contracts and instruments made or executed in connection with the issuance or marketing of the agency's bonds, including procurement of financial consultants, underwriters, actuaries, bond counsel, and computer and printing services related to the issuance or marketing of the bonds.

(2) Contracts and instruments relating to protection of the security interests of holders of the agency's bonds or the management, acquisition, or disposition of any property, funds, assets, or loans that are either acquired with the proceeds of any bonds or pledged or held in trust for the benefit of holders of the agency's bonds.

(3) Contracts and instruments made or executed pursuant to Chapter 5 (commencing with Section 51100).

(g) To acquire real or personal property, or any interest therein, on either a temporary or long-term basis in its own name by gift, purchase, transfer, foreclosure, lease, option, or otherwise, including easements or other incorporeal rights in property.

(h) To hold, sell, assign, lease, encumber, mortgage, or otherwise dispose of any real or personal property or any interest therein; to hold, sell, assign, or otherwise dispose of any mortgage interest owned by it, under its control or custody, or in its possession; and, as applicable, to do any of the acts specified in this subdivision by public or private sale, with or without public bidding, notwithstanding any other provision of law.

(i) To release or relinquish any right, title, claim, lien, interest, easement, or demand however acquired, including any equity or right of redemption in real property foreclosed by it.

(j) To determine the terms and conditions of any mortgage instrument, deed of trust, or promissory note used or executed in conjunction with the financing of any housing development.

(k) To employ architects, engineers, attorneys, accountants, housing construction and financial experts, and such other advisers, consultants, and agents as may be necessary in its judgment and to fix their compensation.

(*l*) To provide advice, technical information, and consultative and technical service in connection with the financing of housing developments pursuant to this part.

(m) To procure insurance against any loss in connection with its property and other assets, including mortgages and mortgage loans, in such amounts and from such insurers as it deems desirable.

(n) To establish, revise from time to time, and charge and collect fees and charges in connection with loans made by the agency.

(o) To borrow money and issue bonds, as provided in this part.

(p) To enter such agreements and perform such acts as are necessary to obtain federal housing subsidies for use in connection with housing developments.

(q) To provide bilingual staff in connection with services of the department and make available agency publications in a language, other than English, where necessary to effectively serve all groups for which those services or publications are made available.

(r) To require any individual, corporation, or other legal entity operating, managing, or providing maintenance services for a housing development or a residential structure to maintain a current certificate of qualification developed and approved by the agency.

(s) To do any and all things necessary to carry out its purposes and exercise the powers expressly granted by this part.

SEC. 83. Section 1190 of the Insurance Code is amended to read:

1190. Any domestic incorporated insurer, which maintains in cash on hand or on deposit in a national or state bank, or in securities specified in Article 3 (commencing with Section 1170), an amount equal to its required minimum paid-in capital, may invest the remainder of its assets in the purchase of, or loans upon the securities

set forth in this article. The investments are known as excess funds investments and are subject to the restrictions set forth in this article.

SEC. 84. Section 1210 of the Insurance Code is amended to read:

1210. (a) Any admitted insurer, after investing an amount equal to its required minimum paid-in capital in securities specified in Article 3 (commencing with Section 1170), may make such investments as it may see fit in the purchase of, or loans upon, properties and securities other than or in addition to or in excess of those set forth in Articles 2 (commencing with Section 1150), 3 (commencing with Section 1170) and 4 (commencing with Section 1190) of this chapter. Investments under this section shall not exceed, in the aggregate, the lesser of any of the following:

(1) Five percent of the insurer's admitted assets.

(2) Fifty percent of the excess of admitted assets over the sum of capital paid-up, liabilities and the surplus required by subdivision (a) of Section 700.02. The percentage or dollar value of admitted assets and capital paid-up and liabilities shall be determined by the insurer's last preceding annual statement of conditions and affairs made as of the preceding December 31st and which has been filed with the commissioner pursuant to law. The investments shall be subject to the provisions of Sections 1153.5, 1154, 1200, 1201, and 1202 as if they were excess funds investments. This section shall apply to an insurer other than life only if the insurer has aggregate capital and surplus of at least ten million dollars ($10,000,000).

(b) An investment originally made by an insurer pursuant to this section which subsequently meets the requirements of an investment contained in Article 2 (commencing with Section 1150), 3 (commencing with Section 1170) or 4 (commencing with Section 1190) may, at the election of the insurer, be considered to be held pursuant to any provision contained in those articles.

SEC. 85. Section 1350 of the Insurance Code is amended to read:

1350. The commissioner shall issue a certificate of authority to the attorney upon compliance with the requirements of this chapter, and the payment of the application fee prescribed by Article 3 (commencing with Section 699) of Chapter 1 of Part 2 of Division 1. The certificate shall authorize the making, by the attorney, of contracts of insurance under this chapter. It shall also specify all of the following:

(a) The classes of insurance to be effected.

(b) The name of the attorney.

(c) The location of the principal office.

(d) The name under which the contracts of insurance are issued.

SEC. 86. Section 10499 of the Insurance Code is amended to read:

10499. The commissioner may at any time notify any person possessing a certificate of exemption that the commissioner has grounds to believe that it is violating any of the applicable provisions of this code or is not operating in strict conformity with the documents filed with the commissioner as a basis of its application for the certificate of exemption. The notice shall fix the time and place

for hearing at which the person notified may appear and show cause why the commissioner should not revoke its certificate of exemption. The time fixed shall not be less than 15 nor more than 60 days after date of the notice.

At the time and place specified in the notice and order to show cause, the commissioner shall hold a hearing at which the possessor of a certificate of exemption may present evidence to show that it is not violating any applicable provision of this code, and that it is operating in conformity with the documents which were filed as a basis for the certificate of exemption. If after the hearing the commissioner finds the evidence shows that the operations of the person are in violation of any of the applicable provisions of this code, or are in violation of the documents upon which its application for certificate of exemption was based, the commissioner shall revoke the certificate of exemption and the person whose certificate of exemption is thus revoked shall cease the transaction of life and disability insurance until it procures a new certificate of exemption or a certificate of authority under other provisions of this code.

This article does not prevent the commissioner from acting and bringing proceedings under Article 14 (commencing with Section 1010) of Chapter 1 of Part 2 of Division 1, if grounds exist for the institution of such proceedings with respect to any person transacting life or disability insurance either with or without a certificate of exemption.

SEC. 87. Section 10500 of the Insurance Code is amended to read:

10500. Every person not expressly exempted by the provisions of this code that transacts life or disability insurance without a valid and unrevoked certificate of authority or without a valid and unrevoked certificate of exemption issued pursuant to this article is guilty of a misdemeanor. Every employee, officer, or agent of any person who knowingly assists any person in the transaction of insurance in violation of the provisions of this code, is guilty of a misdemeanor.

SEC. 88. Section 10507.2 of the Insurance Code is amended to read:

10507.2. An investment return assurance policy evidencing such insurance, shall not be issued or delivered in this state until a copy of the form thereof is filed with the commissioner, the fees required by Section 12973.9 are paid, and the commissioner has given written approval of the form.

SEC. 89. Section 11512.1 of the Insurance Code, as added by Chapter 1594 of the Statutes of 1982, is amended and renumbered to read:

11512.11. A plan shall provide group contractors with a current roster of institutional and professional providers under contract to provide services at alternative rates under their group contract, and shall also make such a roster available for public inspection, during regular business hours, at the plan's home office or principal place of business in this state.

SEC. 90. Section 11512.2 of the Insurance Code, as added by

Chapter 558 of the Statutes of 1981, is amended and renumbered to read:

11512.196. A hospital service plan contract which is written or issued for delivery outside California in a state the laws of which require recognition of psychologists licensed in such state for services performed within the scope of psychological practice shall not be deemed to prohibit the insured from selecting a psychologist licensed in California to perform services in California which are covered under the terms of the policy even though such psychologist is not licensed in the state in which the insurance is written or issued for delivery.

SEC. 91. Section 11512.21 of the Insurance Code is amended to read:

11512.21. Every group hospital service contract issued or issued for delivery or amended in this state after January 1, 1977, shall comply with the requirements of Article 1.5 (commencing with Section 10128) of Chapter 1.

SEC. 92. Section 11512.25 of the Insurance Code is amended to read:

11512.25. (a) Any hospital service contract issued to a corporation, copartnership, or individual employer eligible for group hospital service contracts pursuant to Section 11512.2 may also provide that "employees" shall include the officers, managers, and employees of subsidiary or affiliated corporations, and the individual proprietors, partners, and employees of affiliated individuals and firms, when the business of the subsidiary or affiliated corporations, firms, or individuals, is controlled by the holder of the hospital service contract through stock ownership, contract, or otherwise, or when the holder of the hospital service contract is controlled by affiliated corporations, firms, or individuals through stock ownership, contract, or otherwise.

(b) Nothing contained herein shall permit any person other than an officer, manager, or employee for compensation of the holder of the hospital service contract or of one or more of the individuals, firms, or corporations specified in subdivision (a) to be covered under a group hospital service contract.

SEC. 93. Section 11527 of the Insurance Code is amended to read:

11527. The commissioner shall examine the plan submitted under subdivision (c) of Section 11526. The commissioner shall not approve the plan unless in the commissioner's opinion the rights and interests of the insurer, its policyholders, and shareholders are protected and the commissioner is satisfied that the plan will be fair and equitable in its operation.

SEC. 94. Section 11528 of the Insurance Code is amended to read:

11528. The election prescribed by subdivision (d) of Section 11526, shall be called by the board of directors or the president and every policyholder of the class or classes for whose benefit the stock is to be acquired, whose insurance shall have been in force for at least one year prior to the election shall have one vote, regardless of the

ıd renumbered to

hich is written or
the laws of which
:h state for services
actice shall not be
ng a psychologist
alifornia which are
h such psychologist
is written or issued

:ode is amended to

act issued or issued
nuary 1, 1977, shall
(commencing with

Code is amended to

ract issued to a
'er eligible for group
n [illegible].2 may also
cers, managers, and
s, and the individual
ted individuals and
filiated corporations,
der of the hospital
act, or otherwise, or
act is controlled by
igh stock ownership,

ny person other than
tion of the holder of
e of the individuals,
(a) to be covered

e is amended to read:
the plan submitted
mmissioner shall not
pinion the rights and
d shareholders are
the plan will be fair

e is amended to read:
sion (d) of Section
or the president and
ose benefit the stock
n in force for at least
egardless of the

number of policies or amount of insurance the policyholder holds, and regardless of whether the policies are policies of life insurance or policies of disability insurance. Notice of the election shall be given to policyholders entitled to vote by mail from the principal office of the insurer at least 30 days prior to the date set for the election, in a sealed envelope, postage prepaid, addressed to the policyholder at that person's last known address.

Voting shall be by one of the following methods:

(a) At a meeting of those policyholders, held pursuant to the notice, by ballot in person or by proxy.

(b) If not by the method described in subdivision (a), then by mail pursuant to a procedure and on forms to be prescribed by the plan.

The election shall be conducted under the direction and supervision of three impartial and disinterested inspectors appointed by the insurer and approved by the commissioner. In case any person appointed as inspector fails to appear at the meeting or fails or refuses to act at the election, the vacancy, if occurring in advance of the convening of the meeting or in advance of the opening of the mail vote, may be filled in the manner prescribed for the appointment of inspectors and, if occurring at the meeting or during the canvass of the mail vote, may be filled by the person acting as chairperson of the meeting or designated for that purpose in the plan. The decision, act, or certificate of a majority of the inspectors shall be effective in all respects as the decision, act, or certificate of all. The inspectors of election shall determine the number of policyholders, the voting power of each, the policyholders represented at the meeting or voting by mail, the existence of a quorum, and the authenticity, validity, and effect of proxies. They shall receive votes, hear and determine all challenges and questions in any way arising in connection with the right to vote, count and tabulate all votes, determine the result, and do such other acts as are proper to conduct the vote with fairness to all policyholders. The inspectors of election shall, before commencing performance of their duties, subscribe to and file with the insurer and with the commissioner an oath that they, and each of them, will perform their duties impartially, in good faith, to the best of their ability and as expeditiously as is practicable. On the request of the insurer, the commissioner, a policyholder or his or her proxy, the inspectors shall make a report in writing of any challenge or question or matter determined by them and execute a certificate of any fact found by them. They shall also certify the result of the vote to the insurer and to the commissioner. Any report or certificate made by them shall be prima facie evidence of facts stated therein. All necessary expenses incurred in connection with the election shall be paid by the insurer. For the purpose of this section, a quorum shall consist of 5 percent of the policyholders of the insurer entitled to vote at the election.

SEC. 95. Section 11555.2 of the Insurance Code is amended to

read:

11555.2. Each insurer transacting insurance covering liability for malpractice of any person licensed under the Dental Practice Act (Chapter 4 (commencing with Section 1600) of Division 2 of the Business and Professions Code), or under the Medical Practice Act (Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code), shall report all of the following statistics to the commissioner, by profession and by medical specialty, on a date to be set by the commissioner, but not later than July 1st of each calendar year:

(a) The total number of doctors written during the immediately preceding calendar year.

(b) The total amount of premiums received from insureds, both written and earned (as reported in the annual statement), during the immediately preceding calendar year.

(c) The number of claims reported to the insurer for the first time separately by the year the claim occurred, and the number of claims reported closed during a previous calendar year which were reopened separately by the year claim occurred.

(d) The total number of claims outstanding, together with the monetary amount reserved for loss and allocated loss expense, in the annual statement as of December 31 of the calendar year next preceding, separately stated by the year the claim occurred.

(e) (1) The number of claims closed with payment to the claimant during the calendar year next preceding, to be reported by the year the claim occurred, (2) the total monetary amount paid thereon, reported by the year the claim occurred, and (3) the total allocated loss expense paid thereon, reported by the year the claim occurred.

(f) The monetary amount paid on claims during the calendar year next preceding, to be reported separately by the year the claim occurred, with allocated loss expense paid, to be reported separately by the year the claim occurred.

(g) The number of claims closed without payment to the claimant during the calendar year next preceding, by the year the claim occurred, and the allocated loss expense paid thereon, separately by the year the claim occurred.

(h) The monetary amount reserved in the annual statement for the calendar year next preceding on claims incurred but not reported to the insurer.

(i) The number of lawsuits filed against the insurer's insureds, and the number of doctors included therein, during the calendar year next preceding, to be separately reported by the year the claim occurred.

(j) A distribution by size of payment for those claims closed during the calendar year next preceding, showing the number of claims and total amount paid for each monetary category, as determined by the commissioner.

SEC. 96. Section 12762 of the Insurance Code is amended to read:

12762. (a) A home protection contract shall specify, in clear and conspicuous terms, the following information:

(1) Each of the appliances, systems and components covered by the contract.

(2) All exclusions and limitations respecting the extent of coverage.

(3) The period during which the contract will remain in effect, the protection contract fee and the renewal terms, if any.

(4) With respect to the performance of services by the home protection company, all of the following:

(A) The services to be performed by the company and the terms and conditions of such performance.

(B) The service fee or fees, if any, to be charged for such services.

(C) All limitations respecting the performance of services, including any restrictions as to the time period when or geographical area within which services may be requested or will be performed.

(D) A statement that services will be performed upon telephonic request therefor to the company, without any requirement that claim forms or applications be filed prior to the rendition of service.

(E) A representation that services will be initiated by or under the direction of the company within 48 hours after request is made for such services by any person entitled to make such request under the contract, or the agent of such person.

(b) The commissioner may adopt, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, such reasonable regulations as may be necessary to make more specific the provisions of this section. Those regulations may also establish such other contract form standards and requirements as the commissioner may deem necessary and appropriate in the public interest. However, this section does not authorize the commissioner to specify those appliances, systems, or components which must be covered by a home protection contract except to the extent necessary to guarantee the equity of the exclusions from coverage offered or provided under a contract, or to the extent necessary to avoid illusory coverage due to the nature or extent of exclusions from the contract.

SEC. 97. Section 51 of the Labor Code is amended to read:

51. The department shall be conducted under the control of an executive officer known as Director of Industrial Relations. The Director of Industrial Relations shall be appointed by the Governor with the advice and consent of the Senate and hold office at the pleasure of the Governor and shall receive an annual salary provided for by Chapter 6 (commencing with Section 11550) of Part 1 of Division 3 of Title 2 of the Government Code.

SEC. 98. Section 103 of the Labor Code is amended to read:

103. The Labor Commissioner shall, to the extent provided for by any reciprocal agreement entered into pursuant to Section 64, or by the laws of any other state, maintain actions in the courts of the other state for the collection of the claims for wages, judgments, and other

demands and may assign the claims, judgments, and demands to the labor department or agency of the other state for collection to the extent that they may be permitted or provided for by the laws of that state or by reciprocal agreement.

SEC. 99. Section 1144 of the Labor Code is amended to read:

1144. The board may from time to time make, amend, and rescind, in the manner prescribed in Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, such rules and regulations as may be necessary to carry out this part.

SEC. 100. Section 1700.36 of the Labor Code is amended to read:

1700.36. No talent agency shall accept any application for employment made by or on behalf of any minor, as defined by subdivision (c) of Section 1286, or shall place or assist in placing any such minor in any employment whatever in violation of Part 4 (commencing with Section 1171).

SEC. 101. Section 1720.3 of the Labor Code is amended to read:

1720.3. For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California.

SEC. 102. Section 4650.5 of the Labor Code is amended to read:

4650.5. Notwithstanding Section 4650, in the case of state civil service employees, employees of the Regents of the University of California, and employees of the Board of Trustees of the California State University, the disability payment shall be made from the first day the injured employee leaves work as a result of the injury, if the injury is the result of a criminal act of violence against the employee.

SEC. 103. Section 4700 of the Labor Code is amended to read:

4700. The death of an injured employee does not affect the liability of the employer under Articles 2 (commencing with Section 4600) and 3 (commencing with Section 4650). Neither temporary nor permanent disability payments shall be made for any period of time subsequent to the death of the employee. Any accrued and unpaid compensation shall be paid to the dependents, or, if there are no dependents, to the personal representative of the deceased employee or heirs or other persons entitled thereto, without administration.

SEC. 104. Section 4702 of the Labor Code is amended to read:

4702. Except as otherwise provided in this section and in Sections 4553, 4554, 4557, and 4558, the death benefit in cases of total dependency, when added to all accrued disability indemnity, shall be as follows:

(a) In the case of two or more total dependents and regardless of the number of partial dependents, eighty-five thousand dollars ($85,000), if the injury resulting in death occurred on and after January 1, 1983, or ninety-five thousand dollars ($95,000), if the injury occurred on and after January 1, 1984.

(b) In the case of one total dependent and one or more partial dependents, sixty thousand dollars ($60,000), if the injury resulting in death occurred on and after January 1, 1983, or seventy thousand dollars ($70,000), if the injury occurred on and after January 1, 1984, plus four times the amount annually devoted to the support of the partial dependents, but not more than a total of eighty-five thousand dollars ($85,000), if the injury resulting in death occurred on and after January 1, 1983, or ninety-five thousand dollars ($95,000), if the injury occurred on and after January 1, 1984.

(c) In the case of one total dependent and no partial dependents, sixty thousand dollars ($60,000), if the injury resulting in death occurred on and after January 1, 1983, or seventy thousand dollars ($70,000), if the injury occurred on and after January 1, 1984.

(d) In the case of no total dependents and one or more partial dependents, four times the amount annually devoted to the support of the partial dependents, but not more than a total of sixty thousand dollars ($60,000), if the injury resulting in death occurred on and after January 1, 1983, or seventy thousand dollars ($70,000) if the injury occurred on and after January 1, 1984.

The death benefit in all cases shall be paid in installments in the same manner and amounts as temporary disability indemnity, payments to be made at least twice each calendar month, unless the appeals board otherwise orders.

Disability indemnity shall not be deducted from the death benefit and shall be paid in addition to the death benefit when the original injury resulting in death occurs after September 30, 1949.

Every computation made pursuant to this section shall be made only with reference to death resulting from an original injury sustained on and after January 1, 1983. However, all rights presently existing under this section shall be continued in force.

SEC. 105. Section 4706.5 of the Labor Code is amended to read:

4706.5. (a) Whenever any fatal injury is suffered by an employee under such circumstances as to entitle the employee to compensation benefits, but for his or her death, and the employee does not leave surviving any person entitled to a dependency death benefit, the employer shall pay a sum to the Department of Industrial Relations equal to the total dependency death benefit that would be payable to a surviving spouse with no dependent minor children.

(b) Where the deceased employee leaves no surviving dependent, personal representative, heir, or other person entitled to the accrued and unpaid compensation referred to in Section 4700, the accrued and unpaid compensation shall be paid by the employer to the Department of Industrial Relations.

(c) The payments to be made to the Department of Industrial Relations, as required by subdivisions (a) and (b), shall be deposited in the General Fund and shall be credited, as a reimbursement, to any appropriation to the Department of Industrial Relations for payment of the additional compensation for subsequent injury

provided in Article 5 (commencing with Section 4750), in the fiscal year in which the Controller's receipt is issued.

(d) The payments to be made to the Department of Industrial Relations, as required by subdivision (a), shall be paid to the department in a lump sum in the manner provided in subdivision (b) of Section 5101.

(e) The Department of Industrial Relations shall keep a record of all payments due the state under this section, and shall take such steps as may be necessary to collect those amounts.

(f) Each employer, or the employer's insurance carrier, shall notify the administrative director, in such form as the administrative director may prescribe, of each employee death, except when the employer has actual knowledge or notice that the deceased employee left a surviving dependent.

(g) When, after a reasonable search, the employer concludes that the deceased employee left no one surviving who is entitled to a dependency death benefit, and concludes that the death was under such circumstances as to entitle the employee to compensation benefits, the employer may voluntarily make the payment referred to in subdivision (a). Payments so made shall be construed as payments made pursuant to an appeals board findings and award. Thereafter, if the appeals board finds that the deceased employee did in fact leave a person surviving who is entitled to a dependency death benefit, upon that finding, all payments referred to in subdivision (a) which have been made shall be forthwith returned to the employer, or if insured, to the employer's workers' compensation carrier that indemnified the employer for the loss.

SEC. 106. Section 4721 of the Labor Code is amended to read:

4721. The surviving spouse or dependent minor children of an elected public official who is killed by assassination shall be entitled to a special death benefit which shall be in addition to any other benefits provided for by this division or Division 4.5 (commencing with Section 6100).

SEC. 107. Section 4723 of the Labor Code is amended to read:

4723. The person or persons to whom the special death benefit is payable pursuant to Section 4722 shall, within one year of the date of death of the elected public official, choose either of the following benefits:

(a) An annual benefit equal to one-half of the average annual salary paid to the elected public official in his or her elected capacity, less credit for any other death benefit provided for under existing law or by public funds, except benefits payable pursuant to this division or Division 4.5 (commencing with Section 6100). Payments shall be paid not less frequently than monthly, and shall be paid from the date of death until the spouse dies or remarries, or until the youngest minor dependent child reaches the age of 18 years, whichever occurs last. If payments are being made to a dependent parent or parents they shall continue during dependency.

(b) A lump-sum benefit of one hundred fifty thousand dollars

($150,000), less any other death benefit provided for under existing law or by public funds, except benefits payable pursuant to this division or Division 4.5 (commencing with Section 6100).

SEC. 108. Section 4903.2 of the Labor Code is amended to read:

4903.2. Where a lien claimant is reimbursed pursuant to subdivision (f) or (g) of Section 4903 or Section 4903.1, for benefits paid or services provided, the appeals board may award an attorney's fee to the applicant's attorney out of the lien claimant's recovery if the appeals board determines that all of the following occurred:

(a) The lien claimant received notice of all hearings following the filing of the lien and received notice of intent to award the applicant's attorney a fee.

(b) An attorney or other representative of the lien claimant did not participate in the proceedings before the appeals board with respect to the lien claim.

(c) There were bona fide issues respecting compensability, or respecting allowability of the lien, such that the services of an attorney were reasonably required to effectuate recovery on the claim of lien and were instrumental in effecting the recovery.

(d) The case was not disposed of by compromise and release.

The amount of the attorney's fee out of the lien claimant's recovery shall be based on the extent of applicant's attorney's efforts on behalf of the lien claimant. The ratio of the amount of the attorney's fee awarded against the lien claimant's recovery to that recovery shall not exceed the ratio of the amount of the attorney's fee awarded against the applicant's award to that award.

SEC. 109. Section 5455 of the Labor Code is amended to read:

5455. Nothing in this chapter shall prohibit any party from filing an application for benefits under this division. In any proceeding pursuant to such application, the admissibility of written evidence or reports submitted by any party pursuant to this chapter, or Section 5502, shall be governed by Chapter 5 (commencing with Section 5700).

SEC. 110. Section 5600 of the Labor Code is amended to read:

5600. The appeals board may, upon the filing of an application by or on behalf of an injured employee, the employee's dependents, or any other party in interest, direct the county clerk of any county to issue writs of attachment authorizing the sheriff to attach the property of the defendant as security for the payment of any compensation which may be awarded in any of the following cases:

(a) In any case mentioned in Section 415.50 of the Code of Civil Procedure.

(b) Where the employer has failed to secure the payment of compensation as required by Article 1 (commencing with Section 3700) of Chapter 4 of Part 1.

The attachment shall be in an amount fixed by the appeals board, not exceeding the greatest probable award against the defendant in the matter.

SEC. 111. Section 6304.4 of the Labor Code is amended to read:

6304.4. A prisoner engaged in correctional industry, as defined by the Department of Corrections, shall not be considered an employee for purposes of the provisions relating to appeal proceedings set forth in Chapter 7 (commencing with Section 6600).

SEC. 112. Section 6396 of the Labor Code is amended to read:

6396. (a) The Director of Industrial Relations shall protect from disclosure any and all trade secrets coming into his or her possession, as defined in subdivision (d) of Section 6254.7 of the Government Code, when requested in writing or by appropriate stamping or marking of documents by the manufacturer or producer of a mixture.

(b) Any information reported to or otherwise obtained by the Director of Industrial Relations, or any of his or her representatives or employeees, which is exempt from disclosure under subdivision (a), shall not be disclosed to anyone except an officer or employee of the state or of the United States of America, in connection with the official duties of that officer or employee under any law for the protection of health, or to contractors with the state and their employees if in the opinion of the director the disclosure is necessary and required for the satisfactory performance of a contract for performance of work in connection with this act.

(c) Any officer or employee of the state, or former officer or employee, who by virtue of that employment or official position has obtained possession of or has access to material the disclosure of which is prohibited by this section, and who knowing that disclosure of the material is prohibited, knowingly and willfully discloses the material in any manner to any person not entitled to receive it, is guilty of a misdemeanor. Any contractor with the state and any employee of that contractor, who has been furnished information as authorized by this section, shall be considered to be an employee of the state for purposes of this section.

(d) Information certified to by appropriate officials of the United States, as necessarily kept secret for national defense purposes, shall be accorded the full protections against disclosure as specified by that official or in accordance with the laws of the United States.

(e) (1) The director, upon his or her own initiative, or upon receipt of a request pursuant to the California Public Records Act, (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) for the release of data submitted and designated as a trade secret by an employer, manufacturer, or producer of a mixture, shall determine whether any or all of the data so submitted are a properly designated trade secret.

(2) If the director determines that the data is not a trade secret, the director shall notify the employer, manufacturer, or producer of a mixture by certified mail.

(3) The employer, manufacturer, or producer of a mixture shall have 15 days after receipt of notification to provide the director with a complete justification and statement of the grounds on which the trade secret privilege is claimed. This justification and statement

shall be submitted by certified mail.

(4) The director shall determine whether the data are protected as a trade secret within 15 days after receipt of the justification and statement, or if no justification and statement is filed, within 30 days of the original notice, and shall notify the employer or manufacturer and any party who has requested the data pursuant to the California Public Records Act of that determination by certified mail. If the director determines that the data are not protected as a trade secret, the final notice shall also specify a date, not sooner than 15 days after the date of mailing of the final notice, when the data shall be available to the public.

(5) Prior to the date specified in the final notice, an employer, manufacturer, or producer of a mixture may institute an action in an appropriate superior court for a declaratory judgment as to whether the data are subjected to protection under subdivision (a).

(f) This section does not authorize a manufacturer to refuse to disclose information required pursuant to this chapter to the director.

SEC. 113. Section 6403 of the Labor Code is amended to read:

6403. No employer shall fail or neglect to do any of the following:

(a) To provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe.

(b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe.

(c) To do every other thing reasonably necessary to protect the life, safety, and health of employees.

SEC. 114. Section 6410 of the Labor Code is amended to read:

6410. The reports required by subdivision (a) of Section 6409, subdivision (a) of Section 6409.1, and Section 6413 shall be made in the form and detail and within the time limits prescribed by reasonable rules and regulations adopted by the Division of Labor Statistics and Research in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

Nothing in this chapter requiring recordkeeping and reporting by employers shall relieve the employer of maintaining records and making reports to the assistant secretary, United States Department of Labor, as required under the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596). The Division of Labor Statistics and Research shall prescribe and provide the forms necessary for maintenance of the required records, and the Division of Occupational Safety and Health shall enforce by citation and penalty assessment any violation of the recordkeeping requirements of this chapter.

All state and local government employers shall maintain records and make reports in the same manner and to the same extent as required of other employers by this section.

SEC. 115. Section 6413 of the Labor Code is amended to read:

6413. (a) The Department of Corrections, and every physician

or surgeon who attends any injured state prisoner, shall file with the Division of Labor Statistics and Research a complete report of every injury to each state prisoner, not reported pursuant to subdivision (a) of Section 6409 or Section 6409.1, resulting from any labor performed by the prisoner unless disability resulting from such injury does not last through the day or does not require medical service other than ordinary first aid treatment. The Division of Labor Statistics and Research may, in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, adopt reasonable rules and regulations prescribing the details and time limits of the report.

(b) Where the injury results in death a report, in addition to the report required by subdivision (a), shall forthwith be made by the Department of Corrections to the Division of Labor Statistics and Research by telephone or telegraph.

(c) Except as provided in Section 6304.2, nothing in this section or in this code shall be deemed to make a prisoner an employee, for any purpose, of the Department of Corrections.

(d) Notwithstanding subdivision (a), no physician or surgeon who attends any injured state prisoner outside of a Department of Corrections institution shall be required to file the report required by subdivision (a), but the Department of Corrections shall file the report.

SEC. 116. Section 6454 of the Labor Code is amended to read:

6454. The division may, in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, make such rules and regulations as are reasonably necessary to carry out the provisions of this chapter and to establish rules and regulations relating to the granting or denial of temporary variances.

SEC. 117. Section 6500 of the Labor Code is amended to read:

6500. For those employments or places of employment which by their nature involve a substantial risk of injury, the division shall require the issuance of a permit prior to the initiation of any practices, work, method, operation, or process of employment. The employment or places of employment shall be limited to any of the following:

(a) Construction of trenches or excavations which are five feet or deeper and into which a person is required to descend.

(b) The construction of any building, structure, falsework, or scaffolding more than three stories high or the equivalent height.

(c) The demolition of any building, structure, falsework, or scaffold more than three stories high or the equivalent height.

SEC. 118. Section 6650 of the Labor Code is amended to read:

6650. After the exhaustion of the review procedures provided for in Chapter 7 (commencing with Section 6600), the director may apply to the appropriate superior court for an order directing payment of a civil penalty. The application, which shall include a certified copy of the notice of civil penalty or the decision of the

appeals board, shall constitute a sufficient showing to warrant the issuance of the order.

SEC. 119. Section 7655 of the Labor Code is amended to read:

7655. The division shall prepare and adopt regulations in accordance with the Administrative Procedure Act provided for in Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, designed to promote safety with respect to the installation and operation of vendor facilities for the storage and pumping of compressed or liquefied natural gas and liquefied petroleum gas into vehicles.

SEC. 120. Section 987.8 of the Penal Code, as amended by Section 3 of Chapter 966 of the Statutes of 1982, is amended to read:

987.8. (a) In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided.

(b) In any case in which the defendant hires counsel replacing a publicly provided attorney; in which the public defender or appointed counsel was required by the court to proceed with the case after a determination by the public defender that the defendant is not indigent; or, in which the defendant, at the conclusion of the case, appears to have sufficient assets to repay, without undue hardship, all or a portion of the cost of the legal assistance provided to him or her, by monthly installments or otherwise; the court shall make a determination of the defendant's ability to pay as provided in subdivision (a), and may, in its discretion, make other orders as provided in that subdivision.

This subdivision shall be operative in a county only upon the adoption of a resolution by the board of supervisors to that effect.

(c) If the defendant, after having been ordered to appear before a county officer, has been given proper notice and fails to appear before a county officer within 20 working days, the county officer shall recommend to the court that the full cost of the legal assistance shall be ordered to be paid by the defendant. The notice to the defendant shall contain all of the following:

(1) A statement of the cost of the legal assistance provided to the defendant as determined by the court.

(2) The defendant's procedural rights under this section.

(3) The time limit within which the defendant's response is required.

(4) A warning that if the defendant fails to appear before the

designated officer, the officer will recommend that the court order the defendant to pay the full cost of the legal assistance provided to him or her.

(d) At a hearing, the defendant shall be entitled to, but shall not be limited to, all of the following rights:

(1) The right to be heard in person.

(2) The right to present witnesses and other documentary evidence.

(3) The right to confront and cross-examine adverse witnesses.

(4) The right to have the evidence against him or her disclosed to him or her.

(5) The right to a written statement of the findings of the court.

If the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability. Failure of a defendant who is not in custody to appear after due notice is a sufficient basis for an order directing the defendant to pay the full cost of the legal assistance determined by the court. The order to pay all or a part of the costs may be enforced in the manner provided for enforcement of money judgments generally but may not be enforced by contempt.

Any order entered under this subdivision is subject to relief under Section 473 of the Code of Civil Procedure.

(e) Prior to the furnishing of counsel or legal assistance by the court, the court shall give notice to the defendant that the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. The court shall also give notice that, if the court determines that the defendant has the present ability, the court shall order him or her to pay all or a part of the cost. The notice shall inform the defendant that the order shall have the same force and effect as a judgment in a civil action and shall be subject to enforcement against the property of the defendant in the same manner as any other money judgment.

(f) As used in this section:

(1) "Legal assistance" means legal counsel and supportive services including, but not limited to, medical and psychiatric examinations, investigative services, expert testimony, or any other form of services provided to assist the defendant in the preparation and presentation of the defendant's case.

(2) "Ability to pay" means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following:

(A) The defendant's present financial position.

(B) The defendant's reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining

the defendant's reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense.

(C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing.

(D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant.

(g) At any time during the pendency of the judgment rendered according to the terms of this section, a defendant against whom a judgment has been rendered may petition the rendering court to modify or vacate its previous judgment on the grounds of a change in circumstances with regard to the defendant's ability to pay the judgment. The court shall advise the defendant of this right at the time it renders the judgment.

(h) This section shall apply to all proceedings, including contempt proceedings, in which the party is represented by a public defender or appointed counsel.

SEC. 121. Section 1170.8 of the Penal Code, as added by Chapter 964 of the Statutes of 1982, is amended and renumbered to read:

1170.9. In the case of any person convicted of a felony who would otherwise be sentenced to state prison the court shall consider whether the defendant was a member of the military forces of the United States who served in combat in Vietnam and who suffers from substance abuse or psychological problems resulting from that service. If the court concludes that the defendant is such a person, the court may order the defendant committed to the custody of federal correctional officials for incarceration for a term equivalent to that which the defendant would have served in state prison. The court may make such a commitment only if the defendant agrees to such a commitment, the court has determined that appropriate federal programs exist, and federal law authorizes the receipt of the defendant under such conditions.

SEC. 122. Section 1170.8 of the Penal Code, as added by Chapter 1296 of the Statutes of 1982, is amended and renumbered to read:

1170.95. (a) Notwithstanding Section 1170.1 relating to the maximum total of subordinate terms for consecutive offenses which are not "violent felonies," the total of the subordinate terms for consecutive offenses which are all residential burglaries may exceed five years but shall not exceed 10 years.

(b) Notwithstanding Section 1170.1, the term of imprisonment may exceed twice the number of years imposed by the trial court as the base term pursuant to subdivision (b) of Section 1170 if the defendant stands convicted of at least two residential burglaries.

(c) As used in this section, "residential burglary" means burglary in the nighttime or a felony burglary in the daytime, of an inhabited dwelling house or trailer coach, as defined in Section 635 of the

Vehicle Code, or the inhabited portion of any other building.

SEC. 123. Section 1603 of the Penal Code, as added by Section 2 of Chapter 1232 of the Statutes of 1982, is amended to read:

1603. Any person subject to subdivision (a) of Section 1601 may be placed on outpatient status if all of the following conditions are satisfied:

(a) The director of the state hospital or other treatment facility to which the person has been committed advises the committing court that the defendant is no longer likely to be a danger to the health and safety of others while on outpatient status, and will benefit from that status.

(b) The county mental health director advises the court that the defendant will benefit from that status, and identifies an appropriate program of supervision and treatment.

(c) After actual notice to the prosecutor and defense counsel, and after a hearing in court, the court specifically approves the recommendation and plan for outpatient status pursuant to Section 1604.

(d) This section shall become operative January 1, 1989.

SEC. 124. Section 608 of the Probate Code is amended to read:

608. The appraisement shall be signed by the executor or administrator as to those assets appraised by him or her, and by the probate referee as to those assets appraised by him or her. The executor or administrator and the probate referee shall each subscribe his or her oath or statement under penalty of perjury that all items thereof which he or she has appraised have been truly, honestly, and impartially appraised to the best of his or her ability.

SEC. 125. Section 4799.10 of the Public Resources Code is amended to read:

4799.10. (a) The department is authorized to implement a program in urban forestry to encourage better tree management and planting in urban areas, to assist the cities in seeking innovative solutions to problems such as tree maintenance and vandalism, encourage demonstration projects to maximize the benefits of urban forests, and otherwise accomplish the purposes of this chapter.

The department shall assume the primary responsibility in carrying out the intent of this chapter in cooperation with other private and public entities or persons and appropriate local, state, and federal agencies such as the Cooperative Extension, the Department of Parks and Recreation, the Department of Transportation, resource conservation districts, and the United States Forest Service.

(b) The department shall be the agent of the state and shall have full power to cooperate with those agencies of the federal government which have powers and duties concerning urban forestry, and shall perform all things necessary to secure for this state the benefits of federal urban forestry programs.

To facilitate implementation of this chapter, the director is authorized to enter into agreements and contracts with any public

10 05

er building.
lded by Section 2
:d to read:
Section 1601 may
ng conditions are

:atment facility to
committing court
: to the health and
benefit from that

the court that the
ies an appropriate

:fense counsel, and
lly approves the
ursuant to Section

ry 1, 1989.
am[illegible]ed to read:
th[illegible]executor or
or her, and by the
him or her. The
referee shall each
alty of perjury that
l have been truly,
f his or her ability.
Resources Code is

to implement a
e management and
seeking innovative
ce and vandalism,
e benefits of urban
f this chapter.
responsibility in
eration with other
opriate local, state,
e Extension, the
Department of
and the United

tate and shall have
s of the federal
concerning urban
ecure for this state

[illegible]e director is
ts with any public

10 05

or private organization including local agencies having forestry-related jurisdictional responsibilities and established and operating urban forestry programs. The director shall consult with those agencies when carrying out the provisions of this chapter in their respective areas.

(c) The director shall take all steps necessary to prevent or retard the introduction, establishment, and spread of the Dutch elm disease including the detection and removal of infected and high-hazard elm trees.

The department and the Department of Food and Agriculture shall cooperate in setting quarantine boundary lines and in enforcing the provisions relating to quarantine and pest abatement contained in Division 4 (commencing with Section 5001) of the Food and Agricultural Code when a quarantine is established with regard to the Dutch elm disease.

(d) The department may use available recipients of the Aid to Families with Dependent Children or General Assistance Program who are participating in state or county work experience programs for carrying out the purposes of this chapter. The participation of Work Incentive Program registrants shall be consistent with their employability development plan. Persons being used by the department pursuant to this subdivision shall not be in the same crew as persons being used pursuant to subdivision (e).

(e) Whenever it is feasible to do so, the department may utilize inmates and wards assigned to conservation camps in implementing this chapter.

SEC. 126. Section 9965 of the Public Resources Code is amended to read:

9965. (a) The Legislature finds that compliance with the mandated regulations of the district will produce public benefits by improving wildlife habitat in the primary management area and that providing public funds to partially offset the costs of complying with those regulations would serve a valid public purpose. Assistance under this section shall not be treated as taxable income to a private landowner.

(b) Each year the district shall submit to the department an estimate of an amount sufficient to reimburse the private landowners in the primary management area for 50 percent of the operation and maintenance costs which it anticipates they will incur the following fiscal year in carrying out this chapter and Division 19 (commencing with Section 29000). Funds for this purpose shall not exceed five thousand dollars ($5,000) per individual ownership. The funds shall be included in the budget of the department payable from the Wildlife Restoration Fund and shall be available to the department for disbursement to the private landowners in accordance with subdivision (c).

(c) Each fiscal year, any private landowner in the primary management area who desires to qualify for the assistance provided by this section shall, by December 31, submit to the district a claim

10 010

for those costs incurred that calendar year in carrying out the operation and maintenance activities specified in that landowner's individual ownership management program. Each claim shall be accompanied by substantiating documents, as determined by the district. The district shall review each claim to determine its appropriateness by, including, but not limited to, an onsite inspection to establish that the physical improvements or management procedures for which a claim is submitted have been satisfactorily completed. The district shall submit the individual ownership claims to the department for review and approval for payment equal to 50 percent of each claim. However, no payment shall exceed five thousand dollars ($5,000). In any fiscal year in which the funds appropriated for purposes of this section are insufficient to pay 50 percent of each claim, the department shall pay all approved claims on a pro rata basis. In any fiscal year in which no funds are appropriated for purposes of this section, the department shall pay no claims.

SEC. 127. Section 304 of the Public Utilities Code is amended to read:

304. The annual salary of each commissioner is provided for by Chapter 6 (commencing with Section 11550) of Part 1 of Division 3 of Title 2 of the Government Code. The commissioners shall be civil executive officers, and their salaries as fixed by law shall be paid in the same manner as are the salaries of other state officers.

SEC. 128. Section 705 of the Public Utilities Code is amended to read:

705. Whenever in Articles 2 (commencing with Section 726), 3 (commencing with Section 761), and 4 (commencing with Section 791) a hearing by the commission is required, the hearing may be had either upon complaint or upon motion of the commission.

SEC. 129. Section 1906 of the Public Utilities Code is amended to read:

1906. All fees collected under this chapter shall be paid, except as provided in Chapter 6 (commencing with Section 5001) of Division 2, at least once each month into the State Treasury to the credit of the General Fund.

SEC. 130. Section 2702 of the Public Utilities Code is amended to read:

2702. Any corporation or association which is organized for the purpose of delivering water solely to its stockholders or members at cost, and which delivers water to others than its stockholders or members, or to the state or any department or agency thereof or any school district, or to any other mutual water company, for compensation, is a public utility and is subject to Part 1 (commencing with Section 201) and to the jurisdiction, control, and regulation of the commission.

SEC. 131. Section 2703 of the Public Utilities Code is amended to read:

2703. Any corporation or association which is organized both for

carrying out the
ı that landowner's
ich claim shall be
etermined by the
to determine its
ed to, an onsite
mprovements or
omitted have been
nit the individual
and approval for
vever, no payment
fiscal year in which
are insufficient to
ll pay all approved
which no funds are
partment shall pay

ode is amended to

is provided for by
Part [illegible] Division 3
on[illegible]hall be civil
aw shall be paid in
e officers.
ode is amended to

ith Section 726), 3
ncing with Section
e hearing may be
e commission.
Code is amended to

all be paid, except
Section 5001) of
te Treasury to the

Code is amended to

organized for the
ers or members at
ts stockholders or
ncy thereof or any
er company, for
art 1 (commencing
, and regulation of

Code is amended to

or[illegible]ed both for

the purpose of delivering water to its stockholders or members at cost, and to persons, firms, corporations, municipalities, or other political subdivisions of the state, is a public utility and is subject to Part 1 (commencing with Section 201) and to the jurisdiction, control, and regulation of the commission.

SEC. 132. Section 2707 of the Public Utilities Code is amended to read:

2707. For the purpose of determining the status of any person, firm, or corporation, their lessees, trustees, receivers or trustees appointed by any court, owning, controlling, operating, or managing any water system or water supply within this state, the commission may hold hearings and issue process and orders in the manner and to the same extent as provided in Part 1 (commencing with Section 201), and the findings and conclusions of the commission on questions of fact arising under this chapter are final and not subject to review, except as provided in Part 1 (commencing with Section 201).

SEC. 133. Section 3904 of the Public Utilities Code is amended to read:

3904. Unless the context otherwise requires, the definitions and general provisions set forth in Chapter 1 (commencing with Section 3501) govern the construction of this chapter.

SEC. 134. Section 5162 of the Public Utilities Code is amended to read:

5162. The protection required under this article shall be evidenced by the deposit of any of the following with the commission covering each vehicle used, or to be used, under the permit applied for:

(a) A policy of insurance, issued by a company licensed to write such insurance in this state, or by nonadmitted insurers subject to Section 1763 of the Insurance Code, if the policies meet the rules promulgated therefor by the commission.

(b) A bond of a surety company licensed to write surety bonds in the state.

(c) Such evidence of the qualification of the household goods carrier as a self-insurer as may be authorized by the commission.

SEC. 135. Section 5164 of the Public Utilities Code is amended to read:

5164. The protection against liability shall be continued in effect during the active life of the permit. The policy of insurance or surety bond shall not be cancelable on less than 30 days' written notice to the commission.

SEC. 136. Section 5392 of the Public Utilities Code is amended to read:

5392. The protection required under Section 5391 shall be evidenced by the deposit of any of the following with the commission covering each vehicle used or to be used under the certificate or permit applied for:

(a) Of a policy of insurance, issued by a company licensed to write

such insurance in this state, or by nonadmitted insurers subject to Section 1763 of the Insurance Code, if the policies meet the rules promulgated therefor by the commission.

(b) Of a bond of a surety company licensed to write surety bonds in the state.

(c) Such evidence of the qualification of the charter-party carrier of passengers as a self-insurer as may be authorized by the commission.

SEC. 137. Section 5504 of the Public Utilities Code is amended to read:

5504. This article does not apply to any person licensed under Article 1 (commencing with Section 11701) of Chapter 4 of Division 6 of the Food and Agricultural Code with respect to that person's operation of an aircraft for the purpose of applying pest control materials or substances by dusting, spraying, or any other manner whereby the materials or substances are applied through the medium of aircraft. That person is subject to Article 2 (commencing with Section 11931) of Chapter 5 of Division 6 of the Food and Agricultural Code with respect to that aircraft operation.

SEC. 138. Section 99314.3 of the Public Utilities Code is amended to read:

99314.3. (a) The amount received by each transportation planning agency and county transportation commission, and the San Diego Metropolitan Transit Development Board, pursuant to Section 99314 shall be allocated to the operators in the area of its jurisdiction.

(b) The amount allocated to each operator pursuant to this section shall be based on the ratio of its revenue during the prior fiscal year to the total revenue of all the operators during the prior fiscal year within the area of jurisdiction of the allocating agency, commission, or board, as the case may be.

(c) For purposes of subdivision (a), the City and County of San Francisco with respect to its municipal railway system, the Alameda-Contra Costa Transit District, and the San Francisco Bay Area Rapid Transit District shall be considered one operator. The amount allocated to them as one operator shall be apportioned to each of them based on the ratio of its revenue to the sum of their revenues, excluding from the determination of that ratio the amount allocated to each of them pursuant to Section 29142.2.

SEC. 139. Section 100055.4 of the Public Utilities Code is amended to read:

100055.4. Section 851 does not apply to any contract for sale or sale of an existing system, or any portion thereof, pursuant to this chapter, and the Public Utilities Commission has no jurisdiction with respect thereto.

SEC. 140. Section 102304 of the Public Utilities Code is amended to read:

102304. Section 851 does not apply to any contract for sale or sale of an existing system, or any portion thereof, pursuant to this chapter,

and the Public Utilities Commission has no jurisdiction with respect thereto.

SEC. 141. Section 102571 of the Public Utilities Code is amended to read:

102571. Chapter 1 (commencing with Section 99000) of Part 11 applies to the district.

SEC. 142. Section 12631 of the Revenue and Taxation Code is amended to read:

12631. Any insurer who fails to pay any tax, except a tax determined as a deficiency assessment by the board under Article 3 (commencing with Section 12421) of Chapter 4, within the time required, shall pay a penalty of 10 percent of the amount of the tax in addition to the tax, plus interest at the adjusted annual rate established pursuant to Section 19269 from the due date of the tax until the date of payment.

SEC. 143. Section 17052.4 of the Revenue and Taxation Code, as amended by Section 155 of Chapter 454 of the Statutes of 1982, is amended and renumbered to read:

17052.1. (a) (1) There shall be allowed as a credit against the amount of net tax imposed by this part an amount equal to 50 percent of the cost incurred by the taxpayer during the taxable year for the acquisition and installation of solar pumping systems used in agricultural irrigation on premises in California.

(2) A husband and wife shall receive but one credit under this section. If the husband and wife file separate returns, the credit may be taken by either or equally divided between them.

(3) The basis of any solar pumping system for which a credit is allowed shall be reduced by the amount of the credit. The basis adjustment shall be made for the taxable year for which the credit is allowed.

(4) The credit provided by this section for the cost incurred by the taxpayer for the acquisition and installation of solar pumping systems shall be in lieu of any credit under Section 17052.5 to which the taxpayer otherwise may be entitled, if any.

(b) The amount of credits allowed by this section shall not exceed seventy-five thousand dollars ($75,000) for each solar pumping system.

(c) If in the case where the credit allowed under this section exceeds the "net tax" for the taxable year, that portion of the credit which exceeds such "net tax" may be carried over to the "net tax" in succeeding taxable years, with respect to which this section shall remain in effect for purposes of carrying over excess credit, until the credit is used. The credit shall be applied first to the earliest years possible.

(d) For purposes of this section:

(1) "Installation" means placing in position in a functionally operative state.

(2) "Net tax" means the tax imposed under Section 17041 or 17048 minus all credits except the credits provided by Sections 17061

(relating to state disability insurance withheld), 18551.1 (relating to income tax withheld), and 17053.5 (relating to the renters' credit).

(3) "Solar pumping system" includes, but is not limited to, active thermal systems, photovoltaic systems, and any other system which converts solar energy into electrical or mechanical energy for purposes of driving an irrigation pump. "Solar pumping system" also includes the ancillary components necessary for the installation and operation of the system.

(e) The Franchise Tax Board, in determining the eligibility of a solar pumping system for which a taxpayer has filed a statement of election, may consult with the California Energy Commission regarding the technical qualifications of the equipment.

SEC. 144. Section 17056 of the Revenue and Taxation Code is amended to read:

17056. For the purposes of this part, "dependents" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under Section 17058 or 17059.5 as received from the taxpayer):

(a) A son or daughter of the taxpayer, or a descendant of either.

(b) A stepson or stepdaughter of the taxpayer.

(c) A brother, sister, stepbrother, or stepsister of the taxpayer.

(d) The father or mother of the taxpayer or an ancestor of either.

(e) A stepfather or stepmother of the taxpayer.

(f) A son or daughter of a brother or sister of the taxpayer.

(g) A brother or sister of the father or mother of the taxpayer.

(h) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer.

(i) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to Section 17060, of the taxpayer) who, for the taxable year of the taxpayer, has as his or her principal place of abode the home of the taxpayer and is a member of the taxpayer's household.

SEC. 145. Section 17063.3 of the Revenue and Taxation Code is amended to read:

17063.3. For purposes of subdivision (i) of Section 17063:

(a) "Straight line recovery of intangibles," when used with respect to intangible drilling and development costs for any well, means (except in the case of an election under subdivision (b)) ratable amortization of those costs over the 120-month period beginning with the month in which production from the well begins.

(b) If the taxpayer elects, at such time and in such manner as the Franchise Tax Board may by regulations prescribe, with respect to the intangible drilling and development costs for any well, "straight line recovery of intangibles" means any method which would be permitted for purposes of determining cost depletion with respect to such well and which is selected by the taxpayer for purposes of subdivision (i) of Section 17063.

SEC. 146. Section 17112.5 of the Revenue and Taxation Code is

18551.1 (relating to
he renters' credit).
ot limited to, active
other system which
nanical energy for
mping system" also
the installation and

g the eligibility of a
filed a statement of
nergy Commission
uipment.
d Taxation Code is

dents" means any of
ort, for the calendar
egins, was received
17058 or 17059.5 as

escendant of either.
er.
er of the taxpayer.
n ancestor of either.
yer.
of the taxpayer.
ser of the taxpayer.
-law, mother-in-law,

l who at any time
ined without regard
e taxable year of the
ode the home of the
usehold.
nd Taxation Code is

Section 17063:
," when used with
t costs for any well,
der subdivision (b))
e 120-month period
from the well begins.
n such manner as the
cribe, with respect to
or any well, "straight
nod which would be
letion with respect to
ayer for purposes of

and Taxation Code is

amended to read:

17112.5. (a) In computing—

(1) The aggregate amount of premiums or other consideration paid for the contract for purposes of Section 17103(a)(1) (relating to the investment in the contract),

(2) The consideration for the contract contributed by the employee for purposes of Section 17104(a) (relating to employee's contributions recoverable in three years), and

(3) The aggregate premiums or other consideration paid for purposes of Section 17105 (relating to certain amounts not received as an annuity),

any amount allowed as a deduction with respect to the contract under Sections 17513 to 17525, inclusive, which was paid while the employee was an employee within the meaning of Section 17502.2(a) shall be treated as consideration contributed by the employer, and there shall not be taken into account any portion of the premiums or other consideration for the contract paid while the employee was an owner-employee which is properly allocable (as determined under regulations prescribed by the Franchise Tax Board) to the cost of life, accident, health, or other insurance.

(b) (1) This subdivision shall apply to any life insurance contract—

(A) Purchased as a part of a plan described in Section 17511, or

(B) Purchased by a trust described in Section 17501 which is exempt from tax under Section 17631 if the proceeds of the contract are payable directly or indirectly to a participant in the trust or to a beneficiary of the participant.

(2) Any contribution to plan described in paragraph (1)(A) or a trust described in paragraph (1)(B) which is allowed as a deduction under Sections 17513 to 17525, inclusive, which is determined in accordance with regulations prescribed by the Franchise Tax Board to have been applied to purchase the life insurance protection under a contract described in paragraph (1), is includable in the gross income of the participant for the taxable year when so applied.

(3) In the case of the death of an individual insured under a contract described in paragraph (1), an amount equal to the cash surrender value of the contract immediately before the death of the insured shall be treated as a payment under such plan or a distribution by such trust, and the excess of the amount payable by reason of the death of the insured over such cash surrender value shall not be includable in gross income under this chapter and shall be treated as provided in Section 17132.

(c) (1) If during any taxable year an owner-employee assigns (or agrees to assign) or pledges (or agrees to pledge) any portion of his or her interest in a trust described in Section 17501 which is exempt from tax under Section 17631, an individual retirement account described in Section 17530(a), an individual retirement annuity described in Section 17530(b) or any portion of the value of a contract purchased as part of a plan described in Section 17511, that

portion shall be treated as having been received by the owner-employee as a distribution from the trust or as an amount received under the contract.

(2) If during any taxable year, an owner-employee receives, directly or indirectly, any amount from any insurance company as a loan under a contract purchased by a trust described in Section 17501 which is exempt from tax under Section 17631 or purchased as part of a plan described in Section 17511, and issued by that insurance company, that amount shall be treated as an amount received under the contract.

(d) (1) This subdivision shall apply—

(A) To amounts (other than any amount received by an individual in his capacity as a policyholder of an annuity, endowment, or life insurance contract which is in the nature of a dividend or similar distribution) which are received from a qualified trust described in Section 17501 or under a plan described in Section 17511 and which are received by an individual, who is, or has been, an owner-employee, before the individual attains the age of 59½ years, for any reason other than the individual's becoming disabled (within the meaning of subdivision (f)), but only to the extent that the amounts are attributable to contributions paid on behalf of that individual (other than contributions made by that individual as an owner-employee) while the individual was an owner-employee, and

(B) To amounts which are received from a qualified trust described in Section 17501 or under a plan described in Section 17511 at any time by an individual who is, or has been, an owner-employee, or by the successor of that individual, but only to the extent that the amounts are determined, under regulations prescribed by the Franchise Tax Board, to exceed the benefits provided for that individual under the plan formula, and

(2) If a person receives an amount to which this subdivision applies, that person's tax under this part for the taxable year in which that amount is received shall be increased by an amount equal to 2.5 percent of the portion of the amount so received which is includable in that person's gross income for the taxable year.

(e) For purposes of this section, "owner-employee" has the meaning assigned to it by Section 17502.2(c) and includes an individual for whose benefit an individual retirement account or annuity described in Section 17530(a) or (b) is maintained.

(f) For purposes of this chapter, an individual shall be considered to be disabled if that individual is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be disabled unless that individual furnishes proof of the existence thereof in such form and manner as the Franchise Tax Board may require.

SEC. 147. Section 17155 of the Revenue and Taxation Code is amended to read:

17155. (a) At the election of the taxpayer, gross income shall not include gain from the sale or exchange of property if:

(1) The taxpayer has attained the age of 55 before the date of the sale or exchange, and

(2) During the five-year period ending on the date of the sale or exchange, the property has been owned and used by the taxpayer as his or her principal residence for periods which cumulatively total three years or more.

(b) The amount of the gain excluded from gross income under subdivision (a) shall not exceed one hundred twenty-five thousand dollars ($125,000) (sixty-two thousand five hundred dollars ($62,500) in the case of a separate return by a married individual).

(c) Subdivision (a) shall not apply to any sale or exchange by the taxpayer if an election by the taxpayer or the taxpayer's spouse under subdivision (a) with respect to any other sale or exchange is in effect.

(d) An election under subdivision (a) may be made or revoked at any time before the expiration of the period for making a claim for credit or refund of the tax imposed by this part for the taxable year in which the sale or exchange occurred, and shall be made or revoked in such manner as the Franchise Tax Board shall prescribe. In the case of a taxpayer who is married, an election under subdivision (a) or a revocation of an election made under subdivision (a) may be made only if the taxpayer's spouse joins in the election or revocation.

(e) (1) For purposes of this section, if:

(A) Property is held by a husband and wife as joint tenants, tenants by the entirety, or community property,

(B) The husband and wife make a joint return under Section 18402 for the taxable year of the sale or exchange, and

(C) One spouse satisfies the holding and use requirements of subdivision (a) with respect to the property,

then both husband and wife shall be treated as satisfying the holding and use requirements of subdivision (a) with respect to the property.

(2) For purposes of this section, in the case of an unmarried individual whose spouse is deceased on the date of the sale or exchange of property, if:

(A) The deceased spouse (during the five-year period ending on the date of the sale or exchange) satisfied the holding and use requirements of subdivision (a) with respect to the property, and

(B) No election by the deceased spouse under subdivision (a) is in effect with respect to a prior sale or exchange then the individual shall be treated as satisfying the holding and use requirements of subdivision (a) with respect to the property.

(3) For purposes of this section, if the taxpayer holds stock as a tenant-stockholder (as defined in Section 17265) in a cooperative housing corporation (as defined in that section) then:

(A) The holding requirements of subdivision (a) shall be applied to the holding of that stock, and

(B) The use requirements of subdivision (a) shall be applied to

the house or apartment which the taxpayer was entitled to occupy as the stockholder.

(4) For purposes of this section, the destruction, theft, seizure, requisition, or condemnation of property shall be treated as the sale of the property.

(5) In the case of property only a portion of which, during the five-year period ending on the date of the sale or exchange, has been owned and used by the taxpayer as his or her principal residence for periods aggregating three years or more, this section shall apply with respect to so much of the gain from the sale or exchange of the property as is determined, as prescribed by the Franchise Tax Board, to be attributable to the portion of the property so owned and used by the taxpayer.

(6) In the case of any sale or exchange, for purposes of this section:

(A) The determination of whether an individual is married shall be made as of the date of the sale or exchange; and

(B) An individual legally separated from his or her spouse under a decree of divorce, dissolution or of separate maintenance shall not be considered as married.

(7) In applying Sections 18082 (relating to involuntary conversions) and 18091 (relating to sale or exchange of residence), the amount realized from the sale or exchange of property shall be treated as being the amount determined without regard to this section, reduced by the amount of gain not included in gross income pursuant to an election under this section.

(8) If the basis of the property sold or exchanged is determined (in whole or in part) under Section 18088 (relating to basis of property acquired through involuntary conversion), then the holding and use by the taxpayer of the converted property shall be treated as holding and use by the taxpayer of the property sold or exchanged.

(f) The amendments made to this section by the act adding this subdivision shall apply to residences sold or exchanged in taxable years beginning after December 31, 1981.

SEC. 148. Section 17299 of the Revenue and Taxation Code is amended to read:

17299. (a) Notwithstanding any other provisions in this part to the contrary, in the case of a taxpayer who derives rental income from substandard housing located in this state, no deduction shall be allowed for interest, taxes, depreciation, or amortization paid or incurred in the taxable year with respect to the substandard housing, except as provided in subdivision (e).

(b) "Substandard housing" means housing which (1) has been determined by a state or local government regulatory agency to violate state law or local codes dealing with health, safety, or building; and (2) after written notice of violation by the regulatory agency, specifying the applicability of this section, has not been brought to a condition of compliance within six months after the date of the notice or the time prescribed in the notice, whichever period

is later; or on which good faith efforts for compliance have not been commenced, as determined by the regulatory agency. The regulatory agency may, for good cause shown, extend the compliance date prescribed in a violation notice.

(c) When the period specified in subdivision (b) has expired without compliance, the regulatory agency shall mail to the taxpayer a notice of noncompliance. The notice of noncompliance shall be in such form and shall include such information as may be prescribed by the Franchise Tax Board, shall be mailed by certified mail to the taxpayer at the taxpayer's last known address, and shall advise the taxpayer (1) of an intent to notify the Franchise Tax Board of the noncompliance within 10 days unless an appeal is filed, (2) where an appeal may be filed, and (3) a general description of the tax consequences of the filing with the Franchise Tax Board. Appeals shall be made to the same body and in the same manner as appeals from other actions of the regulatory agency. If no appeal is made within 10 days or after disposition of the appeal if the regulatory agency is sustained, the regulatory agency shall notify the Franchise Tax Board of the noncompliance. No deduction shall be allowed for the items provided in subdivision (a) from the date of the notice of noncompliance until the date the regulatory agency determines that the substandard housing has been brought to a condition of compliance. The regulatory agency shall mail to the Franchise Tax Board and the taxpayer a notice of compliance, which notice shall be in such form and include such information as may be prescribed by the Franchise Tax Board. In the event the period of noncompliance does not cover an entire taxable year, the deductions shall be denied at the rate of one-twelfth for each full month during the period of noncompliance.

If the property is owned by more than one owner or if recorded title is in the name of a fictitious owner, the notice requirements provided in subdivision (b) and this subdivision shall be satisfied for each owner if the notices are mailed to one owner or to the fictitious name owner at the address appearing on the latest available property tax bill. However, notices made pursuant to this subdivision shall not relieve the regulatory agency from furnishing taxpayer identification information required to implement this section to the Franchise Tax Board.

(d) For the purposes of this section, a notice of noncompliance shall not be mailed by the regulatory agency to the Franchise Tax Board if:

(1) The rental housing was rendered substandard solely by reason of earthquake, flood, or other natural disaster except where the condition remains for more than three years after the disaster,

(2) The owner of the rental housing has secured financing to bring the housing into compliance with those laws or codes which have been violated, causing the housing to be classified as substandard, and has commenced repairs or other work necessary to bring the housing into compliance or

(3) The owner of rental housing which is not within the meaning of housing accommodation as defined by subdivision (d) of Section 35805 of the Health and Safety Code has attempted to:

(A) Secure financing to bring such housing into compliance with those laws or codes which have been violated, causing such housing to be classified as substandard; and

(B) The financing is denied solely because the housing is located in a neighborhood or geographical area in which financial institutions do not provide financing for rehabilitation of any such housing.

(e) This section does not apply to deductions from income derived from property rendered substandard solely by reason of a change in applicable state or local housing standards unless the violations cause substantial danger to the occupants of the property, as determined by the regulatory agency which has served notice of violation pursuant to subdivision (b).

(f) The owner of rental housing found to be in noncompliance shall, upon total or partial divestiture of interest in the property, immediately notify the regulatory agency of the name and address of the person or persons to whom the property has been sold or otherwise transferred and the date of the sale or transference.

(g) By July 1st of each year, the regulatory agency shall report to the appropriate legislative body of its jurisdiction all of the following information, for the preceding calendar year, regarding its activities to secure code enforcement, which shall be public information:

(1) The number of written notices of violation issued for substandard dwellings under subdivision (b).

(2) The number of violations complied with within the period prescribed in subdivision (b).

(3) The number of notices of noncompliance issued pursuant to subdivision (c).

(4) The number of appeals from those notices pursuant to subdivision (c).

(5) The number of successful appeals by owners.

(6) The number of notices of noncompliance mailed to the Franchise Tax Board pursuant to subdivision (c).

(7) The number of cases in which a notice of noncompliance was not sent pursuant to the provision of subdivision (d).

(8) The number of extensions for compliance granted pursuant to subdivision (b) and the mean average length of the extensions.

(9) The mean average length of time from the issuance of a notice of violation to the mailing of a notice of noncompliance to the Franchise Tax Board where the notice is actually sent to the Franchise Tax Board.

(10) The number of cases where compliance is achieved after a notice of noncompliance has been mailed to the Franchise Tax Board.

(11) The number of instances of disallowance of tax deductions by the Franchise Tax Board resulting from referrals made by the

regulatory agency. This information may be filed in a supplemental report in succeeding years as it becomes available.

SEC. 149. Section 17524 of the Revenue and Taxation Code is amended to read:

17524. (a) (1) In the case of a plan included in Section 17514, 17515, or 17516, which provides contributions or benefits for employees some or all of whom are employees within the meaning of Section 17502.2 (a), the amounts deductible under Sections 17513 to 17520.6, inclusive, in any taxable year with respect to contributions on behalf of any employee within the meaning of Section 17502.2(a) shall, subject to the provisions of subdivision (b), not exceed two thousand five hundred dollars ($2,500), or 10 percent of the earned income derived by the employee from the trade or business with respect to which the plan is established, whichever is the lesser.

(2) In the case of such a plan where contributions are also made pursuant to and in conformance with the special limitations for self-employed individuals under Section 404 (e) of the Internal Revenue Code of 1954, as amended by the Employee Retirement Income Security Act of 1974 (P.L. 93-406) and the Economic Recovery Tax Act of 1981 (P.L. 97-34)—

(A) The amounts deductible are subject to the limitations provided in subdivisions (a), (b), and (c), and

(B) The net income attributable to the nondeductible portion shall not be includable in the gross income of the owner-employee for the taxable year or for succeeding taxable years until distributed pursuant to the provision of the plan or by operation of the law.

(b) (1) In any taxable year in which amounts are deductible with respect to contributions under two or more plans on behalf of an individual who is an employee within the meaning of Section 17502.2(a) with respect to the plans, the aggregate amount deductible for the taxable year under all the plans with respect to contributions on behalf of the employee shall not exceed two thousand five hundred dollars ($2,500), or 10 percent of the earned income derived by the employee from the trades or businesses with respect to which the plans are established, whichever is the lesser.

(2) In any case in which the amounts deductible under Sections 17513 to 17520.6, inclusive (with the application of the limitations of this section), with respect to contributions made on behalf of an employee within the meaning of Section 17502.2(a), under two or more plans are, by reason of subdivision (b)(1), less than the amounts deductible under that section determined without regard to that subdivision, the amount deductible under Sections 17513 to 17520.6, inclusive, with respect to the contributions under each such plan shall be determined in accordance with regulations prescribed by the Franchise Tax Board.

(c) For purposes of this section, contributions which are allocable (determined under regulations prescribed by the Franchise Tax Board) to the purchase of life, accident, health, or other insurance shall not be taken into account.

SEC. 150. Section 17530 of the Revenue and Taxation Code is amended to read:

17530. (a) For purposes of this section, "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or the individual's beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:

(1) Except in the case of a rollover contribution described in subdivision (d)(3), in Section 17503(d), 17511(e), 17512(a)(9), or 17530.1(b)(3), no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year on behalf of any individual in excess of two thousand dollars ($2,000).

(2) The trustee is a bank (as defined in Section 17502.3(a)) or such other person who demonstrates to the satisfaction of the Franchise Tax Board that the manner in which that other person will administer the trust will be consistent with the requirements of this section.

(3) No part of the trust funds will be invested in life insurance contracts.

(4) The interest of an individual in the balance in that individual's account is nonforfeitable.

(5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.

(6) The entire interest of an individual for whose benefit the trust is maintained will be distributed to the individual not later than the close of that individual's taxable year in which the individual attains age 70½, or will be distributed, commencing before the close of the taxable year, in accordance with regulations prescribed by the Franchise Tax Board, over—

(A) The life of the individual or the lives of the individual and the individual's spouse, or

(B) A period not extending beyond the life expectancy of the individual or the life expectancy of the individual and that individual's spouse.

(7) If an individual for whose benefit the trust is maintained dies before the individual's entire interest has been distributed to him or her, or if distribution has been commenced as provided in paragraph (6) to his or her surviving spouse and the surviving spouse dies before the entire interest has been distributed to the spouse, the entire interest (or the remaining part of the interest if distribution thereof has commenced) will, within five years after that individual's death (or the death of the surviving spouse), be distributed, or applied to the purchase of an immediate annuity for that individual's beneficiary or beneficiaries (or the beneficiary or beneficiaries of his or her surviving spouse) which will be payable for the life of the beneficiary or beneficiaries (or for a term certain not extending beyond the life expectancy of the beneficiary or beneficiaries) and which annuity will be immediately distributed to the beneficiary or

beneficiaries. The preceding sentence does not apply if distributions over a term certain commenced before the death of the individual for whose benefit the trust was maintained and the term certain is for a period permitted under paragraph (6).

(b) For purposes of this section, "individual retirement annuity" means an annuity contract, or an endowment contract (as determined under regulations prescribed by the Franchise Tax Board), issued by an insurance company which meets the following requirements:

(1) The contract is not transferable by the owner.

(2) Under the contract—

(A) The premiums are not fixed,

(B) The annual premium on behalf of any individual will not exceed two thousand dollars ($2,000), and

(C) Any refund of premiums will be applied before the close of the calendar year following the year of the refund toward the payment of future premiums or the purchase of additional benefits.

(3) The entire interest of the owner will be distributed to the owner not later than the close of the owner's taxable year in which the owner attains age 70½, or will be distributed, in accordance with regulations prescribed by the Franchise Tax Board over—

(A) The life of the owner or the lives of the owner and the owner's spouse, or

(B) A period not extending beyond the life expectancy of the owner or the life expectancy of the owner and the owner's spouse.

(4) If the owner dies before the owner's entire interest has been distributed to the owner, or if distribution has been commenced as provided in paragraph (3) to the owner's surviving spouse and the surviving spouse dies before the entire interest has been distributed to the spouse, the entire interest (or the remaining part of the interest if distribution thereof has commenced) will, within five years after the owner's death (or the death of the surviving spouse), be distributed, or applied to the purchase of an immediate annuity for the owner's beneficiary or beneficiaries (or the beneficiary or beneficiaries of the owner's surviving spouse) which will be payable for the life of the beneficiary or beneficiaries (or for a term certain not extending beyond the life expectancy of the beneficiary or beneficiaries) and which annuity will be immediately distributed to the beneficiary or beneficiaries. The preceding sentence shall have no application if distributions over a term certain commenced before the death of the owner and the term certain is for a period permitted under paragraph (3).

(5) The entire interest of the owner is nonforfeitable. The term does not include an annuity contract for any taxable year of the owner in which it is disqualified on the application of subdivision (e) or for any subsequent taxable year. For purposes of this subdivision, no contract shall be treated as an endowment contract if it matures later than the taxable year in which the individual in whose name the contract is purchased attains age 70½; if it is not for the exclusive

benefit of the individual in whose name it is purchased or the individual's beneficiaries; or if the aggregate annual premiums under all such contracts purchased in the name of the individual for any taxable year exceed two thousand dollars ($2,000).

(c) A trust created or organized in the United States by an employer for the exclusive benefit of his or her employees or their beneficiaries, or by an association of employees (which may include employees within the meaning of Section 17502.2(a)) for the exclusive benefit of its members or their beneficiaries, shall be created as an individual retirement account (described in subdivision (a)), but only if the written governing instrument creating the trust meets the following requirements:

(1) The trust satisfies the requirements of paragraphs (1) through (7) of subdivision (a).

(2) There is a separate accounting for the interest of each employee or member (or spouse of an employee or member).

The assets of the trust may be held in a common fund for the account of all individuals who have an interest in the trust.

(d) (1) Except as otherwise provided in this subdivision, any amount paid or distributed out of an individual retirement account or under an individual retirement annuity shall be included in gross income by the payee or distributee, as the case may be, for the taxable year in which the payment or distribution is received. Notwithstanding any other provision of this code (including Parts 8 (commencing with Section 13301) and 9 (commencing with Section 15101)), the basis of any person in such an account or annuity is the amount of contributions not allowed as a deduction under Section 17240 or 17241 on account of the purchase of the account or annuity.

(2) Paragraph (1) does not apply to any annuity contract which meets the requirements of paragraphs (1), (3), (4), and (5) of subdivision (b) and which is distributed from an individual retirement account. Sections 17101 to 17112.7, inclusive, apply to any such annuity contract, and for purposes of Sections 17101 to 17112.7, inclusive, the investment in the contract is zero.

(3) An amount is described in this paragraph as a rollover contribution if it meets the requirements of subparagraphs (A) and (B).

(A) Paragraph (1) does not apply to any amount paid or distributed out of an individual retirement account or individual retirement annuity to the individual for whose benefit the account or annuity is maintained if—

(i) The entire amount received (including money and any other property) is paid into an individual retirement account or individual retirement annuity (other than an endowment contract) or retirement bond for the benefit of the individual not later than the 60th day after the day on which the individual receives the payment or distribution;

(ii) The entire amount received (including money and other property) represents the entire amount in the account or the entire

rchased or the
premiums under
dividual for any

d States by an
ployees or their
ich may include
2.2(a)) for the
ciaries, shall be
(described in
ning instrument
ts:
aphs (1) through

nterest of each
r member).
on fund for the
he trust.
subdivision, any
irement account
ncluded in gross
may be, for the
ion is received.
ncluding Parts 8
ing with Section
r annuity is the
Section
annuity.
contract which
(4), and (5) of
an individual
ive, apply to any
17101 to 17112.7,

as a rollover
graphs (A) and

mount paid or
t or individual
efit the account

and any other
nt or individual
contract) or
later than the
es the payment

ney and other
nt or the entire

10 035

value of the annuity and no amount in the account and no part of the value of the annuity is attributable to any source other than a rollover contribution from an employees' trust described in Section 17501 which is exempt from tax under Section 17631 (other than a trust forming part of a plan under which the individual was an employee within the meaning of Section 17502.2(a) at the time contributions were made on his behalf under the plan), or an annuity plan described in Section 17511 (other than a plan under which the individual was an employee within the meaning of Section 17502.2(a) at the time contributions were made on the individual's behalf under the plan) and any earnings on those sums and the entire amount thereof is paid into another such trust (for the benefit of that individual) or annuity plan not later than the 60th day on which the individual receives the payment or distribution; or

(iii) (I) The entire amount received (including money and other property) represents the entire interest in the account or the entire value of the annuity,

(II) No amount in the account and no part of the value of the annuity is attributable to any source other than a rollover contribution from an annuity contract described in Section 17512 and any earnings on the rollover, and

(III) The entire amount thereof is paid into another annuity contract described in Section 17512 (for the benefit of that individual) not later than the 60th day after the individual receives the payment or distribution.

(B) This paragraph does not apply to any amount described in subparagraph (A)(i) received by an individual from an individual retirement account or individual retirement annuity if at any time during the one-year period ending on the day of that receipt the individual received any other amount described in that subparagraph from an individual retirement account, individual retirement annuity, or a retirement bond which was not includable in the individual's gross income because of the application of this paragraph. Clause (ii) of subparagraph (A) shall not apply to any amount paid or distributed out of an individual retirement account or an individual retirement annuity to which an amount was contributed which was treated as a rollover contribution by Section 17503(f) (or in the case of an individual retirement annuity, that section as made applicable by Section 17511(e)(2)).

(4) Paragraph (1) does not apply to the distribution of any contribution paid for a taxable year to an individual retirement account or for an individual retirement annuity to the extent that the contribution exceeds the amount allowable as a deduction under Section 17240 or 17241 if—

(A) The distribution is received on or before the day prescribed by law (including extensions of time) for filing the individual's return for the taxable year.

(B) No deduction is allowed under Section 17240 or 17241 with respect to the excess contribution, and

10 050

(C) The distribution is accompanied by the amount of net income attributable to the excess contribution. In the case of such a distribution, for purposes of Section 17071, any net income described in subparagraph (C) shall be deemed to have been earned and receivable in the taxable year in which the excess contribution is made.

(5) (A) In the case of any individual, if the aggregate contributions (other than rollover contributions) paid for any taxable year to an individual retirement account or for an individual retirement annuity do not exceed two thousand two hundred fifty dollars ($2,250), paragraph (1) shall not apply to the distribution of any such contribution to the extent that the contribution exceeds the amount allowable as a deduction under Section 17240 or 17241 for the taxable year for which the contribution was paid—

(i) If the distribution is received after the date described in paragraph (4),

(ii) But only to the extent that no deduction has been allowed under Section 17240 or 17241 with respect to the excess contribution.

If employer contributions on behalf of the individual are paid for the taxable year to a simplified employee pension, the dollar limitation of the preceding sentence shall be increased by the lesser of the amount of such contributions or fifteen thousand dollars ($15,000).

(B) (i) The taxpayer reasonably relies on information supplied pursuant to this part for determining the amount of a rollover contribution, but

(ii) The information was erroneous, subparagraph (A) shall be applied by increasing the dollar limit set forth therein by that portion of the excess contribution which was attributable to that information.

(6) The transfer of an individual's interest in an individual retirement account, individual retirement annuity, or retirement bond to the individual's former spouse under a divorce decree or under a written instrument incident to the divorce is not to be considered a taxable transfer made by the individual notwithstanding any other provision of this part, and that interest at the time of the transfer is to be treated as an individual retirement account of the spouse, and not of the individual. Thereafter the account, annuity, or bond for purposes of this part shall be treated as maintained for the benefit of the spouse.

(7) The payment or distribution of any contribution made in a taxable year which exceeds the amount allowable as a deduction under subdivision (a) Section 17240 or subdivision (a) 17241 shall be attributable to the earliest excess contribution made.

(e) (1) Any individual retirement account is exempt from taxation under this part unless the account has ceased to be an individual retirement account by reason of paragraph (2) or (3). Notwithstanding the preceding sentence, any such account is subject to the taxes imposed by Section 17651 (relating to imposition of tax on unrelated business income of charitable, etc. organizations).

(2) (A) In the case of such a plan in existence in taxable year 1975 where contributions were made pursuant to and in conformance with Section 408 or 409 of the Internal Revenue Code of 1954 as amended by the Employee Income Security Act of 1974 (P.L. 93-406), any net income attributable to the 1975 contribution shall not be includable in the gross income, for taxable year 1977 or succeeding taxable years, of the individual for whose benefit the plan was established until distributed pursuant to the provisions of the plan or by operation of law.

(B) In the case of a simplified employee pension, where contributions are also made pursuant to, and in conformance with, the provisions of Section 408(k) of the Internal Revenue Code of 1954, as amended by Public Law 97-34, the net income attributable to the nondeductible portion of the contributions shall not be includable in the gross income of the individual for whose benefit the plan was established for the taxable year or for succeeding taxable years until distributed pursuant to the provisions of the plan or by operation of law.

(C) Notwithstanding the limitations provided in Sections 17240 and 17241 with respect to the amount of deductible contributions and individuals eligible for the deduction, any income attributable to contributions made to a plan in existence in taxable years beginning on or after January 1, 1982, in conformance with Sections 219, 220, 408, and 409 of the Internal Revenue Code of 1954, as amended by P.L. 97-34, shall not be includable in the gross income of the individual for whose benefit the plan was established until distributed pursuant to the provisions of the plan or by operation of law. The Franchise Tax Board shall prescribe regulations with respect to the determination of the amount of the income included in the amount distributed or deemed distributed by operation of law which is includable in the individual's gross income in the taxable year in which the distribution is received or deemed distributed by operation of law.

(3) (A) If, during any taxable year of the individual for whose benefit any individual retirement account is established, that individual or the individual's beneficiary engages in any transaction prohibited by Section 4975 of the Internal Revenue Code of 1954 as amended by Public Law 95-596 with respect to that account, the account ceases to be an individual retirement account as of the first day of the taxable year. For purposes of this paragraph—

(i) The individual for whose benefit any account was established is treated as the creator of the account and

(ii) The separate account for any individual within an individual retirement account maintained by an employer or association of employees is treated as a separate individual retirement account.

(B) In any case in which any account ceases to be an individual retirement account by reason of subparagraph (A) as of the first day of any taxable year, paragraph (1) of subdivision (d) applies as if there were a distribution on that first day in an amount equal to the

fair market value (on that first day) of all assets in the account (on that first day).

(4) If during any taxable year the owner of an individual retirement annuity borrows any money under or by use of the contract, the contract ceases to be an individual retirement annuity as of the first day of that year. The owner shall include in gross income for the taxable year an amount equal to the fair market value of such contract as of the first day.

(5) If, during any taxable year of the individual for whose benefit an individual retirement account is established, that individual uses the account or any portion thereof as security for a loan, the portion so used is treated as distributed to that individual.

(6) If the assets of an individual retirement account or any part of the assets are used to purchase an endowment contract for the benefit of the individual for whose benefit the account is established—

(A) To the extent that the amount of the assets involved in the purchase are not attributable to the purchase of life insurance, the purchase is treated as a rollover contribution described in subdivision (d)(3), and

(B) To the extent that the amount of the assets involved in the purchase are attributable to the purchase of life, health, accident, or other insurance, those amounts are treated as distributed to that individual (but subdivision (f) does not apply).

(7) Any common trust fund or common investment fund of individual retirement account assets which is exempt from taxation under this part does not cease to be exempt on account of the participation or inclusion of assets of a trust exempt from taxation under Section 17631 which is described in Section 17501.

(f) (1) If a distribution from an individual retirement account or under an individual retirement annuity to the individual for whose benefit the account or annuity was established is made before the individual attains age 59½, the individual's tax under this part for the taxable year in which the distribution is received shall be increased by an amount equal to 2.5 percent of the amount of distribution which is includable in the individual's gross income for the taxable year.

(2) If an amount is includable in gross income for a taxable year under subdivision (e) and the taxpayer has not attained age 59½ before the beginning of the taxable year, the individual's tax under this article for the taxable year shall be increased by an amount equal to 2.5 percent of the amount so required to be included in his gross income.

(3) Paragraphs (1) and (2) do not apply if the amount paid or distributed, or the disqualification of the account or annuity under subdivision (e), is attributable to the taxpayer becoming disabled within the meaning of Section 17112.5(f).

(g) This section shall be applied without regard to any community property laws.

10 080

(h) For purposes of this section, a custodial account shall be treated as a trust if the assets of the account are held by a bank (as defined in Section 17502.3(a)) or another person who demonstrates, to the satisfaction of the Franchise Tax Board, that the manner in which the person will administer the account will be consistent with the requirements of this section, and if the custodial account would, except for the fact that it is not a trust, constitute an individual retirement account described in subdivision (a). For purposes of this part, in the case of a custodial account treated as a trust by reason of the preceding sentence, the custodian of the account shall be treated as the trustee thereof.

(i) The trustee of an individual retirement account and the issuer of an endowment contract described in subdivision (b) or an individual retirement annuity shall make the reports regarding the account, contract, or annuity to the Franchise Tax Board and to the individuals for whom the account, contract, or annuity is, or is to be, maintained with respect to contributions, distributions, and such other matters as the Franchise Tax Board may require under regulations. The reports required by this subdivision shall be filed at such time and in such manner and furnished to those individuals at such time and in such manner as may be required by those regulations.

(j) In the case of a simplified employee pension, this section shall be applied by substituting "fifteen thousand dollars ($15,000)" or, if applicable, any higher amount referred to in subparagraph (A) of paragraph (5) of subdivision (d) for "two thousand dollars ($2,000)" in the following provisions:

(1) Paragraph (1) of subdivision (a), and

(2) Paragraph (2) of subdivision (b).

(k) (1) For purposes of this part, "simplified employee pension" means an individual retirement account or individual retirement annuity with respect to which the requirements of paragraphs (2), (3), (4), and (5) are met.

(2) This paragraph is satisfied with respect to a simplified employee pension for a calendar year only if for such year the employer contributes to the simplified employee pension of each employee who—

(A) Has attained age 25, and

(B) Has performed service for the employer during at least three of the immediately preceding five calendar years. For purposes of this paragraph, there shall be excluded from consideration employees described in subparagraph (A) or (C) of paragraph (1) of subsection (b) of Section 410 of the Internal Revenue Code of 1954 as amended by Public Law 96-605.

(3) (A) The requirements of this paragraph are met with respect to a simplified employee pension for a calendar year if for that year the contributions made by the employer to simplified employee pensions for his employees do not discriminate in favor of any employee who is—

(i) An officer,

(ii) A shareholder,

(iii) A self-employed individual, or

(iv) Highly compensated.

(B) For purposes of subparagraph (A)—

(i) There shall be excluded from consideration employees described in subparagraph (A) or (C) of Section 410(b)(2) of the Internal Revenue Code of 1954, as amended by Public Law 96-605, and

(ii) An individual shall be considered a shareholder if the individual owns (with the application of Section 17384) more than 10 percent of the value of the stock of the employer.

(C) For purposes of subparagraph (A), employer contributions to simplified employee pensions shall be considered discriminatory unless—

(i) Contributions thereto bear a uniform relationship to the total compensation not in excess of the first two hundred thousand dollars ($200,000) of each employee maintaining a simplified employee pension, and

(ii) If compensation in excess on one hundred thousand dollars ($100,000) is taken into account under a simplified employee pension for an employee, contributions to a simplified employee pension on behalf of each employee for whom a contribution is required are at a rate (expressed as a percentage of compensation) not less than 7.5 percent.

(D) Except as provided in this subparagraph, employer contributions do not meet the requirements of this paragraph unless those contributions meet the requirements of this paragraph without taking into account contributions or benefits relating to tax on self-employment income, relating to Federal Insurance Contributions Act, Title II of the Social Security Act, or any other federal or state law. Taxes paid under Section 3111 of the Internal Revenue Code of 1954, as amended by Public Law 95-216 (relating to tax on employers) with respect to an employee may, for purposes of this paragraph, be taken into account as a contribution by the employer to an employee's simplified employee pension. If contributions are made to the simplified employee pension of an owner-employee, the preceding sentence shall not apply unless taxes paid by all such owner-employees under Chapter 2 of the Internal Revenue Code of 1954, as amended by Public Law 97-34, and the taxes which would be payable under Chapter 2 by the owner-employees but for paragraphs (4) and (5) of Section 1402(c) of the Internal Revenue Code of 1954, as amended by Public Law 95-600, are taken into account as contributions by the employer on behalf of the owner-employees.

(4) A simplified employee pension meets the requirements of this paragraph only if—

(A) Employer contributions thereto are not conditioned on the retention in such pension of any portion of the amount contributed,

leration employees
on 410(b)(2) of the
Public Law 96-605,

shareholder if the
17384) more than 10
yer.
oyer contributions to
ered discriminatory

lationship to the total
dred thousand dollars
simplified employee

dred thousand dollars
ied employee pension
employee pension on
tion is required are at
ation) not less than 7.5

paragraph, employer
f this paragraph unless
this paragraph without
its relating to tax on
Federal Insurance
rity Act, or any other
n 3111 of the Internal
c Law 95-216 (relating
oyee may, for purposes
a contribution by the
mployee pension. If
nployee pension of an
l not apply unless taxes
apter 2 of the Internal
lic Law 97-34, and the
Chapter 2 by the
(5) of Section 1402(c)
nended by Public Law
ns by the employer on

he requirements of this

onditioned on the
nount contributed,

and

(B) There is no prohibition imposed by the employer on withdrawals from the simplified employee pension.

(5) The requirements of this paragraph are met with respect to a simplified employee pension only if employer contributions to the pension are determined under a definite written allocation formula which specifies—

(A) The requirements which an employee must satisfy to share in an allocation, and

(B) The manner in which the amount allocated is computed.

(6) For purposes of this subdivision and subdivision (*l*)—

(A) "Employee", "employer", and "owner-employee" shall have the respective meanings given the terms by Section 17502.2.

(B) "Compensation" means, in the case of an employee within the meaning of Section 17502.2(a), earned income within the meaning of Section 17502.2(b).

(*l*) An employer who makes a contribution on behalf of an employee to a simplified employee pension shall provide such simplified reports with respect to such contributions as the Franchise Tax Board may require by regulations. The reports required by this subdivision shall be filed at such time and in such manner, and information with respect to such contributions shall be furnished to the employee at such time and in such manner, as may be required by regulations.

(m) (1) The acquisition by an individual retirement account or by an individually directed account under a plan described in Section 17501 (a) of any collectible shall be treated (for purposes of this section and Section 17503) as distribution from that account in an amount equal to the cost to that account of that collectible.

(2) For purposes of this subdivision, "collectible" means—

(A) Any work of art,

(B) Any rug or antique,

(C) Any metal or gem,

(D) Any stamp or coin,

(E) Any alcoholic beverage, or

(F) Any other tangible personal property specified by the Franchise Tax Board for purposes of this subdivision.

(3) This subdivision shall apply to property acquired after December 31, 1981, in taxable years ending after that date.

(n) The amendments made to this section by the act adding this subdivision shall apply to taxable years beginning after December 31, 1981.

SEC. 151. Section 19356 is added to the Revenue and Taxation Code, to read:

19356. (a) The Tax Relief and Refund Account is hereby created in the General Fund and is continuously appropriated to the Franchise Tax Board for purposes of making all payments as provided in this section.

(b) Notwithstanding any other provision of law, all payments

required to be made to taxpayers or other persons from the Personal Income Tax Fund shall be paid from the Tax Relief and Refund Account.

(c) The Controller shall transfer, as needed, to the Tax Relief and Refund Account:

(1) From the unexpended balance of the appropriation made by Item 375 of Chapter 219 of the Statutes of 1977, an amount determined by the Franchise Tax Board to be equivalent to the total amount of renters' assistance credits and refunds allowed under Section 17053.5.

(2) From the disability fund, the amount transferable to the General Fund pursuant to subdivision (a) of Section 1176.5 of the Unemployment Insurance Code.

(3) From the Personal Income Tax Fund, such additional amounts as determined by the Franchise Tax Board to be necessary to make the payments required under this section.

SEC. 152. Section 23603 of the Revenue and Taxation Code, as added by Chapter 1559 of the Statutes of 1982, is amended and renumbered to read:

23606. (a) There shall be allowed as a credit against the taxes imposed by this part (except the minimum franchise tax and the tax on preference income) an amount equal to 25 percent of the fair market value of qualified charitable contributions, not to exceed the basis of the property contributed.

(b) For purposes of this section, "qualified charitable contribution" means a charitable contribution of tangible personal property described in paragraph (1) of Section 1221 of the Internal Revenue Code of 1954, but only if all of the following conditions are met:

(1) The contribution is to an educational organization which is described in subsection (b) (1) (A) (ii) of Section 170 of the Internal Revenue Code of 1954 and which is not an institution of higher education (as defined in Section 3304 (f) of the Internal Revenue Code of 1954) in this state.

(2) The contribution is made not later than one year after the date the construction of the property is substantially completed.

(3) The original use of the property is by the donee.

(4) The property is a computer, scientific equipment, or apparatus all of the use of which by the donee is directly in the education of students of this state.

(5) The property is not transferred by the donee in exchange for money, other property, or services.

(6) The taxpayer receives from the donee a written statement representing that its use and disposition of the property will be in accordance with these provisions.

(7) The property has the approval of the donee.

(8) The contribution is made on or after January 1, 1983, and on or before June 30, 1984.

(c) The credit shall be in lieu of any deduction under this part to

ıns from the Personal
x Relief and Refund

to the Tax Relief and

ıpropriation made by
of 1977, an amount
ıquivalent to the total
funds allowed under

: transferable to the
Section 1176.5 of the

ch additional amounts
be necessary to make

nd Taxation Code, as
982, is amended and

edi inst the taxes
inc tax and the tax
35 percent of the fair
ions, not to exceed the

'qualified charitable
n of tangible personal
ɔn 1221 of the Internal
llowing conditions are

organization which is
ion 170 of the Internal
institution of higher
the Internal Revenue

one year after the date
ally completed.
the donee.
ntific equipment, or
ɔnee is directly in the

donee in exchange for

ee a written statement
the property will be in

donee.
Jan 1, 1983, and on

ıction under this part to

10 010

which the taxpayer otherwise may be entitled, if any.

(d) In the case of a taxpayer whose credits exceed its tax liability computed under this part (except the minimum franchise tax and the tax on preference income) for the income year, the taxpayer shall be allowed a credit to the extent of that tax liability. At the election of the taxpayer, that portion of the credit which exceeds the taxes imposed by this part (except the minimum franchise tax and the tax on preference income) may be carried over to the taxes imposed by this part (except the minimum franchise tax and the tax on preference income) in succeeding income years, with respect to which this section shall remain in effect for purposes of carrying over excess credit, until the credit is used. The credit shall be applied first to the earliest income years possible.

(e) The credit shall be claimed on tax returns filed on or after July 1, 1983.

(f) The Franchise Tax Board shall prescribe regulations as may be necessary to carry out the purposes of this section.

SEC. 153. Section 25951 of the Revenue and Taxation Code is amended to read:

25951. In case of any underpayment of estimated tax, except as provided in Section 25954, there shall be added to the tax for the income year an amount determined at the adjusted annual rate established pursuant to Section 19269 upon the amount of underpayment (determined under Section 25952) for the period of the underpayment (determined under Section 25953).

SEC. 154. Section 26132 of the Revenue and Taxation Code is amended to read:

26132. The Franchise Tax Board may by notice, served personally or by first-class mail, require any bank, corporation, or person, and any officer or department of the state or any political subdivision or agency of the state, or any city organized under a freeholder's charter, or any political body not a subdivision or agency of the state, having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer to withhold, from the credits or other property the amount of any tax, interest or penalties due from the taxpayer or the amount of any liability incurred by that person for failure to withhold and transmit amounts due from a taxpayer under this part and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate. However, in the case of a depository institution, as defined in Section 19(b) of the Federal Reserve Act (12 U.S.C.A. Sec. 461(b)(1)(A)), amounts due from a taxpayer under this part shall be transmitted to the Franchise Tax Board not less than 10 business days from receipt of the notice. To be effective, the notice shall state the amount due from the taxpayer and shall be delivered or mailed to the branch or office where the credits or other property is held, unless another branch or office is designated by the bank, corporation, person, officer or department of the state, political subdivision or agency of the state, city organized under a freeholder's

10 010

charter, or a political body not a subdivision or agency of the state. Any bank, corporation, or person failing to withhold the amounts due from any taxpayer and transmit them to the Franchise Tax Board after service of the notice shall be liable for those amounts.

SEC. 155. Section 188.8 of the Streets and Highways Code is amended to read:

188.8. From the money expended pursuant to Section 188, the commission shall allocate and the department shall expend, or cause to be expended, in each county of County Group No. 1 and in each county of County Group No. 2 during the period commencing July 1, 1983, and ending June 30, 1988, and for each period of five years thereafter, not less than an amount computed as follows:

(a) The commission shall compute, for each period of five years, an amount equal to 70 percent of the money to be expended in County Groups Nos. 1 and 2, respectively, as provided in Section 188.

(b) From the amount computed for County Group No. 1 in subdivision (a) for each five-year period, the commission shall determine the minimum expenditure for each county in the group based on a formula which is based 75 percent on the population of the county to the total population of County Group No. 1 and 25 percent on state highway miles in the county to the total state highway miles in County Group No. 1.

(c) From the amount computed for County Group No. 2 in subdivision (a) for each five-year period, the commission shall determine the minimum expenditure for each county in the group based on a formula which is based 75 percent on the population of the county to the total population of County Group No. 2 and 25 percent on state highway miles in the county to the total state highway miles in County Group No. 2.

(d) A county board of supervisors may adopt a resolution to pool its county minimum expenditure with adjacent counties adopting similar resolutions. The resolution shall provide for pooling the county minimum expenditures for expenditure in any of the pooling counties for a five-year period and shall be submitted to the commission not later than May 1 immediately preceding the commencement of the five-year period.

(e) Except as provided in this subdivision, the entire obligation under a contract awarded or a day labor project commenced during any of the periods shall be deemed an expenditure within the period in which the contract was awarded or day labor project commenced. Obligations under contracts which have been awarded or day labor projects which have been commenced, but which are to be budgeted over more than one fiscal year pursuant to Section 170, shall be deemed expenditures in each of the fiscal years in which the work is to be performed in an amount equal to the final amount budgeted for each of the fiscal years for the work.

(f) For the purpose of this section, the population in each county is that determined by the last preceding federal census, or a subsequent census validated by the Population Research Unit of the

r agency of the state.
hold the amounts due
Franchise Tax Board
hose amounts.
d Highways Code is

nt to Section 188, the
shall expend, or cause
oup No. 1 and in each
iod commencing July
n period of five years
! as follows:
n period of five years,
y to be expended in
ovided in Section 188.
nty Group No. 1 in
he commission shall
county in the group
on the population of
Group No. 1 and 25
ty to the total state

nty Group No. 2 in
he commission shall
county in the group
on the population of
Group No. 2 and 25
ty to the total state

ot a resolution to pool
nt counties adopting
vide for pooling the
in any of the pooling
be submitted to the
ately preceding the

the entire obligation
ct commenced during
ure within the period
project commenced.
awarded or day labor
ch are to be budgeted
Section 170, shall be
rs in which the work
nal amount budgeted

lation in each county
federal census, or a
Research Unit of the

Department of Finance, at the beginning of each five-year period.

(g) For the purpose of this section, "state highway miles," means the miles of state highways open to vehicular traffic at the beginning of each five-year period.

(h) Notwithstanding subdivisions (a), (b), and (c), the commission shall program and allocate funds for projects that were included in the 1980 state transportation improvement program. This subdivision shall be limited to projects, as defined in the 1980 state transportation improvement program, and shall provide for inflationary cost increases, but shall not provide for cost increases which are caused by any change in the scope or nature of the project. This subdivision shall not apply to projects that cannot proceed due to changes in federal law or other causes beyond the commission's and department's authority. During the five-year period beginning July 1, 1983, the commission may deviate from subdivisions (a), (b), and (c) for the purpose of meeting the requirements of this subdivision, but shall make a reasonable effort to compiy with subdivisions (a), (b), and (c).

SEC. 156. Section 680 of the Streets and Highways Code is amended to read:

680. Whenever a franchise is granted by any county or city in any public highway which has been or is subsequently constituted a state highway, the department may enforce any obligations of the grantee or holder of the franchise with respect to the repair of the highway. The department may require any person who has placed and maintained any pole, pole line, pipe, pipeline, conduit, street railroad tracks, or other structures or facilities upon any state highway, whether under that or any franchise, to move it at his or her own cost and expense to such different location in the highway as is specified in a written demand of the department, whenever necessary to insure the safety of the traveling public or to permit the improvement of the highway. However, no such change of location shall be required for a temporary purpose. The department shall specify in the demand a reasonable time within which the work of relocation shall be commenced and the grantee or owner shall commence the relocation within the time specified in the demand and thereafter diligently prosecute it to completion.

In case the owner fails to comply with any such demand, the encroachments specified in the demand become subject to Article 3 (commencing with Section 720), except that no further notice is required.

SEC. 157. Section 701 of the Streets and Highways Code is amended to read:

701. This article is limited to state highways which are or shall become freeways. Article 2 (commencing with Section 670), except as inconsistent with this article, applies to freeways.

SEC. 158. Section 724 of the Streets and Highways Code is amended to read:

724. Unless the encroachment is authorized under Article 2

(commencing with Section 670), any person owning, controlling, or placing, or causing or suffering to exist, any encroachment within any state highway after the service upon that person of the notice, in the manner provided in Section 720, is, in addition to any civil liability therefor, guilty of a misdemeanor.

SEC. 159. Section 625 of the Vehicle Code is amended to read:

625. A "traffic officer" is any member of the California Highway Patrol, or any peace officer who is on duty for the exclusive or main purpose of enforcing Division 10 (commencing with Section 20000) or 11 (commencing with Section 21000).

SEC. 160. Section 3061 of the Vehicle Code is amended to read:

3061. In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following:

(a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(c) Permanency of the investment.

(d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(g) Extent of franchisee's failure to comply with the terms of the franchise.

SEC. 161. Section 3063 of the Vehicle Code is amended to read:

3063. In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to, all of the following:

(a) Permanency of the investment.

(b) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

(c) Whether it is injurious to the public welfare for an additional franchise to be established.

(d) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

(e) Whether the establishment of an additional franchise would

increase competition and therefore be in the public interest.

SEC. 162. Section 4460 of the Vehicle Code is amended to read:

4460. The Department of Motor Vehicles, the Traffic Adjudication Board, and the Department of the California Highway Patrol or any regularly employed and salaried police officer or deputy sheriff may take possession of any certificate, card, placard, permit, license, or license plate issued under this code, upon expiration, revocation, cancellation, or suspension thereof or which is fictitious or which has been unlawfully or erroneously issued. Any license plate which is not attached to the vehicle for which issued, when and in the manner required under this code, may be seized, and attachment to the proper vehicle may be made or required.

Any such document, placard, or license plate seized shall be delivered to the Department of Motor Vehicles.

SEC. 163. Section 4601 of the Vehicle Code is amended to read:

4601. Except as otherwise provided in this code, every vehicle registration and registration card expires at midnight on the expiration date designated by the director pursuant to Section 1651.5, and shall be renewed prior to the expiration of the registration year. The department may, upon payment of the proper fees, renew the registration of vehicles.

SEC. 164. Section 4602 of the Vehicle Code is amended to read:

4602. Application for renewal of a vehicle registration shall be made by the owner not later than midnight of the expiration date, and shall be made by presentation of the registration card last issued for the vehicle or by presentation of a potential registration card issued by the department for use at the time of renewal and by payment of the full registration year fee for the vehicle as provided in this code.

SEC. 165. Section 9102.5 of the Vehicle Code is amended to read:

9102.5. (a) In lieu of all other fees which are specified in this code, except fees for duplicate plates, certificates, or cards, a fee of ten dollars ($10) shall be paid for the registration and licensing of any privately owned schoolbus, as defined in Section 545, which is either of the following:

(1) Owned by a private nonprofit educational organization and operated in accordance with the rules and regulations of the Department of Education and the Department of the California Highway Patrol exclusively in transporting school pupils, or school pupils and employees, of the private nonprofit educational organization.

(2) Operated in accordance with the rules and regulations of the Department of Education and the Department of the California Highway Patrol exclusively in transporting school pupils, or school pupils and employees, of any public school or private nonprofit educational organization pursuant to a contract between a public school district or nonprofit educational organization and the owner or operator of the schoolbus.

This section does not apply to any schoolbus which is operated

pursuant to any contract which requires the public school district or nonprofit educational organization to pay any amount representing the costs of registration and weight fees unless and until the contract is amended to require only the payment of an amount representing the fee required by this section.

(b) When a schoolbus under contract and registered pursuant to subdivision (a) is to be temporarily operated in such a manner that it becomes subject to full registration fees specified in this code, the owner may, prior to such operation, as an alternative to such full registration, secure a temporary permit to operate the vehicle in this state for any one or more calendar months. The permit shall be posted upon the windshield or other prominent place upon the vehicle, and shall identify the vehicle to which it is affixed. When so affixed, the permit shall serve as indicia of full registration for the period designated thereon. Upon payment of the fees specified in Section 9266.5, the department may issue a temporary permit under this section.

(c) Notwithstanding any other provision, any schoolbus used exclusively to transport students at or below the 12th-grade level to or from any school, education-related purpose, or activity sponsored by a nonprofit organization shall be deemed to be a schoolbus for the purposes of this section and shall pay a fee of ten dollars ($10) in lieu of all other fees which are specified in this code, except fees for duplicate plates, certificates, or cards.

SEC. 166. Section 9706 of the Vehicle Code is amended to read:

9706. (a) Application for partial year registration in conjunction with an application for original California registration shall be made by the owner within 20 days of the date the vehicle first becomes subject to California registration. Any application for partial year registration submitted after that 20-day period shall not be registered for a partial year, and the vehicle shall be subject to payment of the fees for the entire registration year. In addition to the fee for the registration year, a penalty, as specified in Section 9554, shall be added to the fee for registration.

(b) Any application to renew registration for a part of the remainder of the registration year, or for the entire remainder of the registration year, shall be made prior to midnight of the expiration date of the last issued registration certificate. Application shall be made upon presentation of the last issued registration card, or of a potential registration issued by the department for use at the time of renewal and by payment of the proper partial year fees, or, if renewal, is for the remainder of the registration year, by payment of the annual fee provided by Section 9400, as reduced pursuant to Section 9407. Any application submitted after the expiration date of the last issued registration certificate which is not accompanied by a certificate of nonoperation, as provided in Section 9708, shall be refused partial year registration and shall be subject to payment of the full fees for the registration year or remainder thereof. In addition to the fee for the registration year or remainder thereof, a

chool district or
nt representing
ıtil the contract
nt representing

:red pursuant to
n a manner that
in this code, the
tive to such full
ıe vehicle in this
permit shall be
place upon the
affixed. When so
istration for the
fees specified in
ıry permit under

sc bus used
th-g de level to
ctivity sponsored
schoolbus for the
llars ($10) in lieu
, except fees for

mended to read:
on in conjunction
on shall be made
cle first becomes
for partial year
not be registered
o payment of the
o the fee for the
on 9554, shall be

r a part of the
remainder of the
of the expiration
plication shall be
tion card, or of a
r use at the time
l year fees, or, if
ar, by payment of
uced pursuant to
expiration date of
mpanied by
708, shall be
ct to payment of
nder thereof. In
ainder thereof, a

penalty, as specified in Section 9554, shall be added to the fee for renewal of registration.

(c) In order to obtain partial year registration or renewal of partial year registration for a period of less than three months, application shall be made prior to the date the vehicle is first operated, moved, or left standing on the highways. Partial year registration or renewal of partial year registration may be obtained for a minimum of three months when application is made after, but within 20 days of, the date the vehicle is first operated, moved, or left standing on the highways.

SEC. 167. Section 9853.4 of the Vehicle Code is amended to read:

9853.4. The department may issue one or more stickers, tabs, or other suitable devices to identify vessels as being currently registered. The size, shape, and color of the sticker, tab, or other device and the positioning of the sticker, tab, or other device on the vessel shall be as determined by the department after consultation with the Department of Boating and Waterways, such consultation to consider the responsibilities and duties of the Department of Boating and Waterways as prescribed in the Harbors and Navigation Code.

SEC. 168. Section 11520 of the Vehicle Code is amended to read:

11520. (a) A licensed automobile dismantler who acquired, for the purpose of dismantling, actual possession, as a transferee, of a vehicle of a type subject to registration under this code shall do all of the following:

(1) Within five calendar days, not including the day of acquisition, mail a notice of acquisition to the department at its headquarters.

(2) Within five calendar days, not including the day of acquisition, mail a copy of the notice of acquisition to the Department of Justice at its headquarters.

(3) Not begin dismantling until 10 calendar days have elapsed after mailing the notice of acquisition. In the alternative, dismantling may begin any time after the dismantler complies with paragraph (4).

(4) Deliver to the department, within 90 calendar days of the date of acquisition, the documents evidencing ownership and the license plates last issued for the vehicle. Proof that a registered or certified letter of demand for the documents was sent within 90 days of the date of acquisition to the person from whom the vehicle was acquired may be substituted for documents that cannot otherwise be obtained. A certificate of license plate destruction, when authorized by the director, may be delivered in lieu of the license plates.

(5) Maintain a business record of all vehicles acquired for dismantling. The record shall contain the name and address of the person from whom the vehicle was acquired; the date the vehicle was acquired; the license plate number last assigned to the vehicle; and a brief description of the vehicle, including its make, type, and the vehicle identification number used for registration purposes. The record required by this subdivision shall be a business record of the

dismantler separate and distinct from the records maintained in those books and forms furnished by the department.

(b) Paragraphs (1) and (2) of subdivision (a), do not apply to vehicles acquired pursuant to Section 11515 or 22851.2 of this code or Section 3071, 3072, or 3073 of the Civil Code.

(c) Any person, other than a licensed dismantler, desiring to dismantle a vehicle of a type subject to registration under this code shall deliver to the department the certificate of ownership, registration card, and the license plates last issued to the vehicle before dismantling may begin.

(d) Any person who violates this section is guilty of a misdemeanor. Any person not licensed under this chapter who is convicted under this section shall be punished upon a first conviction by imprisonment in the county jail for not less than five days or more than six months or by a fine of not less than fifty dollars ($50) nor more than five hundred dollars ($500) or by both such fine and imprisonment; and upon a second or any subsequent conviction, by imprisonment in the county jail for not less than 30 days nor more than one year or by a fine of not less than two hundred fifty dollars ($250) nor more than one thousand dollars ($1,000) or by both such fine and imprisonment.

SEC. 169. Section 23181 of the Vehicle Code is amended to read:

23181. (a) If the court grants probation to any person punished under Section 23180, in addition to the provisions of Section 23206 and any other terms and conditions imposed by the court, the court shall impose as a condition of probation that the person be confined in the county jail for at least five days but not more than one year and pay a fine of at least three hundred ninety dollars ($390) but not more than one thousand dollars ($1,000). The person's privilege to operate a motor vehicle shall be suspended by the Department of Motor Vehicles pursuant to paragraph (2) of subdivision (a) of Section 13352.

(b) In any county where the county alcohol program administrator has certified, and the board of supervisors has approved, such a program or programs, the court shall also impose as a condition of probation that the driver shall participate in, and successfully complete, an alcohol or drug education program, as designated by the court.

(c) Each county which has approved and certified an alcohol or drug education program or programs shall make provision for persons who cannot afford the program fee, in order to enable those persons to participate.

(d) In order to assure effectiveness of the alcohol or drug education program, the county shall provide, as appropriate, services to ethnic minorities, women, youth, or any other group that has particular needs related to the program.

SEC. 170. Section 25108 of the Vehicle Code is amended to read:

25108. (a) Any motor vehicle may be equipped with not more than two amber turn signal pilot indicators mounted on the exterior.

records maintained in
partment.
on (a), do not apply to
or 22851.2 of this code or
e.
dismantler, desiring to
stration under this code
rtificate of ownership,
t issued to the vehicle

ction is guilty of a
ler this chapter who is
d upon a first conviction
s than five days or more
fifty dollars ($50) nor
by both such fine and
sequent conviction, by
than 30 days nor more
vo hundred fifty dollars
$1,000) or by both such

de is amended to read:
o a person punished
isions of Section 23206
by the court, the court
the person be confined
ot more than one year
dollars ($390) but not
e person's privilege to
by the Department of
of subdivision (a) of

ty alcohol program
d of supervisors has
court shall also impose
all participate in, and
ducation program, as

certified an alcohol or
l make provision for
order to enable those

the alcohol or drug
s appropriate, services
other group that has

e is amended to read:
uipped with not more
unted on the exterior.

The light output from any such indicator shall not exceed five candlepower unless provision is made for operating the indicator at reduced intensity during darkness in which event the light output shall not exceed five candlepower during darkness or 15 candlepower at any other time. The center of the beam shall be projected toward the driver.

(b) Any vehicle may be equipped with pilot indicators visible from the front to monitor the functioning or condition of parts essential to the operation of the vehicle or of equipment attached to the vehicle which is necessary for protection of the cargo or load. The pilot indicators shall be steady burning, having a projected lighted lens area of not more than three-quarters of a square inch and have a light output of no more than five candlepower. The pilot indicator may be of any color except red.

(c) Other exterior pilot indicators of any color may be used for monitoring exterior lighting devices, provided that the area of each indicator is less than 0.20 square inch, the intensity of each indicator does not exceed 0.10 candlepower, and the color red is not visible to the front.

SEC. 171. Section 27909 of the Vehicle Code is amended to read:

27909. Any vehicle which carries liquefied petroleum gas fuel or natural gas, in a tank attached to a vehicle, in any concealed area, including trunks, compartments, or under the vehicle, shall display on the exterior of the vehicle the letters "CNG," "LNG," or "LPG," whichever type fuel is utilized, in block letters at least one inch high. The letters shall be of contrasting color and shall be placed as near as possible to the area of the location of the tank. Any vehicle fueled by liquefied petroleum gas fuel or by natural gas may also comply with this section by displaying on each side of the vehicle words or letters at least 0.25 inch high indicating that the vehicle is fueled by liquefied petroleum gas or natural gas. It is unlawful to dispense liquefied petroleum gas fuel or natural gas into any tank in a concealed area of any vehicle registered in California, unless the vehicle complies with the requirements of this section.

SEC. 172. Section 34501.5 of the Vehicle Code is amended to read:

34501.5. The Department of the California Highway Patrol shall adopt reasonable rules and regulations which, in the judgment of the department, are designed to promote the safe operation of vehicles described in Sections 39830 and 82321 of the Education Code and Sections 545 and 34500 of this code. The Commissioner of the California Highway Patrol shall appoint a committee of nine members to act in an advisory capacity when developing and adopting regulations affecting schoolbuses and schoolbus operations. The advisory member committee shall consist of nine members appointed as follows:

(a) One member of the State Department of Education.

(b) One member of the Department of Motor Vehicles.

(c) One member of the Department of the California Highway Patrol.

(d) One member who is employed as a schoolbus driver.

(e) One member of the Office of Traffic Safety in the Business, Transportation and Housing Agency.

(f) Two members who are schoolbus contractors, one which shall be from an urban area of the state and one which shall be from a rural area of the state, as determined by the department.

(g) Two members who are representatives of school districts, one which shall be from an urban area of the state and one which shall be from a rural area of the state, as determined by the department.

The department shall cooperate and confer with the advisory committee appointed pursuant to this section prior to adopting rules or regulations affecting schoolbuses and schoolbus operations.

SEC. 173. Section 40000.7 of the Vehicle Code is amended to read:

40000.7. A violation of any of the following provisions shall constitute a misdemeanor, and not an infraction:

(a) Section 2416, relating to regulations for emergency vehicles.

(b) Section 2800, relating to failure to obey an officer's lawful order or submit to a lawful inspection.

(c) Section 2800.1, relating to fleeing from a peace officer.

(d) Section 2801, relating to failure to obey a fireman's lawful order.

(e) Section 2803, relating to unlawful vehicle or load.

(f) Section 2813, relating to stopping for inspection.

(g) Subdivision (b) of Section 4461 and subdivisions (b) and (c) of Section 4463, relating to disabled person placards.

(h) Section 5753, relating to delivery of certificates of ownership and registration when committed by a dealer or any person while a dealer within the preceding 12 months.

(i) Section 5901, relating to dealers and lessor-retailers giving notice.

(j) Section 5901.1, relating to lessors giving notice and failure to pay fee.

(k) Section 8802, relating to the return of canceled, suspended, or revoked certificates of ownership, registration cards, or license plates, when committed by any person with intent to defraud.

(*l*) Section 8803, relating to return of canceled, suspended, or revoked documents and license plates of a dealer, manufacturer, transporter, dismantler, or salesman.

SEC. 174. Section 127 of the Water Code is amended to read:

127. The department may employ legal counsel who shall advise the director, represent the department in connection with legal matters before other boards and agencies of the state, and may, when authorized by the Attorney General, represent the department and the state in litigation concerning affairs of the department. In any event, the legal counsel of the department may, with the approval of the director and with the consent of the court before which the action is pending, present to the court the views of the department with respect to the action. Sections 955.4, 955.6, 11041, 11042, 11043, and the first sentence of Section 11157 of the Government Code do

not apply to the department.

SEC. 175. Section 259 of the Water Code is amended to read:

259. When the department condemns the property of any common carrier railroad, other public utility, or state agency, or the appurtenances thereof, it shall be governed by Article 3 (commencing with Section 11590) of Chapter 6 of Part 3 of Division 6.

SEC. 176. Section 2782 of the Water Code is amended to read:

2782. After expiration of the time fixed by the court for filing contests, the court shall proceed to hear and determine the exception and proof of intervenor and any contest thereto in accordance as near as may be with Article 9 (commencing with Section 2750).

SEC. 177. Section 1722 of the Welfare and Institutions Code is amended to read:

1722. (a) Any rules and regulations, including any resolutions and policy statements, promulgated by the Youthful Offender Parole Board, shall be promulgated and filed pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and shall, to the extent practical, be stated in language that is easily understood by the general public.

(b) The board shall maintain, publish, and make available to the general public, a compendium of its rules and regulations, including any resolutions and policy statements, promulgated pursuant to this section.

(c) The following exception to the procedures specified in this section shall apply to the board: The chairperson may specify an effective date that is any time more than 30 days after the rule or regulation is filed with the Secretary of State; provided that no less than 20 days prior to that effective date, copies of the rule or regulation shall be posted in conspicuous places throughout each institution and shall be mailed to all persons or organizations who request them.

SEC. 178. Section 16712 of the Welfare and Institutions Code is amended to read:

16712. The State Department of Health Services shall adopt any regulations necessary to implement this part. The department may adopt these regulations on an emergency basis pursuant to Article 5 (commencing with Section 11346) of Chapter 3.5 of Division 3 of Title 2 of the Government Code, based on the finding by the department that these regulations are necessary to assure that local jurisdictions receive funding for health services on a timely basis in order to promote and protect the health and safety of the people of California.

SEC. 179. Section 3 of Chapter 61 of the Statutes of 1978, as amended by Chapter 1055 of the Statutes of 1979, is repealed.

SEC. 180. The repeal, by Section 179 of this act, of Section 3 of Chapter 61 of the Statutes of 1978, as amended by Chapter 1055 of the Statutes of 1979, shall not become operative if Section 19356 of

the Revenue and Taxation Code, as added by Section 151 of this act, does not become operative or Chapter 22 (commencing with Section 19351) of Part 10 of Division 2 of the Revenue and Taxation Code is repealed during the 1982 calendar year.

SEC. 181. Any section of any act enacted by the Legislature during the 1983 calendar year, which takes effect on or before January 1, 1984, and which amends, amends and renumbers, adds, repeals and adds, or repeals a section amended, amended and renumbered, repealed and added, or repealed by this act, shall prevail over this act, whether that act is enacted prior to or subsequent to this act.

CHAPTER 143

An act to amend Section 2902 of the Business and Professions Code, to amend Section 2080.9 of the Civil Code, to amend Sections 8080, 8081, 8084, 10000, 10001, 10003, 10101, 10103, 10105, 12090, 22509, 23918, 23921, 32220, 32221, 32320, 33031, 33113, 33115, 39363.5, 44212, 44315, 44521, 44522, 44525, 44528, 44529, 44531, 44534, 44574, 44585, 44857, 52342, 54405, 54632, 59006, 59143, 59211, 60313, 66010, 66011, 66016, 66102, 66202, 66203, 66300, 66500, 66601, 66605, 66606, 66607, 66609, 66901, 66903.1, 66904, 67003, 67124, 67146, 68011, 68012, 68022, 68040, 68121, 68123, 68124, 68133, 69271, 69534.3, 69620, 69621, 69622, 69624, 69625, 69626, 69627, 70022, 78001, 81363.5, 84500, 87463, 89001, 89004, 89006, 89030, 89031, 89032, 89033, 89034, 89036, 89037, 89038, 89040, 89041, 89044, 89045, 89046, 89047, 89060, 89063, 89064, 89080, 89082, 89084, 89200, 89210, 89211, 89222, 89230, 89301, 89302, 89304, 89330, 89333, 89400, 89502, 89503, 89508, 89515, 89520, 89530, 89542.5, 89545, 89550, 89552, 89560, 89561, 89701, 89702, 89703, 89704, 89706, 89707, 89708, 89710, 89722, 89723, 89724, 89725, 89750, 89753, 89756, 89758, 89901, 89902, 89903, 89905, 90002, 90011, 90073, 90074, 90075, 90077, 90078, 90100, 90101, 90126, 90400, 90401, 90420, 90510, and 94302 of, to amend the heading of Article 4 (commencing with Section 37050) of Chapter 1 of Part 22 of, to amend the heading of Chapter 8 (commencing with Section 66600) of Part 40 of, to amend the heading of Article 7 (commencing with Section 69620) of Chapter 2 of Part 42 of, to amend the heading of Division 8 (commencing with Section 89000) of, to amend the heading of Part 55 (commencing with Section 89000) of, and to amend the heading of Article 3 (commencing with Section 89560) of Chapter 5 of Part 55 of, the Education Code, to amend Section 12041 of the Food and Agricultural Code, to amend Sections 7.6, 3202, 3560, 3561, 3562, 3569.5, 3572, 3586, 3592, 4451, 4475, 8832, 11121.5, 11126, 14903, 15854.5, 15861, 16304.6a, 16315, 20023.4, 20023.5, 20815, 22816.5, 50330, and 50330.4 of the Government Code, to amend Section 551 of the Health and Safety Code, to amend Section 10203.1 of the Insurance Code, to amend Section 1720.3 of the Labor Code, to amend Sections 602.10,

the Revenue and Taxation Code, as added by Section 151 of this act, does not become operative or Chapter 22 (commencing with Section 19351) of Part 10 of Division 2 of the Revenue and Taxation Code is repealed during the 1982 calendar year.

SEC. 181. Any section of any act enacted by the Legislature during the 1983 calendar year, which takes effect on or before January 1, 1984, and which amends, amends and renumbers, adds, repeals and adds, or repeals a section amended, amended and renumbered, repealed and added, or repealed by this act, shall prevail over this act, whether that act is enacted prior to or subsequent to this act.

CHAPTER 143

An act to amend Section 2902 of the Business and Professions Code, to amend Section 2080.9 of the Civil Code, to amend Sections 8080, 8081, 8084, 10000, 10001, 10003, 10101, 10103, 10105, 12090, 22509, 23918, 23921, 32220, 32221, 32320, 33031, 33113, 33115, 39363.5, 44212, 44315, 44521, 44522, 44525, 44528, 44529, 44531, 44534, 44574, 44585, 44857, 52342, 54405, 54632, 59006, 59143, 59211, 60313, 66010, 66011, 66016, 66102, 66202, 66203, 66300, 66500, 66601, 66605, 66606, 66607, 66609, 66901, 66903.1, 66904, 67003, 67124, 67146, 68011, 68012, 68022, 68040, 68121, 68123, 68124, 68133, 69271, 69534.3, 69620, 69621, 69622, 69624, 69625, 69626, 69627, 70022, 78001, 81363.5, 84500, 87463, 89001, 89004, 89006, 89030, 89031, 89032, 89033, 89034, 89036, 89037, 89038, 89040, 89041, 89044, 89045, 89046, 89047, 89060, 89063, 89064, 89080, 89082, 89084, 89200, 89210, 89211, 89222, 89230, 89301, 89302, 89304, 89330, 89333, 89400, 89502, 89503, 89508, 89515, 89520, 89530, 89542.5, 89545, 89550, 89552, 89560, 89561, 89701, 89702, 89703, 89704, 89706, 89707, 89708, 89710, 89722, 89723, 89724, 89725, 89750, 89753, 89756, 89758, 89901, 89902, 89903, 89905, 90002, 90011, 90073, 90074, 90075, 90077, 90078, 90100, 90101, 90126, 90400, 90401, 90420, 90510, and 94302 of, to amend the heading of Article 4 (commencing with Section 37050) of Chapter 1 of Part 22 of, to amend the heading of Chapter 8 (commencing with Section 66600) of Part 40 of, to amend the heading of Article 7 (commencing with Section 69620) of Chapter 2 of Part 42 of, to amend the heading of Division 8 (commencing with Section 89000) of, to amend the heading of Part 55 (commencing with Section 89000) of, and to amend the heading of Article 3 (commencing with Section 89560) of Chapter 5 of Part 55 of, the Education Code, to amend Section 12041 of the Food and Agricultural Code, to amend Sections 7.6, 3202, 3560, 3561, 3562, 3569.5, 3572, 3586, 3592, 4451, 4475, 8832, 11121.5, 11126, 14903, 15854.5, 15861, 16304.6a, 16315, 20023.4, 20023.5, 20815, 22816.5, 50330, and 50330.4 of the Government Code, to amend Section 551 of the Health and Safety Code, to amend Section 10203.1 of the Insurance Code, to amend Section 1720.3 of the Labor Code, to amend Sections 602.10,

626, 626.2, 626.4, 626.6, 626.9, 626.11, 1463.5a, 13507, 13510.5, and 13522 of the Penal Code, to amend Sections 6217 and 30119 of the Public Resources Code, to amend Section 6404 of the Revenue and Taxation Code, to amend Sections 135 and 12004 of the Unemployment Insurance Code, and to amend Section 22855 of the Vehicle Code, relating to the California State University.

[Approved by Governor June 28, 1983. Filed with Secretary of State June 28, 1983.]

The people of the State of California do enact as follows:

SECTION 1. Section 2902 of the Business and Professions Code is amended to read:

2902. As used in this chapter, unless the context clearly requires otherwise and except as in this chapter expressly otherwise provided:

(a) "Licensed psychologist" means an individual to whom a license has been issued pursuant to the provisions of this chapter, and which license is in force and has not been suspended or revoked.

(b) "Board" means the Division of Allied Health Professions of the Board of Medical Quality Assurance. "Committee" means the Psychology Examining Committee.

(c) A person represents himself or herself to be a psychologist when the person holds himself or herself out to the public by any title or description of services incorporating the words "psychology," "psychological," "psychologist," "psychometry," "psychometrics" or "psychometrist," "psychotherapy," "psychotherapist," "psychoanalysis," "psychoanalyst" or when the person holds himself or herself out to be trained, experienced, or an expert in the field of psychology.

(d) "Accredited," as used with reference to academic institutions, means the University of California, the California State University, an institution accredited under the provisions of subdivision (a) of Section 94310 of the Education Code, or an institution located in another state which is accredited by a national or an applicable regional accrediting agency recognized by the United States Department of Education.

(e) "Approved," as used with reference to academic institutions, means approved under the provisions of subdivision (b) of Section 94310 of the Education Code.

SEC. 2. Section 2080.9 of the Civil Code is amended to read:

2080.9. The Trustees of the California State University may provide by resolution or regulation for the care, restitution, sale, or destruction of unclaimed, lost, or abandoned property in the possession of any state university. Any resolution or regulation adopted pursuant to this section shall include therein (1) that such unclaimed or lost property shall be held by the particular state university for a period of at least six months, (2) that thereafter such property, as well as abandoned property, will be sold at public

auction to the highest bidder, and (3) that notice of such sale shall be given by the Trustees of the California State University at least five days before the time therefor by publication once in a newspaper of general circulation published in the county in which such property is held. The Trustees of the California State University may dispose of any such property upon which no bid is made at any such sale.

SEC. 3. Section 8080 of the Education Code is amended to read:

8080. For purposes of this chapter, the determination of definite need shall be established by the appropriate body as follows:

(a) The determination of need for a regional occupational center shall be established by the governing body of the agency maintaining the center.

(b) The determination of need for a high school shall be established by the governing body of the district maintaining the high school.

(c) The determination of need for a community college shall be established by the governing body of the district maintaining the community college.

(d) The determination of need for a state university shall be established by the Trustees of the California State University.

SEC. 4. Section 8081 of the Education Code is amended to read:

8081. No programs, courses, classes, or instruction in cosmetology, as defined by Section 7321 of the Business and Professions Code, shall be initiated or expanded by any regional occupational center, high school, public community college, or campus of the California State University unless and until a determination has been made, by the appropriate body pursuant to Section 8080, that a definite need exists for the initiation or expansion of such instruction and that existing private institutions offering the same or similar instruction are not adequately meeting that need.

SEC. 5. Section 8084 of the Education Code is amended to read:

8084. The appropriate body, as referred to in Section 8080, shall report its findings at a public meeting within 90 days from the date of being notified by a regional occupational center, high school, community college, or campus of the California State University of its intent to initiate or expand its teaching of cosmetology.

SEC. 6. Section 10000 of the Education Code is amended to read:

10000. Notwithstanding any other provision of law, the Trustees of the California State University and any school district or community college district may enter into an agreement for the exchange of personnel between the state university and the district.

Nothing in this chapter shall be construed to limit the present authority of the parties, which exists by law, to participate in other agreements concerning the exchange, transfer, or temporary assignment of personnel.

SEC. 7. Section 10001 of the Education Code is amended to read:

10001. An agreement authorized by Section 10000 shall provide that an employee of the California State University engaged in

e of such sale shall
University at least
ication once in a
ne county in which
nia State University
bid is made at any

s amended to read:
nination of definite
dy as follows:
ccupational center
agency maintaining

h school shall be
ct maintaining the

ity college shall be
ict maintaining the

uni ity shall be
ite University.
s amended to read:
or instruction in
the Business and
ed by any regional
munity college, or
nless and until a
te body pursuant to
tiation or expansion
itutions offering the
meeting that need.
is amended to read:
n Section 8080, shall
days from the date
center, high school,
. State University of
osmetology.
is amended to read:
of law, the Trustees
school district or
agreement for the
sity and the district.
o limit the present
participate in other
fer, or temporary

is nded to read:
10000 shall provide
iversity engaged in

teacher training may assume the duties of one of the certificated employees of the district engaged in classroom teaching, and that the certificated employee of the district may assume the duties of the state university employee engaged in teacher training.

SEC. 8. Section 10003 of the Education Code is amended to read:

10003. During such time as an employee has assumed duties in another entity, pursuant to this chapter, he or she shall continue to be an employee of the California State University, the school district, or the community college district, as the case may be, for all purposes, including, but not limited to, salary, membership in a retirement system, tenure rights, and all other incidents of employment.

SEC. 9. Section 10101 of the Education Code is amended to read:

10101. The Commission on Teacher Credentialing shall develop, on or before January 15th of each year, a status report on local, state, and federally funded bilingual-crosscultural teacher preparation programs. The report shall be made to the Legislature not later than February 15th of each year. The Board of Governors of the California Community Colleges, the Trustees of the California State University, and the Regents of the University of California shall, by November 15 of each year, report to the Commission on Teacher Credentialing with reference to their programs in bilingual-crosscultural teacher training. The report shall include, but not be limited to, information on special classes or programs leading to a certificate of competence for bilingual-crosscultural instruction, preservice or in-service programs offered by these institutions to bilingual-crosscultural teachers or teacher aides, the number of persons enrolled in the programs, and any other relevant data requested by the Commission on Teacher Credentialing.

SEC. 10. Section 10103 of the Education Code is amended to read:

10103. The Commission on Teacher Credentialing shall, with the assistance of a representative appointed by the Superintendent of Public Instruction, the Chancellor of the California Community Colleges, the Chancellor of the California State University, the President of the University of California, and with five presently practicing teachers appointed by the Superintendent of Public Instruction, design a comprehensive language and culture curriculum for teachers who are already certificated. The curriculum shall be designed to enable teachers to qualify for the bilingual-crosscultural certificate of competence authorized pursuant to Section 44253.5. Initial programs to assist in the development of this shall be offered at not less than five public institutions of higher education in California, beginning not later than September 1, 1977.

SEC. 11. Section 10105 of the Education Code is amended to read:

10105. The Board of Governors of the California Community Colleges and the Trustees of the California State University shall, within their respective systems, establish a policy of recruitment and appointment of professors of bilingual-crosscultural education.

SEC. 12. Section 12090 of the Education Code is amended to read:

12090. Subject to the provisions of this article, the State Department of Education acting by and through the Director of Education is hereby authorized to enter into an agreement, or agreements, with the Veterans Administration, or any other agency of the federal government, for the education of veterans in any of the schools of the public school system, except the California State University. The contract shall provide for the payment to the schools through the State Department of Education or otherwise of the maximum amount permitted by the act, or acts, of Congress under which the agreement, or agreements, is entered into by the Veterans Administration, or any other agency of the federal government.

SEC. 13. Section 22509 of the Education Code is amended to read:

22509. Members who on January 1, 1976, are in state service positions according to former Section 13948 as it read on December 31, 1975, or who are employees of the Trustees of the California State University, may elect in writing prior to July 1, 1976, not to continue as members of this system and to transfer membership to the Public Employees' Retirement System. Failure to execute and file the election, which shall be received in the office of this system by the close of business on June 30, 1976, shall be deemed a decision to remain as a member of this system.

SEC. 14. Section 23918 of the Education Code is amended to read:

23918. Any retirant whose last employment was in the California State University, as a member of this system or the Public Employees' Retirement System, may serve as a member of the teaching staff of the California State University and shall be subject to the employment limitations as provided by the Public Employees' Retirement Law (Part 3 (commencing with Section 20000) of Division 5 of Title 2 of the Government Code).

SEC. 15. Section 23921 of the Education Code is amended to read:

23921. Upon retaining the services of a retirant as an employee under the provisions of Section 23918 or 23919, the school district, community college district, county superintendent of schools, California State University, or other employing agency shall do both of the following:

(a) Advise the retirant of the earnings limitation set forth in Sections 23918 and 23919.

(b) Maintain accurate records of the retirant's earnings and report those earnings monthly to the system and the retirant regardless of the method of payment or the fund from which the payments were made.

This section shall not be construed to make any school district, community college district, county superintendent of schools, the California State University, or other employing agency liable for any amount paid to the retirant in excess of the earnings limitation under any circumstance, including the failure to inform the retirant that continuation of service would exceed the limitations.

SEC. 16. Section 32220 of the Education Code is amended to read:

32220. As used in this chapter:

(a) "Educational institution" means a school district, a community college district, a state university, the University of California, and the State Department of Education special schools.

(b) "Governing board" means the governing board of a school district or community college district, the Trustees of the California State University, and the Regents of the University of California.

(c) "Member of an athletic team" means member of any extramural athletic team engaged in athletic events on or outside the school grounds, maintained or sponsored by the educational institution or a student body organization thereof. "Member of an athletic team" also includes members of school bands or orchestras, cheerleaders and their assistants, pompon girls, team managers and their assistants, and any student or pupil selected by the school or student body organization to directly assist in the conduct of the athletic event, including activities incidental thereto, but only while such members are being transported by or under the sponsorship or arrangements of the educational institution or a student body organization thereof to or from a school or other place of instruction and the place at which the athletic event is being conducted.

Organized rooting sections, student body members who are spectators, and other spectator students, who are not actually participating in the conduct of the athletic event, are not members of an athletic team. Participants in a playday or field day activity occurring occasionally during a school year, in which students of one or more particular grade levels from two or more schools of a school district or community college district participate in athletic contests, are not members of an athletic team. Nothing in this subdivision shall be construed as prohibiting a governing board from extending the applicability of the provisions of this article to any of those persons, should the governing board elect so to do.

(d) "Student body organization" means any student organization under supervision of the educational institution or its officers.

SEC. 17. Section 32221 of the Education Code is amended to read:

32221. The governing board of any educational institution, except a school district or community college district and except the State Department of Education special schools as defined in Sections 59000, 59100, and 59200, shall provide for each member of an athletic team insurance protection for medical and hospital expenses resulting from accidental bodily injuries in an amount of at least five thousand dollars ($5,000) for all services for each member of an athletic team, through group, blanket, or individual policies of accident insurance from authorized insurers, or through a benefit and relief association described in paragraph (1) of subdivision (c) of Section 10493 of the Insurance Code. The coverage shall be for the injury to members of athletic teams arising while the members are engaged in or are preparing for an athletic event promoted under the sponsorship or arrangements of the educational institution or a student body organization thereof or while the members are being

transported by or under the sponsorship or arrangements of the educational institution or a student body organization thereof to or from school or other place of instruction and the place of the athletic event. However, the Trustees of the California State University and the Regents of the University of California may authorize and require the student body organizations designated pursuant to this section, to be responsible for such medical and hospital expenses in any amount the trustees or the regents may specify, up to two hundred fifty dollars ($250), in which event the insurance protection for the health and accident expenses may include a deductible clause in the same amount.

The governing board of each school district or community college district and the State Department of Education special schools as defined in Sections 59000, 59100, and 59200 shall provide for each member of an athletic team insurance protection for medical and hospital expenses resulting from accidental bodily injuries in one of the following amounts:

(a) A group or individual medical plan with accidental benefits of at least two hundred dollars ($200) for each occurrence and major medical coverage of at least ten thousand dollars ($10,000), with no more than one hundred dollars ($100) deductible and no less than 80 percent payable for each occurrence.

(b) Group or individual medical plans which are certified by the Insurance Commissioner to be equivalent to the required coverage of at least one thousand five hundred dollars ($1,500).

(c) At least one thousand five hundred dollars ($1,500) for all medical and hospital expenses.

Insurance protection in any of the above amounts shall be provided through group, blanket, or individual policies of accident insurance from authorized insurers or through a benefit and relief association described in paragraph (1) of subdivision (c) of Section 10493 of the Insurance Code. The coverage shall be for the injury to members of athletic teams arising while the members are engaged in or are preparing for an athletic event promoted under the sponsorship or arrangements of the educational institution or a student body organization thereof or while the members are being transported by or under the sponsorship or arrangements of the school districts or community college districts or a student body organization thereof to or from school or other place of instruction and the place of the athletic event. Minimum medical benefits under any insurance required by this subdivision shall be equivalent to the three dollars and fifty cents ($3.50) conversion factor as applied to the unit values contained in the minimum fee schedule adopted by the Division of Industrial Accidents of the Department of Industrial Relations, effective October 1, 1966.

The Trustees of the California State University and the Board of Regents of the University of California shall designate any student body organizations the trustees and the regents deem appropriate to bear the entire cost of the insurance under this article, in such

proportions as they deem equitable, and shall make appropriate deductions from any student body organization funds held by the institutions, or otherwise take such measures, as will assure the payment thereof.

The governing boards of the various school districts or community college districts and the State Department of Education special schools shall require that each member of an athletic team have insurance protection as prescribed by this section, with the costs of the insurance protection to be paid either out of the funds of the district or the funds of the student body, or by any other persons on behalf of, the individual team members or students covered by the insurance. In the event that the governing board of a school district or community college district should determine that a member of an athletic team or the parents, guardian, or other person having charge or control of a member of an athletic team are financially unable to pay the costs of insurance protection, then the governing board shall require the costs of the protection to be paid either out of funds of the district or funds of the student body.

The insurance required by this article shall be issued by an admitted insurer, or through a benefit and relief association described in paragraph (1) of subdivision (c) of Section 10493 of the Insurance Code.

The insurance otherwise required by this section shall not be required for any individual team member or student who has insurance or a reasonable equivalent of health benefits coverage provided for him or her in any other way or manner, including, but not limited to, purchase by himself or herself, or by his or her parent or guardian.

SEC. 18. Section 32320 of the Education Code is amended to read:

32320. No state-owned college, university, or other school shall charge any tuition, or incidental fees to any of the following:

(a) Any dependent receiving assistance under Article 2 (commencing with Section 890) of Chapter 4 of Division 4 of the Military and Veterans Code.

(b) Any child of any veteran of the United States military service who has a service-connected disability, and whose annual income not including governmental compensation for such service-connected disability, does not exceed five thousand dollars ($5,000).

(c) Any child of any veteran who has been killed in service or has died of a service-connected disability, where the annual income of the child, including the value of any support received from a parent, and the annual income of a surviving parent, does not exceed five thousand dollars ($5,000).

Nothing contained in this section shall prevent the Regents of the University of California from charging to and collecting from nonresident students an admission fee and rate of tuition nor shall anything in this section prevent the charging and collecting of fees required of nonresident students admitted to schools under the jurisdiction of the State Department of Education or the Director of

Education or to a state university under the jurisdiction of the Trustees of the California State University.

This section shall not apply to a dependent of a veteran within the meaning of paragraph (4) of subdivision (a) of Section 890 of the Military and Veterans Code.

SEC. 19. Section 33031 of the Education Code is amended to read:

33031. The board shall adopt rules and regulations not inconsistent with the laws of this state (a) for its own government, (b) for the government of its appointees and employees, (c) for the government of the day and evening elementary schools, the day and evening secondary schools, and the technical and vocational schools of the state, and (d) for the government of other schools, excepting the University of California and the California State University, as may receive in whole or in part financial support from the state.

The rules and regulations adopted shall be published for distribution as soon as practicable after adoption.

SEC. 20. Section 33113 of the Education Code is amended to read:

33113. The Superintendent of Public Instruction shall prescribe regulations under which contracts, agreements, or arrangements may be made with agencies of the federal government for funds, services, commodities, or equipment to be made available to schools of the public school system, except the California State University.

SEC. 21. Section 33115 of the Education Code is amended to read:

33115. The Superintendent of Public Instruction may enter into an agreement with the government of the United States or any agency thereof relative to the establishment of courses of study in aeronautics in the technical schools of the public school system, except the California State University.

SEC. 22. The heading of Article 4 (commencing with Section 37050) of Chapter 1 of Part 22 of the Education Code is amended to read:

Article 4. Contracts with the California State University

SEC. 23. Section 39363.5 of the Education Code, as amended by Section 1 of Chapter 643 of the Statutes of 1981, is amended to read:

39363.5. Except as provided for in Article 2 (commencing with Section 39030) of Chapter 1, the sale or lease with an option to purchase of real property by a school district shall be in accordance with the following priorities and procedures.

(a) First, the property shall be offered for park or recreational purposes pursuant to Article 8 (commencing with Section 54220) of Chapter 5 of Part 1 of Division 2 of Title 5 of the Government Code, in any instance in which that article is applicable.

(b) Second, the property shall be offered for sale or lease with an option to purchase, at fair market value, in both of the following ways:

(1) In writing, to the Director of General Services, the Regents of the University of California, the Trustees of the California State

e jurisdiction of the

f a veteran within the
of Section 890 of the

ie is amended to read;
nd regulations not
its own government,
mployees, (c) for the
y schools, the day and
nd vocational schools
ner schools, excepting
a State University, as
port from the state.
ll be published for
ion.
de is amended to read:
uction shall prescribe
nts, or arrangements
overnment for funds,
de available to schools
orn[illegible]te University.
de is amended to read:
uction may enter into
United States or any
of courses of study in
public school system,

mencing with Section
on Code is amended to

a State University

Code, as amended by
81, is amended to read:
2 (commencing with
ase with an option to
shall be in accordance

r park or recreational
with Section 54220) of
he Government Code,
cable.
or sale or lease with an
both of the following

ervices, the Regents of
f California State

University, the county and city in which the property is situated, and to any public housing authority in the county in which the property is situated.

(2) By public notice to any public district, public authority, public agency, public corporation, or any other political subdivision in this state, to the federal government, and to any charitable corporation determined by the Secretary of State to be a public benefit corporation under Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code. Public notice shall consist of at least publishing its intention to dispose of the real property in a newspaper of general circulation within the district, or if there is no newspaper of general circulation within the district, then in any newspaper of general circulation that is regularly circulated in the district. The notice shall specify that the property is being made available to all public districts, public authorities, public agencies, and other political subdivisions or public corporations in this state, and to nonprofit public benefit corporations.

Publication of notice pursuant to this section shall be once each week for three successive weeks. Three publications in a newspaper regularly published once a week or more often, with at least five days intervening between the respective publication dates not counting the publication dates, are sufficient. The written notice required by paragraph (1) of this subdivision shall be mailed no later than the date of the second published notice.

The entity desiring to purchase or lease the property shall, within 60 days after the third publication of notice, notify the school district of its intent to purchase or lease the property. If the entity desiring to purchase or lease the property and the district are unable to arrive at a mutually satisfactory price or lease payment during the 60-day period after the third publication of notice, the property may be disposed of as otherwise provided in this section. In the event the district receives offers from more than one entity pursuant to this subdivision, the school district governing board shall accept the highest offer. If two or more entities make the same offer, which is also the highest offer, the board shall seek an additional higher offer from all these entities. In the event no additional higher offer is made, the board may determine which of the original highest offers to accept.

Before accepting any written proposal, the board shall call for oral bids from entities with a priority pursuant to this subdivision, or with a higher priority. If, upon the call for oral bidding, an entity offers to purchase the property or to lease the property for a price or rental exceeding by at least 5 percent, the highest written proposal, after deducting the commission, if any, to be paid a licensed real estate broker, shall be finally accepted. Final acceptance shall not be made, however, until the oral bid is reduced to writing and signed by the offeror.

(c) Third, the property may be disposed of in any other manner

authorized by law.

This section shall remain in effect only until January 1, 1988, and as of that date is repealed, unless a later enacted statute, which is chaptered before January 1, 1988, deletes or extends such date.

SEC. 24. Section 39363.5 of the Education Code, as amended by Section 2 of Chapter 643 of the Statutes of 1981, is amended to read:

39363.5. Except as provided for in Article 2 (commencing with Section 39030) of Chapter 1, the sale or lease with an option to purchase of real property by a school district shall be in accordance with the following priorities and procedures.

(a) First, the property shall be offered for park or recreational purposes pursuant to Article 8 (commencing with Section 54220) of Chapter 5 of Part 1 of Division 2 of Title 5 of the Government Code, in any instance in which that article is applicable.

(b) Second, the property shall be offered for sale or lease with an option to purchase, at fair market value in both of the following ways:

(1) In writing, to the Director of General Services, the Regents of the University of California, the Trustees of the California State University, the county and city in which the property is situated, and to any public housing authority in the county in which the property is situated.

(2) By public notice to any public district, public authority, public agency, public corporation, or any other political subdivision in this state, to the federal government, and to nonprofit charitable corporations existing on December 31, 1979, and organized pursuant to Part 3 (commencing with Section 10200) of Division 2 of Title 1 of the Corporations Code then in effect or organized on or after January 1, 1980, as a public benefit corporation under Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code. Public notice shall consist of at least publishing its intention to dispose of the real property in a newspaper of general circulation within the district, or if there is no newspaper of general circulation in the district, then in any newspaper of general circulation that is regularly circulated in the district. The notice shall specify that the property is being made available to all public districts, public authorities, public agencies, and other political subdivisions or public corporations in this state, and to other nonprofit charitable or nonprofit public benefit corporations.

Publication of notice pursuant to this section shall be once each week for three successive weeks. Three publications in a newspaper regularly published once a week or more often, with at least five days intervening between the respective publication dates not counting the publication dates, are sufficient. The written notice required by paragraph (1) shall be mailed no later than the date of the second published notice.

The entity desiring to purchase or lease the property shall, within 60 days after the third publication of notice, notify the school district of its intent to purchase or lease the property. If the entity desiring to purchase or lease the property and the district are unable to arrive

at a mutually satisfactory price or lease payment during the 60-day period, the property may be disposed of as otherwise provided in this section. In the event the district receives offers from more than one entity pursuant to this subdivision, the school district governing board may determine which of such offers to accept.

(c) Third, the property may be disposed of in any other manner authorized by law.

This section shall become operative January 1, 1988.

SEC. 25. Section 44212 of the Education Code is amended to read:

44212. The Superintendent of Public Instruction, the Regents of the University of California, the Trustees of the California State University, the California Postsecondary Education Commission, and the Association of Independent California Colleges and Universities shall each appoint a representative to serve as member ex officio without vote in proceedings of the commission.

The ex officio members shall not vote in any proceedings of the commission nor in any of its committees or subcommittees, except, by a majority vote of the commission, ex officio members may be permitted to vote in committees or subcommittees in order to establish a quorum as otherwise determined by majority vote of the commission.

SEC. 26. Section 44315 of the Education Code is amended to read:

44315. Notwithstanding any provisions of law or administrative regulations, a California state university may approve a "diversified" or a "liberal arts" degree, provided that all coursework used to meet such requirements is provided in the several academic schools or departments, other than the school or department of education or educational methodology, of the institution.

SEC. 27. Section 44521 of the Education Code is amended to read:

44521. The University of California, the California State University, or any private institution of higher education may participate in the program prescribed in this article.

SEC. 28. Section 44522 of the Education Code is amended to read:

44522. Any school district may enter into an agreement with the University of California, the California State University, or any private institution of higher education to participate in the New Careers Program prescribed in this article.

SEC. 29. Section 44525 of the Education Code is amended to read:

44525. An intern shall be enrolled in at least a 6-week, but not more than a 12-week, preservice program at the participating university, campus of the California State University, or private institution of higher education.

SEC. 30. Section 44528 of the Education Code is amended to read:

44528. An intern shall enroll in a course of study at the participating university, campus of the California State University, or private institution of higher education which will lead to a baccalaureate degree and a teaching credential.

SEC. 31. Section 44529 of the Education Code is amended to read:

44529. The team leader and his or her interns shall, in addition to

teaching duties, be afforded time for a teacher education program to be carried out under the guidance of the team leader in cooperation with the participating university, campus of the California State University, or private institution of higher education.

SEC. 32. Section 44531 of the Education Code is amended to read:

44531. The participating school district shall pay to the intern an amount equivalent to the tuition fees or college or university fees, or both, if levied, upon the intern attending the participating university, campus of the California State University, or private institution of higher education.

SEC. 33. Section 44534 of the Education Code is amended to read:

44534. The participating university, campus of the California State University, and private institution of higher education shall fund its own costs involved in the program prescribed by this article.

SEC. 34. Section 44574 of the Education Code is amended to read:

44574. The governing board of any school district may contract with institutions of higher education, including the University of California, the California State University, and private institutions, and with research centers or regional education laboratories for any of these institutions, centers, or laboratories, to furnish academic and consulting services for purposes of a staff development project. The school district shall be deemed the contracting agency and shall be responsible for coordination and administration of the staff development project.

SEC. 35. Section 44585 of the Education Code is amended to read:

44585. The governing board of any school district may contract with institutions of higher education, including the University of California, the California State University, and private institutions, and with research centers or regional education laboratories for any of these institutions, centers, or laboratories, to furnish academic and consulting services for purposes of a staff development project. The school district shall be deemed the contracting agency and shall be responsible for coordination and administration of the staff development project.

SEC. 36. Section 44857 of the Education Code is amended to read:

44857. Each person employed by the governing board of a school district for a position requiring certification qualifications shall, not later than 60 days after the date fixed by the governing board of the district for the commencement of the person's service, register, in the manner prescribed by Section 44310, a valid certification document issued on or before that date, authorizing the person to serve in the position for which he or she was employed, and shall, not later than 60 days after the renewal thereof, register the renewed certification document in the manner prescribed by Section 44310. If any person so employed is the holder of a California State University, or state teachers college, diploma accompanied by the certificate of the State Board of Education, or of an educational or life diploma of this state, and has presented the diploma to, and has had his or her name recorded by, the county superintendent of

ducation program to
eader in cooperation
the California State
cation.
e is amended to read:
pay to the intern an
or university fees, or
g the participating
niversity, or private

le is amended to read:
ous of the California
igher education shall
scribed by this article.
le is amended to read:
district may contract
ing the University of
d private institutions,
on laboratories for any
fu academic and
elopment project. The
g agency and shall be
tration of the staff

de is amended to read:
district may contract
ing the University of
d private institutions,
on laboratories for any
furnish academic and
elopment project. The
g agency and shall be
tration of the staff

de is amended to read:
rning board of a school
qualifications shall, not
overning board of the
's service, register, in
a valid certification
horizing the person to
nployed, and shall, not
register the renewed
bed by Section 44310.
of a California State
accompanied by the
n educational or
e diploma to, and has
ty superintendent of

10 05

schools of the county, the person shall be deemed to have registered the diploma under Section 44310.

SEC. 37. Section 52342 of the Education Code is amended to read:

52342. In the implementation of this article, the State Department of Education shall, on a regular basis, advise and consult with representatives of the Employment Development Department, the office of the Chancellor of the California Community Colleges, the California Postsecondary Education Commission, the University of California, the Chancellor of the California State University, the Commission on Teacher Credentialing, the Department of Industrial Relations, the Department of Consumer Affairs, the California Advisory Council on Vocational Education and Technical Training, and the State Personnel Board.

SEC. 38. Section 54405 of the Education Code is amended to read:

54405. (a) The State Board of Education may establish programs of the following types:

(1) Establishment of new curricula or modification of existing curricula in connection with the education and training of prospective teachers, to incorporate instruction in methods and techniques developed by competent authorities designed to enable teachers effectively to teach disadvantaged children.

(2) Research and consultative work projects undertaken to assist state and local public school agencies in carrying out their responsibilities under this chapter.

(3) Independently, or in cooperation with any public or private agency or organization, engaging in research and development undertakings directed to overcoming disadvantage, together with related activities involving evaluation, demonstration, and dissemination of findings having to do with programs of compensatory education.

(b) It is the intent and aim of the Legislature that the University of California and the California State University participate to the extent practicable with local public school agencies and the State Board of Education in their endeavors under this chapter. It is recommended that greater attention be devoted in the training of teachers to their preparation in the techniques and skills required to cope with the problems of disadvantaged children at the preschool as well as the elementary and secondary level. The University of California and the California State University are urged to participate at the local level in the programs being administered by the local public school authorities and agencies, and to provide all technical and personnel services practicable.

SEC. 39. Section 54632 of the Education Code is amended to read:

54632. (a) A "program improvement school" is an elementary school, a junior high school, or a high school designated as such by the district and approved by the State Board of Education.

(b) A "community resource committee" is a committee appointed by the director of each program improvement school at least one-half of the membership of which is made up of parents of

10 05

children participating in the program. The committee shall assist the director and the director's staff to plan and implement the educational program, identify community resources which could be utilized in the program, and inform the community of the proposed program. The membership of the community resource committee may include, in addition to parents of children participating in the program, but need not be limited to:

(1) Parents of other pupils served by the school.

(2) Pupils enrolled in the school.

(3) Representatives of the community college, campus of the California State University, or university participating in the project.

(4) Other individuals representing business and industry, organized labor, and representatives of local law enforcement, welfare, and employment agencies.

(c) If a parent advisory committee has been established for the school pursuant to Title I of the Elementary and Secondary Education Act of 1965, the director may, at his or her election, designate it to serve as the community resource committee in lieu of the committee otherwise to be appointed pursuant to subdivision (b).

SEC. 40. Section 59006 of the Education Code is amended to read:

59006. The Superintendent of Public Instruction may authorize the California School for the Deaf to establish and maintain teacher training courses designed to prepare teachers of the public schools and such other persons holding a credential issued by the State Board of Education as are recommended by the president of a campus of the California State University, to give instruction to the deaf and the hard of hearing. The Superintendent of Public Instruction shall prescribe standards for the admission of persons to the courses, and for the content of the courses.

The California School for the Deaf may enter into agreements with the Trustees of the California State University, the University of California, or any other university or college accredited by the State Board of Education as a teacher training educational institution, to provide practice teaching required for issuance of the credential authorizing the holder to teach the deaf and severely hard of hearing. The agreement may provide a reasonable payment, for services rendered, to teachers of the California School for the Deaf who have practice teachers under their direction.

SEC. 41. Section 59143 of the Education Code is amended to read:

59143. The Superintendent of Public Instruction may authorize the California School for the Blind to establish and maintain, either independently or in cooperation with the University of California or the Trustees of the California State University, teacher training courses for teachers of the blind. The Superintendent of Public Instruction shall establish standards for the admission of persons to the courses, and for the content thereof.

The California School for the Blind may enter into agreements with the Trustees of the California State University, the University

nittee shall assist the
nd implement the
rces which could be
nity of the proposed
resource committee
participating in the

hool.

ege, campus of the
pating in the project.
ness and industry,
l law enforcement,

n established for the
ary and Secondary
his or her election,
ce committee in lieu
rsuant to subdivision

e is amended to read:
uction may authorize
and maintain teacher
of the public schools
ed by the State Board
sident of a campus of
on to the deaf and the
blic Instruction shall
ns to the courses, and

into agreements with
ty, the University of
credited by the State
cational institution, to
nce of the credential
nd severely hard of
sonable payment, for
a School for the Deaf
tion.

de is amended to read:
uction may authorize
and maintain, either
versity of California or
sity, teacher training
rintendent of Public
n of persons to

nter into agreements
versity, the University

of California, or any other university or college accredited by the State Board of Education as a teacher training educational institution, to provide practice teaching required for issuance of the credentials authorizing the holder to teach the visually handicapped, the deaf-blind, or provide orientation and mobility instruction. The agreement may provide a reasonable payment, for services rendered, to teachers of the California School for the Blind who have practice teachers under their direction.

SEC. 42. Section 59211 of the Education Code is amended to read:

59211. The Superintendent of Public Instruction may, in cooperation with an accredited college or university, authorize the California schools for neurologically handicapped children to establish and maintain teacher training courses designed to prepare teachers to instruct neurologically handicapped children in special classes in the public school system. The Superintendent of Public Instruction, in cooperation with an accredited college or university, shall prescribe standards for the admission of persons to the courses, and for the contents of the courses. Courses conducted in the schools shall be counted toward requirements of a credential in the area of the educationally handicapped upon the establishment of the credential.

The diagnostic schools for neurologically handicapped children may enter into agreements with the Trustees of the California State University, the University of California, or any other university or college accredited by the State Board of Education as a teacher training educational institution, to provide practice teaching required for issuance of the credential authorizing the holder to teach the educationally handicapped. The agreement may provide a reasonable payment, for services rendered, to teachers of the diagnostic schools for neurologically handicapped children who have practice teachers under their direction.

SEC. 43. Section 60313 of the Education Code is amended to read:

60313. The Superintendent of Public Instruction shall establish and maintain a central clearinghouse-depository and duplication center for specialized textbooks, reference books, recordings, study materials, tangible apparatus, equipment, and other similar items for the use of visually handicapped students enrolled in the public schools of California who may require their use as shall be determined by the state board.

The instructional materials in specialized media shall be available to other handicapped minors enrolled in the public schools of California who are unable to benefit from the use of conventional print copies of textbooks, reference books, and other study materials in a manner determined by the state board.

The specialized textbooks, reference books, recordings, study materials, tangible apparatus, equipment, and other similar items shall be available for use by visually handicapped students enrolled in the public community colleges, the California State University, and the University of California.

SEC. 44. Section 66010 of the Education Code is amended to read:

66010. Public higher education consists of (a) all public community colleges, (b) the California State University, and each campus, branch, and function thereof, (c) each campus, branch, and function of the University of California, and (d) the California Maritime Academy.

SEC. 45. Section 66011 of the Education Code is amended to read:

66011. It is hereby declared to be the policy of the Legislature that all resident applicants to California institutions of public higher education, who are determined to be qualified by law or by admission standards established by the respective governing boards, should be admitted to either (1) the public community colleges, (2) the California State University, or (3) the University of California.

SEC. 46. Section 66016 of the Education Code is amended to read:

66016. It is the intent of the Legislature that opportunities for participation in intercollegiate athletic programs in the community colleges, in the campuses of the California State University, and in the campuses of the University of California be provided on as equal a basis as is practicable to male and female students.

The costs of providing these equal opportunities may vary according to the type of sports contained within the respective men's and women's athletic programs. Therefore it is also the intent of the Legislature that additional sources of revenue should be determined to provide additional funds for these equal opportunity programs.

SEC. 47. Section 66102 of the Education Code is amended to read:

66102. For purposes of this chapter, "public higher education" shall consist of (a) all public community colleges, (b) the California State University, and each campus, branch, and function thereof, (c) each campus, branch, and function of the University of California, and (d) the California Maritime Academy.

SEC. 48. Section 66202 of the Education Code is amended to read:

66202. It is further the intent of the Legislature that the following categories be established, insofar as practicable in the following order, for the purpose of enrollment planning and admission priority practice at the undergraduate resident student level for the California State University and the University of California:

(1) Continuing undergraduate students in good standing.

(2) California residents who have successfully completed the first two years of their baccalaureate program.

(3) California residents entering at the freshman or sophomore levels.

It is further the intent of the Legislature that within each of the preceding enrollment categories, the following groups of applicants receive priority consideration in admissions practice in the following order:

(a) Residents of California who are recently released veterans of the armed forces of the United States.

(b) Transfers from California public community colleges.

(c) Applicants who have been previously enrolled at the campus

to which they are applying, provided they left such institution in good standing.

(d) Applicants who have a degree or credential objective that is not generally offered at other public institutions of higher learning within California.

(e) Applicants for whom the distance involved in attending another institution would create financial or other hardships.

It is further the intent of the Legislature that those veterans referred to in subdivision (a) who were enrolled in good standing at a campus of the University of California or at one of the California state universities prior to military service receive priority over other veterans recently released from military service.

(4) Residents of other states and foreign countries.

The segments may, in implementing these enrollment plans and admissions priorities, consider the overall needs of students in maintaining a balanced program and a quality curriculum.

SEC. 49. Section 66203 of the Education Code is amended to read:

66203. The California State University and the University of California shall keep a record of the applicants denied admission and develop and utilize an information collection system which indicates the number of qualified applicants who could not be accommodated at their campus of first choice and were redirected to campuses of alternate choice and the number of qualified redirected applicants who declined an offer of admission to an alternate campus.

SEC. 50. Section 66300 of the Education Code is amended to read:

66300. The Regents of the University of California, the Trustees of the California State University, and the governing board of every community college district, shall adopt or provide for the adoption of specific rules and regulations governing student behavior along with applicable penalties for violation of the rules and regulations. The institutions shall adopt procedures by which all students are informed of such rules and regulations, with applicable penalties, and any revisions thereof.

SEC. 51. Section 66500 of the Education Code is amended to read:

66500. The University of California may provide instruction in the liberal arts and sciences and in the professions, including the teaching professions. It shall have exclusive jurisdiction in public higher education over instruction in the profession of law and over graduate instruction in the professions of medicine, dentistry, and veterinary medicine. It has the sole authority in public higher education to award the doctoral degree in all fields of learning, except that it may agree with the California State University to award joint doctoral degrees in selected fields. It shall be the primary state-supported academic agency for research.

SEC. 52. The heading of Chapter 8 (commencing with Section 66600) of Part 40 of the Education Code is amended to read:

CHAPTER 8. CALIFORNIA STATE UNIVERSITY

SEC. 53. Section 66601 of the Education Code is amended to read:

66601. Whenever, in any law, the term "Trustees of the State College System of California" or "Trustees of the California State University," or the term "chief executive officer of the state college system" is used, such terms shall be deemed to mean the Trustees of the California State University and the Chancellor of the California State University, respectively.

SEC. 54. Section 66605 of the Education Code is amended to read:

66605. If the trustees and the Regents of the University of California both consent, the Chancellor of the California State University shall sit with the Regents of the University of California in an advisory capacity and the President of the University of California shall sit with the trustees in an advisory capacity.

SEC. 55. Section 66606 of the Education Code is amended to read:

66606. The Trustees of the California State University shall succeed to the powers, duties, and functions with respect to the management, administration, and control of the state colleges heretofore vested in the State Board of Education or in the Director of Education, including all powers, duties, obligations, and functions specified in Article 2 (commencing with Section 90010) of Chapter 8 of Part 55, and all obligations assumed by the State Board of Education pursuant to that article prior to July 1, 1961.

On and after July 1, 1961, the Trustees of the California State University shall have full power and responsibility in the construction and development of any state university campus, and any buildings or other facilities or improvements connected with the California State University. The powers shall be exercised by the Trustees of the California State University notwithstanding the provisions of Chapter 2 (commencing with Section 14100) and Chapter 3 (commencing with Section 14250) of Part 5 of Division 3 of Title 2 of the Government Code, except that the powers shall be carried out pursuant to the procedures prescribed by these laws.

The Trustees of the California State University may accept gifts of land, or gifts of options on land, may accept and expend gifts of money for the purchase of land or options on land, and may enter into negotiations and contracts for the purchase of land for a future state university site in the vicinity of any of the areas specified in the recommendations contained in the Master Plan for Higher Education printed on page 42, paragraph 5, Senate Journal (Regular Session) for February 1, 1960, except that the gifts, expenditures, negotiations, and contracts shall not obligate the expenditure of any state funds for the purchase of the land or for development on the land, unless the Legislature shall subsequently approve the obligation by appropriating the funds for that specific purpose.

Any acceptance, acceptance and expenditure, or negotiations and contract may be conditioned upon an automatic reversion back to the donor or automatic termination of the negotiations and contract

if a new state university is not established at a specific site prior to a specific date designated by the trustees and the donor or the trustees and the person or corporation with whom the trustees are negotiating or contracting.

SEC. 56. Section 66607 of the Education Code is amended to read:

66607. The California State University shall be entirely independent of all political and sectarian influence and kept free therefrom in the appointment of its trustees and in the administration of its affairs, and no person shall be debarred admission to any department of the state university on account of sex.

SEC. 57. Section 66609 of the Education Code is amended to read:

66609. All state employees employed on June 30, 1961, in carrying out functions transferred to the Trustees of California State University by this chapter, except persons employed by the Director of Education in the Division of State Colleges and Teacher Education of the Department of Education, are transferred to the California State University.

Nonacademic employees so transferred shall retain their respective positions in the state service, together with the personnel benefits accumulated by them at the time of transfer, and shall retain such rights as may attach under the law to the positions which they held at the time of transfer. All nonacademic positions filled by the trustees on and after July 1, 1961, shall be by appointment made in accordance with Chapter 5 (commencing with Section 89500) of Part 55, and persons so appointed shall be subject to the provisions of Chapter 5.

The trustees shall provide, or cooperate in providing, academic and administrative employees transferred by this section with personnel rights and benefits at least equal to those accumulated by them as employees of the state colleges, except that any administrative employee may be reassigned to an academic or other position commensurate with his or her qualifications at the salary fixed for that position. An administrative employee so reassigned shall have a right to appeal from such reassignment, but only as to whether the position to which he or she is reassigned is commensurate with his or her qualifications. All academic and administrative positions filled by the trustees on and after July 1, 1961, shall be filled by appointment made solely at the discretion of the trustees. The trustees shall establish and adjust the salaries and classifications of all academic, nonacademic, and administrative positions and neither Section 18004 of the Government Code nor any other provision of law requiring approval by a state officer or agency for salaries or classifications shall be applicable thereto. In establishing and adjusting salaries, consideration shall be given to the maintenance of the state university in a competitive position in the recruitment and retention of qualified personnel in relation to other educational institutions, private industry, or public jurisdictions which are employing personnel with similar duties and

responsibilities. The establishment and adjustment of salaries for nonacademic employees shall be in accordance with the standards prescribed in Section 18850 of the Government Code. The trustees, however, shall make no adjustments which require expenditures in excess of existing appropriations available for the payment of salaries. The provisions of Chapter 5 (commencing with Section 89500) of Part 52 relating to appeals from dismissal, demotion, or suspension shall be applicable to academic employees.

Persons excluded from the transfer made by this section shall retain all the rights and privileges conferred upon civil service employees by law. Personnel of state agencies employed in state university work other than those transferred by this section and who are employed by the trustees prior to July 1, 1962, shall be provided with personnel rights and benefits at least equal to those accumulated by them as employees of such state agencies.

If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 12 (commencing with Section 3560) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action, except that if the provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

SEC. 58. Section 66901 of the Education Code is amended to read:

66901. There is hereby created the California Postsecondary Education Commission, which shall be advisory to the Governor, the Legislature, other appropriate governmental officials, and institutions of postsecondary education. The commission shall be composed of the following members:

(a) One representative of the Regents of the University of California designated by the regents, one representative of the Trustees of the California State University designated by the trustees, and one representative of the Board of Governors of the California Community Colleges designated by the board. Representatives of the regents, the trustees, and the board of governors shall be chosen from among the appointed members of their respective boards, but in no instance shall an ex officio member of a governing board serve on the commission.

(b) One representative of the independent California colleges and universities which are accredited by a national or regional association which is recognized by the United States Department of Education. This member shall be appointed by the Governor from a list or lists submitted by an association or associations of those institutions.

(c) The chair or the designee of the chair of the Council for Private Postsecondary Educational Institutions.

(d) The President of the State Board of Education or his or her designee from among the other members of the board.

(e) Nine representatives of the general public appointed as

follows: three by the Governor, three by the Senate Rules Committee, and three by the Speaker of the Assembly. It is the intent of the Legislature that the commission be broadly and equitably representative of the general public in the appointment of its public members and that the appointing authorities, therefore, shall confer to assure that their combined appointments include adequate representation on the basis of sex and on the basis of the significant racial, ethnic, and economic groups in the state.

No person who is employed by any institution of public or private postsecondary education shall be appointed to or serve on the commission, except that a person who is not a permanent, full-time employee and who has part-time teaching duties which do not exceed six hours per week may be appointed to and serve on the commission.

The commission members designated in subdivisions (a), (c), and (d) shall serve at the pleasure of their respective appointing authorities. The member designated in subdivision (b) shall serve a three-year term. The members designated in subdivision (e) shall each serve a six-year term. The respective appointing authority may appoint an alternate for each member who may, during the member's absence, serve on the commission and vote on matters before the commission. When vacancies occur prior to expiration of terms, the respective appointing authority may appoint a member for the remainder of the term.

Any person appointed pursuant to this section may be reappointed to serve additional terms.

Any person appointed pursuant to this section who no longer has the position which made him or her eligible for appointment may nonetheless complete his or her term of office on the commission.

No person appointed pursuant to this section shall, with respect to any matter before the commission, vote for or on behalf of, or in any way exercise the vote of, any other member of the commission.

The commission shall meet as often as it deems necessary to carry out its duties and responsibilities.

Any member of the commission who in any calendar year misses more than one-third of the meetings of the full commission forfeits his or her office, thereby creating a vacancy.

The commission shall select a chair from among the members representing the general public. The chair shall hold office for a term of one year and may be selected to successive terms.

There is established an advisory committee to the commission and the director, consisting of the chief executive officers of each of the public segments, or their designees, the Superintendent of Public Instruction or his or her designee, and an executive officer from each of the groups of institutions designated in subdivisions (b) and (c) to be designated by the respective commission representative from such groups. Commission meeting agenda items and associated documents shall be provided to the committee in a timely manner for its consideration and comments.

The commission may appoint any subcommittees or advisory committees it deems necessary to advise the commission on matters of educational policy. The advisory committees may consist of commission members or nonmembers or both, including students, faculty members, segmental representatives, governmental representatives, and representatives of the public.

The commission shall appoint and may remove a director in the manner hereinafter specified. The director shall appoint persons to any staff positions the commission may authorize.

The commission shall prescribe rules for the transaction of its own affairs, subject, however, to all the following requirement and limitations:

(1) The votes of all representatives shall be recorded.

(2) Effective action shall require the affirmative vote of a majority of all the duly appointed members of the commission, not including vacant commission seats.

(3) The affirmative votes of two-thirds of all the duly appointed members of the commission, not including vacant commission seats, shall be necessary to the appointment of the director.

SEC. 59. Section 66903.1 of the Education Code is amended to read:

66903.1. The commission shall report to the Legislature and the Governor on March 1, 1980, and every two years thereafter until, and including, 1984, on the representation and utilization of ethnic minorities and women among academic, administrative, and other employees at the California State University, the University of California, and the public community colleges. To prepare this report, the commission shall collect data from each of the three segments of public postsecondary education. The format for this data shall be the higher education staff information form required biennially from all institutions of higher education by the Federal Equal Employment Opportunity Commission, the collection of which is coordinated by the California Postsecondary Education Commission.

(a) The higher education staff information form includes all the following types of data:

(1) The number of full-time employees by job categories, ethnicity, sex, and salary ranges.

(2) The number of full-time faculty by ethnicity, sex, rank, and tenure.

(3) The number of part-time employees by job categories (including tenured, nontenured or tenure track, and other nontenured academic employees), ethnicity, and sex.

(4) The number of full-time new hires by job categories (including tenured, nontenured or tenure track, and other nontenured academic employees), ethnicity, and sex.

(b) In addition to the above, the segments shall submit to the commission all the following:

(1) Promotion and separation data for faculty and staff employees

emittees or advisory
mmission on matters
rees may consist of
, including students,
ves, governmental
blic.
ove a director in the
ll appoint persons to
ize.
ransaction of its own
g requirement and

recorded.
ive vote of a majority
nission, not including

l the duly appointed
nt commission seats,
irector.
Code is amended to

Le ture and the
thereafter until, and
utilization of ethnic
nistrative, and other
, the University of
es. To prepare this
n each of the three
e format for this data
tion form required
ation by the Federal
n, the collection of
econdary Education

form includes all the

by job categories,

nicity, sex, rank, and

by job categories
track, and other
nd sex.
by job categories
track, and other
nd sex.
shall submit to the

a aff employees

10 010

by ethnicity and sex for each of the two-year time periods beginning with 1977 to 1979.

(2) Narrative evaluation examining patterns of underutilization of women and minority employees among different job categories compared with the availability of qualified women and minorities for different job categories.

(3) Narrative evaluation examining specific results of affirmative action programs in reducing underutilization of women and minorities.

(4) Narrative evaluation of both strengths and inadequacies of current affirmative action programs, including inadequacies resulting from budgetary constraints.

(c) For purposes of this section, minorities and ethnic minorities shall include those persons defined as such by rules and regulations of the Federal Equal Employment Opportunity Commission.

This section shall remain in effect until January 1, 1985, and as of that date is repealed.

SEC. 60. Section 66904 of the Education Code is amended to read:

66904. It is the intent of the Legislature that sites for new institutions or branches of the University of California and the California State University, and the classes of off-campus centers as the commission shall determine, shall not be authorized or acquired unless recommended by the commission.

It is further the intent of the Legislature that California community colleges shall not receive state funds for acquisition of sites or construction of new institutions, branches, or off-campus centers unless recommended by the commission. Acquisition or construction of nonstate-funded community college institutions, branches, and off-campus centers, and proposals for acquisition or construction shall be reported to and may be reviewed and commented upon by the commission.

It is further the intent of the Legislature that existing or new institutions of public education, other than those described in subdivisions (b) and (c) of Section 66010, shall not be authorized to offer instruction beyond the 14th grade level.

All proposals for new postsecondary educational programs shall be forwarded to the commission for review together with such supporting materials and documents as the commission may specify. The commission shall review the proposals within a reasonable length of time, which time shall not exceed 60 days following submission of the program and the specified materials and documents. For the purposes of this section, "new postsecondary educational programs" means all proposals for new schools or colleges, all series of courses arranged in a scope or sequence leading to (1) a graduate or undergraduate degree, or (2) a certificate of a type defined by the commission, which have not appeared in a segment's or district's academic plan within the previous two years, and all proposals for new research institutes or centers which have not appeared in a segment's or district's academic plan within the

10 010

previous two years.

It is further the intent of the Legislature that the advice of the commission be utilized in reaching decisions on requests for funding new and continuing graduate and professional programs, enrollment levels, and capital outlay for existing and new campuses, colleges, and off-campus centers.

SEC. 61. Section 67003 of the Education Code is amended to read:

67003. The Trustees of the California State University on behalf of the California State University, the Regents of the University of California on behalf of the university, the Board of Governors of the California Community Colleges on behalf of the community colleges, and the Board of Governors of the California Maritime Academy on behalf of the California Maritime Academy, are vested with all power and authority to perform all acts necessary to receive the benefits and to expend the funds provided by the act of Congress described in Section 67000 and with all necessary power and authority to cooperate with the government of the United States, or any agency or agencies thereof, and with the California Postsecondary Education Commission for the purpose of receiving the benefits and expending the funds provided by the act of Congress, in accordance with the act, or any rules or regulations adopted thereunder, or any state plan or rules or regulations of the California Postsecondary Education Commission adopted in accordance with the act of Congress. Whenever necessary to secure the full benefits of the act of Congress for loans or grants for academic facilities, the trustees, regents, or boards of governors may give any required security and may comply with any conditions imposed by the federal government.

SEC. 62. Section 67124 of the Education Code is amended to read:

67124. Whenever a student transfers from one public or private institution of postsecondary education to another within the state, appropriate records or a copy thereof shall be transferred by the former community college, college, or university upon a request from the student. However, the community college, college, or university from which the student is transferring may notify the student that his or her records will be transferred upon payment by the student of all fees and charges due the community college, college, or university. Any community college, college, or university making such a transfer of records shall notify the student of his or her right to receive a copy of the record and of his or her right to a hearing to challenge the content of the record.

The California State University Board of Trustees and the Regents of the University of California may adopt rules and regulations concerning transfer of records to, from, or between schools under their respective jurisdictions.

SEC. 63. Section 67146 of the Education Code is amended to read:

67146. The California State University Board of Trustees shall adopt appropriate rules and regulations to insure the orderly implementation of this chapter.

SEC. 64. Section 68011 of the Education Code is amended to read:

68011. "Institution" means the University of California, the California State University, the California Maritime Academy, or a California community college.

SEC. 65. Section 68012 of the Education Code is amended to read:

68012. "Governing board" means the Regents of the University of California, the Trustees of the California State University, the Board of Governors of the California Maritime Academy, or the Board of Governors of the California Community Colleges.

SEC. 66. Section 68022 of the Education Code is amended to read:

68022. "Resident classification" means classification as a resident, pursuant to Section 68017, at the University of California, the California State University, and the California Maritime Academy, and as a district resident, pursuant to Section 68019, or a nondistrict resident, pursuant to Section 68020, at a California community college.

SEC. 67. Section 68040 of the Education Code is amended to read:

68040. Each student shall be classified as: (a) a resident or nonresident at the University of California, the California State University, or the California Maritime Academy; or (b) a district resident, nondistrict resident, or nonresident at a California community college.

SEC. 68. Section 68121 of the Education Code is amended to read:

68121. (a) Notwithstanding any other provisions of law to the contrary, no fees or tuition of any kind shall be required of or collected by the Trustees of the California State University from any surviving child, natural or adopted, of a deceased person who met all the following requirements:

(1) Who was a resident of this state.

(2) Who was employed by a public agency.

(3) Whose principal duties consisted of active law enforcement service or active fire suppression and prevention, except a person whose principal duties were clerical even though such a person was subject to occasional call or was occasionally called upon to perform duties within the scope of active law enforcement or active fire suppression and prevention.

(4) Who was killed in the performance of active law enforcement or active fire suppression and prevention duties or who died as a result of an accident or an injury caused by external violence or physical force, incurred in the performance of his or her active law enforcement or active fire suppression and prevention duties.

(b) As used in this section, "public agency" means the state or any city, county, district, or other local authority or public body of or within this state.

SEC. 69. Section 68123 of the Education Code is amended to read:

68123. Notwithstanding any other provision of law, the Trustees of the California State University may enter into agreements with other universities or colleges located within the state whereby qualified students from campuses of the California State University

may attend the other universities or colleges without payment of some or all fees or tuition, or both, charged by the other institutions, and students from the other institutions may attend campuses of the California State University without payment of some or all of the fees or tuition, or both, charged by the state university. During any year, however, the number of students attending campuses of the California State University from other universities or colleges, pursuant to the agreements entered in between the Trustees of the California State University and other universities and colleges, shall not exceed the number of students of the California State University attending the other institutions.

SEC. 70. Section 68124 of the Education Code is amended to read:

68124. The trustees may enter into agreements with public colleges and universities in other states whereby qualified students from the California State University may attend the other college or university without payment of any tuition fee charged by that institution to persons who are nonresidents of the state in which it is situate, and students from that institution may attend the California State University without payment of the nonresident tuition established pursuant to Section 89705. No nonresident tuition shall be charged of students attending a campus of the California State University pursuant to an agreement entered into under this section. During any year, however, the number of students attending the California State University from a particular public college or university in another state, pursuant to the agreement, shall not exceed the number of the California State University students attending the institution under that agreement.

SEC. 71. Section 68133 of the Education Code is amended to read:

68133. If an action is brought against a governing board as the result of the application of this chapter, that governing board shall inform the governing boards of the other institutions regarding the litigation. If an action is brought against a district governing board as a result of the application of this chapter, that district governing board shall inform the Board of Governors of the California Community Colleges, who shall inform the Regents of the University of California, the Trustees of the California State University, and the Board of Governors of the California Maritime Academy regarding the pending litigation.

SEC. 72. Section 69271 of the Education Code is amended to read:

69271. The term "family physician," as used in this chapter, means a primary care physician who is prepared to and renders continued comprehensive and preventative health care services to families and who has received specialized training in an approved family practice residency for three years after graduation from an accredited medical school.

The terms "associated" and "affiliated," as used in this chapter, mean that relationship that exists by virtue of a formal written agreement between a hospital or other health care delivery system and an approved medical school which pertains to the family

practice training program for which state contract funds are sought. This definition shall include agreements which may be entered into subsequent to October 2, 1973, as well as those relevant agreements which are in existence prior to October 2, 1973.

The term "commission," as used in this chapter, means the Health Manpower Policy Commission.

The term "programs which train primary care physician's assistants," as used in this chapter, means a program which has been approved for the training of primary care physician's assistants pursuant to Section 3513 of the Business and Professions Code.

The term "programs which train primary care nurse practitioners," as used in this chapter, means a program which is operated by a California school of medicine or nursing, or which is authorized by the Regents of the University of California or by the Trustees of the California State University, or which is approved by the Board of Registered Nursing.

SEC. 73. Section 69534.3 of the Education Code is amended to read:

69534.3. (a) The technical advisory committee shall be composed of all the following:

(1) Five students, one from each of the entities specified in paragraphs (3) to (7), inclusive, shall be selected by the Director of the California Postsecondary Education Commission.

(2) Two high school counselors, selected by the Superintendent of Public Instruction.

(3) Two representatives of the California Community Colleges, selected by the Chancellor of the Community Colleges.

(4) Two representatives of the California State University, selected by the Chancellor of the California State University.

(5) Two representatives of the University of California, selected by the President of the University of California.

(6) Two representatives of independent colleges and universities, selected by the Director of the California Postsecondary Education Commission.

(7) Two representatives of private postsecondary education, selected by the Council on Private Postsecondary Education.

It is the intent of the Legislature that at least one of the representatives from each segment of postsecondary education be a practicing, campus-based student financial aid officer.

(b) Committee members shall receive no remuneration, other than reimbursement for actual and necessary expenses allowed by the State Board of Control incurred in the performance of their duties on the committee.

(c) Each committee member shall file annual financial disclosure statements required by the Fair Political Practices Commission.

(d) The Student Aid Commission shall provide staff support to the technical advisory committee during its evaluation of forms and processors. No member of the Student Aid Commission shall serve as a voting member of the technical advisory committee.

SEC. 74. The heading of Article 7 (commencing with Section 69620) of Chapter 2 of Part 42 of the Education Code is amended to read:

Article 7. California State University Educational Opportunity Program

SEC. 75. Section 69620 of the Education Code is amended to read:

69620. There is a state student assistance program which shall be known as the State University Educational Opportunity Program. It shall be the purpose of the program to provide educational assistance and grants for undergraduate study at the California State University to students who are economically disadvantaged or educationally and economically disadvantaged, but who display potential for success in accredited curricula offered by the California State University.

For the purposes of this chapter:

(a) "Trustees" means the Trustees of the California State University.

(b) "Educational agency" means an agency, other than a federal agency, which is supported in whole or in part by funds appropriated for educational purposes.

(c) "State agency" means every state office, officer, department, division, bureau, board, and commission.

(d) The residence of a recipient shall be determined in accordance with the rules for determining residence prescribed by Chapter 1 (commencing with Section 68000) of Part 41 and Article 1 (commencing with Section 89700) of Chapter 6 of Part 52.

SEC. 76. Section 69621 of the Education Code is amended to read:

69621. California State University Educational Opportunity Program grants may be awarded to persons selected for enrollment in programs authorized by the trustees according to the procedures established by the trustees. A person selected for a grant shall be a resident of this state, shall be a high school graduate or have, pursuant to the procedures, equivalent qualifications, and shall have been nominated by his or her high school, the Veterans Administration, a state agency or educational agency designated by the trustees, or a state university president. The trustees shall determine eligibility for grants awarded pursuant to this chapter. The grants may be granted and renewed according to standards set by the trustees until the student has received a baccalaureate degree or has completed five academic years, whichever occurs first. In special circumstances, as in the case of illness, military service, or family hardship, the trustees may renew the grant beyond the fifth year of study, provided the student has not received a baccalaureate degree. When the recipient is an enrollee in a special educational opportunity program approved by the trustees, for the purposes of this chapter, the state university sponsoring the program shall receive from the trustees reimbursement of up to sixty dollars ($60)

per month per enrollee up to 12 months' support.

SEC. 77. Section 69622 of the Education Code is amended to read:

69622. Grants shall be provided for students who display potential for success in accredited curricula offered by the California State University, but lack the necessary funds to pay for tuition, books, and room and board, provided the students meet the standards of the state university which they are attending or the requirements for the special admissions program established by the trustees.

SEC. 78. Section 69624 of the Education Code is amended to read:

69624. Each high school in this state may nominate to the trustees students it deems deserving of the grants made available under this chapter. The trustees shall compile a list of students so nominated from which it may select students for grants in accordance with standards set by the trustees pursuant to this chapter. The Veterans Administration, any state agency, or educational agency designated by the trustees, or any president of a California State University may nominate persons whom they deem eligible for the grants.

SEC. 79. Section 69625 of the Education Code is amended to read:

69625. Records of the academic progress of each student attending a campus of the California State University under a grant shall be kept by each campus of the California State University having a program and forwarded to the trustees in order that the program created by this chapter may be evaluated.

SEC. 80. Section 69626 of the Education Code is amended to read:

69626. Each campus of the California State University may submit plans for a special educational opportunity program for approval by the trustees. Each program qualifying shall be authorized a program director and may be authorized as many special qualified counselors and advisers and the related operating and equipment support as is appropriate.

SEC. 81. Section 69627 of the Education Code is amended to read:

69627. This chapter shall be known as the California State University Educational Opportunity Act.

SEC. 82. Section 70022 of the Education Code is amended to read:

70022. The board of governors shall obtain the following services from the Trustees of the California State University pursuant to a contract providing for compensation, either in direct payment or by means of the exchange of services or use of facilities, to the trustees for the services:

(a) Legal services.

(b) Legislative representation.

(c) Assistance in curriculum development to the extent requested by the board of governors.

SEC. 83. Section 78001 of the Education Code is amended to read:

78001. The governing board of a community college district may contract with the Trustees of the California State University for the maintenance of a community college in a state university situated in the district. Any contract executed pursuant to this section shall

include among its provisions a requirement that all expenditures incurred for community college maintenance shall be payable only on order of the governing board as all other expenditures of the district are payable, and an additional provision that the president of the state university shall serve as president of the community college and in that capacity shall be responsible to the governing board through the superintendent of schools of the district if there is one. Otherwise he or she shall be responsible directly to the governing board.

SEC. 84. Section 81363.5 of the Education Code is amended to read:

81363.5. Except as provided for in Article 9 (commencing with Section 81190) of Chapter 1, the sale or lease with an option to purchase of real property by a community college district shall be in accordance with the following priorities and procedures.

(a) First, the property shall be offered for park or recreational purposes pursuant to Article 8 (commencing with Section 54220) of Chapter 5 of Part 1 of Division 2 of Title 5 of the Government Code, in any instance in which such article is applicable.

(b) Second, the property shall be offered for sale or lease with an option to purchase, at fair market value;

(1) In writing, to the Director of General Services, the Regents of the University of California, the Trustees of the California State University, the county and city in which the property is situated, and to any public housing authority in the county in which the property is situated; and

(2) By public notice to any public district, public authority, public agency, public corporation, or any other political subdivision in this state, to the federal government, and to nonprofit charitable corporations existing on December 31, 1979, and organized pursuant to Part 3 (commencing with Section 10200) of Division 2 of Title 1 of the Corporations Code then in effect or organized for charitable purposes on or after January 1, 1980, under Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code. Public notice shall consist of at least publishing its intention to dispose of the real property in a newspaper of general circulation within the district, or if there is no such newspaper, then in any newspaper of general circulation that is regularly circulated in the district. The notice shall specify that the property is being made available to all public districts, public authorities, public agencies, and other political subdivisions or public corporations in this state, and to other nonprofit charitable or nonprofit public benefit corporations.

Publication of notice pursuant to this section shall be once each week for three successive weeks. Three publications in a newspaper regularly published once a week or more often, with at least five days intervening between the respective publication dates not counting such publication dates, are sufficient. The written notice required by paragraph (1) of this subdivision shall be mailed no later than the date of the second published notice.

The entity desiring to purchase or lease the property shall, within 60 days after the third publication of notice, notify the community college district of its intent to purchase or lease the property. If the entity desiring to purchase or lease the property and the district are unable to arrive at a mutually satisfactory price or lease payment during the 60-day period, the property may be disposed of as otherwise provided in this section. In the event the district receives offers from more than one entity pursuant to this subdivision, the school district governing board may, in its discretion, determine which of the offers to accept.

(c) Third, the property may be disposed of in any other manner authorized by law.

SEC. 85. Section 84500 of the Education Code is amended to read:

84500. (a) (1) Except as otherwise provided, in computing the average daily attendance of a community college district, there shall be included only the attendance of students while engaged in educational activities required of students and under the immediate supervision and control of an employee of the district who possessed a valid certification document, authorizing him or her to render service in the capacity and during the period in which he or she served.

(2) A community college district may also include the attendance of students enrolled in approved courses or programs of independent study, including courses or programs formerly conducted as coordinated instruction systems, who are under the supervision, control, and evaluation, but not necessarily in the immediate presence, of an employee of the district who possesses a valid certification document. Such attendance may only be included for college level credit courses and programs which are accepted for completion of an appropriate educational sequence leading to an associate degree, and which generally are recognized upon transfer by an institution of the University of California or the California State University.

The community college district shall determine the nature, manner, and place of conducting any independent study course or program in accordance with rules and regulations adopted by the Board of Governors of the California Community Colleges to implement the purposes of this subdivision. The rules and regulations shall require community college districts to ensure that the components of each individual study course or program for each student shall be set out in a written record which includes the goals and methodology of the course or program, the number of units and hours of study required, the arrangements for consultation with the instructor, the work product to be evaluated, and the college facility required. The rules and regulations shall also provide for input from, and participation by, faculty, who are selected by academic senates or faculty councils, and students, in the development and evaluation of approved educational courses and programs.

The board of governors or its designee shall study the educational

and fiscal effects of the authorization provided by this subdivision and shall report to the Legislature prior to June 30, 1981, on the appropriateness of deleting or extending the authorization, as well as other changes that should be made.

(b) For the purpose of work experience education programs in the community colleges meeting the standards of the California State Plan for Vocational Education, "immediate supervision" of off-campus work training stations means student participation in on-the-job training as outlined under a training agreement, coordinated by the community college district under a state-approved plan, wherein the employer and certificated school personnel share the responsibility for on-the-job supervision. The student/instructor ratio in the work experience program shall not exceed 125 students per full-time equivalent certificated coordinator.

(c) For purposes of computing the average daily attendance of a community college district, attendance shall also include student attendance and participation in in-service training courses in the areas of police, fire, corrections, and other criminal justice system occupations that conform to all apportionment attendance and course of study requirements otherwise imposed by law, if the courses are fully open to the enrollment and participation of the public. However, prerequisites for the courses shall not be established or construed so as to prevent academically qualified persons not employed by agencies in the criminal justice system from enrolling in and attending the courses.

(d) Notwithstanding subdivision (c) and any regulations adopted pursuant thereto, a community college may give preference in enrollment to persons employed by, or serving in a voluntary capacity with, a fire protection or fire prevention agency in any course of in-service fire training at the community college in cooperation with any fire protection or fire prevention agency or association. Preference shall only be given when such persons could not otherwise complete the course within a reasonable time and when no other training program is reasonably available. At least 15 percent of the enrollment in in-service fire training courses shall consist of persons who are neither volunteers of, nor employed by, a fire protection or prevention agency or association, if the persons are available to attend a course. Average daily attendance for the courses shall be reported for state aid.

(e) Subdivision (d) shall apply only to the following:

(1) Community colleges which, in cooperation with any fire protection or fire prevention agency or association, have been, as of January 1, 1980, the primary source of in-service fire training for any fire protection or fire prevention agency or association.

(2) Community colleges which, in cooperation with any fire protection or fire prevention agency or association, establish in-service fire training for any fire protection or fire prevention agency or association which did not have in-service fire training prior

Environmental Health who shall be registered as sanitarians by the department and shall have had at least two years' experience as directors in the State of California.

(b) Three members, each of whom shall be a qualified, practicing sanitarian who has been registered by the State of California for a period of five or more years.

(c) One member from the California Conference of Local Health Officers.

(d) Two members from the faculty of any campus of the California State University which has curricula leading to a degree in environmental health. The members may be from the same or from different campuses.

(e) One public member. The public member ~~shall not have~~ been engaged at any time within five years immediately preceding his or her appointment in pursuits which lie within the field of environmental health or the profession regulated by the advisory committee of which he or she is a member.

SEC. 200. Section 10203.1 of the Insurance Code is amended to read:

10203.1. Life insurance conforming to all the following conditions is another form of group life insurance:

(a) Written under a policy covering, when issued, not less than 25 employees of the Trustees of the California State University in eligible classes as designated by the trustees pursuant to Section 89506 of the Education Code.

(b) Written under a policy issued to the Trustees of the California State University pursuant to Section 89506 of the Education Code.

(c) The premium on the policy is to be paid by the employees alone, or in part by the State of California, with the remainder to be paid by the employees. Payment of the premium by a third party on behalf of the employees shall be considered payment by the employees.

(d) Insuring only the employees of the Trustees of the California State University.

(e) Insuring for amounts of insurance based upon some plan which will preclude individual selection.

(f) Insuring for the benefit of persons other than the Trustees of the California State University.

(g) Written under a policy insuring, when issued, not less than 75 percent of all such employees eligible for insurance under the policy, or 75 percent of the employees of any class thereof reasonably determined by conditions pertaining to employment or of any established unit thereof not formed for the purpose of procuring insurance. However, if a group policy is intended to insure several classes or units, it may be issued as respects any class or unit, of which 75 percent are covered and extended to other units or classes as 75 percent thereof express the desire to be covered. In such case, when the employees apply and pay for additional amounts of insurance, a smaller percentage of employees may be insured for additional

amounts of insurance. If any employee fails to become insured under an existing policy when he or she becomes eligible and later wishes to become insured thereunder, the insurer may require satisfactory evidence of insurability before insurance is granted on the employee.

SEC. 201. Section 1720.3 of the Labor Code is amended to read:

1720.3. For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California.

SEC. 202. Section 602.10 of the Penal Code is amended to read:

602.10. Every person who, by physical force and with the intent to prevent attendance or instruction, willfully obstructs or attempts to obstruct any student or teacher seeking to attend or instruct classes at any of the campuses or facilities owned, controlled, or administered by the Regents of the University of California, the Trustees of the California State University, or the governing board of a community college district shall be punished by a fine not exceeding five hundred dollars ($500), by imprisonment in a county jail for a period of not exceeding one year, or by both such fine and imprisonment.

As used in this section, "physical force" includes, but is not limited to, use of one's person, individually or in concert with others, to impede access to, or movement within, or otherwise to obstruct the students and teachers of the classes to which the premises are devoted.

SEC. 203. Section 626 of the Penal Code is amended to read:

626. (a) As used in this chapter:

(1) "University" means the University of California, and includes any affiliated institution thereof and any campus or facility owned, operated, or controlled by the Regents of the University of California.

(2) "State university" means any California state university, and includes any campus or facility owned, operated, or controlled by the Trustees of the California State University.

(3) "Community college" means any public community college established pursuant to the Education Code.

(4) "School" means any elementary school, junior high school, four-year high school, senior high school, adult school or any branch thereof, opportunity school, continuation high school, regional occupational center, evening high school, or technical school.

(5) "Chief administrative officer" means:

(i) The president of the university or a state university, the Chancellor of the California State University, or the officer designated by the Regents of the University of California or pursuant to authority granted by the Regents of the University of California to administer and be the officer in charge of a campus or other facility owned, operated, or controlled by the Regents of the University of California, or the superintendent of a community

(5) The receiver, trustee in bankruptcy, trustee or successor thereof, and the legal representative of a deceased person.

(b) All individuals performing services within this state for any employing unit which maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this division.

SEC. 217. Section 12004 of the Unemployment Insurance Code is amended to read:

12004. It is the intent of the Legislature that the board in carrying out career opportunities development programs pursuant to this division shall provide for both of the following:

(a) Close coordination between career opportunities development programs and related activities under the Federal Intergovernmental Personnel Act (Public Law 91-648).

(b) Clear, direct, and systematic involvement by representatives of cities, counties, educational agencies, including, but not limited to, the California Community Colleges, the California State University, and the University of California, and lay representatives, especially those which represent low-income and minority persons.

SEC. 218. Section 22855 of the Vehicle Code is amended to read:

22855. The following persons shall have the authority to make appraisals of the value of vehicles for purposes of this chapter, subject to the conditions stated in this chapter:

(a) Any member of the California Highway Patrol designated by the commissioner.

(b) Any regularly employed and salaried deputy sheriff or other employee designated by the sheriff of any county.

(c) Any regularly employed and salaried police officer or other employee designated by the chief of police of any city.

(d) Any officer or employee of the Department of Motor Vehicles designated by the director of that department.

(e) Any member of the California State Police designated by the chief thereof.

(f) Any regularly employed and salaried police officer or other employee of the University of California Police Department designated by the chief thereof.

(g) Any regularly salaried employee of a city, county, or city and county designated by a board of supervisors or a city council pursuant to subdivision (a) of Section 22702.

(h) Any regularly employed and salaried police officer or other employee of the police department of a California State University designated by the chief thereof.

(i) Any regularly employed and salaried security officer or other employee of a transit district security force designated by the chief thereof.

(j) Any regularly employed and salaried peace officer or other employee of the Department of Parks and Recreation designated by the director of that department.

SEC. 219. Any section of any act enacted by the Legislature

, trustee or successor
ceased person.
ithin this state for any
or more separate
ıed to be employed by
of this division.
nent Insurance Code is

ıt the board in carrying
rams pursuant to this
ng:
areer opportunities
es under the Federal
aw 91-648).
ent by representatives
ling, but not limited to,
ornia State University,
esentatives, especially
rity persons.
de is amended to read:
the authority to make
of this chapter, subject

y Patrol designated by

deputy sheriff or other
ounty.
police officer or other
f any city.
nent of Motor Vehicles
nt.
lice designated by the

police officer or other
Police Department

ity, county, or city and
ors or a city council

police officer or other
ornia State University

ecurity officer or other
esignated by the chief

peace officer or other
creation designated by

ed by the Legislature

during the 1983 calendar year, which takes effect on or before January 1, 1983, and which amends, amends and renumbers, adds, repeals and adds, or repeals a section amended, amended and renumbered, repealed and added, or repealed by this act, shall prevail over this act, whether that act is enacted prior to, or subsequent to, this act.

CHAPTER 144

An act to amend Section 1305.1 of the Penal Code, relating to crime.

[Approved by Governor June 28, 1983. Filed with Secretary of State June 28, 1983.]

The people of the State of California do enact as follows:

SECTION 1. Section 1305.1 of the Penal Code is amended to read:

1305.1. If an assessment is made a condition of discharging the forfeiture under Section 1305, and the surety or depositor is not present in court, the clerk of the court shall within 30 days mail notice thereof to the surety or depositor at the address of its principal office and shall execute a certificate of mailing and place it in the court's file in the case. The time limit for payment shall in no event be less than 30 days after the date of mailing of such notice.

If the assessment has not been paid by the date specified, the court shall determine if a certificate of mailing has been executed, and if none has, the court shall cause a notice to be mailed to the surety or depositor, and said surety or depositor shall be allowed an additional 30 days to pay the assessment.

CHAPTER 145

An act to amend Sections 630, 35100, 35101, 35105, 35109, 35110, 35401, 35411, 35784, and 42030 of, to add Sections 320.5 and 35401.5 to, and to repeal Sections 35103, 35106.5, 35108, 35112, 35114, 35115, 35116, and 35117 of, the Vehicle Code, relating to vehicles, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor June 28, 1983. Filed with Secretary of State June 28, 1983.]

The people of the State of California do enact as follows:

SECTION 1. Section 320.5 is added to the Vehicle Code, to read:

CHAPTER 278

An act to amend Section 1720 of the Labor Code, relating to public works.

[Became law without Governor's signature. Filed with Secretary of State August 7, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 1720 of the Labor Code is amended to read:

1720. As used in this chapter, "public works" means:

(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

SEC. 2. This act shall become operative only if Assembly Bill 680 is enacted in the 1989–90 Regular Session of the Legislature and adds Section 143 to the Streets and Highways Code authorizing the Department of Transportation to enter into agreements with private entities for the construction by, and lease to, private entities of public transportation demonstration projects. In that case, this act shall become operative on the operative date of Assembly Bill 680, or as soon as possible thereafter.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the

California Constitution.

CHAPTER 279

An act to amend Section 2775.5 of the Public Utilities Code, relating to public utilities.

[Approved by Governor August 30, 1989. Filed with Secretary of State August 31, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 2775.5 of the Public Utilities Code is amended to read:

2775.5. (a) If an electrical or gas corporation desires to manufacture, lease, sell, or otherwise own or control any solar energy system, it shall submit to the commission, in such form as the commission may specify, a description of the proposed program of solar energy development which it desires to pursue. The corporation may pursue the program of solar energy development unless the commission, within 45 days after the commission has accepted the filing of the corporation's description pursuant to this subdivision, orders the corporation to obtain from the commission the authorization to do so as provided in this section. No such authorization shall be required for any solar energy system which is owned or controlled for experimental or demonstration purposes. As used in this subdivision, "experimental or demonstration purposes" means a limited program of installation, use, or development the sole purpose of which is to investigate the technical viability or economic cost effectiveness of a solar application.

(b) The commission shall deny the authorization sought if it finds that the proposed program will restrict competition or restrict growth in the solar energy industry or unfairly employ in a manner which would restrict competition in the market for solar energy systems any financial, marketing, distributing, or generating advantage which the corporation may exercise as a result of its authority to operate as a public utility. Before granting any such authorization, the commission shall find that the program of solar energy development proposed by the corporation will accelerate the development and use of solar energy systems in this state for the duration of the program.

(c) The commission shall suspend or terminate any authorization granted pursuant to this section whenever it finds and determines that the program of solar energy development no longer qualifies for the authorization under subdivision (b). This subdivision applies to all programs of solar energy development undertaken by a gas or electrical corporation pursuant to this section, including programs undertaken pursuant to subdivision (a) without formal authorization

CHAPTER 1224

An act to amend Sections 1773.5, 1775, and 1777.5 of, to add Sections 1720.4, 1771.5, 1771.6, 1771.7, and 1777.1 to, and to repeal and add Section 1777.7 of, the Labor Code, relating to public works.

[Approved by Governor October 1, 1989. Filed with Secretary of State October 1, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 1720.4 is added to the Labor Code, to read:

1720.4. For the limited purposes of this chapter, "public works" shall not include any otherwise covered work which meets all the following conditions:

(a) The work is performed entirely by volunteer labor.

(b) The work involves facilities or structures which are, or will be, used exclusively by, or primarily for or on behalf of, private nonprofit community organizations including, but not limited to, charitable, youth, service, veterans, and sports groups or associations.

(c) The work will not have an adverse impact on employment.

(d) The work is approved by the Director of Industrial Relations as meeting the requirements of this section.

For purposes of subdivision (c), the director shall request information on whether or not the work will have an adverse impact on employment from the appropriate local or state organization of duly authorized employee representatives of workers employed on public works.

SEC. 2. Section 1771.5 is added to the Labor Code, to read:

1771.5. (a) Nothwithstanding Section 1771, an awarding body shall not require the payment of the general prevailing rate of per diem wages or the general prevailing rate of per diem wages for holiday and overtime work for any public works project of twenty-five thousand dollars ($25,000) or less when the project is for construction work, or for any public works project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program pursuant to subdivision (b) for every public works project under the authority of the awarding body.

(b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements:

(1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of this chapter.

(2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.

(3) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll

7.5 of, to add Sections
d to repeal and add
public works.

filed with
.]

as follows:

Labor Code, to read:
pter, "public works"
which meets all the

nteer labor.
which are, or will be,
of, private nonprofit
mited to, charitable,
ssociations.
act on employment.
Industrial Relations

ector shall request
ve an adverse impact
state organization of
orkers employed on

or Code, to read:
, an awarding body
revailing rate of per
per diem wages for
works project of
nen the project is for
project of fifteen
ject is for alteration,
awarding body elects
rogram pursuant to
under the authority

compliance program
ing requirements:
ntracts shall contain
nents of this chapter.
with the contractor
d state labor law

shall maintain and
each weekly payroll

containing a statement of compliance signed under penalty of perjury.

(4) The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chapter.

(5) The awarding body shall withhold contract payments when payroll records are delinquent or inadequate.

(6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

SEC. 3. Section 1771.6 is added to the Labor Code, to read:

1771.6. Notwithstanding Sections 1730, 1731, and 1734, any political subdivision which enforces this chapter in accordance with Section 1771.5 shall, at the expiration of 90 days after the completion of the contract and the formal acceptance of the job, deposit all penalties or forfeitures withheld from any contract payment in the general fund of the political subdivision. Any court collecting any fines or penalties under the criminal provisions of this chapter, or any of the labor laws pertaining to public works, when the fines and penalties resulted from enforcement actions by a political subdivision pursuant to Section 1771.5, shall deposit the fines or penalties in the general fund of the political subdivision.

SEC. 4. Section 1771.7 is added to the Labor Code, to read:

1771.7. A contractor may appeal an enforcement action by a political subdivision pursuant to Section 1771.5 to the Director of Industrial Relations. Any ruling by the director shall be final and, notwithstanding Section 1732, any appeal shall waive the contractor's right to bring court action on the same issue.

SEC. 5. Section 1773.5 of the Labor Code is amended to read:

1773.5. The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter.

SEC. 6. Section 1775 of the Labor Code is amended to read:

1775. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the

amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both to pay each worker in full, the money shall be prorated among all workers.

SEC. 7. Section 1775 of the Labor Code is amended to read:

1775. The employer shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or under subcontract by the subcontractor. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the employer, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

137180

ar day or portion thereof
he prevailing wage rate
ntractor, and the body
serted in the contract a
d with.
oney due a contractor to
e in accordance with this
nd in all cases where the
yment by the awarding
shall notify the Division
ation and the Division of
with the assistance of the
any court of competent
amounts due provided
d not later than 90 days
ion in the office of the
e public work or some
er than 90 days after
st occurs. No issue other
the penalties allegedly
d in the action, and the
blish that the penalties
ot due.
both there shall first be
insufficient funds are
rker in full, the money

is amended to read:
o the state or political
ade or awarded, forfeit
lendar day, or portion
e prevailing rates as
ft in which the worker
the contract by the
ntractor. The amount
Labor Commissioner
contractor's mistake,
the correct rate of
contractor in meeting
ntractor's willful failure
mistake, inadvertence,
prevailing wages is not
his or her obligations
prevailing wage rates
alendar day or portion
an the prevailing wage
mployer, and the body
ted in the contract a
with.

To the extent that there is insufficient money due an employer to cover all penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the employer, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due under this section. This action shall be commenced not later than six months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than six months after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the employer for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the employer to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all the workers.

"Employer," as used in this section, means the contractor or the subcontractor, whichever one employs the worker.

SEC. 8. Section 1775 of the Labor Code is amended to read:

1775. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all wages and penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and

in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the wages and penalties due under this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. The division may maintain a court action whether or not it has an assignment of the wage claim of the worker. No issue other than that of the liability of the contractor for the wages and penalties due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all the workers.

SEC. 9. Section 1775 of the Labor Code is amended to read:

1775. The employer shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or under subcontract by the subcontractor. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the employer, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due an employer to cover all wages and penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the, employer the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with

noney payment
ding body shall
of the violation
f necessary with
an action in any
es and penalties
ed not later than
on in the office
public work or
in 90 days after
irs. The division
in assignment of
at of the liability
ll be determined
actor to establish
due.
here shall first be
icient funds are
n full, the money

nded to read:
state or political
awarded, forfeit
r day, or portion
evailing rates as
which the worker
contract by the
tor. The amount
or Commissioner
ractor's mistake,
correct rate of
ractor in meeting
or's willful failure
ce, inadvertence,
iling wages is not
r her obligations
ailing wage rates
lar day or portion
e prevailing wage
er, and the body
in the contract a

e an employer to
amounts due in
Section 1813, and
a money payment
arding body shall
nt of the violation
if necessary with

the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the wages and penalties due under this section. This action shall be commenced not later than six months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than six months after acceptance of the public work, whichever last occurs. The division may maintain a court action whether or not it has an assignment of the wage claim of the worker. No issue other than that of the liability of the employer for the wages and penalties due shall be determined in the action, and the burden shall be upon the employer to establish that the wages and penalties demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all the workers.

"Employer," as used in this section, means the contractor or the subcontractor, whichever one employs the worker.

SEC. 10. Section 1777.1 is added to the Labor Code, to read:

1777.1. (a) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible to bid on or to receive any public works contract for a period of not less than one year or more than three years. The period of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(b) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible to bid on or to receive any public works contract for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter. These periods of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(c) Any determination by the Labor Commissioner shall be made after a full investigation by the Labor Commissioner and a fair and impartial hearing and reasonable notice.

(d) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

(e) The Labor Commissioner shall promulgate rules and regulations for the administration and enforcement of this section,

the definition of terms, and appropriate penalties.

SEC. 11. Section 1777.5 of the Labor Code is amended to read:

1777.5. Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed, and shall be employed only at the work of the craft or trade to which he or she is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him or her, in performing any of the work under the contract or subcontract, employs workers in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. Every contractor and subcontractor shall submit contract award information to the applicable joint apprenticeship committee which shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices to be employed, and the approximate dates the apprentices will be employed. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of work performed by apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentices

ies.
is amended to read:
the employment of
orks.
ndard wage paid to
ır trade at which he
at the work of the

who are in training
prentice agreements
'0) of Division 3, are
e employment and
cordance with the
ments under which

ıwarded by the state
ır under him or her,
ract or subcontract,
rade, the contractor
nticeship committee
the craft or trade in
ficate approving the
ceship standards for
the area or industry
ed by the joint
l be subject to the
ticeship. The joint
equent to approving
ll arrange for the
contractor in order
d subcontractor shall
e applicable joint
de an estimate of
ontract, the number
roximate dates the
an affirmative duty
e or committees
the craft or trade in
equal employment
men and minorities.
required to submit
oint apprenticeship
ered by the local
ork performed by
oyed in the craft or
o stipulated in the
oint apprenticeship
se provided in this
e hour of apprentices

work for every five hours of labor performed by a journeyman. However, the minimum ratio for the land surveyor classification shall not be less than one apprentice for each five journeymen.

Any ratio shall apply during any day or portion of a day when any journeyman, or the higher standard stipulated by the joint apprenticeship committee, is employed at the job site and shall be computed on the basis of the hours worked during the day by journeymen so employed, except for the land surveyor classification. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the job site. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of a joint apprenticeship committee, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

The contractor or subcontractor, if he or she is covered by this section, upon the issuance of the approval certificate, or if he or she has been previously approved in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he or she employs apprentices in the craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by a journeyman, or in the land surveyor classification, one apprentice for each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio as set forth in this section. This section shall not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor, when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000) or 20 working days. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week, shall not be used to calculate the hourly ratio required by this section.

"Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(b) The number of apprentices in training in such area exceeds a

ratio of 1 to 5.

(c) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis, or on a local basis.

(d) Assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him or her, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he or she employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept the funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of the contributions in computing his or her bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of the contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to Section 3081.

SEC. 12. Section 1777.7 of the Labor Code is repealed.

SEC. 13. Section 1777.7 is added to the Labor Code, to read:

1777.7. (a) In the event a contractor or subcontractor willfully fails to comply with Section 1777.5, the Director of Industrial Relations shall deny to the contractor or subcontractor, both individually and in the name of the business entity under which the contractor or subcontractor is doing business, the right to bid on, or to receive, any public works contract for a period of up to one year

ticeable craft or trade is
eymen annually through
wide basis, or on a local

work performed under a
condition which would
y, or property of fellow
pecific task to which the
ure that training cannot

ization which represents
-to-5 ratio on a local or
will not be required to
proval . to local joint
ady covered by the local

is awarded, or any
forming any of the work
or apprentices in any
t contributing to a fund
prenticeship program in
he public work, to which
of the site of the public
he fund or funds in each
rneymen or apprentices
upon the same basis and
s do, but where the trust
e funds, contractors not
y a like amount to the
tractor or subcontractor
computing his or her bid
ndards Enforcement is
ontributions to the fund

se to be inserted in the
n. The stipulations shall
n this section for all
contractor.
committee under this

le is repealed.
abor Code, to read:
subcontractor willfully
Director of Industrial
subcontractor, both
entity under which the
the right to bid on, or
riod of up to one year

for the first violation and for a period of up to three years for the second and subsequent violations. Each period of debarment shall run from the date the determination of noncompliance by the Administrator of Apprenticeship becomes an order of the California Apprenticeship Council.

(b) A contractor or subcontractor who violates Section 1777.5 shall forfeit as a civil penalty the sum of fifty dollars ($50) for each calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(c) In lieu of the penalty provided for in subdivision (a) or (b), the director may for a first time violation and with the concurrence of the joint apprenticeship committee, order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the period of noncompliance.

(d) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(e) The interpretation and enforcement of Section 1777.5 and this section shall be in accordance with the rules and procedures of the California Apprenticeship Council.

SEC. 14. (a) Section 7 of this bill incorporates amendments to Section 1775 of the Labor Code proposed by both this bill and AB 254. It shall only become operative if (1) both bills are enacted and become effective January 1, 1990, (2) each bill amends Section 1775 of the Labor Code, and (3) SB 197 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after AB 254, in which case Sections 6, 8, and 9 of this bill shall not become operative.

(b) Section 8 of this bill incorporates amendments to Section 1775 of the Labor Code proposed by both this bill and SB 197. It shall only become operative if (1) both bills are enacted and become effective January 1, 1990, (2) each bill amends Section 1775 of the Labor Code, (3) AB 254 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after SB 197 in which case Sections 6, 7, and 9 of this bill shall not become operative.

(c) Section 9 of this bill incorporates amendments to Section 1775 of the Labor Code proposed by this bill, AB 254, and SB 197. It shall only become operative if (1) all three bills are enacted and become effective January 1, 1990, (2) all three bills amend Section 1775 of the Labor Code, and (3) this bill is enacted after AB 254 and SB 197, in which case Sections 6, 7, and 8 of this bill shall not become operative.

Section 12940 of the Government Code, and (3) this bill is enacted after AB 2265 and AB 1077, in which case Sections 5, 5.1, and 5.2 of this bill shall not become operative.

SEC. 15. Section 6.1 of this bill incorporates amendments to Section 12944 of the Government Code proposed by both this bill and AB 1077. It shall only become operative if (1) both bills are enacted and become effective on January 1, 1993, (2) each bill amends Section 12944 of the Government Code, and (3) this bill is enacted after AB 1077, in which case Section 6 of this bill shall not become operative.

SEC. 16. Section 7.1 of this bill incorporates amendments to Section 12965 of the Government Code proposed by both this bill and AB 311. It shall only become operative if (1) both bills are enacted and become effective on January 1, 1993, (2) each bill amends Section 12965 of the Government Code, and (3) this bill is enacted after AB 311 in which case Section 7 of this bill shall not become operative.

SEC. 17. (a) Section 8.1 of this bill incorporates amendments to Section 12993 of the Government Code proposed by both this bill and AB 1178. It shall only become operative if (1) both bills are enacted and become effective January 1, 1993, (2) each bill amends Section 12993 of the Government Code, (3) AB 1077 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after AB 1178, in which case Sections 8, 8.2, and 8.3 of this bill shall not become operative.

(b) Section 8.2 of this bill incorporates amendments to Section 12993 of the Government Code proposed by both this bill and AB 1077. It shall only become operative if (1) both bills are enacted and become effective January 1, 1993, (2) each bill amends Section 12993 of the Government Code, (3) AB 1178 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after AB 1077, in which case Sections 8, 8.1, and 8.3 of this bill shall not become operative.

(c) Section 8.3 of this bill incorporates amendments to Section 12993 of the Government Code proposed by this bill, AB 1178, and AB 1077. It shall only become operative if (1) all three bills are enacted and become effective January 1, 1993, (2) all three bills amend Section 12993 of the Government Code, and (3) this bill is enacted after AB 1178 and AB 1077, in which case Sections 8, 8.1, and 8.2 of this bill shall not become operative.

DISCRIMINATION—DISABLED PERSONS

CHAPTER 913

A.B. No. 1077

AN ACT to amend Section 125.6 of the Business and Professions Code, to amend Sections 51, 51.5, 51.8, 52, 53, 54, 54.1, 54.2, 54.3, and 54.8 of the Civil Code, to amend Section 224 of the Code of Civil Procedure, to amend Sections 44100, 44101, 44337, and 44338 of the Education Code, to amend Sections 754 and 754.5 of the Evidence Code, to amend Sections 4450, 4500, 11135, 12920, 12921, 12926, 12931, 12940, 12944, 12993, 19230, 19231, 19232, 19233, 19234, 19235, 19237, and 19702 of, to add Section 12940.3 to, and to repeal Section 12994 of, the Government Code, to amend Section 19952 of the Health and Safety Code, to amend Section 1735 of the Labor Code, to amend Section 365.5 of the Penal Code, to amend Sections 2881 and 99155.5 of, and to add Section 2881.2 to, the Public Utilities Code, to amend Section 2557 of the Streets and Highways Code, and to amend Section 336 of the Vehicle Code, relating to disabled persons.

[Approved by Governor September 24, 1992.]

[Filed with Secretary of State September 25, 1992.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1077, Bronzan. Disabled persons: discrimination.

(1) Under existing law, persons holding licenses under the provisions of the Business and Professions Code are subject to disciplinary action for refusing, or aiding or inciting another licensee to refuse, to perform the licensed services because of, among other

things, a physical handicap of the prospective recipient. Existing law also creates an exception to the prohibition for healing arts practitioners where the licensed activity sought is beyond the practitioner's skill or could better be performed by another licensee.

This bill would revise these antidiscrimination provisions to make them applicable to persons with defined disabilities and to replace the above exemption with an exemption permitting nonservice to disabled individuals who pose a direct threat to the health or safety of others, as defined.

(2) Existing provisions of the Unruh Civil Rights Act and related provisions, with certain exceptions, prohibit various types of discrimination by business establishments and franchisors, and in written instruments relating to real property, including discrimination on the basis of blindness or other physical disability.

This bill would make a violation of the Americans with Disabilities Act of 1990 also a violation of the Unruh Civil Rights Act, and would expand the express coverage of that act and related provisions to include discrimination on account of any disability.

(3) Existing provisions of the Unruh Civil Rights Act and related provisions specify that persons providing property for compensation are not required to modify their property or provide a higher degree of care for physically disabled persons than for persons who are not physically disabled.

This bill would delete those provisions.

(4) Existing law, with certain exceptions, guarantees physically disabled persons the full and free use of specified facilities for the public and guarantees them full and equal access to specified transportation, communication, lodging, places of public accommodation, amusement, or resort, and defined housing accommodations offered for rent, lease, or compensation.

This bill would extend these guarantees to all individuals with disabilities, as defined. The bill would define "full and equal access" for purposes of application of these requirements to transportation. The bill would modify a requirement in these provisions respecting rental of housing to persons with guide dogs, to expand the definition of "guide dog" to include guide dogs meeting definitional criteria of the federal law. The bill would also expand the scope of these provisions to include adoption agencies and private schools.

(5) Existing law gives specified blind, hearing-impaired, and physically handicapped persons a right to be accompanied by guide dogs, signal dogs, or service dogs without paying an extra charge therefor.

This bill would make these provisions applicable to individuals with a disability, as defined, rather than physically handicapped persons and would prohibit requiring a special security deposit for these dogs.

(6) Under existing law, in any judicial proceeding in which a party, witness, attorney, judicial employee, judge, or juror is hard of hearing, it is required that the hard-of-hearing person be supplied with an assistive listening system or that specified computer-aided transcription equipment be used, upon the person's request.

This bill would revise the above provisions to use the term "individual who is hearing impaired," as defined, and make these requirements additionally applicable to administrative hearings of public agencies and where other types of participants in the proceedings are hearing impaired, thereby imposing a state-mandated local program. The bill would expressly make these provisions applicable to traffic court, small claims court proceedings, and court-ordered alternative dispute resolution.

(7) Existing law requires parties to judicial actions who do not challenge an individual juror with a hearing, sight, or speech handicap, on the basis that the juror requires the services of a sign language interpreter, reader, or speech interpreter, to stipulate to the presence of the interpreter or reader in the jury room, and also requires the court in these cases to instruct the jury, as specified.

This bill would change the terminology describing these impairments and would impose a state-mandated local program by requiring the courts to appoint, and counties to compensate, defined service providers for these jurors. The bill would also expand the

types of interpreters subject to these provisions to include oral-interpreters and deaf-blind interpreters.

(8) Existing law precludes using statements made by deaf or hard-of-hearing persons in response to questions from any person having a prosecutorial function against that person in a criminal or quasi-criminal investigation or proceeding, unless, among other things, the statement was either made knowingly, voluntarily, and intelligently and was accurately interpreted or the court makes a special finding that the statement was made knowingly, voluntarily, and intelligently.

This bill would revise these provisions to use the term "deaf or hearing impaired" and, as a condition of using such a statement against an individual who the court finds to be deaf or hearing impaired that was made without an interpreter, require the court to find that the person affirmatively indicated he or she did not use or could not have used an interpreter or that an interpreter was not required by the federal Americans with Disabilities Act of 1990. The bill would require, as a condition of using such a statement that is interpreted against an individual who is deaf or hearing impaired, that the questions to the person have been accurately interpreted. The bill would impose a state-mandated local program by requiring peace officers and others with a prosecutorial function to make good faith efforts without unnecessary delay to obtain an interpreter when interviewing a person who is an alleged victim or witness and who demonstrates or alleges deafness or hearing impairment, unless the person indicates that he or she does not need or cannot use an interpreter or it is determined that an interpreter is not otherwise required by the Americans with Disabilities Act of 1990 and federal regulations adopted thereunder.

(8.5) Under existing law, court interpreters for deaf or hard-of-hearing persons are required to be certified commencing July 1, 1992, in accordance with guidelines adopted by the Judicial Council. Existing law requires the Judicial Council to initially approve testing entities for this purpose by July 1, 1992.

This bill would make these provisions applicable to court interpreters for individuals who are deaf or hearing impaired. The bill would postpone these requirements until January 1, 1994, and would require the Judicial Council to approve the testing entities by July 1, 1993.

(9) Existing law specifies that the use of an interpreter to facilitate communications of a deaf or hard-of-hearing person does not waive an otherwise valid privilege applicable to the communication.

This bill would make those provisions applicable to communications by individuals who are deaf or hearing impaired.

(10) Existing law requires each school district to have an affirmative action employment program.

This bill would impose a state-mandated local program by changing the requirements for those programs.

(11) Existing law precludes denial of an elementary or secondary teaching credential, training for the purpose of becoming a teacher, or refusal by a school district to employ a teacher, on account of a defined physical handicap.

This bill would instead make these prohibitions applicable with respect to defined disabilities.

(12) Existing law requires the State Architect to adopt regulations for access and usability of public facilities by the physically handicapped.

This bill would make these provisions applicable to access and usability by individuals with a disability and would preclude the regulations from imposing lower standards of usability and accessibility than specified regulations adopted under the Americans with Disabilities Act of 1990.

(13) Existing law requires local and quasi-public entities to require rapid transit equipment and structures to be built to provide easy access to handicapped persons. This requirement does not, however, apply to contracts for urban transit systems until the necessary equipment is available from not less than 2 manufacturers.

This bill would make these provisions applicable to access by individuals with a disability, would make these provisions applicable to fixed-route transit facilities, would expand application of the requirements to include the state, and would require all public transit facilities and operations to meet standards of Titles II and III of the Americans with Disabilities Act of 1990 and regulations adopted thereunder or higher standards of this state's law in effect on December 31, 1992, notwithstanding the above provisions or any other provision of law. The bill would delete the exemption for contracts for transit systems where the necessary equipment is not available from 2 or more manufacturers.

(14) Existing law prohibits discrimination on the basis of physical or mental disability in the receipt of benefits under any program funded directly or financially assisted by the state.

This bill would make that prohibition applicable to any disability as defined, rather than mental or physical disability, and would require these programs to meet or exceed specified protections and prohibitions in the Americans with Disabilities Act of 1990.

(15) Existing law in the California Fair Employment and Housing Act declares a state policy that persons are entitled to employment without discrimination on various bases, including physical handicap, and, with certain exceptions, prohibits employers and labor organizations from discriminating on that basis. Existing provisions of that act also specify that nothing in the act requires an employer to make any accommodation for a physically handicapped employee where it would produce undue hardship to the employer.

This bill would change these provisions to substitute a reference to physical and mental disabilities for the existing reference to physical handicap. The bill would define "mental disability" and "physical disability" for this purpose. However, the bill would limit the application of provisions of the act on unlawful employment practices by employers against individuals with a mental disability to employers with 15 or more employees, the state, and its municipalities and political subdivisions; application of these provisions to employers with 15 to 24, inclusive, employees would be delayed until July 15, 1994, and the bill would provide for a study to determine the desirability of including employers with 5 to 14, inclusive, employees under these provisions. The bill would add discrimination on the basis of familial status to the types of discrimination declared to be against public policy with respect to both employment and housing accommodations, and would add discrimination on the basis of familial status to provisions authorizing the Department of Fair Employment and Housing to provide assistance in resolving disputes, disagreements, or difficulties relating to specified discriminatory practices. It also would add discrimination on the basis of disability to the type of discrimination declared to be against public policy with respect to housing accomocations.[1] The bill would require employers and certain other entities to make specified reasonable accommodations for employees with physical or mental disabilities and would require an employer making certain preemployment inquiries concerning a prospective employee's fitness, or refusing to hire or discharging a disabled employee, to comply with the Americans with Disabilities Act of 1990.

The bill would specify that the definitions of "physical disability" and "mental disability" in the California Fair Employment and Housing Act are superseded by the definition of "disability" in the federal Americans with Disabilities Act of 1990 if broader civil rights protection would thereby be produced for persons with mental or physical disabilities or a medical condition. The bill would specify that the act's provisions are not superseded by provisions of other laws relating to workers' compensation and insurance, benefits for injured state employees not covered by workers' compensation, and retraining and rehabilitation benefits for injured public employees.

(16) Existing law prohibits licensing boards from discriminating, as specified, on the basis of a person's physical handicap.

This bill would instead prohibit that discrimination by licensing boards on the basis of a physical or mental disability and would require a licensing board to make defined reasonable accommodation to an individual's physical or mental disability or medical condition, as specified.

[1] So in enrolled bill.

(17) Existing law in the state civil service prohibits discrimination against employees on the basis of non-job-related physical handicap.

This bill would instead prohibit discrimination against state civil service employees who are individuals with a disability, as defined. The bill would also revise accommodations required to be made for these employees.

(18) Existing law requires specified places of public amusement and resort to be equipped with wheelchair spaces and other seating and accommodations for persons with physical disabilities.

This bill would make compliance with these provisions subject to no lesser standards than prescribed in prescribed federal regulations.

(19) Existing law, with certain exceptions, prohibits discrimination in employment on public works projects on the basis of physical handicap.

This bill would instead prohibit this discrimination on the basis of physical or mental disability.

(20) Existing law prohibits any person from denying access to specified transportation and accommodations to any blind, deaf, or physically disabled person on account of the person being accompanied by a guide dog, signal dog, or service dog.

This bill would revise the definition of "guide dog" for purposes of these provisions.

(21) Existing law requires the Public Utilities Commission to design and implement a dual party relay system by which telephone service may be made available between deaf and hard-of-hearing persons and persons of normal hearing, as specified.

This bill would substitute the term "hearing impaired" for "hard-of-hearing" and require the commission to apply to the Federal Communications Commission for prescribed certification of this system and would revise existing requirements for an annual report by the commission on the fiscal status of this and related programs. The bill would require the commission to study whether there exist sufficient public pay phones with capability to serve deaf and severely hearing impaired persons.

(22) Existing law requires operators of dial-a-ride or paratransit services funded through the Mills-Alquist-Deddeh Act to provide specified services for defined handicapped persons.

This bill would require these services to be provided to individuals with disabilities, would make clarifying changes, and would make certain of these provisions subject to overriding requirements of the federal Americans with Disabilities Act of 1990. The bill would also revise the Vehicle Code definition of "general public paratransit vehicle."

(23) Existing law authorizes the formation of service authorities for freeway emergencies, which are empowered to establish a prescribed motorist aid system.

This bill would require these motorist aid systems to meet standards of Title II of the federal Americans with Disabilities Act of 1990.

(24) This bill would incorporate additional changes in Section 12926 of the Government Code, proposed by AB 311 or AB 1286, or both, to become operative only if AB 311 or AB 1286, or both, and this bill are chaptered and become effective on or before January 1, 1993, and this bill is chaptered last.

(25) This bill would incorporate additional changes in Section 12940 of the Government Code, proposed by AB 1286 or AB 2265, or both, to become operative only if AB 1286 or AB 2265, or both, and this bill are chaptered and become effective on or before January 1, 1993, and this bill is chaptered last.

(26) This bill would incorporate additional changes in Section 12993 of the Government Code, proposed by AB 311 or AB 1178, or both, to be operative only if AB 311 or AB 1178, or both, and this bill are chaptered and become effective January 1, 1993, and this bill is chaptered last.

(27) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates

Claims Fund to pay the costs of mandates which do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that this bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to those statutory procedures and, if the statewide cost does not exceed $1,000,000, shall be made from the State Mandates Claims Fund.

The people of the State of California do enact as follows:

SECTION 1. It is the intent of the Legislature in enacting this act to strengthen California law in areas where it is weaker than the Americans with Disabilities Act of 1990 (Public Law 101-336) and to retain California law when it provides more protection for individuals with disabilities than the Americans with Disabilities Act of 1990.

SEC. 2. Section 125.6 of the Business and Professions Code is amended to read:

125.6. Every person who holds a license under the provisions of this code is subject to disciplinary action under the disciplinary provisions of this code applicable to such person if, because of the applicant's race, color, sex, religion, ancestry, * * * disability, marital status, or national origin, he or she refuses to perform the licensed activity or aids or incites the refusal to perform such licensed activity by another licensee, or if, because of the applicant's race, color, sex, religion, ancestry, * * * disability, marital status, or national origin, he or she makes any discrimination, or restriction in the performance of the licensed activity. Nothing in this section shall be interpreted to apply to discrimination by employers with regard to employees or prospective employees, nor shall this section authorize action against any club license issued pursuant to Article 4 (commencing with Section 23425) of Chapter 3 of Division 9 because of discriminatory membership policy. The presence of architectural barriers to * * * an individual with physical disabilities which conform to applicable state or local building codes and regulations shall not constitute discrimination under this section.

* * * Nothing in this section requires a person licensed pursuant to Division 2 (commencing with Section 500) to * * * permit an individual to participate in, or benefit from, the licensed activity of the licensee where that individual poses a direct threat to the health or safety of others. For this purpose, the term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids and services.

"License," as used in this section, includes "certificate," "permit," "authority," and "registration" or any other indicia giving authorization to engage in a business or profession regulated by this code.

"Applicant," as used in this section means a person applying for licensed services provided by a person licensed under this code.

* * *

"Disability" means any of the following with respect to an individual:

(a) A physical or mental impairment that substantially limits one or more of the major life activities of the individual.

(b) A record of such an impairment.

(c) Being regarded as having such an impairment.

SEC. 3. Section 51 of the Civil Code is amended to read:

51. This section shall be known, and may be cited, as the Unruh Civil Rights Act.

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or * * * disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or * * * disability.

Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever to any new or existing establishment, facility, building, improvement, or any other structure, or to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other provisions of the law.

* * *

A violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.

SEC. 3.2. Section 51.5 of the Civil Code is amended to read:

51.5. No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, refuse to buy from, sell to, or trade with any person in this state because of the race, creed, religion, color, national origin, sex, or * * * disability of the person or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers.

As used in this section "person" includes any person, firm, association, organization, partnership, business trust, corporation, or company.

Nothing in this section shall be construed to require any construction, alternation, repair, structural or otherwise, or modification of any sort whatsoever to any new or existing establishment, facility, building, improvement, or any other structure, or to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other provisions of the law.

* * *

SEC. 3.4. Section 51.8 of the Civil Code is amended to read:

51.8. No franchisor shall discriminate in the granting of franchises solely because of the race, color, religion, sex, * * * national origin, or disability of the franchisee and the racial, ethnic, religious, national origin, or * * * disability composition of a neighborhood or geographic area in which the franchise is located. Nothing in this section shall be interpreted to prohibit a franchisor from granting a franchise to prospective franchisees as part of a program or programs to make franchises available to persons lacking the capital, training, business experience, or other qualifications ordinarily required of franchisees, or any other affirmative action program adopted by the franchisor.

Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever to any new or existing establishment, facility, building, improvement, or any other structure, or to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other provisions of the law.

* * *

SEC. 3.6. Section 52 of the Civil Code is amended to read:

52. (a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction * * * contrary to Section 51 or 51.5, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than two hundred fifty dollars ($250), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51 or 51.5.

(b) Whoever denies the right provided by Section 51.7, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

(2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7.

(3) Attorney fees as may be determined by the court.

(c) Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights hereby secured, and that conduct is of that nature and is intended to deny the full exercise of the rights herein described, the Attorney General, any district attorney or city attorney, or any person aggrieved by the conduct may bring a civil action in the appropriate court by filing with it a complaint. The complaint shall contain the following:

(1) The signature of the officer, or, in his or her absence, the individual acting on behalf of the officer, or the signature of the person aggrieved.

(2) The facts pertaining to the conduct.

(3) A request for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to insure the full enjoyment of the rights herein described.

(d) Whenever an action has been commenced in any court seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States on account of race, color, religion, sex, national origin, or * * * disability, the Attorney General or any district attorney or city attorney for or in the name of the people of the State of California may intervene in the action upon timely application if the Attorney General or any district attorney or city attorney certifies that the case is of general public importance. In that action the people of the State of California shall be entitled to the same relief as if it had instituted the action.

(e) Actions under this section shall be independent of any other remedies or procedures that may be available to an aggrieved party.

(f) Any person claiming to be aggrieved by an alleged unlawful practice in violation of Section 51 or 51.7 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code.

(g) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever to any new or existing establishment, facility, building, improvement, or any other structure, or to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

* * *

(h) For the purposes of this section, "actual damages" means special and general damages. This subdivision is declaratory of existing law.

SEC. 3.8. Section 53 of the Civil Code is amended to read:

53. (a) Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of that real property to any person of a specified sex, race, color, religion, ancestry, national origin, or * * * disability, is void and every restriction or prohibition as to the use or occupation of real property because of the user's or occupier's sex, race, color, religion, ancestry, national origin, or * * * disability is void.

(b) Every restriction or prohibition, whether by way of covenant, condition upon use or occupation, or upon transfer of title to real property, which restriction or prohibition directly or indirectly limits the acquisition, use or occupation of that property because of the acquirer's, user's, or occupier's sex, race, color, religion, ancestry, national origin, or * * * disability is void.

(c) In any action to declare that a restriction or prohibition specified in subdivision (a) or (b) is void, the court shall take judicial notice of the recorded instrument or instruments containing the prohibitions or restrictions in the same manner that it takes judicial notice of the matters listed in Section 452 of the Evidence Code.

* * *

SEC. 4. Section 54 of the Civil Code is amended to read:

54. * * * (a) Individuals with disabilities shall have the same right as the * * * general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities, and other public places.

(b) "Disability," as used in this part, means any of the following with respect to an individual:

(1) A physical or mental impairment that substantially limits one or more of the major life activities of the individual.

(2) A record of such an impairment.

(3) Being regarded as having such an impairment.

SEC. 5. Section 54.1 of the Civil Code is amended to read:

54.1. (a) * * * Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motorbuses, streetcars, boats, or any other public conveyances or modes of transportation (whether private, public, franchised, licensed, contracted, or otherwise provided), telephone facilities, adoption agencies, private schools, hotels, lodging places, places of public accommodation, amusement, or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

As used in this section, "telephone facilities" means tariff items and other equipment and services which have been approved by the Public Utilities Commission to be used by * * * individuals with disabilities in a manner feasible and compatible with the existing telephone network proved [2] by the telephone companies.

"Full and equal access," for purposes of this section in its application to transportation, means access that meets the standards of Titles II and III of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted pursuant thereto, except that, if the laws of this state prescribe higher standards, it shall mean access that meets those higher standards.

(b) (1) * * * Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to all housing accommodations offered for rent, lease, or compensation in this state, subject to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

(2) "Housing accommodations" means any real property, or portion thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home, residence, or sleeping place of one or more human beings, but shall not include any accommodations included within subdivision (a) or any single-family residence the occupants of which rent, lease, or furnish for compensation not more than one room therein.

(3) Nothing in this subdivision shall require any person renting, leasing, or providing for compensation real property to modify his or her property in any way or provide a higher degree of care for * * * an individual with a disability than for * * * an individual who is not disabled.

(4) Except as provided in paragraph (5) of this subdivision, nothing in this part shall require any person renting, leasing, or providing for compensation real property, if that person refuses to accept tenants who have dogs, to accept as a tenant * * * an individual with a disability who has a dog.

(5) It shall be deemed a denial of equal access to housing accommodations within the meaning of this subdivision for any person, firm, or corporation to refuse to lease or rent housing accommodations to * * * an individual who is blind * * * or visually * * * impaired on the basis that * * * the individual uses the services of a guide dog, * * * an individual who is deaf * * * or hearing impaired on the basis that * * * the individual

[2] So in enrolled bill.

uses the services of a signal dog, or to * * * an individual with a physical disability on the basis that * * * the individual uses the services of a service dog, or to refuse to permit such * * * an individual who is blind * * * or visually * * * impaired to keep a guide dog, * * * an individual who is deaf * * * or hearing impaired to keep a signal dog, or * * * an individual with a physical disability to keep a service dog on the premises.

Except in the normal performance of duty as a mobility or signal aid, nothing contained in this paragraph shall be construed to prevent the owner of a housing accommodation from establishing * * * terms in a lease or rental agreement which reasonably regulate the presence of guide dogs, signal dogs, or service dogs on the premises of a housing accommodation, nor shall this paragraph be construed to relieve a tenant from any liability otherwise imposed by law for real and personal property damages caused by such a dog when proof of same exists.

As used in this subdivision, "guide dog" means any guide dog * * * which was trained by a person licensed under the provisions of Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code or as defined in the regulations implementing Title III of the Americans with Disabilities Act of 1990 (Public Law 101-336).

As used in this subdivision, "signal dog" means any dog trained to alert * * * an individual who is deaf * * * or hearing impaired to intruders or sounds.

As used in this subdivision, "service dog" means any dog individually trained to the * * * individual with a physical disability's requirements including, but not limited to, minimal protection work, rescue work, pulling a wheelchair, or fetching dropped items.

(6) It shall be deemed a denial of equal access to housing accommodations within the meaning of this subdivision for any person, firm, or corporation to refuse to lease or rent housing accommodations to * * * an individual who is blind * * * or visually * * * impaired, an individual who is deaf * * * or hearing impaired, or other * * * individual with a disability on the basis that the * * * individual with a disability is partially or wholly dependent upon the income of his or her spouse, if the spouse is a party to the lease or rental agreement. Nothing in this subdivision shall, however, prohibit a lessor or landlord from considering the aggregate financial status of * * * an individual with a disability and his or her spouse.

(c) Persons licensed to train guide dogs for * * * individuals who are visually impaired or blind pursuant to Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code or guide dogs as defined in the regulations implementing Title III of the Americans with Disabilities Act of 1990 (Public Law 101-336), and persons authorized to train signal dogs for * * * individuals who are deaf or hearing impaired, and persons authorized to train service dogs for * * * individuals with physical disabilities, may take dogs, for the purpose of training them as guide dogs, signal dogs, or service dogs in any of the places specified in subdivisions (a) and (b). These persons shall carry and display identification if issued as an authorization, upon request.

SEC. 6. Section 54.2 of the Civil Code is amended to read:

54.2. (a) Every * * * individual with a disability shall have the right to be accompanied by a guide dog, signal dog, or service dog, especially trained for the purpose, in any of the places specified in Section 54.1 without being required to pay an extra charge or security deposit for the guide dog, signal dog, or service dog. However, the individual shall be liable for any damage done to the premises or facilities by his or her dog.

(b) Persons licensed to train guide dogs for * * * individuals who are blind or visually impaired pursuant to Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code or as defined in regulations implementing Title III of the Americans with Disabilities Act of 1990 (Public Law 101-336), and persons authorized to train signal dogs for * * * individuals who are deaf or hearing impaired, and service dogs for the * * * individuals with physical disabilities may take dogs, for the purpose of training them as guide dogs, signal dogs, or service dogs in any of the places specified in Section 54.1 without being required to pay an extra charge or security deposit for the guide dog, signal dog, or service dog. However, the person shall be liable for any damage done to the premises or facilities by his or her dog.

These persons shall carry and display identification if issued as an authorization, upon request.

(c) As used in this section, the terms "guide dog," "signal dog," and "service dog" have the same meanings as specified in Section 54.1.

SEC. 7. Section 54.3 of the Civil Code is amended to read:

54.3. Any person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in Sections 54 and 54.1 or otherwise interferes with the rights of * * * an individual with a disability under Sections 54, 54.1 and 54.2 is liable for each * * * offense for the actual damages and any amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than two hundred fifty dollars ($250), and such attorney's fees as may be determined by the court in addition thereto, suffered by any person denied any of the rights provided in Sections 54, 54.1, and 54.2.

SEC. 8. Section 54.8 of the Civil Code is amended to read:

54.8. (a) * * * In any civil or criminal proceeding, including, but not limited to, traffic, small claims court, family court proceedings and services, and juvenile court proceedings, in any court-ordered or court-provided alternative dispute resolution, including mediation and arbitration, or in any administrative hearing of a public agency, where a party, witness, attorney, judicial employee, judge, * * * juror * * *, or other participant who is hearing impaired, the individual who is hearing impaired, upon his or her request, shall be provided with a functioning assistive listening system or a computer-aided transcription system. Any individual requiring this equipment shall give advance notice of his or her need to the appropriate court or agency at the time the hearing is set or not later than five days before the hearing.

(b) Assistive listening systems include, but are not limited to, special devices which transmit amplified speech by means of audio-induction loops, radio frequency systems (AM or FM), or infrared transmission. Personal receivers equipped with headphones for, or use with, hearing aids shall be available upon request by * * * individuals who are hearing impaired.

(c) * * * If a computer-aided transcription system is used, sufficient display terminals * * * shall be provided to allow the * * * individual who is hearing impaired to read the real time transcript of the proceeding without difficulty.

(d) A sign shall be posted in a prominent place indicating the availability of an assistive listening system or a computer-aided transcription system.

(e) Each county shall have at least one portable assistive listening * * * system for use by any court within the county. The system shall be * * * in a location jointly determined by the county board of supervisors and the judges. Notice of the availability of the system shall be posted with notice of trials.

(f) The Judicial Council shall develop and approve official forms for notice of the availability of assistive listening systems and computer-aided transcription systems for * * * individuals who are hearing impaired. The Judicial Council shall also develop and maintain a system to record utilization by the courts of these assistive listening systems and computer-aided transcription systems.

(g) If the * * * individual who is hearing impaired in question is a juror, the jury deliberation room shall be equipped with an assistive listening system or a computer-aided transcription system upon the request of the juror.

(h) A court reporter may be present in the jury deliberating room during a jury deliberation if the services of a court reporter for the purpose of operating a computer-aided transcription system are required for a * * * juror who is hearing impaired.

(i) In any * * * of the proceedings referred to in subdivision (a), or administrative hearing of a public agency, in which the * * * individual who is hearing impaired is a party, witness, attorney, judicial employee, judge, juror, or other participant, and has requested use of an assistive listening system or computer-aided transcription system, the proceedings shall not commence until the system is in place and functioning.

(j) As used in this section, * * * "individual who is hearing impaired" means * * * an individual with a * * * hearing loss, who, with sufficient amplification * * * or a computer-aided transcription system, is able to fully participate in the proceeding.

(k) In no case shall this section be construed to prescribe a lesser standard of accessibility or usability than that provided by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted pursuant to that act.

SEC. 9. Section 224 of the Code of Civil Procedure is amended to read:

224. (a) If a party does not cause the removal by challenge of an individual juror who is * * * deaf, hearing * * * impaired, blind, visually impaired, or * * * speech * * * impaired and who requires * * * auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of * * * a service provider in the jury room during jury deliberations, and (2) prepare and deliver to the court proposed jury instructions to * * * the service provider.

(b) * * * As used in this section, "service provider" includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury deliberations, the court shall instruct the jury and * * * the service provider that the service provider for the * * * juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the * * * juror with a disability and other jurors.

(c) The court shall appoint an [8] service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this section shall be a qualified interpreter, as defined in subdivision (f) of Section 754 of the Evidence Code. Persons appointed by the court to serve as attendants under this subdivision shall be compensated in the same manner as provided in subdivision (i) of Section 754 of the Evidence Code.

SEC. 10. Section 44100 of the Education Code is amended to read:

44100. The Legislature finds and declares that:

(a) Generally, California school districts employ a disproportionately low number of racial and ethnic minority classified and certificated employees and a disproportionately low number of women and members of racial and ethnic minorities in administrative positions.

(b) It is educationally sound for the minority student attending a racially impacted school to have available to him the positive image provided by minority classified and certificated employees. It is likewise educationally sound for the child from the majority group to have positive experiences with minority people which can be provided, in part, by having minority classified and certificated employees at schools where the enrollment is largely made up of majority group students. It is also educationally important for students to observe that women as well as men can assume responsible and diverse roles in society.

(c) Past employment practices created artificial barriers and past efforts to promote additional action in the recruitment, employment, and promotion of women and minorities have not resulted in a substantial increase in employment opportunities for these persons.

(d) Lessons concerning democratic principles and the richness which racial diversity brings to our national heritage can be best taught by the presence of staffs of mixed races and ethnic groups working toward a common goal.

It is the intent of the Legislature to establish and maintain a policy of equal opportunity in employment for all persons and to prohibit discrimination based on race, sex, color, religion, age, disability, ancestry, or national origin in every aspect of personnel policy and practice in employment, development, advancement, and treatment of persons employed in the public school system, and to promote the total realization of equal employment opportunity through a continuing affirmative action employment program.

[8] So in enrolled bill.

The Legislature recognizes that it is not enough to proclaim that public employers do not discriminate in employment but that effort must also be made to build a community in which opportunity is equalized. It is the intent of the Legislature to require educational agencies to adopt and implement plans for increasing the numbers of women and minority persons at all levels of responsibility.

SEC. 11. Section 44101 of the Education Code is amended to read:

44101. For the purposes of this article:

(a) "Affirmative action employment program" means planned activities designed to seek, hire, and promote persons who are underrepresented in the work force compared to their number in the population, including * * * individuals with disabilities, women, and persons of minority racial and ethnic backgrounds. It is a conscious, deliberate step taken by a hiring authority to assure equal employment opportunity for all staff, both certificated and classified. Such programs require the employer to make additional efforts to recruit, employ, and promote members of groups formerly excluded at the various levels of responsibility who are qualified or may become qualified through appropriate training or experience within a reasonable length of time. Such programs should be designed to remedy the exclusion, whatever its cause. Affirmative action requires imaginative, energetic, and sustained action by each employer to devise recruiting, training, and career advancement opportunities which will result in an equitable representation of women and minorities in relation to all employees of the employer.

(b) "Disability," means (1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual, (2) a record of such an impairment, or (3) being regarded as having such an impairment.

(c) "Goals and timetables" means projected new levels of employment of women and minority racial and ethnic groups to be attained on an annual schedule, given the expected turnover in the work force and the availability of persons who are qualified or may become qualified through appropriate training or experience within a reasonable length of time. Goals are not quotas or rigid proportions. They should relate both to the qualitative and quantitative needs of the employer.

(d) "Public education agency" means the Department of Education, each office of the county superintendent of schools, and the governing board of each school district in California.

SEC. 12. Section 44337 of the Education Code is amended to read:

44337. No person otherwise qualified shall be denied the right to receive credentials from the commission, to receive training for the purpose of becoming a teacher, or to engage in practice teaching in any school, on the grounds he * * * or she is an individual with a disability; nor shall any school district refuse to engage a teacher on such grounds, provided, that * * * the teacher, with reasonable accommodations, is able to carry out the duties of the position for which he or she applies in the school district. * * * "Disability," as used in this section * * *, means (1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual, (2) a record of such an impairment, or (3) being regarded as having such an impairment.

SEC. 13. Section 44338 of the Education Code is amended to read:

44338. No person otherwise qualified shall be denied the right to receive credentials issued by the commission, to receive training for the purpose of becoming a teacher, or to engage in practice teaching in any school, on the ground he * * * or she is a person with a disability; provided, that * * * the person does not pose a direct threat of substantial harm to the health or safety of other individuals.

SEC. 14. Section 754 of the Evidence Code is amended to read:

754. (a) As used in this section, * * * "individual who is deaf or hearing impaired" means * * * an individual with a hearing loss so great as to prevent his or her understanding language spoken in a normal tone, but does not include * * * an individual who is hearing impaired provided with, and able to fully participate in the proceedings through the use of, an assistive listening system or computer-aided transcription equipment provided pursuant to Section 54.8 of the Civil Code.

(b) In any civil or criminal action, including, but not limited to, any action involving a misdemeanor or other infraction * * *, any small claims court proceeding, any juvenile court proceeding, any family court proceeding or service, or any proceeding to determine the mental competency of a person, in any court-ordered or court-provided alternative dispute resolution, including mediation and arbitration, or any administrative hearing, where a party or witness is * * * an individual who is deaf or * * * hearing impaired and the individual who is deaf or * * * hearing impaired is present and participating, the proceedings shall be interpreted in a language that the * * * individual who is deaf or hearing impaired understands by a qualified interpreter appointed by the court or other appointing authority, or as agreed upon * * *.

(c) For purposes of this section, "appointing authority" means a court, department, board, commission, agency, licensing or legislative body, or other body for proceedings requiring a qualified interpreter.

(d) For the purposes of this section, "interpreter" includes, but is not limited to, an oral interpreter, a sign language interpreter, or a deaf-blind interpreter, depending upon the needs of the * * * individual who is deaf or * * * hearing impaired.

(e) For purposes of this section, "intermediary interpreter" means * * * an individual who is deaf or hearing impaired, or a hearing individual who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language or between American Sign Language and other foreign languages by acting as an intermediary between the * * * individual who is deaf * * * or hearing impaired and the qualified interpreter.

(f) For purposes of this section, "qualified interpreter" means an interpreter who has been certified as competent to interpret court proceedings by a testing organization, agency, or educational institution approved by the Judicial Council as qualified to administer tests to court interpreters for * * * individuals who are deaf or * * * hearing impaired.

(g) In the event that the appointed interpreter is not familiar with the * * * use of particular signs by the individual who is deaf or * * * hearing impaired or his or her particular variant of sign language, the court or other appointing authority shall, in consultation with the * * * individual who is deaf or * * * hearing impaired or his or her representative, appoint an intermediary interpreter.

(h) Prior to July 1, 1992, the Judicial Council shall conduct a study to establish the guidelines pursuant to which it shall determine which testing organizations, agencies, or educational institutions will be approved to administer tests for certification of court interpreters for * * * individuals who are deaf or hearing impaired. It is the intent of the Legislature that the study obtain the widest possible input from the public, including, but not limited to, educational institutions, the judiciary, linguists, members of the State Bar, court interpreters, members of professional interpreting organizations, and members of the deaf and * * * hearing-impaired communities. After obtaining public comment and completing its study, the Judicial Council shall publish these guidelines and shall approve one or more entities to administer testing for court interpreters for * * * individuals who are deaf or hearing impaired. Initial approval of testing entities by the Judicial Council shall occur prior to January 1, 1994.

(i) Commencing July 1, 1994, court interpreters for * * * individuals who are deaf or * * * hearing impaired shall meet the qualifications specified in subdivision (f).

(j) Persons appointed to serve as interpreters under this section shall be paid, in addition to actual travel costs, the prevailing rate paid to persons employed by the court to provide other interpreter services unless such service is considered to be a part of the person's regular duties as an employee of the state, county, or other political subdivision of the state. Payment of the interpreter's fee shall be a charge against the county, or other political subdivision of the state, in which that action is pending. Payment of the interpreter's fee in administrative proceedings shall be a charge against the appointing board * * * or authority.

(k) Whenever a peace officer or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding

questions or otherwise interviews an alleged victim or witness who demonstrates or alleges deafness or hearing impairment, a good faith effort to secure the services of an interpreter shall be made, without any unnecessary delay unless either the individual who is deaf or hearing impaired affirmatively indicates that he or she does not need or cannot use an interpreter, or an interpreter is not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder.

(k) No statement, written or oral, made by * * * an individual who the court finds is deaf or * * * hearing impaired in reply to a question of a peace officer, or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding, may be used against that * * * individual who is deaf or * * * hearing impaired unless the question was accurately interpreted and the statement was made knowingly, voluntarily, and intelligently and was accurately interpreted, or the court makes * * * special findings that either the individual could not have used an interpreter or an interpreter was not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder and that the statement was made knowingly, voluntarily, and intelligently.

(l) In obtaining services of an interpreter for * * * purposes of subdivision (j) or (k), priority shall be given to first obtaining a qualified interpreter.

(m) Nothing in subdivision (j) or (k) shall be deemed to supersede the requirement of subdivision (b) for use of a qualified interpreter for * * * individuals who are deaf or * * * hearing impaired participating as parties or witnesses in a trial or hearing.

(n) In any action or proceeding in which * * * an individual who is deaf or * * * hearing impaired is a participant, the * * * appointing authority shall not commence proceedings until the appointed interpreter is in full view of and spatially situated to assure proper communication with the * * * participating individual who is deaf or * * * hearing impaired.

(o) Each superior court shall maintain a current roster of qualified interpreters certified pursuant to subdivision (f).

SEC. 15. Section 754.5 of the Evidence Code is amended to read:

754.5. Whenever an otherwise valid privilege exists between * * * an individual who is deaf or * * * hearing impaired and another person, that privilege is not waived merely because an interpreter was used to facilitate their communication.

SEC. 16. Section 4450 of the Government Code is amended to read:

4450. (a) It is the purpose of this chapter to ensure that all buildings, structures, sidewalks, curbs, and related facilities, constructed in this state by the use of state, county, or municipal funds, or the funds of any political subdivision of the state shall be accessible to and usable by * * * individuals with disabilities. The State Architect shall adopt and submit proposed building standards for approval pursuant to Chapter 4 (commencing with Section 18935) of Part 2.5 of Division 13 of the Health and Safety Code and shall adopt other regulations for making buildings, structures, sidewalks, curbs, and related facilities accessible to and usable by * * * individuals with disabilities. The regulations and building standards relating to access for * * * individuals with disabilities shall be consistent with the standards for buildings and structures which are contained in pertinent provisions of the latest edition of the Uniform Building Code, as adopted by the International Conference of Building Officials, and these regulations and building standards shall contain such additional requirements relating to buildings, structures, sidewalks, curbs, and other related facilities as the State Architect determines are necessary to assure access and usability for * * * individuals with disabilities. In developing and revising these additional requirements, the State Architect shall consult with the * * * Department of Rehabilitation, the League of California Cities, the County Supervisors Association of California, and at least one private organization representing and comprised of * * * individuals with disabilities.

(b) However, in no case shall the State Architect's regulations and building standards prescribe a lesser standard of accessibility or usability than provided by regulations of the

federal Architectural and Transportation Barriers Compliance Board adopted to implement the Americans with Disabilities Act of 1990 (Public Law 101-336).

SEC. 17. Section 4500 of the Government Code is amended to read:

4500. (a) Notwithstanding the provisions of any statute, rule, regulation, decision, or pronouncement to the contrary, other than subdivision (b), every state agency, board, and department, every local governmental subdivision, every district, every public and quasi-public corporation, every local public agency and public service corporation, and every city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not, in awarding contracts for operations, equipment, or structures shall be obligated to require that all fixed-route transit equipment and public transit structures shall be so built that * * * individuals with disabilities shall have ready access to, from and in such equipment and structures * * *.

(b) Notwithstanding any other provision of law, public transit facilities and operations, whether operated by or under contract with a public entity, shall meet the applicable standards of Titles II and III of the federal Americans with Disabilities Act of 1990 (Public Law 101-336) and the federal regulations adopted pursuant thereto, subject to the exceptions provided in that act. However, if the laws of this state in effect on December 31, 1992, prescribe higher standards than the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted pursuant thereto, then those public transit facilities and operations shall meet the higher standards.

SEC. 18. Section 11135 of the Government Code is amended to read:

11135. (a) No person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color, or * * * disability, be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or receives any financial assistance from the state.

(b) With respect to discrimination on the basis of disability, programs and activities subject to subdivision (a) shall meet the protections and prohibitions contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof, except that if the laws of this state prescribe stronger protections and prohibitions, the programs and activities subject to subdivision (a) shall be subject to the stronger protections and prohibitions.

(c) As used in this section, "disability" means any of the following with respect to an individual: (1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual, (2) a record of such an impairment, (3) being regarded as having such an impairment.

SEC. 19. Section 12920 of the Government Code is amended to read:

12920. It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, sex, or age.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general.

Further, the practice of discrimination because of race, color, religion, sex, marital status, national origin, * * * ancestry, familial status, or disability in housing accommodations is declared to be against public policy.

It is the purpose of this part to provide effective remedies which will eliminate such discriminatory practices.

This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.

SEC. 20. Section 12921 of the Government Code is amended to read:

12921. The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, sex, or age is hereby recognized as and declared to be a civil right.

SEC. 21. Section 12926 of the Government Code is amended to read:

12926. As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(a) "Age" refers to the chronological age of any individual who has reached his or her 40th birthday.

(b) "Employee" does not include any individual employed by his or her parents, spouse, or child, or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.

(c) "Employer * * *" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities * * *, except as follows:

(1) "Employer" does not include a religious association or corporation not organized for private profit.

(2) "Employer," for purposes of provisions defining unlawful employment practices related to mental disability, means any person regularly employing 15 or more persons, or any person directly or indirectly acting as an agent of such an employer, and also includes the state and municipalities and political subdivisions of the state.

(d) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

(e) "Essential duties" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential duties" does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's judgment as to which functions are essential.

(B) Written job descriptions prepared before advertising or interviewing applicants for the job.

(C) The amount of time spent on the job performing the function.

(D) The consequences of not requiring the incumbent to perform the function.

(E) The terms of a collective bargaining agreement.

(F) The work experiences of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(f) "Labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

(g) "Medical condition" * * * includes, but is not limited to, any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical evidence.

(h) "Mental disability" includes any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. However, "mental disability" does not include conditions excluded from the federal definition of "disability" pursuant to Section 511 of the Americans with Disabilities Act of 1990 (42 U.S.C., Sec. 12211). Additionally, for purposes of this part, the unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a mental disability.

(i) "On the bases enumerated in this part" means or refers to discrimination on the basis of one or more of the following: race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, sex, or age.

(j) "Physical disability" includes impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services. It is the intent of the Legislature that the definition of "physical disability" in this subdivision shall have the same meaning as the term "physical handicap" formerly defined by this subdivision and construed in American National Ins. Co. v. Fair Employment & Housing Com., 32 Cal.3d 603. However, "physical disability" does not include conditions excluded from the federal definition of "disability" pursuant to Section 511 of the Americans with Disabilities Act of 1990 (42 U.S.C., Sec. 12211). Additionally, for purposes of this part, the unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a physical disability.

(k) "Reasonable accommodation" may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(l) "Religious creed," "religion," "religious observance," "religious belief," and "creed" include all aspects of religious belief, observance, and practice.

(m) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.

(n) "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of all the following factors: (1) the nature and cost of the accommodation needed, (2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility, (3) the overall financial resources of the covered entity, the overall size of the business or a covered entity with respect to the number of employees, and the number, type, and location of its facilities, (4) the type of operations, including the composition, structure, and functions of the work force of the entity, and (5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

Notwithstanding subdivision (h) and (k), if the definition of "disability" used in the Americans with Disabilities Act of 1990 (Public Law 101–336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (h) or (j), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (h) and (j).

SEC. 21.1. Section 12926 of the Government Code is amended to read:

12926. As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(a) "Affirmative relief" or "prospective relief" includes the authority to order reinstatement of an employee, awards of back pay, reimbursement of out-of-pocket expenses,

hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part.

(b) "Age" refers to the chronological age of any individual who has reached his or her 40th birthday.

(c) "Employee" does not include any individual employed by his or her parents, spouse, or child, or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.

(d) "Employer * * *" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities * * *, except as follows:

(1) "Employer" does not include a religious association or corporation not organized for private profit.

(2) "Employer," for purposes of provisions defining unlawful employment practices related to mental disability, means any person regularly employing 15 or more persons, or any person directly or indirectly acting as an agent of such an employer, and also includes the state and municipalities and political subdivisions of the state.

(e) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

(f) "Essential duties" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential duties" does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's judgment as to which functions are essential.

(B) Written job descriptions prepared before advertising or interviewing applicants for the job.

(C) The amount of time spent on the job performing the function.

(D) The consequences of not requiring the incumbent to perform the function.

(E) The terms of a collective bargaining agreement.

(F) The work experiences of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(g) "Labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

(h) "Medical condition" * * * includes, but is not limited to, any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical evidence.

(i) "Mental disability" includes any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. However, "mental disability" does not include conditions excluded from the federal definition of "disability" pursuant to Section 511 of the Americans with Disabili-

ties Act of 1990 (42 U.S.C., Sec. 12211). Additionally, for purposes of this part, the unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a mental disability.

(j) "On the bases enumerated in this part" means or refers to discrimination on the basis of one or more of the following: race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, sex, or age.

(k) "Physical disability" includes impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services. It is the intent of the Legislature that the definition of "physical disability" in this subdivision shall have the same meaning as the term "physical handicap" formerly defined by this subdivision and construed in American National Ins. Co. v. Fair Employment & Housing Com., 32 Cal.3d 603. However, "physical disability" does not include conditions excluded from the federal definition of "disability" pursuant to Section 511 of the Americans with Disabilities Act of 1990 (42 U.S.C., Sec. 12211). Additionally, for purposes of this part, the unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a physical disability.

(l) "Reasonable accommodation" may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(m) "Religious creed," "religion," "religious observance," "religious belief," and "creed" include all aspects of religious belief, observance, and practice.

(n) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.

(o) "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of all the following factors:

(1) The nature and cost of the accommodation needed.

(2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.

(3) The overall financial resources of the covered entity, the overall size of the business or a covered entity with respect to the number of employees, and the number, type, and location of its facilities.

(4) The type of operations, including the composition, structure, and functions of the work force of the entity.

(5) The geographic separateness, administrative, or fiscal relationship of the facility or facilities.

Notwithstanding subdivisions (i) and (k), if the definition of "disability" used in the Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (i) or (k), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (i) and (k).

SEC. 21.2. Section 12926 of the Government Code is amended to read:

12926. As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (h) or (j), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (h) and (j).

SEC. 21.3. Section 12926 of the Government Code is amended to read:

12926. As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(a) "Affirmative relief" or "prospective relief" includes the authority to order reinstatement of an employee, awards of back pay, reimbursement of out-of-pocket expenses, hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part.

(b) "Age" refers to the chronological age of any individual who has reached his or her 40th birthday.

(c) "Employee" does not include any individual employed by his or her parents, spouse, or child, or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.

(d) "Employer * * *" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities * * *, except as follows:

(1) "Employer" does not include a religious association or corporation not organized for private profit.

(2) "Employer," for purposes of provisions defining unlawful employment practices related to mental disability, means any person regularly employing 15 or more persons, or any person directly or indirectly acting as an agent of such an employer, and also includes the state and municipalities and political subdivisions of the state.

(e) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

(f) "Essential duties" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential duties" does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's judgment as to which functions are essential.

(B) Written job descriptions prepared before advertising or interviewing applicants for the job.

(C) The amount of time spent on the job performing the function.

(D) The consequences of not requiring the incumbent to perform the function.

(E) The terms of a collective bargaining agreement.

(F) The work experiences of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(g) "Labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

(h) "Medical condition" * * * includes, but is not limited to, any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical evidence.

(i) "Mental disability" includes any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. However, "mental disability" does not include conditions excluded from the federal definition of "disability" pursuant to Section 511 of the Americans with Disabilities Act of 1990 (42 U.S.C., Sec. 12211). Additionally, for purposes of this part, the unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a mental disability.

(j) "On the bases enumerated in this part" means or refers to discrimination on the basis of one or more of the following: race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, sex, or age.

(k) "Physical disability" includes * * *, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits an individual's ability to participate in major life activities.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Being regarded as having or having had a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2).

(4) Being regarded as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

It is the intent of the Legislature that the definition of "physical disability" in this subdivision shall have the same meaning as the term "physical handicap" formerly defined by this subdivision and construed in American National Ins. Co. v. Fair Employment & Housing Com., 32 Cal. 3d 603. However, "physical disability" does not include conditions excluded from the federal definition of "disability" pursuant to Section 511 of the Americans with Disabilities Act of 1990 (42 U.S.C., Sec. 12211). Additionally, for purposes of this part, the unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a physical disability.

(l) "Reasonable accommodation" may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. It is the intent of the Legislature that the definition of "physical disability" in this subdivision shall have the same meaning as the term "physical handicap" formerly defined by this subdivision and construed in American National Ins. Co. v. Fair Employment & Housing Com., 32 Cal.3d 603. However, "physical disability" does not include conditions excluded from the federal definition of "disability" pursuant to Section 511 of the Americans with Disabilities Act of 1990 (42 U.S.C., Sec. 12211). Additionally, for purposes of this part, the unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a physical disability.

(m) "Reasonable accommodation" may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(n) "Religious creed," "religion," "religious observance," "religious belief," and "creed" include all aspects of religious belief, observance, and practice.

(o) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.

(p) "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of all the following factors: (1) the nature and cost of the accommodation needed, (2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility, (3) the overall financial resources of the covered entity, the overall size of the business or a covered entity with respect to the number of employees, and the number, type, and location of its facilities, (4) the type of operations, including the composition, structure, and functions of the workforce of the entity, (5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

Notwithstanding subdivisions (i) and (k), if the definition of "disability" used in the Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (i) or (k), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (i) and (k).

SEC. 22. Section 12931 of the Government Code is amended to read:

12931. The department may also provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, sex, familial status, or age which impair the rights of persons in such communities under the Constitution or laws of the United States or of this state. The services of the department may be made available in cases of such disputes, disagreements, or difficulties only when, in its judgment, peaceful relations among the citizens of the community involved are threatened thereby. The department's services are to be made available only upon the request of an appropriate state or local public body, or upon the request of any person directly affected by any such dispute, disagreement, or difficulty.

The assistance of the department pursuant to this section shall be limited to endeavors at investigation, conference, conciliation, and persuasion.

SEC. 23. Section 12940 of the Government Code is amended to read:

12940. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

(1) Nothing in this part shall prohibit an employer from refusing to hire or discharging * * * an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of * * * an employee

with a physical or mental disability, where the employee, because of his or her physical or * * * mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner which would not endanger his or her health or safety or the health and safety of others even with reasonable accommodations.

(2) Nothing in this part shall prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner which would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner which would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall either (i) affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission, or (ii) prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam era veterans.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of any person, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of the person discriminated against.

(d) For any employer or employment agency, unless specifically acting in accordance with federal equal employment opportunity guidelines and regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex, or any intent to make any such limitation, specification or discrimination. Except as provided in the Americans with Disabilities Act of 1990 (Public Law 101-336) and the regulations adopted pursuant thereto, nothing in this subdivision shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or * * * request for information regarding, the physical fitness, medical condition, physical condition or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or the safety or * * * health and safety of others.

(e) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code which prohibits retaliation against hospital

employees who report suspected patient abuse by health facilities or community care facilities.

(f) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(h) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment. The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment. For purposes of this subdivision only, "employer" means any person regularly employing one or more persons, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision thereof, and cities. However, "employer" does not include a religious association or corporation not organized for private profit. For other types of discrimination as enumerated in subdivision (a), an employer remains as defined in subdivision (c) of Section 12926. Nothing contained in this subdivision shall be construed to apply the definition of employer found in this subdivision to subdivision (a).

(i) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(j) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties which conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance such as a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.

(k) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.

(l) Initial application of this section to discrimination by employers on the basis of mental disability shall be in accordance with the following schedule:

(1) Commencing January 1, 1993, for employers with 25 or more employees, the state, and its municipalities and political subdivisions.

(2) Commencing July 26, 1994, for all other employers specified in paragraph (2) of subdivision (c) of Section 12926.

SEC. 23.1. Section 12940 of the Government Code is amended to read:

12940. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

(1) Nothing in this part shall prohibit an employer from refusing to hire or discharging * * * an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of * * * an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health and safety of others even with reasonable accommodations.

(2) Nothing in this part shall prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner which would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner which would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either * * * of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission * * *.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam era veterans.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of any person, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of the person discriminated against.

(d) For any employer or employment agency, unless specifically acting in accordance with federal equal employment opportunity guidelines and regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to

race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex, or any intent to make any such limitation, specification or discrimination. Except as provided in the Americans with Disabilities Act of 1990 (Public Law 101-336) and the regulations adopted pursuant thereto, nothing in this subdivision shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.

(e) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code which prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(f) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(h) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

* * * (2) This subdivision is declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3) (A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision thereof, and cities.

* * * (B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or corporation not organized for private profit.

(4) For other types of discrimination as enumerated in subdivision (a), an employer remains as defined in subdivision (c) of Section 12926.

(5) Nothing contained in this subdivision shall be construed to apply the definition of employer found in this subdivision to subdivision (a).

(i) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(j) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties which conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer or other entity

covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance such as a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.

(k) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.

(l) Initial application of this section to discrimination by employers on the basis of mental disability shall be in accordance with the following schedule:

(1) Commencing January 1, 1993, for employers with 25 or more employees, the state, and its municipalities and political subdivisions.

(2) Commencing July 26, 1994, for all other employers specified in paragraph (2) of the subdivision of Section 12926 which defines "employer."

SEC. 23.2. Section 12940 of the Government Code is amended to read:

12940. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

(1) Nothing in this part shall prohibit an employer from refusing to hire or discharging * * * an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of * * * an employee with a physical or mental disability, where the employee, because of his or her physical * * * or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner which would not endanger his or her health or safety or the health and safety of others even with reasonable accommodations.

(2) Nothing in this part shall prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner which would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner which would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall either (i) affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission, or (ii) prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam era veterans.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of any person, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person

because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of the person discriminated against.

(d) For any employer or employment agency, unless specifically acting in accordance with federal equal employment opportunity guidelines and regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex, or any intent to make any such limitation, specification or discrimination. Except as provided in the Americans with Disabilities Act of 1990 (Public Law 101-336) and the regulations adopted pursuant thereto, nothing in this subdivision shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.

(e) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code which prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(f) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(h) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment. For purposes of this section, hostile work environment sexual harassment is established where there is unwelcome sexual conduct that a reasonable person of the same gender as the complainant would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment and the standard provided for the establishment of hostile work environment sexual harassment. For purposes of this subdivision only, "employer" means any person regularly employing one or more persons, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision thereof, and cities. However, "employer" does not include a religious association or corporation not organized for private profit. For other types of discrimination as enumerated in subdivision (a), an employer remains as defined in subdivision (c) of Section

12926. Nothing contained in this subdivision shall be construed to apply the definition of employer found in this subdivision to subdivision (a).

(i) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(j) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties which conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance such as a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.

(k) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.

(l) Initial application of this section to discrimination by employers on the basis of mental disability shall be in accordance with the following schedule:

(1) Commencing January 1, 1993, for employers with 25 or more employees, the state, and its municipalities and political subdivisions.

(2) Commencing July 26, 1994, for all other employers specified in paragraph (2) of the subdivision of Section 12926 which defines "employer."

SEC. 23.3. Section 12940 of the Government Code is amended to read:

12940. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

(1) Nothing in this part shall prohibit an employer from refusing to hire or discharging * * * an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of * * * an employee with a physical or mental disability, where the employee, because of his or her physical * * * or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health and safety of others even with reasonable accommodations.

(2) Nothing in this part shall prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner which would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or

her essential duties, or cannot perform those duties in a manner which would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either * * * of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission * * *.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam era veterans.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of any person, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of the person discriminated against.

(d) For any employer or employment agency, unless specifically acting in accordance with federal equal employment opportunity guidelines and regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex, or any intent to make any such limitation, specification or discrimination. Except as provided in the Americans with Disabilities Act of 1990 (Public Law 101-336) and the regulations adopted pursuant thereto, nothing in this subdivision shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.

(e) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code which prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

mental disability, medical condition, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment. * * * For purposes of this section, hostile work environment sexual harassment is established where there is unwelcome sexual conduct that a reasonable person of the same gender as the complainant would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

(2) This subdivision is declaratory of existing law, except for the new duties imposed on employers with regard to harassment and the standard provided for the establishment of hostile work environment sexual harassment.

(3) (A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision thereof, and cities.

* * * (B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or corporation not organized for private profit.

(4) For other types of discrimination as enumerated in subdivision (a), an employer remains as defined in subdivision (c) of Section 12926.

(5) Nothing contained in this subdivision shall be construed to apply the definition of employer found in this subdivision to subdivision (a).

(i) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(j) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties which conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance such as a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.

(k) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.

(l) Initial application of this section to discrimination by employers on the basis of mental disability shall be in accordance with the following schedule:

(1) Commencing January 1, 1993, for employers with 25 or more employees, the state, and its municipalities and political subdivisions.

(2) Commencing July 26, 1994, for all other employers specified in paragraph (2) of the subdivision of Section 12926 which defines "employer."

SEC. 23.5. Section 12940.3 is added to the Government Code, to read:

12940.3. Prior to January 1, 1996, a study or survey of the costs, including litigation and reasonable accommodation expenses and other impacts on California employers of 15 or more employees, resulting from compliance with Title I of the Americans with

Disabilities Act of 1990 (Public Law 101-336), shall be undertaken jointly by the California Chamber of Commerce, the Department of Fair Employment and Housing, Protection and Advocacy, Inc., and the State Department of Rehabilitation. The study shall also include an analysis of the benefits of the requirements of Title I of the Americans with Disabilities Act of 1990 (Public Law 101-336) to persons with disabilities. The results of the study shall be submitted to the Commission on Special Education for their review and recommendations. The study shall provide a basis for a recommendation to the Legislature and the Governor concerning whether the hardships imposed upon businesses outweigh the benefits to persons with disabilities when the requirements of Title I of the Americans with Disabilities Act of 1990 (Public Law 101-336) are extended to California employers of 5 to 14, inclusive, employees by amending the Fair Employment and Housing Act to include people with mental disabilities as a protected class. In conducting the study and making a recommendation, the parties shall consider whether the additional requirements or consequences of being subject to the additional requirements will impose a significant hardship on employers of 5 to 14, inclusive, employees.

It is the intent to the Legislature that if, at the conclusion of the study and report to the Legislature, it is determined that employers of between 5 and 14 employees would not have a significant hardship in implementing the requirements of Title I of the Americans with Disabilities Act of 1990 (Public Law 101-336), legislation should be introduced to require that employers with between 5 and 14 employees are covered by the requirements of Title I of the Americans with Disabilities Act of 1990 (Public Law 101-336).

The Legislature intends that all employers, including employers of 5 to 14, inclusive, employees, voluntarily comply with the requirements of Title I of the Americans with Disabilities Act of 1990 (Public Law 101-336) so that persons with mental disabilities can participate fully in the employment opportunities provided to all Californians. However, it is the intent of the Legislature that existing employment discrimination provisions covering employers of 5 to 14, inclusive, employees shall not be altered by amendments to this part that become effective on January 1, 1993.

SEC. 24. Section 12944 of the Government Code is amended to read:

12944. (a) It shall be unlawful for a licensing board to require any examination or establish any other qualification for licensing which has an adverse impact on any class by virtue of its race, creed, color, national origin or ancestry, sex, age, medical condition, or physical * * * disability, mental disability, unless such practice can be demonstrated to be job related.

Where the commission, after hearing, determines that an examination is unlawful under this subdivision, the licensing board may continue to use and rely on such examination until such time as judicial review by the superior court of the determination is exhausted.

If an examination or other qualification for licensing is determined to be unlawful under this section, that determination shall not void, limit, repeal, or otherwise affect any right, privilege, status, or responsibility previously conferred upon any person by such examination or by a license issued in reliance on such examination or qualification.

(b) It shall be unlawful for a licensing board to fail or refuse to make reasonable accommodation to an individual's mental or physical disability or medical condition.

(c) It shall be unlawful for any licensing board, unless specifically acting in accordance with federal equal employment opportunity guidelines or regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, sex, or age, or any intent to make any such limitation, specification, or discrimination. Nothing in this subdivision shall prohibit any licensing board from making, in connection with prospective licensure or certification, an inquiry as to, or a request for information regarding, the physical fitness of applicants if that inquiry or request for information is directly related and pertinent to the license or the licensed position the applicant is applying for. Nothing in this subdivision shall prohibit any licensing board, in connection with prospective examinations, licensure, or certifica-

tion, from inviting individuals with physical or mental disabilities to request reasonable accommodations or from making inquiries related to reasonable accommodations.

(d) It is unlawful for a licensing board to discriminate against any person because such person has filed a complaint, testified, or assisted in any proceeding under this part.

(e) It is unlawful for any licensing board to fail to keep records of applications for licensing or certification for a period of two years following the date of receipt of such applications.

(f) As used in this section, "licensing board" means any state board, agency, or authority in the State and Consumer Services Agency which has the authority to grant licenses or certificates which are prerequisites to employment eligibility or professional status.

SEC. 25. Section 12993 of the Government Code is amended to read:

12993. (a) The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, sex, or age.

(b) Nothing contained in this part relating to discrimination in employment on account of sex or medical condition shall be deemed to affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan, provided such terms or conditions are in accordance with customary and reasonable or actuarially sound underwriting practices.

(c) While it is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment and housing by any city, city and county, county, or other political subdivision of the state, nothing contained in this part shall be construed, in any manner or way, to limit or restrict the application of Section 51 of the Civil Code.

SEC. 25.1. Section 12993 of the Government Code is amended to read:

12993. (a) The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, sex, or age.

(b) Nothing contained in this part relating to discrimination in employment on account of sex or medical condition shall be deemed to affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan, provided such terms or conditions are in accordance with customary and reasonable or actuarially sound underwriting practices.

(c) While it is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment and housing by any city, city and county, county, or other political subdivision of the state, nothing contained in this part shall be construed, in any manner or way, to limit or restrict the application of Section 51 or 51.7 of the Civil Code.

SEC. 25.2. Section 12993 of the Government Code is amended to read:

12993. (a) This part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, sex, or age.

(b) Nothing contained in this part relating to discrimination in employment on account of sex or medical condition shall be deemed to affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan,

provided * * * that those terms or conditions are in accordance with customary and reasonable or actuarially sound underwriting practices.

(c) While it is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment and housing by any city, city and county, county, or other political subdivision of the state, nothing contained in this part shall be construed, in any manner or way, to limit or restrict the application of Section 51 of the Civil Code or to prohibit a city, city and county, county, or other political subdivision of this state from providing or maintaining greater protections for the classes of persons protected by the provisions of this part covering housing discrimination.

(d) This part shall be constructed to supplement other state and local fair housing laws.

SEC. 25.3. Section 12993 of the Government Code is amended to read:

12993. (a) * * * This part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, sex, or age.

(b) Nothing contained in this part relating to discrimination in employment on account of sex or medical condition shall be deemed to affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan, provided * * * that those terms or conditions are in accordance with customary and reasonable or actuarially sound underwriting practices.

(c) While it is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment and housing by any city, city and county, county, or other political subdivision of the state, nothing contained in this part shall be construed, in any manner or way, to limit or restrict the application of Section 51 or 51.7 of the Civil Code or to prohibit a city, city and county, county, or other political subdivision of this state from providing or maintaining greater protections for the classes of persons protected by the provisions of this part covering housing discrimination.

(d) This part shall be construed to supplement other state and local fair housing laws.

SEC. 26. Section 12994 of the Government Code is repealed.

SEC. 27. Section 19230 of the Government Code is amended to read:

19230. The Legislature hereby declares that:

(a) It is the policy of this state to encourage and enable * * * individuals with a disability to participate fully in the social and economic life of the state and to engage in remunerative employment.

(b) It is the policy of this state that qualified * * * individuals with a disability shall be employed in the state service, the service of the political subdivisions of the state, in public schools, and in all other employment supported in whole or in part by public funds on the same terms and conditions as the nondisabled, unless it is shown that the particular disability is job related.

(c) It is the policy of this state that a department, agency, or commission shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified * * * applicant or employee who is an individual with a disability, unless the hiring authority can demonstrate that the accommodation would impose an undue hardship on the operation of its program. A department shall not deny any employment opportunity to a qualified * * * applicant or employee who is an individual with a disability if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the applicant or employee.

SEC. 28. Section 19231 of the Government Code is amended to read:

19231. (a) As used in this article, the following definitions apply:

(1) * * * "Individual with a disability" means any individual who (A) has a physical or mental impairment which substantially limits one or more of that individual's major life activities, (B) has a record of the impairment, or (C) is regarded as having such an impairment.

* * * An individual with a disability is "substantially limited" if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of a disability.

(2) "Reasonable accommodation" means both of the following:

(A) Making facilities used by employees readily accessible to and usable by disabled persons.

(B) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification or examinations, training materials or policies, provision of qualified readers or interpreters, and other similar accommodations.

(b) Undue hardship on the operation of a department's program shall be judged on all of the following:

(1) The overall size of the department's program with respect to the number of employees, the number and type of facilities, and the size of the department's budget.

(2) The type of departmental operation, including composition and structure of the department * * * work force.

(3) The nature and cost of the accommodation needed.

SEC. 29. Section 19232 of the Government Code is amended to read:

19232. Each state agency shall be responsible for establishing an effective affirmative action program to ensure * * * individuals with a disability, who are capable of remunerative employment, access to positions in state service on an equal and competitive basis with the general population.

Each state agency shall develop and implement an affirmative action employment plan for * * * individuals with a disability, which shall include goals and timetables. These goals and timetables shall be set annually for disabilities identified pursuant to guidelines established by the State Personnel Board, and shall be submitted to the board no later than June 1 of each year beginning in 1978, for review and approval or modification. Goals and timetables shall be made available to the public upon request.

SEC. 30. Section 19233 of the Government Code is amended to read:

19233. The State Personnel Board shall be responsible for the following:

(a) Outline specific actions to improve the representation of * * * individuals with a disability in the state work force and to ensure equal and fair employment practices for * * * employees who are individuals with a disability.

(b) Survey the number of * * * individuals with a disability in each department by at least job category and salary range for the purpose of developing goals and timetables pursuant to Section 19232 and compare those numbers with the number of * * * individuals with a disability in the work force.

(c) Establish guidelines for state agencies and departments to set goals and timetables to improve the representation of * * * individuals with a disability in the state work force. Goals and timetables shall be set by at least job category.

SEC. 31. Section 19234 of the Government Code is amended to read:

19234. Each state agency shall annually review its hiring activities designed to achieve the employment objectives established pursuant to subdivision (c) of Section 19233 to determine if any category of * * * individuals with a disability have been disproportionately excluded on a non-job-related basis from employment. If any category has been so excluded, the agency shall correct that underrepresentation.

SEC. 32. Section 19235 of the Government Code is amended to read:

19235. Each state agency shall establish a committee of * * * employees who are individuals with a disability to advise the head of the agency on matters relating to the

formulation and implementation of the plan to overcome and correct any underrepresentation determined pursuant to Section 19234.

SEC. 33. Section 19237 of the Government Code is amended to read:

19237. On or before November 15 of each year, beginning in 1978, the State Personnel Board shall report to the Governor and the Legislature on the current activity, future plans, and past accomplishments of the overall employment program for * * * individuals with a disability in state government, including an evaluation of the achievement of annual employment objectives.

SEC. 34. Section 19702 of the Government Code is amended to read:

19702. (a) A person shall not be discriminated against under this part because of sex, race, religious creed, color, national origin, ancestry, marital status, * * * physical * * * disability, or mental disability. A person shall not be retaliated against because he or she has opposed any practice made an unlawful employment practice, or made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. For purposes of this article, "discrimination" includes harassment. This subdivision is declaratory of existing law.

(b) As used in this section, "physical disability" includes, but is not limited to, impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services.

* * *

(c) As used in this section, "mental disability" includes, but is not limited to, any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Notwithstanding subdivisions (b) and (c), if the definition of disability used in the Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (b) or (c), then that broader protection shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (b) and (c). The definitions of subdivisions (b) and (c) shall not be deemed to refer to or include conditions excluded from the federal definition of "disability" pursuant to Section 511 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12211).

(e) If the board finds that a person has engaged in discrimination under this part, and it appears that this practice consisted of acts described in Section 243.4, 261, 286, 288, 288a, or 289 of the Penal Code, the board, with the consent of the complainant, shall provide the local district attorney's office with a copy of its decision and order.

(f) If the board finds that discrimination has occurred in violation of this part, the board shall issue and cause to be served on the appointing authority an order requiring the appointing authority to cause the discrimination to cease and desist and to take any action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without * * * backpay, and compensatory damages, which, in the judgment of the board, will effectuate the purposes of this part. Consistent with this authority, the board may establish rules governing the award of compensatory damages. The order shall include a requirement of reporting the manner of compliance.

(g) Any person claiming discrimination within the state civil service may submit a complaint which shall be in writing and set forth the particulars of the alleged discrimination, the name of the appointing authority, the persons alleged to have committed the unlawful discrimination, and any other information that may be required by the board. The complaint shall be filed with the appointing authority or, in accordance with board rules, with the board itself.

(h) Complaints shall be filed within one year of the alleged unlawful discrimination or the refusal to act in accordance with this section, except that this period may be extended for not to exceed 90 days following the expiration of that year, if a person allegedly aggrieved by unlawful discrimination first obtained knowledge of the facts of the alleged

unlawful discrimination after the expiration of one year from the date of its occurrence. Complaints of discrimination in adverse actions or rejections on probation shall be filed in accordance with Sections 19175 and 19575.

(j) When an employee of the appointing authority refuses, or threatens to refuse, to cooperate in the investigation of a complaint of discrimination, the appointing authority may seek assistance from the board. The board may provide for direct investigation or hearing of the complaint, the use of subpoenas, or any other action which will effect the purposes of this section.

SEC. 35. Section 19952 of the Health and Safety Code is amended to read:

19952. (a) Any person, or public or private firm, organization, or corporation, who owns or manages places of public amusement and resort including theaters, concert halls, and stadiums shall provide seating or accommodations for physically disabled persons in a variety of locations within the facility, to the extent that such variety can be provided while meeting fire and panic safety requirements of the State Fire Marshal, so as to provide such persons a choice of admission prices otherwise available to members of the general public.

(b) Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.

(c) The requirements of this section shall apply with respect to publicly and privately owned facilities or structures for the purposes specified in subdivision (a) for which a building permit or a building plan for new construction has been issued on or after January 1, 1985. * * *

(d) In no case shall this section be construed to prescribe a lesser standard of accessibility or usability than provided by regulations of the federal Architectural and Transportation Barriers Compliance Board adopted to implement the Americans with Disabilities Act of 1990 (Public Law 101-336).

SEC. 36. Section 1735 of the Labor Code is amended to read:

1735. No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of such persons, except as provided in Section 12940 of the Government Code, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter.

SEC. 37. Section 365.5 of the Penal Code is amended to read:

365.5. (a) Any blind person, deaf person, or physically disabled person who is a passenger on any common carrier, airplane, motor vehicle, railway train, motorbus, streetcar, boat, or any other public conveyance or mode of transportation operating within this state, shall be entitled to have with him or her a specially trained guide dog, signal dog, or service dog.

(b) No blind person, deaf person, or physically disabled person and his or her specially trained guide dog, signal dog, or service dog shall be denied admittance to hotels, restaurants, lodging places, places of public accommodation, amusement, or resort or other places to which the general public is invited within this state because of that guide dog, signal dog, or service dog.

(c) Any person, firm, association, or corporation, or the agent of any person, firm, association, or corporation, who prevents a blind person, deaf person, or physically disabled person from exercising the rights specified in this section is guilty of an infraction, punishable by a fine not exceeding two hundred fifty dollars ($250).

(d) As used in this section, "guide dog" means any guide dog or seeing-eye dog which was trained by a person licensed under Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code or which meets the definitional criteria under federal regulations adopted to implement Title III of the Americans with Disabilities Act of 1990 (Public Law 101-336).

(e) As used in this section, "signal dog" means any dog trained to alert a deaf person, or a person whose hearing is impaired, to intruders or sounds.

(f) As used in this section "service dog" means any dog individually trained to do work or perform tasks to meet the requirements of a physically disabled person, including, but not limited to, minimal protection work, rescue work, pulling a wheelchair, or fetching dropped items.

(g) Nothing in this section is intended to affect any civil remedies available for a violation of this section.

SEC. 38. Section 2881 of the Public Utilities Code is amended to read:

2881. (a) The commission shall design and implement a program whereby each telephone corporation shall provide a telecommunications device capable of servicing the needs of * * * individuals who are deaf or * * * hearing impaired, together with a single party line, at no charge additional to the basic exchange rate, to any subscriber who is certified as an individual who is deaf or * * * hearing impaired by a licensed physician, audiologist, or a qualified state agency and to any subscriber which is an organization representing * * * individuals who are deaf or * * * hearing impaired, as determined and specified by the commission pursuant to subdivision (e).

(b) The commission shall also design and implement a program whereby each telephone corporation shall provide a dual-party relay system, using third-party intervention, to connect individuals who are deaf or * * * hearing impaired and offices of organizations representing * * * individuals who are deaf or * * * hearing impaired, as determined and specified by the commission pursuant to subdivision (e), with persons of normal hearing by way of intercommunications devices for * * * individuals who are deaf or * * * hearing impaired and the telephone system, making available reasonable access of all phases of public telephone service to telephone subscribers who are deaf or * * * hearing impaired. In order to make a dual-party relay system which will meet the requirements of individuals who are deaf or * * * hearing impaired available at a reasonable cost, the commission shall initiate an investigation, conduct public hearings to determine the most cost-effective method of providing dual-party relay service to the deaf or * * * hearing impaired when using a telecommunications device, and solicit the advice, counsel, and physical assistance of statewide nonprofit consumer organizations of the deaf, during the development and implementation of the system. The commission shall phase in this program, on a geographical basis, over a three-year period ending on January 1, 1987. The commission shall apply for certification of this program under rules adopted by the Federal Communications Commission pursuant to Section 401 of the Americans with Disabilities Act of 1990 (Public Law 101-336).

(c) The commission shall also design and implement a program whereby specialized or supplemental telephone communications equipment may be provided to subscribers who are certified to be disabled at no charge additional to the basic exchange rate. The certification, including a statement of medical need for specialized telephone communications equipment, shall be provided by a licensed physician and surgeon acting within the scope of his or her license or by a qualified state agency, as determined by the commission. The commission shall, in this connection, study the feasibility of, and implement if determined to be feasible, personal income criteria, in addition to the medical certification of disability, for determining a subscriber's eligibility under this subdivision.

(d) The commission shall establish a rate recovery mechanism through a surcharge not to exceed one-half of 1 percent uniformly applied to a subscriber's intrastate telephone service, other than one-way radio paging service and universal telephone service, both within a service area and between service areas, to allow telephone corporations to recover costs as they are incurred under this section. The surcharge shall be in effect until January 1, 1995. The commission shall require that the programs implemented under this section be identified on subscribers' bills as "communication devices funds for deaf and disabled" and shall establish a fund and require separate accounting for each of the programs implemented under this section.

(e) The commission shall determine and specify those statewide organizations representing the deaf or * * * hearing impaired which shall receive a telecommunications device pursuant to subdivision (a) or a dual-party relay system pursuant to subdivision (b), or both, and in which offices the equipment shall be installed in the case of an organization having more than one office. The commission shall direct the telephone

corporations subject to its jurisdiction to comply with its determinations and specifications in this regard.

(f) The commission shall annually review the surcharge level and the balances in the funds established pursuant to subdivision (d). Until January 1, 1995, the commission shall be authorized to make, within the limits set by subdivision (d), any necessary adjustments to the surcharge to ensure that the programs supported thereby are adequately funded and that the fund balances are not excessive. A fund balance which is projected to exceed six months' worth of projected expenses at the end of the fiscal year is excessive.

(g) The commission shall prepare and submit to the Legislature, on or before December 31, 1988, and annually thereafter, a report on the fiscal status of the programs established and funded pursuant to this section and Sections 2881.1 and 2881.2. The report shall include a statement of the surcharge level established pursuant to subdivision (d) and revenues produced by the surcharge, an accounting of program expenses, and an evaluation of options for controlling those expenses and increasing program efficiency, including, but not limited to, all of the following proposals:

(1) The establishment of a means test for persons to qualify for program equipment or free or reduced charges for the use of telecommunication services.

(2) * * * If and to the extent not prohibited under Section 401 of the Americans with Disabilities Act of 1990 (Public Law 101–336), the imposition of limits or other restrictions on maximum usage levels for the relay service, which shall include the development of a program to provide basic communications requirements to all relay users at discounted rates, including discounted toll call rates, and, for usage in excess of those basic requirements, at rates which recover the full costs of service.

(3) More efficient means for obtaining and distributing equipment to qualified subscribers.

(4) The establishment of quality standards for increasing the efficiency of the relay system.

SEC. 39. Section 2881.2 is added to the Public Utilities Code, to read:

2881.2. (a) The commission shall conduct a one-time study to determine whether the number and location of public pay telephones equipped with telecommunications devices capable of servicing the needs of individuals who are deaf, hearing impaired, or speech impaired, as required under the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder, are adequate to meet the needs of individuals who are deaf, severely hearing impaired, or speech impaired. The commission shall include its findings in the report required by subdivision (g) of Section 2881 to be submitted to the Legislature on or before December 31, 1993.

(b) The commission shall study the feasibility of reasonable toll call discounts for public pay telephone calls made using telecommunications devices capable of servicing the needs of individuals who are deaf, severely hearing impaired, or speech impaired and shall include its findings in the report required by subdivision (g) of Section 2881 to be submitted to the Legislature on or before December 31, 1993.

SEC. 40. Section 99155.5 of the Public Utilities Code is amended to read:

99155.5. (a) The Legislature intends that dial-a-ride and paratransit services be accessible to handicapped persons, as defined in Section 99206.5. It is intended that transportation service be provided for employment, education, medical, and personal reasons. Transportation for * * * individuals with disabilities is a necessity, and allows * * * these persons to fully participate in our society.

The Legislature finds and declares that the term "paratransit," as used in the Americans with Disabilities Act of 1990 (Public Law 101-336), refers to transportation services with specific criteria of quality and quantity, and which are required to be made available to limited classes of persons based on eligibility categories; this is often referred to as "ADA paratransit" or "complementary paratransit." The Legislature finds and declares that the terms "paratransit" and "dial-a-ride," as used in the laws of this state, apply to a broader range of transportation services and that not all individuals with

disabilities under the laws of this state are eligible for "ADA paratransit" under the federal law.

(b) Each transit operator, profit or nonprofit, which provides, or contracts for the provision of, dial-a-ride or paratransit service for * * * individuals with disabilities and which receives public funding pursuant to the Mills-Alquist-Deddeh Act (Chapter 4 (commencing with Section 99200)) for that service shall provide the service without regard to either of the following:

(1) Whether the person is a member of a household which owns a motor vehicle.

(2) The place of residence of the person who requests transportation service within the service area of the provider. * * * To the extent that they are eligible for the specified service requested, all persons requesting transportation service in the service area of the provider shall be provided service on the same terms and at the same price that service is provided to other persons residing within the service area of the provider.

(c) Subdivision (b) does not preclude a provider from offering a subscription service, and does not require a reduction in the amount the provider charges other public or private agencies.

(d) * * * Except as required by the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted pursuant thereto or by higher standards prescribed by the laws of this state, nothing in this section requires any transit operator which provides service to * * * individuals with disabilities in a manner consistent with subdivision (b) to make those services available outside the operator's established operating service area, or requires the operator to make the presentation of identification a condition to using the service.

(e) A transit operator shall honor any current identification card which is valid for the type of transportation service or discount requested and which has been issued to * * * an individual with disabilities by another transit operator.

(f) Any person who believes an operator has violated Section 99155 or 99155.5 may file a report of the alleged violation with the transportation planning agency or county transportation commission. Any * * * individual with disabilities may request the Attorney General to resolve any dispute as to compliance with Section 99155 or this section.

SEC. 41. Section 2557 of the Streets and Highways Code is amended to read:

2557. (a) Except as provided in subdivisions (c) and (d), the moneys received by each authority pursuant to subdivision (b) of Section 9250.10 of the Vehicle Code shall be used for the implementation, maintenance, and operation of a motorist aid system of call boxes, including the lease or lease-purchase of facilities and equipment for the system, on the portions of the California Freeway and Expressway System and a county expressway system, and on state highway routes that connect segments of these systems, which are located within the county in which the authority is established and over which the Department of the California Highway Patrol or an agency designated by that department has law enforcement responsibility. The Department of Transportation and the Department of the California Highway Patrol shall each review and approve plans for implementation of a motorist aid system proposed for any state highway route and shall be reimbursed by the service authority for all costs incurred.

(b) An authority or any other public entity may construct and maintain, and lease or lease-purchase on terms and conditions it deems appropriate, the facilities of a motorist aid system or it may contract with a private person or entity to do so.

(c) If leases or lease-purchase agreements are entered into pursuant to subdivision (a), or if revenue bonds are issued and sold pursuant to Section 2558, the moneys received by each authority pursuant to subdivision (b) of Section 9250.10 of the Vehicle Code shall be used to the extent necessary to make lease payments or to pay the principal of, and interest on, the amount of bonded indebtedness outstanding, as the case may be. Facilities and equipment acquired through the expenditure of proceeds from the sale of those bonds shall have a useful life at least equal to the term of the bonds.

(d) (1) Any money received by an authority pursuant to subdivision (b) of Section 9250.10 of the Vehicle Code which exceeds the amount needed for full implementation and ongoing costs to maintain and operate the motorist aid system of call boxes, installed pursuant to subdivision (a), may be used for purposes of paragraph (2) and for additional motorist aid services or support, including, but not limited to, the following safety-related projects:

(A) Changeable message signs.

(B) Lighting for call boxes.

(C) Support for traffic operations centers.

(D) Contracting for removal of disabled vehicles from the traveled portion of the right-of-way.

(2) Any amendment to an existing plan for a motorist aid system adopted by an authority for any state highway route shall, prior to implementation, be submitted to the Department of Transportation and the Department of the California Highway Patrol for review and approval and shall not be implemented until so reviewed and approved. The authority shall reimburse each department for the costs of that review.

(e) A motorist aid system constructed, maintained, or operated pursuant to this section shall meet the applicable standards of Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted pursuant thereto.

SEC. 42. Section 336 of the Vehicle Code is amended to read:

336. "General public paratransit vehicle" means any motor vehicle designed for carrying no more than 19 persons and the driver, and which provides local transportation to the general public under the exclusive jurisdiction of a publicly owned and operated transit system through one of the following modes: dial-a-ride, subscription service, or route-deviated bus service. Vehicles used in the exclusive transportation of handicapped persons as defined in Section * * * 99206.5 of the Public Utilities Code, or of persons 55 years of age or older, including any persons necessary to provide assistance to these passengers, are not general public paratransit vehicles.

* * *

However, transportation of attendants, companions, or both traveling together with those individuals with disabilities who are determined to be eligible for complementary paratransit services in accordance with Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted pursuant thereto, shall not be sufficient to qualify a vehicle as a general public paratransit vehicle.

SEC. 43. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

SEC. 44. (a) Section 21.1 of this bill incorporates amendments to Section 12926 of the Government Code proposed by both this bill and AB 311. It shall only become operative if (1) both bills are enacted and become effective January 1, 1993, (2) each bill amends Section 12926 of the Government Code, and (3) AB 1286 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after AB 311, in which case Sections 21, 21.2, and 21.3 of this bill shall not become operative.

(b) Section 21.2 of this bill incorporates amendments to Section 12926 of the Government Code proposed by both this bill and AB 1286. It shall only become operative if (1) both bills are enacted and become effective January 1, 1993, (2) each bill amends Section 12926 of the Government Code, (3) AB 311 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after AB 1286, in which case Sections 21, 21.1, and 21.3 of this bill shall not become operative.

(c) Section 21.3 of this bill incorporates amendments to Section 12926 of the Government Code proposed by this bill, AB 311, and AB 1286. It shall only become operative if (1) all three bills are enacted and become effective January 1, 1993, (2) all three bills amend Section 12926 of the Government Code, and (3) this bill is enacted after AB 311 and AB 1286, in which case Sections 21, 21.1, and 21.2 of this bill shall not become operative.

SEC. 45. (a) Section 23.1 of this bill incorporates amendments to Section 12940 of the Government Code proposed by both this bill and AB 1286. It shall only become operative if (1) both bills are enacted and become effective January 1, 1993, (2) each bill amends Section 12940 of the Government Code, and (3) AB 2265 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after AB 1286, in which case Sections 23, 23.2, and 23.3 of this bill shall not become operative.

(b) Section 23.2 of this bill incorporates amendments to Section 12940 of the Government Code proposed by both this bill and AB 2265. It shall only become operative if (1) both bills are enacted and become effective January 1, 1993, (2) each bill amends Section 12940 of the Government Code, (3) AB 1286 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after AB 2265 in which case Sections 23, 23.1, and 23.3 of this bill shall not become operative.

(c) Section 23.3 of this bill incorporates amendments to Section 12940 of the Government Code proposed by this bill, AB 1286, and AB 2265. It shall only become operative if (1) all three bills are enacted and become effective January 1, 1993, (2) all three bills amend Section 12940 of the Government Code, and (3) this bill is enacted after AB 1286 and AB 2265, in which case Sections 23, 23.1, and 23.2 of this bill shall not become operative.

SEC. 46. (a) Section 25.1 of this bill incorporates amendments to Section 12993 of the Government Code proposed by both this bill and AB 311. It shall only become operative if (1) both bills are enacted and become effective January 1, 1993, (2) each bill amends Section 12993 of the Government Code, and (3) AB 1178 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after AB 311, in which case Sections 25, 25.2, and 25.3 of this bill shall not become operative.

(b) Section 25.2 of this bill incorporates amendments to Section 12993 of the Government Code proposed by both this bill and AB 1178. It shall only become operative if (1) both bills are enacted and become effective January 1, 1993, (2) each bill amends Section 12993 of the Government Code, (3) AB 311 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after AB 1178 in which case Sections 25, 25.1, and 25.3 of this bill shall not become operative.

(c) Section 25.3 of this bill incorporates amendments to Section 12993 of the Government Code proposed by this bill, AB 311, and AB 1178. It shall only become operative if (1) all three bills are enacted and become effective January 1, 1993, (2) all three bills amend Section 12993 of the Government Code, and (3) this bill is enacted after AB 311 and AB 1178, in which case Sections 25, 25.1, and 25.2 of this bill shall not become operative.

COMMERCIAL LAW—NEGOTIABLE INSTRUMENTS

CHAPTER 914

S.B. No. 833

AN ACT to add Section 17538.6 to the Business and Professions Code, to amend Sections 1201, 1207, 2511, 4101, 4102, 4103, 4104, 4105, 4201, 4202, 4203, 4204, 4206, 4301, 4302, 4303, 4401, 4402, 4403, 4404, 4405, 4407, 4501, 4502, 4503, and 4504 of, to amend and renumber Sections 4106, 4107, 4108, 4208, 4209, 4210, 4212, 4213, and 4214 of, to amend, repeal, and add Section 4406 to, to add Sections 4106, 4110, 4111, 4205, 4207, 4208, 4209, and 4213 to, to repeal Sections 4205, 4207, and 4211 of, and to repeal and add Division 3 (commencing with Section 3101) of, the Commercial Code, and to add Section 670 to the Evidence Code, relating to commercial law.

PUBLIC CONTRACTS—PENALTIES AND WITHHELD WAGES CONTRACTORS' SUITS

CHAPTER 1342

S.B. No. 222

AN ACT to amend Sections 1727, 1731, 1732, 1733, 1772, 1773.2, 1775, and 1776 of, and to repeal and add Section 1730 of, the Labor Code, relating to public works employment, and making an appropriation therefor.

[Approved by Governor September 30, 1992.]

[Filed with Secretary of State September 30, 1992.]

LEGISLATIVE COUNSEL'S DIGEST

SB 222, B. Greene. Public works employment: enforcement.

(1) Existing law regulating public works employment requires the awarding body of a public works contract to withhold and retain from payments to the contractor all amounts which have been forfeited pursuant to the contract or existing law, and requires the awarding body to transfer all penalties or forfeitures from any contract payment to the Treasurer to become a part of the General Fund.

This bill would instead require the awarding body to transfer all wages and penalties, retained pursuant to specified provisions, to the Labor Commissioner for disbursement pursuant to other specified provisions whenever a contractor fails to bring a suit against the awarding body for recovery of the wages and penalties withheld within 90 days after the completion of the contract and formal exceptance[1] of the job.

(2) Existing law authorizes the contractor to bring suit for the limited purpose of recovery of the penalties or forfeitures withheld. It further provides that amounts withheld shall be retained by the awarding body, pending suit, and shall be forwarded to the Treasurer only in the case of a final judgment against the contractor or his or her assignee.

This bill would permit the Division of Labor Standards Enforcement to intervene in a contractor's suit for recovery of amounts withheld. It would delete provisions for the forwarding of amounts to the Treasurer and instead provide that amounts withheld shall be forwarded to the Labor Commissioner if the contractor does not prevail in the suit. The bill would make an appropriation by providing, as specified, for the deposit of wages for workers who cannot be located into the Industrial Relations Unpaid Wage Fund, a continuously appropriated fund, and would provide for the deposit of penalties into the General Fund.

(3) Existing law requires each contractor and subcontractor to keep an accurate certified payroll record showing specified information for each employee employed in connection with the public work.

This bill would require that the certified payroll records be on forms provided by the Division of Labor Standards Enforcement or contain the same information as the forms provided by the division.

(4) This bill would also make various technical, nonsubstantive changes.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 1727 of the Labor Code is amended to read:

1727. Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all * * * wages and

[1] So in enrolled bill.

penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body.

SEC. 2. Section 1730 of the Labor Code is repealed.

SEC. 3. Section 1730 is added to the Labor Code, to read:

1730. Every awarding body shall transfer all wages and penalties that have been withheld pursuant to Section 1727 to the Labor Commissioner, for disbursement pursuant to Section 1775, whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties that are withheld pursuant to Section 1727 within 90 days after the completion of the contract and formal acceptance of the job.

SEC. 4. Section 1731 of the Labor Code is amended to read:

1731. If suit is brought against the awarding body within the 90-day period and formal notice thereof is given to the awarding body within the 90-day period either by service of summons or by registered mail which is received within the 90-day period, the wages and penalties * * * shall be retained by the awarding body pending the outcome of the suit, and be forwarded to the * * * Labor Commissioner for disbursement pursuant to Section 1775 if the contractor * * * does not prevail in the action. Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

SEC. 5. Section 1732 of the Labor Code is amended to read:

1732. * * * Notwithstanding any other provision of law, the time for action by the contractor or his or her assignee for the recovery of wages or penalties * * * is limited to the 90-day period and * * * suit on the contract for alleged breach thereof in not making the payment is the exclusive remedy of the contractor or his or her assignees with reference to * * * those wages or penalties * * *.

SEC. 6. Section 1733 of the Labor Code is amended to read:

1733. Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties * * * without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the * * * contractor or his or her assignee to establish his or her right to the wages or penalties * * * withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body or the Division of Labor Standards Enforcement.

The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action.

SEC. 7. Section 1772 of the Labor Code is amended to read:

1772. Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

SEC. 8. Section 1773.2 of the Labor Code is amended to read:

1773.2. The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site.

SEC. 9. Section 1775 of the Labor Code is amended to read:

1775. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties * * * and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

SEC. 10. Section 1776 of the Labor Code is amended to read:

1776. (a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or copies thereof made; provided, however, that a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse

the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated in * * * a manner so as to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

* * * (g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. * * * In the event that the contractor fails to comply within the 10-day period, * * * he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(i) The director shall adopt rules consistent with the California Public Records Act, (Ch. 3.5 (commencing with Sec. 6250), Div. 7, Title 1, Gov. C.) and the Information Practices Act of 1977, (Title 1.8 (commencing with Sec. 1798) Pt. 4, Div. 3, Civ. C.) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

ENVIRONMENT—HAZARDOUS WASTE

CHAPTER 1343

A.B. No. 3172

AN ACT to amend Sections 25143.2 and 25200.5 of, to add Section 25158.4 to, and to add and repeal Sections 25158.2 and 25158.3 of, the Health and Safety Code, and to amend Section 21151.1 of the Public Resources Code, relating to hazardous waste.

[Approved by Governor September 30, 1992.]

[Filed with Secretary of State September 30, 1992.]

LEGISLATIVE COUNSEL'S DIGEST

AB 3172, Lempert. Hazardous waste: facilities: treatability studies: recycling: permitting.

(1) Existing law subjects recyclable materials to the requirements of hazardous waste control laws, unless the Department of Toxic Substances Control issues a variance or unless the material meets specified requirements, including if the material is oily waste,

BEFORE THE
COMMISSION ON STATE MANDATES

Test Claim of:
City of Newport Beach

Prevailing Wages

Chapter 1084, Statutes of 1976
Chapter 1174, Statutes of 1976
Chapter 992, Statutes of 1980
Chapter 142, Statutes of 1983
Chapter 143, Statutes of 1983
Chapter 278, Statutes of 1989
Chapter 1224, Statutes of 1989
Chapter 913, Statutes of 1992
Chapter 1342, Statutes of 1992
Chapter 83, Statutes of 1999
Chapter 220, Statutes of 1999
Chapter 881, Statutes of 2000
Chapter 954, Statutes of 2000
Chapter 938, Statutes of 2001
Chapter 1048, Statutes of 2002
8 California Code of Regulations, Sections 16000-16802

Volume II

Senate Bill No. 966

CHAPTER 83

An act to amend Sections 2530.2, 2725.1, 4052, 4827, 10145, 10177, 10229, 10232, 11018.12, 17539.15, 17550.14, 17550.16, 17550.23, 17550.41, 19950.2, 21701.1, and 23104.2 of, and to amend and renumber Section 730 of, the Business and Professions Code, to amend Sections 1102.6c, 1739.7, 1793.22, 1815, and 3269 of the Civil Code, to amend Sections 631 and 1167.3 of the Code of Civil Procedure, to amend Sections 25102 and 28956 of the Corporations Code, to amend Sections 8927, 42238.95, 44259.3, 44403, 44579.4, 44731, 51201.5, 51554, 51555, 51871, 52122, 54745, 54748, 54761.3, 60603, 60640, 69621, and 89010 of the Education Code, to amend Sections 10262, 15112, and 15151 of the Elections Code, to amend Sections 4252, 4351, 4901, 6380, 7572, and 7575 of the Family Code, to amend Sections 6420 and 7151 of the Fish and Game Code, to amend Sections 221, 5852, 14651, 20797, and 31753 of the Food and Agricultural Code, to amend Sections 3517.65, 4560, 6253, 6505.5, 7073, 7260, 7262.5, 9359.01, 12652, 13965.2, 14838.5, 18523.3, 19141.3, 19175.6, 19576.5, 19582.3, 20068.2, 20677, 21028, 22200, 22209, 22754.5, and 54975 of, to amend the heading of Article 5 (commencing with Section 63043) of Chapter 2 of Division 1 of Title 6.7 of, to amend and renumber Sections 66400, 66401, 66402, and 66403 of, and to amend and renumber the heading of Chapter 6 (commencing with Section 66400) of Division 1 of Title 7 of, and to repeal Section 54953 of, the Government Code, to amend Sections 1206, 1261.5, 1261.6, 1300, 1351.2, 1357.09, 1357.50, 1357.51, 1367.24, 1442.5, 1502.6, 1522, 1746, 1771.9, 1797.191, 18020, 18025.5, 25989.1, 33392, 33492.22, 44015, 111940, 120440, 124980, and 129820 of, to amend and renumber Section 50518 of, and to repeal Section 33298 of, the Health and Safety Code, to amend Sections 1063.6, 1765.1, 10095, 10116.5, 10194.8, 10232.8, 10273.4, 10700, and 10841 of, and to amend and renumber Sections 12963.96 and 12963.97 of, the Insurance Code, to amend Sections 138.4, 201.5, 1771.5, 3716.2, 4707, and 5433 of the Labor Code, to amend Sections 136.2, 148.10, 290, 298, 299, 299.6, 350, 550, 594, 626.9, 653m, 790, 831.5, 1203.097, 1269b, 1347, 3003, 4536.5, 5066, 6051, 6065, 6126, 12071, 12085, 12086, 12370, 13515.55, and 13602 of the Penal Code, to amend Section 10218, 14575, and 33001 of the Public Resources Code, to amend Sections 64, 401.15, 995.2, 3772.5, 17275.6, 19057, 19141.6, 19271, 23038.5, 23610.5, 23701t, 23704, 24416.2, 41136, and 65004 of the Revenue and Taxation Code, to amend Section 1095 of the Unemployment Insurance Code, to amend Sections 2478, 2810, 4466, 11614, and 40000.15 of the Vehicle Code, to amend Section 1062 of the Water Code, to amend Sections 319, 366.26, 781, 1801, 5768.5, 6609.1, 10980, 11369, 11401, 12302.3, 16118, and 16501.1 of, to amend and renumber Sections 1790, 1791, 1792, 1793,

(a) "Board" means the Speech-Language Pathology and Audiology Board or any successor.

(b) "Person" means any individual, partnership, corporation, limited liability company, or other organization or combination thereof, except that only individuals can be licensed under this chapter.

(c) A "speech-language pathologist" is a person who practices speech-language pathology.

(d) "The practice of speech-language pathology" means the application of principles, methods, and procedures for measurement, testing, identification, prediction, counseling, or instruction related to the development and disorders of speech, voice, or language for the purpose of identifying, preventing, managing, habilitating or rehabilitating, ameliorating, or modifying those disorders and conditions in individuals or groups of individuals; conducting hearing screenings; and the planning, directing, conducting and supervision of programs for identification, evaluation, habilitation, and rehabilitation of disorders of speech, voice, or language.

(e) "Speech-language pathology aide" means any person meeting the minimum requirements established by the board, who works directly under the supervision of a speech-language pathologist.

(f) (1) "Speech-language pathology assistant" means a person who meets the academic and supervised training requirements set forth by the board and who is approved by the board to assist in the provision of speech-language pathology under the direction and supervision of a speech-language pathologist who shall be responsible for the extent, kind, and quality of the services provided by the speech-language pathology assistant.

(2) The supervising speech-language pathologist employed or contracted for by a public school may hold either a valid and current license issued by the board or a valid, current, and professional clear clinical or rehabilitative services credential in language, speech, and hearing issued by the Commission on Teacher Credentialing. For purposes of this paragraph, a "clear" credential is a credential that is not issued pursuant to a waiver or emergency permit and is as otherwise defined by the Commission on Teacher Credentialing.

(g) An "audiologist" is one who practices audiology.

(h) "The practice of audiology" means the application of principles, methods, and procedures of measurement, testing, appraisal, prediction, consultation, counseling, instruction related to auditory, vestibular, and related functions, and the modification of communicative disorders involving speech, language, auditory behavior or other aberrant behavior resulting from auditory dysfunction, and the planning, directing, conducting, supervising, or participating in programs of identification of auditory disorders, hearing conservation, cerumen removal, aural habilitation, and rehabilitation, including hearing aid recommendation and

evaluation procedures including, but not limited to, specifying amplification requirements and evaluation of the results thereof, auditory training, and speech reading.

(i) "Audiology aide" means any person, meeting the minimum requirements established by the board, who works directly under the supervision of an audiologist.

(j) "Medical board" means the Medical Board of California or a division of the board.

(k) A "hearing screening" performed by a speech-language pathologist means a binary puretone screening at a preset intensity level for the purpose of determining if the screened individuals are in need of further medical or audiological evaluation.

(*l*) "Cerumen removal" means the nonroutine removal of cerumen within the cartilaginous ear canal necessary for access in performance of audiological procedures that shall occur under physician and surgeon supervision. Cerumen removal, as provided by this section, shall only be performed by a licensed audiologist. "Physician and surgeon supervision" shall not be construed to require the physical presence of the physician, but shall include all of the following:

(1) The supervising physician shall collaborate on the development of written standardized protocols. The protocols shall include a requirement that the supervised audiologist immediately refer to an appropriate physician any trauma, including skin tears, bleeding, or other pathology of the ear discovered in the process of cerumen removal as defined in this subdivision.

(2) The supervising physician shall approve the written standardized protocol.

(3) The supervising physician shall be within the general vicinity, as provided by the physician-audiologist protocol, of the supervised audiologist and available by telephone contact at the time of cerumen removal.

(4) A licensed physician and surgeon may not at any one time supervise more than two audiologists for purposes of cerumen removal.

SEC. 3. Section 2725.1 of the Business and Professions Code is amended to read:

2725.1. Notwithstanding any other provision of law, a registered nurse may dispense drugs or devices upon an order by a licensed physician and surgeon when the nurse is functioning within a licensed clinic as defined in paragraphs (1) and (2) of subdivision (a) of Section 1204 of, or within a clinic as defined in subdivision (b) or (c) of Section 1206 of the Health and Safety Code.

A clinic may not employ a registered nurse to perform dispensing duties exclusively. A registered nurse may not dispense drugs in a pharmacy or keep a pharmacy, open shop, or drugstore for the retailing of drugs or poisons. A registered nurse may not compound

(i) Ordering or performing routine drug therapy-related patient assessment procedures including temperature, pulse, and respiration.

(ii) Ordering drug therapy-related laboratory tests.

(iii) Administering drugs and biologicals by injection pursuant to a prescriber's order (the administration of immunizations under the supervision of a prescriber may also be performed outside of a licensed health care facility).

(iv) Adjusting the drug regimen of a patient pursuant to a specific written order or authorization made by the patient's prescriber for the individual patient, and in accordance with the policies, procedures, or protocols of the health care facility, home health agency, licensed clinic, or health care service plan. Adjusting the drug regimen does not include substituting or selecting a different drug, except as authorized by Section 4073.

(B) A patient's prescriber may prohibit, by written instruction, any adjustment or change in the patient's drug regimen by the pharmacist.

(C) The policies, procedures, or protocols referred to in this paragraph shall require that the pharmacist function as part of a multidisciplinary group that includes physicians and direct care registered nurses. The multidisciplinary group shall determine the appropriate participation of the pharmacist and the direct care registered nurse.

(D) A pharmacist performing any procedure authorized under this paragraph for a licensed home health agency shall perform the procedures in accordance with a written, patient-specific protocol approved by the treating or supervising physician. Any change, adjustment, or modification of an approved preexisting treatment or drug therapy shall be provided in writing to the treating or supervising physician within 24 hours.

(6) Manufacture, measure, fit to the patient, or sell and repair dangerous devices or furnish instructions to the patient or the patient's representative concerning the use of those devices.

(7) Provide consultation to patients and professional information, including clinical or pharmacological information, advice, or consultation, to other health care professionals.

(b) Prior to performing any procedure authorized by paragraph (4) of subdivision (a), a pharmacist shall have received appropriate training as prescribed in the policies and procedures of the licensed health care facility. Prior to performing any procedure authorized by paragraph (5) of subdivision (a), a pharmacist shall have either (1) successfully completed clinical residency training or (2) demonstrated clinical experience in direct patient care delivery.

(c) Nothing in this section affects the requirements of existing law relating to maintaining the confidentiality of medical records.

97

(d) Nothing in this section affects the requirements of existing law relating to the licensing of a health care facility.

SEC. 5. Section 4827 of the Business and Professions Code is amended to read:

4827. Nothing in this chapter prohibits any person from:

(a) Practicing veterinary medicine as a bona fide owner of one's own animals. This exemption applies to the following:

(1) The owner's bona fide employees.

(2) Any person assisting the owner, provided that the practice is performed gratuitously.

(b) Lay testing of poultry by the whole blood agglutination test. For purposes of this section, "poultry" means flocks of avian species maintained for food production, including, but not limited to, chickens, turkeys, and exotic fowl.

(c) Making any determination as to the status of pregnancy, sterility, or infertility upon livestock, equine, or food animals at the time an animal is being inseminated, providing no charge is made for this determination.

(d) Administering sodium pentobarbital for euthanasia of sick, injured, homeless, or unwanted domestic pets or animals without the presence of a veterinarian when the person is an employee of an animal control shelter and its agencies or humane society and has received proper training in the administration of sodium pentobarbital for these purposes.

SEC. 6. Section 10145 of the Business and Professions Code is amended to read:

10145. (a) (1) A real estate broker who accepts funds belonging to others in connection with a transaction subject to this part shall deposit all those funds that are not immediately placed into a neutral escrow depository or into the hands of the broker's principal, into a trust fund account maintained by the broker in a bank or recognized depository in this state. All funds deposited by the broker in a trust fund account shall be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds.

(2) Notwithstanding the provisions of paragraph (1), a real estate broker collecting payments or performing services for investors or note owners in connection with loans secured by a first lien on real property may deposit funds received in trust in an out-of-state depository institution insured by the Federal Deposit Insurance Corporation, if the investor or note owner is any one of the following:

(A) The Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration, or the United States Department of Veterans Affairs.

(B) A bank or subsidiary thereof, bank holding company or subsidiary thereof, trust company, savings bank or savings and loan association or subsidiary thereof, savings bank or savings association

holding company or subsidiary thereof, credit union, industrial bank or industrial loan company, or insurance company doing business under the authority of, and in accordance with, the laws of this state, another state, or the United States relating to banks, trust companies, savings banks or savings associations, credit unions, industrial banks or industrial loan companies, or insurance companies, as evidenced by a license, certificate, or charter issued by the United States or a state, district, territory, or commonwealth of the United States.

(C) Trustees of a pension, profit-sharing, or welfare fund, if the pension, profit-sharing, or welfare fund has a net worth of not less than fifteen million dollars ($15,000,000).

(D) A corporation with outstanding securities registered under Section 12 of the Securities Exchange Act of 1934 or a wholly owned subsidiary of that corporation.

(E) A syndication or other combination of any of the entities specified in subparagraph (A), (B), (C), or (D) that is organized to purchase the promissory note.

(F) The California Housing Finance Agency or a local housing finance agency organized under the Health and Safety Code.

(G) A licensed residential mortgage lender or servicer acting under the authority of that license.

(H) A licensed real estate broker selling all or part of the loan, note, or contract to a lender or purchaser specified in subparagraphs (A) to (G), inclusive.

(3) A real estate broker who deposits funds held in trust in an out-of-state depository institution in accordance with paragraph (2) shall make available, in this state, the books, records, and files pertaining to the trust accounts to the commissioner or the commissioner's representatives or pay the reasonable expenses for travel and lodging incurred by the commissioner or the commissioner's representatives in order to conduct an examination at an out-of-state location.

(b) A real estate broker acting as a principal pursuant to Section 10131.1 shall place all funds received from others for the purchase of real property sales contracts or promissory notes secured directly or collaterally by liens on real property in a neutral escrow depository unless delivery of the contract or note is made simultaneously with the receipt of the purchase funds.

(c) A real estate sales person who accepts trust funds from others on behalf of the broker under whom he or she is licensed shall immediately deliver the funds to the broker or, if so directed by the broker, shall deliver the funds into the custody of the broker's principal or a neutral escrow depository or shall deposit the funds into the broker's trust fund account.

(d) If not otherwise expressly prohibited by this part, a real estate broker may, at the request of the owner of trust funds or of the principals to a transaction or series of transactions from whom the

broker has received trust funds, deposit the funds into an interest-bearing account in a bank, savings and loan association, credit union, or industrial loan company, the accounts of which are insured by the Federal Deposit Insurance Corporation, if all of the following requirements are met:

(1) The account is in the name of the broker as trustee for the designated beneficiary or principal of a transaction or series of transactions.

(2) All of the funds in the account are covered by insurance provided by an agency of the United States.

(3) The funds in the account are kept separate, distinct, and apart from funds belonging to the broker or to any other person for whom the broker holds funds in trust.

(4) The broker discloses to the person from whom the trust funds are received, and to a beneficiary whose identity is known to the broker at the time of establishing the account, the nature of the account, how interest will be calculated and paid under various circumstances, whether service charges will be paid to the depository and by whom, and possible notice requirements or penalties for withdrawal of funds from the account.

(5) Interest earned on funds in the account may not inure directly or indirectly to the benefit of the broker or a person licensed to the broker.

(6) In an executory sale, lease, or loan transaction in which the broker accepts funds in trust to be applied to the purchase, lease, or loan, the parties to the contract shall have specified in the contract or by collateral written agreement the person to whom interest earned on the funds is to be paid or credited.

(e) The broker shall have no obligation to place trust funds into an interest-bearing account unless requested to do so and unless all of the conditions in subdivision (d) are met, nor, in any event, if he or she advises the party making the request that the funds will not be placed in an interest-bearing account.

(f) Nothing in subdivision (d) shall preclude the commissioner from prescribing, by regulation, circumstances in which, and conditions under which, a real estate broker is authorized to deposit funds received in trust into an interest-bearing trust fund account.

(g) The broker shall maintain a separate record of the receipt and disposition of all funds described in subdivisions (a) and (b), including any interest earned on the funds.

(h) Upon request of the commissioner, a broker shall furnish to the commissioner an authorization for examination of financial records of those trust fund accounts maintained in a financial institution, in accordance with the procedures set forth in Section 7473 of the Government Code.

(i) As used in this section, "neutral escrow" means an escrow business conducted by a person licensed under Division 6

(commencing with Section 17000) of the Financial Code or by a person described in paragraph (1) or (3) of subdivision (a) of Section 17006 of that code.

SEC. 7. Section 10177 of the Business and Professions Code is amended to read:

10177. The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

(a) Procured, or attempted to procure, a real estate license or license renewal, for himself or herself or any salesperson, by fraud, misrepresentation, or deceit, or by making any material misstatement of fact in an application for a real estate license, license renewal, or reinstatement.

(b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony or a crime involving moral turpitude, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information.

(c) Knowingly authorized, directed, connived at, or aided in the publication, advertisement, distribution, or circulation of any material false statement or representation concerning his or her business, or any business opportunity or any land or subdivision (as defined in Chapter 1 (commencing with Section 11000) of Part 2) offered for sale.

(d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2.

(e) Willfully used the term "realtor" or any trade name or insignia of membership in any real estate organization of which the licensee is not a member.

(f) Acted or conducted himself or herself in a manner that would have warranted the denial of his or her application for a real estate license, or has either had a license denied or had a license issued by another agency of this state, another state, or the federal government revoked or suspended for acts that, if done by a real estate licensee, would be grounds for the suspension or revocation of a California real

estate license, if the action of denial, revocation, or suspension by the other agency or entity was taken only after giving the licensee or applicant fair notice of the charges, an opportunity for a hearing, and other due process protections comparable to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), and only upon an express finding of a violation of law by the agency or entity.

(g) Demonstrated negligence or incompetence in performing any act for which he or she is required to hold a license.

(h) As a broker licensee, failed to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required.

(i) Has used his or her employment by a governmental agency in a capacity giving access to records, other than public records, in a manner that violates the confidential nature of the records.

(j) Engaged in any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

(k) Violated any of the terms, conditions, restrictions, and limitations contained in any order granting a restricted license.

(*l*) Solicited or induced the sale, lease, or listing for sale or lease of residential property on the ground, wholly or in part, of loss of value, increase in crime, or decline of the quality of the schools due to the present or prospective entry into the neighborhood of a person or persons of another race, color, religion, ancestry, or national origin.

(m) Violated the Franchise Investment Law (Division 5 (commencing with Section 31000) of Title 4 of the Corporations Code) or regulations of the Commissioner of Corporations pertaining thereto.

(n) Violated the Corporate Securities Law of 1968 (Division 1 (commencing with Section 25000) of Title 4 of the Corporations Code) or the regulations of the Commissioner of Corporations pertaining thereto.

(o) Failed to disclose to the buyer of real property, in a transaction in which the licensee is an agent for the buyer, the nature and extent of a licensee's direct or indirect ownership interest in that real property. The direct or indirect ownership interest in the property by a person related to the licensee by blood or marriage, by an entity in which the licensee has an ownership interest, or by any other person with whom the licensee has a special relationship shall be disclosed to the buyer.

If a real estate broker that is a corporation has not done any of the foregoing acts, either directly or through its employees, agents,

officers, directors, or persons owning or controlling 10 percent or more of the corporation's stock, the commissioner may not deny the issuance of a real estate license to, or suspend or revoke the real estate license of, the corporation, provided that any offending officer, director, or stockholder, who has done any of the foregoing acts individually and not on behalf of the corporation, has been completely disassociated from any affiliation or ownership in the corporation.

SEC. 8. Section 10229 of the Business and Professions Code is amended to read:

10229. Any transaction that involves the sale of or offer to sell a series of notes secured directly by an interest in the same real property, or the sale of undivided interests in a note secured directly by real property equivalent to a series transaction, shall comply with all of the following, except as provided in paragraph (4) of subdivision (i), the terms "sale" and "offer to sell," as used in this section, shall have the same meaning as set forth in Section 25017 of the Corporations Code and include the acts of negotiating and arranging the transaction:

(a) A notice in the following form and containing the following information shall be filed with the commissioner within 30 days after the first transaction and within 30 days of any material change in the information required in the notice:

TO: Real Estate Commissioner
Mortgage Loan Section
2201 Broadway
Sacramento, CA 95818

This notice is filed pursuant to Section 10229 of the Business and Professions Code.

( ) Original Notice ( ) Amended Notice

1. Name of Broker conducting transaction under Section 10229:

_____

2. Firm name (if different from "1"):

_____

97

3. Street address (main location):

_____

and Street City State ZIP Code

4. Mailing address (if different from "3"):

_____

5. Servicing Agent: Identify the person or persons who will act as the servicing agent in transactions pursuant to Section 10229 (including the undersigned Broker if that is the case):

_____

_____

6. Inspection of trust account (before answering this question, review the provisions of paragraph (3) of subdivision (j) of Section 10229).

CHECK ONLY ONE OF THE FOLLOWING:

( ) The undersigned Broker is (or expects to be) required to file reports of inspection of its trust account(s) with the Real Estate Commissioner pursuant to paragraph (3) of subdivision (j) of Section 10229.

( ) The undersigned Broker is NOT (or does NOT expect to be) required to file reports of inspection of its trust account(s) with the Real Estate Commissioner pursuant to paragraph (3) of subdivision (j) of Section 10229.

7. Signature. The contents of this notice are true and correct.

_____ _____

Date Type Name of Broker

_____

Signature of Broker or of Designated Officer of Corporate Broker

97

Type Name of Person(s) Signing This Notice

NOTE: AN AMENDED NOTICE MUST BE FILED BY THE BROKER WITHIN 30 DAYS OF ANY MATERIAL CHANGE IN THE INFORMATION REQUIRED TO BE SET FORTH HEREIN.

(b) All advertising employed for transactions under this section shall (1) show the name of the broker and (2) comply with Section 10235 of the Business and Professions Code and Sections 260.302 and 2848 of Title 10 of the California Code of Regulations. Brokers and their agents are cautioned that a reference to a prospective investor that a transaction is conducted under this section may be deemed misleading or deceptive if this representation may reasonably be construed by the investor as an implication of merit or approval of the transaction.

(c) The real property directly securing the notes or interests is located in this state, the note or notes are not by their terms subject to subordination to any subsequently created deed of trust upon the real property, and the note or notes are not promotional notes secured by liens on separate parcels of real property in one subdivision or in contiguous subdivisions. For purposes of this subdivision, a promotional note means a promissory note secured by a trust deed, executed on unimproved real property or executed after construction of an improvement of the property but before the first purchase of the property as so improved, or executed as a means of financing the first purchase of the property as so improved, that is subordinate, or by its terms may become subordinate, to any other trust deed on the property. However, the term "promotional note" does not include either of the following:

(1) A note that was executed in excess of three years prior to being offered for sale.

(2) A note secured by a first trust deed on real property in a subdivision that evidences a bona fide loan made in connection with the financing of the usual cost of the development in a residential, commercial, or industrial building or buildings on the property under a written agreement providing for the disbursement of the loan funds as costs are incurred or in relation to the progress of the work and providing for title insurance ensuring the priority of the security as against mechanic's and materialmen's liens or for the final disbursement of at least 10 percent of the loan funds after the expiration of the period for the filing of mechanic's and materialmen's liens.

97

(d) (1) The notes or interests are sold by or through a real estate broker, as principal or agent. At the time the interests are originally sold or assigned, neither the broker nor an affiliate of the broker shall have an interest as owner, lessor, or developer of the property securing the loan, or any contractual right to acquire, lease, or develop the property securing the loan. This provision does not prohibit a broker from conducting the following transactions if, in either case, the disclosure statement furnished by the broker pursuant to subdivision (k) discloses the interest of the broker or affiliate in the transaction and the circumstances under which the broker or affiliate acquired the interest:

(A) A transaction in which the broker or an affiliate of the broker is acquiring the property pursuant to a foreclosure under, or sale pursuant to, a deed of trust securing a note for which the broker is the servicing agent or that the broker sold to the holder or holders.

(B) A transaction in which the broker or an affiliate of the broker is reselling from inventory property acquired by the broker pursuant to a foreclosure under, or sale pursuant to, a deed of trust securing a note for which the broker is the servicing agent or that the broker sold to the holder or holders.

(2) For the purposes of this subdivision, the following definitions apply:

(A) "Broker" means a person licensed as a broker under this part.

(B) "Affiliate" means a person controlled by, controlling, or under common control with, the broker.

(e) (1) The notes or interests shall not be sold to more than 10 persons, each of whom meets one or both of the qualifications of income or net worth set forth below and signs a statement, which shall be retained by the broker for four years, conforming to the following:

Transaction Identifier: _____

Name of Purchaser: _____ Date: _____

Check either one of the following, if true:

( ) My investment in the transaction does not exceed 10% of my net worth, exclusive of home, furnishings, and automobiles.

( ) My investment in the transaction does not exceed 10% of my adjusted gross income for federal income tax purposes for my last tax year or, in the alternative, as estimated for the current year.

97

Signature

(2) The number of offerees shall not be considered for the purposes of this section.

(3) A husband and wife and their dependents, and an individual and his or her dependents, shall be counted as one person.

(4) A retirement plan, trust, business trust, corporation, or other entity that is wholly owned by an individual and the individual's spouse or the individual's dependents, or any combination thereof, shall not be counted separately from the individual, but the investments of these entities shall be aggregated with those of the individual for the purposes of the statement required by paragraph (1). If the investments of any entities are required to be aggregated under this subdivision, the adjusted gross income or net worth of these entities may also be aggregated with the net worth, income, or both, of the individual.

(5) The "institutional investors" enumerated in subdivision (i) of Section 25102 or subdivision (c) of Section 25104 of the Corporations Code, or in a rule adopted pursuant thereto, shall not be counted.

(f) The notes or interests of the purchasers shall be identical in their underlying terms, including the right to direct or require foreclosure, rights to and rate of interest, and other incidents of being a lender, and the sale to each purchaser pursuant to this section shall be upon the same terms, subject to adjustment for the face or principal amount or percentage interest purchased and for interest earned or accrued. This subdivision does not preclude different selling prices for interests to the extent that these differences are reasonably related to changes in the market value of the loan occurring between the sales of these interests. The interest of each purchaser shall be recorded.

(g) (1) Except as provided in paragraph (2), the aggregate principal amount of the notes or interests sold, together with the unpaid principal amount of any encumbrances upon the real property senior thereto, shall not exceed the following percentages of the current market value of the real property, as determined in writing by the broker or appraiser pursuant to Section 10232.6, plus the amount for which the payment of principal and interest in excess of the percentage of current market value is insured for the benefit of the holders of the notes or interests by an insurer admitted to do business in this state by the Insurance Commissioner:

(A)	Single-family residence, owner occupied	80%
(B)	Single-family residence, not owner occupied	75%
(C)	Commercial and income-producing properties	65%

(D)	Single family residentially zoned lot or parcel which has installed offsite improvements including drainage, curbs, gutters, sidewalks, paved roads, and utilities as mandated by the political subdivision having jurisdiction over the lot or parcel	65%
(E)	Land that has been zoned for (and if required, approved for subdivision as) commercial or residential development	50%
(F)	Other real property	35%

(2) The percentage amounts specified in paragraph (1) may be exceeded when and to the extent that the broker determines that the encumbrance of the property in excess of these percentages is reasonable and prudent considering all relevant factors pertaining to the real property. However, in no event shall the aggregate principal amount of the notes or interests sold, together with the unpaid principal amount of any encumbrances upon the property senior thereto, exceed 80 percent of the current fair market value of improved real property or 50 percent of the current fair market value of unimproved real property, except in the case of a single-family zoned lot or parcel as defined in paragraph (1), which shall not exceed 65 percent of the current fair market value of that lot or parcel, plus the amount insured as specified in paragraph (1). A written statement shall be prepared by the broker that sets forth the material considerations and facts that the broker relies upon for his or her determination, which shall be retained as a part of the broker's record of the transaction. Either a copy of the statement or the information contained therein shall be included in the disclosures required pursuant to subdivision (k).

(3) A copy of the appraisal or the broker's evaluation shall be delivered to each purchaser. The broker shall advise purchasers of their right to receive a copy. For purposes of this paragraph, "appraisal" means a written estimate of value based upon the assembling, analyzing, and reconciling of facts and value indicators for the real property in question. A broker shall not purport to make an appraisal unless the person so employed is qualified on the basis of special training, preparation, or experience.

(h) The documentation of the transaction shall require that (1) a default upon any interest or note is a default upon all interests or notes and (2) the holders of more than 50 percent of the record beneficial interests of the notes or interests may govern the actions to be taken on behalf of all holders in accordance with Section 2941.9 of the Civil Code in the event of default or foreclosure for matters that require direction or approval of the holders, including designation of the broker, servicing agent, or other person acting on

their behalf, and the sale, encumbrance, or lease of real property owned by the holders resulting from foreclosure or receipt of a deed in lieu of foreclosure. The terms called for by this subdivision may be included in the deed of trust, in the assignment of interests, or in any other documentation as is necessary or appropriate to make them binding on the parties.

(i) (1) The broker shall not accept any purchase or loan funds or other consideration from a prospective lender or purchaser, or directly or indirectly cause the funds or other consideration to be deposited in an escrow or trust account, except as to a specific loan or note secured by a deed of trust that the broker owns, is authorized to negotiate, or is unconditionally obligated to buy.

(2) All funds received by the broker from the purchasers or lenders shall be handled in accordance with Section 10145 for disbursement to the persons thereto entitled upon recordation of the interests of the purchasers or lenders in the note and deed of trust. No provision of this section shall be construed as modifying or superseding applicable law regulating the escrow holder in any transaction or the handling of the escrow account.

(3) The books and records of the broker or servicing agent, or both, shall be maintained in a manner that readily identifies transactions under this section and the receipt and disbursement of funds in connection with these transactions.

(4) If required by paragraph (3) of subdivision (j), the review by the independent certified public accountant shall include a sample of transactions, as reflected in the records of the trust account required pursuant to paragraph (1) of subdivision (j), and the bank statements and supporting documents. These documents shall be reviewed for compliance with this section with respect to the handling and distribution of funds. The sample shall be selected at random by the accountant from all these transactions and shall consist of the following: (A) three sales made or 5 percent of the sales made pursuant to this section during the period for which the examination is conducted, whichever is greater, and (B) 10 payments processed or 2 percent of payments processed under this exemption during the period for which the examination is conducted, whichever is greater. The transaction that constitutes a "sale," for purposes of this subdivision, is the series of transactions by which a series of notes of a maker, or the interests in the note of a maker, are sold or issued to their various purchasers under this section, including all receipts and disbursements in that process of funds received from the purchasers or lenders. The transaction that constitutes a "payment," for the purposes of this subdivision, is the receipt of a payment from the person obligated on the note or from some other person on behalf of the person so obligated, including the broker or servicing agent, and the distribution of that payment to the persons entitled thereto. If a payment involves an advance paid by the broker or servicing

agent as the result of a dishonored check, the inspection shall identify the source of funds from which the payment was made or, in the alternative, the steps that are reasonably necessary to determine that there was not a disbursement of trust funds. The accountant shall inspect for compliance with the following specific provisions of this section: paragraphs (1), (2), and (3) of subdivision (i) and paragraphs (1) and (2) of subdivision (j).

(5) Within 30 days of the close of the period for which the report is made, or within any additional time as the commissioner may in writing allow in a particular case, the accountant shall forward to the broker or servicing agent, as the case may be, and to the commissioner, the report of the accountant, stating that the inspection was performed in accordance with this section, listing the sales and the payments examined, specifying the nature of the deficiencies, if any, noted by the accountant with respect to each sale or payment, together with any further information as the accountant may wish to include, such as corrective steps taken with respect to any deficiency so noted, or stating that no deficiencies were observed. If the broker meets the threshold criteria of Section 10232, the report of the accountant shall be submitted as part of the quarterly reports required under Section 10232.25.

(j) The notes or interests shall be sold subject to a written agreement that obligates a licensed real estate broker, or a person exempted from the licensing requirement for real estate brokers under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4, to act as agent for the purchasers or lenders to service the note or notes and deed of trust, including the receipt and transmission of payments and the institution of foreclosure proceedings in the event of a default. A copy of this servicing agreement shall be delivered to each purchaser. The broker shall offer to the lenders or purchasers the services of the broker or one or more affiliates of the broker, or both, as servicing agent for each transaction conducted pursuant to this section. The agreement shall require all of the following:

(1) (A) That payments received on the note or notes be deposited immediately to a trust account maintained in accordance with this section and with the provisions for trust accounts of licensed real estate brokers contained in Section 10145 and Article 15 (commencing with Section 2830.1) of Chapter 6 of Title 10 of the California Code of Regulations.

(B) That payments deposited pursuant to subparagraph (A) shall not be commingled with the assets of the servicing agent or used for any transaction other than the transaction for which the funds are received.

(2) That payments received on the note or notes shall be transmitted to the purchasers or lenders pro rata according to their respective interests within 25 days after receipt thereof by the agent.

If the source for the payment is not the maker of the note, the agent shall inform the purchasers or lenders of the source for payment. A broker or servicing agent who transmits to the purchaser or lenders the broker's or servicing agent's own funds to cover payments due from the borrower but unpaid as a result of a dishonored check may recover the amount of the advances from the trust fund when the past due payment is received. However, this section does not authorize the broker, servicing agent, or any other person to issue, or to engage in any practice constituting, any guarantee or to engage in the practice of advancing payments on behalf of the borrower.

(3) If the broker, directly or through an affiliate, is the servicing agent for notes or interests sold pursuant to this section upon which the payments due during any period of three consecutive months in the aggregate exceed one hundred twenty-five thousand dollars ($125,000) or the number of persons entitled to the payments exceeds 120, the trust account or accounts of that broker or affiliate shall be inspected by an independent certified public accountant at no less than three-month intervals during the time the volume is maintained. Within 30 days after the close of the period for which the review is made, the report of the accountant shall be forwarded as provided in paragraph (5) of subdivision (i). If the broker is required to file an annual report pursuant to subdivision (n) or Section 10232.2, the quarterly report pursuant to this subdivision need not be filed for the last quarter of the year for which the annual report is made. For the purposes of this subdivision, an affiliate of a broker is any person controlled by, controlling, or under common control with the broker.

(4) Unless the servicing agent will receive notice pursuant to Section 2924b of the Civil Code, the servicing agent shall file a request for notice of default upon any prior encumbrances and promptly notify the purchasers or lenders of any default on the prior encumbrances or on the note or notes subject to the servicing agreement.

(5) The servicing agent shall promptly forward copies of the following to each purchaser or lender:

(A) Any notice of trustee sale filed on behalf of the purchasers or lenders.

(B) Any request for reconveyance of the deed of trust received on behalf of the purchasers or lenders.

(k) The broker shall disclose in writing to each purchaser or lender the material facts concerning the transaction on a disclosure form adopted or approved by the commissioner pursuant to Section 10232.5, subject to the following:

(1) The disclosure form shall include a description of the terms upon which the note and deed of trust are being sold, including the terms of the undivided interests being offered therein, including the following:

(A) In the case of the sale of an existing note:

(i) The aggregate sale price of the note.

(ii) The percent of the premium over or discount from the principal balance plus accrued but unpaid interest.

(iii) The effective rate of return to the purchasers if the note is paid according to its terms.

(iv) The name and address of the escrow holder for the transaction.

(v) A description of, and the estimated amount of, each cost payable by the seller in connection with the sale and a description of, and the estimated amount of, each cost payable by the purchasers in connection with the sale.

(B) In the case of the origination of a note:

(i) The name and address of the escrow holder for the transaction.

(ii) The anticipated closing date.

(iii) A description of, and the estimated amount of, each cost payable by the borrower in connection with the loan and a description of, and the estimated amount of, each cost payable by the lenders in connection with the loan.

(2) A copy of the written statement or information contained therein, as required by paragraph (2) of subdivision (g), shall be included in the disclosure form.

(3) Any interest of the broker or affiliate in the transaction, as described in subdivision (d), shall be included with the disclosure form.

(4) When the particular circumstances of a transaction make information not specified in the disclosure form material or essential to keep the information provided in the form from being misleading, and the other information is known to the broker, the other information shall also be provided by the broker.

(*l*) The broker or servicing agent shall furnish any purchaser of a note or interest, upon request, with the names and addresses of the purchasers of the other notes or interests in the loan.

(m) No agreement in connection with a transaction covered by this section shall grant to the real estate broker, the servicing agent, or any affiliate of the broker or agent the option or election to acquire the interests of the purchasers or lenders or to acquire the real property securing the interests. This subdivision shall not prohibit the broker or affiliate from acquiring the interests, with the consent of the purchasers or lenders whose interests are being purchased, or the property, with the consent of the purchasers or lenders, if the consent is given at the time of the acquisition.

(n) Each broker who conducts transactions under this section and meets the criteria of paragraph (3) of subdivision (j) shall file with the commissioner an annual report of a review of its trust account. The report shall be prepared and filed in accordance with subdivision (a) of Section 10232.2 and the rules and procedures thereunder of the commissioner. That report shall cover the broker's transactions

under this section and, if the broker also meets the threshold criteria set forth in Section 10232, the broker's transactions subject to that section shall be included as well.

(o) Each broker conducting transactions pursuant to this section who meets the criteria of paragraph (3) of subdivision (j) shall file with the commissioner a report of the transactions that is prepared in accordance with subdivision (c) of Section 10232.2. If the broker also meets the threshold criteria of Section 10232, the report shall include the transactions subject to that section as well. This report shall be confidential pursuant to subdivision (f) of Section 10232.2.

(p) The jurisdiction of the Commissioner of Corporations under the Corporate Securities Law of 1968 shall be neither limited nor expanded by this section. Nothing in this section shall be construed to supersede or restrict the application of the Corporate Securities Law of 1968. A transaction under this section shall not be construed to be a transaction involving the issuance of securities subject to authorization by the Real Estate Commissioner under subdivision (e) of Section 25100 of the Corporations Code.

(q) Nothing in this section shall be construed to change the agency relationships between the parties where they exist or limit in any manner the fiduciary duty of brokers to borrowers, lenders, and purchasers of notes or interests in transactions subject to this section.

SEC. 9. Section 10232 of the Business and Professions Code is amended to read:

10232. (a) Except as otherwise expressly provided, Sections 10232.2, 10232.25, 10233, and 10236.6 are applicable to every real estate broker who intends or reasonably expects in a successive 12 months to do any of the following:

(1) Negotiate a combination of 10 or more of the following transactions pursuant to subdivision (d) or (e) of Section 10131 or Section 10131.1 in an aggregate amount of more than one million dollars ($1,000,000):

(A) Loans secured directly or collaterally by liens on real property or on business opportunities as agent for another or others.

(B) Sales or exchanges of real property sales contracts or promissory notes secured directly or collaterally by liens on real property or on business opportunities as agent for another or others.

(C) Sales or exchanges of real property sales contracts or promissory notes secured directly or collaterally by liens on real property as the owner of those notes or contracts.

(2) Make collections of payments in an aggregate amount of two hundred fifty thousand dollars ($250,000) or more on behalf of owners of promissory notes secured directly or collaterally by liens on real property, owners of real property sales contracts, or both.

(3) Make collections of payments in an aggregate amount of two hundred fifty thousand dollars ($250,000) or more on behalf of

obligors of promissory notes secured directly or collaterally by liens on real property, lenders of real property sales contracts, or both.

Persons under common management, direction, or control in conducting the activities enumerated above shall be considered as one person for the purpose of applying the above criteria.

(b) The negotiation of a combination of two or more new loans and sales or exchanges of existing promissory notes and real property sales contracts of an aggregate amount of more than two hundred fifty thousand dollars ($250,000) in any three successive months or a combination of five or more new loans and sales or exchanges of existing promissory notes and real property sales contracts of an aggregate amount of more than five hundred thousand dollars ($500,000) in any successive six months shall create a rebuttable presumption that the broker intends to negotiate new loans and sales and exchanges of an aggregate amount that will meet the criteria of subdivision (a).

(c) In determining the applicability of Sections 10232.2, 10232.25, 10233, and 10236.6, loans or sales negotiated by a broker, or for which a broker collects payments or provides other servicing for the owner of the note or contract, shall not be counted in determining whether the broker meets the criteria of subdivisions (a) and (b) if any of the following apply:

(1) The lender or purchaser is any of the following:

(A) The Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration, and the United States Department of Veterans Affairs.

(B) A bank or subsidiary thereof, bank holding company or subsidiary thereof, trust company, savings bank or savings and loan association or subsidiary thereof, savings bank or savings association holding company or subsidiary thereof, credit union, industrial bank or industrial loan company, commercial finance lender, personal property broker, consumer finance lender, or insurer doing business under the authority of, and in accordance with, the laws of this state, any other state, or the United States relating to banks, trust companies, savings banks or savings associations, credit unions, industrial banks or industrial loan companies, commercial finance lenders, or insurers, as evidenced by a license, certificate, or charter issued by the United States or a state, district, territory, or commonwealth of the United States.

(C) Trustees of a pension, profit-sharing, or welfare fund, if the pension, profit-sharing, or welfare fund has a net worth of not less than fifteen million dollars ($15,000,000).

(D) A corporation with outstanding securities registered under Section 12 of the Securities Exchange Act of 1934 or a wholly owned subsidiary of that corporation.

97

(E) A syndication or other combination of any of the entities specified in subparagraph (A), (B), (C), or (D) that is organized to purchase the promissory note.

(F) The California Housing Finance Agency or a local housing finance agency organized under the Health and Safety Code.

(G) A licensed residential mortgage lender or servicer acting under the authority of that license.

(H) An institutional investor that issues mortgage-backed securities, as specified in paragraph (11) of subdivision (i) of Section 50003 of the Financial Code.

(I) A licensed real estate broker selling all or part of the loan, the note, or the contract to a lender or purchaser specified in subparagraphs (A) to (H), inclusive.

(2) The loan or sale is negotiated, or the loan or contract is being serviced for the owner, under authority of a permit issued pursuant to applicable provisions of the Corporate Securities Law of 1968 (Division 1 (commencing with Section 25000) of Title 4 of the Corporations Code).

(3) The transaction is subject to the requirements of Article 3 (commencing with Section 2956) of Chapter 2 of Title 14 of Part 4 of Division 3 of the Civil Code.

(d) If two or more real estate brokers who are not under common management, direction, or control cooperate in the negotiation of a loan or the sale or exchange of a promissory note or real property sales contract and share in the compensation for their services, the dollar amount of the transaction shall be allocated according to the ratio that the compensation received by each broker bears to the total compensation received by all brokers for their services in negotiating the loan or sale or exchange.

(e) A real estate broker who meets any of the criteria of subdivision (a) or (b) shall notify the department in writing within 30 days after that determination is made.

SEC. 10. Section 11018.12 of the Business and Professions Code is amended to read:

11018.12. (a) The commissioner may issue a conditional public report for a subdivision specified in Section 11004.5 if the requirements of subdivision (e) are met, all deficiencies and substantive inadequacies in the documents that are required to make an application for a final public report for the subdivision substantially complete have been corrected, the material elements of the setup of the offering to be made under the authority of the conditional public report have been established, and all requirements for the issuance of a public report set forth in the regulations of the commissioner have been satisfied, except for one or more of the following requirements, as applicable:

(1) A final map has not been recorded.

(2) A condominium plan pursuant to subdivision (e) of Section 1351 of the Civil Code has not been recorded.

(3) A declaration of covenants, conditions, and restrictions pursuant to Section 1353 of the Civil Code has not been recorded.

(4) A declaration of annexation has not been recorded.

(5) A recorded subordination of existing liens to the declaration of covenants, conditions, and restrictions or declaration of annexation, or escrow instructions to effect recordation prior to the first sale, are lacking.

(6) Filed articles of incorporation are lacking.

(7) A current preliminary report of a licensed title insurance company issued after filing of the final map and recording of the declaration covering all subdivision interests to be included in the public report has not been provided.

(8) Other requirements the commissioner determines are likely to be timely satisfied by the applicant, notwithstanding the fact that the failure to meet these requirements makes the application qualitatively incomplete.

(b) The commissioner may issue a conditional public report for a subdivision not referred to or specified in Section 11000.1 or 11004.5 if the requirements of subdivision (c) are met, all deficiencies and substantive inadequacies in the documents that are required to make an application for a final public report for the subdivision substantially complete have been corrected, the material elements of the setup of the offering to be made under the authority of the conditional public report have been established, and all requirements for issuance of a public report set forth in the regulations of the commissioner have been satisfied, except for one or more of the following requirements, as applicable:

(1) A final map has not been recorded.

(2) A declaration of covenants, conditions, and restrictions has not been recorded.

(3) A current preliminary report of a licensed title insurance company issued after filing of the final map and recording of the declaration covering all subdivision interests to be included in the public report has not been provided.

(4) Other requirements the commissioner determines are likely to be timely satisfied by the applicant, notwithstanding the fact that the failure to meet these requirements makes the application qualitatively incomplete.

(c) A decision by the commissioner to not issue a conditional public report shall be noticed in writing to the applicant within five business days and that notice shall specifically state the reasons why the report is not being issued.

(d) Notwithstanding the provisions of Section 11018.2, a person may sell or lease, or offer for sale or lease, lots or parcels in a subdivision pursuant to a conditional public report if, as a condition

of the sale or lease or offer for sale or lease, delivery of legal title or other interest contracted for will not take place until issuance of a public report and provided that the requirements of subdivision (e) are met.

(e) (1) Evidence shall be supplied that all purchase money will be deposited in compliance with subdivision (a) of Section 11013.2 or subdivision (a) of Section 11013.4, and in the case of a subdivision referred to in subdivision (a) of this section, evidence shall be given of compliance with paragraphs (1) and (2) of subdivision (a) of Section 11018.5.

(2) A description of the nature of the transaction shall be supplied.

(3) Provision shall be made for the return of the entire sum of money paid or advanced by the purchaser if a subdivision public report has not been issued within six months of the date of issuance of the conditional public report or the purchaser is dissatisfied with the public report because of a change pursuant to Section 11012.

(f) A subdivider, principal, or his or her agent shall provide a prospective purchaser a copy of the conditional public report and a written statement including all of the following:

(1) Specification of the information required for issuance of a public report.

(2) Specification of the information required in the public report that is not available in the conditional public report, along with a statement of the reasons why that information is not available at the time of issuance of the conditional public report.

(3) A statement that no person acting as a principal or agent shall sell or lease, or offer for sale or lease, lots or parcels in a subdivision for which a conditional public report has been issued except as provided in this article.

(4) Specification of the requirements of subdivision (e).

(g) The prospective purchaser shall sign a receipt that he or she has received and has read the conditional public report and the written statement provided pursuant to subdivision (f).

(h) The term of a conditional public report shall not exceed six months, and may be renewed for one additional term of six months if the commissioner determines that the requirements for issuance of a public report are likely to be satisfied during the renewal term.

SEC. 11. Section 17539.15 of the Business and Professions Code is amended to read:

17539.15. (a) Solicitation materials containing sweepstakes entry materials shall not represent, taking into account the context in which the representation is made, including, without limitation, emphasis, print, size, color, location, and presentation of the representation and any qualifying language, that a person is a winner or has already won a prize unless that person has in fact won a prize. If the representation is made on or visible through the mailing envelope containing the sweepstakes materials, the context in which

the representation is to be considered, including any qualifying language, shall be limited to what appears on, appears from, or is visible through the mailing envelope.

(b) Solicitation materials containing sweepstakes entry materials shall include a prominent statement of the no-purchase-necessary message, in readily understandable terms, in the official rules included in those solicitation materials and, if the official rules do not appear thereon, on the entry-order device included in those solicitation materials. The no-purchase-necessary message included in the official rules shall be set out in a separate paragraph in the official rules and be printed in capital letters in contrasting typeface not smaller than the largest typeface used in the text of the official rules.

(c) Sweepstakes entries not accompanied by an order for products or services shall not be subjected to any disability or disadvantage in the winner selection process to which an entry accompanied by an order for products or services would not be subject.

(d) Sweepstakes materials containing sweepstakes entry materials shall not represent that an entry in the promotional sweepstakes accompanied by an order for products or services will be eligible to receive additional prizes or be more likely to win than an entry not accompanied by an order for products or services or that an entry not accompanied by an order for products or services will have a reduced chance of winning a prize in the promotional sweepstakes.

(e) For purposes of this section:

(1) "No-purchase-necessary message" means a statement to the effect that no purchase is necessary as a condition of entering the promotional sweepstakes.

(2) "Official rules" means the formal printed statement, however designated, of the rules for the promotional sweepstakes appearing in the solicitation materials. The official rules shall be prominently identified and all references thereto in any solicitation materials shall consistently use the designation for the official rules that appears in those materials. Each sweepstakes solicitation shall contain a copy of the official rules.

SEC. 12. Section 17550.14 of the Business and Professions Code is amended to read:

17550.14. (a) The seller of travel has an obligation either to provide the air or sea transportation or travel services purchased by the passenger or to make a refund as provided by this section. The seller of travel shall return to the passenger all moneys paid for air or sea transportation or travel services not actually provided to the passenger, within either of the following periods, whichever is earlier:

(1) Thirty days from one of the following dates:

(A) The scheduled date of departure.

97

(B) The day the passenger requests a refund.

(C) The day of cancellation by the seller of travel.

(2) Three days from the day the seller of travel is first unable to provide the air or sea transportation or travel services.

As used in this section, "unable to provide" includes, but is not limited to, any day on which the passenger's funds are not in the trust account required by Section 17550.15 and subdivision (g) of Section 17750.21 or the funds necessary to provide the passenger's transportation or travel services have been disbursed other than as allowed by Section 17550.15 or subdivision (a) of Section 17550.16.

(b) If the seller of travel has disbursed the passenger's funds pursuant to paragraph (1), (2), (3), or (4) of subdivision (c) of Section 17550.15, the seller of travel may, instead of providing a refund, provide to the passenger a written statement accompanied by bank records establishing that the passenger's funds were disbursed as required by those provisions and, if disbursed to a seller of travel, proof of current registration of that seller of travel. A seller of travel who is exempt from the requirements of Section 17550.15 pursuant to subdivision (a) of Section 17550.16 and who is in compliance with subdivision (a) of Section 17550.16 may comply with this section by maintaining and providing to the passenger documentary proof of disbursement in compliance with subdivision (a) of Section 17550.16, and proof of current registration of the seller of travel to whom the funds were disbursed, which registration shall note that the registered seller of travel either has a trust account in compliance with Section 17550.15, or is exempt from the requirements of Section 17550.15 pursuant to subdivision (b) or (c) of Section 17550.16.

(c) If terms and conditions relating to a refund upon cancellation by the passenger have been disclosed and agreed to by the passenger and the passenger elects to cancel for any reason other than a seller of travel being unable to provide the air or sea transportation or travel services purchased, the making of a refund in accordance with those terms and conditions shall be deemed to constitute compliance with this section.

(d) Any material misrepresentation by the seller of travel shall be deemed to be a violation of this article and cancellation by the seller of travel, necessitating a refund as required by subdivision (a).

SEC. 13. Section 17550.16 of the Business and Professions Code is amended to read:

17550.16. (a) A seller of travel is exempt from the requirements of subdivisions (a) to (f), inclusive, of Section 17550.15 for all transactions in which the seller of travel is in compliance with paragraphs (1) to (6), inclusive, or with paragraph (7).

(1) The seller of travel sells, provides, furnishes, contracts for, or arranges air or sea transportation in transactions with persons in California, only from locations in California, and the air or sea

97

transportation or travel services are to be furnished by (A) a registered seller of travel that is in compliance with this article and Article 2.7 (commencing with Section 17550.35) or (B) an air or sea carrier.

(2) The seller of travel forwards the passenger's funds, without offsetting or reducing the amount forwarded by any amounts due or claimed in connection with any other transaction, to (A) the provider of the transportation or travel services, (B) the Airlines Reporting Corporation, (C) the trust account identified in the registration of the seller of travel to whom the funds are forwarded, or (D) a registered seller of travel whose registration states that the registered seller is exempt pursuant to subdivision (b) or (c) from the requirements of Section 17550.15, and the seller of travel who forwards funds pursuant to subparagraph (C) or (D) obtains and keeps a copy of the registration referred to in subparagraph (C) or (D).

(3) The seller of travel is an officially appointed agent in good standing of the Airlines Reporting Corporation and the air transportation, if any, is sold to the passenger pursuant to that agency appointment.

(4) The seller of travel has been in business under the same ownership for a period of three years, unless acquired or formed by a registered seller of travel that has been in business under the same ownership for a period of three years. For the purposes of this paragraph, the following shall not constitute a change in ownership:

(A) Any structural change involving a change in the type of entity, such as from a corporation to a partnership, and not involving the addition of any new, underlying ownership interest.

(B) The deletion of any owner or ownership interest.

(5) The seller of travel sells, provides, furnishes, contracts for, or arranges air or sea transportation or travel services only at retail directly to the general public and not through any other seller of travel, all of which air or sea transportation and travel services are to be furnished by other, unrelated providers or sellers of travel.

(6) The seller of travel is in compliance with the requirements of Section 17550.20 and Article 2.7 (commencing with Section 17550.35). Any seller of travel seeking to qualify for this exemption shall provide all information necessary for the Attorney General or his or her delegate to determine that the seller of travel meets the criteria set forth in paragraphs (1) to (6), inclusive.

(7) A seller of travel in a transaction where the air or sea transportation or travel services are furnished by a business entity that (A) is located and providing transportation or travel services outside of the United States and (B) is not in compliance with the provisions of this article is exempt from the requirements of Section 17550.15 for that transaction if the seller of travel obtains each passenger's written acknowledgment of receiving, prior to making

any payment, a clear, conspicuous, and complete written disclosure that the provider of transportation or travel services is not in compliance with the Seller of Travel Law and the transaction is not covered by the Travel Consumer Restitution Fund, and of the attendant risks and consequences thereof.

(8) If the Attorney General or his or her delegate finds, pursuant to Section 17550.52, that the Travel Consumer Restitution Corporation has failed or ceased to operate, a seller of travel who was a participant in the Travel Consumer Restitution Fund shall no longer be exempt from compliance with the requirements of Section 17550.15 and 17550.17.

If Article 2.7 (commencing with Section 17550.35) ceases to operate for any reason, including, but not limited to, repeal pursuant to Section 17550.59, no seller of travel shall be exempt from compliance with the requirements of Sections 17550.15 and 17550.17 unless in compliance with subdivision (b) or (c).

(b) A seller of travel who is a participant, with respect to all sales of air or sea transportation and travel services, in a Consumer Protection Deposit Plan that meets the criteria of paragraphs (1) to (3), inclusive, and who complies with paragraph (4) need not comply with Section 17550.15.

(1) The plan is operated and administered by an entity who demonstrates to the satisfaction of the Attorney General or his or her delegate that the operating and administering entity is competent and reliable and that the plan will achieve fully the purposes and objectives of this article. Each approved plan shall include provisions requiring that each participating seller of travel (A) has been engaged in business as a seller of travel in the United States under the same ownership for not less than three years, unless acquired or formed by a seller of travel already participating and in good standing in the plan, and (B) has deposited with the administrator of the plan a minimum of one million dollars ($1,000,000) in security in the form of a bond, letter of credit, or certificate of deposit, which security shall be (i) in favor solely of the plan, (ii) held by the plan pursuant to the terms of the plan, (iii) used solely to refund passenger payments or deposits or to complete tours, and (iv) payable solely in the event that (I) the seller of travel fails to refund passenger payments or deposits due as a result of the bankruptcy, insolvency, or cessation of operations of the seller of travel or after the cancellation or material failure by the seller of travel to complete performance of the passenger's transportation or travel services or (II) the seller of travel fails to replace the security with another meeting the criteria set forth in subparagraph (B) no later than 30 days prior to its expiration.

(2) Claims filed against the Consumer Protection Deposit Plan are decided within 45 days of receipt and paid within 30 days of decision.

(3) The Consumer Protection Deposit Plan has been reviewed and approved in writing by the Attorney General or his or her

delegate as meeting the criteria set forth above, including a finding that the plan will effectuate the purposes of this article. Should the approved plan cease to provide the consumer protections set forth in paragraph (1), the Attorney General or his or her delegate shall revoke his or her approval immediately. Upon that revocation, the seller of travel shall no longer be exempt from compliance with the requirements of Sections 17550.15 and 17550.17.

(4) Any participant in a Consumer Protection Deposit Plan seeking to qualify for this exemption shall provide all information necessary for the Attorney General or his or her delegate to determine (A) that the Consumer Protection Deposit Plan in which the seller of travel is a participant meets the criteria set forth in paragraphs (1), (2), and (3), (B) that the seller of travel is a participant in full compliance with the terms and conditions of an approved consumer protection deposit plan, and (C) provide a written agreement from the authorized representative of the Consumer Protection Deposit Plan in which the plan administrator agrees to give the office of the Attorney General, Consumer Law Section, immediate written and telephonic notice in the event of termination of the seller of travel's participation in the plan.

(c) A seller of travel who utilizes for all transactions a Consumer Protection Escrow Plan which meets the criteria of paragraphs (1) to (6), inclusive, and who complies with paragraph (7) is exempt from the requirements of Section 17550.15.

(1) The plan is operated and administered as escrow holder by a federally insured bank that demonstrates to the Attorney General or his or her delegate that the manner in which it will administer the plan will be consistent with the purposes of this article. Each approved escrow plan shall include provisions requiring that all air tickets sold by participants in the plan be issued through the Airlines Reporting Corporation.

(2) All funds delivered to the escrow holder, by cash, check, charge card, or otherwise, are held and disbursed by the escrow holder for the benefit of, and to protect the interests of, the passenger.

(3) All funds are separately accounted for by booking number and passenger name.

(4) Claims filed against the escrow plan are decided within 45 days of receipt and paid within 30 days of decision.

(5) All passenger funds are to be delivered to the escrow holder as required by Section 17550.15.

(6) The Consumer Protection Escrow Plan has been reviewed and approved in writing by the Attorney General or his or her delegate as meeting the criteria set forth herein, including a finding that the plan will effectuate the purposes and objectives of this article. Should the approved plan cease to provide the consumer protections set forth in paragraphs (1) to (5), inclusive, the Attorney

General or his or her delegate shall revoke his or her approval of the plan immediately. Upon that revocation, the seller of travel shall no longer be exempt from compliance with the requirements of Sections 17550.15 and 17550.17.

(7) Any participant in a consumer protection plan seeking to qualify for this exemption shall provide all information necessary for the Attorney General or his or her delegate to (A) determine that the Consumer Protection Escrow Plan in which the seller of travel is a participant meets the criteria set forth in paragraphs (1) to (6), inclusive, (B) determine that the seller of travel is a participant in full compliance with the terms and conditions of an approved Consumer Protection Escrow Plan, and (C) provide a written agreement from the authorized representative of the Consumer Protection Escrow Plan in which the plan administrator agrees to give the office of the Attorney General, Consumer Law Section, immediate written and telephonic notice in the event of termination of the seller of travel's participation in the plan.

SEC. 14. Section 17550.23 of the Business and Professions Code is amended to read:

17550.23. (a) The Travel Consumer Restitution Corporation shall notify the office of the Attorney General whenever a seller of travel with its principal place of business in California, which does business with persons located in California, is in compliance with Article 2.7 (commencing with Section 17550.35).

(b) A registration application for a seller of travel who does not or intends not to comply with the requirements of Section 17550.15 because the seller of travel claims to meet the requirements of subdivision (b) of Section 17550.16 shall be accompanied by evidence that the seller of travel is a participant in a Consumer Protection Deposit Plan that meets the criteria set forth in subdivision (b) of Section 17550.16.

(c) A registration application for a seller of travel who does not or intends not to comply with the requirements of Section 17550.15 because the seller of travel claims to meet the requirements of subdivision (c) of Section 17550.16 shall be accompanied by evidence that the seller of travel is a participant in a Consumer Protection Escrow Plan that meets the criteria set forth in subdivision (c) of Section 17550.16.

SEC. 15. Section 17550.41 of the Business and Professions Code is amended to read:

17550.41. (a) The Board of Directors of the Travel Consumer Restitution Corporation shall be composed of six directors, as follows:

(1) One public consumer representative member appointed by the Director of Consumer Affairs.

(2) One employee of the Department of Justice, assigned by the office of the Attorney General, who shall serve as an ex officio, nonvoting member.

97

(3) Four directors who are participants in the Travel Consumer Restitution Fund.

(b) The director appointed pursuant to paragraph (1) of subdivision (a) shall serve until the appointment is revoked or another appointment is made, or until the director resigns.

(c) (1) Participant directors shall be elected by a balloting of all participants in the Travel Consumer Restitution Fund in an election to be conducted by the Travel Consumer Restitution Corporation in February of each year. Participant directors shall be elected to serve two-year terms, with two of the four participant directors being elected each year to staggered two-year terms.

(2) The Travel Consumer Restitution Corporation shall adopt bylaw provisions setting forth procedures for the nomination, qualifications, and election of the four participant directors, consistent with this section.

(3) A director who does not qualify to be a participant or who otherwise becomes unable to serve shall not continue to serve as director. The board of the Travel Consumer Restitution Corporation shall adopt rules setting forth the procedures to determine that a director is no longer able to serve as a director and for the board to elect a successor to serve as director until the next election.

SEC. 16. Section 19950.2 of the Business and Professions Code is amended to read:

19950.2. (a) On and after the effective date of this chapter, neither the governing body nor the electors of a county, city, or city and county that has not authorized legal gaming within its boundaries prior to January 1, 1996, shall authorize legal gaming.

(b) No ordinance in effect on January 1, 1996, that authorizes legal gaming within a city, county, or city and county may be amended to expand gaming in that jurisdiction beyond that permitted on January 1, 1996.

(c) Except as provided in subdivision (d), this section shall remain operative only until January 1, 2001.

(d) With respect to Alameda, Contra Costa, Los Angeles, San Mateo, and Santa Clara Counties only, due to the over-concentration of gambling establishments in those counties, this section shall remain operative with respect to those counties until January 1, 2003, and as of that date is repealed.

SEC. 17. Section 21701.1 of the Business and Professions Code is amended to read:

21701.1. (a) The owner or operator of a self-service storage facility or a household goods carrier, may, for a fee, transport individual storage containers to and from a self-service storage facility that he or she owns or operates. This transportation activity, whether performed by an owner, operator, or carrier, shall not be deemed transportation for compensation or hire as a business of used household goods and is not subject to regulation under Chapter 7

(commencing with Section 5101) of Division 2 of the Public Utilities Code, provided that all of the following requirements are met:

(1) The fee charged (A) to deliver an empty individual storage container to a customer and to transport the loaded container to a self-service storage facility or (B) to return a loaded individual storage container from a self-service storage facility to the customer does not exceed one hundred dollars ($100).

(2) The owner, operator, or carrier, or any affiliate of the owner, operator, or carrier, does not load, pack, or otherwise handle the contents of the container.

(3) The owner, operator, or carrier is registered under Chapter 2 (commencing with Section 34620) of Division 14.85 of the Vehicle Code or holds a permit under Chapter 7 (commencing with Section 5101) of Division 2 of the Public Utilities Code.

(4) The owner, operator, or carrier has procured and maintained cargo insurance in the amount of at least twenty thousand dollars ($20,000) per shipment. Proof of cargo insurance coverage shall be maintained on file and presented to the Department of Motor Vehicles or Public Utilities Commission upon written request.

(5) The owner, operator, or carrier shall disclose to the customer in advance the following information regarding the container transfer service offered, in a written document separate from others furnished at the time of disclosure:

(A) A detailed description of the transfer service, including a commitment to use its best efforts to place the container in an appropriate location designated by the customer.

(B) The dimensions and construction of the individual storage containers used.

(C) The unit charge, if any, for the container transfer service that is in addition to the storage charge or any other fees under the rental agreement.

(D) The availability of delivery or pickup by the customer of his or her goods at the self-service storage facility.

(E) The maximum allowable distance, measured from the self-service storage facility, for the initial pickup and final delivery of the loaded container.

(F) The precise terms of the company's right to move a container from the initial storage location at its own discretion and a statement that the customer will not be required to pay additional charges with respect to that transfer.

(G) Conspicuous disclosure in bold text of the allocation of responsibility for the risk of loss or damage to the customer's goods, including any disclaimer of the company's liability, and the procedure for presenting any claim regarding loss or damage to the company.

The disclosure of terms and conditions required by this subdivision, and the rental agreement, shall be received by the customer a

97

minimum of 72 hours prior to delivery of the empty individual storage container; however, the customer may, in writing, knowingly and voluntarily waive that receipt. The company shall record in writing, and retain for a period of at least six months after the end of the rental, the time and method of delivery of the information, any waiver made by the customer, and the times and dates of initial pickup and redelivery of the containerized goods.

(6) No later than the time the empty individual storage container is delivered to the customer, the company shall provide the customer with an informational brochure containing the following information about loading the container:

(A) Packing and loading tips to minimize damage in transit.

(B) A suggestion that the customer make an inventory of the items as they are loaded and keep any other record (for example, photographs or videotape) that may assist in any subsequent claims processing.

(C) A list of items that are impermissible to pack in the container (for example, flammable items).

(D) A list of items that are not recommended to be packed in light of foreseeable hazards inherent in the company's handling of the containers and in light of any limitation of liability contained in the rental agreement.

(b) Pickup and delivery of the individual storage containers shall be on a date agreed upon between the customer and the company. If the company requires the customer to be physically present at the time of pickup, the company shall in fact be at the customer's premises prepared to perform the service not more than four hours later than the scheduled time agreed to by the customer and company, and in the event of a preventable breach of that obligation by the company, the customer shall be entitled to receive a penalty of fifty dollars ($50) from the company and to elect rescission of the rental agreement without liability.

(c) No charge shall be assessed with respect to any movement of the container between self-service storage facilities by the company at its own discretion, nor for the delivery of a container to a customer's premises if the customer advises the company, at least 24 hours before the agreed time of container dropoff, orally or in writing, that he or she is rescinding the request for service.

(d) For purposes of this chapter, "individual storage container" means a container that meets all of the following requirements:

(1) It shall be fully enclosed and locked.

(2) It contains not less than 100 and not more than 1,100 cubic feet.

(3) It is constructed out of a durable material appropriate for repeated use. A box constructed out of cardboard or a similar material shall not constitute an individual storage container for purposes of this section.

(c) Nothing in this section shall be construed to limit the authority of the Public Utilities Commission to investigate and commence an appropriate enforcement action pursuant to Chapter 7 (commencing with Section 5101) of Division 2 of the Public Utilities Code against any person transporting household goods in individual storage containers in a manner other than that described in this section.

SEC. 18. Section 23104.2 of the Business and Professions Code is amended to read:

23104.2. (a) Subject to the exceptions specified in subdivision (b), a retail licensee may return beer to the wholesaler or manufacturer from whom the retail licensee purchased the beer, or any successor thereto, and the wholesaler, manufacturer, or successor thereto may accept that return if the beer is returned in exchange for the identical quantity and brand of beer. No wholesaler or manufacturer, or any successor thereto, shall accept the return of any beer from a retail licensee except when the beer delivered was not the brand or size container ordered by the retail licensee or the amount delivered was other than the amount ordered, in which case the order may be corrected by the wholesaler or manufacturer who sold the beer, or any successor thereto. If a package had been broken or otherwise damaged prior to or at the time of actual delivery, a credit memorandum may be issued for the returned package by the wholesaler or manufacturer who sold the beer, or any successor thereto, in lieu of exchange for an identical package when the return and corrections are completed within 15 days from the date the beer was delivered to the retail licensee.

(b) Notwithstanding subdivision (a), a wholesaler or manufacturer, or any successor thereto, may accept the return of beer purchased from that wholesaler, manufacturer, or successor thereto, as follows:

(1) (A) From a seasonal or temporary licensee if at the termination of the period of the license the seasonal or temporary licensee has beer remaining unsold, or from an annual licensee operating on a temporary basis if at the termination of the temporary period the annual licensee has beer remaining unsold.

(B) For purposes of subparagraph (A), an annual licensee shall be considered to be operating on a temporary basis if he or she operates at seasonal resorts, including summer and winter resorts, or at sporting or entertainment facilities, including racetracks, arenas, concert halls, and convention centers. Temporary status shall be deemed terminated when operations cease for 15 days or more. No wholesaler or manufacturer, or successor thereto, shall accept the return of beer from an annual licensee considered to be operating on a temporary basis unless the licensee notifies that wholesaler or manufacturer, or successor thereto, within 15 days of the date the licensee's operations ceased.

97

(2) (A) Subject to subparagraph (B), a wholesaler or manufacturer, or any successor thereto, may, with department approval, accept the return of a brand of beer discontinued in a California market area or a seasonal brand of beer from a retail licensee, provided that the beer is exchanged for a quantity of beer of a brand produced or sold by the same manufacturer with a value no greater than the original sales price to the retail licensee of the returned beer. For purposes of this subparagraph, "seasonal brand of beer" means a brand of beer, as defined in Section 23006, that is brewed by a manufacturer to commemorate a specific holiday season and is so identified by appropriate product packaging and labeling.

(B) A discontinued brand of beer may not be reintroduced for a period of 12 months in the same California market area in which a return and exchange of that beer as described in subparagraph (A) has taken place. A seasonal brand of beer may not be reintroduced for a period of six months in the same California market area in which a return and exchange of that beer as described in subparagraph (A) has taken place.

SEC. 19. Section 1102.6c of the Civil Code is amended to read:

1102.6c. (a) This section shall apply only to any real property that is subject to one or more of the following:

(1) Section 8589.3 of the Government Code.
(2) Section 8589.4 of the Government Code.
(3) Section 51183.5 of the Government Code.
(4) Section 2621.9 of the Public Resources Code.
(5) Section 2694 of the Public Resources Code.
(6) Section 4136 of the Public Resources Code.

(b) In addition to the disclosure required pursuant to Section 1102.6, the transferor of any real property that is subject to this section, or his or her agent, shall deliver to the prospective transferee the following natural hazard disclosure statement:

NATURAL HAZARD DISCLOSURE STATEMENT

This statement applies to the following property: _____

The seller and his or her agent(s) disclose the following information with the knowledge that even though this is not a warranty, prospective buyers may rely on this information in deciding whether and on what terms to purchase the subject property. Seller hereby authorizes any agent(s) representing any principal(s) in this action to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

97

The following are representations made by the seller and his or her agent(s) based on their knowledge and maps drawn by the state. This information is a disclosure and is not intended to be part of any contract between the buyer and the seller.

THIS REAL PROPERTY LIES WITHIN THE FOLLOWING HAZARDOUS AREA(S):

A SPECIAL FLOOD HAZARD AREA (any type Zone "A" or "V") designated by the Federal Emergency Management Agency.

Yes _____ No _____ Do not know and information not available from local jurisdiction _____

AN AREA OF POTENTIAL FLOODING shown on a dam failure inundation map pursuant to Section 8589.5 of the Government Code.

Yes _____ No _____ Do not know and information not available from local jurisdiction _____

A VERY HIGH FIRE HAZARD SEVERITY ZONE pursuant to Section 51178 or 51179 of the Government Code. The owner of this property is subject to the maintenance requirements of Section 51182 of the Government Code.

Yes _____ No _____

A WILDLAND AREA THAT MAY CONTAIN SUBSTANTIAL FOREST FIRE RISKS AND HAZARDS pursuant to Section 4125 of the Public Resources Code. The owner of this property is subject to the maintenance requirements of Section 4291 of the Public Resources Code. Additionally, it is not the state's responsibility to provide fire protection services to any building or structure located within the wildlands unless the Department of Forestry and Fire Protection has entered into a cooperative agreement with a local agency for those purposes pursuant to Section 4142 of the Public Resources Code.

97

Yes _____ No _____

AN EARTHQUAKE FAULT ZONE pursuant to Section 2622 of the Public Resources Code.

Yes _____ No _____

A SEISMIC HAZARD ZONE pursuant to Section 2696 of the Public Resources Code.

Yes (Landslide Zone)_____ Yes (Liquefaction Zone) _____
No _____ Map not yet released by state _____

THESE HAZARDS MAY LIMIT YOUR ABILITY TO DEVELOP THE REAL PROPERTY, TO OBTAIN INSURANCE, OR TO RECEIVE ASSISTANCE AFTER A DISASTER.

THE MAPS ON WHICH THESE DISCLOSURES ARE BASED ESTIMATE WHERE NATURAL HAZARDS EXIST. THEY ARE NOT DEFINITIVE INDICATORS OF WHETHER OR NOT A PROPERTY WILL BE AFFECTED BY A NATURAL DISASTER. BUYER(S) AND SELLER(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE REGARDING THOSE HAZARDS AND OTHER HAZARDS THAT MAY AFFECT THE PROPERTY.

Seller represents that the information herein is true and correct to the best of the seller's knowledge as of the date signed by the seller.

Signature of Seller _____ Date _____

Agent represents that the information herein is true and correct to the best of the agent's knowledge as of the date signed by the agent.

Signature of Agent _____ Date _____

Signature of Agent _____ Date _____

Buyer represents that he or she has read and understands this document.

Signature of Buyer _____ Date _____

97

(c) If an earthquake fault zone, seismic hazard zone, very high fire hazard severity zone, or wildland fire area map or accompanying information is not of sufficient accuracy or scale that a reasonable person can determine if the subject real property is included in a natural hazard area, the seller or seller's agent shall mark "Yes" on the Natural Hazard Disclosure Statement. The seller or seller's agent may mark "No" on the Natural Hazard Disclosure Statement if he or she attaches a report prepared pursuant to subdivision (c) of Section 1102.4 that verifies the property is not in the hazard zone. Nothing in this subdivision is intended to limit or abridge any existing duty of the seller or the seller's agents to exercise reasonable care in making a determination under this subdivision.

(d) The disclosure required pursuant to this section may be provided by the seller and seller's agent in the Local Option Real Estate Disclosure Statement, provided that the Local Option Real Estate Disclosure Statement includes substantially the same information and substantially the same warning that is required by this section.

(e) The disclosure required pursuant to this section is only a disclosure between the seller, the seller's agent, and the buyer, and shall not be used by any other party, including, but not limited to, insurance companies, lenders, or governmental agencies, for any purpose.

(f) The specification of items for disclosure in this section does not limit or abridge any obligation for disclosure created by any other provision of law or that may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction.

(g) In any transaction in which a seller has accepted, prior to June 1, 1998, an offer to purchase, the seller, or his or her agent, shall be deemed to have complied with the requirement of subdivision (b) if the seller or agent delivers to the prospective transferee a statement that includes substantially the same information and warning as the Natural Hazard Disclosure Statement.

SEC. 20. Section 1739.7 of the Civil Code is amended to read:

1739.7. (a) As used in this section:

(1) "Autographed" means bearing the actual signature of a personality signed by that individual's own hand.

(2) "Collectible" means an autographed sports item, including, but not limited to, a photograph, book, ticket, plaque, sports program, trading card, item of sports equipment or clothing, or other sports memorabilia sold or offered for sale in or from this state by a dealer to a consumer for five dollars ($5) or more.

(3) "Consumer" means any natural person who purchases a collectible from a dealer for personal, family, or household purposes. "Consumer" also includes a prospective purchaser meeting these criteria.

(4) "Dealer" means a person who is in the business of selling or offering for sale collectibles in or from this state, exclusively or nonexclusively, or a person who by his or her occupation holds himself or herself out as having knowledge or skill peculiar to collectibles, or to whom that knowledge or skill may be attributed by his or her employment of an agent or other intermediary that by his or her occupation holds himself or herself out as having that knowledge or skill. "Dealer" includes an auctioneer who sells collectibles at a public auction, and also includes persons who are consignors or representatives or agents of auctioneers. "Dealer" includes a person engaged in a mail order, telephone order, or cable television business for the sale of collectibles.

(5) "Description" means any of the following:

(A) Any representation in writing, including, but not limited to, a representation in an advertisement, brochure, catalog, flyer, invoice, sign, or other commercial or promotional material.

(B) Any oral representation.

(C) Any representation included in a radio or television broadcast to the public in or from this state.

(6) "Limited edition" means any collectible that meets all of the following requirements:

(A) A company has produced a specific quantity of a collectible and placed it on the open market.

(B) The producer of the collectible has posted a notice, at its primary place of business, that it will provide any consumer, upon request, with a copy of a notice that states the exact number of a collectible produced in that series of limited editions.

(C) The producer makes available, upon request of a consumer, evidence that the electronic encoding, films, molds, or plates used to create the collectible have been destroyed after the specified number of collectibles have been produced.

(D) The sequence number of the collectible and the number of the total quantity produced in the limited edition are printed on the collectible.

(7) "Mint condition" means any collectible sold on the open market or through a private transaction that meets all of the following requirements:

(A) The item has never been circulated, used, or worn.

(B) The item exhibits little or no sign of aging or degradation caused by oxidation or exposure to sunlight as a result of its display.

(C) The item is otherwise free from creases, blemishes, or marks.

(8) "Promoter" means a person who arranges, holds, organizes, or presents a trade show featuring collectibles, autograph signings, or both.

(9) "Person" means any natural person, partnership, corporation, limited liability company, company, trust, association, or other entity, however organized.

97

(b) Whenever a dealer, in selling or offering to sell to a consumer a collectible in or from this state, provides a description of that collectible as being autographed, the dealer shall furnish a certificate of authenticity to the consumer at the time of sale. The certificate of authenticity shall be in writing, shall be signed by the dealer or his or her authorized agent, and shall specify the date of sale. The certificate of authenticity shall be in at least 10-point boldface type and shall contain the dealer's true legal name and street address. The dealer shall retain a copy of the certificate of authenticity for not less than seven years. Each certificate of authenticity shall do all of the following:

(1) Describe the collectible and specify the name of the sports personality who autographed it.

(2) Either specify the purchase price and date of sale or be accompanied by a separate invoice setting forth that information.

(3) Contain an express warranty, which shall be conclusively presumed to be part of the bargain, of the authenticity of the collectible. This warranty shall not be negated or limited by reason of the lack of words such as "warranty" or "guarantee" or because the dealer does not have a specific intent or authorization to make the warranty or because any statement relevant to the collectible is or purports to be, or is capable of being, merely the dealer's opinion.

(4) Specify whether the collectible is offered as one of a limited edition and, if so, specify (A) how the collectible and edition are numbered and (B) the size of the edition and the size of any prior or anticipated future edition, if known. If the size of the edition and the size of any prior or anticipated future edition is not known, the certificate shall contain an explicit statement to that effect.

(5) Indicate whether the dealer is surety bonded or is otherwise insured to protect the consumer against errors and omissions of the dealer and, if bonded or insured, provide proof thereof.

(6) Indicate the last four digits of the dealer's resale certificate number from the State Board of Equalization.

(7) Indicate whether the item was autographed in the presence of the dealer and specify the date and location of, and the name of a witness to, the autograph signing.

(8) Indicate whether the item was obtained or purchased from a third party. If so, indicate the name and address of this third party.

(9) Include an identifying serial number that corresponds to an identifying number printed on the collectible item, if any. The serial number shall also be printed on the sales receipt. If the sales receipt is printed electronically, the dealer may manually write the serial number on the receipt.

(c) No dealer shall represent an item as a collectible if it was not autographed by the sports personality in his or her own hand.

(d) No dealer shall display or offer for sale a collectible in this state unless, at the location where the collectible is offered for sale and in

close proximity to the collectible merchandise, there is a conspicuous sign that reads as follows:

"SALE OF AUTOGRAPHED SPORTS MEMORABILIA: AS REQUIRED BY LAW, A DEALER WHO SELLS TO A CONSUMER ANY SPORTS MEMORABILIA DESCRIBED AS BEING AUTOGRAPHED MUST PROVIDE A WRITTEN CERTIFICATE OF AUTHENTICITY AT THE TIME OF SALE. THIS DEALER MAY BE SURETY BONDED OR OTHERWISE INSURED TO ENSURE THE AUTHENTICITY OF ANY COLLECTIBLE SOLD BY THIS DEALER."

(e) Any dealer engaged in a mail-order or telephone-order business for the sale of collectibles in or from this state:

(1) Shall include the disclosure specified in subdivision (d), in type of conspicuous size, in any written advertisement relating to a collectible.

(2) Shall include in each television advertisement relating to a collectible the following written on-screen message, which shall be prominently displayed, easily readable, and clearly visible for no less than five seconds, and which shall be repeated for five seconds once during each four-minute segment of the advertisement following the initial four minutes:

"A written certificate of authenticity is provided with each autographed collectible, as required by law. This dealer may be surety bonded or otherwise insured to ensure the authenticity of any collectible sold by this dealer."

(3) Shall include as part of the oral message of each radio advertisement for a collectible the disclosure specified in subdivision (d).

(f) No dealer shall display or offer for sale a collectible in this state at any trade show or similar event primarily featuring sales of collectibles or other sports memorabilia that offers onsite admission ticket sales unless, at each onsite location where admission tickets are sold, there is prominently displayed a specimen example of a certificate of authenticity.

(g) Any consumer injured by the failure of a dealer to provide a certificate of authenticity containing the information required by this section, or by a dealer's furnishing of a certificate of authenticity that is false, shall be entitled to recover, in addition to actual damages, a civil penalty in an amount equal to 10 times actual damages, plus court costs, reasonable attorney's fees, interest, and expert witness fees, if applicable, incurred by the consumer in the action. The court, in its discretion, may award additional damages based on the egregiousness of the dealer's conduct. The remedy specified in this

section is in addition to, and not in lieu of, any other remedy that may be provided by law.

(h) No person shall represent himself or herself as a dealer in this state unless he or she possesses a valid resale certificate number from the State Board of Equalization.

(i) A dealer may be surety bonded or otherwise insured for purposes of indemnification against errors and omissions arising from the authentication, sale, or resale of collectibles.

(j) Whenever a promoter arranges or organizes a trade show featuring collectibles and autograph signings, the promoter shall notify, in writing, any dealer who has agreed to purchase or rent space in this trade show what the promoter will do if any laws of this state are violated, including the fact that law enforcement officials will be contacted when those laws are violated. This notice shall be delivered to the dealer, at his or her registered place of business, at the time the agreement to purchase space in the trade show is made. The following language shall be included in each notice:

"As a vendor at this collectibles trade show, you are a professional representative of this hobby. As a result, you will be required to follow the laws of this state, including laws regarding the sale and display of collectibles, as defined in Section 1739.7 of the Civil Code, forged and counterfeit collectibles and autographs, and mint and limited edition collectibles. If you do not obey the laws, you may be evicted from this trade show, be reported to law enforcement, and be held liable for a civil penalty of 10 times the amount of damages."

SEC. 21. Section 1793.22 of the Civil Code is amended to read:

1793.22. (a) This section shall be known and may be cited as the Tanner Consumer Protection Act.

(b) It shall be presumed that a reasonable number of attempts have been made to conform a new motor vehicle to the applicable express warranties if, within one year from delivery to the buyer or 12,000 miles on the odometer of the vehicle, whichever occurs first, either (1) the same nonconformity has been subject to repair four or more times by the manufacturer or its agents and the buyer has at least once directly notified the manufacturer of the need for the repair of the nonconformity or (2) the vehicle is out of service by reason of repair of nonconformities by the manufacturer or its agents for a cumulative total of more than 30 calendar days since delivery of the vehicle to the buyer. The 30-day limit shall be extended only if repairs cannot be performed due to conditions beyond the control of the manufacturer or its agents. The buyer shall be required to directly notify the manufacturer pursuant to paragraph (1) only if the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of this section and of subdivision (d) of Section 1793.2, including the

requirement that the buyer must notify the manufacturer directly pursuant to paragraph (1). This presumption shall be a rebuttable presumption affecting the burden of proof, and it may be asserted by the buyer in any civil action, including an action in small claims court, or other formal or informal proceeding.

(c) If a qualified third-party dispute resolution process exists, and the buyer receives timely notification in writing of the availability of that qualified third-party dispute resolution process with a description of its operation and effect, the presumption in subdivision (b) may not be asserted by the buyer until after the buyer has initially resorted to the qualified third-party dispute resolution process as required in subdivision (d). Notification of the availability of the qualified third-party dispute resolution process is not timely if the buyer suffers any prejudice resulting from any delay in giving the notification. If a qualified third-party dispute resolution process does not exist, or if the buyer is dissatisfied with that third-party decision, or if the manufacturer or its agent neglects to promptly fulfill the terms of the qualified third-party dispute resolution process decision after the decision is accepted by the buyer, the buyer may assert the presumption provided in subdivision (b) in an action to enforce the buyer's rights under subdivision (d) of Section 1793.2. The findings and decision of a qualified third-party dispute resolution process shall be admissible in evidence in the action without further foundation. Any period of limitation of actions under any federal or California laws with respect to any person shall be extended for a period equal to the number of days between the date a complaint is filed with a third-party dispute resolution process and the date of its decision or the date before which the manufacturer or its agent is required by the decision to fulfill its terms if the decision is accepted by the buyer, whichever occurs later.

(d) A qualified third-party dispute resolution process shall be one that does all of the following:

(1) Complies with the minimum requirements of the Federal Trade Commission for informal dispute settlement procedures as set forth in Part 703 of Title 16 of the Code of Federal Regulations, as those regulations read on January 1, 1987.

(2) Renders decisions that are binding on the manufacturer if the buyer elects to accept the decision.

(3) Prescribes a reasonable time, not to exceed 30 days after the decision is accepted by the buyer, within which the manufacturer or its agent must fulfill the terms of its decisions.

(4) Provides arbitrators who are assigned to decide disputes with copies of, and instruction in, the provisions of the Federal Trade Commission's regulations in Part 703 of Title 16 of the Code of Federal Regulations, as those regulations read on January 1, 1987, Division 2 (commencing with Section 2101) of the Commercial Code, and this chapter.

97

(5) Requires the manufacturer, when the process orders, under the terms of this chapter, either that the nonconforming motor vehicle be replaced if the buyer consents to this remedy or that restitution be made to the buyer, to replace the motor vehicle or make restitution in accordance with paragraph (2) of subdivision (d) of Section 1793.2.

(6) Provides, at the request of the arbitrator or a majority of the arbitration panel, for an inspection and written report on the condition of a nonconforming motor vehicle, at no cost to the buyer, by an automobile expert who is independent of the manufacturer.

(7) Takes into account, in rendering decisions, all legal and equitable factors, including, but not limited to, the written warranty, the rights and remedies conferred in regulations of the Federal Trade Commission contained in Part 703 of Title 16 of the Code of Federal Regulations as those regulations read on January 1, 1987, Division 2 (commencing with Section 2101) of the Commercial Code, this chapter, and any other equitable considerations appropriate under the circumstances. Nothing in this chapter requires that, to be certified as a qualified third-party dispute resolution process pursuant to this section, decisions of the process must consider or provide remedies in the form of awards of punitive damages or multiple damages, under subdivision (c) of Section 1794, or of attorney's fees under subdivision (d) of Section 1794, or of consequential damages other than as provided in subdivisions (a) and (b) of Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

(8) Requires that no arbitrator deciding a dispute may be a party to the dispute and that no other person, including an employee, agent, or dealer for the manufacturer, may be allowed to participate substantively in the merits of any dispute with the arbitrator unless the buyer is allowed to participate also. Nothing in this subdivision prohibits any member of an arbitration board from deciding a dispute.

(9) Obtains and maintains certification by the Department of Consumer Affairs pursuant to Chapter 9 (commencing with Section 472) of Division 1 of the Business and Professions Code.

(e) For the purposes of subdivision (d) of Section 1793.2 and this section, the following terms have the following meanings:

(1) "Nonconformity" means a nonconformity that substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee.

(2) "New motor vehicle" means a new motor vehicle that is used or bought for use primarily for personal, family, or household purposes. "New motor vehicle" also means a new motor vehicle that is bought or used for business and personal, family, or household purposes by a person, including a partnership, limited liability company, corporation, association, or any other legal entity, to which

not more than five motor vehicles are registered in this state. "New motor vehicle" includes the chassis, chassis cab, and that portion of a motor home devoted to its propulsion, but does not include any portion designed, used, or maintained primarily for human habitation, a dealer-owned vehicle and a "demonstrator" or other motor vehicle sold with a manufacturer's new car warranty, but does not include a motorcycle or a motor vehicle that is not registered under the Vehicle Code because it is to be operated or used exclusively off the highways. A "demonstrator" is a vehicle assigned by a dealer for the purpose of demonstrating qualities and characteristics common to vehicles of the same or similar model and type.

(3) "Motor home" means a vehicular unit, designed for human habitation for recreational or emergency occupancy, that is built on, or permanently attached to, a self-propelled motor vehicle chassis, chassis cab, or van, that becomes an integral part of the completed vehicle.

(f) (1) Except as provided in paragraph (2), no person shall sell, either at wholesale or retail, lease, or transfer a motor vehicle transferred by a buyer or lessee to a manufacturer pursuant to paragraph (2) of subdivision (d) of Section 1793.2 or a similar statute of any other state, unless the nature of the nonconformity experienced by the original buyer or lessee is clearly and conspicuously disclosed to the prospective buyer, lessee, or transferee, the nonconformity is corrected, and the manufacturer warrants to the new buyer, lessee, or transferee in writing for a period of one year that the motor vehicle is free of that nonconformity.

(2) Except for the requirement that the nature of the nonconformity be disclosed to the transferee, paragraph (1) does not apply to the transfer of a motor vehicle to an educational institution if the purpose of the transfer is to make the motor vehicle available for use in automotive repair courses.

SEC. 22. Section 1815 of the Civil Code is amended to read:

1815. An involuntary deposit is made:

(a) By the accidental leaving or placing of personal property in the possession of any person, without negligence on the part of its owner.

(b) In cases of fire, shipwreck, inundation, insurrection, riot, or like extraordinary emergencies, by the owner of personal property committing it, out of necessity, to the care of any person.

(c) By the delivery to, or picking up by, and the holding of, a stray live animal by any person or public or private entity.

SEC. 23. Section 3269 of the Civil Code is amended to read:

3269. For purposes of this title, the following definitions apply:

(a) "Year 2000 Problem" means any expected or actual computing, physical, enterprise, or distribution system complications that may occur in any computer system, computer program, software

application, embedded systems, embedded chip calculations, or other computing application as a result of the year change from 1999 to 2000. These complications are often associated with the common programming practice of using a two-digit field to represent a year, resulting in erroneous date calculations, an ambiguous interpretation of the term "00," the failure to recognize the year 2000 as a leap year, the use of algorithms that use the year "99" or "00" as a flag for another function, or the use of applications, software, or hardware that are date sensitive.

(b) "Information" means any assessment, projection, estimate, planning document, objective, timetable, test plan, test date, or test result related to the implementation or verification of Year 2000 Problem processing capabilities of a computer system, computer program, software application, embedded systems, embedded chip calculations, or other computing application and intended to solve a Year 2000 Problem.

(c) "Disclosure" and "discloses" mean any dissemination or provision of information without any expectation or right to remuneration or fee therefor.

(d) "Person" means any individual, corporation, partnership, business entity, joint venture, association, the State of California or any of its subdivisions, or any other organization, or any combination thereof.

SEC. 24. Section 631 of the Code of Civil Procedure is amended to read:

631. (a) Trial by jury may be waived by the several parties to an issue of fact in any of the following ways:

(1) By failing to appear at the trial.

(2) By written consent filed with the clerk or judge.

(3) By oral consent, in open court, entered in the minutes or docket.

(4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation.

(5) By failing to deposit with the clerk, or judge, advance jury fees 25 days prior to the date set for trial, except in unlawful detainer actions where the fees shall be deposited at least five days prior to the date set for trial, or as provided by subdivision (b). The advance jury fee shall not exceed the amount necessary to pay the average mileage and fees of 20 trial jurors for one day in the court to which the jurors are summoned.

(6) By failing to deposit with the clerk or judge, promptly after the impanelment of the jury, a sum equal to the mileage or transportation (if allowed by law) of the jury accrued up to that time.

(7) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session a sum equal to one day's fees of the jury, and the mileage or transportation, if any.

(b) In a superior court action, other than a limited civil case, if a jury is demanded by either party in the memorandum to set the cause for trial and the party, prior to trial, by announcement or by operation of law, waives a trial by jury, then all adverse parties shall have five days following the receipt of notice of the waiver to file and serve a demand for a trial by jury and to deposit any advance jury fees that are then due.

(c) When the party who has demanded trial by jury either (1) waives the trial upon or after the assignment for trial to a specific department of the court, or upon or after the commencement of the trial, or (2) fails to deposit the fees as provided in paragraph (6) of subdivision (a), trial by jury shall be waived by the other party by either failing promptly to demand trial by jury before the judge in whose department the waiver, other than for the failure to deposit the fees, was made, or by failing promptly to deposit the fees described in paragraph (6) of subdivision (a).

(d) The court may, in its discretion upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury.

SEC. 25. Section 1167.3 of the Code of Civil Procedure is amended to read:

1167.3. In any action under this chapter, unless otherwise ordered by the court for good cause shown, the time allowed the defendant to answer the complaint, answer the complaint if amended, or amend the answer under paragraph (2), (3), (5), (6), or (7) of subdivision (a) of Section 586 shall not exceed five days.

SEC. 26. Section 25102 of the Corporations Code is amended to read:

25102. The following transactions are exempted from the provisions of Section 25110:

(a) Any offer (but not a sale) not involving any public offering and the execution and delivery of any agreement for the sale of securities pursuant to the offer if (1) the agreement contains substantially the following provision: "The sale of the securities that are the subject of this agreement has not been qualified with the Commissioner of Corporations of the State of California and the issuance of the securities or the payment or receipt of any part of the consideration therefor prior to the qualification is unlawful, unless the sale of securities is exempt from the qualification by Section 25100, 25102, or 25105 of the California Corporations Code. The rights of all parties to this agreement are expressly conditioned upon the qualification being obtained, unless the sale is so exempt"; and (2) no part of the purchase price is paid or received and none of the securities are issued until the sale of the securities is qualified under this law unless the sale of securities is exempt from the qualification by this section, Section 25100, or 25105.

(b) Any offer (but not a sale) of a security for which a registration statement has been filed under the Securities Act of 1933 but has not

yet become effective, or for which an offering statement under Regulation A has been filed but has not yet been qualified, if no stop order or refusal order is in effect and no public proceeding or examination looking toward such an order is pending under Section 8 of the act and no order under Section 25140 or subdivision (a) of Section 25143 is in effect under this law.

(c) Any offer (but not a sale) and the execution and delivery of any agreement for the sale of securities pursuant to the offer as may be permitted by the commissioner upon application. Any negotiating permit under this subdivision shall be conditioned to the effect that none of the securities may be issued and none of the consideration therefor may be received or accepted until the sale of the securities is qualified under this law.

(d) Any transaction or agreement between the issuer and an underwriter or among underwriters if the sale of the securities is qualified, or exempt from qualification, at the time of distribution thereof in this state, if any.

(e) Any offer or sale of any evidence of indebtedness, whether secured or unsecured, and any guarantee thereof, in a transaction not involving any public offering.

(f) Any offer or sale of any security in a transaction (other than an offer or sale to a pension or profit-sharing trust of the issuer) that meets each of the following criteria:

(1) Sales of the security are not made to more than 35 persons, including persons not in this state.

(2) All purchasers either have a preexisting personal or business relationship with the offeror or any of its partners, officers, directors or controlling persons, or managers (as appointed or elected by the members) if the offeror is a limited liability company, or by reason of their business or financial experience or the business or financial experience of their professional advisors who are unaffiliated with and who are not compensated by the issuer or any affiliate or selling agent of the issuer, directly or indirectly, could be reasonably assumed to have the capacity to protect their own interests in connection with the transaction.

(3) Each purchaser represents that the purchaser is purchasing for the purchaser's own account (or a trust account if the purchaser is a trustee) and not with a view to or for sale in connection with any distribution of the security.

(4) The offer and sale of the security is not accomplished by the publication of any advertisement. The number of purchasers referred to above is exclusive of any described in subdivision (i), any officer, director, or affiliate of the issuer, or manager (as appointed or elected by the members) if the issuer is a limited liability company, and any other purchaser who the commissioner designates by rule. For purposes of this section, a husband and wife (together with any custodian or trustee acting for the account of their minor children)

are counted as one person and a partnership, corporation, or other organization that was not specifically formed for the purpose of purchasing the security offered in reliance upon this exemption, is counted as one person. The commissioner may by rule require the issuer to file a notice of transactions under this subdivision. However, the failure to file the notice or the failure to file the notice within the time specified by the rule of the commissioner shall not affect the availability of this exemption. An issuer who fails to file the notice as provided by rule of the commissioner shall, within 15 business days after demand by the commissioner, file the notice and pay to the commissioner a fee equal to the fee payable had the transaction been qualified under Section 25110.

(g) Any offer or sale of conditional sale agreements, equipment trust certificates, or certificates of interest or participation therein or partial assignments thereof, covering the purchase of railroad rolling stock or equipment or the purchase of motor vehicles, aircraft, or parts thereof, in a transaction not involving any public offering.

(h) Any offer or sale of voting common stock by a corporation incorporated in any state if, immediately after the proposed sale and issuance, there will be only one class of stock of the corporation outstanding that is owned beneficially by no more than 35 persons, provided all of the following requirements have been met:

(1) The offer and sale of the stock is not accompanied by the publication of any advertisement, and no selling expenses have been given, paid, or incurred in connection therewith.

(2) The consideration to be received by the issuer for the stock to be issued consists of any of the following:

(A) Only assets (which may include cash) of an existing business enterprise transferred to the issuer upon its initial organization, of which all of the persons who are to receive the stock to be issued pursuant to this exemption were owners during, and the enterprise was operated for, a period of not less than one year immediately preceding the proposed issuance, and the ownership of the enterprise immediately prior to the proposed issuance was in the same proportions as the shares of stock are to be issued.

(B) Only cash or cancellation of indebtedness for money borrowed, or both, upon the initial organization of the issuer, provided all of the stock is issued for the same price per share.

(C) Only cash, provided the sale is approved in writing by each of the existing shareholders and the purchaser or purchasers are existing shareholders.

(D) In a case where after the proposed issuance there will be only one owner of the stock of the issuer, only any legal consideration.

(3) No promotional consideration has been given, paid, or incurred in connection with the issuance. Promotional consideration means any consideration paid directly or indirectly to a person who, acting alone or in conjunction with one or more other persons, takes

the initiative in founding and organizing the business or enterprise of an issuer for services rendered in connection with the founding or organizing.

(4) A notice in a form prescribed by rule of the commissioner, signed by an active member of the State Bar of California, is filed with or mailed for filing to the commissioner not later than 10 business days after receipt of consideration for the securities by the issuer. That notice shall contain an opinion of the member of the State Bar of California that the exemption provided by this subdivision is available for the offer and sale of the securities. However, the failure to file the notice as required by this subdivision and the rules of the commissioner shall not affect the availability of this exemption. An issuer who fails to file the notice within the time specified by this subdivision shall, within 15 business days after demand by the commissioner, file the notice and pay to the commissioner a fee equal to the fee payable had the transaction been qualified under Section 25110. The notice, except when filed on behalf of a California corporation, shall be accompanied by an irrevocable consent, in the form that the commissioner by rule prescribes, appointing the commissioner or his or her successor in office to be the issuer's attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against it or its successor that arises under this law or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the issuer. An issuer on whose behalf a consent has been filed in connection with a previous qualification or exemption from qualification under this law (or application for a permit under any prior law if the application or notice under this law states that the consent is still effective) need not file another. Service may be made by leaving a copy of the process in the office of the commissioner, but it is not effective unless (A) the plaintiff, who may be the commissioner in a suit, action, or proceeding instituted by him or her, forthwith sends notice of the service and a copy of the process by registered or certified mail to the defendant or respondent at its last address on file with the commissioner, and (B) the plaintiff's affidavit of compliance with this section is filed in the case on or before the return day of the process, if any, or within the further time as the court allows.

(5) Each purchaser represents that the purchaser is purchasing for the purchaser's own account, or a trust account if the purchaser is a trustee, and not with a view to or for sale in connection with any distribution of the stock.

For the purposes of this subdivision, all securities held by a husband and wife, whether or not jointly, shall be considered to be owned by one person, and all securities held by a corporation that has issued stock pursuant to this exemption shall be considered to be held by the shareholders to whom it has issued the stock.

97

All stock issued by a corporation pursuant to this subdivision as it existed prior to the effective date of the amendments to this section made during the 1996 portion of the 1995–96 Regular Session that required the issuer to have stamped or printed prominently on the face of the stock certificate a legend in a form prescribed by rule of the commissioner restricting transfer of the stock in a manner provided for by that rule shall not be subject to the transfer restriction legend requirement and, by operation of law, the corporation is authorized to remove that transfer restriction legend from the certificates of those shares of stock issued by the corporation pursuant to this subdivision as it existed prior to the effective date of the amendments to this section made during the 1996 portion of the 1995–96 Regular Session.

(i) Any offer or sale (1) to a bank, savings and loan association, trust company, insurance company, investment company registered under the Investment Company Act of 1940, pension or profit-sharing trust (other than a pension or profit-sharing trust of the issuer, a self-employed individual retirement plan, or individual retirement account), or other institutional investor or governmental agency or instrumentality that the commissioner may designate by rule, whether the purchaser is acting for itself or as trustee, or (2) to any corporation with outstanding securities registered under Section 12 of the Securities Exchange Act of 1934 or any wholly owned subsidiary of the corporation that after the offer and sale will own directly or indirectly 100 percent of the outstanding capital stock of the issuer, provided the purchaser represents that it is purchasing for its own account (or for the trust account) for investment and not with a view to or for sale in connection with any distribution of the security.

(j) Any offer or sale of any certificate of interest or participation in an oil or gas title or lease (including subsurface gas storage and payments out of production) if either of the following apply:

(1) All of the purchasers meet one of the following requirements:

(A) Are and have been during the preceding two years engaged primarily in the business of drilling for, producing, or refining oil or gas (or whose corporate predecessor, in the case of a corporation, has been so engaged).

(B) Are persons described in clause (1) of subdivision (i).

(C) Have been found by the commissioner upon written application to be substantially engaged in the business of drilling for, producing, or refining oil or gas so as not to require the protection provided by this law (which finding shall be effective until rescinded).

(2) The security is concurrently hypothecated to a bank in the ordinary course of business to secure a loan made by the bank, provided that each purchaser represents that it is purchasing for its

own account for investment and not with a view to or for sale in connection with any distribution of the security.

(k) Any offer or sale of any security under, or pursuant to, a plan of reorganization under Chapter 11 of the federal bankruptcy law that has been confirmed or is subject to confirmation by the decree or order of a court of competent jurisdiction.

(*l*) Any offer or sale of an option, warrant, put, call, or straddle, and any guarantee of any of these securities, by a person who is not the issuer of the security subject to the right, if the transaction, had it involved an offer or sale of the security subject to the right by the person, would not have violated Section 25110 or 25130.

(m) Any offer or sale of a stock to a pension, profit-sharing, stock bonus, or employee stock ownership plan, provided that (1) the plan meets the requirements for qualification under Section 401 of the Internal Revenue Code, and (2) the employees are not required or permitted individually to make any contributions to the plan. The exemption provided by this subdivision shall not be affected by whether the stock is contributed to the plan, purchased from the issuer with contributions by the issuer or an affiliate of the issuer, or purchased from the issuer with funds borrowed from the issuer, an affiliate of the issuer, or any other lender.

(n) Any offer or sale of any security in a transaction, other than an offer or sale of a security in a rollup transaction, that meets all of the following criteria:

(1) The issuer is (A) a California corporation or foreign corporation that, at the time of the filing of the notice required under this subdivision, is subject to Section 2115, or (B) any other form of business entity, including without limitation a partnership or trust organized under the laws of this state. The exemption provided by this subdivision is not available to a "blind pool" issuer, as that term is defined by the commissioner, or to an investment company subject to the Investment Company Act of 1940.

(2) Sales of securities are made only to qualified purchasers or other persons the issuer reasonably believes, after reasonable inquiry, to be qualified purchasers. A corporation, partnership, or other organization specifically formed for the purpose of acquiring the securities offered by the issuer in reliance upon this exemption may be a qualified purchaser if each of the equity owners of the corporation, partnership, or other organization is a qualified purchaser. Qualified purchasers include the following:

(A) A person designated in Section 260.102.13 of Title 10 of the California Code of Regulations.

(B) A person designated in subdivision (i) or any rule of the commissioner adopted thereunder.

(C) A pension or profit-sharing trust of the issuer, a self-employed individual retirement plan, or an individual retirement account, if

the investment decisions made on behalf of the trust, plan, or account are made solely by persons who are qualified purchasers.

(D) An organization described in Section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, each with total assets in excess of five million dollars ($5,000,000) according to its most recent audited financial statements.

(E) With respect to the offer and sale of one class of voting common stock of an issuer or of preferred stock of an issuer entitling the holder thereof to at least the same voting rights as the issuer's one class of voting common stock, provided that the issuer has only one-class voting common stock outstanding upon consummation of the offer and sale, a natural person who, either individually or jointly with the person's spouse, (i) has a minimum net worth of two hundred fifty thousand dollars ($250,000) and had, during the immediately preceding tax year, gross income in excess of one hundred thousand dollars ($100,000) and reasonably expects gross income in excess of one hundred thousand dollars ($100,000) during the current tax year or (ii) has a minimum net worth of five hundred thousand dollars ($500,000). "Net worth" shall be determined exclusive of home, home furnishings, and automobiles. Other assets included in the computation of net worth may be valued at fair market value.

Each natural person specified above, by reason of his or her business or financial experience, or the business or financial experience of his or her professional advisor, who is unaffiliated with and who is not compensated, directly or indirectly, by the issuer or any affiliate or selling agent of the issuer, can be reasonably assumed to have the capacity to protect his or her interests in connection with the transaction. The amount of the investment of each natural person shall not exceed 10 percent of the net worth, as determined by this subparagraph, of that natural person.

(F) Any other purchaser designated as qualified by rule of the commissioner.

(3) Each purchaser represents that the purchaser is purchasing for the purchaser's own account (or trust account, if the purchaser is a trustee) and not with a view to or for sale in connection with a distribution of the security.

(4) Each natural person purchaser, including a corporation, partnership, or other organization specifically formed by natural persons for the purpose of acquiring the securities offered by the issuer, receives, at least five business days before securities are sold to, or a commitment to purchase is accepted from, the purchaser, a written offering disclosure statement that shall meet the disclosure requirements of Regulation D (17 C.F.R. 230.501 et seq.), and any other information as may be prescribed by rule of the commissioner, provided that the issuer shall not be obligated pursuant to this

paragraph to provide this disclosure statement to a natural person qualified under Section 260.102.13 of Title 10 of the California Code of Regulations. The offer or sale of securities pursuant to a disclosure statement required by this paragraph that is in violation of Section 25401, or that fails to meet the disclosure requirements of Regulation D (17 C.F.R. 230.501 et seq.), shall not render unavailable to the issuer the claim of an exemption from Section 25110 afforded by this subdivision. This paragraph does not impose, directly or indirectly, any additional disclosure obligation with respect to any other exemption from qualification available under any other provision of this section.

(5) (A) A general announcement of proposed offering may be published by written document only, provided that the general announcement of proposed offering sets forth the following required information:

(i) The name of the issuer of the securities.

(ii) The full title of the security to be issued.

(iii) The anticipated suitability standards for prospective purchasers.

(iv) A statement that (I) no money or other consideration is being solicited or will be accepted, (II) an indication of interest made by a prospective purchaser involves no obligation or commitment of any kind, and, if the issuer is required by paragraph (4) to deliver a disclosure statement to prospective purchasers, (III) no sales will be made or commitment to purchase accepted until five business days after delivery of a disclosure statement and subscription information to the prospective purchaser in accordance with the requirements of this subdivision.

(v) Any other information required by rule of the commissioner.

(vi) The following legend: "For more complete information about (Name of Issuer) and (Full Title of Security), send for additional information from (Name and Address) by sending this coupon or calling (Telephone Number)."

(B) The general announcement of proposed offering referred to in subparagraph (A) may also set forth the following information:

(i) A brief description of the business of the issuer.

(ii) The geographic location of the issuer and its business.

(iii) The price of the security to be issued, or, if the price is not known, the method of its determination or the probable price range as specified by the issuer, and the aggregate offering price.

(C) The general announcement of proposed offering shall contain only the information that is set forth in this paragraph.

(D) Dissemination of the general announcement of proposed offering to persons who are not qualified purchasers, without more, shall not disqualify the issuer from claiming the exemption under this subdivision.

97

(6) No telephone solicitation shall be permitted until the issuer has determined that the prospective purchaser to be solicited is a qualified purchaser.

(7) The issuer files a notice of transaction under this subdivision both (A) concurrent with the publication of a general announcement of proposed offering or at the time of the initial offer of the securities, whichever occurs first, accompanied by a filing fee, and (B) within 10 business days following the close or abandonment of the offering, but in no case more than 210 days from the date of filing the first notice. The first notice of transaction under subparagraph (A) shall contain an undertaking, in a form acceptable to the commissioner, to deliver any disclosure statement required by paragraph (4) to be delivered to prospective purchasers, and any supplement thereto, to the commissioner within 10 days of the commissioner's request for the information. The exemption from qualification afforded by this subdivision is unavailable if an issuer fails to file the first notice required under subparagraph (A) or to pay the filing fee. The commissioner has the authority to assess an administrative penalty of up to one thousand dollars ($1,000) against an issuer that fails to deliver the disclosure statement required to be delivered to the commissioner upon the commissioner's request within the time period set forth above. Neither the filing of the disclosure statement nor the failure by the commissioner to comment thereon precludes the commissioner from taking any action deemed necessary or appropriate under this division with respect to the offer and sale of the securities.

(o) An offer or sale of any security issued pursuant to a stock purchase plan or agreement, or issued pursuant to a stock option plan or agreement, where the security is exempt from registration under the Securities Act of 1933, as amended, pursuant to Rule 701 adopted pursuant to that act (17 C.F.R. 230.701), the provisions of which are hereby incorporated by reference into this section, provided that (1) the terms of any stock purchase plan or agreement shall comply with Sections 260.140.42, 260.140.45, and 260.140.46 of Title 10 of the California Code of Regulations, (2) the terms of any stock option plan or agreement shall comply with Sections 260.140.41, 260.140.45, and 260.140.46 of Title 10 of the California Code of Regulations, and (3) the issuer files a notice of transaction in accordance with rules adopted by the commissioner within 30 days after the initial issuance of any security under that plan, accompanied by a filing fee as prescribed by subdivision (y) of Section 25608..

(p) An offer or sale of nonredeemable securities to accredited investors (Section 28031) by a person licensed under the Capital Access Company Law (Division 3 (commencing with Section 28000) of Title 4). All nonredeemable securities shall be evidenced by certificates that shall have stamped or printed prominently on their face a legend in a form to be prescribed by rule or order of the

commissioner restricting transfer of the securities in the manner as the rule or order provides.

SEC. 27. Section 28956 of the Corporations Code is amended to read:

28956. If any provision of this division , or the application thereof to any person or circumstance, is held invalid, the invalidity shall not affect other provisions or applications of this law that can be given effect without the invalid provision or application, and to this end the provisions of this division are declared to be severable.

SEC. 28. Section 8927 of the Education Code is amended to read:

8927. (a) The Legislature finds and declares that an evaluation of the Teenage Pregnancy Prevention Grant Program is both desirable and necessary and, accordingly, requires all of the following:

(1) No later than October 1, 2001, each local educational agency that receives a grant shall submit a report to the superintendent that includes:

(A) An assessment of the effectiveness of that local educational agency in achieving stated goals, including reducing teenage birthrates, delaying sexual activity, and increasing high school completion rates.

(B) Problems encountered in the design and operation of the grant program plan, including identification of any federal, state, or local statute or regulation that impedes program implementation.

(C) Client and practitioner satisfaction.

(2) The superintendent shall contract for an independent evaluation of the effectiveness of funds awarded under this chapter in assisting local educational agencies in implementing the Teenage Pregnancy Prevention Grant Program. No later than April 1, 2002, the superintendent shall submit to the Governor and the Legislature the results of the evaluation, and a summary of the reports submitted to the superintendent pursuant to paragraph (1).

(A) The evaluation shall focus on youth education, health, and social measures, as appropriate, including, but not limited to, birthrates, delayed sexual activity, school attendance, academic performance, dropout rates, pupil grades, birth weights, self-esteem, child protective services referrals, family functioning, and school staff and administration participation.

(B) Additional independent evaluations may be conducted by the superintendent subject to additional funding being made available for purposes of this chapter in subsequent fiscal years.

(b) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

SEC. 29. Section 42238.95 of the Education Code is amended to read:

42238.95. (a) The amount per unit of average daily attendance for pupils in special classes and centers that shall be apportioned to each county office of education shall be equal to the amount determined for the district of residence pursuant to Section 42238.9, increased by the quotient equal to the amount determined pursuant to paragraph (1) divided by the amount determined pursuant to paragraph (2). This subdivision only applies to average daily attendance served by employees of the county office of education.

(1) Determine the second principal apportionment average daily attendance for special education for the county office of education for the 1996–97 fiscal year, including attendance for excused absences, divided by the corresponding average daily attendance excluding attendance for excused absences pursuant to subdivision (b) of Section 46010 as it read on July 1, 1996, reported pursuant to Section 41601 for the 1996–97 fiscal year.

(2) Determine the second principal apportionment average daily attendance for the 1996–97 fiscal year, including attendance for excused absences, for all of the school districts within the county, excluding average daily attendance for county office special education and county community school programs and nonpublic nonsectarian schools, divided by the corresponding average daily attendance, excluding attendance for excused absences determined pursuant to subdivision (b) of Section 46010 as it read on July 1, 1996, and reported pursuant to Section 41601 for the 1996–97 fiscal year.

(b) A county office of education shall provide the data required to perform the calculation specified in paragraph (1) of subdivision (a) to the Superintendent of Public Instruction in order to be eligible for the adjustment pursuant to subdivision (a).

SEC. 30. Section 44259.3 of the Education Code is amended to read:

44259.3. The commission shall review the minimum requirements set forth in Section 44259 for the preliminary and professional multiple subject teaching credential and shall recommend their revision as necessary, during the normal revision cycles, to ensure that teachers of the elementary grades receive training related to, and have knowledge of, developmentally appropriate teaching methods for pupils in kindergarten and grades 1 to 3, inclusive, who may be of the same grade level but of vastly different developmental levels. As part of its review, the commission shall ensure that the requirements link academic theory regarding child development to instructional methods designed for use in classrooms of young pupils of varying developmental levels. These instructional methods should be designed to ensure success and progress by all pupils and should especially help teachers ensure that children who enter school less prepared or with fewer skills than their classmates meet the expected performance standards for that grade by the end of the instructional year. At the conclusion of its review,

the commission shall report to the Legislature on its recommended revisions, on or before January 1, 2001.

SEC. 31. Section 44403 of the Education Code is amended to read:

44403. The commission shall, on or before January 1, 2004, submit to the education policy committees of the Legislature, the Legislative Analyst, and the Department of Finance a summative report of the effects of this article. The report shall include recommendations regarding the continuation, modification, or termination of the program. Subject to an appropriation of sufficient funds to the commission for this purpose, the commission shall base its report on an evaluation of the California Mathematics Initiative for Teaching by an independent contractor selected in consultation with the office of the Legislative Analyst. If, in the judgment of the commission, available funds are insufficient to contract for an independent evaluation, the commission shall base its report on information received from school districts and county superintendents of schools pursuant to subdivision (e) of Section 44402.

SEC. 32. Section 44579.4 of the Education Code is amended to read:

44579.4. (a) For the 1998–99 school year, a school district may request the State Board of Education to provide a waiver of instructional time requirements if both of the following conditions are met:

(1) The district provides evidence to the board that the waiver is necessary only because the repeal of the authority of school districts to provide staff development during instructional time results in the district being unable to reasonably meet the instructional time requirements.

(2) The school district had a school calendar, or a schoolsite plan adopted in accordance with law, either of which was approved by the governing board prior to August 19, 1998, or not more than 30 days after that date, that authorizes the use of instructional days for staff development.

(b) A school district that receives a waiver for the 1998–99 school year shall ensure that both of the following occur:

(1) The combined instructional time and staff development time provided by the district during the 1998–99 school year pursuant to the waiver meets or exceeds 180 days or the equivalent number of annual instructional minutes determined pursuant to Article 8 (commencing with Section 46200) of Chapter 2 of Part 26.

(2) The actual instructional time provided is at least 172 days or the equivalent number of annual instructional minutes determined pursuant to Article 8 (commencing with Section 46200) of Chapter 2 of Part 26.

(c) The maximum amount of instructional time that may be waived may not exceed the number of days the school district had

previously approved as staff development days within the school calendar, or in a schoolsite plan adopted in accordance with law.

(d) A school district that receives a waiver for the 1998–99 school year under this section shall only be eligible to receive staff development funding under this article for each day of staff development offered under this article that replaces a staff development day previously authorized under Sections 44670.6, 48645.7, 52022, 52854, or 56242 and utilized during the 1997–98 school year and that was included in a school calendar, or schoolsite plan adopted in accordance with law, that was approved by the governing board prior to August 19, 1998, or not more than 30 days after that date. For purposes of this subdivision, a staff development day funded pursuant to the Staff Development Buy-Out Program in the 1997–98 school year shall be funded in the 1998-99 school year with no requirement that this day replace an additional staff development day that was previously authorized pursuant to Sections 44670.6, 48645.7, 52022, 52854, or 56242.

SEC. 33. Section 44731 of the Education Code is amended to read:

44731. A school district shall certify all of the following to the State Department of Education as a condition of each applicant school in the district being eligible to receive funding pursuant to this chapter:

(a) Each school maintaining any of grades 4 to 8, inclusive, that is applying for funding under this chapter has access, for instructional purposes, to the Internet in its classrooms and has a sufficient number of up-to-date computers or other devices that provide Internet access in its classrooms for instructional use.

(b) The funds received pursuant to this chapter shall be expended by the eligible schools for the purpose of providing in-service training to their schoolsite administrators, appropriate instructional classified employees, and certificated employees who provide direct instructional services to pupils in grades 4 to 8, inclusive, in the use of education technology to support the daily instruction of pupils and the recordkeeping necessary to support that instruction.

(c) The funds received pursuant to this chapter shall be expended for in-service training programs in education technology that meet or exceed the proficiency standards developed by the Commission on Teacher Credentialing pursuant to Section 44259.

(d) Each applicant school has developed an action plan that provides for a program of in-service training in education technology for its schoolsite administrators, appropriate instructional classified employees, and all certificated employees who provide direct instructional services to pupils in grades 4 to 8, inclusive. In the action plan, the applicant school shall, to the extent feasible and appropriate, integrate training in educational technology with all of the following:

(1) Staff development days authorized pursuant to Section 44670.6 or 52854.

(2) Staff development funds available from all state and federal funding sources.

(3) Involvement of the parents and guardians of pupils enrolled in the school district.

(e) In-service training provided pursuant to this chapter shall be coordinated and integrated with any other in-service training, including staff development offered pursuant to Article 7.5 (commencing with Section 44579) of Chapter 3.

SEC. 34. Section 51201.5 of the Education Code is amended to read:

51201.5. (a) Commencing in the 1992–93 school year, school districts shall ensure that all pupils in grades 7 to 12, inclusive, or the equivalent thereof, except as otherwise provided in subdivision (c), receive AIDS prevention instruction from adequately trained instructors in appropriate courses. Each pupil shall receive the instruction at least once in junior high or middle school and once in high school. For purposes of this subdivision, "school district" includes county boards of education, county superintendents of schools, and the State Schools for the Handicapped.

(b) The required AIDS prevention instruction shall accurately reflect the latest information and recommendations from the United States Surgeon General, federal Centers for Disease Control, and the National Academy of Sciences, and shall include the following:

(1) Information on the nature of AIDS and its effects on the human body.

(2) Information on how the human immunodeficiency virus (HIV) is and is not transmitted, including information on activities that present the highest risk of HIV infection.

(3) Discussion of methods to reduce the risk of HIV infection. This instruction shall emphasize that sexual abstinence, monogamy, the avoidance of multiple sexual partners, and abstinence from intravenous drug use are the most effective means for AIDS prevention, but shall also include statistics based upon the latest medical information citing the failure and success rates of condoms and other contraceptives in preventing sexually transmitted HIV infection and information on other methods that may reduce the risk of HIV transmission from intravenous drug use. Nothing in this section shall be construed to supersede Section 51553.

(4) Discussion of the public health issues associated with AIDS.

(5) Information on local resources for HIV testing and medical care.

(6) Development of refusal skills to assist pupils in overcoming peer pressure and using effective decisionmaking skills to avoid high-risk activities.

(7) Discussion about societal views on AIDS, including stereotypes and myths regarding persons with AIDS. This instruction

shall emphasize compassion for persons suffering from debilitating handicaps and terminal diseases, such as AIDS.

(c) AIDS prevention instruction may not be conducted in a manner that advocates drug use, a particular sexual practice, or sexual activities. AIDS prevention instruction shall be consistent with Section 51553.

(d) At the beginning of each school year or, for a pupil who enrolls in a school after the beginning of the school year, at the time of that pupil's enrollment, the governing board of each school district, each county board of education, and each county superintendent of schools, as applicable, shall provide the parent or guardian of each pupil in grades 7 to 12, inclusive, or the equivalent thereof, with written notice explaining the purpose of the AIDS prevention instruction and information stating the parent's or guardian's right to request a copy of this section and Section 51553, related to AIDS prevention instruction. The governing board of each school district, each county board of education, and each county superintendent of schools, as applicable, shall keep on file copies of this section and Section 51553. The Superintendent of Public Instruction shall provide the parent or guardian of each pupil in grades 7 to 12, inclusive, or the equivalent thereof, in the State Schools for the Handicapped with written notice explaining the purpose of the AIDS prevention instruction.

(1) The notice shall specify that any parent or guardian may request that his or her child or ward not receive instruction in AIDS prevention. No pupil shall attend the AIDS prevention instruction if a written request that he or she not attend has been received by the school. For the governing boards of school districts, this notification shall accompany the reporting of rights and responsibilities required by Section 48980.

(2) If authorized by the school district governing board, a school district may require parental consent prior to providing instruction on AIDS prevention to any minor pupil.

(3) At any time that an outside organization or guest speaker is scheduled to deliver AIDS prevention instruction, or anytime an assembly is held to deliver AIDS prevention instruction, notification shall be sent to the pupils' parents or legal guardians through regular United States mail, or any other method that the school district, county board of education, or county superintendent of schools, as applicable, commonly uses to communicate individually in writing to all parents or guardians, at the beginning of the school year or, with respect to a pupil who enrolls in a school after the beginning of the school year, at the time of that pupil's enrollment. If arrangements for this instruction are made after these occurrences, notice shall be mailed, or provided by the alternative method of notification otherwise commonly used, no fewer than 10, and no more than 15, days before the instruction is delivered. Notification sent pursuant to

this paragraph shall include the date of the instruction, the name of the organization or affiliation of each guest speaker, and information stating the parent's or guardian's right to request a copy of this section and Section 51553, related to AIDS prevention instruction. The governing board of each school district, each county board of education, and each county superintendent of schools, as applicable, shall keep on file copies of this section and Section 51553.

(e) All school districts shall ensure all of the following:

(1) That instructional materials related to this instruction are available.

(2) That these instructional materials are appropriate for use with pupils of various ages and learning abilities.

(3) That these instructional materials may be used effectively with pupils from a variety of ethnic, cultural, and linguistic backgrounds, and pupils with special needs.

(f) A pupil shall not be subject to disciplinary action, academic penalty, or other sanction if the pupil's parent or guardian declines to permit the pupil to receive the instruction described in subdivision (a) and the pupil does not receive the instruction.

(g) While the instruction described in subdivision (a) is being delivered, an alternative educational activity shall be made available to pupils whose parents or guardians have requested that they not receive the instruction described in subdivision (a).

SEC. 35. Section 51554 of the Education Code is amended to read:

51554. (a) Unless a pupil's parent or guardian has been sent written notification through regular United States mail, or any other method that the school district, county board of education, or county superintendent of schools, as applicable, commonly uses to communicate individually in writing to all parents or guardians, at the beginning of the school year or, with respect to a pupil who enrolls in a school after the beginning of the school year, at the time of that pupil's enrollment, a pupil shall not receive instruction on sexually transmitted diseases, AIDS, human sexuality, or family life that is delivered by an outside organization or guest speakers brought in specifically to provide that instruction, whether the guest speakers are brought in to lecture, distribute information, show a videotape, act out, conduct an activity involving pupil participation, or provide audio material on these subjects. Notification sent pursuant to this section shall include the date of the instruction, the name of the organization or affiliation of each guest speaker, and information stating the parent's or guardian's right to request a copy of Sections 51201.5 and 51553, related to AIDS prevention instruction. The governing board of each school district, each county board of education, and each county superintendent of schools, as applicable, shall keep on file copies of this section and Section 51553. If arrangements for this instruction are made after the written notice required by this section is sent, notice of instruction to be delivered

by outside organizations or guest speakers shall be mailed, or provided by the alternative method of notification otherwise commonly used, no fewer than 10, and no more than 15, days before the instruction is delivered. For purposes of this subdivision, "instruction" includes instruction delivered in an individual classroom, before combined classes, or in assemblies.

(b) In the case of instruction that involves presentations on sexually transmitted diseases, AIDS, human sexuality, or family life delivered in an assembly, a pupil shall not receive that instruction if a teacher employed by the school district or administrator employed by the school district delivers that instruction unless the pupil's parent or guardian is notified through regular United States mail, or any other method that the school district, county board of education, or county superintendent of schools, as applicable, commonly uses to communicate individually in writing to all parents or guardians, about the instruction at the beginning of the school year or, with respect to a pupil who enrolls in a school after the beginning of the school year, at the time of that pupil's enrollment. If arrangements for this instruction are made after these occurrences, notice shall be provided no fewer than 10, and no more than 15, days before the instruction is delivered. For purposes of this subdivision, "instruction" includes oral presentations, visual presentations, and activities.

(c) A pupil shall not be subject to a disciplinary action, academic penalty, or other sanction if the pupil's parent or guardian declines to permit the pupil to receive the instruction described in subdivision (a) or (b) and the pupil does not receive the instruction.

(d) During the period of time instruction described in subdivision (a) or (b) is being delivered, an alternative educational activity shall be made available to pupils whose parents or guardians have requested that they not receive the instruction described in subdivision (a) or (b).

SEC. 36. Section 51555 of the Education Code is amended to read:

51555. Before a pupil who is enrolled in kindergarten or any of grades 1 to 6, inclusive, receives instruction on sexually transmitted diseases, AIDS, human sexuality, or family life, the governing board of each school district, each county board of education, and each county superintendent of schools, as applicable, shall provide the parent or guardian of each pupil with written notice explaining that the instruction will be given and information stating the parent's or guardian's right to request a copy of Sections 51201.5 and 51553, related to AIDS prevention instruction. The governing board of each school district, each county board of education, and each county superintendent of schools, as applicable, shall keep on file copies of this section and Section 51553. Sending the required notice through the regular United States mail, or by any other method that the school district, county board of education, or county superintendent of

schools, as applicable, commonly uses to communicate individually in writing to all parents or guardians, meets the notification requirement of this paragraph.

SEC. 37. Section 51871 of the Education Code is amended to read:

51871. (a) The California Technology Assistance Project shall be established by the State Department of Education to administer a regionalized network of technical assistance to schools and school districts on the implementation of education technology as set forth in policies of the State Board of Education. The California Technology Assistance Project shall be composed of regional consortia that will work collaboratively with school districts and county offices of education in order to meet locally defined technology-based needs, as identified in the certified technology plans for their client school districts, including, but not necessarily limited to, all of the following areas:

(1) Staff development.

(2) Learning resources.

(3) Hardware.

(4) Telecommunications infrastructure.

(5) Technical assistance to school districts in developing a support system to operate and maintain an education technology infrastructure, including improving pupil recordkeeping and tracking related to pupil instruction.

(6) Coordination with other federal, state, and local programs.

(7) Funding.

(b) The State Board of Education shall award grants to fund a school district or county office of education in each region of the California Technology Assistance Project to act as the lead agency to administer the services of that region. The term of a grant awarded pursuant to this section may not exceed three years. Grant funding may be awarded and received for subsequent terms of three years as provided in this section. The lead agency shall be chosen through a process based on all of the following:

(1) Knowledge of technology.

(2) Technology planning and technical assistance.

(3) A proven record of success in providing staff development in technology and curriculum integration.

(4) A demonstrated ability to work collaboratively with school districts, county offices of education, and businesses in the region.

(5) The ability to deliver services specified in this article to all school districts and county offices of education in its region.

(6) The degree of support for the application by school districts and county offices of education in the region.

(7) Review of the annual report of the services provided by the lead agency submitted to the State Board of Education and school districts and county offices of education within the California Technology Assistance Project region. School districts and county

offices of education within a California Technology Assistance Project region shall have the opportunity to comment on the report.

(c) To receive funding for the second and third year of a grant awarded pursuant to subdivision (b), a lead agency shall submit an annual report to the State Board of Education for approval that describes the services provided, the persons served, and the funds expended for those services in the prior year. School districts and county offices of education within the California Technology Assistance Project region shall have an opportunity to comment on the report. The State Department of Education shall release grant funding for a second or third year only after the annual report has been approved by the State Board of Education.

(d) Funding to support the regional education technology services provided by the California Technology Assistance Project shall be provided through the annual Budget Act. Funding of the regional lead agencies shall be approved by the State Board of Education based on adopted guidelines.

SEC. 38. Section 52122 of the Education Code is amended to read:

52122. (a) Except as otherwise provided by Section 52123, any school district that maintains any kindergarten or any of grades 1 to 3, inclusive, may apply to the Superintendent of Public Instruction for an apportionment to implement a class size reduction program in that school district in kindergarten and any of the grades designated in this chapter.

(b) An application submitted pursuant to this chapter shall identify both of the following:

(1) Each class that will participate in the Class Size Reduction Program.

(2) For each class that will participate in the Class Size Reduction Program, whether that class will operate under Option One or Option Two:

(A) (i) Option One: A school district shall provide a reduced class size for all pupils in each classroom for the full regular schoolday in each grade level for which funding is claimed. For the purposes of this chapter, "full regular schoolday" means a substantial majority of the instructional minutes per day, but shall permit limited periods of time during which pupils are brought together for a particular phase of education in groups that are larger than 20 pupils per certificated teacher. It is the intent of the Legislature that those limited periods of time be kept to a minimum and that instruction in reading and mathematics not be delivered during those limited periods of time. For the purposes of this subparagraph, "class" is defined in the same manner as provided in the regulations adopted by the Superintendent of Public Instruction prior to July 1, 1996, pursuant to Sections 41376 and 41378 (subdivision (a) of Section 15103 of Title 5 of the California Code of Regulations).

97

(ii) The purpose of the Class Size Reduction Program is to ensure that children in public school in kindergarten and grades 1 to 3, inclusive, receive instruction in classrooms where there are not more than 20 pupils. In order to qualify for funding pursuant to this chapter, each class in the Class Size Reduction Program shall be maintained with an annual average class size of not more than 20 pupils for the instructional time that qualifies the class for funding pursuant to this chapter. Nothing in this chapter shall be construed to prohibit the class size from exceeding 20 pupils on any particular day, provided that the average class size for the school year does not exceed 20.

(B) (i) Option Two: A school district shall provide a reduced class size for all pupils in each classroom for at least one-half of the instructional minutes offered per day in each grade level for which funding is claimed. School districts selecting this option shall primarily devote those instructional minutes to the subject areas of reading and mathematics. For the purposes of this subparagraph, "class" is defined in the same manner as provided in the regulations adopted by the Superintendent of Public Instruction prior to July 1, 1996, pursuant to Sections 41376 and 41378 (subdivision (a) of Section 15103 of Title 5 of the California Code of Regulations).

(ii) The purpose of the Class Size Reduction Program is to ensure that children in public school in kindergarten and grades 1 to 3, inclusive, receive instruction in classrooms where there are not more than 20 pupils. In order to qualify for funding pursuant to this chapter, each class in the Class Size Reduction Program shall be maintained with an annual average class size of not more than 20 pupils for the instructional time that qualifies the class for funding pursuant to this chapter. Nothing in this chapter shall be construed to prohibit the class size from exceeding 20 pupils on any particular day, provided that the average class size for the school year does not exceed 20.

(c) A school district that intends to implement a Class Size Reduction Program for the 1996–97 school year shall submit an application for funds pursuant to this chapter to the Superintendent of Public Instruction not later than November 1, 1996. To receive the total amount of funding in the 1996–97 school year for which the school district is eligible pursuant to Section 52126, a school district shall implement the Class Size Reduction Program by February 16, 1997, within the meaning of paragraph (2) of subdivision (b).

(d) A school district that intends to implement or continue to implement a Class Size Reduction Program for the 1997–98 school year and any subsequent school year shall submit an application for funding pursuant to this chapter to the Superintendent of Public Instruction not later than 90 days after the annual Budget Act is chaptered, unless otherwise specified in regulations adopted by the State Board of Education.

(e) For the 1997–98 school year, a school district that is either implementing or expanding a class size reduction program pursuant to this chapter may receive funding pursuant to this chapter even if the new classes for which funding is sought are not implemented at the beginning of the 1997–98 school year, provided that, for each new class in the Class Size Reduction Program, all of the following criteria are met:

(1) The teacher for each new class is hired and placed on the school district's payroll by November 1, 1997.

(2) Each teacher for a new class has begun to receive the training required by this chapter on or before February 16, 1998.

(3) All other requirements of this chapter are satisfied by February 16, 1998, and continue to be satisfied for the remainder of the 1997–98 school year.

(f) For the 1997–98 school year, the number of new classes in the Class Size Reduction Program is the number of classes satisfying the requirements of this chapter minus the number of classes funded in the Class Size Reduction Program pursuant to this chapter in the 1996–97 school year.

(g) Any school district that chooses to reduce class size through the use of an early-late instructional program is ineligible to also use Section 46205, relating to the computation of instructional time for purposes of the Incentive for Longer Instructional Day and Year, in any grade level for which class size reduction funding is received pursuant to this chapter; provided, however, that any school district that operated under Section 46205 prior to July 1, 1996, may receive class size reduction funding pursuant to Option One in any grade level for which class size reduction funding would otherwise be received pursuant to Option One.

SEC. 39. Section 54745 of the Education Code is amended to read:

54745. (a) In the administration of the Cal-SAFE program, the following provisions shall apply:

(1) Participation by a school district or county superintendent of schools in the Cal-SAFE program is voluntary.

(2) The governing board of a school district or county superintendent of schools may individually, or jointly as a consortium of governing boards of school districts or county superintendents of schools, or both, submit an application to the State Department of Education in the manner, form, and date specified by the department to establish and maintain a Cal-SAFE program.

(3) A school district or county superintendent of schools, alone or as a member of a consortium of school districts or county superintendents of schools, or both, approved to implement the Cal-SAFE program shall be funded as one program to be operated at one or multiple sites depending upon the need within the service area.

(4) Notwithstanding any other provision of law, a school district or county superintendent of schools operating a School Age Parent and Infant Development Program pursuant to Article 17 (commencing with Section 8390) of Chapter 2 of Part 6, a Pregnant Minors Program pursuant to Chapter 6 (commencing with Section 8900) of Part 6 and Section 2551.3, or a Pregnant and Lactating Students Program pursuant to Sections 49553 and 49559, as those provisions existed prior to the operative date of the act that adds this article, or any combination thereof, that chooses to participate in the Cal-SAFE program shall have priority for Cal-SAFE program funding for an amount up to the dollar amount provided under those provisions in the fiscal year prior to participation in the Cal-SAFE program, provided that an application is submitted and approved.

(5) If a school district or county superintendent of schools operating a School Age Parent and Infant Development Program, a Pregnant Minors Program, or a Pregnant and Lactating Students Program, or any combination thereof, chooses not to participate in the Cal-SAFE program, the funding it would have received for the operation of those programs shall be redirected to the Cal-SAFE program and the school district or county superintendent of schools may apply in a subsequent school year to operate a Cal-SAFE program.

(6) A school district or county superintendent of schools that terminates its Cal-SAFE program may reapply to establish a Cal-SAFE program.

(7) In order to continue implementation of the Cal-SAFE program beyond the initial three years of funding, each funded agency shall be reviewed by the department to determine progress towards achieving the goals set forth in Section 54742. Thereafter, funded agencies shall be reviewed and reauthorized every five years based upon a process determined by the department to continue implementation of a Cal-SAFE program.

(b) All of the following requirements shall apply to an application for the Cal-SAFE program:

(1) The governing board of a participating local education agency shall adopt a policy or resolution declaring its commitment to provide a comprehensive, continuous, community-linked program for pregnant and parenting pupils and their children that reflects the cultural and linguistic diversity of the community.

(2) The local education agency shall provide assurance for participation in the development of the County Service Coordination Plan as described in Section 54744.

(3) A school district or county superintendent of schools shall agree to participate in the data collection and evaluation of the Cal-SAFE program.

(c) To implement a Cal-SAFE program, the funded school district, county superintendent of schools, or consortium of school

97

districts or county superintendents of schools, or both, shall meet all of the following criteria:

(1) Be in compliance with Title IX of the Education Amendments of 1972 Regulations.

(2) Ensure that enrolled pupils retain their right to participate in the regular school or educational alternative programs. School placement and instructional strategies shall be based upon the needs and styles of learning of the individual pupils. The classroom setting shall be the preferred instructional strategy unless an alternative is necessary to meet the needs of the individual parent, child, or both.

(3) Enroll pupils into the Cal-SAFE program on an open entry and open exit basis.

(4) Provide a quality education program to pupils in a supportive and accommodating learning environment with appropriate classroom strategies to ensure school access and academic credit for all work completed.

(5) Provide a parenting education and life skills class to enrolled pupils.

(6) Make maximum utilization of available programs and facilities to serve pregnant and parenting pupils and their children.

(7) Provide a quality child care and development program for the children of enrolled teen parents located on or near the schoolsite.

(8) Make maximum utilization of its local school food service program.

(9) Provide special school nutrition supplements, as defined by subdivision (b) of Section 49553, to pregnant and lactating pupils.

(10) Enter into formal partnership agreements, as necessary, with community-based organizations and other governmental agencies to assist pupils in accessing support services.

(11) Provide staff development and community outreach in order to establish a positive learning environment and school policies supportive of pregnant and parenting pupils' academic achievement and to promote the healthy development of their children.

(12) Maintain an annual program budget and expenditure report to document that funds are expended pursuant to Section 54749.

(13) Assess no fees to enrolled pupils or their families for services provided through the Cal-SAFE program.

(14) Establish and maintain a data base in the manner and form prescribed by the State Department of Education for purposes of program evaluation.

SEC. 40. Section 54748 of the Education Code is amended to read:

54748. The duties of the State Department of Education include all of the following:

(a) Provision of technical assistance, focused upon transition into the Cal-SAFE program, to school districts and county superintendents of schools currently operating a School Age Parent and Infant Development Program, a Pregnant Minors Program, or

a Pregnant and Lactating Students Program, or any combination thereof.

(b) Provision of technical assistance to school districts and county superintendents of schools that do not currently operate a School Age Parent and Infant Development Program, a Pregnant Minors Program, or a Pregnant and Lactating Students Program as defined by subdivision (a) of Section 54745.

(c) Identification and sharing of information on best practices across program sites.

(d) Development of benchmarks to determine to what degree pupils and children enrolled in the Cal-SAFE program attain the program goals.

(e) Consultation with local education agency representatives and others, as appropriate, to develop strategies for implementation of the Cal-SAFE program.

(f) Determination of areas in the state where there are pupils who are most in need or pupils who are least likely to access services on their own if there are not enough resources to serve all eligible pupils.

(g) Development of an application process and approval of local education agencies to implement a Cal-SAFE program.

(h) Development of operating guidelines for implementing an effective Cal-SAFE program.

(i) Development of guidelines for fiscal reporting.

(j) Coordination with other state agencies that administer teen pregnancy prevention and intervention programs.

(k) Development of procedures to conduct program evaluation and monitoring, as appropriate.

(*l*) Commencing March 1, 2004, and every five years thereafter, preparation and submission of a report to the Joint Legislative Budget Committee and appropriate policy and fiscal committees of the Legislature. The report shall include data, analysis of data, and an evaluation of the Cal-SAFE program.

SEC. 41. Section 54761.3 of the Education Code is amended to read:

54761.3. Notwithstanding any other provision of law, a school district that chose to designate home-to-school transportation as the program to which a supplemental grant was to be added, thereby increasing its home-to-school transportation allowance, may, for the 1996–97 fiscal year, transfer into another categorical education program account set forth in clause (i) of subparagraph (B) of paragraph (1) of subdivision (a) of Section 54761 the amount by which the school district's home-to-school transportation allowance for the 1996–97 fiscal year exceeded its approved home-to-school transportation costs for the 1995–96 fiscal year. The amount transferred pursuant to this section may not exceed the amount of supplemental grant funding that was added to the home-to-school transportation allowance of the school district. In a manner

prescribed by the Superintendent of Public Instruction, eligible school districts shall request, no later than February 1, 1999, that the Superintendent of Public Instruction initiate the transfer. The request shall designate the program or programs to which the supplemental grant funding is to be transferred. The Superintendent of Public Instruction shall adjust program allocations as requested.

SEC. 42. Section 60603 of the Education Code is amended to read:

60603. As used in this chapter:

(a) "Achievement test" means any standardized test that measures the level of performance that a pupil has achieved in the core curriculum areas.

(b) "Assessment of applied academic skills" means a form of assessment that requires pupils to demonstrate their knowledge of, and ability to apply, academic knowledge and skills in order to solve problems and communicate. It may include, but is not limited to, writing an essay response to a question, conducting an experiment, or constructing a diagram or model. An assessment of applied academic skills may not include assessments of personal behavioral standards or skills, including, but not limited to, honesty, sociability, ethics, or self-esteem.

(c) "Basic academic skills" means those skills in the subject areas of reading, spelling, written expression, and mathematics that provide the necessary foundation for mastery of more complex intellectual abilities, including the synthesis and application of knowledge.

(d) "Content standards" means the specific academic knowledge, skills, and abilities that all public schools in this state are expected to teach and all pupils expected to learn in each of the core curriculum areas, at each grade level tested.

(e) "Core curriculum areas" means the areas of reading, writing, mathematics, history-social science, and science.

(f) "Direct writing assessment" means an assessment of applied academic skills that requires pupils to use written expression to demonstrate writing skills, including writing mechanics, grammar, punctuation, and spelling.

(g) "End of course exam" means a comprehensive and challenging assessment of pupil achievement in a particular subject area or discipline such as the Golden State Exams.

(h) "Performance standards" are standards that define various levels of competence at each grade level in each of the curriculum areas for which content standards are established. Performance standards gauge the degree to which a pupil has met the content standards and the degree to which a school or school district has met the content standards.

(i) "Publisher" means a commercial publisher or any other public or private entity, other than the State Department of Education,

which is able to provide tests or test items that meet the requirements of this chapter.

(j) "Statewide pupil assessment program" means the systematic achievement testing of pupils in grades 2 to 11, inclusive, pursuant to the standardized testing and reporting program under Article 4 (commencing with Section 60640) and the assessment of basic academic skills and applied academic skills, administered to pupils in grade levels specified in subdivision (c) of Section 60605, required by this chapter in all schools within each school district by means of tests designated by the State Board of Education.

SEC. 43. Section 60640 of the Education Code is amended to read:

60640. (a) There is hereby established the Standardized Testing and Reporting Program, to be known as the STAR Program.

(b) Commencing in the 1997–98 fiscal year and each fiscal year thereafter, and from the funds available for that purpose, each school district, charter school, and county office of education shall administer to each of its pupils in grades 2 to 11, inclusive, before May 15, the achievement test designated by the State Board of Education pursuant to Section 60642.

(c) The publisher and the school district shall provide two makeup days for the testing of previously absent pupils no later than May 25.

(d) The governing board of the school district may administer achievement tests in kindergarten, and grade 1 or 12, or both, as it deems appropriate.

(e) Individuals with exceptional needs who have an explicit provision in their individualized education program that exempts them from the testing requirement of subdivision (b) shall be so exempt.

(f) At the school district's option, pupils of limited English proficiency who are enrolled in any of grades 2 to 11, inclusive, may take a second achievement test in their primary language. Primary language tests administered pursuant to this subdivision and subdivision (g) shall be subject to the requirements of subdivisions (b), (c), (d), and (e) of Section 60641. These primary language tests shall produce individual pupil scores that are valid and reliable. Notwithstanding any other provision of law, the State Board of Education shall designate for use, as part of this program, a single primary language test in each language for which such a test is available for grades 2 to 11, inclusive, no later than November 14, 1998, pursuant to the process used for designation of the assessment chosen in the 1997–98 fiscal year, as specified in Section 60642 and 60643, as applicable.

(g) In addition to the test required by subdivision (b), pupils of limited English proficiency who are enrolled in any of grades 2 to 11, inclusive, shall be required to take a test in their primary language if such a test is available, if less than 12 months has elapsed after their initial enrollment in any public school in the state.

(h) The Superintendent of Public Instruction shall apportion funds to enable school districts to meet the requirements of subdivisions (b), (f), and (g). The State Board of Education shall establish the amount of funding to be apportioned. The amount to be apportioned shall be up to eight dollars ($8) per test administered to a pupil in grades 2 to 11, inclusive.

(i) For the purposes of making the computations required by Section 8 of Article XVI of the California Constitution, the appropriation for the apportionments made pursuant to subdivision (g) shall be deemed to be "General Fund revenues appropriated for school districts," as defined in subdivision (c) of Section 41202, for the applicable fiscal year, and included within the "total allocations to school districts and community college districts from General Fund proceeds of taxes appropriated pursuant to Article XIII B," as defined in subdivision (e) of Section 41202, for that fiscal year.

(j) As a condition to receiving an apportionment pursuant to subdivision (h), a school district shall report to the superintendent all of the following:

(1) The number of pupils enrolled in the school district in grades 2 to 11, inclusive.

(2) The number of pupils to whom an achievement test was administered in grades 2 to 11, inclusive, in the school district.

(3) The number of pupils in paragraph (1) who were exempted from the test pursuant to subdivision (e) of Section 60640.

(4) The number of pupils in paragraph (1) who were exempted from the test at the request of their parents or guardians.

SEC. 44. Section 69621 of the Education Code is amended to read:

69621. For purposes of this article, the following definitions apply:

(a) "Child Development Permit" means a permit issued by the Commission on Teacher Credentialing that authorizes an individual to teach, instruct, or supervise in a licensed child care and development program.

(b) "Licensed children's center" means a public school district-based, nonprofit community-based, or private proprietary program licensed by the State Department of Social Services under the health and safety requirements of Title 22 of the California Code of Regulations or administered by the State Department of Education under Title 5 of the California Code of Regulations. Licensed children's centers include federally subsidized, state-subsidized, and nonsubsidized child care and development programs serving children part day or full day.

SEC. 45. Section 89010 of the Education Code is amended to read:

89010. (a) Notwithstanding Article 1 (commencing with Section 11000) of Chapter 1 of Part 1 of, Article 2 (commencing with Section 14660) of Chapter 2 of Part 5.5 of, and Part 11 (commencing with Section 15850) of, Division 3 of Title 2 of the Government Code, or any other provision of law to the contrary, the trustees may sell

improvements located on the land at the California State University, Monterey Bay campus that was transferred to the trustees from the United States of America and used for housing purposes, in circumstances in which the underlying ownership in the land remains with the trustees. The trustees may exercise this authority without the prior approval of any other state department or agency.

(b) Moneys received by the trustees from the sale of improvements authorized in this section shall be deposited in local trust accounts. Moneys so deposited may be invested in accordance with state law and, notwithstanding Section 13340 of the Government Code, are continuously appropriated without regard to fiscal years for the purposes of building, maintaining, and funding a campus of the California State University at Monterey Bay through expenditures for improvements to the campus, funding of scholarships, and other academic purposes of the campus.

SEC. 46. Section 10262 of the Elections Code is amended to read:

10262. The governing body of the city shall meet at its usual place of meeting on the second Tuesday after the election to canvass the returns and to install the newly elected officers. The body shall declare elected the persons for whom the highest number of votes were cast for each office. Upon the completion of the canvass and before installing the new officers, the body shall pass a resolution reciting the fact of the election and the other matters that are enumerated in Section 10264.

SEC. 47. Section 15112 of the Elections Code is amended to read:

15112. When elections are consolidated pursuant to Division 10 (commencing with Section 10000), and only one form of ballot is used at the consolidated election, the ballots cast by absent voters shall be counted only in connection with elections to which absent voter privileges have been extended by law.

Whenever the period of time within which absent voters' ballots shall be received by the elections official in order to be counted, as provided for any election by this code or any other law of this state, is different from that period of time provided for another election, and the elections are consolidated and only one form of ballot used for both elections, all absent voters' ballots issued for the consolidated election may be counted for both elections if received by the elections official within whichever period of time is longer.

SEC. 48. Section 15151 of the Elections Code is amended to read:

15151. (a) The elections official shall transmit the semifinal official results to the Secretary of State in the manner and according to the schedule prescribed by the Secretary of State prior to each election, for the following:

(1) All candidates voted for statewide office.

(2) All candidates voted for the following offices:

(A) Member of the Assembly.

(B) Member of the Senate.

(C) Member of the United States House of Representatives.

(D) Member of the State Board of Equalization.

(E) Justice of the Court of Appeal.

(3) All persons voted for at the presidential primary or for electors of President and Vice President of the United States.

(4) Statewide ballot measures.

(b) The elections official shall transmit the results to the Secretary of State at intervals no greater than two hours, following commencement of the semifinal official canvass.

SEC. 49. Section 4252 of the Family Code is amended to read:

4252. (a) One or more child support commissioners shall be appointed by the superior court to perform the duties specified in Section 4251. The child support commissioners' first priority always shall be to hear Title IV-D child support cases. The child support commissioners shall specialize in hearing child support cases, and their primary responsibility shall be to hear Title IV-D child support cases. Child support commissioner positions shall not be subject to the limitation on other commissioner positions imposed upon the counties by Article 13 (commencing with Section 70140) of Chapter 5 of Title 8 of the Government Code. The number of child support commissioner positions allotted to each superior court shall be determined by the Judicial Council in accordance with caseload standards developed pursuant to paragraph (3) of subdivision (b), subject to appropriations in the annual Budget Act.

(b) The Judicial Council shall do all of the following:

(1) Establish minimum qualifications for child support commissioners.

(2) Establish minimum educational and training requirements for child support commissioners and other court personnel that are assigned to Title IV-D child support cases. Training programs shall include both federal and state laws concerning child support and related issues.

(3) Establish caseload, case processing, and staffing standards for child support commissioners on or before April 1, 1997, which shall set forth the maximum number of cases that each child support commissioner can process. These standards shall be reviewed and, if appropriate, revised by the Judicial Council every two years.

(4) Adopt uniform rules of court and forms for use in Title IV-D child support cases.

(5) Offer technical assistance to counties regarding issues relating to implementation and operation of the child support commissioner system, including assistance related to funding, staffing, and the sharing of resources between counties.

(6) Establish procedures for the distribution of funding to the courts for child support commissioners, family law facilitators pursuant to Division 14 (commencing with Section 10000), and related allowable costs.

(7) Adopt rules that define the exceptional circumstances in which judges may hear Title IV-D child support matters as provided in subdivision (a) of Section 4251.

(8) Convene a workgroup, including representatives of the State Department of Social Services, county district attorneys, child support commissioners, child support advocates, family law facilitators, attorneys engaging in the private practice of family law, custodial and noncustodial parents' organizations, and staff of the Assembly and Senate Judiciary Committees, to advise the Judicial Council in establishing criteria to evaluate the success and identify any failures of the child support commissioner system. The workgroup shall also provide advice on how to establish successful outcomes for the child support commissioner system created pursuant to this article. The Judicial Council shall conduct an evaluation and report the results of the evaluation and its recommendations to the Legislature no later than February 1, 2000. At a minimum, the evaluation shall examine the ability of the child support commissioner system to achieve the goals set forth in Section 4250. The report shall include a fiscal impact statement estimating the costs of implementing the recommendations.

(9) Undertake other actions as appropriate to ensure the successful implementation and operation of child support commissioners in the counties.

SEC. 50. Section 4351 of the Family Code is amended to read:

4351. (a) In any proceeding where the court has entered an order pursuant to Section 4350, the court may also refer the matter of enforcement of the spousal support order to the district attorney. The district attorney may bring those enforcement proceedings as the district attorney, in the district attorney's discretion, determines to be appropriate.

(b) Notwithstanding subdivision (a), in any case in which the district attorney is required to appear on behalf of a welfare recipient in a proceeding to enforce an order requiring payment of child support, the district attorney shall also enforce any order requiring payment to the welfare recipient of spousal support that is in arrears.

(c) Nothing in this section shall be construed to prohibit the district attorney from bringing an action or initiating process to enforce or punish the failure to obey an order for spousal support under any provision of law that empowers the district attorney to bring an action or initiate a process, whether or not there has been a referral by the court pursuant to this chapter.

(d) Any notice from the district attorney requesting a meeting with the support obligor for any purpose authorized under this part shall contain a statement advising the support obligor of his or her right to have an attorney present at the meeting.

SEC. 51. Section 4901 of the Family Code is amended to read:

4901. The following definitions apply to this chapter:

(a) "Child" means an individual, whether over or under the age of majority, who is, or is alleged to be, owed a duty of support by the individual's parent or who is, or is alleged to be, the beneficiary of a support order directed to the parent.

(b) "Child support order" means a support order for a child, including a child who has attained the age of majority under the law of the issuing state.

(c) "Duty of support" means an obligation imposed or imposable by law to provide support for a child, spouse, or former spouse, including an unsatisfied obligation to provide support.

(d) "Home state" means the state in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than six months old, the state in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month or other period.

(e) "Income" includes earnings or other periodic entitlements to money from any source and any other property subject to withholding for support under the laws of this state.

(f) "Income-withholding order" means an earnings assignment order for support, as defined in Section 5208, or any other order or other legal process directed to an obligor's employer, or other debtor, to withhold from the income of the obligor an amount owed for support.

(g) "Initiating state" means a state from which a proceeding is forwarded, or in which a proceeding is filed for forwarding, to a responding state under this chapter or a law or procedure substantially similar to this chapter, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act.

(h) "Initiating tribunal" means the authorized tribunal in an initiating state.

(i) "Issuing state" means the state in which a tribunal issues a support order or renders a judgment determining parentage.

(j) "Issuing tribunal" means the tribunal that issues a support order or renders a judgment determining parentage.

(k) "Law" includes decisional and statutory law and rules and regulations having the force of law.

(*l*) "Obligee" means any of the following:

(1) An individual to whom a duty of support is, or is alleged to be, owed or in whose favor a support order has been issued or a judgment determining parentage has been rendered.

(2) A state or political subdivision to which the rights under a duty of support or support order have been assigned or which has independent claims based on its provision of financial assistance to an individual obligee.

(3) An individual seeking a judgment determining parentage of the individual's child.

(m) "Obligor" means an individual, or the estate of a decedent, who satisfies any of the following criteria:

(1) He or she owes or is alleged to owe a duty of support.

(2) He or she is alleged, but has not been adjudicated to be, a parent of a child.

(3) He or she is liable under a support order.

(n) "Register" means to file a support order or judgment determining parentage in the superior court in any county in which enforcement of the order is sought.

(o) "Registering tribunal" means a tribunal in which a support order is registered.

(p) "Responding state" means a state in which a proceeding is filed or to which a proceeding is forwarded for filing from an initiating state under this chapter or a law or procedure substantially similar to this chapter, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act.

(q) "Responding tribunal" means the authorized tribunal in a responding state.

(r) "Spousal support order" means a support order for a spouse or former spouse of the obligor.

(s) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term "state" also includes both of the following:

(1) An Indian tribe.

(2) A foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under this chapter, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act.

(t) "Support enforcement agency" means a public official or agency authorized to seek any of the following:

(1) Enforcement of support orders or laws relating to the duty of support.

(2) Establishment or modification of child support.

(3) Determination of parentage.

(4) Location of obligors or their assets.

(u) "Support order" means a judgment, decree, or order, whether temporary, final, or subject to modification, for the benefit of a child, spouse, or former spouse, that provides for monetary support, health care, arrearages, or reimbursement, and may include related costs and fees, interest, income withholding, attorney's fees, or other relief.

(v) "Tribunal" means a court, administrative agency, or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage.

SEC. 52. Section 6380 of the Family Code is amended to read:

6380. (a) Each county, with the approval of the Department of Justice, shall, by July 1, 1996, develop a procedure, using existing systems, for the electronic transmission of data, as described in subdivision (b), to the Department of Justice. The data shall be electronically transmitted through the California Law Enforcement Telecommunications System (CLETS) of the Department of Justice by law enforcement personnel, or with the approval of the Department of Justice, court personnel, or another appropriate agency capable of maintaining and preserving the integrity of both the CLETS and the Domestic Violence Protective Order Registry, as described in subdivision (e). Data entry is required to be entered only once under the requirements of this section, unless the order is served at a later time. A portion of all fees payable to the Department of Justice under subdivision (a) of Section 1203.097 of the Penal Code for the entry of the information required under this section, based upon the proportion of the costs incurred by the local agency and those incurred by the Department of Justice, shall be transferred to the local agency actually providing the data. All data with respect to criminal court protective orders issued under subdivision (g) of Section 136.2 of the Penal Code shall be transmitted by the court or its designee within one business day to law enforcement personnel by either one of the following methods:

(1) Transmitting a physical copy of the order to a local law enforcement agency authorized by the Department of Justice to enter orders into CLETS.

(2) With the approval of the Department of Justice, entering the order into CLETS directly.

(b) Upon the issuance of a protective order to which this division applies pursuant to Section 6221, or the issuance of a temporary restraining order or injunction relating to harassment or domestic violence pursuant to Section 527.6 or 527.8 of the Code of Civil Procedure, or the issuance of a criminal court protective order under subdivision (g) of Section 136.2 of the Penal Code, or the issuance of a juvenile court restraining order related to domestic violence pursuant to Section 213.5, 304, or 362.4 of the Welfare and Institutions Code, or upon registration with the court clerk of a domestic violence protective order issued by the court of another state, tribe, or territory, and including any of the foregoing orders issued in connection with an order for modification of a custody or visitation order issued pursuant to a dissolution, legal separation, nullity, or paternity proceeding, the Department of Justice shall be immediately notified of the contents of the order and the following information:

(1) The name, race, date of birth, and other personal descriptive information of the respondent as required by a form prescribed by the Department of Justice.

(2) The names of the protected persons.

(3) The date of issuance of the order.

(4) The duration or expiration date of the order.

(5) The terms and conditions of the protective order, including stay-away, no-contact, residency exclusion, custody, and visitation provisions of the order.

(6) The department or division number and the address of the court.

(7) Whether or not the order was served upon the respondent.

(8) The terms and conditions of any restrictions on the ownership or possession of firearms.

All available information shall be included; however, the inability to provide all categories of information shall not delay the entry of the information available.

(c) The information conveyed to the Department of Justice shall also indicate whether the respondent was present in court to be informed of the contents of the court order. The respondent's presence in court shall provide proof of service of notice of the terms of the protective order. The respondent's failure to appear shall also be included in the information provided to the Department of Justice.

(d) Immediately upon receipt of proof of service the clerk of the court, and immediately after service any law enforcement officer who served the protective order, shall notify the Department of Justice, by electronic transmission, of the service of the protective order, including the name of the person who served the order and, if that person is a law enforcement officer, the law enforcement agency.

(e) The Department of Justice shall maintain a Domestic Violence Protective Order Registry and shall make available to court clerks and law enforcement personnel, through computer access, all information regarding the protective and restraining orders and injunctions described in subdivision (b), whether or not served upon the respondent.

(f) If a court issues a modification, extension, or termination of a protective order, the transmitting agency for the county shall immediately notify the Department of Justice, by electronic transmission, of the terms of the modification, extension, or termination.

(g) The Judicial Council shall assist local courts charged with the responsibility for issuing protective orders by developing informational packets describing the general procedures for obtaining a domestic violence restraining order and indicating the appropriate Judicial Council forms, and shall include a design, that

local courts shall complete, that describes local court procedures and maps to enable applicants to locate filing windows and appropriate courts. The court clerk shall provide a fee waiver form to all applicants for domestic violence protective orders. The court clerk shall provide all Judicial Council forms required by this chapter to applicants free of charge. The informational packet shall also contain a statement that the protective order is enforceable in any state, territory, or reservation, and general information about agencies in other jurisdictions that may be contacted regarding enforcement of an order issued by a court of this state.

(h) For the purposes of this part, "electronic transmission" includes computer access through the California Law Enforcement Telecommunications System (CLETS).

SEC. 53. Section 7572 of the Family Code is amended to read:

7572. (a) The State Department of Social Services, in consultation with the State Department of Health Services, the California Association of Hospitals and Health Systems, and other affected health provider organizations, shall work cooperatively to develop written materials to assist providers and parents in complying with this chapter.

(b) The written materials for parents shall be attached to the form specified in Section 7574, shall be provided to unmarried parents, and shall contain the following information:

(1) That a signed voluntary declaration of paternity that is filed with the State Department of Social Services legally establishes paternity.

(2) The legal rights and obligations of both parents and the child that result from the establishment of paternity.

(3) An alleged father's constitutional rights to have the issue of paternity decided by a court; to receive notice of any hearing on the issue of paternity; to have an opportunity to present his case to the court, including his right to present and cross-examine witnesses; to have an attorney represent him; and to have an attorney appointed to represent him if he cannot afford one in a paternity action filed by the district attorney.

(4) That by signing the voluntary declaration of paternity, the father is voluntarily waiving his constitutional rights.

(c) Parents shall also be given oral notice of the rights and responsibilities specified in subdivision (b). Oral notice may be accomplished through the use of audio or videotape programs developed by the State Department of Social Services to the extent permitted by federal law.

(d) The State Department of Social Services shall, free of charge, make available to hospitals, clinics, and other places of birth any and all informational and training materials for the program under this chapter, as well as the paternity declaration form. The State Department of Social Services shall make training available to every

participating hospital, clinic, local registrar of births and deaths, and other place of birth no later than June 30, 1999.

(e) The State Department of Social Services may adopt regulations, including emergency regulations, necessary to implement this chapter.

SEC. 54. Section 7575 of the Family Code is amended to read:

7575. (a) Either parent may rescind the voluntary declaration of paternity by filing a rescission form with the State Department of Social Services within 60 days after the date of execution of the declaration by the attesting father or attesting mother, whichever signature is later, unless a court order for custody, visitation, or child support has been entered in an action in which the signatory seeking to rescind was a party. The State Department of Social Services shall develop a form to be used by parents to rescind the declaration of paternity and instructions on how to complete and file the rescission with the State Department of Social Services. The form shall include a declaration under penalty of perjury completed by the person filing the rescission form that certifies that a copy of the rescission form was sent by any form of mail requiring a return receipt to the other person who signed the voluntary declaration of paternity. A copy of the return receipt shall be attached to the rescission form when filed with the State Department of Social Services. The form and instructions shall be written in simple, easy to understand language and shall be made available at the local family support office and the office of local registrar of births and deaths.

(b) (1) Notwithstanding Section 7573, if the court finds that the conclusions of all of the experts based upon the results of the genetic tests performed pursuant to Chapter 2 (commencing with Section 7550) are that the man who signed the voluntary declaration is not the father of the child, the court may set aside the voluntary declaration of paternity.

(2) The notice of motion for genetic tests under this section may be filed not later than two years after the date of the child's birth by either the mother or the man who signed the voluntary declaration as the child's father in an action to determine the existence or nonexistence of the father and child relationship pursuant to Section 7630 or in any action to establish an order for child custody, visitation, or child support based upon the voluntary declaration of paternity.

(3) The notice of motion for genetic tests pursuant to this section shall be supported by a declaration under oath submitted by the moving party stating the factual basis for putting the issue of paternity before the court.

(c) (1) Nothing in this chapter shall be construed to prejudice or bar the rights of either parent to file an action or motion to set aside the voluntary declaration of paternity on any of the grounds described in, and within the time limits specified in, Section 473 of the Code of Civil Procedure and Chapter 10 (commencing with

Section 2120) of Part 1 of Division 6. If the action or motion to set aside the voluntary declaration of paternity is based upon an act of fraud or perjury, the act must have induced the defrauded parent to sign the voluntary declaration of paternity. If the action or motion to set aside a judgment is required to be filed within a specified time period under Section 473 of the Code of Civil Procedure or Section 2122, the period within which the action or motion to set aside the voluntary declaration of paternity must be filed shall commence on the date that the court makes a finding of paternity based upon the voluntary declaration of paternity in an action for custody, visitation, or child support.

(2) The parent seeking to set aside the voluntary declaration of paternity shall have the burden of proof.

(3) Any order for custody, visitation, or child support shall remain in effect until the court determines that the voluntary declaration of paternity should be set aside, subject to the court's power to modify the orders as otherwise provided by law.

(4) Nothing in this section is intended to restrict a court from acting as a court of equity.

(5) If the voluntary declaration of paternity is set aside pursuant to paragraph (1), the court shall order that the mother, child, and alleged father submit to genetic tests pursuant to Chapter 2 (commencing with Section 7550). If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the genetic tests, are that the person who executed the voluntary declaration of paternity is not the father of the child, the question of paternity shall be resolved accordingly. If the person who executed the declaration as the father of the child is not excluded as a possible father, the question of paternity shall be resolved as otherwise provided by law. If the person who executed the declaration of paternity is ultimately determined to be the father of the child, any child support that accrued under an order based upon the voluntary declaration of paternity shall remain due and owing.

(6) The Judicial Council shall develop the forms and procedures necessary to effectuate this subdivision.

SEC. 55. Section 6420 of the Fish and Game Code is amended to read:

6420. The Legislature finds and declares all of the following:

(a) Declines in various southern California marine species of fish have adversely affected the sport and commercial fishing industry.

(b) Efforts to enhance these species through the placement of artificial reefs need to be investigated.

(c) A program of artificial reef research and development, including reef design, placement, and monitoring, is in the public interest and can best be accomplished under the administration of the department with the cooperation and assistance of the University of California, the California State University, other established,

appropriate academic institutions, and other organizations with demonstrated expertise in the field.

(d) A state artificial reef research and construction program under the administration of the department is necessary to coordinate ongoing studies and construction of artificial reefs in waters of the state.

SEC. 56. Section 7151 of the Fish and Game Code is amended to read:

7151. (a) Upon application to the department, the following persons, if they have not been convicted of any violation of this code, shall be issued, free of any charge or fee, a sportfishing license, which is valid for the calendar year of issue or, if issued after the beginning of the year, for the remainder thereof, and which authorizes the licensee to take any fish, reptile, or amphibian anywhere in this state for purposes other than profit:

(1) A blind person upon presentation of proof of blindness. "Blind person" means a person with central visual acuity of 20/200 or less in the better eye, with the aid of the best possible correcting glasses, or central visual acuity better than 20/200 if the widest diameter of the remaining visual field is no greater than 20 degrees. Proof of blindness shall be by certification from a qualified licensed optometrist or ophthalmologist or by presentation of a license issued pursuant to this paragraph in the preceding license year.

(2) Every resident Native American who, in the discretion of the department, is financially unable to pay the fee required for the license.

(3) Upon certification by the person in charge of a state hospital, a person who is a ward of the state and who is a patient in, and resides in, the state hospital.

(4) Upon certification by the person in charge of a regional center for the developmentally disabled, a developmentally disabled person receiving services from the regional center.

(5) A person who is a resident of the state and who is so severely physically disabled as to be permanently unable to move from place to place without the aid of a wheelchair, walker, forearm crutches, or a comparable mobility-related device. Proof of the disability shall be by certification from a licensed physician and surgeon or, beginning January 1, 1997, by presentation of a license issued pursuant to this paragraph for the preceding year.

(b) Upon application to the department, the department may issue, free of any charge or fee, a sportfishing permit to groups of mentally or physically handicapped persons under the care of a certified federal, state, county, city, or private licensed care center that is a community care facility as defined in subdivision (a) of Section 1502 of the Health and Safety Code, to organizations exempt from taxation under Section 501(c)(3) of the federal Internal Revenue Code, or to schools or school districts. Any organization that

applies for a group fishing permit shall provide evidence that it is a legitimate private licensed care center, tax-exempt organization, school, or school district. The permit shall be issued to the person in charge of the group and shall be in his or her possession when the group is fishing. Employees of private licensed care centers, tax-exempt organizations, schools, or school districts are exempt from Section 7145 only while assisting physically or mentally disabled persons fishing under the authority of a valid permit issued pursuant to this section. The permit shall include the location where the activity will take place, the date or dates of the activity, and the maximum number of people in the group. The permitholder shall notify the local department office before fishing and indicate where, when, and how long the group will fish.

(c) On January 15 of each year, the department shall determine the number of free sportfishing licenses issued under subdivisions (a) and (b) to blind persons, indigent resident Native Americans, wards of the state, developmentally disabled persons, and physically disabled persons.

(d) There shall be appropriated from the General Fund a sum equal to two dollars ($2) per free sportfishing license issued under subdivisions (a) and (b), as determined by the department pursuant to subdivision (c). That sum may be appropriated annually in the Budget Act for transfer to the Fish and Game Preservation Fund and appropriated in the Budget Act from the Fish and Game Preservation Fund to the department for the purposes of this part.

SEC. 57. Section 221 of the Food and Agricultural Code is amended to read:

221. The "Department of Food and Agriculture Fund," which is a special fund, is continued in existence. Any money that is directed by law to be paid into the fund shall be paid into it and, unless otherwise specifically provided, shall be expended solely for the enforcement of the law under which the money was derived. The expenditure from the fund for the enforcement of any law shall not, unless otherwise specifically provided, exceed the amount of money that is credited to the fund pursuant to the law.

Notwithstanding Section 13340 of the Government Code, all money deposited in the fund under the provisions enumerated below is hereby continuously appropriated to the department without regard to fiscal years for expenditure in carrying out the purposes for which the money was deposited and for making the refunds authorized by Section 302.

All money deposited in the fund under the provisions enumerated below is hereby exempted from Sections 13320 to 13324, inclusive, of the Government Code:

(a) Article 7 (commencing with Section 5821) and Article 7.5 (commencing with Section 5850) of Chapter 8 of Part 1 of Division

4, Chapter 1 (commencing with Section 6701) of Part 3 of Division 4, and Chapter 5 (commencing with Section 53301) of Division 18.

(b) Article 5 (commencing with Section 6001) of Chapter 9 of Part 1 of Division 4.

(c) Article 4.5 (commencing with Section 6971) and Article 5 (commencing with Section 6981) of Chapter 2 of Part 3 of Division 4.

(d) Chapter 4 (commencing with Section 14200), Chapter 5 (commencing with Section 14501), and Chapter 6 (commencing with Section 14901) of Division 7.

(e) Part 1 (commencing with Section 16301) and Part 2 (commencing with Section 17401) of Division 9.

(f) Sections 19225, 19227, 19312, and 19315.

(g) Division 10 (commencing with Section 20001).

(h) Division 11 (commencing with Section 23001).

(i) Part 4 (commencing with Section 27501) of Division 12.

(j) Division 16 (commencing with Section 40501).

(k) Chapter 9 (commencing with Section 44971) of Division 17.

(*l*) Chapter 1 (commencing with Section 52001) of Division 18.

(m) Chapter 2 (commencing with Section 52251) of Division 18.

(n) Chapter 3 (commencing with Section 52651) of Division 18.

(o) Chapter 4 (commencing with Section 52851) of Division 18.

(p) Chapter 6 (commencing with Section 55401), Chapter 7 (commencing with Section 56101), and Chapter 7.5 (commencing with Section 56701) of Division 20.

(q) Section 58582.

(r) Chapter 1 (commencing with Section 61301), Chapter 2 (commencing with Section 61801), and Chapter 3 (commencing with Section 62700) of Part 3 of Division 21.

(s) Chapter 5.5 (commencing with Section 12531) of Division 5 of the Business and Professions Code.

(t) Chapter 7 (commencing with Section 12700) of Division 5 of the Business and Professions Code.

(u) Chapter 14 (commencing with Section 13400) and Chapter 15 (commencing with Section 13700) of Division 5 of the Business and Professions Code.

SEC. 58. Section 5852 of the Food and Agricultural Code is amended to read:

5852. (a) The department may provide, upon request, nonregulatory accreditation, analytical, certification, diagnostic, inspection, quality assurance, testing, and other nonregulatory services relating to nursery stock, plants, seed, or other plant pests and diseases on a charge-for-service basis or may accredit private persons or business entities to perform those services.

(b) To ensure that the activities performed by private persons or business entities are valid and reliable, the department shall adopt regulations to establish accreditation criteria to govern its

97

accreditation, monitoring or auditing, and revocation of accreditation activities. Any regulations adopted by the department pursuant to this subdivision shall be consistent with applicable federal law. The department may adopt by reference any pertinent federal laws or regulations pertaining to the accreditation of persons or business entities for the performance of work required to certify compliance with the quarantine, quality, and other import requirements established by other states or foreign countries. No private, nongovernmental entities that perform diagnostic or field inspections for the issuance of federal phytosanitary certificates shall be accredited until federal rules are adopted that permit and regulate those activities.

(c) To retain accreditation, those persons or business entities providing services described in subdivision (a) shall agree to be monitored or assessed and evaluated on a periodic basis by means of proficiency testing or sample checking.

(d) It is unlawful for any person or business entity that is not accredited by the department to make any representation regarding accreditation by the department. Any person or business entity that makes that representation, without valid departmental accreditation, may be enjoined from doing so by any court of competent jurisdiction upon suit by the department.

(e) To assure validity and reliability, the department may specify, by order, the location or locations where the services described in subdivision (a) will be provided.

(f) The department may establish, by regulation, a schedule of charges to cover the department's costs for specific services it provides. Charges for the accreditation and monitoring of laboratories located outside the state shall include the expenses for all required travel and per diem and may include application, basic, initial, renewal, and other charges that the department deems necessary to cover its costs for accreditation and monitoring or auditing for compliance. Funds collected through cost-recovery charges are dedicated to, and may only be used for, carrying out the activities and functions specified in this article.

(g) Notwithstanding any other provision of this code regarding the provision of the services described in subdivision (a), orders issued by the department and regulations establishing charges adopted by the secretary pursuant to this section shall not be subject to review, approval, or disapproval by the Office of Administrative Law.

(h) Nothing in this section shall be construed to interfere with or supersede any existing inspection, quality assurance, or certification program conducted by an agricultural trade or commodity organization, and this section shall not be construed to require those programs to be certified or accredited by the department.

SEC. 59. Section 14651 of the Food and Agricultural Code is amended to read:

14651. (a) Unless otherwise specified in this chapter, any violation of this chapter, or the regulations adopted pursuant to this chapter, is a misdemeanor , punishable by a fine of not more than five hundred dollars ($500) for the first violation and not less than five hundred dollars ($500) for each subsequent violation.

(b) The director may, after hearing, refuse to issue or renew, or may suspend or revoke, a license or registration for any violation of this chapter or any regulation that is adopted pursuant to this chapter.

(c) Upon calling a hearing, the director shall hand deliver or mail a notice of the hearing to the licensee or registrant specifying the time and place of the hearing at least 10 days prior to the hearing. The hearing officer may do any of the following:

(1) Administer oaths and take testimony.

(2) Issue subpoenas requiring the attendance of the licensee, registrant, or witnesses, together with books, records, memoranda, papers, and all other documents that may be pertinent to the case.

(3) Compel from the licensee or registrant and any witness the disclosure of all facts known to him or her regarding the case. In no instance shall any employee of Agricultural Commodities and Regulatory Services serve as the hearing officer in any hearing conducted pursuant to this section.

(d) Any person who is denied a license, whose license is not renewed, or whose license is suspended or revoked pursuant to this section may appeal to the director.

SEC. 60. Section 20797 of the Food and Agricultural Code is amended to read:

20797. Any person who loses his or her right to use a brand as a result of the determination of the chief pursuant to this article may appeal to the secretary within 15 days. The secretary may affirm, reverse, or modify the determination of the chief.

SEC. 61. Section 31753 of the Food and Agricultural Code is amended to read:

31753. Any rabbit, guinea pig, hamster, pot-bellied pig, bird, lizard, snake, turtle, or tortoise that is legally allowed as personal property and that is impounded in a public or private shelter shall be held for the same period of time, under the same requirements of care, and with the same opportunities for redemption and adoption by new owners or nonprofit, as defined in Section 501(c)(3) of the Internal Revenue Code, animal rescue or adoption organizations as provided for cats and dogs. Section 17006 shall also apply to these animals. In addition to any required spay or neuter deposit, the pound or shelter, at its discretion, may assess a fee, not to exceed the standard adoption fee, for animals released to nonprofit animal rescue or adoption organizations pursuant to this section.

SEC. 62. Section 3517.65 of the Government Code is amended to read:

3517.65. (a) Notwithstanding Section 3517.6, this section shall apply only to state employees in State Bargaining Unit 19.

(b) If the provisions of Section 70031 of the Education Code, or subdivision (i) of Section 3513, or Section 14876, 18714, 19080.5, 19100, 19143, 19261, 19576.1, 19582.3, 19175.5, 19818.16, 19819.1, 19820, 19822, 19824, 19826, 19827, 19828, 19829, 19830, 19831, 19832, 19833, 19834, 19835, 19836, 19837, 19838, 19839, 19840, 19841, 19842, 19843, 19844, 19845, 19846, 19847, 19848, 19849, 19849.1, 19849.4, 19850.1, 19850.2, 19850.3, 19850.4, 19850.5, 19850.6, 19851, 19853, 19854, 19856, 19856.1, 19858.1, 19858.2, 19859, 19860, 19861, 19862, 19862.1, 19863, 19863.1, 19864, 19866, 19869, 19870, 19871, 19871.1, 19872, 19873, 19874, 19875, 19876, 19877, 19877.1, 19878, 19879, 19880, 19880.1, 19881, 19882, 19883, 19884, 19885, 19887, 19887.1, 19887.2, 19888, 19990, 19991, 19991.1, 19991.2, 19991.3, 19991.4, 19991.5, 19991.6, 19991.7, 19992, 19992.1, 19992.2, 19992.3, 19992.4, 19993, 19994.1, 19994.2, 19994.3, 19994.4, 19995, 19995.1, 19995.2, 19995.3, 19996.1, 19996.2, 19998, 19998.1, 20796, 21600, 21602, 21604, 21605, 22825, or 22825.1 are in conflict with the provisions of a memorandum of understanding, the memorandum of understanding shall be controlling without further legislative action.

(c) If the provisions of Section 19997.2, 19997.9, 19997.10, 19997.12, 19997.14, 19997.43, 19997.48, 19997.51, or 19997.53 are in conflict with the provisions of a memorandum of understanding, the terms of the memorandum of understanding shall be controlling unless the State Personnel Board finds those terms to be inconsistent with merit employment principles as provided for by Article VII of the California Constitution. If this finding is made, the provisions of the Government Code shall prevail until those affected sections of the memorandum of understanding are renegotiated to resolve the inconsistency. If any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the memorandum of understanding shall not become effective unless approved by the Legislature in the annual Budget Act. If any provision of the memorandum of understanding requires legislative action to permit its implementation by amendment of any section not cited in this subdivision, those provisions of the memorandum of understanding shall not become effective unless approved by the Legislature.

SEC. 63. Section 4560 of the Government Code is amended to read:

4560. (a) The Legislature finds and declares that there is a substantial need to provide adequate child care facilities for state employees.

(b) When the state constructs, acquires, or receives as a gift any office building that can accommodate 700 or more state employees, or when additions, alterations, or repairs are made to any existing

state-owned office building that can accommodate 700 or more state employees, and the additions, alterations, or repairs both change and affect the use of 25 percent of the net square feet area of the building and include the addition to, alteration of, or repair of the first floor, adequate space shall be designated within the building to meet the child care needs of those employees, if a review of those employees slated to occupy the new or renovated building shows sufficient need for child care services for 30 or more children. The review shall be conducted by the Department of General Services and the Child Development Programs Advisory Committee established pursuant to Section 8286 of the Education Code.

(c) The Director of General Services may secure space in any adequate facility for the same purposes if funds for the offsite facilities are made available and the director determines that any of the following conditions exist:

(1) All other physical requirements controlling the development of the child care facilities within the office building cannot be utilized.

(2) It is more cost-efficient for the state to provide for equivalent child care facilities within a reasonable distance of the place of employment.

(3) Locating the child care center within a reasonable distance offsite would provide an enhanced facility for the children or would mitigate security concerns.

(d) Existing state office buildings, at the discretion of the Director of General Services, may be retrofitted to accommodate a child care facility. State funds required for the retrofitting shall be subject to regular budgetary procedures and approvals.

(e) Space designed within a state-owned office building for the child care facility shall comply with the prevailing local and state safety building codes for child care facilities.

(f) The indoor area shall not exceed 2,100 square feet, nor be less than that required to accommodate 30 children, excluding space for restrooms, kitchen facilities, storage areas, and teacher offices. Outdoor play area space shall correspond with the indoor play area as described in Title 22 of the California Code of Regulations.

(g) Utilization of the space shall be subject to terms and conditions set forth by the Director of General Services. The terms shall include payment of rent, proof of financial responsibility, and maintenance of space. The space shall be made available to employees who wish to establish child care facilities at a rate to be established by the Director of General Services based upon the actual cost to the state, the average cost of state-owned space in the area, or the statewide average cost of state-owned space, whichever is less. If, however, the director determines that a lower rent must be charged to ensure the viability of a child care facility, the director may charge a lower rate.

(h) (1) The department or departments occupying the building shall notify the employee-occupants in writing of the availability of space to be used for a child care facility no earlier than 180 days prior to the projected date of occupancy of a new building or space provided as the result of additions, alterations, or repairs to an existing state-owned building, and the additions, alterations, or repairs that both change and affect the use of 25 percent of the net square feet area of the building and include the addition to, alteration of, or repair of the first floor. If, within 30 days after full occupancy of a new office building or 30 days after the completion of additions, alterations, or repairs to an existing state-owned office building, the employee-occupants so desiring have not filed an application with the Secretary of State as a nonprofit corporation for the purpose of organizing a child care center, deposited two months' rent in a commercial or savings account, and entered into a contract with the Department of General Services, the space may be used for any other purpose, as long as no permanent alteration of the space occurs. Other purposes may include, but are not limited to, conference rooms, storage areas, or offices. The space for child care shall be held for the employee-occupants' nonprofit corporation only as long as they pay the monthly rent and meet the terms set forth in the contract. Payment of rent shall commence 30 days after full occupancy of a new office building or 30 days after completion of additions, alterations, or repairs, as specified in this section.

(2) If, at a later date, the employee-occupants so desiring (A) file an application with the Secretary of State as a nonprofit corporation for the purpose of organizing a child care facility, (B) deposit two months' rent in a commercial or savings account, and (C) notify the Director of General Services of those actions, then the space shall be reconverted for child care purposes within 180 days of the notice.

(i) Children from families in which at least one parent or guardian is a state employee shall be given priority admission over other children to the child care facility.

(j) When a child care center within a state-owned office building has been operative for five years, the Director of General Services shall assess the child care needs of the state employees using the center and the office space needs of the building within which the center is located. If the assessment demonstrates a greater need for office space than for child care, the Director of General Services may close the child care center. Ninety days' written notice of the closure shall be given to the director or head teacher of the center.

(k) This section does not apply to buildings that provide care or 24-hour residential care for patients, inmates, or wards of the state, such as state hospitals and correctional facilities.

SEC. 64. Section 6253 of the Government Code is amended to read:

6253. (a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

(b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so. Computer data shall be provided in a form determined by the agency.

(c) Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. As used in this section, "unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(d) Nothing in this chapter shall be construed to permit an agency to obstruct the inspection or copying of public records. Any notification of denial of any request for records shall set forth the names and titles or positions of each person responsible for the denial.

(e) Except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter.

SEC. 65. Section 6505.5 of the Government Code is amended to read:

6505.5. If a separate agency or entity is created by the agreement, the agreement shall designate the treasurer of one of the contracting parties, or in lieu thereof, the county treasurer of a county in which one of the contracting parties is situated, or a certified public accountant to be the depositary and have custody of all the money of the agency or entity, from whatever source.

The treasurer or certified public accountant so designated shall do all of the following:

(a) Receive and receipt for all money of the agency or entity and place it in the treasury of the treasurer so designated to the credit of the agency or entity.

(b) Be responsible, upon his or her official bond, for the safekeeping and disbursement of all agency or entity money so held by him or her.

(c) Pay, when due, out of money of the agency or entity held by him or her, all sums payable on outstanding bonds and coupons of the agency or entity.

(d) Pay any other sums due from the agency or entity from agency or entity money, or any portion thereof, only upon warrants of the public officer performing the functions of auditor or controller who has been designated by the agreement.

(e) Verify and report in writing on the first day of July, October, January, and April of each year to the agency or entity and to the contracting parties to the agreement the amount of money he or she holds for the agency or entity, the amount of receipts since his or her last report, and the amount paid out since his or her last report.

The officer performing the functions of auditor or controller shall be of the same public agency as the treasurer designated as depositary pursuant to this section. However, where a certified public accountant has been designated as treasurer of the entity, the auditor of one of the contracting parties or of a county in which one of the contracting parties is located shall be designated as auditor of the entity. The auditor shall draw warrants to pay demands against the agency or entity when the demands have been approved by any person authorized to so approve in the agreement creating the agency or entity.

The governing body of the same public entity as the treasurer and auditor specified pursuant to this section shall determine charges to be made against the agency or entity for the services of the treasurer and auditor. However, where a certified public accountant has been designated as treasurer, the governing body of the same public entity as the auditor specified pursuant to this section shall determine charges to be made against the agency or entity for the services of the auditor.

SEC. 66. Section 7073 of the Government Code is amended to read:

7073. (a) Except as provided in subdivision (e), any city, county, or city and county with an eligible area within its jurisdiction may complete a preliminary application for designation as an enterprise zone. The applying entity shall establish definitive boundaries for the proposed enterprise zone and the targeted employment area.

(b) (1) In designating enterprise zones, the agency shall select from the applications submitted those proposed enterprise zones that, upon a comparison of all of the applications submitted, indicate that they propose the most effective, innovative, and comprehensive regulatory, tax, program, and other incentives in attracting private sector investment in the zone proposed.

(2) For purposes of this subdivision, regulatory incentives include, but are not limited to, all of the following:

(A) The suspension or relaxation of locally originated or modified building codes, zoning laws, general development plans, or rent controls.

(B) The elimination or reduction of fees for applications, permits, and local government services.

(C) The establishment of a streamlined permit process.

(3) For purposes of this subdivision, tax incentives include, but are not limited to, the elimination or reduction of construction taxes or business license taxes.

(4) For the purposes of this subdivision, program and other incentives may include, but are not limited to, all of the following:

(A) The provision or expansion of infrastructure.

(B) The targeting of federal block grant moneys, including small cities, education, and health and welfare block grants.

(C) The targeting of economic development grants and loan moneys, including grant and loan moneys provided by the federal Urban Development Action Grant program and the federal Economic Development Administration.

(D) The targeting of state and federal job disadvantaged and vocational education grant moneys, including moneys provided by the federal Job Training Partnership Act of 1982 (P.L. 97-300).

(E) The targeting of federal or state transportation grant moneys.

(F) The targeting of federal or state low-income housing and rental assistance moneys.

(G) The use of tax allocation bonds, special assessment bonds, bonds under the Mello-Roos Community Facilities Act of 1982 (Chapter 2.5 (commencing with Section 53311) of Part 1 of Division 2 of Title 5), industrial development bonds, revenue bonds, private activity bonds, housing bonds, bonds issued pursuant to the Marks-Ross Local Bond Pooling Act of 1985 (Article 4 (commencing with Section 6584) of Chapter 5), certificates of participation, hospital bonds, redevelopment bonds, school bonds, and all special

provisions provided for under federal tax law for enterprise community or empowerment zone bonds.

(5) In the process of designating new enterprise zones, the agency shall take into consideration the location of existing zones and make every effort to locate new zones in a manner that will not adversely affect any existing zones.

(6) In designating new enterprise zones, the agency shall include in its criteria the fact that jurisdictions have been declared disaster areas by the President of the United States within the last seven years.

(c) In evaluating applications for designation, the agency shall ensure that applications are not disqualified solely because of technical deficiencies, and shall provide applicants with an opportunity to correct the deficiencies. Applications shall be disqualified if the deficiencies are not corrected within two weeks.

(d) (1) Except as provided in paragraph (2), or upon dedesignation pursuant to subdivision (c) of Section 7076.1 or Section 7076.2, a designation made by the agency shall be binding for a period of 15 years from the date of the original designation.

(2) The designation period for any zone designated pursuant to either Section 7073 or 7085 prior to 1990 may total 20 years, subject to possible dedesignation pursuant to subdivision (c) of Section 7076.1 or Section 7076.2, if the following requirements are met:

(A) The zone receives a superior or passing audit pursuant to subdivision (c) of Section 7076.1.

(B) The local jurisdictions comprising the zone submit an updated economic development plan to the agency justifying the need for an additional five years by defining goals and objectives that still need to be achieved and indicating what actions are to be taken to achieve these goals and objectives.

(e) (1) Notwithstanding any other provision of law, any area designated as an enterprise zone pursuant to Chapter 12.8 (commencing with Section 7070) as it read prior to January 1, 1997, or as a targeted economic development area, neighborhood economic development area, or program area pursuant to Chapter 12.9 (commencing with Section 7080) as it read prior to January 1, 1997, or any program area or part of a program area deemed designated as an enterprise zone pursuant to Section 7085.5 as it read prior to January 1, 1997, shall be deemed to be designated as an enterprise zone pursuant to this chapter. The effective date of designation of the enterprise zone shall be that of the original designation of the enterprise zone pursuant to Chapter 12.8 (commencing with Section 7070) as it read prior to January 1, 1997, or of the program area pursuant to Chapter 12.9 (commencing with Section 7080) as it read prior to January 1, 1997, and in no event shall the total designation period exceed 15 years, except as provided in paragraph (2) of subdivision (d).

(2) Notwithstanding any other provision of law, any enterprise zone authorized, but not designated, pursuant to Chapter 12.8 (commencing with Section 7070) as it read prior to January 1, 1997, shall be allowed to complete the application process started pursuant to that chapter, and to receive final designation as an enterprise zone pursuant to this chapter.

(3) Notwithstanding any other provision of law, any expansion of a designated enterprise zone or program area authorized pursuant to Chapter 12.8 (commencing with Section 7070) as it read prior to January 1, 1997, or Chapter 12.9 (commencing with Section 7080) as it read prior to January 1, 1997, shall be deemed to be authorized as an expansion for a designated enterprise zone pursuant to this chapter.

(4) This chapter shall not be construed to require a new application for designation by an enterprise zone designated pursuant to Chapter 12.8 (commencing with Section 7070) as it read prior to January 1, 1997, or a targeted economic development area, neighborhood economic development area, or program area designated pursuant to Chapter 12.9 (commencing with Section 7080) as it read prior to January 1, 1997.

(f) No more than 39 enterprise zones shall be designated at any one time pursuant to this chapter, including those deemed designated pursuant to subdivision (e). Upon the expiration or termination of a designation, the agency is authorized to designate another enterprise zone to maintain a total of 39 enterprise zones.

SEC. 67. Section 7260 of the Government Code is amended to read:

7260. As used in this chapter:

(a) "Public entity" includes the state, the Regents of the University of California, a county, city, city and county, district, public authority, public agency, and any other political subdivision or public corporation in the state or any entity acting on behalf of these agencies when acquiring real property, or any interest therein, in any city or county for public use, and any person who has the authority to acquire property by eminent domain under state law.

(b) "Person" means any individual, partnership, corporation, limited liability company, or association.

(c) (1) "Displaced person" means both of the following:

(A) Any person who moves from real property, or who moves his or her personal property from real property, either:

(i) As a direct result of a written notice of intent to acquire, or the acquisition of, the real property, in whole or in part, for a program or project undertaken by a public entity or by any person having an agreement with, or acting on behalf of, a public entity.

(ii) As a direct result of the rehabilitation, demolition, or other displacing activity, as the public entity may prescribe under a program or project undertaken by a public entity, of real property

on which the person is a residential tenant or conducts a business or farm operation, if the public entity determines that the displacement is permanent. For purposes of this subparagraph, "residential tenant" includes any occupant of a residential hotel unit, as defined in subdivision (b) of Section 50669 of the Health and Safety Code, and any occupant of employee housing, as defined in Section 17008 of the Health and Safety Code, but does not include any person who has been determined to be in unlawful occupancy of the displacement dwelling.

(B) Solely for the purposes of Sections 7261 and 7262, any person who moves from real property, or moves his or her personal property from real property, either:

(i) As a direct result of a written notice of intent to acquire, or the acquisition of, other real property, in whole or in part, on which the person conducts a business or farm operation for a program or project undertaken by a public entity.

(ii) As a direct result of the rehabilitation, demolition, or other displacing activity as the public entity may prescribe under a program or project undertaken by a public entity, of other real property on which the person conducts a business or farm operation, in any case in which the public entity determines that the displacement is permanent.

(2) This subdivision shall be construed so that persons displaced as a result of public action receive relocation benefits in cases where they are displaced as a result of an owner participation agreement or an acquisition carried out by a private person for, or in connection with, a public use where the public entity is otherwise empowered to acquire the property to carry out the public use.

Except for persons or families of low and moderate income, as defined in Section 50093 of the Health and Safety Code, who are occupants of housing that was made available to them on a permanent basis by a public agency and who are required to move from the housing, a "displaced person" shall not include any of the following:

(A) Any person who has been determined to be in unlawful occupancy of the displacement dwellings.

(B) Any person whose right of possession at the time of moving arose after the date of the public entity's acquisition of the real property.

(C) Any person who has occupied the real property for the purpose of obtaining assistance under this chapter.

(D) In any case in which the public entity acquires property for a program or project (other than a person who was an occupant of the property at the time it was acquired), any person who occupies the property for a period subject to termination when the property is needed for the program or project.

(d) "Business" means any lawful activity, except a farm operation, conducted for any of the following:

(1) Primarily for the purchase, sale, lease, or rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property.

(2) Primarily for the sale of services to the public.

(3) Primarily by a nonprofit organization.

(4) Solely for the purpose of Section 7262 for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display, whether or not the display is located on the premises on which any of the above activities are conducted.

(e) "Farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use, and customarily producing these products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

(f) "Affected property" means any real property that actually declines in fair market value because of acquisition by a public entity for public use of other real property and a change in the use of the real property acquired by the public entity.

(g) "Public use" means a use for which real property may be acquired by eminent domain.

(h) "Mortgage" means classes of liens that are commonly given to secure advances on, or the unpaid purchase price of, real property, together with the credit instruments, if any, secured thereby.

(i) "Comparable replacement dwelling" means any dwelling that is all of the following:

(1) Decent, safe, and sanitary.

(2) Adequate in size to accommodate the occupants.

(3) In the case of a displaced person who is a renter, within the financial means of the displaced person. A comparable replacement dwelling is within the financial means of a displaced person if the monthly rental cost of the dwelling, including estimated average monthly utility costs, minus any replacement housing payment available to the person, does not exceed 30 percent of the person's average monthly income, unless the displaced person meets one or more of the following conditions, in which case the payment of the monthly rental cost of the comparable replacement dwelling, including estimated average monthly utility costs, minus any replacement housing payment available to the person, shall not exceed 25 percent of the person's average monthly income:

(A) Prior to January 1, 1998, the displaced person received a notice to vacate from a public entity, or from a person having an agreement with a public entity.

(B) The displaced person resides on property that was acquired by a public entity, or by a person having an agreement with a public entity, prior to January 1, 1998.

(C) Prior to January 1, 1998, a public entity, or a person having an agreement with a public entity, initiated negotiations to acquire the property on which the displaced person resides.

(D) Prior to January 1, 1998, a public entity, or a person having an agreement with a public entity, entered into an agreement to acquire the property on which the displaced person resides.

(E) Prior to January 1, 1998, a public entity, or a person having an agreement with a public entity, gave written notice of intent to acquire the property on which the displaced person resides.

(F) The displaced person is covered by, or resides in an area or project covered by, a final relocation plan that was adopted by the legislative body prior to January 1, 1998, pursuant to this chapter and the regulations adopted pursuant to this chapter.

(G) The displaced person is covered by, or resides in an area or project covered by, a proposed relocation plan that was required to have been submitted prior to January 1, 1998, to the Department of Housing and Community Development or to a local relocation committee, or for which notice was required to have been provided to occupants of the property prior to January 1, 1998, pursuant to this chapter and the regulations adopted pursuant to this chapter.

(H) The displaced person is covered by, or resides in an area or project covered by, a proposed relocation plan that was submitted prior to January 1, 1998, to the Department of Housing and Community Development or to a local relocation committee, or for which notice was provided to the public or to occupants of the property prior to January 1, 1998, pursuant to this chapter and the regulations adopted pursuant to this chapter, and the person is eventually displaced by the project covered in the proposed relocation plan.

(I) The displaced person resides on property for which a contract for acquisition, rehabilitation, demolition, construction, or other displacing activity was entered into by a public entity, or by a person having an agreement with a public entity, prior to January 1998.

(J) The displaced person resides on property where an owner participation agreement, or other agreement between a public entity and a private party that will result in the acquisition, rehabilitation, demolition, or development of the property or other displacement, was entered into prior to January 1, 1998, and the displaced person resides in the property at the time of the agreement, provides information to the public entity, or person having an agreement with the public entity showing that he or she did reside in the property at the time of the agreement and is eventually displaced by the project covered in the agreement.

(4) Comparable with respect to the number of rooms, habitable space, and type and quality of construction. Comparability under this paragraph shall not require strict adherence to a detailed, feature-by-feature comparison. While a comparable replacement dwelling need not possess every feature of the displacement dwelling, the principal features shall be present.

(5) In an area not subject to unreasonable adverse environmental conditions.

(6) In a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, facilities, services, and the displaced person's place of employment.

(j) "Displacing agency" means any public entity or person carrying out a program or project which causes a person to be a displaced person for a public project.

(k) "Appraisal" means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information.

(*l*) "Small business" means a business as defined in Part 24 of Title 49 of the Code of Federal Regulations.

(m) "Lead agency" means the Department of Housing and Community Development.

SEC. 68. Section 7262.5 of the Government Code is amended to read:

7262.5. Notwithstanding Section 7265.3 or any other provision of law, tenants residing in any rental project who are displaced from the project for a period of one year or less as part of a rehabilitation of that project, that is funded in whole or in part by a public entity, shall not be eligible for permanent housing assistance benefits pursuant to Sections 7264 and 7264.5 if all of the following criteria are satisfied:

(a) The project is a "qualified affordable housing preservation project," which means any complex of two or more units whose owners enter into a recorded regulatory agreement, having a term for the useful life of the project, with any entity for the provision of project rehabilitation financing. For this purpose, the regulatory agreement shall require of the owner and all successors and assigns of the owner, as long as the regulatory agreement is in effect, that at least 49 percent of the tenants in the project have, at the time of the recordation of the regulatory agreement, incomes not in excess of 60 percent of the area median income, adjusted by household size, as determined by the appropriate agency of the state. In addition, a project is a qualified affordable housing preservation project only if the beneficiary of the regulatory agreement elects this designation by so indicating on the regulatory agreement.

(b) The resident is offered the right to return to his or her original unit, or a comparable unit in the same complex if his or her original

unit is not otherwise available due to the rehabilitation, with rent for the first 12 months subsequent to that return being the lower of the following: up to 5 percent higher than the rent at the time of displacement; or up to 30 percent of household income.

(c) The estimated time of displacement is reasonable, and the temporary unit is not unreasonably impacted by the effects of the construction, taking into consideration the ages and physical conditions of the members of the displaced household.

(d) All other financial benefits and services otherwise required under this chapter are provided to the residents temporarily displaced from their units, including relocation to a comparable replacement unit. Residents shall be temporarily relocated to a unit within the same complex, or to a unit located reasonably near the complex if that unit is in a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, services, and the displaced person's place of employment.

SEC. 69. Section 9359.01 of the Government Code is amended to read:

9359.01. (a) Notwithstanding any other provision of this part, the benefits payable to any person who becomes a member for the first time on or after January 1, 1990, shall be subject to the limitations set forth in Section 415 of the Internal Revenue Code.

(b) Notwithstanding any other law, the benefits payable to any person who became a member prior to January 1, 1990, shall be subject to the greater of the following limitations as provided in Section 415(b)(10) of the Internal Revenue Code:

(1) The limitations set forth in Section 415 of the Internal Revenue Code.

(2) The accrued benefit of a member under this system (determined without regard to any amendment to the system made after October 14, 1987).

SEC. 70. Section 12652 of the Government Code is amended to read:

12652. (a) (1) The Attorney General shall diligently investigate violations under Section 12651 involving state funds. If the Attorney General finds that a person has violated or is violating Section 12651, the Attorney General may bring a civil action under this section against that person.

(2) If the Attorney General brings a civil action under this subdivision on a claim involving political subdivision funds as well as state funds, the Attorney General shall, on the same date that the complaint is filed in this action, serve by mail with "return receipt requested" a copy of the complaint on the appropriate prosecuting authority.

(3) The prosecuting authority shall have the right to intervene in an action brought by the Attorney General under this subdivision within 60 days after receipt of the complaint pursuant to paragraph

(2). The court may permit intervention thereafter upon a showing that all of the requirements of Section 387 of the Code of Civil Procedure have been met.

(b) (1) The prosecuting authority of a political subdivision shall diligently investigate violations under Section 12651 involving political subdivision funds. If the prosecuting authority finds that a person has violated or is violating Section 12651, the prosecuting authority may bring a civil action under this section against that person.

(2) If the prosecuting authority brings a civil action under this section on a claim involving state funds as well as political subdivision funds, the prosecuting authority shall, on the same date that the complaint is filed in this action, serve a copy of the complaint on the Attorney General.

(3) Within 60 days after receiving the complaint pursuant to paragraph (2), the Attorney General shall do either of the following:

(A) Notify the court that it intends to proceed with the action, in which case the Attorney General shall assume primary responsibility for conducting the action and the prosecuting authority shall have the right to continue as a party.

(B) Notify the court that it declines to proceed with the action, in which case the prosecuting authority shall have the right to conduct the action.

(c) (1) A person may bring a civil action for a violation of this article for the person and either for the State of California in the name of the state, if any state funds are involved, or for a political subdivision in the name of the political subdivision, if political subdivision funds are exclusively involved. The person bringing the action shall be referred to as the qui tam plaintiff. Once filed, the action may be dismissed only with the written consent of the court, taking into account the best interests of the parties involved and the public purposes behind this act.

(2) A complaint filed by a private person under this subdivision shall be filed in superior court in camera and may remain under seal for up to 60 days. No service shall be made on the defendant until after the complaint is unsealed.

(3) On the same day as the complaint is filed pursuant to paragraph (2), the qui tam plaintiff shall serve by mail with "return receipt requested" the Attorney General with a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses.

(4) Within 60 days after receiving a complaint and written disclosure of material evidence and information alleging violations that involve state funds but not political subdivision funds, the Attorney General may elect to intervene and proceed with the action.

(5) The Attorney General may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal pursuant to paragraph (2). The motion may be supported by affidavits or other submissions in camera.

(6) Before the expiration of the 60-day period or any extensions obtained under paragraph (5), the Attorney General shall do either of the following:

(A) Notify the court that it intends to proceed with the action, in which case the action shall be conducted by the Attorney General and the seal shall be lifted.

(B) Notify the court that it declines to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(7) (A) Within 15 days after receiving a complaint alleging violations that exclusively involve political subdivision funds, the Attorney General shall forward copies of the complaint and written disclosure of material evidence and information to the appropriate prosecuting authority for disposition, and shall notify the qui tam plaintiff of the transfer.

(B) Within 45 days after the Attorney General forwards the complaint and written disclosure pursuant to subparagraph (A), the prosecuting authority may elect to intervene and proceed with the action.

(C) The prosecuting authority may, for good cause shown, move for extensions of the time during which the complaint remains under seal. The motion may be supported by affidavits or other submissions in camera.

(D) Before the expiration of the 45-day period or any extensions obtained under subparagraph (C), the prosecuting authority shall do either of the following:

(i) Notify the court that it intends to proceed with the action, in which case the action shall be conducted by the prosecuting authority and the seal shall be lifted.

(ii) Notify the court that it declines to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(8) (A) Within 15 days after receiving a complaint alleging violations that involve both state and political subdivision funds, the Attorney General shall forward copies of the complaint and written disclosure to the appropriate prosecuting authority, and shall coordinate its review and investigation with those of the prosecuting authority.

(B) Within 60 days after receiving a complaint and written disclosure of material evidence and information alleging violations that involve both state and political subdivision funds, the Attorney General or the prosecuting authority, or both, may elect to intervene and proceed with the action.

(C) The Attorney General or the prosecuting authority, or both, may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). The motion may be supported by affidavits or other submissions in camera.

(D) Before the expiration of the 60-day period or any extensions obtained under subparagraph (C), the Attorney General shall do one of the following:

(i) Notify the court that it intends to proceed with the action, in which case the action shall be conducted by the Attorney General and the seal shall be lifted.

(ii) Notify the court that it declines to proceed with the action but that the prosecuting authority of the political subdivision involved intends to proceed with the action, in which case the seal shall be lifted and the action shall be conducted by the prosecuting authority.

(iii) Notify the court that both it and the prosecuting authority decline to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(E) If the Attorney General proceeds with the action pursuant to clause (i) of subparagraph (D), the prosecuting authority of the political subdivision shall be permitted to intervene in the action within 60 days after the Attorney General notifies the court of its intentions. The court may authorize intervention thereafter upon a showing that all the requirements of Section 387 of the Code of Civil Procedure have been met.

(9) The defendant shall not be required to respond to any complaint filed under this section until 30 days after the complaint is unsealed and served upon the defendant pursuant to Section 583.210 of the Code of Civil Procedure.

(10) When a person brings an action under this subdivision, no other person may bring a related action based on the facts underlying the pending action.

(d) (1) No court shall have jurisdiction over an action brought under subdivision (c) against a Member of the State Senate or Assembly, a member of the state judiciary, an elected official in the executive branch of the state, or a member of the governing body of any political subdivision if the action is based on evidence or information known to the state or political subdivision when the action was brought.

(2) A person may not bring an action under subdivision (c) that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the state or political subdivision is already a party.

(3) (A) No court shall have jurisdiction over an action under this article based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation,

report, hearing, or audit conducted by or at the request of the Senate, Assembly, auditor, or governing body of a political subdivision, or by the news media, unless the action is brought by the Attorney General or the prosecuting authority of a political subdivision, or the person bringing the action is an original source of the information.

(B) For purposes of subparagraph (A), "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based, who voluntarily provided the information to the state or political subdivision before filing an action based on that information, and whose information provided the basis or catalyst for the investigation, hearing, audit, or report that led to the public disclosure as described in subparagraph (A).

(4) No court shall have jurisdiction over an action brought under subdivision (c) based upon information discovered by a present or former employee of the state or a political subdivision during the course of his or her employment unless that employee first, in good faith, exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and unless the state or political subdivision failed to act on the information provided within a reasonable period of time.

(e) (1) If the state or political subdivision proceeds with the action, it shall have the primary responsibility for prosecuting the action. The qui tam plaintiff shall have the right to continue as a full party to the action.

(2) (A) The state or political subdivision may seek to dismiss the action for good cause notwithstanding the objections of the qui tam plaintiff if the qui tam plaintiff has been notified by the state or political subdivision of the filing of the motion and the court has provided the qui tam plaintiff with an opportunity to oppose the motion and present evidence at a hearing.

(B) The state or political subdivision may settle the action with the defendant notwithstanding the objections of the qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances.

(f) (1) If the state or political subdivision elects not to proceed, the qui tam plaintiff shall have the same right to conduct the action as the Attorney General or prosecuting authority would have had if it had chosen to proceed under subdivision (c). If the state or political subdivision so requests, and at its expense, the state or political subdivision shall be served with copies of all pleadings filed in the action and supplied with copies of all deposition transcripts.

(2) (A) Upon timely application, the court shall permit the state or political subdivision to intervene in an action with which it had initially declined to proceed if the interest of the state or political

subdivision in recovery of the property or funds involved is not being adequately represented by the qui tam plaintiff.

(B) If the state or political subdivision is allowed to intervene under paragraph (A), the qui tam plaintiff shall retain principal responsibility for the action and the recovery of the parties shall be determined as if the state or political subdivision had elected not to proceed.

(g) (1) (A) If the Attorney General initiates an action pursuant to subdivision (a) or assumes control of an action initiated by a prosecuting authority pursuant to subparagraph (A) of paragraph (3) of subdivision (b), the office of the Attorney General shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims.

(B) If a prosecuting authority initiates and conducts an action pursuant to subdivision (b), the office of the prosecuting authority shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims.

(C) If a prosecuting authority intervenes in an action initiated by the Attorney General pursuant to paragraph (3) of subdivision (a) or remains a party to an action assumed by the Attorney General pursuant to subparagraph (A) of paragraph (3) of subdivision (b), the court may award the office of the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery under subparagraph (A), taking into account the prosecuting authority's role in investigating and conducting the action.

(2) If the state or political subdivision proceeds with an action brought by a qui tam plaintiff under subdivision (c), the qui tam plaintiff shall, subject to paragraphs (4) and (5), receive at least 15 percent but not more than 33 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the qui tam plaintiff substantially contributed to the prosecution of the action. When it conducts the action, the Attorney General's office or the office of the prosecuting authority of the political subdivision shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims made against the state or political subdivision. When both the Attorney General and a prosecuting authority are involved in a qui tam action pursuant to subparagraph (C) of paragraph (6) of subdivision (c), the court at its discretion may award the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery, taking into account the prosecuting authority's contribution to investigating and conducting the action.

(3) If the state or political subdivision does not proceed with an action under subdivision (c), the qui tam plaintiff shall, subject to

paragraphs (4) and (5), receive an amount that the court decides is reasonable for collecting the civil penalty and damages on behalf of the government. The amount shall be not less than 25 percent and not more than 50 percent of the proceeds of the action or settlement and shall be paid out of these proceeds.

(4) If the action is one provided for under paragraph (4) of subdivision (d), the present or former employee of the state or political subdivision is not entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff those sums from the proceeds as it considers appropriate, but in no case more than 33 percent of the proceeds if the state or political subdivision goes forth with the action or 50 percent if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, and the scope of, and response to, the employee's attempts to report and gain recovery of the falsely claimed funds through official channels.

(5) If the action is one that the court finds to be based primarily on information from a present or former employee who actively participated in the fraudulent activity, the employee is not entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff any sums from the proceeds that it considers appropriate, but in no case more than 33 percent of the proceeds if the state or political subdivision goes forth with the action or 50 percent if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, the scope of the present or past employee's involvement in the fraudulent activity, the employee's attempts to avoid or resist the activity, and all other circumstances surrounding the activity.

(6) The portion of the recovery not distributed pursuant to paragraphs (1) to (5), inclusive, shall revert to the state if the underlying false claims involved state funds exclusively and to the political subdivision if the underlying false claims involved political subdivision funds exclusively. If the violation involved both state and political subdivision funds, the court shall make an apportionment between the state and political subdivision based on their relative share of the funds falsely claimed.

(7) For purposes of this section, "proceeds" include civil penalties as well as double or treble damages as provided in Section 12651.

(8) If the state, political subdivision, or the qui tam plaintiff prevails in or settles any action under subdivision (c), the qui tam plaintiff shall receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable costs and attorney's fees. All expenses, costs, and fees shall be awarded against the defendant and under no circumstances shall they be the responsibility of the state or political subdivision.

(9) If the state, a political subdivision, or the qui tam plaintiff proceeds with the action, the court may award to the defendant its reasonable attorney's fees and expenses against the party that proceeded with the action if the defendant prevails in the action and the court finds that the claim was clearly frivolous, clearly vexatious, or brought solely for purposes of harassment.

(h) The court may stay an act of discovery of the person initiating the action for a period of not more than 60 days if the Attorney General or local prosecuting authority show that the act of discovery would interfere with an investigation or a prosecution of a criminal or civil matter arising out of the same facts, regardless of whether the Attorney General or local prosecuting authority proceeds with the action. This showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Attorney General or local prosecuting authority has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(i) Upon a showing by the Attorney General or local prosecuting authority that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Attorney General's or local prosecuting authority's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, including the following:

(1) Limiting the number of witnesses the person may call.

(2) Limiting the length of the testimony of the witnesses.

(3) Limiting the person's cross-examination of witnesses.

(4) Otherwise limiting the participation by the person in the litigation.

(j) The False Claims Act Fund is hereby created in the State Treasury. Proceeds from the action or settlement of the claim by the Attorney General pursuant to this article shall be deposited into this fund. Moneys in this fund, upon appropriation by the Legislature, shall be used by the Attorney General to support the ongoing investigation and prosecution of false claims in furtherance of this article.

SEC. 71. Section 13965.2 of the Government Code is amended to read:

13965.2. Whenever an application for assistance has been approved, and the board determines that an independent evaluation pursuant to paragraph (5) of subdivision (a) of Section 13965 is appropriate, the victim or derivative victim shall be notified of the name of the provider who is to perform the evaluation within 30 days of that determination.

SEC. 72. Section 14838.5 of the Government Code is amended to read:

14838.5. (a) Notwithstanding the advertising and bidding requirements of Chapter 6 (commencing with Section 14825) and Section 10302 of the Public Contract Code, a state agency may award a contract for the acquisition of goods, services, or information technology that has an estimated value of greater than two thousand five hundred dollars ($2,500), but less than fifty thousand dollars ($50,000), to a small business, as long as the agency obtains price quotations from two or more small businesses.

(b) In carrying out subdivision (a), state agencies shall consider a responsive offer timely received from a responsible small business.

(c) If the estimated cost to the state is less than two thousand five hundred dollars ($2,500) and for the acquisition of goods, services, or information technology, or a greater amount as administratively established by the director, a state agency shall obtain at least two price quotations from responsible suppliers whenever there is reason to believe a response from a single source is not a fair and reasonable price.

SEC. 73. Section 18523.3 of the Government Code is amended to read:

18523.3. (a) Notwithstanding Section 18523, this section shall apply only to state employees in State Bargaining Unit 19.

(b) "Class" means a group of positions sufficiently similar with respect to duties and responsibilities that the same title may reasonably and fairly be used to designate each position allocated to the class, that substantially the same tests of fitness may be used, that substantially the same minimum qualifications may be required, and that the same schedule of compensation may be made to apply with equity.

(c) The board may also establish "broadband" classes for which the same general title may be used to designate each position allocated to the class and that may include more than one level or more than one specialty area within the same general field of work. In addition to the minimum qualifications for each broadband class, other job-related qualifications may be required for particular positions within the class. When the board establishes a broadband class, these levels and specialty areas shall be described in the class specification, and the board shall specify any instances in which these levels and speciality areas are to be treated as separate classes for purposes of applying other provisions of law.

SEC. 74. Section 19141.3 of the Government Code is amended to read:

19141.3. (a) Notwithstanding Section 19141, this section shall apply only to state employees in State Bargaining Unit 19.

(b) This section applies only to a permanent employee, or an employee who previously had permanent status and who, since that permanent status, has had no break in the continuity of his or her state service due to a permanent separation. As used in this section,

"former position" is defined as in Section 18522, or, if the appointing power to which reinstatement is to be made and the employee agree, a vacant position in any department, commission, or state agency for which he or she is qualified at substantially the same level.

(c) Within the periods of time specified below, an employee who vacates a civil service position to accept an appointment to an exempt position shall be reinstated to his or her former position upon termination either by the employee or appointing power of the exempt appointment, provided that he or she (1) accepted the appointment without a break in the continuity of state service and (2) requests in writing reinstatement by the appointing power of his or her former position within 10 working days after the effective date of the termination.

(d) The reinstatement may be requested by the employee only within the following periods of time:

(1) At any time after the effective date of the exempt appointment if the employee was appointed under one of the following:

(A) Subdivision (a), (b), (c), (d), (e), (f), (g), or (m) of Section 4 of Article VII of the California Constitution.

(B) Section 2.1 of Article IX of the California Constitution.

(C) Section 22 of Article XX of the California Constitution.

(D) To an exempt position under the same appointing power as the former position even though a shorter period of time may be otherwise specified for that appointment.

(2) Within six months after the effective date of the exempt appointment if appointed under subdivision (h), (i), (k), or (*l*) of Section 4 of Article VII of the California Constitution.

(3) Within four years after the effective date of an exempt appointment if appointed under any other authority.

(e) An employee who vacates his or her civil service position to accept an assignment as a member, inmate, or patient helper under subdivision (j) of Section 4 of Article VII of the California Constitution shall not have a right to reinstatement.

(f) An employee who is serving under an exempt appointment retains a right of reinstatement when he or she accepts an extension of that exempt appointment or accepts a new exempt appointment, provided that the extension or new appointment is made within the specified reinstatement time limit and there is no break in the continuity of state service. The reinstatement right is retained for the period applicable to the extended or new exempt appointment as if that appointment had been made on the date of the initial exempt appointment.

(g) When an employee exercises his or her right of reinstatement and returns to his or her former position, the service while under an exempt appointment shall be deemed to be time served in the former

position for the purpose of determining his or her eligibility for merit salary increases.

(h) If the termination of an exempt appointment is for a reason contained in Section 19997 and the employee does not have a right to reinstatement, he or she shall have his or her name placed on the departmental and general reemployment lists for the class of his or her former position.

SEC. 75. Section 19175.6 of the Government Code is amended to read:

19175.6. (a) Notwithstanding Section 19175, this section applies only to state employees in State Bargaining Unit 19.

(b) The board at the written request of a rejected probationer, filed within 15 calendar days of the effective date of rejection, shall only review allegations that the rejection was made for reasons of discrimination as defined for the purposes of subdivision (a) of Section 19702, fraud, or political patronage. If the board determines that the rejected probationer has stated a prima facie case of discrimination, fraud, or political patronage, the board may investigate the case with or without a hearing, and do any one of the following:

(1) Affirm the action of the appointing power.

(2) Modify the action of the appointing power.

(3) Restore the name of the rejected probationer to the employment list for certification to any position within the class, provided that his or her name shall not be certified to the agency by which he or she was rejected except with the concurrence of the appointing power thereof.

(4) Restore the rejected probationer to the position from which he or she was rejected, only if the board determines that there is substantial evidence to support that the rejection was made for reasons of discrimination as defined for the purposes of subdivision (a) of Section 19702, fraud, or political patronage. At the investigation or hearing the rejected probationer shall have the burden of proof; subject to rebuttal by him or her, it shall be presumed that the rejection was free from discrimination, fraud, and political patronage, and that the statement of reasons therefor in the notice of rejection is true.

SEC. 76. Section 19576.5 of the Government Code is amended to read:

19576.5. Notwithstanding Section 19576, this section applies only to state employees in State Bargaining Unit 8.

(a) Minor discipline is a suspension without pay for five days or less or up to a 5-percent reduction in pay for five months or less. Whenever an answer is filed by an employee who is subject to minor discipline, and the memorandum of understanding for state employees in State Bargaining Unit 8 has expired, the state employer shall follow the minor discipline appeal procedures contained in the

expired memorandum of understanding for state employees in State Bargaining Unit 8 until a successor agreement is negotiated between the Department of Personnel Administration and the exclusive representative. However, if an employee receives one of the cited actions in more than three instances in any 12-month period, he or she shall, upon each additional action within the same 12-month period, be afforded a hearing before the State Personnel Board if he or she files an answer to the action.

(b) The State Personnel Board shall not have the authority stated in subdivision (a) with regard to written or oral reprimands. Reprimands shall not be grievable or appealable by the receiving employee by any means. Rejections on probation shall not be grievable or appealable by the receiving employee by any means except as provided in Section 19175.1.

(c) The appointing power shall not impose any discipline in a manner that is inconsistent with "salary basis test" against an employee employed in an executive, administrative, or professional capacity and whose duties exempt him or her from the wage and hour provisions of the federal Fair Labor Standards Act as set forth pursuant to Section 13(a)(1) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. Sec. 213(a)(1)), and in Part 54 of Title 29 of the Code of Federal Regulations, as defined and delimited on the effective date of this section, and as those provisions may be amended in the future by the Administrator of the Wage and Hour Division of the United States Department of Labor.

(d) Disciplinary action taken pursuant to this section shall not be subject to any of the following provisions: Sections 19180, 19574.1, 19574.2, 19575, 19575.5, 19579, 19580, 19581, 19581.5, 19582, 19583, and 19587, and State Personnel Board Rules 51.1 to 51.9, inclusive, 52, and 52.1 to 52.5, inclusive.

(e) Notwithstanding any other law or rule, if any provision of this section is in conflict with any provision of the memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if provisions of a memorandum of understanding require the expenditure of funds, those provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

(f) If the State Personnel Board establishes regulations to implement this section, the regulations shall be consistent with the expired memorandum of understanding for state employees in State Bargaining Unit 8 and the Ralph C. Dills Act (Part 10.3 (commencing with Section 3512) of Division 4 of Title 1).

SEC. 77. Section 19582.3 of the Government Code is amended to read:

19582.3. (a) Notwithstanding Section 19582, this section applies only to state employees in State Bargaining Unit 19.

(b) The board's review of decisions of minor discipline, as defined by a memorandum of understanding or by Section 19576.4, shall be limited to either adopting the penalty of the proposed decision or revoking the disciplinary action in its entirety.

(c) The board's review of decisions of discipline, including minor discipline, shall not impose any discipline against an employee that would jeopardize the employee's status under the federal Fair Labor Standards Act, as set forth pursuant to Section 13(a)(1) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. Sec. 213(a)(1)) and in Part 54 of Title 29 of the Code of Federal Regulations, as defined and delimited on the effective date of this section and as those provisions may be amended in the future.

(d) If any provision of this section is in conflict with any provision of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if any provision of a memorandum of understanding requires the expenditure of funds, the provision shall not become effective unless approved by the Legislature in the annual Budget Act.

SEC. 78. Section 20068.2 of the Government Code is amended to read:

20068.2. (a) Notwithstanding Section 20068, this section applies only to state employees in State Bargaining Unit 19.

(b) "State safety service" means service rendered as a state safety member only while receiving compensation for that service, except as provided in Article 4 (commencing with Section 20990) of Chapter 11. It also includes service rendered in an employment in which persons have since become state safety members and service rendered prior to April 1, 1973, and falling within the definition of warden, forestry, and law enforcement service under this chapter prior to April 1, 1973. "State safety service" pursuant to this subdivision does not include service as an investigator prior to April 1, 1973, within the Department of Justice by persons who, prior to April 1, 1973, were classified as miscellaneous members.

(c) "State safety service," with respect to a member who becomes a state safety member pursuant to Section 20405, also includes service prior to the date on which he or she becomes a state safety member as an officer or employee of the Board of Prison Terms, Department of Corrections, Prison Industry Authority, or the Department of the Youth Authority.

(d) "State safety service," with respect to a member who becomes a state safety member pursuant to Sections 20409 and 20410, also includes service in a class specified in those sections or service pursuant to subdivision (a) prior to September 27, 1982.

(e) "State safety service," with respect to a member who becomes a state safety member pursuant to Sections 20414 and 20415, shall also include service prior to September 22, 1982, as an officer or employee

of the Department of Parks and Recreation or the Military Department.

(f) "State safety service" does not include service in classes specified in Section 20407 prior to January 1, 1989.

(g) "State safety service" does not include service in classes specified in Section 20408 prior to January 1, 1990.

(h) "State safety service," with respect to a member who becomes a state safety member pursuant to subdivision (b) of Section 20405.3, shall also include service rendered in an employment in which persons have since become state safety members, as determined by the Department of Personnel Administration pursuant to that section.

SEC. 79. Section 20677 of the Government Code is amended to read:

20677. (a) (1) The normal rate of contribution for a state miscellaneous member whose service is not included in the federal system shall be 6 percent of the compensation in excess of three hundred seventeen dollars ($317) per month paid that member for service rendered on and after July 1, 1976. The normal rate of contribution for a school member or a local miscellaneous member shall be 7 percent of the compensation paid that member for service rendered on and after June 21, 1971.

(2) The normal rate of contribution for a state miscellaneous or industrial member who has elected to be subject to Section 21353.5 and whose service is not included in the federal system shall be 6 percent of the member's compensation.

(3) The normal rate of contribution, as established under this subdivision for a member whose service is included in the federal system, and whose service retirement allowance is reduced under Section 21353, 21353.5, or 21354 because of that inclusion, shall be reduced by one-third as applied to compensation not exceeding four hundred dollars ($400) per month for service after the date of execution of the agreement, including service in the federal system and prior to termination of the agreement, with respect to the coverage group to which he or she belongs.

(b) (1) The normal rate of contribution for a state miscellaneous member whose service has been included in the federal system shall be 5 percent of compensation in excess of five hundred thirteen dollars ($513) per month paid that member for service rendered on and after July 1, 1976.

(2) The normal rate of contribution for a state miscellaneous or industrial member who has elected to be subject to Section 21353.5 and whose service has been included in the federal system shall be 5 percent of compensation, subject to the reduction specified in paragraph (3) of subdivision (a).

(c) The normal rate of contribution for a state miscellaneous or industrial member who elects to become subject to Section 21076 or

97

21077 shall be zero percent, unless the member subsequently elects to become subject to Section 21353, as authorized by subdivision (c) of Section 21070 or Section 21353.5. A member who elects to become subject to Section 21353 shall contribute at the rate specified in paragraph (1) of subdivision (a) or paragraph (1) of subdivision (b), as determined by the member's status with the federal system, and the rate shall be applied from the first of the month following the date of the election. A member who makes the election shall also contribute for service prior to the date the contribution rate was applied, in the manner specified in Section 21073. A member who elected to become subject to Section 21353 solely for service rendered on or after the effective date of the election, as authorized by subdivision (c) of Section 21070 during the period between November 1, 1988, and October 31, 1989, is not required to make the contributions specified in Section 21073.

SEC. 80. Section 21028 of the Government Code is amended to read:

21028. "Public service" also means service in temporary, seasonal, limited term, on call, emergency, intermittent, substitute, or other irregular employment in which a person is excluded from membership.

SEC. 81. Section 22200 of the Government Code is amended to read:

22200. The board is hereby authorized on behalf of the state to administer and to maintain in full force and effect the agreement entered into between the state and the Federal Security Administrator on March 9, 1951, and all modifications thereof heretofore made.

SEC. 82. Section 22209 of the Government Code is amended to read:

22209. At the request of a public agency, or as otherwise permitted by the board, any class or classes of positions covered by a retirement system which may be excluded from coverage under the federal system pursuant to paragraph (3) or (5) of Section 218(c) of the Social Security Act, and to which the agreement does not already apply, may be excluded from the agreement at the time it is made applicable to such retirement system; except that such exclusion shall not include any services to which Section 218(c)(3)(B) of the Social Security Act is applicable.

SEC. 83. Section 22754.5 of the Government Code is amended to read:

22754.5. (a) Notwithstanding Section 22754, for state employees in State Bargaining Unit 8 or 16 and members of State Bargaining Unit 8 or 16 who retire on or after the effective date of this section and who meet the definition of annuitant, "eligible family member" means:

(1) The legal spouse in a marriage recognized by the state.

(2) A child under the age of 19 years who has never been married or who has obtained a legal annulment. This includes:

(A) The natural or adopted child, or stepchild, of the employee or annuitant.

(B) A child who is not the natural or adopted child, or stepchild, of the employee or annuitant and who is not receiving or eligible for coverage through another source and who meets either of the following conditions:

(i) The employee or annuitant has legal or joint custody of the child.

(ii) The child is a grandchild living in the household of the employee or annuitant, and the natural parent or parents are not living in the same household.

(3) A child over the age of 19 years but under the age of 23 years who has never been married or who has obtained a legal annulment and meets the criteria of subparagraph (A) or (B) of paragraph (2) may continue to be enrolled if the child is one of the following:

(A) Enrolled on an ongoing basis as a college student for at least nine semester college units or equivalent quarter units.

(B) Enrolled on an ongoing basis in an adult continuation school curriculum that would result in a high school diploma or its equivalent. An employee or annuitant whose child continues to be enrolled under this paragraph must provide the employer or benefit carrier, upon request, with an annual certification of schooling or enrollment.

(4) A child under the age of 19 years who has never been married or who has obtained a legal annulment may continue to be enrolled after attaining the age of 19 years if he or she is incapable of self-support because of physical disability or mental incapacity and he or she is dependent on the employee or annuitant for support and care. A disabled child may continue to be enrolled after attaining the age of 19 years only if he or she was enrolled as disabled at the time of the employee's initial enrollment or became disabled while enrolled as an eligible family member prior to attaining the age of 19 years. The employee or annuitant must provide satisfactory evidence of the disability within 60 days after the disabled child attains the age of 19 years. Necessary documentation, as prescribed by the employer, must be completed, processed, and approved by the Public Employees' Retirement System. An annual certification of continued disability may be required.

(b) At the time of enrollment or audit, an employee or annuitant will be required to provide proof of eligibility for all enrolled family members that may include any of the following:

(1) A valid marriage certificate.

(2) A birth certificate.

(3) A certification of disability.

(4) Legal custody documents.

97

(5) A copy of the employee's or annuitant's signed state income tax return.

SEC. 84. Section 54953 of the Government Code, as added by Section 2 of Chapter 399 of the Statutes of 1988, is repealed.

SEC. 85. Section 54975 of the Government Code is amended to read:

54975. The board of supervisors shall include in the Local Appointments List prepared pursuant to Section 54972 all appointments of public members and alternate public members made to the local agency formation commission pursuant to Sections 56325, 56329, 56330, 56331, and 56333.

Whenever an unscheduled vacancy occurs in a local agency formation commission, the board of supervisors shall cause a special vacancy notice to be posted as provided in Section 54974. Final appointment to fill the vacancy may not be made by the appointing body for at least 10 working days after the posting of the notice.

SEC. 86. The heading of Article 5 (commencing with Section 63043) of Chapter 2 of Division 1 of Title 6.7 of the Government Code is amended to read:

Article 5. Financing Economic Development Facilities

SEC. 87. The heading of Chapter 6 (commencing with Section 66400) of Division 1 of Title 7 of the Government Code is amended and renumbered to read:

CHAPTER 10. HIGHWAY INTERCHANGE DISTRICTS

SEC. 88. Section 66400 of the Government Code is amended and renumbered to read:

66100. The Legislature finds and declares that , because substantial public moneys will be expended on the development of the West Side Freeway portion of Interstate Route 5, including the development of recreational and scenic observation sites in relatively undeveloped areas, and because new commercial and other development tends to locate at freeway interchanges in these areas, and this development may be detrimental to both traffic capacity and safety and to the preservation of the scenic characteristics along the freeway route, it is therefore necessary, in the interests of the public health, safety, and welfare, and to safeguard community economic development along the route of the freeway, to establish controls over the kinds, intensity, and design of land use and development that are permitted to occur at those interchanges along the freeway route from its intersection with the San Joaquin River to the junction of the route with State Highway Route 99 in the vicinity of Wheeler Ridge.

97

SEC. 89. Section 66401 of the Government Code is amended and renumbered to read:

66101. To preserve the effective traffic capacity and safety of the West Side Freeway, to maintain and enhance the present character of the landscape abutting the freeway, and to ensure compatible land use and development at and near interchanges along the route, the kind, intensity, and design of land use and development occurring at the freeway interchanges on the portion of the West Side Freeway designated in Section 66100 shall be regulated within highway interchange districts, which districts shall be established by each local jurisdiction traversed by the West Side Freeway in which is located any of the interchanges identified in this chapter.

SEC. 90. Section 66402 of the Government Code is amended and renumbered to read:

66102. The boundaries of each district shall be designated by the local jurisdiction within which each interchange is located and shall include the territory that the local jurisdiction deems to be affected by each interchange, but in no case shall the area consist of less than a circle of one-mile radius from the point of intersection of the centerline of the West Side Freeway with the centerline of any highway, street, or road intersecting at an interchange.

SEC. 91. Section 66403 of the Government Code is amended and renumbered to read:

66103. Each local jurisdiction shall prepare for each highway interchange district a general land use plan and appropriate zoning ordinances by January 1, 1964. It shall be recognized that this state has a continuing interest in adequate enforcement of these plans and ordinances due to construction by this state of the West Side Freeway.

SEC. 92. Section 1206 of the Health and Safety Code is amended to read:

1206. This chapter does not apply to the following:

(a) Except with respect to the option provided with regard to surgical clinics in paragraph (1) of subdivision (b) of Section 1204 and, further, with respect to specialty clinics specified in paragraph (2) of subdivision (b) of Section 1204, any place or establishment owned or leased and operated as a clinic or office by one or more licensed health care practitioners and used as an office for the practice of their profession, within the scope of their license, regardless of the name used publicly to identify the place or establishment.

(b) Any clinic directly conducted, maintained, or operated by the United States or by any of its departments, officers, or agencies, and any primary care clinic specified in subdivision (a) of Section 1204 that is directly conducted, maintained, or operated by this state or by any of its political subdivisions or districts, or by any city. Nothing in this subdivision precludes the state department from adopting

regulations that utilize clinic licensing standards as eligibility criteria for participation in programs funded wholly or partially under Title XVIII or XIX of the federal Social Security Act.

(c) Any clinic conducted, maintained, or operated by a federally recognized Indian tribe or tribal organization, as defined in Section 450 or 1601 of Title 25 of the United States Code, and which is located on land recognized as tribal land by the federal government.

(d) Clinics conducted, operated, or maintained as outpatient departments of hospitals.

(e) Any facility licensed as a health facility under Chapter 2 (commencing with Section 1250).

(f) Any freestanding clinical or pathological laboratory licensed under Chapter 3 (commencing with Section 1200) of Division 2 of the Business and Professions Code.

(g) A clinic operated by, or affiliated with, any institution of learning that teaches a recognized healing art and is approved by the state board or commission vested with responsibility for regulation of the practice of that healing art.

(h) A clinic that is operated by a primary care community or free clinic and that is operated on separate premises from the licensed clinic and is only open for limited services of no more than 20 hours a week. An intermittent clinic as described in this paragraph shall, however, meet all other requirements of law, including administrative regulations and requirements, pertaining to fire and life safety.

(i) The offices of physicians in group practice who provide a preponderance of their services to members of a comprehensive group practice prepayment health care service plan subject to Chapter 2.2 (commencing with Section 1340).

(j) Student health centers operated by public institutions of higher education.

(k) Nonprofit speech and hearing centers, as defined in Section 1201.5. Any nonprofit speech and hearing clinic desiring an exemption under this subdivision shall make application therefor to the director, who shall grant the exception to any facility meeting the criteria of Section 1201.5. Notwithstanding the licensure exemption contained in this subdivision, a nonprofit speech and hearing center shall be deemed to be an organized outpatient clinic for purposes of qualifying for reimbursement as a rehabilitation center under the Medi-Cal Act (Chapter 7 (commencing with Section 14000) of Part 3 of Division 9 of the Welfare and Institutions Code).

(l) A clinic operated by a nonprofit corporation exempt from federal income taxation under paragraph (3) of subsection (c) of Section 501 of the Internal Revenue Code of 1954, as amended, or a statutory successor thereof, that conducts medical research and health education and provides health care to its patients through a group of 40 or more physicians and surgeons, who are independent

contractors representing not less than 10 board-certified specialties, and not less than two-thirds of whom practice on a full-time basis at the clinic.

(m) Any clinic, limited to in vivo diagnostic services by magnetic resonance imaging functions or radiological services under the direct and immediate supervision of a physician and surgeon who is licensed to practice in California. This shall not be construed to permit cardiac catheterization or any treatment modality in these clinics.

(n) A clinic operated by an employer or jointly by two or more employers for their employees only, or by a group of employees, or jointly by employees and employers, without profit to the operators thereof or to any other person, for the prevention and treatment of accidental injuries to, and the care of the health of, the employees comprising the group.

(o) A community mental health center as defined in Section 5601.5 of the Welfare and Institutions Code.

(p) (1) A clinic operated by a nonprofit corporation exempt from federal income taxation under paragraph (3) of subsection (c) of Section 501 of the Internal Revenue Code of 1954, as amended, or a statutory successor thereof, as an entity organized and operated exclusively for scientific and charitable purposes and that satisfies all of the following requirements:

(A) Commenced conducting medical research on or before January 1, 1982, and continues to conduct medical research.

(B) Conducted research in, among other areas, prostatic cancer, cardiovascular disease, electronic neural prosthetic devices, biological effects and medical uses of lasers, and human magnetic resonance imaging and spectroscopy.

(C) Sponsored publication of at least 200 medical research articles in peer-reviewed publications.

(D) Received grants and contracts from the National Institutes of Health.

(E) Held and licensed patents on medical technology.

(F) Received charitable contributions and bequests totaling at least five million dollars ($5,000,000).

(G) Provides health care services to patients only:

(i) In conjunction with research being conducted on procedures or applications not approved or only partially approved for payment (I) under the Medicare program pursuant to Section 1359y(a)(1)(A) of Title 42 of the United States Code, or (II) by a health care service plan registered under Chapter 2.2 (commencing with Section 1340) or a disability insurer regulated under Chapter 1 (commencing with Section 10110) of Part 2 of Division 2 of the Insurance Code; provided that services may be provided by the clinic for an additional period of up to three years following the approvals, but only to the extent necessary to maintain clinical expertise in the procedure or application for purposes of actively providing training in the

procedure or application for physicians and surgeons unrelated to the clinic.

(ii) Through physicians and surgeons who, in the aggregate, devote no more than 30 percent of their professional time for the entity operating the clinic, on an annual basis, to direct patient care activities for which charges for professional services are paid.

(H) Makes available to the public the general results of its research activities on at least an annual basis, subject to good faith protection of proprietary rights in its intellectual property.

(I) Is a freestanding clinic, whose operations under this subdivision are not conducted in conjunction with any affiliated or associated health clinic or facility defined under this division, except a clinic exempt from licensure under subdivision (m). For purposes of this subparagraph, a freestanding clinic is defined as "affiliated" only if it directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, a clinic or health facility defined under this division, except a clinic exempt from licensure under subdivision (m). For purposes of this subparagraph, a freestanding clinic is defined as "associated" only if more than 20 percent of the directors or trustees of the clinic are also the directors or trustees of any individual clinic or health facility defined under this division, except a clinic exempt from licensure under subdivision (m). Any activity by a clinic under this subdivision in connection with an affiliated or associated entity shall fully comply with the requirements of this subdivision. This subparagraph shall not apply to agreements between a clinic and any entity for purposes of coordinating medical research.

(2) This subdivision shall become inoperative on January 1, 2003. Prior to extending or deleting that inoperative date, the Legislature shall receive a report from each clinic meeting the criteria of this subdivision and any other interested party concerning the operation of the clinic's activities. The report shall include, but not be limited to, an evaluation of how the clinic impacted competition in the relevant health care market, and a detailed description of the clinic's research results and the level of acceptance by the payer community of the procedures performed at the clinic. The report shall also include a description of procedures performed both in clinics governed by this subdivision and those performed in other settings.

SEC. 93. Section 1261.5 of the Health and Safety Code is amended to read:

1261.5. (a) The number of oral dosage form or suppository form drugs provided by a pharmacy to a health facility licensed pursuant to subdivision (c) or (d), or both (c) and (d), of Section 1250 for storage in a secured emergency supplies container, pursuant to Section 4035 of the Business and Professions Code, shall be limited to 24. The State Department of Health Services may limit the number

of doses of each drug available to not more than four doses of any separate drug dosage form in each emergency supply.

(b) Any limitations established pursuant to subdivision (a) on the number and quantity of oral dosage or suppository form drugs provided by a pharmacy to a health facility licensed pursuant to subdivision (c), (d), or both (c) and (d), of Section 1250 for storage in a secured emergency supplies container shall not apply to an automated drug delivery system, as defined in Section 1261.6, when a pharmacist controls access to the drugs. This subdivision shall become operative on July 1, 1999.

SEC. 94. Section 1261.6 of the Health and Safety Code is amended to read:

1261.6. (a) For purposes of this section and Section 1261.5, an "automated drug delivery system" means a mechanical system that performs operations or activities, other than compounding or administration, relative to the storage, dispensing, or distribution of drugs. An automated drug delivery system shall collect, control, and maintain all transaction information to accurately track the movement of drugs into and out of the system for security, accuracy, and accountability.

(b) Transaction information shall be made readily available in a written format for review and inspection by individuals authorized by law. These records shall be maintained in the facility for a minimum of three years.

(c) Individualized and specific access to automated drug delivery systems shall be limited to facility and contract personnel authorized by law to administer drugs.

(d) (1) The facility and the pharmacy shall develop and implement written policies and procedures to ensure safety, accuracy, accountability, security, patient confidentiality, and maintenance of the quality, potency, and purity of stored drugs. Policies and procedures shall define access to the automated drug delivery system and limits to access to equipment and drugs.

(2) All policies and procedures shall be maintained at the location where the automated drug delivery system is being used.

(e) Drugs removed from the automated drug delivery system shall be limited to the following:

(1) A new drug order given by a prescriber for a patient of the facility for administration prior to the next scheduled delivery from the pharmacy, or 72 hours, whichever is less. The drugs shall be retrieved only upon authorization by a pharmacist and after the pharmacist has reviewed the prescriber's order and the patient's profile for potential contraindications and adverse drug reactions.

(2) Drugs that a prescriber has ordered for a patient on an as-needed basis, if the utilization and retrieval of those drugs are subject to ongoing review by a pharmacist.

(3) Drugs designed by the patient care policy committee or pharmaceutical service committee of the facility as emergency drugs or acute onset drugs. These drugs may be retrieved from an automated drug delivery system pursuant to the order of a prescriber for emergency or immediate administration to a patient of the facility. Within 48 hours after retrieval under this paragraph, the case shall be reviewed by a pharmacist.

(f) The stocking of an automated drug delivery system shall be performed by a pharmacist. If the automated drug delivery system utilizes removable pockets or drawers, or similar technology, the stocking system may be done outside of the facility and be delivered to the facility if all of the following conditions are met:

(1) The task of placing drugs into the removable pockets or drawers is performed by a pharmacist or by an intern pharmacist or a pharmacy technician working under the direct supervision of a pharmacist.

(2) The removable pockets or drawers are transported between the pharmacy and the facility in a secure tamper-evident container.

(3) The facility, in conjunction with the pharmacy, has developed policies and procedures to ensure that the pockets or drawers are properly placed into the automated drug delivery system.

(g) Review of the drugs contained within, and the operation and maintenance of, the automated drug delivery system shall be done in accordance with law and shall be the responsibility of the pharmacy. The review shall be conducted on a monthly basis by a pharmacist and shall include a physical inspection of the drugs in the automated drug delivery system, an inspection of the automated drug delivery system machine for cleanliness, and a review of all transaction records in order to verify the security and accountability of the system.

(h) Drugs dispensed from an automated drug delivery system that meets the requirements of this section shall not be subject to the labeling requirements of Section 4076 of the Business and Professions Code or Section 111480 of this code if the drugs to be placed into the automated drug delivery system are in unit dose packaging or unit of use and if the information required by Section 4076 of the Business and Professions Code and Section 111480 of this code is readily available at the time of drug administration.

(i) This section shall become operative on July 1, 1999.

SEC. 95. Section 1300 of the Health and Safety Code is amended to read:

1300. (a) Any licensee or holder of a special permit may, with the approval of the state department, surrender his or her license or special permit for suspension or cancellation by the state department. Any license or special permit suspended or canceled pursuant to this section may be reinstated by the state department

on receipt of an application showing compliance with the requirements of Section 1265.

(b) Before approving a downgrade or closure of emergency services pursuant to subdivision (a), the state department shall receive a copy of the impact evaluation of the county to determine impacts, including, but not limited to, an impact evaluation of the downgrade or closure upon the community, including community access to emergency care, and how that downgrade or closure will affect emergency services provided by other entities. Development of the impact evaluation shall incorporate at least one public hearing. The county in which the proposed downgrade or closure will occur shall ensure the completion of the impact evaluation, and shall notify the state department of results of an impact evaluation within three days of the completion of that evaluation. The county may designate the local emergency medical services agency as the appropriate agency to conduct the impact evaluation. The impact evaluation and hearing shall be completed within 60 days of the county receiving notification of intent to downgrade or close emergency services. The county or designated local emergency medical services agency shall ensure that all hospital and prehospital health care providers in the geographic area impacted by the service closure or change are consulted with, and that local emergency service agencies and planning or zoning authorities are notified, prior to completing an impact evaluation as required by this section. This subdivision shall be implemented on and after the date that the county in which the proposed downgrade or closure will occur, or its designated local emergency medical services agency, has developed a policy specifying the criteria it will consider in conducting an impact evaluation, as required by subdivision (c).

(c) The Emergency Medical Services Authority shall develop guidelines for development of impact evaluation policies. On or before June 30, 1999, each county or its designated local emergency medical services agency shall develop a policy specifying the criteria it will consider in conducting an impact evaluation pursuant to subdivision (b). Each county or its designated local emergency medical services agency shall submit its impact evaluation policy to the state department and the Emergency Medical Services Authority within three days of completion of the policy. The Emergency Medical Services Authority shall provide technical assistance upon request to a county or its designated local emergency medical services agency.

SEC. 96. Section 1351.2 of the Health and Safety Code is amended to read:

1351.2. (a) If a health care service plan licensed under the laws of Mexico elects to operate a health care service plan in this state, the plan shall apply for licensure as a health care service plan under this chapter by filing an application for licensure in the form prescribed

by the department and verified by an authorized representative of the applicant. The plan shall be subject to the provisions of this chapter, and the rules adopted by the commissioner thereunder, as determined by the commissioner to be applicable. The application shall be accompanied by the fee prescribed by subdivision (a) of Section 1356 and shall demonstrate compliance with the following requirements:

(1) The plan is operating lawfully under the laws of Mexico.

(2) The plan offers and sells in this state only employer-sponsored group plan contracts exclusively for the benefit of citizens of Mexico legally employed in this state, and for the benefit of their dependents regardless of nationality, that pay for, reimburse the cost of, or arrange for the provision or delivery of health care services that are to be provided or delivered wholly in Mexico, except for the provision or delivery of those health care services set forth in paragraph (4).

(3) Solicitation of plan contracts in this state is made only through insurance brokers and agents licensed in this state or a third-party administrator licensed in this state, each of which is authorized by the plan to offer and sell plan group contracts.

(4) Group contracts provide, through a contract of insurance between the plan and an insurer admitted in this state, for the reimbursement of emergency and urgent care services provided out of area as required by subdivision (h) of Section 1345.

(5) All advertising, solicitation material, disclosure statements, evidences of coverage, and contracts are in compliance with the appropriate provisions of this chapter and the rules or orders of the commissioner. The commissioner shall require that each of these documents contain a legend in 10-point type, in both English and Spanish, declaring that the health care service plan contract provided by the plan may be limited as to benefits, rights, and remedies under state and federal law.

(6) All funds received by the plan from a subscriber are deposited in an account of a bank organized under the laws of this state or in an account of a national bank located in this state.

(7) The plan maintains a tangible net equity as required by this chapter and the rules of the commissioner, as calculated under United States generally accepted accounting principles, in the amount of at least one million dollars ($1,000,000). In lieu of an amount in excess of the minimum tangible net equity of one million dollars ($1,000,000), the plan may demonstrate a reasonable acceptable alternative reimbursement arrangement that the commissioner may in his or her discretion accept. The plan shall also maintain a fidelity bond and a surety bond as required by Section 1376 and the rules of the commissioner.

(8) The plan agrees to make all of its books and records, including the books and records of health care providers in Mexico, available to the commissioner in the form and at the time and place requested

by the commissioner. Books and records shall be made available to the commissioner no later than 24 hours from the date of the request.

(9) The plan files a consent to service of process with the commissioner and agrees to be subject to the laws of this state and the United States in any investigation, examination, dispute, or other matter arising from the advertising, solicitation, or offer and sale of a plan contract, or the management or provision of health care services in this state or throughout the United States. The plan shall agree to notify the commissioner, immediately and in no case later than one business day, if it is subject to any investigation, examination, or administrative or legal action relating to the plan or the operations of the plan initiated by the government of Mexico or the government of any state of Mexico against the plan or any officer, director, security holder, or contractor owning 10 percent or more of the securities of the plan. The plan shall agree that in the event of conflict of laws in any action arising out of the license, the laws of California and the United States shall apply.

(10) The plan agrees that disputes arising from the group contracts involving group contract holders and providers of health care services in the United States shall be subject to the jurisdiction of the courts of this state and the United States.

(b) The plan shall pay the application processing fee and other fees and assessments specified in Section 1356. When consistent with the intent and purpose of this chapter and in the public interest, the commissioner, by order, may designate provisions of this chapter and rules adopted thereunder that need not be applied to a health care service plan licensed under the laws of Mexico.

SEC. 97. Section 1357.09 of the Health and Safety Code is amended to read:

1357.09. No plan shall be required to offer a health care service plan contract or accept applications for such a contract pursuant to this article in the case of any of the following:

(a) A small employer, where the small employer is not physically located in a plan's approved service areas, or where an eligible employee and dependents who are to be covered by the plan contract do not work or reside within a plan's approved service areas.

(b) A specific service area or portion of a service area where a plan reasonably anticipates and demonstrates to the satisfaction of the commissioner that it will not have sufficient health care delivery resources to assure that health care services will be available and accessible to the eligible employee and dependents of the employee because of its obligations to existing enrollees.

(1) A plan that cannot offer a health care service plan contract to small employers because it is lacking in sufficient health care delivery resources within a service area or a portion of a service area may not offer a contract in the area in which the plan is not offering coverage to small employers to new employer groups with more than 50

eligible employees until the plan notifies the commissioner that it has the ability to deliver services to small employer groups, and certifies to the commissioner that from the date of the notice it will enroll all small employer groups requesting coverage in that area from the plan unless the plan has met the requirements of subdivision (d).

(2) Nothing in this article shall be construed to limit the commissioner's authority to develop and implement a plan of rehabilitation for a health care service plan whose financial viability or organizational and administrative capacity have become impaired.

(c) A small employer or an eligible employee as defined under paragraph (2) of subdivision (b) of Section 1357 who, within 12 months of application for coverage, disenrolled from a plan contract offered by the plan.

(d) A case in which the commissioner approves the plan's certification that the number of eligible employees and dependents enrolled under contracts issued during the current calendar year equals or exceeds (1) in the case of a plan that administers any self-funded health coverage arrangements in California, 10 percent of the total enrollment of the plan in California as of December 31 of the preceding year, or (2) in the case of a plan that does not administer any self-funded health coverage arrangements in California, 8 percent of the total enrollment of the plan in California as of December 31 of the preceding year. If that certification is approved, the plan may not offer any health care service plan contract to any small employers during the remainder of the current year.

(1) If a health care service plan treats an affiliate or subsidiary as a separate carrier for the purpose of this article because one health care service plan is qualified under the federal Health Maintenance Organization Act and does not offer coverage to small employers, while the affiliate or subsidiary offers a plan contract that is not qualified under the federal Health Maintenance Organization Act and offers plan contracts to small employers, the health care service plan offering coverage to small employers shall enroll new eligible employees and dependents, equal to the applicable percentage of the total enrollment of both the health care service plan qualified under the federal Health Maintenance Organization Act and its affiliate or subsidiary.

(2) The certified statement filed pursuant to this subdivision shall state the following:

(A) Whether the plan administers any self-funded health coverage arrangements in California.

(B) The plan's total enrollment as of December 31 of the preceding year.

(C) The number of eligible employees and dependents enrolled under contracts issued to small employer groups during the current calendar year.

The commissioner shall, within 45 days, approve or disapprove the certified statement. If the certified statement is disapproved, the plan shall continue to issue coverage as required by Section 1357.03 and be subject to disciplinary action as prescribed by Article 7 (commencing with Section 1386).

(e) A health care service plan that, as of December 31 of the prior year, had a total enrollment of fewer than 100,000 and 50 percent or more of the plan's total enrollment have premiums paid by the Medi-Cal program.

(f) A social health maintenance organization, as described in subdivision (a) of Section 2355 of the federal Deficit Reduction Act of 1984 (Public Law 97-369), that, as of December 31 of the prior year, had a total enrollment of fewer than 100,000 and has 50 percent or more of the organization's total enrollment premiums paid by the Medi-Cal program or Medicare programs, or by a combination of Medi-Cal and Medicare. In no event shall this exemption be based upon enrollment in Medicare supplement contracts, as described in Article 3.5 (commencing with Section 1358).

SEC. 98. Section 1357.50 of the Health and Safety Code is amended to read:

1357.50. For purposes of this article:

(a) "Health benefit plan" means any individual or group insurance policy or health care service plan contract that provides medical, hospital, and surgical benefits. The term does not include accident only, credit, disability income, coverage of Medicare services pursuant to contracts with the United States government, Medicare supplement, long-term care insurance, dental, vision, coverage issued as a supplement to liability insurance, insurance arising out of a workers' compensation or similar law, automobile medical payment insurance, or insurance under which benefits are payable with or without regard to fault and that is statutorily required to be contained in any liability insurance policy or equivalent self-insurance.

(b) "Late enrollee" means an eligible employee or dependent who has declined health coverage under a health benefit plan offered through employment or sponsored by an employer at the time of the initial enrollment period provided under the terms of the health benefit plan, and who subsequently requests enrollment in a health benefit plan of that employer, provided that the initial enrollment period shall be at least 30 days. However, an eligible employee or dependent shall not be considered a late enrollee if any of the following is applicable:

(1) The individual meets all of the following requirements:

97

(A) The individual was covered under another employer health benefit plan or no-share-of-cost Medi-Cal coverage at the time the individual was eligible to enroll.

(B) The individual certified, at the time of the initial enrollment that coverage under another employer health benefit plan or no-share-of-cost Medi-Cal coverage was the reason for declining enrollment, provided that, if the individual was covered under another employer health benefit plan, the individual was given the opportunity to make the certification required by this subdivision and was notified that failure to do so could result in later treatment as a late enrollee.

(C) The individual has lost or will lose coverage under another employer health benefit plan as a result of termination of employment of the individual or of a person through whom the individual was covered as a dependent, change in employment status of the individual or of a person through whom the individual was covered as a dependent, termination of the other plan's coverage, cessation of an employer's contribution toward an employee or dependent's coverage, death of a person through whom the individual was covered as a dependent, legal separation, divorce, or loss of no-share-of-cost Medi-Cal coverage.

(D) The individual requests enrollment within 30 days after termination of coverage, or cessation of employer contribution toward coverage provided under another employer health benefit plan.

(2) The individual is employed by an employer that offers multiple health benefit plans and the individual elects a different plan during an open enrollment period.

(3) A court has ordered that coverage be provided for a spouse or minor child under a covered employee's health benefit plan. The health benefit plan shall enroll a dependent child within 30 days after receipt of a court order or request from the district attorney, either parent or the person having custody of the child as defined in Section 3751.5 of the Family Code, the employer, or the group administrator. In the case of children who are eligible for medicaid, the State Department of Health Services may also make the request.

(4) The plan cannot produce a written statement from the employer stating that, prior to declining coverage, the individual or the person through whom the individual was eligible to be covered as a dependent was provided with, and signed acknowledgment of, explicit written notice in bold type specifying that failure to elect coverage during the initial enrollment period permits the plan to impose, at the time of the individual's later decision to elect coverage, an exclusion from coverage for a period of 12 months as well as a six-month preexisting condition exclusion, unless the individual meets the criteria specified in paragraph (1), (2), or (3).

97

(5) The individual is an employee or dependent who meets the criteria described in paragraph (1) and was under a COBRA continuation provision, and the coverage under that provision has been exhausted. For purposes of this section, the definition of "COBRA" set forth in subdivision (e) of Section 1373.621 shall apply.

(6) The individual is a dependent of an enrolled eligible employee who has lost or will lose his or her no-share-of-cost Medi-Cal coverage and requests enrollment within 30 days of notification of this loss of coverage.

(c) "Preexisting condition provision" means a contract provision that excludes coverage for charges or expenses incurred during a specified period following the enrollee's effective date of coverage, as to a condition for which medical advice, diagnosis, care, or treatment was recommended or received during a specified period immediately preceding the effective date of coverage.

(d) "Creditable coverage" means:

(1) Any individual or group policy, contract, or program that is written or administered by a disability insurance company, nonprofit hospital service plan, health care service plan, fraternal benefits society, self-insured employer plan, or any other entity, in this state or elsewhere, and that arranges or provides medical, hospital, and surgical coverage not designed to supplement other private or governmental plans. The term includes continuation or conversion coverage but does not include accident only, credit, coverage for onsite medical clinics, disability income, Medicare supplement, long-term care insurance, dental, vision, coverage issued as a supplement to liability insurance, insurance arising out of a workers' compensation or similar law, automobile medical payment insurance, or insurance under which benefits are payable with or without regard to fault and that is statutorily required to be contained in any liability insurance policy or equivalent self-insurance.

(2) The federal Medicare program pursuant to Title XVIII of the Social Security Act.

(3) The medicaid program pursuant to Title XIX of the Social Security Act.

(4) Any other publicly sponsored program, provided in this state or elsewhere, of medical, hospital, and surgical care.

(5) Chapter 55 (commencing with Section 1071) of Title 10 of the United States Code (Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)).

(6) A medical care program of the Indian Health Service or of a tribal organization.

(7) A state health benefits risk pool.

(8) A health plan offered under Chapter 89 (commencing with Section 8901) of Title 5 of the United States Code (Federal Employees Health Benefits Program (FEHBP)).

97

(9) A public health plan as defined in federal regulations authorized by Section 2701(c)(1)(I) of the Public Health Service Act, as amended by Public Law 104-191 (Health Insurance Portability and Accountability Act of 1996).

(10) A health benefit plan under Section 5(e) of the Peace Corps Act (22 U.S.C. Sec. 2504(e)).

(11) Any other creditable coverage as defined by subsection (c) of Section 2701 of Title XXVII of the federal Public Health Services Act (42 U.S.C. Sec. 300gg(c)).

(e) "Waivered condition" means a contract provision that excludes coverage for charges or expenses incurred during a specified period of time for one or more specific, identified, medical conditions.

(f) "Affiliation period" means a period that, under the terms of the health benefit plan, must expire before health care services under the plan become effective.

SEC. 99. Section 1357.51 of the Health and Safety Code is amended to read:

1357.51. (a) No plan contract that covers three or more enrollees shall exclude coverage for any individual on the basis of a preexisting condition provision for a period greater than six months following the individual's effective date of coverage. Preexisting condition provisions contained in plan contracts may relate only to conditions for which medical advice, diagnosis, care, or treatment, including use of prescription drugs, was recommended or received from a licensed health practitioner during the six months immediately preceding the effective date of coverage.

(b) No plan contract that covers one or two individuals shall exclude coverage on the basis of a preexisting condition provision for a period greater than 12 months following the individual's effective date of coverage, nor shall the plan limit or exclude coverage for a specific enrollee by type of illness, treatment, medical condition, or accident, except for satisfaction of a preexisting condition clause pursuant to this article. Preexisting condition provisions contained in plan contracts may relate only to conditions for which medical advice, diagnosis, care, or treatment, including use of prescription drugs, was recommended or received from a licensed health practitioner during the 12 months immediately preceding the effective date of coverage.

(c) A plan that does not utilize a preexisting condition provision may impose a waiting or affiliation period not to exceed 60 days, before the coverage issued subject to this article shall become effective. During the waiting or affiliation period, the plan is not required to provide health care services and no premium shall be charged to the subscriber or enrollee.

(d) A plan that does not utilize a preexisting condition provision in plan contracts that cover one or two individuals may impose a

contract provision excluding coverage for waivered conditions. No plan may exclude coverage on the basis of a waivered condition for a period greater than 12 months following the individual's effective date of coverage. A waivered condition provision contained in plan contracts may relate only to conditions for which medical advice, diagnosis, care, or treatment, including use of prescription drugs, was recommended or received from a licensed health practitioner during the 12 months immediately preceding the effective date of coverage.

(e) In determining whether a preexisting condition provision, a waivered condition provision, or a waiting or affiliation period applies to any enrollee, a plan shall credit the time the enrollee was covered under creditable coverage, provided that the enrollee becomes eligible for coverage under the succeeding plan contract within 62 days of termination of prior coverage, exclusive of any waiting or affiliation period, and applies for coverage under the succeeding plan within the applicable enrollment period. A plan shall also credit any time that an eligible employee must wait before enrolling in the plan, including any postenrollment or employer-imposed waiting or affiliation period.

However, if a person's employment has ended, the availability of health coverage offered through employment or sponsored by an employer has terminated, or an employer's contribution toward health coverage has terminated, a plan shall credit the time the person was covered under creditable coverage if the person becomes eligible for health coverage offered through employment or sponsored by an employer within 180 days, exclusive of any waiting or affiliation period, and applies for coverage under the succeeding plan contract within the applicable enrollment period.

(f) No plan shall exclude late enrollees from coverage for more than 12 months from the date of the late enrollee's application for coverage. No plan shall require any premium or other periodic charge to be paid by or on behalf of a late enrollee during the period of exclusion from coverage permitted by this subdivision.

(g) A health care service plan issuing group coverage may not impose a preexisting condition exclusion upon the following:

(1) A newborn individual, who, as of the last day of the 30-day period beginning with the date of birth, has applied for coverage through the employer-sponsored plan.

(2) A child who is adopted or placed for adoption before attaining 18 years of age and who, as of the last day of the 30-day period beginning with the date of adoption or placement for adoption, is covered under creditable coverage and applies for coverage through the employer-sponsored plan. This provision shall not apply if, for 63 continuous days, the child is not covered under any creditable coverage.

(3) A condition relating to benefits for pregnancy or maternity care.

(h) An individual's period of creditable coverage shall be certified pursuant to subsection (e) of Section 2701 of Title XXVII of the federal Public Health Services Act (42 U.S.C. Sec. 300gg(e)).

SEC. 100. Section 1367.24 of the Health and Safety Code is amended to read:

1367.24. (a) Every health care service plan that provides prescription drug benefits shall maintain an expeditious process by which prescribing providers may obtain authorization for a medically necessary nonformulary prescription drug. On or before July 1, 1999, every health care service plan that provides prescription drug benefits shall file with the department a description of its process, including timelines, for responding to authorization requests for nonformulary drugs. Any changes to this process shall be filed with the department pursuant to Section 1352. Each plan shall provide a written description of its most current process, including timelines, to its prescribing providers. For purposes of this section, a prescribing provider shall include a provider authorized to write a prescription, pursuant to subdivision (a) of Section 4040 of the Business and Professions Code, to treat a medical condition of an enrollee.

(b) Any plan that disapproves a request made pursuant to subdivision (a) by a prescribing provider to obtain authorization for a nonformulary drug shall provide the reasons for the disapproval in a notice provided to the enrollee. The notice shall indicate that the enrollee may file a grievance with the plan if the enrollee objects to the disapproval, including any alternative drug or treatment offered by the plan. The notice shall comply with subdivision (b) of Section 1368.02.

(c) The process described in subdivision (a) by which prescribing providers may obtain authorization for medically necessary nonformulary drugs shall not apply to a nonformulary drug that has been prescribed for an enrollee in conformance with the provisions of Section 1367.22.

(d) The process described in subdivision (a) by which enrollees may obtain medically necessary nonformulary drugs, including specified timelines for responding to prescribing provider authorization requests, shall be described in evidence of coverage and disclosure forms, as required by subdivision (a) of Section 1363, issued on or after July 1, 1999.

(e) Every health care service plan that provides prescription drug benefits shall maintain, as part of its books and records under Section 1381, all of the following information, which shall be made available to the commissioner upon request:

(1) The complete drug formulary or formularies of the plan, if the plan maintains a formulary, including a list of the prescription drugs on the formulary of the plan by major therapeutic category with an indication of whether any drugs are preferred over other drugs.

(2) Records developed by the pharmacy and therapeutic committee of the plan, or by others responsible for developing, modifying, and overseeing formularies, including medical groups, individual practice associations, and contracting pharmaceutical benefit management companies, used to guide the drugs prescribed for the enrollees of the plan, that fully describe the reasoning behind formulary decisions.

(3) Any plan arrangements with prescribing providers, medical groups, individual practice associations, pharmacists, contracting pharmaceutical benefit management companies, or other entities that are associated with activities of the plan to encourage formulary compliance or otherwise manage prescription drug benefits.

(f) If a plan provides prescription drug benefits, the department shall, as part of its periodic onsite medical survey of each plan undertaken pursuant to Section 1380, review the performance of the plan in providing those benefits, including, but not limited to, a review of the procedures and information maintained pursuant to this section, and describe the performance of the plan as part of its report issued pursuant to Section 1380.

(g) The commissioner shall not publicly disclose any information reviewed pursuant to this section that is determined by the commissioner to be confidential pursuant to state law.

(h) Nothing in this section shall be construed to restrict or impair the application of any other provision of this chapter, including, but not limited to, Section 1367, which includes among its requirements that a health care service plan furnish services in a manner providing continuity of care and demonstrate that medical decisions are rendered by qualified medical providers unhindered by fiscal and administrative management.

SEC. 101. Section 1442.5 of the Health and Safety Code is amended to read:

1442.5. (a) Prior to (1) closing , (2) eliminating or reducing the level of medical services provided by, or (3) the leasing, selling, or transfer of management of, a county facility, the board shall provide public notice, including notice posted at the entrance to all county health care facilities, of public hearings to be held by the board prior to its decision to proceed. The notice shall be posted not less than 14 days prior to the public hearings. The notice shall contain a list of the proposed reductions or changes, by facility and service. The notice shall include the amount and type of each proposed change, the expected savings, and the number of persons affected.

(b) Notwithstanding the board's closing of, the elimination of or reduction in the level of services provided by, or the leasing, selling, or transfer of management of, a county facility subsequent to January 1, 1975, the county shall fulfill its duty to provide care to all indigent people, either directly through county facilities or indirectly through alternative means.

(1) Where the county duty is fulfilled by a contractual arrangement with a private facility or individual, the facility or individual shall assume the county's full obligation to provide care to those who cannot afford it, and make their services available to Medi-Cal and Medicare recipients.

(2) Where the county duty is fulfilled by alternative means, the facility or individual providing services shall be in compliance with Sections 441.18 and 1277.

(3) The board shall designate an agency to provide a 24-hour information service that can give eligible people immediate information on the available services and access to them, and an agency to receive and respond to complaints from people eligible for services under this chapter. The designated agency may be the agency that operates the facility. This subdivision applies only in instances in which there is (1) a closing of, (2) an elimination or reduction in the level of services provided by, or (3) the leasing, selling, or transfer of, a county facility.

(4) The board shall arrange for all facilities or individuals contracting to provide services to indigent people to be listed in the local telephone directory under county listings, and shall specify therein that the facilities or individuals fulfill the obligations of county facilities.

(5) Section 25371 of the Government Code does not relieve the county of the obligation to comply with this section.

SEC. 102. Section 1502.6 of the Health and Safety Code is amended to read:

1502.6. The department shall deny a private adoption agency a license, or revoke an existing private adoption agency license, unless the applicant or licensee demonstrates that it currently and continuously employs either an executive director or a supervisor who has had at least five years of full-time social work employment in the field of child welfare as described in Chapter 5 (commencing with Section 16500) of Part 4 of Division 9 of the Welfare and Institutions Code or Division 13 (commencing with Section 8500) of the Family Code, two years of which shall have been spent performing adoption social work services in either the department or a licensed California adoption agency.

SEC. 103. Section 1522 of the Health and Safety Code is amended to read:

1522. The Legislature recognizes the need to generate timely and accurate positive fingerprint identification of applicants as a condition of issuing licenses, permits, or certificates of approval for persons to operate or provide direct care services in a community care facility, foster family home, or certified family home. Therefore, the Legislature supports the use of fingerprint live-scan technology, as identified in the long-range plan of the Department of Justice for fully automating the processing of fingerprints and other data by the

year 1999, otherwise known as the California Crime Information Intelligence System (CAL-CII), to be used for applicant fingerprints. It is the intent of the Legislature in enacting this section to require the fingerprints of those individuals whose contact with community care clients may pose a risk to the clients' health and safety.

(a) Before issuing a license or special permit to any person or persons to operate or manage a community care facility, the State Department of Social Services shall secure from an appropriate law enforcement agency a criminal record to determine whether the applicant or any other person specified in subdivision (b) has ever been convicted of a crime other than a minor traffic violation or arrested for any crime specified in Section 290 of the Penal Code, for violating Section 245 or 273.5, subdivision (b) of Section 273a or, prior to January 1, 1994, paragraph (2) of Section 273a of the Penal Code, or for any crime for which the department cannot grant an exemption if the person was convicted and the person has not been exonerated. That criminal history information shall include the full criminal record of any of those persons, and subsequent arrest information pursuant to Section 11105.2 of the Penal Code. No fee shall be charged by the Department of Justice or the State Department of Social Services for the fingerprinting of an applicant for a license or special permit to operate a facility providing nonmedical board, room, and care for six or fewer children or for obtaining a criminal record of the applicant pursuant to this section. The following shall apply to the criminal record information:

(1) If the State Department of Social Services finds that the applicant, or any other person specified in subdivision (b), has been convicted of a crime other than a minor traffic violation, the application shall be denied, unless the director grants an exemption pursuant to subdivision (g).

(2) If the State Department of Social Services finds that the applicant, or any other person specified in subdivision (b), is awaiting trial for a crime other than a minor traffic violation, the State Department of Social Services shall cease processing the application until the conclusion of the trial.

(3) If no criminal record information has been recorded, the Department of Justice shall provide the applicant and the State Department of Social Services with a statement of that fact.

(4) If the State Department of Social Services finds after licensure that the licensee, or any other person specified in paragraph (2) of subdivision (b), has been convicted of a crime other than a minor traffic violation, the license may be revoked, unless the director grants an exemption pursuant to subdivision (g).

(b) In addition to the applicant, this section shall be applicable to criminal convictions of the following persons:

(1) Adults responsible for administration or direct supervision of staff.

(2) Any person, other than a client, residing in the facility.

(3) Any person who provides client assistance in dressing, grooming, bathing, or personal hygiene. Any nurse assistant or home health aide meeting the requirements of Section 1338.5 or 1736.6, respectively, who is not employed, retained, or contracted by the licensee, and who has been certified or recertified on or after July 1, 1998, shall be deemed to meet the criminal record clearance requirements of this section. A certified nurse assistant and certified home health aide who will be providing client assistance and who falls under this exception shall provide one copy of his or her certification, prior to providing care, to the adult community care facility. The facility shall maintain the copy of the certification on file as long as care is being provided by the certified nurse assistant or certified home health aide at the facility. Nothing in this paragraph restricts the right of the department to exclude a certified nurse assistant or certified home health aide from a licensed community care facility pursuant to Section 1558.

(4) Any staff person or employee who has frequent and routine contact with the clients. In determining who has frequent contact, any volunteer who is in the facility shall be exempt unless the volunteer is used to replace or supplement staff in providing direct care and supervision of clients. In determining who has routine contact, staff and employees under direct onsite supervision and who are not providing direct care and supervision or who have only occasional or intermittent contact with clients shall be exempt.

(5) If the applicant is a firm, partnership, association, or corporation, the chief executive officer or other person serving in like capacity.

(6) Additional officers of the governing body of the applicant, or other persons with a financial interest in the applicant, as determined necessary by the department by regulation. The criteria used in the development of these regulations shall be based on the person's capability to exercise substantial influence over the operation of the facility.

(c) (1) Subsequent to initial licensure, any person specified in subdivision (b) and not exempted from fingerprinting shall, as a condition to employment, residence, or presence in a community care facility, be fingerprinted and sign a declaration under penalty of perjury regarding any prior criminal convictions. The licensee shall submit these fingerprints to the Department of Justice not later than four calendar days following employment, residence, or initial presence in the community care facility. These fingerprints shall be on a card provided by the State Department of Social Services for the purpose of obtaining a permanent set of fingerprints. Fingerprints not submitted to the Department of Justice, as required in this section, shall result in the citation of a deficiency and the fingerprints shall then be submitted to the State Department of Social Services for

processing. Upon request of the licensee, who shall enclose a self-addressed stamped postcard for this purpose, the Department of Justice shall verify receipt of the fingerprints.

(2) Within 30 calendar days of the receipt of the fingerprints, the Department of Justice shall notify the State Department of Social Services of the criminal record information, as provided for in subdivision (a). If no criminal record information has been recorded, the Department of Justice shall provide the licensee and the State Department of Social Services with a statement of that fact within 15 calendar days of receipt of the fingerprints. If new fingerprints are required for processing, the Department of Justice shall, within 15 calendar days from the date of receipt of the fingerprints, notify the licensee that the fingerprints were illegible.

(3) Except for persons specified in paragraph (2) of subdivision (b), the licensee shall endeavor to ascertain the previous employment history of persons required to be fingerprinted under this subdivision. If it is determined by the State Department of Social Services, on the basis of the fingerprints submitted to the Department of Justice, that the person has been convicted of, or is awaiting trial for, a sex offense against a minor, or has been convicted for an offense specified in Section 243.4, 273a, or 273d or subdivision (a) or (b) of Section 368 of the Penal Code, or a felony, the State Department of Social Services shall notify the licensee of its obligation to act immediately to terminate the person's employment, remove the person from the community care facility, or bar the person from entering the community care facility. The State Department of Social Services may subsequently grant an exemption pursuant to subdivision (g). If the conviction or arrest was for another crime, except a minor traffic violation, the licensee shall, upon notification by the State Department of Social Services, act immediately to either (1) terminate the person's employment, remove the person from the community care facility, or bar the person from entering the community care facility or (2) seek an exemption pursuant to subdivision (g). The State Department of Social Services shall determine whether the person will be allowed to remain in the facility until a decision on the exemption is rendered. A licensee's failure to comply with the department's prohibition of employment, contact with clients, or presence in the facility as required by this paragraph shall be grounds for disciplining the licensee pursuant to Section 1550.

(4) The department may issue an exemption on its own motion pursuant to subdivision (g) if the person's criminal history indicates that the person is of good character based on the age, seriousness, and frequency of the conviction or convictions. The department, in consultation with interested parties, shall develop regulations to establish the criteria to grant an exemption pursuant to this paragraph.

97

(5) Concurrently with notifying the licensee pursuant to paragraph (3), the department shall notify the affected individual of his or her right to seek an exemption pursuant to subdivision (g). The individual may seek an exemption only if the licensee terminates the person's employment or removes the person from the facility after receiving notice from the department pursuant to paragraph (3).

(d) (1) Before issuing a license, special permit, or certificate of approval to any person or persons to operate or manage a foster family home or certified family home as described in Section 1506, the State Department of Social Services or other approving authority shall secure from an appropriate law enforcement agency a criminal record to determine whether the applicant or any person specified in subdivision (b) has ever been convicted of a crime other than a minor traffic violation or arrested for any crime specified in Section 290 of the Penal Code or arrested for violating Section 245 or 273.5, subdivision (b) of Section 273a or, prior to January 1, 1994, paragraph (2) of Section 273a of the Penal Code, or for any crime for which the department cannot grant an exemption if the person was convicted and has not been exonerated. That criminal history information shall include the full criminal record, if any, of those persons. No fee shall be charged by the Department of Justice or the State Department of Social Services for the fingerprinting of an applicant for a license, special permit, or certificate of approval described in this subdivision. The record, if any, shall be taken into consideration when evaluating a prospective applicant. The following shall apply to the criminal record information:

(A) If the applicant or other persons specified in subdivision (b) have convictions that would make the applicant's home unfit as a foster family home or a certified family home, the license, special permit, or certificate of approval shall be denied.

(B) If the State Department of Social Services finds that the applicant, or any person specified in subdivision (b) is awaiting trial for a crime other than a minor traffic violation, the State Department of Social Services or other approving authority shall cease processing the application until the conclusion of the trial.

(C) For the purposes of this subdivision, a criminal record clearance provided under Section 8712 of the Family Code may be used by the department or other approving agency.

(2) Any person specified in this subdivision shall, as a part of the application, be fingerprinted and sign a declaration under penalty of perjury regarding any prior criminal convictions or arrests for any crime against a child, spousal or cohabitant abuse, or any crime for which the department cannot grant an exemption if the person was convicted and shall submit these fingerprints to the licensing agency or other approving authority.

(3) The foster family agency shall obtain fingerprints from certified home applicants and from persons specified in subdivision

(b) and shall submit them directly to the Department of Justice. Within five working days of the receipt of the criminal record or information regarding criminal convictions from the Department of Justice, the department shall notify the applicant of any criminal arrests or convictions. If no arrests or convictions are recorded, the Department of Justice shall provide the foster family agency with a statement of that fact concurrent with providing the information to the State Department of Social Services.

(4) If the State Department of Social Services finds that the applicant, or any other person specified in subdivision (b), has been convicted of a crime other than a minor traffic violation, the application shall be denied, unless the director grants an exemption pursuant to subdivision (g).

(5) If the State Department of Social Services finds after licensure or the granting of the certificate of approval that the licensee, certified foster parent, or any other person specified in paragraph (2) of subdivision (b), has been convicted of a crime other than a minor traffic violation, the license or certificate of approval may be revoked by the department or the foster family agency, whichever is applicable, unless the director grants an exemption pursuant to subdivision (g). A licensee's failure to comply with the department's prohibition of employment, contact with clients, or presence in the facility as required by paragraph (3) of subdivision (c) shall be grounds for disciplining the licensee pursuant to Section 1550.

(e) The State Department of Social Services shall not use a record of arrest to deny, revoke, or terminate any application, license, employment, or residence unless the department investigates the incident and secures evidence, whether or not related to the incident of arrest, that is admissible in an administrative hearing to establish conduct by the person that may pose a risk to the health and safety of any person who is or may become a client. The State Department of Social Services is authorized to obtain any arrest or conviction records or reports from any law enforcement agency as necessary to the performance of its duties to inspect, license, and investigate community care facilities and individuals associated with a community care facility.

(f) For purposes of this section or any other provision of this chapter, a conviction means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action that the State Department of Social Services is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or when the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, notwithstanding a subsequent order pursuant to Sections 1203.4 and 1203.4a of the Penal Code permitting the person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the

97

accusation, information, or indictment. For purposes of this section or any other provision of this chapter, the record of a conviction, or a copy thereof certified by the clerk of the court or by a judge of the court in which the conviction occurred, shall be conclusive evidence of the conviction. For purposes of this section or any other provision of this chapter, the arrest disposition report certified by the Department of Justice, or documents admissible in a criminal action pursuant to Section 969b of the Penal Code, shall be prima facie evidence of the conviction, notwithstanding any other provision of law prohibiting the admission of these documents in a civil or administrative action.

(g) (1) After review of the record, the director may grant an exemption from disqualification for a license or special permit as specified in paragraphs (1) and (4) of subdivision (a), or for a license, special permit, or certificate of approval as specified in paragraphs (4) and (5) of subdivision (d), or for employment, residence, or presence in a community care facility as specified in paragraphs (3), (4), and (5) of subdivision (c), if the director has substantial and convincing evidence to support a reasonable belief that the applicant and the person convicted of the crime, if other than the applicant, are of such good character as to justify issuance of the license or special permit or granting an exemption for purposes of subdivision (c). Except as otherwise provided in this subdivision, no exemption shall be granted pursuant to this subdivision if the conviction was for an offense specified in Section 220, 243.4, or 264.1, subdivision (a) of Section 273a or, prior to January 1, 1994, paragraph (1) of Section 273a, Section 273d, 288, or 289, subdivision (a) of Section 290, or subdivision (a) or (b) of Section 368 of the Penal Code, or was a conviction of another crime against an individual specified in subdivision (c) of Section 667.5 of the Penal Code. The director may grant an exemption if the employee or prospective employee, who was convicted of a crime against an individual prescribed in paragraph (1), (2), (7), or (8) of subdivision (c) of Section 667.5 of the Penal Code, has been rehabilitated as provided in Section 4852.03 of the Penal Code, has maintained the conduct required in Section 4852.05 of the Penal Code for at least 10 years, and has the recommendation of the district attorney representing the employee's county of residence, or if the employee or prospective employee has received a certificate of rehabilitation pursuant to Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.

(2) The department shall not prohibit a person from being employed or having contact with clients in a facility on the basis of a denied criminal record exemption request or arrest information unless the department complies with the requirements of Section 1558.

97

(h) (1) For purposes of compliance with this section, the department may permit an individual to transfer a current criminal records clearance, as defined in subdivision (a), from one facility to another, as long as the criminal record clearance has been processed through a state licensing district office, and is being transferred to another state licensing district office.

(2) The State Department of Social Services shall hold criminal record clearances in its active files for a minimum of two years after an employee is no longer employed at a licensed facility in order for the criminal record clearance to be transferred.

(i) The full criminal record obtained for purposes of this section may be used by the department or by a licensed adoption agency as a clearance required for adoption purposes.

(j) If a licensee or facility is required by law to deny employment or to terminate employment of any employee based on written notification from the state department that the employee has a prior criminal conviction or is determined unsuitable for employment under Section 1558, the licensee or facility shall not incur civil liability or unemployment insurance liability as a result of that denial or termination.

(k) (1) In order to expedite the current criminal record clearance and fingerprint process of the Department of Justice pursuant to subdivisions (a) and (c), the Department of Justice shall complete work on all of its current backlog of criminal records clearances for community care facilities licensed by the State Department of Social Services by July 1, 1995.

(2) Effective January 1, 1995, the Department of Justice shall complete all new requests for criminal record clearances for community care facilities within 30 days of receipt.

(3) The Department of Justice shall coordinate with the State Department of Social Services to establish and implement an automated live-scan processing system for fingerprints in two district offices of the Community Care Licensing Division of the State Department of Social Services by July 1, 1995. These live-scan processing units shall be connected to the main system at the Department of Justice by July 1, 1996, and shall become part of that department's pilot project in accordance with its long-range plan. The State Department of Social Services may charge a fee not to exceed five dollars ($5) or the actual cost of processing a set of live-scan fingerprints.

(4) The Department of Justice shall provide a report to the Assembly Human Services Committee and to the Senate Health and Human Services Committee by July 15, 1995, regarding the completion of backlogged criminal record clearance requests pursuant to paragraph (1) and the progress on implementing the automated live-scan processing system in the two district offices pursuant to paragraph (3). The Department of Justice shall provide

a report to the Assembly Human Services Committee and to the Senate Health and Human Services Committee by April 15, 1996, regarding the progress of the implementation of the statewide CAL-CII system, the number of requests for criminal clearances received pursuant to this section during the previous year, the number of criminal record clearances requested and completed pursuant to this section within a 17-day "expedite" period or within the 30-day period required by paragraph (2), and the number of requests and reasons for delays beyond the 30-day period.

SEC. 104. Section 1746 of the Health and Safety Code is amended to read:

1746. For the purposes of this chapter, the following definitions apply:

(a) "Bereavement services" means those services available to the surviving family members for a period of at least one year after the death of the patient, including an assessment of the needs of the bereaved family and the development of a care plan that meets these needs, both prior to and following the death of the patient.

(b) "Hospice" means a specialized form of interdisciplinary health care that is designed to provide palliative care, alleviate the physical, emotional, social, and spiritual discomforts of an individual who is experiencing the last phases of life due to the existence of a terminal disease, and provide supportive care to the primary care giver and the family of the hospice patient, and that meets all of the following criteria:

(1) Considers the patient and the patient's family, in addition to the patient, as the unit of care.

(2) Utilizes an interdisciplinary team to assess the physical, medical, psychological, social, and spiritual needs of the patient and the patient's family.

(3) Requires the interdisciplinary team to develop an overall plan of care and to provide coordinated care that emphasizes supportive services, including, but not limited to, home care, pain control, and limited inpatient services. Limited inpatient services are intended to ensure both continuity of care and appropriateness of services for those patients who cannot be managed at home because of acute complications or the temporary absence of a capable primary care giver.

(4) Provides for the palliative medical treatment of pain and other symptoms associated with a terminal disease, but does not provide for efforts to cure the disease.

(5) Provides for bereavement services following death to assist the family in coping with social and emotional needs associated with the death of the patient.

(6) Actively utilizes volunteers in the delivery of hospice services.

(7) To the extent appropriate, based on the medical needs of the patient, provides services in the patient's home or primary place of residence.

(c) "Inpatient care arrangements" means arranging for those short inpatient stays that may become necessary to manage acute symptoms or because of the temporary absence, or need for respite, of a capable primary care giver. The hospice shall arrange for these stays, ensuring both continuity of care and the appropriateness of services.

(d) "Medical direction" means those services provided by a licensed physician and surgeon who is charged with the responsibility of acting as a consultant to the interdisciplinary team, a consultant to the patient's attending physician and surgeon, as requested, with regard to pain and symptom management, and a liaison with physicians and surgeons in the community.

(e) "An interdisciplinary team" means the hospice care team that includes, but is not limited to, the patient and patient's family, a physician and surgeon, a registered nurse, a social worker, a volunteer, and a spiritual care giver. The team shall be coordinated by a registered nurse and shall be under medical direction. The team shall meet regularly to develop and maintain an appropriate plan of care.

(f) "Plan of care" means a written plan developed by the attending physician and surgeon, the medical director or physician and surgeon designee, and the interdisciplinary team that addresses the needs of a patient and family admitted to the hospice program. The hospice shall retain overall responsibility for the development and maintenance of the plan of care and quality of services delivered.

(g) "Skilled nursing services" means nursing services provided by or under the supervision of a registered nurse under a plan of care developed by the interdisciplinary team and the patient's physician and surgeon to a patient and his or her family that pertain to the palliative, supportive services required by patients with a terminal illness. Skilled nursing services include, but are not limited to, patient assessment, evaluation and case management of the medical nursing needs of the patient, the performance of prescribed medical treatment for pain and symptom control, the provision of emotional support to both the patient and his or her family, and the instruction of care givers in providing personal care to the patient. Skilled nursing services shall provide for the continuity of services for the patient and his or her family. Skilled nursing services shall be available on a 24-hour on-call basis.

(h) "Social service/counseling services" means those counseling and spiritual care services that assist the patient and his or her family to minimize stresses and problems that arise from social, economic, psychological, or spiritual needs by utilizing appropriate community

resources, and maximize positive aspects and opportunities for growth.

(i) "Terminal disease" or "terminal illness" means a medical condition resulting in a prognosis of life of one year or less, if the disease follows its natural course.

(j) "Volunteer services" means those services provided by trained hospice volunteers who have agreed to provide service under the direction of a hospice staff member who has been designated by the hospice to provide direction to hospice volunteers. Hospice volunteers may be used to provide support and companionship to the patient and his or her family during the remaining days of the patient's life and to the surviving family following the patient's death.

(k) "Multiple location" means a location or site from which a hospice makes available basic hospice services within the service area of the parent agency. A multiple location shares administration, supervision, policies and procedures, and services with the parent agency in a manner that renders it unnecessary for the site to independently meet the licensing requirements.

(*l*) "Home health aide" has the same meaning as set forth in subdivision (c) of Section 1727.

(m) "Home health aide services" means those services described in subdivision (d) of Section 1727 that provide for the personal care of the terminally ill patient and the performance of related tasks in the patient's home in accordance with the plan of care in order to increase the level of comfort and to maintain personal hygiene and a safe, healthy environment for the patient.

(n) "Parent agency" means the part of the hospice that is licensed pursuant to this chapter and that develops and maintains administrative controls of multiple locations. All services provided by the multiple location and parent agency are the responsibility of the parent agency.

SEC. 105. Section 1771.9 of the Health and Safety Code is amended to read:

1771.9. (a) (1) The Legislature finds and declares all of the following:

(A) The residents of continuing care retirement communities have a unique and valuable perspective on the operations of and services provided in the community in which they live.

(B) Resident input into decisions made by the provider is an important factor in creating an environment of cooperation, reducing conflict, and ensuring timely response to and resolution of issues that may arise.

(C) Continuing care retirement communities are strengthened when residents know that their views are heard and respected.

(2) The Legislature encourages continuing care retirement communities to exceed the minimum resident participation

requirements established by this section by, among other things, the following:

(A) Encouraging residents to form a resident council, and assisting the residents, resident council, and resident association to keep informed about the operation of the community.

(B) Encouraging residents of a community or their elected representatives to select residents to participate as board members of the provider.

(C) Quickly and fairly resolving any dispute, claim, or grievance arising between a resident and the community.

(b) The governing body of a provider, or the designated representative of the provider, shall hold, at a minimum, semiannual meetings with the residents of the continuing care retirement community, or a committee of residents, for the purpose of the free discussion of subjects including, but not limited to, income, expenditures, and financial trends and issues as they apply to the community and proposed changes in policies, programs, and services. Nothing in this section precludes a provider from taking action or making a decision at any time, without regard to the meetings required under this subdivision.

(c) At least 30 days prior to the implementation of any increase in the monthly care fee, the designated representative of the provider shall convene a meeting, to which all residents shall be invited, for the purpose of discussing the reasons for the increase, the basis for determining the amount of the increase, and the data used for calculating the increase. This meeting may coincide with the semiannual meetings provided for in subdivision (b).

(d) Residents shall be provided at least 14 days' advance notice of each meeting provided for in subdivisions (b) and (c). The notice of, and the agenda for, the meeting shall be posted in a conspicuous place in the community at least 14 days prior to the meeting. The agenda and accompanying materials shall be available to residents of the community upon request.

(e) (1) The governing body of a provider that is not part of a multifacility organization with more than one continuing care retirement community in the state shall accept at least one resident of the continuing care retirement community it operates to participate as a nonvoting resident representative to the provider's governing body.

(2) In a multifacility organization having more than one continuing care retirement community in the state, the governing body of the multifacility organization shall elect either (A) to have at least one nonvoting resident representative to the provider's governing body for each California-based continuing care retirement community that the provider operates or (B) to have a resident-elected committee composed of representatives of the residents of each California-based continuing care retirement

community that the provider operates select or nominate at least one nonvoting resident representative to the provider's governing body for every three California-based continuing care retirement communities, or fraction thereof, that the provider operates.

(f) (1) In order to encourage innovative and alternative models of resident involvement, a resident selected pursuant to subdivision (e) to participate as a resident representative to the provider's governing body may, at the option of the resident council or association, be selected in any one of the following ways:

(A) By a majority vote of the resident council or resident association of a provider or by a majority vote of a resident-elected committee of residents of a multifacility organization.

(B) If no resident council or resident association exists, any resident may organize a meeting of the majority of the residents of the community to select or nominate residents to represent them before the governing body.

(C) Any other method designated by the resident council or resident association.

(2) The residents' council, association, or organizing resident, or in the case of a multifacility organization, the resident-elected committee of residents, shall give residents of the community at least 30 days' advance notice of the meeting to select a resident representative and shall post the notice in a conspicuous place at the community.

(g) Except as provided in subdivision (h), the resident representative shall receive the same notice of board meetings, board packets, minutes, and other materials as members and shall be permitted to attend, speak, and participate in all meetings of the board.

(h) Notwithstanding subdivision (g), the governing body may exclude resident representatives from its executive sessions and from receiving board materials to be discussed during executive sessions. However, resident representatives shall be included in executive sessions and shall receive all board materials to be discussed during executive sessions related to discussions of the annual budgets, increases in monthly care fees, indebtedness, and expansion of new and existing facilities.

(i) The provider shall pay all reasonable travel costs for the resident representative.

(j) The provider shall disclose to prospective tenants, in writing, the extent of resident involvement with the board.

(k) This section does not prohibit a provider from exceeding the minimum resident participation requirements of this section by, for example, having more resident meetings or more resident representatives to the board than required or by having one or more residents on the provider's governing body who are selected with the active involvement of residents.

97

(*l*) On or before January 1, 2001, the Continuing Care Contracts Committee of the department established pursuant to Section 1777 shall evaluate and report to the Legislature on the implementation of this section.

SEC. 106. Section 1797.191 of the Health and Safety Code is amended to read:

1797.191. (a) The authority shall establish minimum standards for the training in pediatric first aid, pediatric cardiopulmonary resuscitation (CPR), and preventive health practices required by Section 1596.866.

(b) (1) The authority shall establish a process for the ongoing review and approval of training programs in pediatric first aid, pediatric CPR, and preventive health practices as specified in paragraph (2) of subdivision (a) of Section 1596.866 to ensure that those programs meet the minimum standards established pursuant to subdivision (a). The authority shall charge fees equal to its costs incurred for the pediatric first aid and pediatric CPR training standards program and for the ongoing review and approval of these programs.

(2) The authority shall establish, in consultation with experts in pediatric first aid, pediatric CPR, and preventive health practices, a process to ensure the quality of the training programs, including, but not limited to, a method for assessing the appropriateness of the courses and the qualifications of the instructors.

(c) (1) The authority may charge a fee equal to its costs incurred for the preventive health practices program and for the initial review and approval and renewal of approval of the program.

(2) If the authority chooses to establish a fee process based on the use of course completion cards for the preventive health practices program, the cost shall not exceed seven dollars ($7) per card for each training participant until January 1, 2001, at which time the authority may evaluate its administrative costs. After evaluation of the costs, the authority may establish a new fee scale for the cards so that revenue does not exceed the costs of the ongoing review and approval of the preventive health practices training.

(d) For the purposes of this section, "training programs" means programs that apply for approval by the authority to provide the training in pediatric first aid, pediatric CPR, or preventive health practices as specified in paragraph (2) of subdivision (a) of Section 1596.866. Training programs include all affiliated programs that also provide any of the authority-approved training required by this division. "Affiliated programs" means programs that are overseen by persons or organizations that have an authority-approved training program in pediatric first aid, pediatric CPR, or preventive health practices. Affiliated programs also include programs that have purchased an authority-approved training program in pediatric first aid, pediatric CPR, or preventive health practices. Training

programs and their affiliated programs shall comply with this division and with the regulations adopted by the authority pertaining to training programs in pediatric first aid, pediatric CPR, or preventive health practices.

(e) The director of the authority may, in accordance with regulations adopted by the authority, deny, suspend, or revoke any approval issued under this division or may place any approved program on probation, upon the finding by the director of the authority of an imminent threat to the public health and safety as evidenced by the occurrence of any of the actions listed in subdivision (f).

(f) Any of the following actions shall be considered evidence of a threat to the public health and safety, and may result in the denial, suspension, probation, or revocation of a program's approval or application for approval pursuant to this division.

(1) Fraud.

(2) Incompetence.

(3) The commission of any fraudulent, dishonest, or corrupt act that is substantially related to the qualifications, functions, and duties of training program directors and instructors.

(4) Conviction of any crime that is substantially related to the qualifications, functions, and duties of training program directors and instructors. The record of conviction or a certified copy of the record shall be conclusive evidence of the conviction.

(5) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, this division or the regulations promulgated by the authority pertaining to the review and approval of training programs in pediatric first aid, pediatric CPR, and preventive health practices as specified in paragraph (2) of subdivision (a) of Section 1596.866.

(g) In order to ensure that adequate qualified training programs are available to provide training in the preventive health practices course to all persons who are required to have that training, the authority may, after approval of the Commission on Emergency Medical Services pursuant to Section 1799.50, establish temporary standards for training programs for use until permanent standards are adopted pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(h) Persons who, prior to the date on which the amendments to this section enacted in 1998 become operative, have completed a course or courses in preventive health practices as specified in subparagraph (C) of paragraph (2) of subdivision (a) of Section 1596.866, and have a certificate of completion card for a course or courses in preventive health practices, or certified copies of transcripts that identify the number of hours and the specific course or courses taken for training in preventive health practices shall be

deemed to have met the requirement for training in preventive health practices.

SEC. 107. Section 18020 of the Health and Safety Code is amended to read:

18020. (a) Except as provided in Section 18027.3, and except as provided by the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. Sec. 5401 et seq.), as it applies to the manufacture of new manufactured housing, the department shall enforce this part and the rules and regulations adopted pursuant to this part.

(b) The department may, at the department's sole option, enforce Chapter 4 (commencing with Section 18025) and the rules and regulations adopted pursuant to Chapter 4 through department-approved third-party entities. The department shall adopt regulations for the approval of third-party entities, including, but not limited to, all of the following criteria:

(1) Freedom from any conflict of interest.

(2) Qualifications of personnel.

(3) Frequency of inspections or monitorings of manufacturer quality control.

(4) Involvement in collusive or fraudulent actions related to the performance of activities required by Section 18013.2.

(5) Any other conditions of operation that the department may reasonably require.

(c) The department may require rotation of third-party entities performing inspection services for any manufacturing facility within the state to prevent the third-party entity from either performing inspections within the same facility for more than 365 calendar days or performing inspections for any facility when the third-party entity performed inspection services within the previous 365 calendar days.

(d) The department shall monitor the performance of third-party entities approved pursuant to subdivision (b) and shall require periodic reports in writing containing information that the department may reasonably require to determine compliance with the conditions of the department's approval.

(1) When the department receives information about an alleged inadequacy in the performance of a third-party entity, including any involvement in collusive or fraudulent actions related to the performance of activities required by Section 18013.2, it shall consider the information in its monitoring efforts and make a determination about the validity of the alleged inadequacy in a timely manner.

(2) When the department determines, either through its monitoring efforts or through information provided by any other person, that an approved third-party entity has failed to perform according to the conditions of approval, the department may withdraw approval by forwarding written notice to the approved

third-party entity by registered mail to its address of record, briefly summarizing the cause for the department's decision.

(3) A third-party entity, upon having its approval withdrawn by the department, may request a hearing before the director of the department. The request for hearing shall be in writing and either delivered or postmarked prior to midnight on the 10th calendar day from the date of the department's notice.

(4) The department, upon timely receipt of a written request for hearing, shall, within 30 calendar days, schedule a hearing before the director or his or her agent. All hearings pursuant to this subdivision shall be held in the department's Sacramento offices and the decision of the director shall be final.

(5) A third-party entity whose approval has been withdrawn by the department shall not be permitted to reapply for the department's approval pursuant to subdivision (b) for a period of one year from the date that the approval was withdrawn by the department.

(6) A third-party entity whose approval has been withdrawn more than once by the department shall not be permitted to reapply for department approval pursuant to subdivision (b) for a period of not less than one year from the date that the department's approval was last withdrawn.

(7) No third-party entity shall perform the activities required by Section 18013.2 unless it has the approval of the department.

(e) (1) Upon finding a violation of subdivision (b) on the part of a third-party entity, the director shall issue citations and levy administrative fines. Each citation and fine assessment shall be in writing and describe the particulars for the citation. The citation and fine assessment shall be issued not later than six months after discovery of the violation.

(2) The fine for a first violation shall be at least five hundred dollars ($500) and shall not exceed one thousand dollars ($1,000). The fine for a second violation shall be at least two thousand dollars ($2,000) and shall not exceed four thousand dollars ($4,000). The fine for a third violation shall be at least five thousand dollars ($5,000), and shall not exceed ten thousand dollars ($10,000). The fines shall be assessed for each day the violation occurs. If a third-party entity has been cited more than three times during a 365-day period, the approval to conduct inspections on behalf of the department shall be suspended for a minimum of one year.

(3) The third-party entity may request an administrative hearing on the citation or fine. If the party fails to request a hearing within 30 days and does not pay the fine, the approval to perform inspections shall be automatically revoked, until the time that the department finds that the circumstances that led to the citation have been corrected and the fines have been paid.

97

(4) Upon review of the findings from the administrative hearing, the director may modify, rescind, or uphold the citation and fine assessment. The decision of the director shall be served by regular mail.

(5) The fines shall be paid into the Housing and Community Development Fund, which is hereby created in the State Treasury, and shall be used, when appropriated by the Legislature, to offset the department's costs to administer this part.

(f) The remedies provided in this part to any aggrieved party are not exclusive and shall not preclude the applicability of any other provision of law.

SEC. 108. Section 18025.5 of the Health and Safety Code is amended to read:

18025.5. (a) Pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. Sec. 5401 et seq.), the department may assume responsibility for the enforcement of manufactured home and mobilehome construction and safety standards relating to any issue with respect to which a federal standard has been established. The department may adopt regulations to ensure acceptance by the Secretary of Housing and Urban Development of California's plan for the administration and enforcement of federal manufactured home and mobilehome safety and construction standards.

(b) The department may conduct inspections and investigations that it determines may be necessary to secure enforcement of this part and regulations adopted pursuant to this part.

(c) Subdivision (b) shall not apply to the enforcement of Section 18027.3 unless the department determines that there is a compelling reason to exercise oversight in the inspection of recreational vehicles or park trailers at a factory, in which case the department may investigate the inspection, or conduct a department inspection, on recreational vehicles or park trailers at a factory and utilize any means necessary to collect a fee from the manufacturer for the cost of the department investigation or inspection.

(d) For the purposes of enforcement of this part and the related regulations, persons duly designated by the director of the department, upon presenting appropriate credentials to the owner, operator, or agent in charge, may do both of the following:

(1) Enter, at reasonable times and without advance notice, any factory, warehouse, sales lot, or establishment in which manufactured homes, mobilehomes, commercial coaches, or special purpose commercial coaches are manufactured, stored, held for sale, sold, or offered for sale, rent, or lease.

(2) Inspect, at reasonable times and within reasonable limits and in a reasonable manner, any factory, warehouse, sales lot, or establishment, and inspect the books, papers, records, and documents to ensure compliance with this part.

SEC. 109. Section 25989.1 of the Health and Safety Code is amended to read:

25989.1. (a) Any traveling circus or carnival that performs in this state shall do both of the following:

(1) Notify each entity that provides animal control services for a city, county, or city and county in which the traveling circus or carnival intends to perform of its intent to perform within that jurisdiction. Notice shall be given at least 14 days prior to the first performance in that city, county, or city and county.

(2) Provide each entity that provides animal control services for a city, county, or city and county in which the traveling circus or carnival intends to perform with a schedule of its performances in California.

(b) For the purposes of this chapter, "traveling circus or carnival" does not include any fair regulated under Chapter 4 (commencing with Section 19400) of Division 8 of the Business and Professions Code, or any rodeo, horse, or school event.

(c) Any violation of subdivision (a) shall be punishable by a fine of not less than five hundred dollars ($500) and not more than two thousand dollars ($2,000) for a first violation, and not less than one thousand five hundred dollars ($1,500) and not more than five thousand dollars ($5,000) for any subsequent violation.

SEC. 110. Section 33298 of the Health and Safety Code is repealed.

SEC. 111. Section 33392 of the Health and Safety Code is amended to read:

33392. Notwithstanding any other provision of this part, an agency with the approval of the legislative body of the community may acquire, by negotiation or other means, real property in a project area at any time after formulation of the preliminary plan for the area by the planning commission, and prior to the adoption of the redevelopment plan by the legislative body of the community, provided, however, that an agency may not exercise the power of eminent domain in connection with that acquisition prior to adoption of the redevelopment plan.

SEC. 112. Section 33492.22 of the Health and Safety Code is amended to read:

33492.22. (a) Notwithstanding the time limit in subdivision (b) of Section 33492.18, the Planning Commission and the Redevelopment Commission of the City and County of San Francisco shall certify an environmental impact report for the Hunter's Point Shipyard Redevelopment Plan within 30 months after the effective date of the ordinance adopting the redevelopment plan.

(b) The following provisions shall apply to the approval of projects that implement a redevelopment plan authorized by this article:

(1) For 18 months after the effective date of the ordinance adopting the redevelopment plan, or until the certification of an

environmental impact report for the redevelopment plan if the report is certified during that 18-month period, subdivision (c) of Section 33492.18 shall apply.

(2) If an environmental impact report for the redevelopment plan is not certified within 18 months after the effective date of the ordinance adopting the plan, then during the succeeding 12 months or until the certification of an environmental impact report if the report is certified during that 12-month period, no project, as defined in Section 21065 of the Public Resources Code, that implements the redevelopment plan shall be approved by the agency or the community unless any of the following occurs:

(A) The agency or the community has approved a negative declaration or certified an environmental impact report, or has certified a subsequent or supplemental environmental impact report, for the project before the expiration of the 18-month period provided in Section 33492.18.

(B) The agency or the community has certified a subsequent or supplemental environmental impact report for the project where the environmental impact report for the project was certified before the expiration of the 18-month period provided in Section 33492.18.

(C) The agency or the community complies with Chapter 4.5 (commencing with Section 21156) of Division 13 of the Public Resources Code for subsequent projects described in a master environmental impact report as being within the scope of the report, and that master environmental impact report was certified before the expiration of the 18-month period provided in Section 33492.18.

(D) The project is categorically exempt pursuant to Article 19 (commencing with Section 15300) of Chapter 3 of Division 6 of Title 14 of the California Code of Regulations.

SEC. 113. Section 44015 of the Health and Safety Code is amended to read:

44015. (a) A licensed smog check station shall not issue a certificate of compliance, except as authorized by this chapter, to any vehicle that meets the following criteria:

(1) A vehicle that has been tampered with.

(2) A vehicle that, prior to repairs, has been initially identified by the smog check station as a gross polluter. Certification of a gross polluting vehicle shall be conducted by a designated test-only facility, or a test-and-repair station that is both licensed and certified pursuant to Sections 44014 and 44014.2 and is participating in the pilot program pursuant to subparagraph (B) of paragraph (2) of subdivision (g) of Section 44014.5.

(3) A vehicle described in subdivision (c).

(b) If a vehicle meets the requirements of Section 44012, a smog check station licensed to issue certificates shall issue a certificate of compliance or a certificate of noncompliance.

(c) (1) A repair cost waiver shall be issued, upon request of the vehicle owner, by an entity authorized to perform referee functions for a vehicle that has been properly tested but does not meet the applicable emission standards when it is determined that no adjustment or repair can be made that will reduce emissions from the inspected motor vehicle without exceeding the applicable repair cost limit established under Section 44017 and that every defect specified by paragraph (2) of subdivision (a) of Section 43204, and by paragraphs (2) and (3) of subdivision (a) of Section 43205, has been corrected. A repair cost waiver issued pursuant to this paragraph shall be accepted in lieu of a certificate of compliance for the purposes of compliance with Section 4000.3 of the Vehicle Code. No repair cost waiver shall exceed two years' duration. No repair cost waiver shall be issued until the vehicle owner has expended an amount equal to the applicable repair cost limit specified in Section 44017.

(2) An economic hardship extension shall be issued, upon request of a qualified low-income motor vehicle owner, by an entity authorized to perform referee functions, for a motor vehicle that has been properly tested but does not meet the applicable emission standards when it is determined that no adjustment or repair can be made that will reduce emissions from the inspected motor vehicle without exceeding the applicable repair cost limit, as established pursuant to Section 44017.1, that every defect specified in paragraph (2) of subdivision (a) of Section 43204, and in paragraphs (2) and (3) of subdivision (a) of Section 43205, has been corrected, that the low-income vehicle owner would suffer an economic hardship if the extension is not issued, and that all appropriate emissions-related repairs up to the amount of the applicable repair cost limit in Section 44017.1 have been performed.

(d) No repair cost waiver or economic hardship extension shall be issued under any of the following circumstances:

(1) If a motor vehicle was issued a repair cost waiver or economic hardship extension in the previous biennial inspection of that vehicle. A repair cost waiver or economic hardship extension may be issued to a motor vehicle owner only once for a particular motor vehicle belonging to that owner. However, a repair cost waiver or economic hardship extension may be issued for a motor vehicle that participated in a previous waiver or extension program prior to January 1, 1998, as determined by the department. For waivers or extensions issued in the program operative on or after January 1, 1998, a waiver or extension may be issued for a motor vehicle only once per owner.

(2) Upon initial registration of all of the following: a direct import motor vehicle, a motor vehicle previously registered outside this state, a dismantled motor vehicle pursuant to Section 11519 of the

Vehicle Code, a motor vehicle that has had an engine change, an alternate fuel vehicle, and a specially constructed vehicle.

(e) Unless the certificate is issued to a licensed automobile dealer, a certificate of compliance or noncompliance shall be valid for 90 days. If the certificate is issued to a licensed automobile dealer, the certificate shall be valid for 180 days.

(f) A test may be made at any time within 90 days prior to the date otherwise required.

SEC. 114. Section 50518 of the Health and Safety Code is amended and renumbered to read:

50514.5. Notwithstanding the proviso to subitem (b) of Item 190 of the Budget Act of 1976, sixty thousand dollars ($60,000) of the amount appropriated by subitem (b) of Item 190 of the Budget Act of 1976 shall not be allocated and expended as provided therein and shall instead be allocated by the Department of Finance to the Department of Housing and Community Development for a loan to a community nonprofit organization for technical assistance in the development of an industrial park in the city of Calexico. The loan shall be repaid upon the terms and conditions prescribed by the Department of Finance.

SEC. 115. Section 111940 of the Health and Safety Code is amended to read:

111940. (a) If any person violates any provision of Chapter 4 (commencing with Section 111950), Chapter 5 (commencing with Section 112150), Chapter 6 (commencing with Section 112350), Chapter 7 (commencing with Section 112500), Chapter 8 (commencing with Section 112650), Chapter 10 (commencing with Section 113025), or Article 3 (commencing with Section 113250) of Chapter 11 of this part, or Chapter 4 (commencing with Section 108100) of Part 3, or any regulation adopted pursuant to these provisions, the department may assess a civil penalty against that person as provided by this section.

(b) The penalty may be in an amount not to exceed one thousand dollars ($1,000) per day. Each day that a violation continues shall be considered a separate violation.

(c) If, after examination of a possible violation and the facts surrounding that possible violation, the department concludes that a violation has occurred, the department may issue a complaint to the person charged with the violation. The complaint shall allege the acts or failures to act that constitute the basis for the violation and the amount of the penalty. The complaint shall be served by personal service or by certified mail and shall inform the person so served of the right to a hearing.

(d) Any person served with a complaint pursuant to subdivision (c) of this section may, within 20 days after service of the complaint, request a hearing by filing with the department a notice of defense. A notice of defense is deemed to have been filed within the 20-day

97

period if it is postmarked within the 20-day period. If a hearing is requested by the person, it shall be conducted within 90 days after the receipt by the department of the notice of defense. If no notice of defense is filed within 20 days after service of the complaint, the department shall issue an order setting the penalty as proposed in the complaint unless the department and the person have entered into a settlement agreement, in which case the department shall issue an order setting the penalty in the amount specified in the settlement agreement. When the person has not filed a notice of defense or where the department and the person have entered into a settlement agreement, the order shall not be subject to review by any court or agency.

(e) Any hearing required under this section shall be conducted pursuant to the procedures specified in Section 100171, except to the extent they are inconsistent with the specific requirements of this section.

(f) Orders setting civil penalties under this section shall become effective and final upon issuance thereof, and payment shall be made within 30 days of issuance. A copy of the order shall be served by personal service or by certified mail upon the person served with the complaint.

(g) Within 30 days after service of a copy of a decision issued by the director after a hearing, any person so served may file with the superior court a petition for writ of mandate for review of the decision. Any person who fails to file the petition within this 30-day period may not challenge the reasonableness or validity of the decision or order of the director in any judicial proceeding brought to enforce the decision or order or for other remedies. Section 1094.5 of the Code of Civil Procedure shall govern any proceedings conducted pursuant to this subdivision. In all proceedings pursuant to this subdivision, the court shall uphold the decision of the director if the decision is based upon substantial evidence in the whole record. The filing of a petition for writ of mandate shall not stay any corrective action required pursuant to the Miscellaneous Food, Food Facility, and Hazardous Substances Act, as defined in subdivision (b) of Section 27, or the accrual of any penalties assessed pursuant to this section. This subdivision does not prohibit the court from granting any appropriate relief within its jurisdiction.

(h) The remedies under this section are in addition to, and do not supersede, or limit, any and all other remedies, civil or criminal.

SEC. 116. Section 120440 of the Health and Safety Code is amended to read:

120440. (a) For the purposes of this chapter, the following definitions shall apply:

(1) "Health care provider" means any person licensed pursuant to Division 2 (commencing with Section 500) of the Business and

Professions Code or a clinic or health facility licensed pursuant to Division 2 (commencing with Section 1200).

(2) "Schools, child care facilities, and family child care homes" means those institutions referred to in subdivision (b) of Section 120335, regardless of whether they directly provide immunizations to patients or clients.

(3) "WIC service provider" means any public or private nonprofit agency contracting with the department to provide services under the California Special Supplemental Food Program for Women, Infants, and Children, as provided for in Article 2 (commencing with Section 123275) of Chapter 1 of Part 2 of Division 106.

(4) "Health care plan" means a health care service plan as defined in subdivision (f) of Section 1345 or an insurer as described in Sections 10123.5 and 10123.55 of the Insurance Code, regardless of whether the plan directly provides immunizations to patients or clients.

(b) Local health officers may operate immunization information systems pursuant to their authority under Section 120175, in conjunction with the Immunization Branch of the State Department of Health Services.

(c) Notwithstanding any other provision of law, unless a refusal to permit recordsharing is made pursuant to subdivision (e), health care providers may disclose the information set forth in paragraphs (1) to (9), inclusive, from the patient's medical record to local health departments operating countywide immunization information and reminder systems and the State Department of Health Services. Local health departments and the State Department of Health Services may disclose the information set forth in paragraphs (1) to (9), inclusive, to other local health departments and health care providers taking care of the patient, upon request for information pertaining to a specific person. Local health departments and the State Department of Health Services may disclose the information in paragraphs (1) to (6), inclusive, and paragraphs (8) and (9), to schools, child care facilities, and family child care homes to which the person is being admitted or in attendance, and WIC service providers providing services to the person and health care plans arranging for immunization services for the patient, upon request for information pertaining to a specific person. The following information shall be subject to this subdivision:

(1) The name of the patient and names of the patient's parents or guardians.

(2) Date of birth of the patient.

(3) Types and dates of immunizations received by the patient.

(4) Manufacturer and lot number for each immunization received.

(5) Adverse reaction to immunizations received.

(6) Other nonmedical information necessary to establish the patient's unique identity and record.

(7) Current address and telephone number of the patient and the patient's parents or guardians.

(8) Patient's gender.

(9) Patient's place of birth.

(d) (1) Health care providers, local health departments, and the State Department of Health Services shall maintain the confidentiality of information listed in subdivision (c) in the same manner as other medical record information with patient identification that they possess. These providers and departments are subject to civil action and criminal penalties for the wrongful disclosure of the information listed in subdivision (c), in accordance with existing law. They shall use the information listed in subdivision (c) only for the following purposes:

(A) To provide immunization services to the patient, including issuing reminder notifications to patients or their parents or guardians when immunizations are due.

(B) To provide or facilitate provision of third-party payer payments for immunizations.

(C) To compile and disseminate statistical information of immunization status on groups of patients or populations in California, without patient identifying information for these patients included in these groups or populations.

(2) Schools, child care facilities, family child care homes, WIC service providers, and health care plans shall maintain the confidentiality of information listed in subdivision (c) in the same manner as other client, patient, and pupil information that they possess. These institutions and providers are subject to civil action and criminal penalties for the wrongful disclosure of the information listed in subdivision (c), in accordance with existing law. They shall use the information listed in subdivision (c) only for those purposes provided in subparagraphs (A) to (C), inclusive, of paragraph (1) and as follows:

(A) In the case of schools, child care facilities, and family child care homes, to carry out their responsibilities regarding required immunization for attendance, as described in Chapter 1 (commencing with Section 120325).

(B) In the case of WIC service providers, to perform immunization status assessments of clients and to refer those clients found to be due or overdue for immunizations to health care providers.

(C) In the case of health care plans, to facilitate payments to health care providers, to assess the immunization status of their clients, and to tabulate statistical information on the immunization status of groups of patients, without including patient-identifying information in these tabulations.

(e) A patient or a patient's parent or guardian may refuse to permit recordsharing. The health care provider administering

immunization shall inform the patient or the patient's parent or guardian of the following:

(1) The information listed in subdivision (c) may be shared with local health departments, and the State Department of Health Services. The health care provider shall provide the name and address of the department or departments with which the provider will share the information.

(2) Any of the information shared with local health departments and the State Department of Health Services shall be treated as confidential medical information and shall be used only to share with health care providers, schools, child care facilities, family child care homes, WIC service providers, and health care plans, upon request. These providers, agencies, and institutions shall, in turn, treat the shared information as confidential, and shall use it only as described in subdivision (d).

(3) The patient or patient's parent or guardian has the right to examine any immunization-related information shared in this manner and to correct any errors in it.

(4) The patient or the patient's parent or guardian may refuse to allow this information to be shared in the manner described, or to receive immunization reminder notifications at any time, or both.

(f) If the patient or patient's parent or guardian refuses to allow the information to be shared, pursuant to paragraph (4) of subdivision (e), the health care provider may not share this information in the manner described in subdivision (c).

(g) Upon request of the patient or the patient's parent or guardian, in writing or by other means acceptable to the recipient, a local health department or the State Department of Health Services that has received information about a person pursuant to subdivision (c) shall do all of the following:

(1) Provide the name and address of other persons or agencies with whom the recipient has shared the information.

(2) Stop sharing the information in its possession after the date of the receipt of the request.

(h) Upon notification, in writing or by other means acceptable to the recipient, of an error in the information, a local health department or the State Department of Health Services that has information about a person pursuant to subdivision (c) shall correct the error. If the recipient is aware of a disagreement about whether an error exists, information to that effect may be included.

(i) Section 120330 shall not apply to this section.

SEC. 117. Section 124980 of the Health and Safety Code is amended to read:

124980. (a) The director shall establish any regulations and standards for hereditary disorders programs as the director deems necessary to promote and protect the public health and safety, in

accordance with the principles established pursuant to this section. These principles shall include, but not be limited to, the following:

(1) The public, especially communities and groups particularly affected by programs on hereditary disorders, should be consulted before any regulations and standards are adopted by the department.

(2) The incidence, severity, and treatment costs of each hereditary disorder and its perceived burden by the affected community should be considered and , where appropriate, state and national experts in the medical, psychological, ethical, social, and economic effects or programs for the detection and management of hereditary disorders shall be consulted by the department.

(3) Information on the operation of all programs on hereditary disorders within the state, except for confidential information obtained from participants in the programs, shall be open and freely available to the public.

(4) Clinical testing procedures established for use in programs, facilities, and projects shall be accurate, provide maximum information, and the testing procedures selected shall produce results that are subject to minimum misinterpretation.

(5) No test or tests may be performed on any minor over the objection of the minor's parents or guardian, nor may any tests be performed unless the parent or guardian is fully informed of the purposes of testing for hereditary disorders and is given reasonable opportunity to object to the testing.

(6) No testing, except initial screening for PKU and other diseases that may be added to the newborn screening program, shall require mandatory participation, and no testing programs shall require restriction of childbearing, and participation in a testing program shall not be a prerequisite to eligibility for, or receipt of, any other service or assistance from, or to participate in, any other program, except where necessary to determine eligibility for further programs of diagnoses of or therapy for hereditary conditions.

(7) Counseling services for hereditary disorders shall be available through the program or a referral source for all persons determined to be or who believe themselves to be at risk for a hereditary disorder as a result of screening programs; the counseling shall be nondirective, emphasize informing the client, and shall not require restriction of childbearing.

(8) All participants in programs on hereditary disorders shall be protected from undue physical and mental harm, and except for initial screening for PKU and other diseases that may be added to newborn screening programs, shall be informed of the nature of risks involved in participation in the programs, and those determined to be affected with genetic disease shall be informed of the nature, and where possible the cost, of available therapies or maintenance programs, and shall be informed of the possible benefits and risks associated with these therapies and programs.

(9) All testing results and personal information generated from hereditary disorders programs shall be made available to an individual over 18 years of age, or to the individual's parent or guardian. If the individual is a minor or incompetent, all testing results that have positively determined the individual to either have, or be a carrier of, a hereditary disorder shall be given through a physician or other source of health care.

(10) All testing results and personal information from hereditary disorders programs obtained from any individual, or from specimens from any individual, shall be held confidential and be considered a confidential medical record except for information that the individual, parent, or guardian consents to be released, provided that the individual is first fully informed of the scope of the information requested to be released, of all of the risks, benefits, and purposes for the release, and of the identity of those to whom the information will be released or made available, except for statistical data compiled without reference to the identity of any individual, and except for research purposes, provided that pursuant to Subpart A (commencing with Section 46.101) of Part 46 of Title 45 of the Code of Federal Regulations entitled "Basic HHS Policy for Protection of Human Subjects," the research has first been reviewed and approved by an institutional review board that certifies the approval to the custodian of the information and further certifies that in its judgment the information is of such potentially substantial public health value that modification of the requirement for legally effective prior informed consent of the individual is ethically justifiable.

(11) An individual whose confidentiality has been breached as a result of any violation of the provisions of the Hereditary Disorders Act , as defined in subdivision (b) of Section 27, may recover compensatory damages and, in addition, may recover civil damages not to exceed ten thousand dollars ($10,000), reasonable attorney's fees, and the costs of litigation.

(b) The department shall recommend appropriate criteria and standards for licensing genetic counselors. In the process of developing the recommended criteria and standards, the department shall consult with a group of medical experts representing medical professional organizations including, but not limited to, the Medical Board of California, the California Medical Association, and organizations representing genetic counselors in California. The department shall report its recommendations to the Legislature by January 1, 2000.

SEC. 118. Section 129820 of the Health and Safety Code is amended to read:

129820. No contract for the construction or alteration of any hospital building, made or executed on or after January 1, 1983, by the governing board or authority of any hospital or other similar public board, body, or officer otherwise vested with authority to make or

execute the contract, is valid, and no money shall be paid for any work done under the contract or for any labor or materials furnished in constructing or altering the hospital building, unless all of the following requirements are satisfied:

(a) The plans and specifications comply with this chapter and the requirements contained in the California Building Standards Code.

(b) The written approval thereof has first been obtained from the office.

(c) The hospital building is to be accessible to, and usable by, persons with disabilities.

(d) The plans and specifications comply with the fire and panic safety requirements of the California Building Standards Code.

SEC. 119. Section 1063.6 of the Insurance Code is amended to read:

1063.6. All proceedings in which the insolvent insurer is a party or is obligated to defend a party in any court in the state shall, subject to waiver by the association in specific cases involving covered claims and subject to waiver by the commissioner as to matters that are not covered claims, be stayed for 60 days from the date that an order of liquidation or an order of receivership with a finding of insolvency has been entered by a superior court in this state or by a court in the state of domicile of the insurer, and an additional time thereafter as may be determined necessary by the court to permit proper defense or conduct of all pending causes of action by the association or the commissioner, as applicable. The stay as to matters to which the insolvent insurer is a party shall be superseded by and when an injunction or stay order is entered by the court in this state having jurisdiction of the liquidation or the ancillary liquidation.

The liquidator, receiver, or statutory successor of an insolvent member insurer shall permit reasonable access by the association to the insolvent insurer's records as is necessary for the association to carry out its duties with regard to covered claims. In addition, the liquidator, receiver, or statutory successor shall provide the association with copies of these records upon the reasonable request of the association and at the expense of the association.

SEC. 120. Section 1765.1 of the Insurance Code is amended to read:

1765.1. No surplus line broker shall place any coverage with a nonadmitted insurer unless the insurer is domiciled in the Republic of Mexico and the placement covers only liability arising out of the ownership, maintenance, or use of a motor vehicle, aircraft, or boat in the Republic of Mexico, or, at the time of placement, the nonadmitted insurer:

(a) (1) Has established its financial stability, reputation, and integrity, for the class of insurance the broker proposes to place, by satisfactory evidence submitted to the commissioner through a surplus line broker.

(2) Has capital and surplus as follows:

(A) Capital and surplus that together total at least fifteen million dollars ($15,000,000). "Capital" shall be as defined in Section 36. "Surplus" shall be defined as assets exceeding the sum of liabilities for losses reported, expenses, taxes, and all other indebtedness and reinsurance of outstanding risks as provided by law and paid-in capital in the case of an insurer issuing or having outstanding shares of capital stock. The type of assets to be used in calculating capital and surplus shall be as follows: at least fifteen million dollars ($15,000,000) shall be in the form of cash, or securities of the same character and quality as specified in Sections 1170 to 1182, inclusive, or in readily marketable securities listed on regulated United States national or principal regional securities exchanges. The remaining assets shall be in the form just described, or in the form of investments of substantially the same character and quality as described in Sections 1190 to 1202, inclusive. In calculating capital and surplus under this section, the term "same character and quality" shall permit, but not require, the commissioner to approve assets maintained in accordance with the laws of another state or country. The commissioner shall be guided by any limitations, restrictions, or other requirements of this code or the National Association of Insurance Commissioners' Accounting Practices and Procedures Manual in determining whether assets substantially similar to those described in Sections 1190 to 1202, inclusive, qualify. The commissioner shall retain the discretion to disapprove or disallow any asset that is not of a sound quality, or that he or she deems to create an unacceptable risk of loss to the insurer or to policyholders. Securities specifically valued by the National Association of Insurance Commissioners Securities Valuation Office shall be presumed readily marketable absent evidence to the contrary. Letters of credit will not qualify as assets in the calculation of surplus. If less than fifteen million dollars ($15,000,000), the commissioner has affirmatively found that the capital and surplus is adequate to protect California policyholders. The commissioner shall consider, on determining whether to make this finding, factors such as quality of management, the capital and surplus of any parent company, the underwriting profit and investment income trends, and the record of claims payment and claims handling practices of the nonadmitted insurer.

(B) In the case of an "Insurance Exchange" created and authorized under the laws of individual states, maintains capital and surplus of not less than fifty million dollars ($50,000,000) in the aggregate. "Capital" shall be defined as in Section 36. "Surplus" shall be defined as assets exceeding the sum of liabilities for losses reported, expenses, taxes, and all other indebtedness and reinsurance of outstanding risks as provided by law and paid-in capital in the case of an insurer issuing or having outstanding shares of capital stock. The type of assets to be used in calculating capital and surplus shall be as

follows: at least fifteen million dollars ($15,000,000) shall be in the form of cash, or securities of the same character and quality as specified in Sections 1170 to 1182, inclusive, or in readily marketable securities listed on regulated United States' national or principal regional securities exchanges. The remaining assets shall be in the form just described, or in the form of investments of substantially the same character and quality as described in Sections 1190 to 1202, inclusive. In calculating capital and surplus under this section, the term "same character and quality" shall permit, but not require, the commissioner to approve assets maintained in accordance with the laws of another state or country. The commissioner shall be guided by any limitations, restrictions, or other requirements of this code or the National Association of Insurance Commissioners' Accounting Practices and Procedures Manual in determining whether assets substantially similar to those described in Sections 1190 to 1202, inclusive, qualify. The commissioner shall retain the discretion to disapprove or disallow any asset that is not of a sound quality, or that he or she deems to create an unacceptable risk of loss to the insurer or to policyholders. Securities specifically valued by the National Association of Insurance Commissioners Securities Valuation Office shall be presumed readily marketable absent evidence to the contrary. Letters of credit will not qualify as assets in the calculation of surplus. In the case of an Insurance Exchange that maintains funds for the protection of all Insurance Exchange policyholders, each individual syndicate seeking to accept surplus line placements of risks resident, located, or to be performed in this state shall maintain minimum capital and surplus of not less than six million four hundred thousand dollars ($6,400,000). Each individual syndicate shall increase the capital and surplus required by this paragraph by one million dollars ($1,000,000) each year until it attains a capital and surplus of fifteen million dollars ($15,000,000). In the case of an Insurance Exchange that does not maintain funds for the protection of all Insurance Exchange policyholders, each individual syndicate seeking to accept surplus line placement of risks resident, located, or to be performed in this state shall meet the capital and surplus requirements of subparagraph (A).

(C) In the case of a syndicate that is part of a group consisting of incorporated individual insurers, or a combination of both incorporated and unincorporated insurers, that at all times maintains a trust fund of not less than one hundred million dollars ($100,000,000) in a qualified United States financial institution as security to the full amount thereof for the United States surplus line policyholders and beneficiaries of direct policies of the group, including all policyholders and beneficiaries of direct policies of the syndicate, and the full balance in the trust fund is available to satisfy the liabilities of each member of the group of those syndicates, incorporated individual insurers or other unincorporated insurers,

without regard to their individual contributions to that trust fund, and the trust complies with the terms of and conditions specified in paragraph (1) of subdivision (b), the syndicate is excepted from the capital and surplus requirements of subparagraph (A). The incorporated members of the group shall not be engaged in any business other than underwriting as a member of the group and shall be subject to the same level of solvency regulation and control by the group's domiciliary regulator as are the unincorporated members.

(b) (1) In addition, to be eligible as a surplus line insurer, an insurer not domiciled in one of the United States or its territories shall have in force in the United States an irrevocable trust account in a qualified United States financial institution, for the protection of United States policyholders, of not less than five million four hundred thousand dollars ($5,400,000) and consisting of cash, securities acceptable to the commissioner that are authorized pursuant to Sections 1170 to 1182, inclusive, readily marketable securities acceptable to the commissioner that are listed on a regulated United States national or principal regional security exchange, or clean and irrevocable letters of credit acceptable to the commissioner and issued by a qualified United States financial institution. The trust agreement shall be in a form acceptable to the commissioner. The funds in the trust account may be included in any calculation of capital and surplus, except letters of credit, which shall not be included in any calculation.

(2) In the case of a syndicate seeking eligibility under subparagraph (C) of paragraph (2) of subdivision (a) the syndicate shall, in addition to the requirements of that subparagraph, at a minimum, maintain in the United States a trust account in an amount satisfactory to the commissioner that is not less than the amount required by the domiciliary state of the syndicate's trust. The trust account shall comply with the terms and conditions specified in paragraph (1) of subdivision (b).

(3) In the case of a group of incorporated insurers under common administration that maintains a trust fund of not less than one hundred million dollars ($100,000,000) in a qualified United States financial institution for the payment of claims of its United States policyholders, their assigns, or successors in interest and that complies with the terms and conditions of paragraph (1) that has continuously transacted an insurance business outside the United States for at least three years, that is in good standing with its domiciliary regulator, whose individual insurer members maintain standards and financial conditions reasonably comparable to admitted insurers, that submits to this state's authority to examine its books and bears the expense of examination, and that has an aggregate policyholder surplus of ten billion dollars ($10,000,000,000), the group is excepted from the capital and surplus requirements of subdivision (a).

97

(c) Has caused to be provided to the commissioner the following documents:

(1) The financial documents as specified below, each showing the insurer's condition as of a date not more than 12 months prior to submission:

(A) A copy of an annual statement, prepared in the form prescribed by the NAIC. For an alien insurer, in lieu of an annual statement, a licensee may submit a form as set forth by regulation and as prepared by the insurer, and, if listed by the IID, a copy of the complete information as required in the application for listing by the IID.

(B) A copy of an audited financial report on the insurer's condition that meets the standards of subparagraph (D) for foreign insurers or subparagraph (E) for alien insurers.

(C) If the insurer is an alien:

(i) A certified copy of the trust agreement referenced in subdivision (b).

(ii) A verified copy of the most recent quarterly statement or list of the assets in the trust.

(D) Financial reports filed pursuant to this section by foreign insurers shall conform to the following standards:

(i) Financial documents shall be certified.

(ii) An audited financial report shall constitute a supplement to the insurer's annual statement, as required by the annual statement instructions issued by the NAIC.

(iii) An audited financial report shall be prepared by an independent certified public accountant or accounting firm in good standing with the American Institute of Certified Public Accountants and in all states where licensed to practice; and be prepared in conformity with statutory accounting practices prescribed, or otherwise permitted, by the insurance regulator of the insurer's domiciliary jurisdiction.

(iv) An audited financial report shall include information on the insurer's financial position as of the end of the most recent calendar year, and the results of its operations, cash-flows, and changes in capital and surplus for the year then ended.

(v) An audited financial report shall be prepared in a form and using language and groupings substantially the same as the relevant sections of the insurer's annual statement filed with its domiciliary jurisdiction, and presenting comparatively the amounts as of December 31 of the most recent calendar year and the amounts as of December 31 of the preceding year.

(E) Financial reports filed pursuant to this section by alien insurers shall conform to the following standards:

(i) Except as provided in clause (ii) of subparagraph (C), financial documents should be certified, if certification of a financial document is not available, the document shall be verified.

(ii) Financial documents should be expressed in United States dollars, but may be expressed in another currency, if the exchange rate for the other currency as of the date of the document is also provided.

(iii) The responses provided pursuant to subparagraph (A) of paragraph (1) on the form submitted in lieu of an annual statement should follow the most recent ISI Guide to Alien Reporting Format, "Standard Definitions of Accounting Items." Responses that do not agree with a standard definition shall be fully explained in the form.

(iv) An audited financial report shall be prepared by an independent licensed auditor in the insurer's domiciliary jurisdiction or in any state.

(v) An audited financial report shall be prepared in accord with either (I) Generally Accepted Auditing Standards that prescribe Generally Accepted Accounting Principles, or (II) International Accounting Standards as published and revised from time to time by the International Auditing Guidelines published by the International Auditing Practice Committee of the International Federation of Accountants; and shall include financial statement notes and a summary of significant accounting practices.

(F) The commissioner may accept, in lieu of a document described above, any certified or verified financial or regulatory document, statement, or report if the commissioner finds that it possesses reliability and financial detail substantially equal to or greater than the document for which it is proposed to be a substitute.

(G) If one of the financial documents required to be submitted under subparagraphs (A) and (B) is dated within 12 months of submission, but the other document is not so dated, the licensee may use the outdated document if it is accompanied by a supplement. The supplement must meet the same requirements which apply to the supplemented document, and must update the outdated document to a date within the prescribed time period, preferably to the same date as the nonsupplemented document.

(2) A certified copy of the insurer's license issued by its domiciliary jurisdiction, plus a certification of good standing, certificate of compliance, or other equivalent certificate, from either that jurisdiction or, if the jurisdiction does not issue those certificates, from any state where it is licensed.

(3) Information on the insurer's agent in California for service of process, including the agent's full name and address. The agent's address must include a street address where the agent can be reached during normal business hours.

(4) The complete street address, mailing address, and telephone number of the insurer's principal place of business.

(5) A certified or verified explanation, report, or other statement, from the insurance regulatory office or official of the insurer's domiciliary jurisdiction, concerning the insurer's record regarding

market conduct and consumer complaints; or, if that information cannot be obtained from that jurisdiction, then any other information that the licensee can procure to demonstrate a good reputation for payment of claims and treatment of policyholders.

(6) A verified statement, from the insurer or licensee, on whether the insurer or any affiliated entity is currently known to be the subject of any order or proceeding regarding conservation, liquidation, or other receivership; or regarding revocation or suspension of a license to transact insurance in any jurisdiction; or otherwise seeking to stop the insurer from transacting insurance in any jurisdiction. The statement shall identify the proceeding by date, jurisdiction, and relief or sanction sought; and shall attach a copy of the relevant order.

(7) A certified copy of the most recent report of examination or an explanation if the report is not available.

(d) (1) Has provided any additional information or documentation required by the commissioner that is relevant to the financial stability, reputation, and integrity of the nonadmitted insurer. In making a determination concerning financial stability, reputation, and integrity of the nonadmitted insurer, the commissioner shall consider any analysis, findings, or conclusion made by the National Association of Insurance Commissioners (NAIC) in its review of the insurer for purposes of inclusion on or exclusion from the list of authorized nonadmitted insurers maintained by the NAIC. The commissioner may, but shall not be required to, rely on, adopt, or otherwise accept any analyses, findings, or conclusions of the NAIC, as the commissioner deems appropriate. In the case of a syndicate seeking eligibility under subparagraph (C) of paragraph (2) of subdivision (a), the commissioner may, but shall not be required to, rely on, adopt, or otherwise accept any analyses, findings, or conclusions of any state, as the commissioner deems appropriate, as long as that state, in its method of regulation and review, meets the requirements of paragraph (2).

(2) The regulatory body of the state shall regularly receive and review the following: (A) an audited financial statement of the syndicate, prepared by a certified or chartered public accountant; (B) an opinion of a qualified actuary with regard to the syndicate's aggregate reserves for payment of losses or claims and payment of expenses of adjustment or settlement of losses or claims; (C) a certification from the qualified United States financial institution that acts as the syndicate's trustee, respecting the existence and value of the syndicate's trust fund; and (D) information concerning the syndicate's or its manager's operating history, business plan, ownership and control, experience and ability, together with any other pertinent factors, and any information indicating that the syndicate or its manager make reasonably prompt payment of claims in this state or elsewhere. The regulatory body of the state shall have

the authority, either by law or through the operation of a valid and enforceable agreement, to review the syndicate's assets and liabilities and audit the syndicate's trust account, and shall exercise that authority with a frequency and in a manner satisfactory to the commissioner.

(e) Has established that:

(1) All documents required by subdivisions (c) and (d) have been filed. Each of the documents appear after review to be complete, clear, comprehensible, unambiguous, accurate, and consistent.

(2) The documents affirm that the insurer is not subject in any jurisdiction to an order or proceeding that:

(A) Seeks to stop it from transacting insurance.

(B) Relates to conservation, liquidation, or other receivership.

(C) Relates to revocation or suspension of its license.

(3) The documents affirm that the insurer has actively transacted insurance for the three years immediately preceding the filing made under this section, unless an exemption is granted. As used in this paragraph, "insurer" does not include a syndicate of underwriting entities. The commissioner may grant an exemption if the licensee has applied for exemption and demonstrates either of the following:

(A) The insurer meets the condition for any exception set forth in subdivision (a), (b), or (c) of Section 716.

(B) If the insurer has been actively transacting insurance for at least 12 months, and the licensee demonstrates that the exemption is warranted because the insurer's current financial strength, operating history, business plan, ownership and control, management experience, and ability, together with any other pertinent factors, make three years of active insurance transaction unnecessary to establish sufficient reputation.

(4) The documents confirm that the insurer holds a license to issue insurance policies (other than reinsurance) to residents of the jurisdiction that granted the license unless an exemption is granted. The commissioner may grant an exemption if the licensee has applied for an exemption and demonstrates that the exemption is warranted because the insurer proposes to issue in California only commercial coverage, and is wholly owned and actually controlled by substantial and knowledgeable business enterprises that are its policyholders and that effectively govern the insurer's destiny in furtherance of their own business objectives.

(5) The information filed pursuant to paragraph (5) of subdivision (c) or otherwise filed with or available to the commissioner, including reports received from California policyholders, shall indicate that the insurer makes reasonably prompt payment of claims in this state or elsewhere.

(6) The information available to the commissioner shall not indicate that the insurer offers in California a licensee products or rates that violate any provision of this code.

(f) Has been placed on the list of eligible surplus line insurers by the commissioner. The commissioner shall establish a list of all surplus line insurers that have met the requirements of subdivisions (a) to (e), inclusive, and shall publish a master list at least semiannually. Any insurer receiving approval as an eligible surplus line insurer shall be added by addendum to the list at the time of approval, and shall be incorporated into the master list at the next date of publication. If an insurer appears on the most recent list, it shall be presumed that the insurer is an eligible surplus line insurer, unless the commissioner or his or her designee has mailed or causes to be mailed notice to all surplus line brokers that the commissioner has withdrawn the insurer's eligibility. Upon receipt of notice, the surplus line broker shall make no further placements with the insurer. Nothing in this subdivision shall limit the commissioner's discretion to withdraw an insurer's eligibility.

(g) (1) Except as provided by paragraph (2), whenever the commissioner has reasonable cause to believe, and determines after a public hearing, that any insurer on the list established pursuant to subdivision (f), (A) is in an unsound financial condition, (B) does not meet the eligibility requirements under subdivisions (a) to (e), inclusive, (C) has violated the laws of this state, or (D) without justification, or with a frequency so as to indicate a general business practice, delays the payment of just claims, the commissioner may issue an order removing the insurer from the list. Notice of hearing shall be served upon the insurer or its agent for service of process stating the time and place of the hearing and the conduct, condition, or ground upon which the commissioner would make his or her order. The hearing shall occur not less than 20 days, nor more than 30 days after notice is served upon the insurer or its agent for service of process.

(2) If the commissioner determines that an insurer's immediate removal from the list is necessary to protect the public or an insured or prospective insured of the insurer, or, in the case of an application by an insurer to be placed on the list which is being denied by the commissioner, the commissioner may issue an order pursuant to paragraph (1) without prior notice and hearing. At the time an order is served pursuant to this paragraph to an insurer on the list, the commissioner shall also issue and serve upon the insurer a statement of the reasons that immediate removal is necessary. Any order issued pursuant to this paragraph shall include a notice stating the time and place of a hearing on the order, which shall be not less than 20 days, nor more than 30 days after the notice is served.

(3) Notwithstanding paragraphs (1) and (2), if the commissioner is basing a decision to remove an insurer from the list, or deny an application to be placed on the list, on the failure of the insurer or applicant to comply with, meet or maintain any of the objective criteria established by this section, or by regulation adopted pursuant

to this section, the commissioner may so specify this fact in the order, and no hearing shall be required to be held on the order.

(4) Notwithstanding paragraphs (1) and (2), the commissioner may, without prior notice or hearing, remove from the list established pursuant to subdivision (f) any insurer that has failed or refused to timely provide documents required by this section, or any regulations adopted to implement this section. The commissioner shall notify all surplus line brokers of any removal made pursuant to this paragraph.

(h) In addition to any other statements or reports required by this chapter, the commissioner may also address to any licensee a written request for full and complete information respecting the financial stability, reputation and integrity of any nonadmitted insurer with whom the licensee has dealt or proposes to deal in the transaction of insurance business. The licensee so addressed shall promptly furnish in written or printed form so much of the information requested as he or she can produce together with a signed statement identifying the same and giving reasons for omissions, if any. After due examination of the information and accompanying statement, the commissioner may, if he or she believes it to be in the public interest, order the licensee in writing to place no further insurance business on property located or operations conducted within or on the lives of persons who are residents of this state with the nonadmitted insurer on behalf of any person. Any placement in the nonadmitted insurer made by a licensee after receipt of that order is a violation of this chapter. The commissioner may issue an order when documents submitted pursuant to subdivisions (c) and (d) do not meet the criteria of subdivisions (a) to (e), inclusive, or when the commissioner obtains documents on an insurer and the insurer does not meet the criteria of subdivisions (a) to (e), inclusive.

(i) The commissioner shall require, at least annually, the submission of records and statements as are reasonably necessary to ensure that the requirements of this section are maintained.

(j) The commissioner shall establish by regulation a schedule of fees to cover costs of administering and enforcing this chapter.

(k) (1) Insurance may be placed on a limited basis with insurers not on the list established pursuant to this section if all of the following conditions are met:

(A) The use of multiple insurers is necessary to obtain coverage for 100 percent of the risk.

(B) At least 80 percent of the risk is placed with admitted insurers or insurers that appear on the list of eligible nonadmitted insurers.

(C) The placing surplus line broker submits to the commissioner, or his or her designee, copies of all documentation relied upon by the surplus line broker to make the broker's determination that the financial stability, reputation, and integrity of the unlisted insurer or insurers, are adequate to safeguard the interest of the insured under

the policy. This documentation, and any other documentation regarding the unlisted insurer requested by the commissioner, shall be submitted no more than 30 days after the insurance is placed with the unlisted insurer for the initial placement by that broker with the particular unlisted insurer, and annually thereafter for as long as the broker continues to make placements with the unlisted insurer pursuant to this paragraph.

(D) The insured has aggregate annual premiums for all risks other than workers' compensation or health coverage totaling no less than one hundred thousand dollars ($100,000).

(2) Insurance may not be placed pursuant to paragraph (1) if any of the following applies:

(A) The unlisted insurer has for any reason been objected to by the commissioner pursuant to this section, removed from the list, or denied placement on the list.

(B) The insurance includes coverage for employer-sponsored medical, surgical, hospital, or other health or medical expense benefits payable to the employee by the insurer.

(C) The insurance is mandatory under the laws of the federal government, this state, or any political subdivision thereof, and includes any portion of limits of coverage mandated by those laws.

(D) The insured is a multiple employer welfare arrangement, as defined in Section 1002(40)(A) of Title 29 of the United States Code, or any other arrangement among two or more employers that are not under common ownership or control, which is established or maintained for the primary purpose of providing insurance benefits to the employees of two or more employers.

(E) Unlisted insurers represent a disproportionate portion of the lower layers of the coverage.

(3) Nothing in this section is intended to alter any duties of a surplus line broker pursuant to subdivision (b) of Section 1765 or other laws of this state to safeguard the interests of the insured under the policy in recommending or placing insurance with a nonadmitted insurer.

(4) Placements authorized by this subdivision are intended to provide sophisticated insurance purchasers with a means to obtain necessary commercial insurance coverage from nonadmitted insurers not listed by the commissioner in situations where it is not commercially possible to fully obtain that coverage from either admitted or listed insurers. This subdivision shall not be deemed to permit surplus line brokers to place with nonadmitted insurers common commercial or personal line coverages for insureds that can be placed with insurers that are admitted or listed pursuant to this section, whether the insured is an individual insured, or a group created primarily for the purpose of purchasing insurance.

(*l*) As used in this section:

(1) "Certified" means an originally signed or sealed statement, dated not more than 60 days before submission, made by a public official or other person, attached to a copy of a document, that attests that the copy is a true copy of the original, and that the original is in the custody of the person making the statement.

(2) "Domiciliary jurisdiction" means the state, nation, or subdivision thereof under the laws of which an insurer is incorporated or otherwise organized.

(3) "Domiciliary state of the syndicate's trust" means the state in which the syndicate's trust fund is principally maintained and administered for the benefit of the syndicate's policyholders in the United States.

(4) "IID" means the International Insurers Department.

(5) "Insurer" means (unless the context indicates otherwise) "nonadmitted" insurers that are either "foreign" or "alien" insurers, as those terms are defined in Sections 25, 27, and 1580, and syndicates whose members consist of individual incorporated insurers who are not engaged in any business other than underwriting as a member of the group and individual unincorporated insurers, provided all the members are subject to the same level of solvency regulation and control by the group's domiciliary regulator. The term "insurer" includes all nonadmitted insurers selling insurance to or through purchasing groups as defined in the Liability Risk Retention Act of 1986 (15 U.S.C. Sec. 3901 et seq.) and the California Risk Retention Act of 1990 (Chapter 1.5 (commencing with Section 125) of Part 1 of Division 1), except insurers that are risk retention groups as defined by those acts.

(6) "ISI" means Insurance Solvency International.

(7) "Licensee" means a surplus line broker as defined in Section 47.

(8) "NAIC" means the National Association of Insurance Commissioners or its successor organization.

(9) "NAIIO" means the Nonadmitted Alien Insurer Information Office of the NAIC or its successor office.

(10) "State" means any state of the United States, the District of Columbia, a commonwealth, or a territory.

(11) "Verified" means a document or copy accompanied by an originally signed statement, dated not more than 60 days before submission, from a responsible executive or official who has authority to provide the statement and knowledge whereof he or she speaks, attesting either under oath before a notary public, or under penalty of perjury under California law, that the assertions made in the document are true.

(m) With respect to a nonadmitted insurer that is listed as an authorized surplus line insurer as of December 31, 1994, pursuant to Sections 2174.1 to 2174.14, inclusive, of Title 10 of the California Code of Regulations, this section shall not be effective until the subsequent

expiration of the listing of that insurer. Nothing in the bill that amended this section during the 1994 portion of the 1993–94 Regular Session is intended to repeal or imply that there is not authority to adopt, or to have adopted, or to continue in force, any regulation, or part thereof, with respect to surplus line insurance that is not clearly inconsistent with it.

SEC. 121. Section 10095 of the Insurance Code is amended to read:

10095. (a) Within 30 days following the effective date of this chapter, the association shall submit to the commissioner, for his or her review, a proposed plan of operation, consistent with the provisions of this chapter, creating an association consisting of all insurers licensed to write and engaged in writing in this state, on a direct basis, basic property insurance or any component thereof in homeowners or other dwelling multiperil policies. Every insurer so described shall be a member of the association and shall remain a member as a condition of its authority to transact those kinds of insurance in this state.

(b) The proposed plan shall authorize the association to assume and cede reinsurance on risks written by insurers in conformity with the program.

(c) Under the plan, each insurer shall participate in the writings, expenses, profits and losses of the association in the proportion that its premiums written during the second preceding calendar year bear to the aggregate premiums written by all insurers in the program, excluding that portion of the premiums written attributable to the operation of the association. Premiums written on a policy of basic residential earthquake insurance issued by the California Earthquake Authority pursuant to Section 10089.6 shall be attributed to the insurer that writes the underlying policy of residential property insurance.

(d) The plan shall provide for administration by a governing committee under rules to be adopted by it with the approval of the commissioner. Voting on administrative questions of the association and facility shall be weighted in accordance with each insurer's premiums written during the second preceding calendar year as disclosed in the reports filed by the insurer with the commissioner.

(e) The plan shall provide for a plan to encourage persons to secure basic property insurance through normal channels from an admitted insurer or a licensed surplus line broker by informing those persons what steps they must take in order to secure the insurance through normal channels.

(f) The plan shall be subject to the approval of the commissioner and shall go into effect upon the tentative approval of the commissioner. The commissioner may, at any time, withdraw his or her tentative approval or he or she may, at any time after he or she has given his or her final approval, revoke that approval if he or she

feels it is necessary to carry out the purposes of the chapter. The withdrawal or revocation of that approval shall not affect the validity of any policies executed prior to the date of the withdrawal. If the commissioner disapproves or withdraws or revokes his or her approval to all or any part of the plan of operation, the association shall, within 30 days, submit for review an appropriately revised plan or part thereof, and, if the association fails to do so, or if the revised plan so filed is unacceptable, the commissioner shall promulgate a plan of operation or part thereof as he or she may deem necessary to carry out the purpose of this chapter.

(g) The association may, on its own initiative or at the request of the commissioner, amend the plan of operation, subject to approval by the commissioner, who shall have supervision of the inspection bureau, the facility and the association. The commissioner or any person designated by him or her, shall have the power of visitation of and examination into the operation and free access to all the books, records, files, papers, and documents that relate to operation of the facility and association, and may summon, qualify, and examine as witnesses all persons having knowledge of those operations, including officers, agents, or employees thereof.

(h) Every insurer member of the plan shall provide to applicants who are denied coverage the statewide toll-free "800" number for the plan established pursuant to Section 10095.5 for the purpose of obtaining information and assistance in obtaining basic property insurance.

SEC. 122. Section 10116.5 of the Insurance Code is amended to read:

10116.5. (a) Every policy of disability insurance that is issued, amended, delivered, or renewed in this state on or after January 1, 1999, that provides hospital, medical, or surgical expense coverage under an employer-sponsored group plan for an employer subject to COBRA, as defined in subdivision (e), or an employer group for which the disability insurer is required to offer Cal-COBRA coverage, as defined in subdivision (f), including a carrier providing replacement coverage under Section 10128.3, shall further offer the former employee the opportunity to continue benefits as required under subdivision (b), and shall further offer the former spouse of an employee or former employee the opportunity to continue benefits as required under subdivision (c).

(b) (1) If a former employee worked for the employer for at least five years prior to the date of termination of employment and is 60 years of age or older on the date employment ends is entitled to and so elects to continue benefits under COBRA or Cal-COBRA for himself or herself and for any spouse, the employee or spouse may further continue benefits beyond the date coverage under COBRA or Cal-COBRA ends, as set forth in paragraph (2). Except as otherwise specified in this section, continuation coverage shall be

under the same benefit terms and conditions as if the continuation coverage under COBRA or Cal-COBRA had remained in force. For the employee or spouse, continuation coverage following the end of COBRA or Cal-COBRA is subject to payment of premiums to the insurer. Individuals ineligible for COBRA or Cal-COBRA or who are eligible but have not elected or exhausted continuation coverage under federal COBRA or Cal-COBRA are not entitled to continuation coverage under this section. Premiums for continuation coverage under this section shall be billed by, and remitted to, the insurer in accordance with subdivision (d). Failure to pay the requisite premiums may result in termination of the continuation coverage in accordance with the applicable provisions in the insurer's group contract with the former employer.

(2) The former employer shall notify the former employee or spouse or both, or the former spouse of the employee or former employee, of the availability of the continuation benefits under this section in accordance with Section 2800.2 of the Labor Code. To continue health care coverage pursuant to this section, the individual shall elect to do so by notifying the insurer in writing within 30 calendar days prior to the date continuation coverage under COBRA or Cal-COBRA is scheduled to end. Every disability insurer shall provide to the employer replacing a group benefit plan policy issued by the insurer, or to the employer's agent or broker representative, within 15 days of any written request, information in possession of the insurer reasonably required to administer the requirements of Section 2800.2 of the Labor Code.

(3) The continuation coverage shall end automatically on the earlier of (A) the date the individual reaches age 65, (B) the date the individual is covered under any group health plan not maintained by the employer or any other insurer or health care service plan, regardless of whether that coverage is less valuable, (C) the date the individual becomes entitled to Medicare under Title XVIII of the Social Security Act, (D) for a spouse, five years from the date on which continuation coverage under COBRA or Cal-COBRA was scheduled to end for the spouse, or (E) the date on which the former employer terminates its group contract with the insurer and ceases to provide coverage for any active employees through that insurer, in which case the insurer shall notify the former employee or spouse, or both, of the right to a conversion policy.

(c) (1) If a former spouse of an employee or former employee was covered as a qualified beneficiary under COBRA or Cal-COBRA, the former spouse may further continue benefits beyond the date coverage under COBRA or Cal-COBRA ends, as set forth in paragraph (2) of subdivision (b). Except as otherwise specified in this section, continuation coverage shall be under the same benefit terms and conditions as if the continuation coverage under COBRA or Cal-COBRA had remained in force. Continuation coverage following

the end of COBRA or Cal-COBRA is subject to payment of premiums to the insurer. Premiums for continuation coverage under this section shall be billed by, and remitted to, the insurer in accordance with subdivision (d). Failure to pay the requisite premiums may result in termination of the continuation coverage in accordance with the applicable provisions in the insurer's group contract with the employer or former employer.

(2) The continuation coverage for the former spouse shall end automatically on the earlier of (A) the date the individual reaches 65 years of age, (B) the date the individual is covered under any group health plan not maintained by the employer or any other health care service plan or insurer, regardless of whether that coverage is less valuable, (C) the date the individual becomes entitled to Medicare under Title XVIII of the Social Security Act, (D) five years from the date on which continuation coverage under COBRA or Cal-COBRA was scheduled to end for the former spouse, or (E) the date on which the employer or former employer terminates its group contract with the insurer and ceases to provide coverage for any active employees through that insurer, in which case the insurer shall notify the former spouse of the right to a conversion policy.

(d) (1) If the premium charged to the employer for a specific employee or dependent eligible under this section is adjusted for the age of the specific employee, or eligible dependent, on other than a composite basis, the rate for continuation coverage under this section shall not exceed 102 percent of the premium charged by the insurer to the employer for an employee of the same age as the former employee electing continuation coverage in the case of an individual who was eligible for COBRA, and 110 percent in the case of an individual who was eligible for Cal-COBRA. If the coverage continued is that of a former spouse, the premium charged shall not exceed 102 percent of the premium charged by the plan to the employer for an employee of the same age as the former spouse selecting continuation coverage in the case of an individual who was eligible for COBRA, and 110 percent in the case of an individual who was eligible for Cal-COBRA.

(2) If the premium charged to the employer for a specific employee or dependent eligible under this section is not adjusted for age of the specific employee, or eligible dependent, then the rate for continuation coverage under this section shall not exceed 213 percent of the applicable current group rate. For purposes of this section, the "applicable current group rate" means the total premiums charged by the insurer for coverage for the group, divided by the relevant number of covered persons.

(3) However, in computing the premiums charged to the specific employer group, the insurer shall not include consideration of the specific medical care expenditures for beneficiaries receiving continuation coverage pursuant to this section.

97

(e) For purposes of this section, "COBRA" means Section 4980B of Title 26 , Section 1161 and following of Title 29 , and Section 300bb of Title 42 of the United States Code, as added by the Consolidated Omnibus Budget Reconciliation Act of 1985 (P.L. 99-272), and as amended.

(f) For purposes of this section, "Cal-COBRA" means the continuation coverage that must be offered pursuant to Article 1.7 (commencing with Section 10128.50), or Article 4.5 (commencing with Section 1366.20) of Chapter 2.2 of Division 2 of the Health and Safety Code.

(g) For the purposes of this section, "former spouse" means either an individual who is divorced from an employee or former employee or an individual who was married to an employee or former employee at the time of the death of the employee or former employee.

(h) Every group benefit plan evidence of coverage that is issued, amended, or renewed after January 1, 1999, shall contain a description of the provisions and eligibility requirements for the continuation coverage offered pursuant to this section.

(i) This section shall take effect on January 1, 1999.

SEC. 123. Section 10194.8 of the Insurance Code is amended to read:

10194.8. (a) No Medicare supplement insurer shall deny or condition the issuance or effectiveness of Medicare supplement coverage, nor discriminate in the pricing of coverage, because of health status, claims experience, receipt of health care or medical condition of an applicant in the case of an application for a policy or certificate that is submitted prior to or during the six-month period beginning with the first day of the first month in which an individual is both 65 years of age or older and is enrolled for benefits under Medicare Part B. This section shall not be construed as preventing the exclusion of benefits for preexisting conditions as defined in paragraph (1) of subdivision (a) of Section 10195, except as provided for in paragraph (1) of subdivision (b).

(b) (1) In determining whether an exclusion of benefits for a preexisting condition may be applied to any person during the open enrollment period provided in this section, a Medicare supplement insurer shall credit the time the person was covered under creditable coverage, provided that the individual becomes eligible for coverage under the Medicare supplement policy:

(A) Within 180 days of the termination of any creditable coverage if the creditable coverage is offered through employment or sponsored by an employer and if the Medicare supplement insurance is offered through succeeding employment or sponsored by a succeeding employer, and is not in violation of the Medicare Secondary Payer provision of Section 1862(b) of the Social Security Act (42 U.S.C. Sec. 1395y(b)).

(B) In cases not covered by paragraph (1), within 30 days of the termination of any other qualifying prior coverage.

(2) For purposes of this section, "creditable coverage" means any of the following:

(A) Any individual or group policy, contract, or program that is written or administered by a disability insurer, health care service plan, fraternal benefits society, self-insured employer plan, or any other entity, in this state or elsewhere, and that arranges or provides medical, hospital, and surgical coverage not designed to supplement other private or governmental plans. The term includes continuation or conversion coverage but does not include accident only, credit, coverage for onsite medical clinics, disability income, Medicare supplement, long-term care insurance, dental coverage, vision coverage, coverage issued as a supplement to liability insurance, insurance arising out of a workers' compensation or similar law, automobile medical payment insurance, or insurance under which benefits are payable with or without regard to fault and that is statutorily required to be contained in any liability insurance policy or equivalent self-insurance.

(B) The federal Medicare program pursuant to Title XVIII of the Social Security Act.

(C) The medicaid program pursuant to Title XIX of the Social Security Act.

(D) Any other publicly sponsored program, provided in this state or elsewhere, of medical, hospital, and surgical care.

(E) Chapter 55 (commencing with Section 1071) of Title 10 of the United States Code (Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)).

(F) A medical care program of the Indian Health Service or of a tribal organization.

(G) A state health benefits risk pool.

(H) A health plan offered under Chapter 89 (commencing with Section 8901) of Title 5 of the United States Code (Federal Employees Health Benefits Program (FEHBP)).

(I) A public health plan as defined in federal regulations authorized by Section 2701(c)(1)(I) of the Public Health Service Act, as amended by Public Law 104-191, the Health Insurance Portability and Accountability Act of 1996.

(J) A health benefit plan under Section 5(e) of the Peace Corps Act (22 U.S.C. Sec. 2504(e)).

(K) Any other creditable coverage as defined by subsection (c) of Section 2701 of Title XXVII of the federal Public Health Services Act (42 U.S.C. Sec. 300gg(c)).

(c) An individual enrolled in Medicare Part B by reason of disability will be entitled to open enrollment described in this section for six months after he or she reaches age 65. Every insurer shall make available to every applicant qualified for open enrollment all policies

and certificates offered by that insurer at the time of application. Insurers shall not discourage sales during the open enrollment period by any means, including the altering of the commission structure.

(d) An individual who is 65 years of age or older and enrolled in Medicare Part B is entitled to open enrollment described in this section for six months following:

(1) Receipt of a notice of termination or, if no notice is received, the effective date of termination, from any employer-sponsored health plan including an employer-sponsored retiree health plan. For purposes of this section, "employer-sponsored retiree health plan" includes any coverage for medical expenses that is directly or indirectly sponsored or established by an employer for employees or retirees, their spouses, dependents, or other included insureds.

(2) Termination of health care services for a military retiree or the retiree's Medicare-eligible spouse or dependent as a result of a military base closure.

(e) An individual who is 65 years of age or older and enrolled in Medicare Part B is entitled to open enrollment described in this section if the individual was covered under a policy, certificate, or contract providing Medicare supplement coverage but that coverage terminated because the individual established residence at a location not served by the plan.

(f) An individual shall be entitled to an annual open enrollment period lasting 30 days or more, commencing with the individual's birthday, during which time that person may purchase any Medicare supplement coverage, with the exception of a Medicare Select policy, that offers benefits equal to or lesser than those provided by the previous coverage. During this open enrollment period, no Medicare supplement insurer that falls under this provision shall deny or condition the issuance or effectiveness of Medicare supplement coverage, nor discriminate in the pricing of coverage, because of health status, claims experience, receipt of health care, or medical condition of the individual if, at the time of the open enrollment period, the individual is covered under another Medicare supplement policy or contract. A Medicare supplement insurer shall notify a policyholder of his or her rights under this subdivision at least 30 and no more than 60 days before the beginning of the open enrollment period.

SEC. 124. Section 10232.8 of the Insurance Code is amended to read:

10232.8. (a) In every long-term care policy or certificate that is not intended to be a federally qualified long-term care insurance contract and provides home care benefits, the threshold establishing eligibility for home care benefits shall be at least as permissive as a provision that the insured will qualify if either one of two criteria are met:

(1) Impairment in two out of seven activities of daily living.

(2) Impairment of cognitive ability.

The policy or certificate may provide for lesser but not greater eligibility criteria. The commissioner, at his or her discretion, may approve other criteria or combinations of criteria to be substituted, if the insurer demonstrates that the interest of the insured is better served.

"Activities of daily living" in every policy or certificate that is not intended to be a federally qualified long-term care insurance contract and provides home care benefits shall include eating, bathing, dressing, ambulating, transferring, toileting, and continence; "impairment" means that the insured needs human assistance, or needs continual substantial supervision; and "impairment of cognitive ability" means deterioration or loss of intellectual capacity due to organic mental disease, including Alzheimer's disease or related illnesses, that requires continual supervision to protect oneself or others.

(b) In every long-term care policy approved or certificate issued after the effective date of the act adding this section, that is intended to be a federally qualified long-term care insurance contract as described in subdivision (a) of Section 10232.1, the threshold establishing eligibility for home care benefits shall provide that a chronically ill insured will qualify if either one of two criteria are met or if a third criterion, as provided by this subdivision, is met:

(1) Impairment in two out of six activities of daily living.

(2) Impairment of cognitive ability.

Other criteria shall be used in establishing eligibility for benefits if federal law or regulations allow other types of disability to be used applicable to eligibility for benefits under a long-term care insurance policy. If federal law or regulations allow other types of disability to be used, the commissioner shall promulgate emergency regulations to add those other criteria as a third threshold to establish eligibility for benefits. Insurers shall submit policies for approval within 60 days of the effective date of the regulations. With respect to policies previously approved, the department is authorized to review only the changes made to the policy. All new policies approved and certificates issued after the effective date of the regulation shall include the third criterion. No policy shall be sold that does not include the third criterion after one year beyond the effective date of the regulations. An insured meeting this third criterion shall be eligible for benefits regardless of whether the individual meets the impairment requirements in paragraph (1) or (2) regarding activities of daily living and cognitive ability.

(c) A licensed health care practitioner, independent of the insurer, shall certify that the insured meets the definition of "chronically ill individual" as defined under Public Law 104-191. If a health care practitioner makes a determination, pursuant to this section, that an insured does not meet the definition of "chronically

ill individual," the insurer shall notify the insured that the insured shall be entitled to a second assessment by a licensed health care practitioner, upon request, who shall personally examine the insured. The requirement for a second assessment shall not apply if the initial assessment was performed by a practitioner who otherwise meets the requirements of this section and who personally examined the insured. The assessments conducted pursuant to this section shall be performed promptly with the certification completed as quickly as possible to ensure that an insured's benefits are not delayed. The written certification shall be renewed every 12 months. A licensed health care practitioner shall develop a written plan of care after personally examining the insured. The costs to have a licensed health care practitioner certify that an insured meets, or continues to meet, the definition of "chronically ill individual," or to prepare written plans of care shall not count against the lifetime maximum of the policy or certificate. In order to be considered "independent of the insurer," a licensed health care practitioner shall not be an employee of the insurer and shall not be compensated in any manner that is linked to the outcome of the certification. It is the intent of this subdivision that the practitioner's assessments be unhindered by financial considerations. This subdivision shall apply only to a policy or certificate intended to be a federally qualified long-term care insurance contract.

(d) "Activities of daily living" in every policy or certificate intended to be a federally qualified long-term care insurance contract as provided by Public Law 104-191 shall include eating, bathing, dressing, transferring, toileting, and continence; "impairment in activities of daily living" means the insured needs "substantial assistance" either in the form of "hands-on assistance" or "standby assistance," due to a loss of functional capacity to perform the activity; "impairment of cognitive ability" means the insured needs substantial supervision due to severe cognitive impairment; "licensed health care practitioner" means a physician, registered nurse, licensed social worker, or other individual whom the United States Secretary of the Treasury may prescribe by regulation; and "plan of care" means a written description of the insured's needs and a specification of the type, frequency, and providers of all formal and informal long-term care services required by the insured, and the cost, if any.

(e) Until the time that these definitions may be superseded by federal law or regulation, the terms "substantial assistance," "hands-on assistance," "standby assistance," "severe cognitive impairment," and "substantial supervision" shall be defined according to the safe-harbor definitions contained in Internal Revenue Service Notice 97-31, issued May 6, 1997.

(f) The definitions of "activities of daily living" to be used in policies and certificates that are intended to be federally qualified

long-term care insurance shall be the following until the time that these definitions may be superseded by federal law or regulations:

(1) Eating, which shall mean feeding oneself by getting food in the body from a receptacle (such as a plate, cup, or table) or by a feeding tube or intravenously.

(2) Bathing, which shall mean washing oneself by sponge bath or in either a tub or shower, including the act of getting into or out of a tub or shower.

(3) Continence, which shall mean the ability to maintain control of bowel and bladder function; or when unable to maintain control of bowel or bladder function, the ability to perform associated personal hygiene (including caring for a catheter or colostomy bag).

(4) Dressing, which shall mean putting on and taking off all items of clothing and any necessary braces, fasteners, or artificial limbs.

(5) Toileting, which shall mean getting to and from the toilet, getting on or off the toilet, and performing associated personal hygiene.

(6) Transferring, which shall mean the ability to move into or out of bed, a chair or wheelchair.

The commissioner may approve the use of definitions of "activities of daily living" that differ from the verbatim definitions of this subdivision if these definitions would result in more policy or certificate holders qualifying for long-term care benefits than would occur by the use of the verbatim definitions of this subdivision. In addition, the following definitions may be used without the approval of the commissioner: (1) the verbatim definitions of eating, bathing, dressing, toileting, transferring, and continence in subdivision (g); or (2) the verbatim definitions of eating, bathing, dressing, toileting, and continence in this subdivision and a substitute, verbatim definition of "transferring" as follows: "transferring," which shall mean the ability to move into and out of a bed, a chair, or wheelchair, or ability to walk or move around inside or outside the home, regardless of the use of a cane, crutches, or braces.

The definitions to be used in policies and certificates for impairment in activities of daily living, "impairment in cognitive ability," and any third eligibility criterion adopted by regulation pursuant to subdivision (b) shall be the verbatim definitions of these benefit eligibility triggers allowed by federal regulations. In addition to the verbatim definitions, the commissioner may approve additional descriptive language to be added to the definitions, if the additional language is (1) warranted based on federal or state laws, federal or state regulations, or other relevant federal decision, and (2) strictly limited to that language which is necessary to ensure that the definitions required by this section are not misleading to the insured.

(g) The definitions of "activities of daily living" to be used verbatim in policies and certificates that are not intended to qualify

for favorable tax treatment under Public Law 104-191 shall be the following:

(1) Eating, which shall mean reaching for, picking up, and grasping a utensil and cup; getting food on a utensil, and bringing food, utensil, and cup to mouth; manipulating food on plate; and cleaning face and hands as necessary following meals.

(2) Bathing, which shall mean cleaning the body using a tub, shower, or sponge bath, including getting a basin of water, managing faucets, getting in and out of tub or shower, and reaching head and body parts for soaping, rinsing, and drying.

(3) Dressing, which shall mean putting on, taking off, fastening, and unfastening garments and undergarments and special devices such as back or leg braces, corsets, elastic stockings or garments, and artificial limbs or splints.

(4) Toileting, which shall mean getting on and off a toilet or commode and emptying a commode, managing clothing and wiping and cleaning the body after toileting, and using and emptying a bedpan and urinal.

(5) Transferring, which shall mean moving from one sitting or lying position to another sitting or lying position; for example, from bed to or from a wheelchair or sofa, coming to a standing position, or repositioning to promote circulation and prevent skin breakdown.

(6) Continence, which shall mean the ability to control bowel and bladder as well as use ostomy or catheter receptacles, and apply diapers and disposable barrier pads.

(7) Ambulating, which shall mean walking or moving around inside or outside the home regardless of the use of a cane, crutches, or braces.

SEC. 125. Section 10273.4 of the Insurance Code is amended to read:

10273.4. All disability insurers writing, issuing, or administering group health benefit plans shall make all of these health benefit plans renewable with respect to the policyholder, contractholder, or employer except in case of the following:

(a) Nonpayment of the required premiums by the policyholder, contractholder, or employer.

(b) Fraud or other intentional misrepresentation by the policyholder, contractholder, or employer.

(c) Noncompliance with a material health benefit plan contract provision.

(d) The insurer ceases to provide or arrange for the provision of health care services for new group health benefit plans in this state, provided that the following conditions are satisfied:

(1) Notice of the decision to cease writing, issuing, or administering new or existing group health benefit plans in this state is provided to the commissioner and to either the policyholder,

contractholder, or employer at least 180 days prior to discontinuation of that coverage.

(2) Group health benefit plans shall not be canceled for 180 days after the date of the notice required under paragraph (1) and for that business of a plan that remains in force, any disability insurer that ceases to write, issue, or administer new group health benefit plans shall continue to be governed by this section with respect to business conducted under this section.

(3) Except as provided under subdivision (h) of Section 10705, or unless the commissioner had made a determination pursuant to Section 10712, a disability insurer that ceases to write, issue, or administer new group health benefit plans in this state after the effective date of this section shall be prohibited from writing, issuing, or administering new group health benefit plans to employers in this state for a period of five years from the date of notice to the commissioner.

(e) The disability insurer withdraws a group health benefit plan from the market; provided, that the plan notifies all affected contractholders, policyholders, or employers and the commissioner at least 90 days prior to the discontinuation of the health benefit plans, and that the insurer makes available to the contractholder, policyholder, or employer all health benefit plans that it makes available to new employer business without regard to the claims experience of health-related factors of insureds or individuals who may become eligible for the coverage.

(f) For the purposes of this section, "health benefit plan" shall have the same meaning as in subdivision (a) of Section 10198.6 and Section 10198.61.

(g) For the purposes of this section, "eligible employee" shall have the same meaning as in Section 10700, except that it applies to all health benefit plans issued to employer groups of two or more employees.

SEC. 126. Section 10700 of the Insurance Code is amended to read:

10700. As used in this chapter:

(a) "Agent or broker" means a person or entity licensed under Chapter 5 (commencing with Section 1621) of Part 2 of Division 1.

(b) "Benefit plan design" means a specific health coverage product issued by a carrier to small employers, to trustees of associations that include small employers, or to individuals if the coverage is offered through employment or sponsored by an employer. It includes services covered and the levels of copayment and deductibles, and it may include the professional providers who are to provide those services and the sites where those services are to be provided. A benefit plan design may also be an integrated system for the financing and delivery of quality health care services

which has significant incentives for the covered individuals to use the system.

(c) "Board" means the Major Risk Medical Insurance Board.

(d) "Carrier" means any disability insurance company or any other entity that writes, issues, or administers health benefit plans that cover the employees of small employers, regardless of the situs of the contract or master policyholder. For the purposes of Article 3 (commencing with Section 10719) and Article 4 (commencing with Section 10730), "carrier" also includes health care service plans.

(e) "Dependent" means the spouse or child of an eligible employee, subject to applicable terms of the health benefit plan covering the employee, and includes dependents of guaranteed association members if the association elects to include dependents under its health coverage at the same time it determines its membership composition pursuant to subdivision (z).

(f) "Eligible employee" means either of the following:

(1) Any permanent employee who is actively engaged on a full-time basis in the conduct of the business of the small employer with a normal workweek of at least 30 hours, in the small employer's regular place of business, who has met any statutorily authorized applicable waiting period requirements. The term includes sole proprietors or partners of a partnership, if they are actively engaged on a full-time basis in the small employer's business, and they are included as employees under a health benefit plan of a small employer, but does not include employees who work on a part-time, temporary, or substitute basis. It includes any eligible employee as defined in this paragraph who obtains coverage through a guaranteed association. Employees of employers purchasing through a guaranteed association shall be deemed to be eligible employees if they would otherwise meet the definition except for the number of persons employed by the employer. A permanent employee who works at least 20 hours but not more than 29 hours is deemed to be an eligible employee if all four of the following apply:

(A) The employee otherwise meets the definition of an eligible employee except for the number of hours worked.

(B) The employer offers the employee health coverage under a health benefit plan.

(C) All similarly situated individuals are offered coverage under the health benefit plan.

(D) The employee must have worked at least 20 hours per normal workweek for at least 50 percent of the weeks in the previous calendar quarter. The insurer may request any necessary information to document the hours and time period in question, including, but not limited to, payroll records and employee wage and tax filings.

(2) Any member of a guaranteed association as defined in subdivision (z).

(g) "Enrollee" means an eligible employee or dependent who receives health coverage through the program from a participating carrier.

(h) "Financially impaired" means a carrier that, on or after the effective date of this chapter, is not insolvent and is either:

(1) Deemed by the commissioner to be potentially unable to fulfill its contractual obligations.

(2) Placed under an order of rehabilitation or conservation by a court of competent jurisdiction.

(i) "Fund" means the California Small Group Reinsurance Fund.

(j) "Health benefit plan" means a policy or contract written or administered by a carrier that arranges or provides health care benefits for the covered eligible employees of a small employer and their dependents. The term does not include accident only, credit, disability income, coverage of Medicare services pursuant to contracts with the United States government, Medicare supplement, long-term care insurance, dental, vision, coverage issued as a supplement to liability insurance, automobile medical payment insurance, or insurance under which benefits are payable with or without regard to fault and that is statutorily required to be contained in any liability insurance policy or equivalent self-insurance.

(k) "In force business" means an existing health benefit plan issued by the carrier to a small employer.

(*l*) "Late enrollee" means the following:

(1) An eligible employee or dependent who has declined health coverage under a health benefit plan offered by a small employer at the time of the initial enrollment period provided under the terms of the health benefit plan, and who subsequently requests enrollment in a health benefit plan of that small employer, provided that the initial enrollment period shall be a period of at least 30 days.

(2) Any member of an association that is a guaranteed association as well as any other person eligible to purchase through the guaranteed association when that person has failed to purchase coverage during the initial enrollment period provided under the terms of the guaranteed association's health benefit plan and who subsequently requests enrollment in the plan, provided that the initial enrollment period shall be a period of at least 30 days. However, an eligible employee, another person eligible for coverage through a guaranteed association pursuant to subdivision (z), or dependent shall not be considered a late enrollee if the following conditions are met:

(A) The individual meets all of the following criteria:

(i) The individual was covered under another employer health benefit plan or no share-of-cost Medi-Cal coverage at the time the individual was eligible to enroll

(ii) The individual was certified at the time of the initial enrollment that coverage under another employer health benefit

plan or no share-of-cost Medi-Cal coverage was the reason for declining enrollment, provided that, if the individual was covered under another employer health plan, the individual was given the opportunity to make the certification required by this subdivision and was notified that failure to do so could result in later treatment as a late enrollee

(iii) The individual has lost or will lose coverage under another employer health benefit plan as a result of termination of employment of the individual or of a person through whom the individual was covered as a dependent, change in employment status of the individual, or of a person through whom the individual was covered as a dependent, the termination of the other plan's coverage, cessation of an employer's contribution toward an employee or dependent's coverage, death of the person through whom the individual was covered as a dependent, legal separation, divorce, or loss of no share-of-cost Medi-Cal coverage

(iv) The individual requests enrollment within 30 days after termination of coverage or employer contribution toward coverage provided under another employer health benefit plan

(B) The individual is employed by an employer who offers multiple health benefit plans and the individual elects a different plan during an open enrollment period

(C) A court has ordered that coverage be provided for a spouse or minor child under a covered employee's health benefit plan

(D) In the case of an eligible employee as defined in paragraph (1) of subdivision (f):

(i) The carrier cannot produce a written statement from the employer stating that the individual or the person through whom an individual was eligible to be covered as a dependent, prior to declining coverage, was provided with, and signed acknowledgment of, an explicit written notice in boldface type specifying that failure to elect coverage during the initial enrollment period permits the carrier to impose, at the time of the individual's later decision to elect coverage, an exclusion from coverage for a period of 12 months as well as a six-month preexisting condition exclusion unless the individual meets the criteria specified in subparagraph (A), (B), or (C).

(ii) The employee is a guaranteed association member and the plan cannot produce a written statement from the guaranteed association stating that the association sent a written notice in boldface type to all potentially eligible association members at their last known address prior to the initial enrollment period informing members that failure to elect coverage during the initial enrollment period permits the plan to impose, at the time of the member's later decision to elect coverage, an exclusion from coverage for a period of 12 months as well as a six-month preexisting condition exclusion unless the member can demonstrate that he or she meets the

requirements of clauses (i), (ii), or (iii) of subparagraph (A) or subparagraph (B) or (C).

(E) In the case of an employer or person who is not a member of an association, was eligible to purchase coverage through a guaranteed association, and did not do so, and would not be eligible to purchase guaranteed coverage unless purchased through a guaranteed association, the employer or person can demonstrate that he or she meets the requirements of clauses (i), (ii), or (iii) of subparagraph (A) or subparagraph (B) or (C), or that he or she recently had a change in status that would make him or her eligible and that application for coverage was made within 30 days of the change

(F) The individual is an employee or dependent who meets the criteria described in subparagraph (A) and was under a COBRA continuation provision and the coverage under that provision has been exhausted. For purposes of this section, the definition of "COBRA" set forth in subdivision (e) of Section 1373.621 of the Health and Safety Code shall apply

(G) The individual is a dependent of an enrolled eligible employee who has lost or will lose his or her no-share-of-cost Medi-Cal coverage and requests enrollment within 30 days after notification of this loss of coverage.

(m) "New business" means a health benefit plan issued to a small employer that is not the carrier's in force business.

(n) "Participating carrier" means a carrier that has entered into a contract with the program to provide health benefits coverage under this part.

(o) "Plan of operation" means the plan of operation of the fund, including articles, bylaws, and operating rules adopted by the fund pursuant to Article 3 (commencing with Section 10719).

(p) "Program" means the Health Insurance Plan of California.

(q) "Preexisting condition provision" means a policy provision that excludes coverage for charges or expenses incurred during a specified period following the insured's effective date of coverage, as to a condition for which medical advice, diagnosis, care, or treatment was recommended or received during a specified period immediately preceding the effective date of coverage.

(r) "Creditable coverage" means:

(1) Any individual or group policy, contract, or program that is written or administered by a disability insurer, health care service plan, fraternal benefits society, self-insured employer plan, or any other entity, in this state or elsewhere, and that arranges or provides medical, hospital, and surgical coverage not designed to supplement other private or governmental plans. The term includes continuation or conversion coverage but does not include accident only, credit, coverage for onsite medical clinics, disability income, Medicare supplement, long-term care, dental, vision, coverage issued as a

97

supplement to liability insurance, insurance arising out of a workers' compensation or similar law, automobile medical payment insurance, or insurance under which benefits are payable with or without regard to fault and that is statutorily required to be contained in any liability insurance policy or equivalent self-insurance.

(2) The federal Medicare program pursuant to Title XVIII of the Social Security Act.

(3) The medicaid program pursuant to Title XIX of the Social Security Act.

(4) Any other publicly sponsored program, provided in this state or elsewhere, of medical, hospital, and surgical care.

(5) Chapter 55 (commencing with Section 1071) of Title 10 of the United States Code (Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)).

(6) A medical care program of the Indian Health Service or of a tribal organization.

(7) A state health benefits risk pool.

(8) A health plan offered under Chapter 89 (commencing with Section 8901) of Title 5 of the United States Code (Federal Employees Health Benefits Program (FEHBP)).

(9) A public health plan as defined in federal regulations authorized by Section 2701(c)(1)(I) of the Public Health Service Act, as amended by Public Law 104-191, the Health Insurance Portability and Accountability Act of 1996.

(10) A health benefit plan under Section 5(e) of the Peace Corps Act (22 U.S.C. Sec. 2504(e)).

(11) Any other creditable coverage as defined by subsection (c) of Section 2701 of Title XXVII of the federal Public Health Services Act (42 U.S.C. Sec. 300gg(c)).

(s) "Rating period" means the period for which premium rates established by a carrier are in effect and shall be no less than six months.

(t) "Risk adjusted employee risk rate" means the rate determined for an eligible employee of a small employer in a particular risk category after applying the risk adjustment factor.

(u) "Risk adjustment factor" means the percent adjustment to be applied equally to each standard employee risk rate for a particular small employer, based upon any expected deviations from standard claims. This factor may not be more than 120 percent or less than 80 percent until July 1, 1996. Effective July 1, 1996, this factor may not be more than 110 percent or less than 90 percent.

(v) "Risk category" means the following characteristics of an eligible employee: age, geographic region, and family size of the employee, plus the benefit plan design selected by the small employer.

(1) No more than the following age categories may be used in determining premium rates:

Under 30
30–39
40–49
50–54
55–59
60–64
65 and over

However, for the 65-and-over age category, separate premium rates may be specified depending upon whether coverage under the health benefit plan will be primary or secondary to benefits provided by the federal Medicare program pursuant to Title XVIII of the federal Social Security Act.

(2) Small employer carriers shall base rates to small employers using no more than the following family size categories:

(A) Single.

(B) Married couple.

(C) One adult and child or children.

(D) Married couple and child or children.

(3) (A) In determining rates for small employers, a carrier that operates statewide shall use no more than nine geographic regions in the state, shall have no region smaller than an area in which the first three digits of all its ZIP Codes are in common within a county, and shall divide no county into more than two regions. Carriers shall be deemed to be operating statewide if their coverage area includes 90 percent or more of the state's population. Geographic regions established pursuant to this section shall, as a group, cover the entire state, and the area encompassed in a geographic region shall be separate and distinct from areas encompassed in other geographic regions. Geographic regions may be noncontiguous.

(B) In determining rates for small employers, a carrier that does not operate statewide shall use no more than the number of geographic regions in the state than is determined by the following formula: the population, as determined in the last federal census, of all counties that are included in their entirety in a carrier's service area divided by the total population of the state, as determined in the last federal census, multiplied by 9. The resulting number shall be rounded to the nearest whole integer. No region may be smaller than an area in which the first three digits of all its ZIP Codes are in common within a county and no county may be divided into more than two regions. The area encompassed in a geographic region shall be separate and distinct from areas encompassed in other geographic regions. Geographic regions may be noncontiguous. No carrier shall have less than one geographic area.

(w) "Small employer" means either of the following:

(1) Any person, proprietary or nonprofit firm, corporation, partnership, public agency, or association that is actively engaged in business or service that, on at least 50 percent of its working days

during the preceding calendar quarter, or preceding calendar year, employed at least 2, but not more than 50, eligible employees, the majority of whom were employed within this state, that was not formed primarily for purposes of buying health insurance and in which a bona fide employer-employee relationship exists. In determining whether to apply the calendar quarter or calendar year test, the insurer shall use the test that ensures eligibility if only one test would establish eligibility. However, for purposes of subdivisions (b) and (h) of Section 10705, the definition shall include employers with at least three eligible employees until July 1, 1997, and two eligible employees thereafter. In determining the number of eligible employees, companies that are affiliated companies and that are eligible to file a combined income tax return for purposes of state taxation shall be considered one employer. Subsequent to the issuance of a health benefit plan to a small employer pursuant to this chapter, and for the purpose of determining eligibility, the size of a small employer shall be determined annually. Except as otherwise specifically provided, provisions of this chapter that apply to a small employer shall continue to apply until the health benefit plan anniversary following the date the employer no longer meets the requirements of this definition. It includes any small employer as defined in this paragraph who purchases coverage through a guaranteed association, and any employer purchasing coverage for employees through a guaranteed association.

(2) Any guaranteed association, as defined in subdivision (y), that purchases health coverage for members of the association.

(x) "Standard employee risk rate" means the rate applicable to an eligible employee in a particular risk category in a small employer group.

(y) "Guaranteed association" means a nonprofit organization consisting of a group of individuals or employers who associate based solely on participation in a specified profession or industry, accepting for membership any individual or employer meeting its membership criteria that (1) includes one or more small employers as defined in paragraph (1) of subdivision (w), (2) does not condition membership directly or indirectly on the health or claims history of any person, (3) uses membership dues solely for and in consideration of the membership and membership benefits, except that the amount of the dues shall not depend on whether the member applies for or purchases insurance offered by the association, (4) is organized and maintained in good faith for purposes unrelated to insurance, (5) has been in active existence on January 1, 1992, and for at least five years prior to that date, (6) has been offering health insurance to its members for at least five years prior to January 1, 1992, (7) has a constitution and bylaws, or other analogous governing documents that provide for election of the governing board of the association by its members, (8) offers any benefit plan design that is purchased to

97

all individual members and employer members in this state, (9) includes any member choosing to enroll in the benefit plan design offered to the association, provided that the member has agreed to make the required premium payments, and (10) covers at least 1,000 persons with the carrier with which it contracts. The requirement of 1,000 persons may be met if component chapters of a statewide association contracting separately with the same carrier cover at least 1,000 persons in the aggregate.

This subdivision applies regardless of whether a master policy by an admitted insurer is delivered directly to the association or a trust formed for or sponsored by an association to administer benefits for association members.

For purposes of this subdivision, an association formed by a merger of two or more associations after January 1, 1992, and otherwise meeting the criteria of this subdivision shall be deemed to have been in active existence on January 1, 1992, if its predecessor organizations had been in active existence on January 1, 1992, and for at least five years prior to that date and otherwise met the criteria of this subdivision.

(z) "Members of a guaranteed association" means any individual or employer meeting the association's membership criteria if that person is a member of the association and chooses to purchase health coverage through the association. At the association's discretion, it may also include employees of association members, association staff, retired members, retired employees of members, and surviving spouses and dependents of deceased members. However, if an association chooses to include those persons as members of the guaranteed association, the association must so elect in advance of purchasing coverage from a plan. Health plans may require an association to adhere to the membership composition it selects for up to 12 months.

(aa) "Affiliation period" means a period that, under the terms of the health benefit plan, must expire before health care services under the plan become effective.

SEC. 127. Section 10841 of the Insurance Code is amended to read:

10841. (a) A purchasing alliance shall comply with all requirements pertaining to the underwriting, rating and renewal practices for small employers, pursuant to subdivisions (a) and (b) of Section 1357.12 of , and subdivision (f) of Section 1357.03 of, the Health and Safety Code, and subdivisions (a) and (b) of Section 10714.

(b) A purchasing alliance shall comply with all requirements pertaining to the marketing practices for small employers who participate in the purchasing alliance, pursuant to subdivision (d) of Section 1357.03 of the Health and Safety Code and subdivisions (f) and (j) of Section 10705.

97

(c) A purchasing alliance shall comply with all requirements pertaining to the participation requirements for small employers who participate in the purchasing alliance, pursuant to subdivision (b) of Section 1357.03 of the Health and Safety Code and Section 10706. A carrier participating in a purchasing alliance shall be deemed to be in compliance with this requirement.

SEC. 128. Section 12963.96 of the Insurance Code is amended and renumbered to read:

12693.96. (a) There is hereby created in the State Treasury the Healthy Families Fund, which is, notwithstanding Section 13340 of the Government Code, continuously appropriated to the board for the purposes specified in this part.

(b) The board shall authorize the expenditure, from the fund, of any state funds, federal funds, or family contributions deposited into the fund. The board may authorize the State Department of Health Services to transfer funds appropriated to the department for the program to the Healthy Families Fund, and to also deposit those funds in, and to disburse those funds from, the Healthy Families Fund.

(c) Notwithstanding any other provision of law, this part shall be implemented only if, and to the extent that, as provided under Title XXI of the Social Security Act, federal financial participation is available and state plan approval is obtained.

(d) Nothing in this part is intended to establish an entitlement for individual coverage.

SEC. 129. Section 12963.97 of the Insurance Code is amended and renumbered to read:

12693.97. The State Department of Health Services and the board may explore and utilize any options available under federal law to allow the use of charitable funding as a match for federal funds for use in the provision of coverage by private and public not-for-profit organizations consistent with the provisions of this part.

SEC. 130. Section 138.4 of the Labor Code is amended to read:

138.4. The administrative director shall, with respect to injuries involving loss of time:

(a) Prescribe reasonable rules and regulations for the serving on the employee of notices dealing with the payment, nonpayment or delay in payment of temporary disability, permanent disability, and death benefits and the provision of vocational rehabilitation services, with copies to the administrative director. A pamphlet published or approved by the administrative director, meeting the criteria specified in subdivision (a) of Section 139.6, shall be included with the first notice of payment or notice of delay in payment served on each injured employee.

(b) Prescribe reasonable rules and regulations for providing the employee notice of any change in the amount or type of benefits

being provided, the termination of benefits, and an accounting of the benefits paid, with copies to the administrative director.

(c) Prescribe reasonable rules and regulations for serving on the employee notice of rejection of any liability for compensation and the remedies available to the employee, and the employee's right to seek information and advice from an information and assistance officer or an attorney.

SEC. 131. Section 201.5 of the Labor Code is amended to read:

201.5. An employer who lays off an employee engaged in the production of motion pictures, whose unusual or uncertain terms of employment require special computation in order to ascertain the amount due, shall be deemed to have made immediate payment of wages within the meaning of Section 201 if the wages of the employee are paid by the next regular payday, as prescribed by Section 204, following the layoff. For purposes of this section, "layoff" means the termination of employment of an employee where the employee retains eligibility for reemployment with the employer. For purposes of this section, "discharge" means the unconditional termination of employment of an employee. However, if an employee is discharged, payment of wages shall be made within 24 hours after discharge, excluding Saturdays, Sundays, and holidays. For purposes of this section, a payment required by this section may be mailed and the date of mailing is the date of payment.

The Legislature finds and determines that special provision must be made for the payment of wages on layoff and discharge of persons engaged in the production of motion pictures because their employment at various locations is often far removed from the employer's principal administrative offices and the unusual hours of their employment in this industry is often geared to the completion of a portion of a picture, which time of completion may have no relation to normal working hours.

SEC. 132. Section 1771.5 of the Labor Code is amended to read:

1771.5. (a) Notwithstanding Section 1771, an awarding body shall not require the payment of the general prevailing rate of per diem wages or the general prevailing rate of per diem wages for holiday and overtime work for any public works project of twenty-five thousand dollars ($25,000) or less when the project is for construction work, or for any public works project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program pursuant to subdivision (b) for every public works project under the authority of the awarding body.

(b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements:

(1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of this chapter.

97

(2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.

(3) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.

(4) The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chapter.

(5) The awarding body shall withhold contract payments when payroll records are delinquent or inadequate.

(6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

SEC. 133. Section 3716.2 of the Labor Code is amended to read:

3716.2. Notwithstanding the precise elements of an award of compensation benefits, and notwithstanding the claim and demand for payment being made therefor to the director, the director, as administrator of the Uninsured Employers Fund, shall pay the claimant only such benefits allowed, recognizing proper liens thereon, that would have accrued against an employer properly insured for workers' compensation liability. The Uninsured Employers Fund shall not be liable for any penalties or for the payment of interest on any awards. However, in civil suits by the director to enforce payment of an award, including procedures pursuant to Section 3717, the total amount of the award, including interest, other penalties, and attorney's fees granted by the award, shall be sought. Recovery by the director, in a civil suit or by other means, of awarded benefits in excess of amounts paid to the claimant by the Uninsured Employers Fund shall be paid over to the injured employee or his representative, as the case may be.

SEC. 134. Section 4707 of the Labor Code is amended to read:

4707. (a) Except as provided in subdivision (b), no benefits, except reasonable expenses of burial not exceeding one thousand dollars ($1,000), shall be awarded under this division on account of the death of an employee who is an active member of the Public Employees' Retirement System unless it is determined that a special death benefit, as defined in the Public Employees' Retirement Law, or the benefit provided in lieu of the special death benefit in Sections 21547 and 21548 of the Government Code, will not be paid by the Public Employees' Retirement System to the surviving spouse or children under 18 years of age, of the deceased, on account of the death, but if the total death allowance paid to the surviving spouse and children is less than the benefit otherwise payable under this division the surviving spouse and children are entitled, under this division, to the difference.

97

The amendments to this section during the 1977–78 Regular Session shall be applied retroactively to July 1, 1976.

(b) The limitation prescribed by subdivision (a) shall not apply to local safety members, or patrol members, as defined in Section 20390 of the Government Code, of the Public Employees' Retirement System.

SEC. 135. Section 5433 of the Labor Code is amended to read:

5433. (a) Any advertisement or other device designed to produce leads based on a response from a person to file a workers' compensation claim or to engage or consult counsel or a medical care provider or clinic shall disclose that an agent may contact the individual if that is the fact. In addition, an individual who makes contact with a person as a result of acquiring that individual's name from a lead generating device shall disclose that fact in the initial contact with that person.

(b) No person shall solicit persons to file a workers' compensation claim or to engage or consult counsel or a medical care provider or clinic to consider a workers' compensation claim through the use of a true or fictitious name which is deceptive or misleading with regard to the status, character, or proprietary or representative capacity of the entity or person, or to the true purpose of the advertisement.

(c) For purposes of this section, an advertisement includes a solicitation in any newspaper, magazine, circular, form letter, or open publication, published, distributed, or circulated in this state, or on any billboard, card, label, transit advertisement, or other written advertising medium, and includes envelopes, stationery, business cards, or other material designed to encourage the filing of a workers' compensation claim.

(d) Advertisements shall not employ words, initials, letters, symbols, or other devices which are so similar to those used by governmental agencies, a nonprofit or charitable institution, or other entity that they could have the capacity or tendency to mislead the public. Examples of misleading materials include, but are not limited to, those that imply any of the following:

(1) The advertisement is in some way provided by or is endorsed by a governmental agency or charitable institution.

(2) The advertiser is the same as, is connected with, or is endorsed by a governmental agency or charitable institution.

(e) Advertisements may not use the name of a state or political subdivision thereof in an advertising solicitation.

(f) Advertisements may not use any name, service mark, slogan, symbol, or any device in any manner which implies that the advertiser, or any person or entity associated with the advertiser, or that any agency who may call upon the person in response to the advertisement, is connected with a governmental agency.

(g) Advertisements may not imply that the reader, listener, or viewer may lose a right or privilege or benefits under federal, state, or local law if he or she fails to respond to the advertisement.

SEC. 136. Section 136.2 of the Penal Code is amended to read:

136.2. Upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, any court with jurisdiction over a criminal matter may issue orders including, but not limited to, the following:

(a) Any order issued pursuant to Section 6320 of the Family Code.

(b) An order that a defendant shall not violate any provision of Section 136.1.

(c) An order that a person before the court other than a defendant, including, but not limited to, a subpoenaed witness or other person entering the courtroom of the court, shall not violate any provisions of Section 136.1.

(d) An order that any person described in this section shall have no communication whatsoever with any specified witness or any victim, except through an attorney under any reasonable restrictions that the court may impose.

(e) An order calling for a hearing to determine if an order as described in subdivisions (a) to (d), inclusive, should be issued.

(f) An order that a particular law enforcement agency within the jurisdiction of the court provide protection for a victim or a witness, or both, or for immediate family members of a victim or a witness who reside in the same household as the victim or witness or within reasonable proximity of the victim's or witness' household, as determined by the court. The order shall not be made without the consent of the law enforcement agency except for limited and specified periods of time and upon an express finding by the court of a clear and present danger of harm to the victim or witness or immediate family members of the victim or witness.

For purposes of this subdivision, "immediate family members" include the spouse, children, or parents of the victim or witness.

(g) Any order protecting victims of violent crime from contact, with the intent to annoy, harass, threaten, or commit acts of violence, by the defendant. The court or its designee shall transmit orders made under this subdivision to law enforcement personnel within one business day of the issuance of the order, pursuant to subdivision (a) of Section 6380 of the Family Code.

Any person violating any order made pursuant to subdivisions (a) to (g), inclusive, may be punished for any substantive offense described in Section 136.1, or for a contempt of the court making the order. A finding of contempt shall not be a bar to prosecution for a violation of Section 136.1. However, any person so held in contempt shall be entitled to credit for any punishment imposed therein against any sentence imposed upon conviction of an offense described in Section 136.1. Any conviction or acquittal for any

substantive offense under Section 136.1 shall be a bar to a subsequent punishment for contempt arising out of the same act.

(h) (1) In all cases where the defendant is charged with a crime of domestic violence, as defined in Section 13700, the court shall consider issuing the above-described orders on its own motion. All interested parties shall receive a copy of those orders. In order to facilitate this, the court's records of all criminal cases involving domestic violence shall be marked to clearly alert the court to this issue.

(2) In those cases in which a complaint, information, or indictment charging a crime of domestic violence, as defined in Section 13700, has been issued, a restraining order or protective order against the defendant issued by the criminal court in that case has precedence over any other outstanding court order against the defendant.

(i) The Judicial Council shall adopt forms for orders under this section.

SEC. 137. Section 148.10 of the Penal Code is amended to read:

148.10. (a) Every person who willfully resists a peace officer in the discharge or attempt to discharge any duty of his or her office or employment and whose willful resistance proximately causes death or serious bodily injury to a peace officer shall be punished by imprisonment in the state prison for two, three, or four years, or by a fine of not less than one thousand dollars ($1,000) or more than ten thousand dollars ($10,000), or by both that fine and imprisonment, or by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment.

(b) For purposes of subdivision (a), the following facts shall be found by the trier of fact:

(1) That the peace officer's action was reasonable based on the facts or circumstances confronting the officer at the time.

(2) That the detention and arrest was lawful and there existed probable cause or reasonable cause to detain.

(3) That the person who willfully resisted any peace officer knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties.

(c) This section does not apply to conduct that occurs during labor picketing, demonstrations, or disturbing the peace.

(d) For purposes of this section, "serious bodily injury" is defined in paragraph (4) of subdivision (f) of Section 243.

SEC. 138. Section 290 of the Penal Code is amended to read:

290. (a) (1) (A) Every person described in paragraph (2), for the rest of his or her life while residing in, or, if he or she has no residence while located within, California, shall be required to register, within five working days of coming into, or changing his or her residence in, or location within, any city, county, or city and

county, or campus in which he or she temporarily resides, or in which he or she is located if he or she has no residence, as follows:

(i) With the chief of police of the city in which either he or she is residing, or within which he or she is located if he or she has no residence.

(ii) In an unincorporated area or city that has no police department, with the sheriff of the county if he or she is residing, or within which he or she is located if he or she has no residence.

(iii) In addition to clause (i) or (ii), with the chief of police of a campus of the University of California, the California State University, or community college at which he or she is residing, or within which he or she is located, including within any of the facilities of the campus, if he or she has no residence.

(B) If the person who is registering has no residence address, he or she shall update his or her registration no less than once every 90 days in addition to the requirement in subparagraph (A), on a form as may be required by the Department of Justice, with the entity or entities described in subparagraph (A) in whose jurisdiction he or she is located at the time he or she is updating the registration.

(C) Beginning on his or her first birthday following registration or change of address, the person shall be required to register annually, within five working days of his or her birthday, to update his or her registration with the entities described in subparagraph (A), including verifying his or her name and address, or temporary location, on a form as may be required by the Department of Justice.

(D) In addition, every person who is a sexually violent predator, as defined in Section 6600 of the Welfare and Institutions Code, shall, after his or her release from custody, verify his or her address no less than once every 90 days in a manner established by the Department of Justice.

(E) No entity shall require a person to pay a fee to register or update his or her registration pursuant to this section. The registering agency shall submit registrations, including annual updates or changes of address, directly into the Department of Justice Violent Crime Information Network (VCIN).

(2) The following persons shall be required to register pursuant to paragraph (1):

(A) Any person who, since July 1, 1944, has been, or hereafter is, convicted in any court in this state or in any federal or military court of a violation of Section 207 or 209 committed with intent to violate Section 261, 286, 288, 288a, or 289, Section 220, except assault to commit mayhem, Section 243.4, paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261, or paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, 266j, 267, 269, 285, 286, 288, 288a, 288.5, or 289, subdivision (b), (c), or (d)

of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, former Section 647a, subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; or any person who since that date has been, or hereafter is, convicted of the attempt to commit any of the above-mentioned offenses.

(B) Any person who, since July 1, 1944, has been, or hereafter is, released, discharged, or paroled from a penal institution where he or she was confined because of the commission or attempted commission of one of the offenses described in subparagraph (A).

(C) Any person who, since July 1, 1944, has been, or hereafter is, determined to be a mentally disordered sex offender under Article 1 (commencing with Section 6300) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code or any person who has been found guilty in the guilt phase of a trial for an offense for which registration is required by this section but who has been found not guilty by reason of insanity in the sanity phase of the trial.

(D) Any person who, since July 1, 1944, has been, or hereafter is, convicted in any other court, including any state, federal, or military court, of any offense which, if committed or attempted in this state, would have been punishable as one or more of the offenses described in subparagraph (A) or any person ordered by any other court, including any state, federal, or military court, to register as a sex offender for any offense, if the court found at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification.

(E) Any person ordered by any court to register pursuant to this section for any offense not included specifically in this section if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration.

(F) (i) Notwithstanding any other subdivision, a person who was convicted before January 1, 1976, under subdivision (a) of Section 286 or Section 288a shall not be required to register pursuant to this section for that conviction if the conviction was for conduct between consenting adults that was decriminalized by Chapter 71 of the Statutes of 1975 or Chapter 1139 of the Statutes of 1976. The Department of Justice shall remove that person from the Sex Offender Registry, and the person is discharged from his or her duty to register pursuant to the following procedure:

(I) The person submits to the Department of Justice official documentary evidence, including court records or police reports, that demonstrates that the person's conviction pursuant to either of those sections was for conduct between consenting adults that was decriminalized; or

(II) The person submits to the department a declaration stating that the person's conviction pursuant to either of those sections was for consensual conduct between adults that has been decriminalized. The declaration shall be confidential and not a public record, and shall include the person's name, address, telephone number, date of birth, and a summary of the circumstances leading to the conviction, including the date of the conviction and county of the occurrence.

(III) The department shall determine whether the person's conviction was for conduct between consensual adults that has been decriminalized. If the conviction was for consensual conduct between adults that has been decriminalized, and the person has no other offenses for which he or she is required to register pursuant to this section, the department shall, within 60 days of receipt of those documents, notify the person that he or she is relieved of the duty to register, and shall notify the local law enforcement agency with which the person is registered that he or she has been relieved of the duty to register. The local law enforcement agency shall remove the person's registration from its files within 30 days of receipt of notification. If the documentary or other evidence submitted is insufficient to establish the person's claim, the department shall, within 60 days of receipt of those documents, notify the person that his or her claim cannot be established, and that the person shall continue to register pursuant to this section. The department shall provide, upon the person's request, any information relied upon by the department in making its determination that the person shall continue to register pursuant to this section. Any person whose claim has been denied by the department pursuant to this clause may petition the court to appeal the department's denial of the person's claim.

(ii) On or before July 1, 1998, the department shall make a report to the Legislature concerning the status of persons who may come under the provisions of this subparagraph, including the number of persons who were convicted before January 1, 1976, under subdivision (a) of Section 286 or Section 288a and are required to register under this section, the average age of these persons, the number of these persons who have any subsequent convictions for a registerable sex offense, and the number of these persons who have sought successfully or unsuccessfully to be relieved of their duty to register under this section.

(b) (1) Any person who is released, discharged, or paroled from a jail, state or federal prison, school, road camp, or other institution where he or she was confined because of the commission or attempted commission of one of the offenses specified in subdivision (a) or is released from a state hospital to which he or she was committed as a mentally disordered sex offender under Article 1 (commencing with Section 6300) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code, shall, prior to discharge,

97

parole, or release, be informed of his or her duty to register under this section by the official in charge of the place of confinement or hospital, and the official shall require the person to read and sign any form that may be required by the Department of Justice, stating that the duty of the person to register under this section has been explained to the person. The official in charge of the place of confinement or hospital shall obtain the address where the person expects to reside upon his or her discharge, parole, or release and shall report the address to the Department of Justice.

(2) The official in charge of the place of confinement or hospital shall give one copy of the form to the person and shall send one copy to the Department of Justice and one copy to the appropriate law enforcement agency or agencies having jurisdiction over the place the person expects to reside upon discharge, parole, or release. If the conviction that makes the person subject to this section is a felony conviction, the official in charge shall, not later than 45 days prior to the scheduled release of the person, send one copy to the appropriate law enforcement agency or agencies having local jurisdiction where the person expects to reside upon discharge, parole, or release; one copy to the prosecuting agency that prosecuted the person; and one copy to the Department of Justice. The official in charge of the place of confinement shall retain one copy.

(c) Any person who is convicted in this state of the commission or attempted commission of any of the offenses specified in subdivision (a) and who is released on probation, granted conditional release without supervised probation, or discharged upon payment of a fine shall, prior to release or discharge, be informed of the duty to register under this section by the probation department, and a probation officer shall require the person to read and sign any form that may be required by the Department of Justice, stating that the duty of the person to register under this section has been explained to him or her. The probation officer shall obtain the address where the person expects to reside upon release or discharge and shall report within three days the address to the Department of Justice. The probation officer shall give one copy of the form to the person, send one copy to the Department of Justice, and forward one copy to the appropriate law enforcement agency or agencies having local jurisdiction where the person expects to reside upon his or her discharge, parole, or release.

(d) (1) Any person who, on or after January 1, 1986, is discharged or paroled from the Department of the Youth Authority to the custody of which he or she was committed after having been adjudicated a ward of the juvenile court pursuant to Section 602 of the Welfare and Institutions Code because of the commission or attempted commission of any offense described in paragraph (3) shall be subject to registration under the procedures of this section.

97

(2) Any person who is discharged or paroled from a facility in another state that is equivalent to the Department of the Youth Authority, to the custody of which he or she was committed because of an offense which, if committed or attempted in this state, would have been punishable as one or more of the offenses described in paragraph (3), shall be subject to registration under the procedures of this section.

(3) Any person described in this subdivision who committed an offense in violation of any of the following provisions shall be required to register pursuant to this section:

(A) Assault with intent to commit rape, sodomy, oral copulation, or any violation of Section 264.1, 288, or 289 under Section 220.

(B) Any offense defined in paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261, Section 264.1, 266c, or 267, paragraph (1) of subdivision (b) of, or subdivision (c) or (d) of, Section 286, Section 288 or 288.5, paragraph (1) of subdivision (b) of, or subdivision (c) or (d) of, Section 288a, subdivision (a) of Section 289, or Section 647.6.

(C) A violation of Section 207 or 209 committed with the intent to violate Section 261, 286, 288, 288a, or 289.

(4) Prior to discharge or parole from the Department of the Youth Authority, any person who is subject to registration under this subdivision shall be informed of the duty to register under the procedures set forth in this section. Department of the Youth Authority officials shall transmit the required forms and information to the Department of Justice.

(5) All records specifically relating to the registration in the custody of the Department of Justice, law enforcement agencies, and other agencies or public officials shall be destroyed when the person who is required to register has his or her records sealed under the procedures set forth in Section 781 of the Welfare and Institutions Code. This subdivision shall not be construed as requiring the destruction of other criminal offender or juvenile records relating to the case that are maintained by the Department of Justice, law enforcement agencies, the juvenile court, or other agencies and public officials unless ordered by a court under Section 781 of the Welfare and Institutions Code.

(e) (1) On or after January 1, 1998, upon incarceration, placement, or commitment, or prior to release on probation, any person who is required to register under this section shall preregister. The preregistering official shall be the admitting officer at the place of incarceration, placement, or commitment, or the probation officer if the person is to be released on probation. The preregistration shall consist of all of the following:

(A) A preregistration statement in writing, signed by the person, giving information that may be required by the Department of Justice.

97

(B) The fingerprints and photograph of the person.

(2) Any person who is preregistered pursuant to this subdivision is required to be preregistered only once.

(3) A person described in paragraph (2) of subdivision (a) shall register, or reregister if the person has previously registered, upon release from incarceration, placement, or commitment, pursuant to paragraph (1) of subdivision (a). The registration shall consist of all of the following:

(A) A statement in writing signed by the person, giving information as may be required by the Department of Justice.

(B) The fingerprints and photograph of the person.

(C) The license plate number of any vehicle owned by, regularly driven by, or registered in the name of, the person.

(D) Notice to the person that, in addition to the requirements of subdivision (f), he or she may have a duty to register in any other state where he or she may relocate.

(E) Copies of adequate proof of residence, which shall be limited to a California driver's license, California identification card, recent rent or utility receipt, printed personalized checks or other recent banking documents showing that person's name and address, or any other information that the registering official believes is reliable. If the person has no residence and no reasonable expectation of obtaining a residence in the foreseeable future, the person shall so advise the registering official and shall sign a statement provided by the registering official stating that fact. Upon presentation of proof of residence to the registering official or a signed statement that the person has no residence, the person shall be allowed to register. If the person claims that he or she has a residence but does not have any proof of residence, he or she shall be allowed to register but shall furnish proof of residence within 30 days of the day he or she is allowed to register. If a registrant fails to furnish proof of residence within this 30-day period, he or she shall be guilty of a misdemeanor.

(4) Within three days thereafter, the preregistering official or the registering law enforcement agency or agencies shall forward the statement, fingerprints, photograph, and vehicle license plate number, if any, to the Department of Justice.

(f) (1) If any person who is required to register pursuant to this section changes his or her residence address or location, whether within the jurisdiction in which he or she is currently registered or to a new jurisdiction inside or outside the state, the person shall inform, in writing within five working days, the law enforcement agency or agencies with which he or she last registered of the new address or location. The law enforcement agency or agencies shall, within three days after receipt of this information, forward a copy of the change of address or location information to the Department of Justice. The Department of Justice shall forward appropriate

registration data to the law enforcement agency or agencies having local jurisdiction of the new place of residence or location.

(2) If the person's new address is in a Department of the Youth Authority facility or a state prison or state mental institution, an official of the place of incarceration, placement, or commitment shall, within 90 days of receipt of the person, forward the registrant's change of address information to the Department of Justice. The agency need not provide a physical address for the registrant but shall indicate that he or she is serving a period of incarceration or commitment in a facility under the agency's jurisdiction. This paragraph shall apply to persons received in a Department of the Youth Authority facility or a state prison or state mental institution on or after January 1, 1999. The Department of Justice shall forward the change of address information to the agency with which the person last registered.

(3) If any person who is required to register pursuant to this section changes his or her name, the person shall inform, in person, the law enforcement agency or agencies with which he or she is currently registered within five working days. The law enforcement agency or agencies shall forward a copy of this information to the Department of Justice within three days of its receipt.

(g) (1) Any person who is required to register under this section based on a misdemeanor conviction who willfully violates any requirement of this section is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding one year.

(2) Except as provided in paragraph (5), any person who is required to register under this section based on a felony conviction who willfully violates any requirement of this section or who has a prior conviction for the offense of failing to register under this section and who subsequently and willfully violates any requirement of this section is guilty of a felony and shall be punished by imprisonment in the state prison for 16 months, or two or three years.

If probation is granted or if the imposition or execution of sentence is suspended, it shall be a condition of the probation or suspension that the person serve at least 90 days in a county jail. The penalty described in this paragraph shall apply whether or not the person has been released on parole or has been discharged from parole.

(3) Any person determined to be a mentally disordered sex offender or who has been found guilty in the guilt phase of trial for an offense for which registration is required under this section, but who has been found not guilty by reason of insanity in the sanity phase of the trial, who willfully violates any requirement of this section is guilty of a misdemeanor and shall be punished by imprisonment in a county jail not exceeding one year. For any second or subsequent willful violation of any requirement of this section, the person is guilty of a felony and shall be punished by imprisonment in the state prison for 16 months, or two or three years.

(4) If, after discharge from parole, the person is convicted of a felony as specified in this subdivision, he or she shall be required to complete parole of at least one year, in addition to any other punishment imposed under this subdivision. A person convicted of a felony as specified in this subdivision may be granted probation only in the unusual case where the interests of justice would best be served. When probation is granted under this paragraph, the court shall specify on the record and shall enter into the minutes the circumstances indicating that the interests of justice would best be served by the disposition.

(5) Any person who, as a sexually violent predator, as defined in Section 6600 of the Welfare and Institutions Code, fails to verify his or her registration every 90 days as required pursuant to subparagraph (D) of paragraph (1) of subdivision (a), shall be punished by imprisonment in the state prison, or in a county jail, not exceeding one year.

(6) Except as otherwise provided in paragraph (5), and in addition to any other penalty imposed under this subdivision, any person who is required pursuant to subparagraph (B) of paragraph (1) of subdivision (a) to update his or her registration every 90 days and willfully fails to update his or her registration is guilty of a misdemeanor and shall be punished by imprisonment in a county jail not exceeding six months. Any subsequent violation of this requirement that persons described in subparagraph (B) of paragraph (1) of subdivision (a) shall update their registration every 90 days is also a misdemeanor and shall be punished by imprisonment in a county jail not exceeding six months.

(7) Any person who is required to register under this section who willfully violates any requirement of this section is guilty of a continuing offense.

(h) Whenever any person is released on parole or probation and is required to register under this section but fails to do so within the time prescribed, the parole authority, the Youthful Offender Parole Board, or the court, as the case may be, shall order the parole or probation of the person revoked. For purposes of this subdivision, "parole authority" has the same meaning as described in Section 3000.

(i) Except as provided in subdivisions (m) and (n) and Section 290.4, the statements, photographs, and fingerprints required by this section shall not be open to inspection by the public or by any person other than a regularly employed peace officer or other law enforcement officer.

(j) In any case in which a person who would be required to register pursuant to this section for a felony conviction is to be temporarily sent outside the institution where he or she is confined on any assignment within a city or county including firefighting, disaster control, or of whatever nature the assignment may be, the

local law enforcement agency having jurisdiction over the place or places where the assignment shall occur shall be notified within a reasonable time prior to removal from the institution. This subdivision shall not apply to any person who is temporarily released under guard from the institution where he or she is confined.

(k) As used in this section, "mentally disordered sex offender" includes any person who has been determined to be a sexual psychopath or a mentally disordered sex offender under any provision which, on or before January 1, 1976, was contained in Division 6 (commencing with Section 6000) of the Welfare and Institutions Code.

(*l*) (1) Every person who, prior to January 1, 1997, is required to register under this section, shall be notified whenever he or she next reregisters of the reduction of the registration period from 14 to 5 working days. This notice shall be provided in writing by the registering agency or agencies. Failure to receive this notification shall be a defense against the penalties prescribed by subdivision (g) if the person did register within 14 days.

(2) Every person who, as a sexually violent predator, as defined in Section 6600 of the Welfare and Institutions Code, is required to verify his or her registration every 90 days, shall be notified wherever he or she next registers of his or her increased registration obligations. This notice shall be provided in writing by the registering agency or agencies. Failure to receive this notice shall be a defense against the penalties prescribed by paragraph (5) of subdivision (g).

(m) (1) When a peace officer reasonably suspects, based on information that has come to his or her attention through information provided by any peace officer or member of the public, that a child or other person may be at risk from a sex offender convicted of a crime listed in paragraph (1) of subdivision (a) of Section 290.4, a law enforcement agency may, notwithstanding any other provision of law, provide any of the information specified in paragraph (4) of this subdivision about that registered sex offender that the agency deems relevant and necessary to protect the public, to the following persons, agencies, or organizations the offender is likely to encounter, including, but not limited to, the following:

(A) Public and private educational institutions, day care establishments, and establishments and organizations that primarily serve individuals likely to be victimized by the offender.

(B) Other community members at risk.

(2) The law enforcement agency may authorize persons and entities who receive the information pursuant to paragraph (1) to disclose information to additional persons only if the agency does the following:

(A) Determines that all conditions set forth in paragraph (1) have been satisfied regarding disclosure to the additional persons.

(B) Identifies the appropriate scope of further disclosure.

97

(3) Persons notified pursuant to paragraph (1) may disclose the information provided by the law enforcement agency in the manner and to the extent authorized by the law enforcement agency.

(4) The information that may be disclosed pursuant to this section includes the following:

(A) The offender's full name.

(B) The offender's known aliases.

(C) The offender's gender.

(D) The offender's race.

(E) The offender's physical description.

(F) The offender's photograph.

(G) The offender's date of birth.

(H) Crimes resulting in registration under this section.

(I) The offender's address, which must be verified prior to publication.

(J) Description and license plate number of offender's vehicles or vehicles the offender is known to drive.

(K) Type of victim targeted by the offender.

(L) Relevant parole or probation conditions, such as one prohibiting contact with children.

(M) Dates of crimes resulting in classification under this section.

(N) Date of release from confinement.

However, information disclosed pursuant to this subdivision shall not include information that would identify the victim.

(5) If a law enforcement agency discloses information pursuant to this subdivision, it shall include, with the disclosure, a statement that the purpose of the release of the information is to allow members of the public to protect themselves and their children from sex offenders.

(6) For purposes of this section, "likely to encounter" means both of the following:

(A) That the agencies, organizations, or other community members are in a location or in close proximity to a location where the offender lives or is employed, or that the offender visits or is likely to visit on a regular basis.

(B) The types of interaction that ordinarily occur at that location and other circumstances indicate that contact with the offender is reasonably probable.

(7) For purposes of this section, "reasonably suspects" means that it is objectively reasonable for a peace officer to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training and experience, to suspect that a child or other person is at risk.

(8) For purposes of this section, "at risk" means that a person is, or may be exposed to, a risk of becoming a victim of a sex offense committed by the offender.

(9) A law enforcement agency may continue to disclose information about an offender under this subdivision for as long as the offender is included in Section 290.4.

(n) In addition to the procedures set forth elsewhere in this section, a designated law enforcement entity may advise the public of the presence of high-risk sex offenders in its community pursuant to this subdivision.

(1) For purposes of this subdivision:

(A) A high-risk sex offender is a person who has been convicted of an offense specified in paragraph (1) of subdivision (a) of Section 290.4 and meets any of the following criteria:

(i) Has been convicted of three or more violent sex offenses, at least two of which were brought and tried separately.

(ii) Has been convicted of two violent sex offenses and one or more violent nonsex offenses, at least two of which were brought and tried separately.

(iii) Has been convicted of one violent sex offense and two or more violent nonsex offenses, at least two of which were brought and tried separately.

(iv) Has been convicted of either two violent sex offenses or one violent sex offense and one violent nonsex offense, at least two of which were brought and tried separately, and has been arrested on separate occasions for three or more violent sex offenses, violent nonsex offenses, or associated offenses.

(v) Has been adjudicated a sexually violent predator pursuant to Article 4 (commencing with Section 6600) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code.

(B) A violent sex offense means any offense defined in Section 220, except attempt to commit mayhem, 261, 264.1, 286, 288, 288a, 288.5, 289, or 647.6, or infliction of great bodily injury during the commission of a sex offense, as provided in Section 12022.8.

(C) A violent nonsex offense means any offense defined in Section 187, subdivision (a) of Section 192, or Section 203, 206, 207, or 236, provided that the offense is a felony, subdivision (a) of Section 273a, Section 273d or 451, or attempted murder, as defined in Sections 187 and 664.

(D) An associated offense means any offense defined in Section 243.4, provided that the offense is a felony, Section 311.1, 311.2, 311.3, 311.4, 311.5, 311.6, 311.7, or 314, Section 459, provided the offense is of the first degree, Section 597 or 646.9, subdivision (d), (h), or (i) of Section 647, Section 653m, or infliction of great bodily injury during the commission of a felony, as defined in Section 12022.7.

(E) For purposes of subparagraphs (B) to (D), inclusive, an arrest or conviction for the statutory predecessor of any of the enumerated offenses, or an arrest or conviction in any other jurisdiction for any offense that, if committed or attempted in this state, would have been punishable as one or more of the offenses described in those

subparagraphs, is to be considered in determining whether an offender is a high-risk sex offender.

(F) For purposes of subparagraphs (B) to (D), inclusive, an arrest as a juvenile or an adjudication as a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code for any of the offenses described in those subparagraphs is to be considered in determining whether an offender is a high-risk sex offender.

(G) Notwithstanding subparagraphs (A) to (D), inclusive, an offender shall not be considered to be a high-risk sex offender if either of the following apply:

(i) The offender's most recent conviction or arrest for an offense described in subparagraphs (B) to (D), inclusive, occurred more than five years prior to the high-risk assessment by the Department of Justice, excluding periods of confinement.

(ii) The offender notifies the Department of Justice, on a form approved by the department and available at any sheriff's office, that he or she has not been convicted in the preceding 15 years, excluding periods of confinement, of an offense for which registration is required under paragraph (2) of subdivision (a), and the department is able, upon exercise of reasonable diligence, to verify the information provided in paragraph (2).

(H) "Confinement" means confinement in a jail, prison, school, road camp, or other penal institution, confinement in a state hospital to which the offender was committed as a mentally disordered sex offender under Article 1 (commencing with Section 6300) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code, or confinement in a facility designated by the Director of Mental Health to which the offender was committed as a sexually violent predator under Article 4 (commencing with Section 6600) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code.

(I) "Designated law enforcement entity" means any of the following: a municipal police department, sheriff's department, district attorney's office, county probation department, Department of Justice, Department of Corrections, Department of the Youth Authority, Department of the California Highway Patrol, or the police department of any campus of the University of California, the California State University, or any community college.

(2) The Department of Justice shall continually search the records provided to it pursuant to subdivision (b) and identify, on the basis of those records, high-risk sex offenders. Four times each year, the department shall provide to each chief of police and sheriff in the state, and to any other designated law enforcement entity upon request, the following information regarding each identified high-risk sexual offender: full name, known aliases, gender, race, physical description, photograph, date of birth, and crimes resulting in classification under this section.

97

(3) The Department of Justice and any designated law enforcement entity to which notice has been given pursuant to paragraph (2) may cause to be made public, by whatever means the agency deems necessary to ensure the public safety, based upon information available to the agency concerning a specific person, including, but not limited to, the information described in paragraph (2); the offender's address, which shall be verified prior to publication; description and license plate number of the offender's vehicles or vehicles the offender is known to drive; type of victim targeted by the offender; relevant parole or probation conditions, such as one prohibiting contact with children; dates of crimes resulting in classification under this section; and date of release from confinement; but excluding information that would identify the victim.

(4) Notwithstanding any other provision of law, any person described in paragraph (2) of subdivision (p) who receives information from a designated law enforcement entity pursuant to paragraph (3) of subdivision (n) may disclose that information in the manner and to the extent authorized by the law enforcement entity.

(o) Agencies disseminating information to the public pursuant to Section 290.4 shall maintain records of those persons requesting to view the CD-ROM or other electronic media for a minimum of five years. Agencies disseminating information to the public pursuant to subdivision (n) shall maintain records of the means and dates of dissemination for a minimum of five years.

(p) (1) Any law enforcement agency and employees of any law enforcement agency shall be immune from liability for good faith conduct under this section. For the purposes of this section, "law enforcement agency" means the Attorney General of California, every district attorney, and every state or local agency expressly authorized by statute to investigate or prosecute law violators.

(2) Any public or private educational institution, day care facility, or any child care custodian described in Section 11165.7, or any employee of a public or private educational institution or day care facility which in good faith disseminates information as authorized pursuant to paragraph (3) of subdivision (m) or paragraph (4) of subdivision (n) that is provided by a law enforcement agency or an employee of a law enforcement agency shall be immune from civil liability.

(q) Any person who uses information disclosed pursuant to this section to commit a felony shall be punished, in addition and consecutive to any other punishment, by a five-year term of imprisonment in the state prison. Any person who uses information disclosed pursuant to this section to commit a misdemeanor shall be subject to, in addition to any other penalty or fine imposed, a fine of not less than five hundred dollars ($500) and not more than one thousand dollars ($1,000).

(r) The registration and public notification provisions of this section are applicable to every person described in this section, without regard to when his or her crimes were committed or his or her duty to register pursuant to this section arose, and to every offense described in this section, regardless of when it was committed.

SEC. 139. Section 298 of the Penal Code is amended to read:

298. (a) The Director of Corrections, or the Chief Administrative Officer of the detention facility, jail, or other facility at which the blood specimens, saliva samples, and thumb and palm print impressions were collected shall cause these specimens, samples, and print impressions to be forwarded promptly to the Department of Justice. The specimens, samples, and print impressions shall be collected by a person using a Department of Justice approved collection kit and in accordance with the requirements and procedures set forth in subdivision (b).

(b) (1) The Department of Justice shall provide all blood specimen vials, mailing tubes, labels, and instructions for the collection of the blood specimens, saliva samples, and thumbprints. The specimens, samples, and thumbprints shall thereafter be forwarded to the DNA Laboratory of the Department of Justice for analysis of DNA and other forensic identification markers.

Additionally, the Department of Justice shall provide all full palm print cards, mailing envelopes, and instructions for the collection of full palm prints. The full palm prints, on a form prescribed by the Department of Justice, shall thereafter be forwarded to the Department of Justice for maintenance in a file for identification purposes.

(2) The withdrawal of blood shall be performed in a medically approved manner. Only health care providers trained and certified to draw blood may withdraw the blood specimens for purposes of this section.

(3) Right thumbprints and a full palm print impression of each hand shall be taken on forms prescribed by the Department of Justice. The palm print forms shall be forwarded to and maintained by the Bureau of Criminal Identification and Information of the Department of Justice. Right thumbprints also shall be taken at the time of the withdrawal of blood and shall be placed on the forms and the blood vial label. The blood vial and thumbprint forms shall be forwarded to and maintained by the DNA Laboratory of the Department of Justice.

(4) The DNA Laboratory of the Department of Justice is responsible for establishing procedures for entering data bank and data base information.

(c) (1) Persons authorized to draw blood under this chapter for the data bank or data base shall not be civilly or criminally liable either for withdrawing blood when done in accordance with

medically accepted procedures, or for obtaining saliva samples or thumb or palm print impressions when performed in accordance with standard professional practices.

(2) There is no civil or criminal cause of action against any law enforcement agency or the Department of Justice, or any employee thereof, for a mistake in placing an entry in a data bank or a data base.

SEC. 140. Section 299 of the Penal Code is amended to read:

299. (a) A person whose DNA profile has been included in the data bank pursuant to this chapter shall have his or her information and materials expunged from the data bank when the underlying conviction or disposition serving as the basis for including the DNA profile has been reversed and the case dismissed, the defendant has been found factually innocent of the underlying offense pursuant to Section 851.8, the defendant has been found not guilty, or the defendant has been acquitted of the underlying offense. The court issuing the reversal, dismissal, or acquittal shall order the expungement and shall send a copy of that order to the Department of Justice DNA Laboratory Director. Upon receipt of the court order, the Department of Justice shall expunge all identifiable information in the data bank and any criminal identification records pertaining to the person.

(b) (1) A person whose DNA profile has been included in a data bank pursuant to this chapter may make a written request to expunge information and materials from the data bank. The person requesting the data bank entry to be expunged must send a copy of his or her request to the trial court that entered the conviction or rendered disposition in the case, to the DNA Laboratory of the Department of Justice, and to the prosecuting attorney of the county in which he or she was convicted, with proof of service on all parties. The court has the discretion to grant or deny the request for expungement. The denial of a request for expungement is a nonappealable order and shall not be reviewed by petition for writ.

(2) Except as provided below, the Department of Justice shall expunge all identifiable information in the data bank and any criminal identification records pertaining to the person upon receipt of a court order that verifies the applicant has made the necessary showing at a noticed hearing, and that includes all of the following:

(A) The written request for expungement pursuant to this section.

(B) A certified copy of the court order reversing and dismissing the conviction, or a letter from the district attorney certifying that the defendant has been found factually innocent, the defendant has been found not guilty, the defendant has been acquitted of the underlying offense, or the underlying conviction has been reversed and the case dismissed.

(C) Proof of written notice to the prosecuting attorney and the Department of Justice that expungement has been requested.

(D) A court order verifying that no retrial or appeal of the case is pending, that it has been at least 180 days since the defendant notified the prosecuting attorney and the Department of Justice of the expungement request, and that the court has not received an objection from the Department of Justice or the prosecuting attorney.

(c) Upon order of the court, the Department of Justice shall destroy any specimen or sample collected from the person and any criminal identification records pertaining to the person, unless the department determines that the person has otherwise become obligated to submit a blood specimen as a result of a separate conviction, juvenile adjudication, or finding of guilty or not guilty by reason of insanity for an offense described in subdivision (a) of Section 296, or as a condition of a plea.

The Department of Justice is not required to destroy an autoradiograph or other item obtained from a blood specimen if evidence relating to another person subject to the provisions of this chapter would thereby be destroyed.

Any identification, warrant, probable cause to arrest, or arrest based upon a data bank match is not invalidated due to a failure to expunge or a delay in expunging records.

(d) The DNA Laboratory of the Department of Justice shall review its data bank to determine whether it contains DNA profiles from persons who are no longer suspects in a criminal case. Evidence accumulated pursuant to this chapter from any crime scene with respect to a particular person shall be stricken from the data bank when it is determined that the person is no longer a suspect in the case.

SEC. 141. Section 299.6 of the Penal Code is amended to read:

299.6. (a) This chapter does not prohibit the sharing or disseminating of population data base or data bank information with any of the following:

(1) Federal, state, or local law enforcement agencies.

(2) Crime laboratories, whether public or private, that serve federal, state, and local law enforcement agencies that have been approved by the Department of Justice.

(3) The attorney general's office of any state.

(4) Any third party that the Department of Justice deems necessary to assist the department's crime laboratory with statistical analyses of the population data base or to assist in the recovery or identification of human remains for humanitarian purposes, including identification of missing persons.

(b) This chapter does not prohibit the sharing or disseminating of protocol and forensic DNA analysis methods and quality control procedures with any of the following:

(1) Federal, state, or local law enforcement agencies.

(2) Crime laboratories, whether public or private, that serve federal, state, and local law enforcement agencies that have been approved by the Department of Justice.

(3) The attorney general's office of any state.

(4) Any third party that the Department of Justice deems necessary to assist the department's crime laboratory with analyses of forensic protocol, research methods, or quality control procedures.

(c) The population data base and data bank of the DNA Laboratory of the Department of Justice may be made available to and searched by the FBI and any other agency participating in the FBI's CODIS System.

(d) The Department of Justice may provide portions of the blood specimens and saliva samples collected pursuant to this chapter to local public DNA laboratories for identification purposes, provided that the privacy provisions of this section are followed by the local laboratory and that all of the following conditions are met:

(1) The procedures used by the local public DNA laboratory for the handling of specimens and samples and the disclosure of results are the same as those established by the Department of Justice pursuant to Sections 297, 298, and 299.5.

(2) The methodologies and procedures used by the local public DNA laboratory for DNA or forensic identification analysis are compatible with those established by the Department of Justice pursuant to subdivision (i) of Section 299.5, or otherwise are determined by the Department of Justice to be valid and appropriate for identification purposes.

(3) Only tests of value to law enforcement for identification purposes are performed, and a copy of the results of the analysis is sent to the Department of Justice.

(4) All provisions of this section concerning privacy and security are followed.

(5) The local public DNA laboratory assumes all costs of securing the specimens and samples and provides appropriate tubes, labels, and instructions necessary to secure the samples.

(e) Any local public DNA laboratory that collects DNA typing information shall comply with and be subject to all of the rules, regulations, and restrictions of this chapter and shall follow the policies of the DNA Laboratory of the Department of Justice.

SEC. 142. Section 350 of the Penal Code is amended to read:

350. (a) Any person who willfully manufactures, intentionally sells, or knowingly possesses for sale any counterfeit of a mark registered with the Secretary of State or registered on the Principal Register of the United States Patent and Trademark Office, shall, upon conviction, be punishable as follows:

(1) When the offense involves less than 1,000 of the articles described in this subdivision, with a total retail or fair market value less than that required for grand theft as defined in Section 487, and

if the person is an individual, he or she shall be punished by a fine of not more than five thousand dollars ($5,000), or by imprisonment in a county jail for not more than one year, or by both that fine and imprisonment; or, if the person is a corporation, by a fine of not more than one hundred thousand dollars ($100,000).

(2) When the offense involves 1,000 or more of the articles described in this subdivision, or has a total retail or fair market value equal to or greater than that required for grand theft as defined in Section 487, and if the person is an individual, he or she shall be punished by imprisonment in a county jail not to exceed one year, or in the state prison for 16 months, or two or three years, or by a fine not to exceed two hundred fifty thousand dollars ($250,000), or by both that imprisonment and fine; or, if the person is a corporation, by a fine not to exceed five hundred thousand dollars ($500,000).

(b) Any person who has been convicted of a violation of either paragraph (1) or (2) of subdivision (a) shall, upon a subsequent conviction of paragraph (1) of subdivision (a), if the person is an individual, be punished by a fine of not more than fifty thousand dollars ($50,000), or by imprisonment in a county jail for not more than one year, or in the state prison for 16 months, or two or three years, or by both that fine and imprisonment; or, if the person is a corporation, by a fine of not more than two hundred thousand dollars ($200,000).

(c) Any person who has been convicted of a violation of subdivision (a) and who, by virtue of the conduct that was the basis of the conviction, has directly and foreseeably caused death or great bodily injury to another through reliance on the counterfeited item for its intended purpose shall, if the person is an individual, be punished by a fine of not more than fifty thousand dollars ($50,000), or by imprisonment in the state prison for two, three, or four years, or by both that fine and imprisonment; or, if the person is a corporation, by a fine of not more than two hundred thousand dollars ($200,000).

(d) In any action brought under this section resulting in a conviction or a plea of nolo contendere, the court shall order the forfeiture and destruction of all of those marks and of all goods, articles, or other matter bearing the marks, and the forfeiture and destruction or other disposition of all means of making the marks, and any and all electrical, mechanical, or other devices for manufacturing, reproducing, transporting, or assembling these marks, that were used in connection with, or were part of, any violation of this section. However, no vehicle shall be forfeited under this section that may be lawfully driven on the highway with a class 3 or 4 license, as prescribed in Section 12804 of the Vehicle Code, and that is any of the following:

(1) A community property asset of a person other than the defendant.

(2) The sole class 3 or 4 vehicle available to the immediate family of that person or of the defendant.

(3) Reasonably necessary to be retained by the defendant for the purpose of lawfully earning a living, or for any other reasonable and lawful purpose.

(e) For the purposes of this section, the following definitions shall apply:

(1) When counterfeited but unassembled components of computer software packages are recovered, including, but not limited to, counterfeited computer diskettes, instruction manuals, or licensing envelopes, the number of "articles" shall be equivalent to the number of completed computer software packages that could have been made from those components.

(2) "Counterfeit mark" means a spurious mark that is identical with, or confusingly similar to, a registered mark and is used on or in connection with the same type of goods or services for which the genuine mark is registered. It is not necessary for the mark to be displayed on the outside of an article for there to be a violation. For articles containing digitally stored information, it shall be sufficient to constitute a violation if the counterfeit mark appears on a video display when the information is retrieved from the article. The term "spurious mark" includes genuine marks used on or in connection with spurious articles and includes identical articles containing identical marks, where the goods or marks were reproduced without authorization of, or in excess of any authorization granted by, the registrant.

(3) "Knowingly possess" means that the person possessing an article knew or had reason to believe that it was spurious, or that it was used on or in connection with spurious articles, or that it was reproduced without authorization of, or in excess of any authorization granted by, the registrant.

(4) "Registrant" means any person to whom the registration of a mark is issued and that person's legal representatives, successors, or assigns.

(5) "Sale" includes resale.

(6) "Value" has the following meanings:

(A) When counterfeit items of computer software are manufactured or possessed for sale, the "value" of those items shall be equivalent to the retail price or fair market price of the true items that are counterfeited.

(B) When counterfeited but unassembled components of computer software packages are recovered, including, but not limited to, counterfeited digital disks, instruction manuals, or licensing envelopes, the "value" of those components of computer software packages shall be equivalent to the retail price or fair market value of the number of completed computer software packages that could have been made from those components.

(C) "Retail or fair market value" of a counterfeit article means a value equivalent to the retail price or fair market value, as of the last day of the charged crime, of a completed similar genuine article containing a genuine mark.

(f) This section shall not be enforced against any party who has adopted and lawfully used the same or confusingly similar mark in the rendition of like services or the manufacture or sale of like goods in this state from a date prior to the earliest effective date of registration of the service mark or trademark either with the Secretary of State or on the Principle Register of the United States Patent and Trademark Office.

(g) An owner, officer, employee, or agent who provides, rents, leases, licenses, or sells real property upon which a violation of subdivision (a) occurs shall not be subject to a criminal penalty pursuant to this section, unless he or she sells, or possesses for sale, articles bearing a counterfeit mark in violation of this section. This subdivision shall not be construed to abrogate or limit any civil rights or remedies for a trademark violation.

SEC. 143. Section 550 of the Penal Code is amended to read:

550. (a) It is unlawful to do any of the following, or to aid, abet, solicit, or conspire with any person to do any of the following:

(1) Knowingly present or cause to be presented any false or fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance.

(2) Knowingly present multiple claims for the same loss or injury, including presentation of multiple claims to more than one insurer, with an intent to defraud.

(3) Knowingly cause or participate in a vehicular collision, or any other vehicular accident, for the purpose of presenting any false or fraudulent claim.

(4) Knowingly present a false or fraudulent claim for the payments of a loss for theft, destruction, damage, or conversion of a motor vehicle, a motor vehicle part, or contents of a motor vehicle.

(5) Knowingly prepare, make, or subscribe any writing, with the intent to present or use it, or to allow it to be presented, in support of any false or fraudulent claim.

(6) Knowingly make or cause to be made any false or fraudulent claim for payment of a health care benefit.

(7) Knowingly submit a claim for a health care benefit that was not used by, or on behalf of, the claimant.

(8) Knowingly present multiple claims for payment of the same health care benefit with an intent to defraud.

(9) Knowingly present for payment any undercharges for health care benefits on behalf of a specific claimant unless any known overcharges for health care benefits for that claimant are presented for reconciliation at that same time.

(10) For purposes of paragraphs (6) to (9), inclusive, a claim or a claim for payment of a health care benefit also means a claim or claim for payment submitted by or on the behalf of a provider of any workers' compensation health benefits under the Labor Code.

(b) It is unlawful to do, or to knowingly assist or conspire with any person to do, any of the following:

(1) Present or cause to be presented any written or oral statement as part of, or in support of or opposition to, a claim for payment or other benefit pursuant to an insurance policy, knowing that the statement contains any false or misleading information concerning any material fact.

(2) Prepare or make any written or oral statement that is intended to be presented to any insurer or any insurance claimant in connection with, or in support of or opposition to, any claim or payment or other benefit pursuant to an insurance policy, knowing that the statement contains any false or misleading information concerning any material fact.

(3) Conceal, or knowingly fail to disclose the occurrence of, an event that affects any person's initial or continued right or entitlement to any insurance benefit or payment, or the amount of any benefit or payment to which the person is entitled.

(4) Prepare or make any written or oral statement, intended to be presented to any insurer or producer for the purpose of obtaining a motor vehicle insurance policy, that the person to be the insured resides or is domiciled in this state when, in fact, that person resides or is domiciled in a state other than this state.

(c) (1) Every person who violates paragraph (1), (2), (3), (4), or (5) of subdivision (a) is guilty of a felony punishable by imprisonment in the state prison for two, three, or five years, and by a fine not exceeding fifty thousand dollars ($50,000), unless the value of the fraud exceeds fifty thousand dollars ($50,000), in which event the fine may not exceed double of the value of the fraud.

(2) Every person who violates paragraph (6), (7), (8), or (9) of subdivision (a) is guilty of a public offense.

(A) Where the claim or amount at issue exceeds four hundred dollars ($400), the offense is punishable by imprisonment in the state prison for two, three, or five years, or by a fine not exceeding fifty thousand dollars ($50,000), or by both that imprisonment and fine, unless the value of the fraud exceeds fifty thousand dollars ($50,000), in which event the fine may not exceed double the value of the fraud, or by imprisonment in a county jail not to exceed one year, by a fine of not more than one thousand dollars ($1,000), or by both that imprisonment and fine.

(B) Where the claim or amount at issue is four hundred dollars ($400) or less, the offense is punishable by imprisonment in a county jail not to exceed six months, or by a fine of not more than one thousand dollars ($1,000), or by both that imprisonment and fine,

unless the aggregate amount of the claims or amount at issue exceeds four hundred dollars ($400) in any 12-consecutive-month period, in which case the claims or amounts may be charged as in subparagraph (A).

(3) Every person who violates paragraph (1), (2), (3), or (4) of subdivision (b) shall be punished by imprisonment in the state prison for two, three, or five years, or by a fine not exceeding fifty thousand dollars ($50,000), unless the value of the fraud exceeds fifty thousand dollars ($50,000), in which event the fine may not exceed double the value of the fraud, or by both that imprisonment and fine ; or by imprisonment in a county jail not to exceed one year, or by a fine of not more than one thousand dollars ($1,000), or by both that imprisonment and fine.

(d) Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of a sentence be suspended for, any adult person convicted of felony violations of this section who previously has been convicted of felony violations of this section or Section 548, or of Section 1871.4 of the Insurance Code, or former Section 556 of the Insurance Code, or former Section 1871.1 of the Insurance Code as an adult under charges separately brought and tried two or more times. The existence of any fact that would make a person ineligible for probation under this subdivision shall be alleged in the information or indictment, and either admitted by the defendant in an open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

Except when the existence of the fact was not admitted or found to be true or the court finds that a prior felony conviction was invalid, the court shall not strike or dismiss any prior felony convictions alleged in the information or indictment.

This subdivision does not prohibit the adjournment of criminal proceedings pursuant to Division 3 (commencing with Section 3000) or Division 6 (commencing with Section 6000) of the Welfare and Institutions Code.

(e) Except as otherwise provided in subdivision (f), any person who violates subdivision (a) or (b) and who has a prior felony conviction of an offense set forth in either subdivision (a) or (b), in Section 548, in Section 1871.4 of the Insurance Code, in former Section 556 of the Insurance Code, or in former Section 1871.1 of the Insurance Code shall receive a two-year enhancement for each prior felony conviction in addition to the sentence provided in subdivision (c). The existence of any fact that would subject a person to a penalty enhancement shall be alleged in the information or indictment and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury. Any person who violates this section shall

be subject to appropriate orders of restitution pursuant to Section 13967 of the Government Code.

(f) Any person who violates paragraph (3) of subdivision (a) and who has two prior felony convictions for a violation of paragraph (3) of subdivision (a) shall receive a five-year enhancement in addition to the sentence provided in subdivision (c). The existence of any fact that would subject a person to a penalty enhancement shall be alleged in the information or indictment and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

(g) Except as otherwise provided in Section 12022.7, any person who violates paragraph (3) of subdivision (a) shall receive a two-year enhancement for each person other than an accomplice who suffers serious bodily injury resulting from the vehicular collision or accident in a violation of paragraph (3) of subdivision (a).

(h) This section shall not be construed to preclude the applicability of any other provision of criminal law or equitable remedy that applies or may apply to any act committed or alleged to have been committed by a person.

SEC. 144. Section 594 of the Penal Code, as amended by Section 1.5 of Chapter 853 of the Statutes of 1998, is amended to read:

594. (a) Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism:

(1) Defaces with graffiti or other inscribed material.

(2) Damages.

(3) Destroys.

Whenever a person violates this subdivision with respect to real property, vehicles, signs, fixtures, or furnishings belonging to any public entity, as defined by Section 811.2 of the Government Code, or the federal government, it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property.

(b) (1) If the amount of defacement, damage, or destruction is fifty thousand dollars ($50,000) or more, vandalism is punishable by imprisonment in the state prison or in a county jail not exceeding one year, or by a fine of not more than fifty thousand dollars ($50,000), or by both that fine and imprisonment.

(2) If the amount of defacement, damage, or destruction is five thousand dollars ($5,000) or more but less than fifty thousand dollars ($50,000), vandalism is punishable by imprisonment in the state prison, or in a county jail not exceeding one year, or by a fine of not more than ten thousand dollars ($10,000), or by both that fine and imprisonment.

(3) If the amount of defacement, damage, or destruction is four hundred dollars ($400) or more but less than five thousand dollars ($5,000), vandalism is punishable by imprisonment in a county jail not exceeding one year, or by a fine of five thousand dollars ($5,000), or by both that fine and imprisonment.

(4) (A) If the amount of defacement, damage, or destruction is less than four hundred dollars ($400), vandalism is punishable by imprisonment in a county jail for not more than six months, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment.

(B) If the amount of defacement, damage, or destruction is less than four hundred dollars ($400), and the defendant has been previously convicted of vandalism or affixing graffiti or other inscribed material under Section 594, 594.3, 594.4, 640.5, 640.6, or 640.7, vandalism is punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than five thousand dollars ($5,000), or by both that fine and imprisonment.

(c) (1) Upon conviction of any person under this section for acts of vandalism consisting of defacing property with graffiti or other inscribed materials, the court may, in addition to any punishment imposed under subdivision (b), order the defendant to clean up, repair, or replace the damaged property himself or herself, or, if the jurisdiction has adopted a graffiti abatement program, order the defendant, and his or her parents or guardians if the defendant is a minor, to keep the damaged property or another specified property in the community free of graffiti for up to one year. Participation of a parent or guardian is not required under this subdivision if the court deems this participation to be detrimental to the defendant, or if the parent or guardian is a single parent who must care for young children.

(2) Any city, county, or city and county may enact an ordinance that provides for all of the following:

(A) That upon conviction of any person pursuant to this section for acts of vandalism, the court may, in addition to any punishment imposed under subdivision (b), provided that the court determines that the defendant has the ability to pay any law enforcement costs not exceeding two hundred fifty dollars ($250), order the defendant to pay all or part of the costs not to exceed two hundred fifty dollars ($250) incurred by a law enforcement agency in identifying and apprehending the defendant. The law enforcement agency shall provide evidence of, and bear the burden of establishing, the reasonable costs that it incurred in identifying and apprehending the defendant.

(B) The law enforcement costs authorized to be paid pursuant to this subdivision are in addition to any other costs incurred or recovered by the law enforcement agency, and payment of these costs does not in any way limit, preclude, or restrict any other right,

remedy, or action otherwise available to the law enforcement agency.

(d) If a minor is personally unable to pay a fine levied for acts prohibited by this section, the parent of that minor shall be liable for payment of the fine. A court may waive payment of the fine, or any part thereof, by the parent upon a finding of good cause.

(e) As used in this section, the term "graffiti or other inscribed material" includes any unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn, or painted on real or personal property.

(f) As used in this section, "graffiti abatement program" means a program adopted by a city, county, or city and county by resolution or ordinance that provides for the administration and financing of graffiti removal, community education on the prevention of graffiti, and enforcement of graffiti laws.

(g) The court may order any person ordered to perform community service or graffiti removal pursuant to paragraph (1) of subdivision (c) to undergo counseling.

(h) No amount paid by a defendant in satisfaction of a criminal matter shall be applied in satisfaction of the law enforcement costs that may be imposed pursuant to this section until all outstanding base fines, state and local penalty assessments, restitution orders, and restitution fines have been paid.

(i) This section shall remain in effect until January 1, 2002, and as of that date is repealed, unless a later enacted statute that is enacted before January 1, 2002, deletes or extends that date.

SEC. 145. Section 594 of the Penal Code, as added by Section 1.6 of Chapter 853 of the Statutes of 1998, is amended to read:

594. (a) Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism:

(1) Defaces with graffiti or other inscribed material.

(2) Damages.

(3) Destroys.

Whenever a person violates this subdivision with respect to real property, vehicles, signs, fixtures, or furnishings belonging to any public entity, as defined by Section 811.2 of the Government Code, or the federal government, it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property.

(b) (1) If the amount of defacement, damage, or destruction is fifty thousand dollars ($50,000) or more, vandalism is punishable by imprisonment in the state prison or in a county jail not exceeding one year, or by a fine of not more than fifty thousand dollars ($50,000), or by both that fine and imprisonment.

97

(2) If the amount of defacement, damage, or destruction is five thousand dollars ($5,000) or more but less than fifty thousand dollars ($50,000), vandalism is punishable by imprisonment in the state prison, or in a county jail not exceeding one year, or by a fine of not more than ten thousand dollars ($10,000), or by both that fine and imprisonment.

(3) If the amount of defacement, damage, or destruction is four hundred dollars ($400) or more but less than five thousand dollars ($5,000), vandalism is punishable by imprisonment in a county jail not exceeding one year, or by a fine of five thousand dollars ($5,000), or by both that fine and imprisonment.

(4) (A) If the amount of defacement, damage, or destruction is less than four hundred dollars ($400), vandalism is punishable by imprisonment in a county jail for not more than six months, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment.

(B) If the amount of defacement, damage, or destruction is less than four hundred dollars ($400), and the defendant has been previously convicted of vandalism or affixing graffiti or other inscribed material under Section 594, 594.3, 594.4, 640.5, 640.6, or 640.7, vandalism is punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than five thousand dollars ($5,000), or by both that fine and imprisonment.

(c) Upon conviction of any person under this section for acts of vandalism consisting of defacing property with graffiti or other inscribed materials, the court may, in addition to any punishment imposed under subdivision (b), order the defendant to clean up, repair, or replace the damaged property himself or herself, or, if the jurisdiction has adopted a graffiti abatement program, order the defendant, and his or her parents or guardians if the defendant is a minor, to keep the damaged property or another specified property in the community free of graffiti for up to one year. Participation of a parent or guardian is not required under this subdivision if the court deems this participation to be detrimental to the defendant, or if the parent or guardian is a single parent who must care for young children.

(d) If a minor is personally unable to pay a fine levied for acts prohibited by this section, the parent of that minor shall be liable for payment of the fine. A court may waive payment of the fine, or any part thereof, by the parent upon a finding of good cause.

(e) As used in this section, the term "graffiti or other inscribed material" includes any unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn, or painted on real or personal property.

(f) As used in this section, "graffiti abatement program" means a program adopted by a city, county, or city and county by resolution or ordinance that provides for the administration and financing of

graffiti removal, community education on the prevention of graffiti, and enforcement of graffiti laws.

(g) The court may order any person ordered to perform community service or graffiti removal pursuant to paragraph (1) of subdivision (c) to undergo counseling.

(h) This section shall become operative on January 1, 2002.

SEC. 146. Section 626.9 of the Penal Code is amended to read:

626.9. (a) This section shall be known, and may be cited, as the Gun-Free School Zone Act of 1995.

(b) Any person who possesses a firearm in a place that the person knows, or reasonably should know, is a school zone, as defined in paragraph (1) of subdivision (e), unless it is with the written permission of the school district superintendent, his or her designee, or equivalent school authority, shall be punished as specified in subdivision (f).

(c) Subdivision (b) does not apply to the possession of a firearm under any of the following circumstances:

(1) Within a place of residence or place of business or on private property, if the place of residence, place of business, or private property is not part of the school grounds and the possession of the firearm is otherwise lawful.

(2) When the firearm is an unloaded pistol, revolver, or other firearm capable of being concealed on the person and is in a locked container or within the locked trunk of a motor vehicle.

This section does not prohibit or limit the otherwise lawful transportation of any other firearm, other than a pistol, revolver, or other firearm capable of being concealed on the person, in accordance with state law.

(3) When the person possessing the firearm reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety. This subdivision may not apply when the circumstances involve a mutual restraining order issued pursuant to Division 10 (commencing with Section 6200) of the Family Code absent a factual finding of a specific threat to the person's life or safety. Upon a trial for violating subdivision (b), the trier of a fact shall determine whether the defendant was acting out of a reasonable belief that he or she was in grave danger.

(4) When the person is exempt from the prohibition against carrying a concealed firearm pursuant to subdivision (b), (d), (e), or (h) of Section 12027.

(d) Except as provided in subdivision (b), it shall be unlawful for any person, with reckless disregard for the safety of another, to discharge, or attempt to discharge, a firearm in a school zone, as defined in paragraph (1) of subdivision (e).

The prohibition contained in this subdivision does not apply to the discharge of a firearm to the extent that the conditions of paragraph (1) of subdivision (c) are satisfied.

(e) As used in this section, the following definitions shall apply:

(1) "School zone" means an area in, or on the grounds of, a public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, or within a distance of 1,000 feet from the grounds of the public or private school.

(2) "Firearm" has the same meaning as that term is given in Section 12001.

(3) "Locked container" has the same meaning as that term is given in subdivision (c) of Section 12026.1.

(4) "Concealed firearm" has the same meaning as that term is given in Sections 12025 and 12026.1.

(f) (1) Any person who violates subdivision (b) by possessing a firearm in, or on the grounds of, a public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, shall be punished by imprisonment in the state prison for two, three, or five years.

(2) Any person who violates subdivision (b) by possessing a firearm within a distance of 1,000 feet from the grounds of a public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, shall be punished as follows:

(A) By imprisonment in the state prison for two, three, or five years, if any of the following circumstances apply:

(i) If the person previously has been convicted of any felony, or of any crime made punishable by Chapter 1 (commencing with Section 12000) of Title 2 of Part 4.

(ii) If the person is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code.

(iii) If the firearm is any pistol, revolver, or other firearm capable of being concealed upon the person and the offense is punished as a felony pursuant to Section 12025.

(B) By imprisonment in a county jail for not more than one year or by imprisonment in the state prison for two, three, or five years, in all cases other than those specified in subparagraph (A).

(3) Any person who violates subdivision (d) shall be punished by imprisonment in the state prison for three, five, or seven years.

(g) (1) Every person convicted under this section for a misdemeanor violation of subdivision (b) who has been convicted previously of a misdemeanor offense enumerated in Section 12001.6 shall be punished by imprisonment in a county jail for not less than three months, or if probation is granted or if the execution or imposition of sentence is suspended, it shall be a condition thereof

that he or she be imprisoned in a county jail for not less than three months.

(2) Every person convicted under this section of a felony violation of subdivision (b) or (d) who has been convicted previously of a misdemeanor offense enumerated in Section 12001.6, if probation is granted or if the execution of sentence is suspended, it shall be a condition thereof that he or she be imprisoned in a county jail for not less than three months.

(3) Every person convicted under this section for a felony violation of subdivision (b) or (d) who has been convicted previously of any felony, or of any crime made punishable by Chapter 1 (commencing with Section 12000) of Title 2 of Part 4, if probation is granted or if the execution or imposition of sentence is suspended, it shall be a condition thereof that he or she be imprisoned in a county jail for not less than three months.

(4) The court shall apply the three-month minimum sentence specified in this subdivision, except in unusual cases where the interests of justice would best be served by granting probation or suspending the execution or imposition of sentence without the minimum imprisonment required in this subdivision or by granting probation or suspending the execution or imposition of sentence with conditions other than those set forth in this subdivision, in which case the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by this disposition.

(h) Notwithstanding Section 12026, any person who brings or possesses a loaded firearm upon the grounds of a campus of, or buildings owned or operated for student housing, teaching, research, or administration by, a public or private university or college, that are contiguous or are clearly marked university property, unless it is with the written permission of the university or college president, his or her designee, or equivalent university or college authority, shall be punished by imprisonment in the state prison for two, three, or four years. Notwithstanding subdivision (k), a university or college shall post a prominent notice at primary entrances on noncontiguous property stating that firearms are prohibited on that property pursuant to this subdivision.

(i) Notwithstanding Section 12026, any person who brings or possesses a firearm upon the grounds of a campus of, or buildings owned or operated for student housing, teaching, research, or administration by, a public or private university or college, that are contiguous or are clearly marked university property, unless it is with the written permission of the university or college president, his or her designee, or equivalent university or college authority, shall be punished by imprisonment in the state prison for one, two, or three years. Notwithstanding subdivision (k), a university or college shall post a prominent notice at primary entrances on noncontiguous

property stating that firearms are prohibited on that property pursuant to this subdivision.

(j) For purposes of this section, a firearm shall be deemed to be loaded when there is an unexpended cartridge or shell, consisting of a case that holds a charge of powder and a bullet or shot, in, or attached in any manner to, the firearm, including, but not limited to, in the firing chamber, magazine, or clip thereof attached to the firearm. A muzzle-loader firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder.

(k) This section does not require that notice be posted regarding the proscribed conduct.

(*l*) This section does not apply to a duly appointed peace officer as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, a full-time paid peace officer of another state or the federal government who is carrying out official duties while in California, any person summoned by any of these officers to assist in making arrests or preserving the peace while he or she is actually engaged in assisting the officer, a member of the military forces of this state or of the United States who is engaged in the performance of his or her duties, a person holding a valid license to carry the firearm pursuant to Article 3 (commencing with Section 12050) of Chapter 1 of Title 2 of Part 4, or an armored vehicle guard, engaged in the performance of his or her duties, as defined in subdivision (e) of Section 7521 of the Business and Professions Code.

(m) This section does not apply to a security guard authorized to carry a loaded firearm pursuant to Section 12031.

(n) This section does not apply to an existing shooting range at a public or private school or university or college campus.

(o) This section does not apply to an honorably retired peace officer authorized to carry a concealed or loaded firearm pursuant to subdivision (a) or (i) of Section 12027 or paragraph (1) or (8) of subdivision (b) of Section 12031.

SEC. 147. Section 653m of the Penal Code is amended to read:

653m. (a) Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith.

(b) Every person who makes repeated telephone calls or makes repeated contact by means of an electronic communication device with intent to annoy another person at his or her residence, is, whether or not conversation ensues from making the telephone call or electronic contact, guilty of a misdemeanor. Nothing in this

subdivision shall apply to telephone calls or electronic contacts made in good faith.

(c) Every person who makes repeated telephone calls or makes repeated contact by means of an electronic communication device with the intent to annoy another person at his or her place of work is guilty of a misdemeanor punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in a county jail for not more than one year, or by both that fine and imprisonment. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith. This subdivision applies only if one or both of the following circumstances exist:

(1) There is a temporary restraining order, an injunction, or any other court order, or any combination of these court orders, in effect prohibiting the behavior described in this section.

(2) The person makes repeated telephone calls or makes repeated contact by means of an electronic communication device with the intent to annoy another person at his or her place of work, totaling more than 10 times in a 24-hour period, whether or not conversation ensues from making the telephone call or electronic contact, and the repeated telephone calls or electronic contacts are made to the workplace of an adult or fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the person has a child or has had a dating or engagement relationship or is having a dating or engagement relationship.

(d) Any offense committed by use of a telephone may be deemed to have been committed where the telephone call or calls were made or received. Any offense committed by use of an electronic communication device or medium, including the Internet, may be deemed to have been committed when the electronic communication or communications were originally sent or first viewed by the recipient.

(e) Subdivision (a), (b), or (c) is violated when the person acting with intent to annoy makes a telephone call requesting a return call and performs the acts prohibited under subdivision (a), (b), or (c) upon receiving the return call.

(f) If probation is granted, or the execution or imposition of sentence is suspended, for any person convicted under this section, the court may order as a condition of probation that the person participate in counseling.

(g) For purposes of this section, the term "electronic communication device" includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

SEC. 148. Section 790 of the Penal Code is amended to read:

790. (a) The jurisdiction of a criminal action for murder or manslaughter is in the county where the fatal injury was inflicted or in the county in which the injured party died or in the county in which his or her body was found. However, if the defendant is indicted in the county in which the fatal injury was inflicted, at any time before his or her trial in another county, the sheriff of the other county shall, if the defendant is in custody, deliver the defendant upon demand to the sheriff of the county in which the fatal injury was inflicted. When the fatal injury was inflicted and the injured person died or his or her body was found within five hundred yards of the boundary of two or more counties, jurisdiction is in either county.

(b) If a defendant is charged with a special circumstance pursuant to paragraph (3) of subdivision (a) of Section 190.2, the jurisdiction for any charged murder, and for any crimes properly joinable with that murder, shall be in any county that has jurisdiction pursuant to subdivision (a) for one or more of the murders charged in a single complaint or indictment as long as the charged murders are "connected together in their commission," as that phrase is used in Section 954, and subject to a hearing in the jurisdiction where the prosecution is attempting to consolidate the charged murders. If the charged murders are not joined or consolidated, the murder that was charged outside of the county that has jurisdiction pursuant to subdivision (a) shall be returned to that county.

SEC. 149. Section 831.5 of the Penal Code, as amended by Section 8 of Chapter 606 of the Statutes of 1998, is amended to read:

831.5. (a) As used in this section, a custodial officer is a public officer, not a peace officer, employed by a law enforcement agency of San Diego County, Fresno County, Kern County, Stanislaus County, Riverside County, or a county having a population of 425,000 or less who has the authority and responsibility for maintaining custody of prisoners and performs tasks related to the operation of a local detention facility used for the detention of persons usually pending arraignment or upon court order either for their own safekeeping or for the specific purpose of serving a sentence therein. Custodial officers of a county shall be employees of, and under the authority of, the sheriff, except in counties in which the sheriff, as of July 1, 1993, is not in charge of and the sole and exclusive authority to keep the county jail and the prisoners in it. A custodial officer includes a person designated as a correctional officer, jailer, or other similar title. The duties of a custodial officer may include the serving of warrants, court orders, writs, and subpoenas in the detention facility or under circumstances arising directly out of maintaining custody of prisoners and related tasks. In counties having a population of 100,000 or less, a custodial officer may be assigned by the sheriff as a court bailiff on an interim basis, and, when under the direction of the sheriff, a custodial officer assigned as a court bailiff may carry or possess firearms.

(b) Notwithstanding any other provision of law, during a state of emergency as defined in Section 8558 of the Government Code, a custodial officer may be assigned limited law enforcement responsibilities under the supervision of a peace officer. While on this assignment, the custodial officer may exercise the powers of arrest pursuant to Section 836.5.

(c) A custodial officer has no right to carry or possess firearms in the performance of his or her prescribed duties, except, under the direction of the sheriff or chief of police, while assigned as a court bailiff or engaged in transporting prisoners, guarding hospitalized prisoners, or suppressing jail riots, lynchings, escapes, or rescues in or about a detention facility falling under the care and custody of the sheriff or chief of police.

(d) Each person described in this section as a custodial officer shall, within 90 days following the date of the initial assignment to that position, satisfactorily complete the training course specified in Section 832. In addition, each person designated as a custodial officer shall, within one year following the date of the initial assignment as a custodial officer, have satisfactorily met the minimum selection and training standards prescribed by the Board of Corrections pursuant to Section 6035. Persons designated as custodial officers, before the expiration of the 90-day and one-year periods described in this subdivision, who have not yet completed the required training, shall not carry or possess firearms in the performance of their prescribed duties, but may perform the duties of a custodial officer only while under the direct supervision of a peace officer, as described in Section 830.1, who has completed the training prescribed by the Commission on Peace Officer Standards and Training, or a custodial officer who has completed the training required in this section.

(e) At any time that 20 or more custodial officers are on duty, there shall be at least one peace officer, as described in Section 830.1, on duty at the same time to supervise the performance of the custodial officers.

(f) This section shall not be construed to confer any authority upon any custodial officer except while on duty.

(g) A custodial officer may use reasonable force in establishing and maintaining custody of persons delivered to him or her by a law enforcement officer, may make arrests for misdemeanors and felonies within the local detention facility pursuant to a duly issued warrant, may make warrantless arrests pursuant to Section 836.5 only during the duration of his or her job, may release without further criminal process persons arrested for intoxication, and may release misdemeanants on citation to appear in lieu of or after booking.

(h) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

97

SEC. 150. Section 831.5 of the Penal Code, as added by Section 8.5 of Chapter 606 of the Statutes of 1998, is amended to read:

831.5. (a) As used in this section, a custodial officer is a public officer, not a peace officer, employed by a law enforcement agency of San Diego County, Fresno County, Kern County, Stanislaus County, Riverside County, or a county having a population of 425,000 or less who has the authority and responsibility for maintaining custody of prisoners and performs tasks related to the operation of a local detention facility used for the detention of persons usually pending arraignment or upon court order either for their own safekeeping or for the specific purpose of serving a sentence therein. Custodial officers of a county shall be employees of, and under the authority of, the sheriff, except in counties in which the sheriff, as of July 1, 1993, is not in charge of and the sole and exclusive authority to keep the county jail and the prisoners in it. A custodial officer includes a person designated as a correctional officer, jailer, or other similar title. The duties of a custodial officer may include the serving of warrants, court orders, writs, and subpoenas in the detention facility or under circumstances arising directly out of maintaining custody of prisoners and related tasks.

(b) A custodial officer has no right to carry or possess firearms in the performance of his or her prescribed duties, except, under the direction of the sheriff or chief of police, while engaged in transporting prisoners; guarding hospitalized prisoners; or suppressing jail riots, lynchings, escapes, or rescues in or about a detention facility falling under the care and custody of the sheriff or chief of police.

(c) Each person described in this section as a custodial officer shall, within 90 days following the date of the initial assignment to that position, satisfactorily complete the training course specified in Section 832. In addition, each person designated as a custodial officer shall, within one year following the date of the initial assignment as a custodial officer, have satisfactorily met the minimum selection and training standards prescribed by the Board of Corrections pursuant to Section 6035. Persons designated as custodial officers, before the expiration of the 90-day and one-year periods described in this subdivision, who have not yet completed the required training, shall not carry or possess firearms in the performance of their prescribed duties, but may perform the duties of a custodial officer only while under the direct supervision of a peace officer, as described in Section 830.1, who has completed the training prescribed by the Commission on Peace Officer Standards and Training, or a custodial officer who has completed the training required in this section.

(d) At any time that 20 or more custodial officers are on duty, there shall be at least one peace officer, as described in Section 830.1, on duty at the same time to supervise the performance of the custodial officers.

97

(e) This section shall not be construed to confer any authority upon any custodial officer except while on duty.

(f) A custodial officer may use reasonable force in establishing and maintaining custody of persons delivered to him or her by a law enforcement officer, may make arrests for misdemeanors and felonies within the local detention facility pursuant to a duly issued warrant, may make warrantless arrests pursuant to Section 836.5 only during the duration of his or her job, may release without further criminal process persons arrested for intoxication, and may release misdemeanants on citation to appear in lieu of or after booking.

(g) This section shall become operative on January 1, 2003.

SEC. 151. Section 1203.097 of the Penal Code is amended to read:

1203.097. (a) If a person is granted probation for a crime in which the victim is a person defined in Section 6211 of the Family Code, the terms of probation shall include all of the following:

(1) A minimum period of probation of 36 months, which may include a period of summary probation as appropriate.

(2) A criminal court protective order protecting the victim from further acts of violence, threats, stalking, sexual abuse, and harassment, and, if appropriate, containing residence exclusion or stay-away conditions.

(3) Notice to the victim of the disposition of the case.

(4) Booking the defendant within one week of sentencing if the defendant has not already been booked.

(5) A minimum payment by the defendant of two hundred dollars ($200) to be disbursed as specified in this paragraph. If, after a hearing in court on the record, the court finds that the defendant does not have the ability to pay, the court may reduce or waive this fee.

One-third of the moneys deposited with the county treasurer pursuant to this section shall be retained by counties and deposited in the domestic violence programs special fund created pursuant to Section 18305 of the Welfare and Institutions Code, to be expended for the purposes of Chapter 5 (commencing with Section 18290) of Part 6 of Division 9 of the Welfare and Institutions Code. The remainder shall be transferred, once a month, to the Controller for deposit in equal amounts in the Domestic Violence Restraining Order Reimbursement Fund and in the Domestic Violence Training and Education Fund, which are hereby created, in an amount equal to two-thirds of funds collected during the preceding month. Moneys deposited into these funds to this section shall be available upon appropriation by the Legislature and shall be distributed each fiscal year as follows:

(A) Funds from the Domestic Violence Restraining Order Reimbursement Fund shall be distributed to local law enforcement or other criminal justice agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision

(a) of Section 6385 of the Family Code, based on the annual notification from the Department of Justice of the number of restraining orders issued and registered in the state domestic violence restraining order registry maintained by the Department of Justice, for the development and maintenance of the domestic violence restraining order data bank system.

(B) Funds from the Domestic Violence Training and Education Fund shall support a statewide training and education program to increase public awareness of domestic violence and to improve the scope and quality of services provided to the victims of domestic violence. Grants to support this program shall be awarded on a competitive basis and be administered by the State Department of Health Services, in consultation with the statewide domestic violence coalition, which is eligible to receive funding under this section.

(6) Successful completion of a batterer's program, as defined in subdivision (c), or if none is available, another appropriate counseling program designated by the court, for a period not less than one year with periodic progress reports by the program to the court every three months or less and weekly sessions of a minimum of two hours class time duration.

(7) (A) (i) The court shall order the defendant to comply with all probation requirements, including the requirements to attend counseling, keep all program appointments, and pay program fees based upon the ability to pay.

(ii) The terms of probation for offenders shall not be lifted until all reasonable fees due to the counseling program have been paid in full, but in no case shall probation be extended beyond the term provided in subdivision (a) of Section 1203.1. If the court finds that the defendant does not have the ability to pay the fees based on the defendant's changed circumstances, the court may reduce or waive the fees.

(B) Upon request by the batterer's program, the court shall provide the defendant's arrest report, prior incidents of violence, and treatment history to the program.

(8) The court also shall order the defendant to perform a specified amount of appropriate community service, as designated by the court. The defendant shall present the court with proof of completion of community service and the court shall determine if the community service has been satisfactorily completed. If sufficient staff and resources are available, the community service shall be performed under the jurisdiction of the local agency overseeing a community service program.

(9) If the program finds that the defendant is unsuitable, the program shall immediately contact the probation department or the court. The probation department or court shall either recalendar the case for hearing or refer the defendant to an appropriate alternative batterer's program.

97

(10) (A) Upon recommendation of the program, a court shall require a defendant to participate in additional sessions throughout the probationary period, unless it finds that it is not in the interests of justice to do so, states its reasons on the record, and enters them into the minutes. In deciding whether the defendant would benefit from more sessions, the court shall consider whether any of the following conditions exist:

(i) The defendant has been violence free for a minimum of six months.

(ii) The defendant has cooperated and participated in the batterer's program.

(iii) The defendant demonstrates an understanding of and practices positive conflict resolution skills.

(iv) The defendant blames, degrades, or has committed acts that dehumanize the victim or puts at risk the victim's safety, including, but not limited to, molesting, stalking, striking, attacking, threatening, sexually assaulting, or battering the victim.

(v) The defendant demonstrates an understanding that the use of coercion or violent behavior to maintain dominance is unacceptable in an intimate relationship.

(vi) The defendant has made threats to harm anyone in any manner.

(vii) The defendant has complied with applicable requirements under paragraph (6) of subdivision (c) or subparagraph (C) to receive alcohol counseling, drug counseling, or both.

(viii) The defendant demonstrates acceptance of responsibility for the abusive behavior perpetrated against the victim.

(B) The program shall immediately report any violation of the terms of the protective order, including any new acts of violence or failure to comply with the program requirements, to the court, the prosecutor, and, if formal probation has been ordered, to the probation department. The probationer shall file proof of enrollment in a batterer's program with the court within 30 days of conviction.

(C) Concurrent with other requirements under this section, in addition to, and not in lieu of, the batterer's program, and unless prohibited by the referring court, the probation department or the court may make provisions for a defendant to use his or her resources to enroll in a chemical dependency program or to enter voluntarily a licensed chemical dependency recovery hospital or residential treatment program that has a valid license issued by the state to provide alcohol or drug services to receive program participation credit, as determined by the court. The probation department shall document evidence of this hospital or residential treatment participation in the defendant's program file.

(11) The conditions of probation may include, in lieu of a fine, but not in lieu of the fund payment required under paragraph (5), one or more of the following requirements:

97

(A) That the defendant make payments to a battered women's shelter, up to a maximum of five thousand dollars ($5,000).

(B) That the defendant reimburse the victim for reasonable expenses that the court finds are the direct result of the defendant's offense.

For any order to pay a fine, to make payments to a battered women's shelter, or to pay restitution as a condition of probation under this subdivision, the court shall make a determination of the defendant's ability to pay. Determination of a defendant's ability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating lack of his or her ability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. In no event shall any order to make payments to a battered women's shelter be made if it would impair the ability of the defendant to pay direct restitution to the victim or court-ordered child support. When the injury to a married person is caused in whole or in part by the criminal acts of his or her spouse in violation of this section, the community property shall not be used to discharge the liability of the offending spouse for restitution to the injured spouse, as required by Section 1203.04, as operative on or before August 2, 1995, or Section 1202.4, or to a shelter for costs with regard to the injured spouse, until all separate property of the offending spouse is exhausted.

(12) If it appears to the prosecuting attorney, the court, or the probation department that the defendant is performing unsatisfactorily in the assigned program, is not benefiting from counseling, or has engaged in criminal conduct, upon request of the probation officer, the prosecuting attorney, or on its own motion, the court, as a priority calendar item, shall hold a hearing to determine whether further sentencing should proceed. The court may consider factors, including, but not limited to, any violence by the defendant against the former or a new victim while on probation and noncompliance with any other specific condition of probation. If the court finds that the defendant is not performing satisfactorily in the assigned program, is not benefiting from the program, has not complied with a condition of probation, or has engaged in criminal conduct, the court shall terminate the defendant's participation in the program and shall proceed with further sentencing.

(b) If a person is granted formal probation for a crime in which the victim is a person defined in Section 6211 of the Family Code, in addition to the terms specified in subdivision (a), all of the following shall apply:

(1) The probation department shall make an investigation and take into consideration the defendant's age, medical history, employment and service records, educational background, community and family ties, prior incidents of violence, police report, treatment history, if any, demonstrable motivation, and other

97

mitigating factors in determining which batterer's program would be appropriate for the defendant. This information shall be provided to the batterer's program if it is requested. The probation department shall also determine which community programs the defendant would benefit from and which of those programs would accept the defendant. The probation department shall report its findings and recommendations to the court.

(2) The court shall advise the defendant that the failure to report to the probation department for the initial investigation, as directed by the court, or the failure to enroll in a specified program, as directed by the court or the probation department, shall result in possible further incarceration. The court, in the interests of justice, may relieve the defendant from the prohibition set forth in this subdivision based upon the defendant's mistake or excusable neglect. Application for this relief shall be filed within 20 court days of the missed deadline. This time limitation may not be extended. A copy of any application for relief shall be served on the office of the prosecuting attorney.

(3) After the court orders the defendant to a batterer's program, the probation department shall conduct an initial assessment of the defendant, including, but not limited to, all of the following:

(A) Social, economic, and family background.

(B) Education.

(C) Vocational achievements.

(D) Criminal history.

(E) Medical history.

(F) Substance abuse history.

(G) Consultation with the probation officer.

(H) Verbal consultation with the victim, only if the victim desires to participate.

(I) Assessment of the future probability of the defendant committing murder.

(4) The probation department shall attempt to notify the victim regarding the requirements for the defendant's participation in the batterer's program, as well as regarding available victim resources. The victim also shall be informed that attendance in any program does not guarantee that an abuser will not be violent.

(c) The court or the probation department shall refer defendants only to batterer's programs that follow standards outlined in paragraph (1), which may include, but are not limited to, lectures, classes, group discussions, and counseling. The probation department shall design and implement an approval and renewal process for batterer's programs and shall solicit input from criminal justice agencies and domestic violence victim advocacy programs.

(1) The goal of a batterer's program under this section shall be to stop domestic violence. A batterer's program shall consist of the following components:

97

(A) Strategies to hold the defendant accountable for the violence in a relationship, including, but not limited to, providing the defendant with a written statement that the defendant shall be held accountable for acts or threats of domestic violence.

(B) A requirement that the defendant participate in ongoing same-gender group sessions.

(C) An initial intake that provides written definitions to the defendant of physical, emotional, sexual, economic, and verbal abuse, and the techniques for stopping these types of abuse.

(D) Procedures to inform the victim regarding the requirements for the defendant's participation in the intervention program as well as regarding available victim resources. The victim also shall be informed that attendance in any program does not guarantee that an abuser will not be violent.

(E) A requirement that the defendant attend group sessions free of chemical influence.

(F) Educational programming that examines, at a minimum, gender roles, socialization, the nature of violence, the dynamics of power and control, and the effects of abuse on children and others.

(G) A requirement that excludes any couple counseling or family counseling, or both.

(H) Procedures that give the program the right to assess whether or not the defendant would benefit from the program and to refuse to enroll the defendant if it is determined that the defendant would not benefit from the program, so long as the refusal is not because of the defendant's inability to pay. If possible, the program shall suggest an appropriate alternative program.

(I) Program staff who, to the extent possible, have specific knowledge regarding, but not limited to, spousal abuse, child abuse, sexual abuse, substance abuse, the dynamics of violence and abuse, the law, and procedures of the legal system.

(J) Program staff who are encouraged to utilize the expertise, training, and assistance of local domestic violence centers.

(K) A requirement that the defendant enter into a written agreement with the program, which shall include an outline of the contents of the program, the attendance requirements, the requirement to attend group sessions free of chemical influence, and a statement that the defendant may be removed from the program if it is determined that the defendant is not benefiting from the program or is disruptive to the program.

(L) A requirement that the defendant sign a confidentiality statement prohibiting disclosure of any information obtained through participating in the program or during group sessions regarding other participants in the program.

(M) Program content that provides cultural and ethnic sensitivity.

(N) A requirement of a written referral from the court or probation department prior to permitting the defendant to enroll in

the program. The written referral shall state the number of minimum sessions required by the court.

(O) Procedures for submitting to the probation department all of the following uniform written responses:

(i) Proof of enrollment, to be submitted to the court and the probation department and to include the fee determined to be charged to the defendant, based upon the ability to pay, for each session.

(ii) Periodic progress reports that include attendance, fee payment history, and program compliance.

(iii) Final evaluation that includes the program's evaluation of the defendant's progress, using the criteria set forth in paragraph (4) of subdivision (a) and recommendation for either successful or unsuccessful termination or continuation in the program.

(P) A sliding fee schedule based on the defendant's ability to pay. The batterer's program shall develop and utilize a sliding fee scale that recognizes both the defendant's ability to pay and the necessity of programs to meet overhead expenses. An indigent defendant may negotiate a deferred payment schedule, but shall pay a nominal fee, if the defendant has the ability to pay the nominal fee. Upon a hearing and a finding by the court that the defendant does not have the financial ability to pay the nominal fee, the court shall waive this fee. The payment of the fee shall be made a condition of probation if the court determines the defendant has the present ability to pay the fee. The fee shall be paid during the term of probation unless the program sets other conditions. The acceptance policies shall be in accordance with the scaled fee system.

(2) The court shall refer persons only to batterer's programs that have been approved by the probation department pursuant to paragraph (5). The probation department shall do both of the following:

(A) Provide for the issuance of a provisional approval, provided that the applicant is in substantial compliance with applicable laws and regulations and an urgent need for approval exists. A provisional approval shall be considered an authorization to provide services and shall not be considered a vested right.

(B) If the probation department determines that a program is not in compliance with standards set by the department, the department shall provide written notice of the noncompliant areas to the program. The program shall submit a written plan of corrections within 14 days from the date of the written notice on noncompliance. A plan of correction shall include, but not be limited to, a description of each corrective action and timeframe for implementation. The department shall review and approve all or any part of the plan of correction and notify the program of approval or disapproval in writing. If the program fails to submit a plan of correction or fails to implement the approved plan of correction, the department shall

97

consider whether to revoke or suspend approval and, upon revoking or suspending approval, shall have the option to cease referrals of defendants under this section.

(3) No program, regardless of its source of funding, shall be approved unless it meets all of the following standards:

(A) The establishment of guidelines and criteria for education services, including standards of services that may include lectures, classes, and group discussions.

(B) Supervision of the defendant for the purpose of evaluating the person's progress in the program.

(C) Adequate reporting requirements to ensure that all persons who, after being ordered to attend and complete a program, may be identified for either failure to enroll in, or failure to successfully complete, the program or for the successful completion of the program as ordered. The program shall notify the court and the probation department in writing within the period of time and in the manner specified by the court of any person who fails to complete the program. Notification shall be given if the program determines that the defendant is performing unsatisfactorily or if the defendant is not benefiting from the education, treatment, or counseling.

(D) No victim shall be compelled to participate in a program or counseling, and no program may condition a defendant's enrollment on participation by the victim.

(4) In making referrals of indigent defendants to approved batterer's programs, the probation department shall apportion these referrals evenly among the approved programs.

(5) The probation department shall have the sole authority to approve a batterer's program for probation. The program shall be required to obtain only one approval but shall renew that approval annually.

(A) The procedure for the approval of a new or existing program shall include all of the following:

(i) The completion of a written application containing necessary and pertinent information describing the applicant program.

(ii) The demonstration by the program that it possesses adequate administrative and operational capability to operate a batterer's treatment program. The program shall provide documentation to prove that the program has conducted batterer's programs for at least one year prior to application. This requirement may be waived under subparagraph (A) of paragraph (2) if there is no existing batterer's program in the city, county, or city and county.

(iii) The onsite review of the program, including monitoring of a session to determine that the program adheres to applicable statutes and regulations.

(iv) The payment of the approval fee.

(B) The probation department shall fix a fee for approval not to exceed two hundred fifty dollars ($250) and for approval renewal not

97

to exceed two hundred fifty dollars ($250) every year in an amount sufficient to cover its cost in administering the approval process under this section. No fee shall be charged for the approval of local governmental entities.

(C) The probation department has the sole authority to approve the issuance, denial, suspension, or revocation of approval and to cease new enrollments or referrals to a batterer's program under this section. The probation department shall review information relative to a program's performance or failure to adhere to standards, or both. The probation department may suspend or revoke any approval issued under this subdivision or deny an application to renew an approval or to modify the terms and conditions of approval, based on grounds established by probation, including, but not limited to, either of the following:

(i) Violation of this section by any person holding approval or by a program employee in a program under this section.

(ii) Misrepresentation of any material fact in obtaining the approval.

(6) For defendants who are chronic users or serious abusers of drugs or alcohol, standard components in the program shall include concurrent counseling for substance abuse and violent behavior, and in appropriate cases, detoxification and abstinence from the abused substance.

(7) The program shall conduct an exit conference that assesses the defendant's progress during his or her participation in the batterer's program.

SEC. 152. Section 1269b of the Penal Code is amended to read:

1269b. (a) The officer in charge of a jail where an arrested person is held in custody, an officer of a sheriff's department or police department of a city who is in charge of a jail or is employed at a fixed police or sheriff's facility and is acting under an agreement with the agency that keeps the jail wherein an arrested person is held in custody, an employee of a sheriff's department or police department of a city who is assigned by the department to collect bail, the clerk of the municipal court of the judicial district in which the offense was alleged to have been committed, and the clerk of the superior court in which the case against the defendant is pending may approve and accept bail in the amount fixed by the warrant of arrest, schedule of bail, or order admitting to bail in cash or surety bond executed by a certified, admitted surety insurer as provided in the Insurance Code, to issue and sign an order for the release of the arrested person, and to set a time and place for the appearance of the arrested person before the appropriate court and give notice thereof.

(b) If a defendant has appeared before a judge of the court on the charge contained in the complaint, indictment, or information, the bail shall be in the amount fixed by the judge at the time of the appearance; if that appearance has not been made, the bail shall be

in the amount fixed in the warrant of arrest or, if no warrant of arrest has been issued, the amount of bail shall be pursuant to the uniform countywide schedule of bail for the county in which the defendant is required to appear, previously fixed and approved as provided in subdivisions (c) and (d).

(c) It is the duty of the superior and municipal court judges in each county to prepare, adopt, and annually revise, by a majority vote, at a meeting called by the presiding judge of the superior court of the county, a uniform countywide schedule of bail for all bailable felony offenses.

In adopting a uniform countywide schedule of bail for all bailable offenses the judges shall consider the seriousness of the offense charged. In considering the seriousness of the offense charged the judges shall assign an additional amount of required bail for each aggravating or enhancing factor chargeable in the complaint, including, but not limited to, additional bail for charges alleging facts that would bring a person within any of the following sections: Section 667.5, 667.51, 667.6, 667.8, 667.85, 667.9, 667.10, 12022, 12022.1, 12022.2, 12022.3, 12022.4, 12022.5, 12022.53, 12022.6, 12022.7, 12022.8, or 12022.9, or Section 11356.5, 11370.2, or 11370.4 of the Health and Safety Code.

In considering offenses wherein a violation of Chapter 6 (commencing with Section 11350) of Division 10 of the Health and Safety Code is alleged, the judge shall assign an additional amount of required bail for offenses involving large quantities of controlled substances.

(d) The municipal court judges in each county, at a meeting called by the presiding judge of the municipal court at each county seat, or the superior court judges in each county in which there is no municipal court, at a meeting called by the presiding judge of the superior court, shall prepare, adopt, and annually revise, by a majority vote, a uniform, countywide schedule of bail for all misdemeanor and infraction offenses except Vehicle Code infractions. The penalty schedule for infraction violations of the Vehicle Code shall be established by the Judicial Council in accordance with Section 40310 of the Vehicle Code.

(e) Each countywide bail schedule shall contain a list of the offenses and the amounts of bail applicable thereto as the judges determine to be appropriate. If the schedules do not list all offenses specifically, they shall contain a general clause for designated amounts of bail as the judges of the county determine to be appropriate for all the offenses not specifically listed in the schedules. A copy of the countywide bail schedule shall be sent to the officer in charge of the county jail, to the officer in charge of each city jail within the county, to each superior and municipal court judge and commissioner in the county, and to the Judicial Council.

97

(f) Upon posting bail, the defendant or arrested person shall be discharged from custody as to the offense on which the bail is posted.

All money and surety bonds so deposited with an officer authorized to receive bail shall be transmitted immediately to the judge or clerk of the court by which the order was made or warrant issued or bail schedule fixed. If, in the case of felonies, an indictment is filed, the judge or clerk of the court shall transmit all of the money and surety bonds to the county clerk.

(g) If a defendant or arrested person so released fails to appear at the time and in the court so ordered upon his or her release from custody, Sections 1305 and 1306 apply.

SEC. 153. Section 1347 of the Penal Code, as amended by Section 1.5 of Chapter 670 of the Statutes of 1998, is amended to read:

1347. (a) It is the intent of the Legislature in enacting this section to provide the court with discretion to employ unusual court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In exercising its discretion, the court necessarily will be required to balance the rights of the defendant or defendants against the need to protect a child witness and to preserve the integrity of the court's truthfinding function. This discretion is intended to be used selectively when the facts and circumstances in the individual case present compelling evidence of the need to use these unusual procedures.

(b) Notwithstanding any other law, the court in any criminal proceeding, upon written notice by the prosecutor made at least three days prior to the date of the preliminary hearing or trial date on which the testimony of the minor is scheduled, or during the course of the proceeding on the court's own motion, may order that the testimony of a minor 13 years of age or younger at the time of the motion be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant or defendants, and attorneys, and communicated to the courtroom by means of closed-circuit television, if the court makes all of the following findings:

(1) The minor's testimony will involve a recitation of the facts of either of the following:

(A) An alleged sexual offense committed on or with the minor.

(B) The minor is a victim of a violent felony, as defined in subdivision (c) of Section 667.5.

(2) The impact on the minor of one or more of the factors enumerated in subparagraphs (A) to (D), inclusive, is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit television is used.

(A) Threats of serious bodily injury to be inflicted on the minor or a family member, of incarceration or deportation of the minor or a family member, or of removal of the minor from the family or dissolution of the family, in order to prevent or dissuade the minor

from attending or giving testimony at any trial or court proceeding, or to prevent the minor from reporting the alleged sexual offense or from assisting in criminal prosecution.

(B) Use of a firearm or any other deadly weapon during the commission of the crime.

(C) Infliction of great bodily injury upon the victim during the commission of the crime.

(D) Conduct on the part of the defendant or defense counsel during the hearing or trial that causes the minor to be unable to continue his or her testimony.

In making the determination required by this section, the court shall consider the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged. The minor's refusal to testify shall not alone constitute sufficient evidence that the special procedure described in this section is necessary to obtain the minor's testimony.

(3) The equipment available for use of closed-circuit television would accurately communicate the image and demeanor of the minor to the judge, jury, defendant or defendants, and attorneys.

(c) If the court orders the use of closed-circuit television, two-way closed-circuit television shall be used, except that if the impact on the minor of one or more of the factors enumerated in subparagraphs (A) to (D), inclusive, of paragraph (2) of subdivision (b), is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness even if two-way closed-circuit television is used, one-way closed-circuit television may be used. The prosecution shall give the defendant or defendants at least 30 days written notice of the prosecution's intent to seek the use of one-way closed-circuit television, unless good cause is shown to the court why this 30-day notice requirement should not apply.

(d) (1) The hearing on a motion brought pursuant to this section shall be conducted out of the presence of the jury.

(2) Notwithstanding Section 804 of the Evidence Code or any other law, the court, in determining the merits of the motion, shall not compel the minor to testify at the hearing; nor shall the court deny the motion on the ground that the minor has not testified.

(3) In determining whether the impact on an individual child of one or more of the four factors enumerated in paragraph (2) of subdivision (b) is so substantial that the minor is unavailable as a witness unless two-way or one-way closed-circuit television is used, the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the support person, the prosecutor, and defense counsel present. The defendant or defendants shall not be present. The court shall conduct the questioning of the minor and shall not permit the prosecutor or defense counsel to examine the

minor. The prosecutor and defense counsel shall be permitted to submit proposed questions to the court prior to the session in chambers. Defense counsel shall be afforded a reasonable opportunity to consult with the defendant or defendants prior to the conclusion of the session in chambers.

(e) When the court orders the testimony of a minor to be taken in another place outside of the courtroom, the court shall do all of the following:

(1) Make a brief statement on the record, outside of the presence of the jury, of the reasons in support of its order. While the statement need not include traditional findings of fact, the reasons shall be set forth with sufficient specificity to permit meaningful review and to demonstrate that discretion was exercised in a careful, reasonable, and equitable manner.

(2) Instruct the members of the jury that they are to draw no inferences from the use of closed-circuit television as a means of facilitating the testimony of the minor.

(3) Instruct respective counsel, outside of the presence of the jury, that they are to make no comment during the course of the trial on the use of closed-circuit television procedures.

(4) Instruct the support witness, outside of the presence of the jury, that he or she is not to coach, cue, or in any way influence or attempt to influence the testimony of the minor.

(5) Order that a complete record of the examination of the minor, including the images and voices of all persons who in any way participate in the examination, be made and preserved on videotape in addition to being stenographically recorded. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant or defendants, and his or her attorney during ordinary business hours. The videotape shall be destroyed after five years have elapsed from the date of entry of judgment. If an appeal is filed, the tape shall not be destroyed until a final judgment on appeal has been ordered. Any videotape that is taken pursuant to this section is subject to a protective order of the court for the purpose of protecting the privacy of the witness. This subdivision does not affect the provisions of subdivision (b) of Section 868.7.

(f) When the court orders the testimony of a minor to be taken in another place outside the courtroom, only the minor, a support person designated pursuant to Section 868.5, a nonuniformed bailiff, and, after consultation with the prosecution and the defense, a representative appointed by the court, shall be physically present for the testimony. A videotape shall record the image of the minor and his or her testimony, and a separate videotape shall record the image of the support person.

(g) When the court orders the testimony of a minor to be taken in another place outside the courtroom, the minor shall be brought

into the judge's chambers prior to the taking of his or her testimony to meet for a reasonable period of time with the judge, the prosecutor, and defense counsel. A support person for the minor shall also be present. This meeting shall be for the purpose of explaining the court process to the child and to allow the attorneys an opportunity to establish rapport with the child to facilitate later questioning by closed-circuit television. No participant shall discuss the defendant or defendants or any of the facts of the case with the minor during this meeting.

(h) When the court orders the testimony of a minor to be taken in another place outside the courtroom, nothing in this section prohibits the court from ordering the minor to be brought into the courtroom for a limited purpose, including the identification of the defendant or defendants as the court deems necessary.

(i) The examination shall be under oath, and the defendant or defendants shall be able to see and hear the minor witness and if two-way closed-circuit television is used, the defendant's image shall be transmitted live to the witness.

(j) Nothing in this section affects the disqualification of witnesses pursuant to Section 701 of the Evidence Code.

(k) The cost of examination by contemporaneous closed-circuit television ordered pursuant to this section shall be borne by the court out of its existing budget.

(*l*) The Judicial Council shall prepare and submit to the Legislature, on or before December 31, 2000, a report on the frequency of use and effectiveness of closed-circuit testimony.

(m) This section shall remain in effect only until January 1, 2001, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2001, deletes or extends that date.

SEC. 154. Section 1347 of the Penal Code, as added by Section 1.6 of Chapter 670 of the Statutes of 1998, is amended to read:

1347. (a) It is the intent of the Legislature in enacting this section to provide the court with discretion to employ unusual court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In exercising its discretion, the court necessarily will be required to balance the rights of the defendant or defendants against the need to protect a child witness and to preserve the integrity of the court's truthfinding function. This discretion is intended to be used selectively when the facts and circumstances in the individual case present compelling evidence of the need to use these unusual procedures.

(b) Notwithstanding any other law, the court in any criminal proceeding, upon written notice by the prosecutor made at least three days prior to the date of the preliminary hearing or trial date on which the testimony of the minor is scheduled, or during the course of the proceeding on the court's own motion, may order that the testimony of a minor 13 years of age or younger at the time of the

motion be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant or defendants, and attorneys, and communicated to the courtroom by means of closed-circuit television, if the court makes all of the following findings:

(1) The minor's testimony will involve a recitation of the facts of an alleged sexual offense committed on or with the minor.

(2) The impact on the minor of one or more of the factors enumerated in subparagraphs (A) to (D), inclusive, is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit television is used.

(A) Threats of serious bodily injury to be inflicted on the minor or a family member, of incarceration or deportation of the minor or a family member, or of removal of the minor from the family or dissolution of the family, in order to prevent or dissuade the minor from attending or giving testimony at any trial or court proceeding, or to prevent the minor from reporting the alleged sexual offense or from assisting in criminal prosecution.

(B) Use of a firearm or any other deadly weapon during the commission of the crime.

(C) Infliction of great bodily injury upon the victim during the commission of the crime.

(D) Conduct on the part of the defendant or defense counsel during the hearing or trial that causes the minor to be unable to continue his or her testimony.

In making the determination required by this section, the court shall consider the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged. The minor's refusal to testify shall not alone constitute sufficient evidence that the special procedure described in this section is necessary to obtain the minor's testimony.

(3) The equipment available for use of closed-circuit television would accurately communicate the image and demeanor of the minor to the judge, jury, defendant or defendants, and attorneys.

(c) If the court orders the use of closed-circuit television, two-way closed-circuit television shall be used, except that if the impact on the minor of one or more of the factors enumerated in subparagraphs (A) to (D), inclusive, of paragraph (2) of subdivision (b), is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness even if two-way closed-circuit television is used, one-way closed-circuit television may be used. The prosecution shall give the defendant or defendants at least 30 days' written notice of the prosecution's intent to seek the use of one-way closed-circuit television, unless good cause is shown to the court why this 30-day notice requirement should not apply.

(d) (1) The hearing on a motion brought pursuant to this section shall be conducted out of the presence of the jury.

(2) Notwithstanding Section 804 of the Evidence Code or any other law, the court, in determining the merits of the motion, shall not compel the minor to testify at the hearing; nor shall the court deny the motion on the ground that the minor has not testified.

(3) In determining whether the impact on an individual child of one or more of the four factors enumerated in paragraph (2) of subdivision (b) is so substantial that the minor is unavailable as a witness unless two-way or one-way closed-circuit television is used, the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the support person, the prosecutor, and defense counsel present. The defendant or defendants shall not be present. The court shall conduct the questioning of the minor and shall not permit the prosecutor or defense counsel to examine the minor. The prosecutor and defense counsel shall be permitted to submit proposed questions to the court prior to the session in chambers. Defense counsel shall be afforded a reasonable opportunity to consult with the defendant or defendants prior to the conclusion of the session in chambers.

(e) When the court orders the testimony of a minor to be taken in another place outside of the courtroom, the court shall do all of the following:

(1) Make a brief statement on the record, outside of the presence of the jury, of the reasons in support of its order. While the statement need not include traditional findings of fact, the reasons shall be set forth with sufficient specificity to permit meaningful review and to demonstrate that discretion was exercised in a careful, reasonable, and equitable manner.

(2) Instruct the members of the jury that they are to draw no inferences from the use of closed-circuit television as a means of facilitating the testimony of the minor.

(3) Instruct respective counsel, outside of the presence of the jury, that they are to make no comment during the course of the trial on the use of closed-circuit television procedures.

(4) Instruct the support witness, outside of the presence of the jury, that he or she is not to coach, cue, or in any way influence or attempt to influence the testimony of the minor.

(5) Order that a complete record of the examination of the minor, including the images and voices of all persons who in any way participate in the examination, be made and preserved on videotape in addition to being stenographically recorded. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant or defendants, and his or her attorney during ordinary business hours. The videotape shall be destroyed after five years have

elapsed from the date of entry of judgment. If an appeal is filed, the tape shall not be destroyed until a final judgment on appeal has been ordered. Any videotape that is taken pursuant to this section is subject to a protective order of the court for the purpose of protecting the privacy of the witness. This subdivision does not affect subdivision (b) of Section 868.7.

(f) When the court orders the testimony of a minor to be taken in another place outside the courtroom, only the minor, a support person designated pursuant to Section 868.5, a nonuniformed bailiff, and, after consultation with the prosecution and the defense, a representative appointed by the court, shall be physically present for the testimony. A videotape shall record the image of the minor and his or her testimony, and a separate videotape shall record the image of the support person.

(g) When the court orders the testimony of a minor to be taken in another place outside the courtroom, the minor shall be brought into the judge's chambers prior to the taking of his or her testimony to meet for a reasonable period of time with the judge, the prosecutor, and defense counsel. A support person for the minor shall also be present. This meeting shall be for the purpose of explaining the court process to the child and to allow the attorneys an opportunity to establish rapport with the child to facilitate later questioning by closed-circuit television. No participant shall discuss the defendant or defendants or any of the facts of the case with the minor during this meeting.

(h) When the court orders the testimony of a minor to be taken in another place outside the courtroom, nothing in this section prohibits the court from ordering the minor to be brought into the courtroom for a limited purpose, including the identification of the defendant or defendants as the court deems necessary.

(i) The examination shall be under oath, and the defendant or defendants shall be able to see and hear the minor witness, and if two-way closed-circuit television is used, the defendant's image shall be transmitted live to the witness.

(j) Nothing in this section affects the disqualification of witnesses pursuant to Section 701 of the Evidence Code.

(k) The cost of examination by contemporaneous closed-circuit television ordered pursuant to this section shall be borne by the court out of its existing budget.

(*l*) This section shall become operative on January 1, 2001.

SEC. 155. Section 3003 of the Penal Code is amended to read:

3003. (a) Except as otherwise provided in this section, an inmate who is released on parole shall be returned to the county that was the last legal residence of the inmate prior to his or her incarceration.

For purposes of this subdivision, "last legal residence" shall not be construed to mean the county wherein the inmate committed an

offense while confined in a state prison or local jail facility or while confined for treatment in a state hospital.

(b) Notwithstanding subdivision (a), an inmate may be returned to another county if that would be in the best interests of the public. If the Board of Prison Terms setting the conditions of parole for inmates sentenced pursuant to subdivision (b) of Section 1168, or the Department of Corrections setting the conditions of parole for inmates sentenced pursuant to Section 1170, decides on a return to another county, it shall place its reasons in writing in the parolee's permanent record and include these reasons in the notice to the sheriff or chief of police pursuant to Section 3058.6. In making its decision, the paroling authority shall consider, among others, the following factors, giving the greatest weight to the protection of the victim and the safety of the community:

(1) The need to protect the life or safety of a victim, the parolee, a witness, or any other person.

(2) Public concern that would reduce the chance that the inmate's parole would be successfully completed.

(3) The verified existence of a work offer, or an educational or vocational training program.

(4) The existence of family in another county with whom the inmate has maintained strong ties and whose support would increase the chance that the inmate's parole would be successfully completed.

(5) The lack of necessary outpatient treatment programs for parolees receiving treatment pursuant to Section 2960.

(c) The Department of Corrections, in determining an out-of-county commitment, shall give priority to the safety of the community and any witnesses and victims.

(d) In making its decision about an inmate who participated in a joint venture program pursuant to Article 1.5 (commencing with Section 2717.1) of Chapter 5, the paroling authority shall give serious consideration to releasing him or her to the county where the joint venture program employer is located if that employer states to the paroling authority that he or she intends to employ the inmate upon release.

(e) (1) The following information, if available, shall be released by the Department of Corrections to local law enforcement agencies regarding a paroled inmate who is released in their jurisdictions:

(A) Last, first, and middle name.

(B) Birth date.

(C) Sex, race, height, weight, and hair and eye color.

(D) Date of parole and discharge.

(E) Registration status, if the inmate is required to register as a result of a controlled substance, sex, or arson offense.

(F) California Criminal Information Number, FBI number, social security number, and driver's license number.

(G) County of commitment.

97

(H) A description of scars, marks, and tattoos on the inmate.

(I) Offense or offenses for which the inmate was convicted that resulted in parole in this instance.

(J) Address, including all of the following information:

(i) Street name and number. Post office box numbers are not acceptable for purposes of this subparagraph.

(ii) City and ZIP Code.

(iii) Date that the address provided pursuant to this subparagraph was proposed to be effective.

(K) Contact officer and unit, including all of the following information:

(i) Name and telephone number of each contact officer.

(ii) Contact unit type of each contact officer, such as units responsible for parole, registration, or county probation.

(L) A digitized image of the photograph and at least a single-digit fingerprint of the parolee.

(M) A geographic coordinate for the parolee's residence location for use with a Geographical Information System (GIS) or comparable computer program.

(2) The information required by this subdivision shall come from the statewide parolee data base. The information obtained from each source shall be based on the same timeframe.

(3) All of the information required by this subdivision shall be provided utilizing a computer-to-computer transfer in a format usable by a desktop computer system. The transfer of this information shall be continually available to local law enforcement agencies upon request.

(4) The unauthorized release or receipt of the information described in this subdivision is a violation of Section 11143.

(f) Notwithstanding any other provision of law, an inmate who is released on parole shall not be returned to a location within 35 miles of the actual residence of a victim of, or a witness to, a violent felony as defined in paragraphs (1) to (7), inclusive, of subdivision (c) of Section 667.5 or a felony in which the defendant inflicts great bodily injury on any person other than an accomplice that has been charged and proved as provided for in Section 12022.53, 12022.7, or 12022.9, if the victim or witness has requested additional distance in the placement of the inmate on parole, and if the Board of Prison Terms or the Department of Corrections finds that there is a need to protect the life, safety, or well-being of a victim or witness.

(g) Notwithstanding any other law, an inmate who is released on parole for any violation of Section 288 or 288.5 shall not be placed within one-quarter mile of any school that includes any or all of grades kindergarten to 6, inclusive.

(h) The authority shall give consideration to the equitable distribution of parolees and the proportion of out-of-county

commitments from a county compared to the number of commitments from that county when making parole decisions.

(i) An inmate may be paroled to another state pursuant to any other law.

(j) (1) Except as provided in paragraph (2), the Department of Corrections shall be the agency primarily responsible for, and shall have control over, the program, resources, and staff implementing the Law Enforcement Automated Data System (LEADS) in conformance with subdivision (e).

(2) Notwithstanding paragraph (1), the Department of Justice shall be the agency primarily responsible for the proper release of information under LEADS that relates to fingerprint cards.

SEC. 156. Section 4536.5 of the Penal Code is amended to read:

4536.5. The medical director or person in charge of a state hospital or other public or private mental health facility to which a person has been committed under the provisions of Article 4 (commencing with Section 6600) of Chapter 2 of Part 2 of the Welfare and Institutions Code, shall promptly notify the Department of Corrections' Sexually Violent Predator Parole Coordinator, the chief of police of the city in which the hospital or facility is located, or the sheriff of the county if the hospital or facility is located in an unincorporated area, of the escape of the person, and shall request the assistance of the chief of police or sheriff in apprehending the person, and shall, within 48 hours of the escape of the person, orally notify the court that made the commitment, the prosecutor in the case, and the Department of Justice of the escape.

SEC. 157. Section 5066 of the Penal Code is amended to read:

5066. The Director of Corrections shall expand the existing prison ombudsman program to ensure the comprehensive deployment of ombudsmen throughout the state prison system with specific focus on the maximum security institutions. The director shall submit a report to the chairs of the appropriate fiscal and policy committees of the Legislature by February 1, 1999, outlining the plans for implementation of this section.

SEC. 158. Section 6051 of the Penal Code is amended to read:

6051. The Inspector General shall conduct a management review audit of any warden in the Department of Corrections or superintendent in the Department of the Youth Authority who has held his or her position for more than four years. The management review audit shall include, but not be limited to, issues relating to personnel, training, investigations, and financial matters. The audit report shall be submitted to the secretary of the agency and the respective director for evaluation and for any response deemed necessary. Any Member of the Legislature may request and shall be provided with a copy of any audit report. A report that involves potential criminal investigations or prosecution shall be considered confidential.

SEC. 159. Section 6065 of the Penal Code is amended to read:

6065. (a) The Legislature finds and declares that investigations of the Department of Corrections and the Department of the Youth Authority that are conducted by their respective offices of internal affairs, or any successor to these offices, require appropriately trained personnel, who perform their duties with honesty, credibility, and without any conflicts of interest.

(b) To meet the objectives stated in subdivision (a), the following conditions shall be met:

(1) Prior to training any peace officer who is selected to conduct internal affairs investigations, the department shall conduct a complete and thorough background check. This background check shall be in addition to the original background screening that was conducted when the person was hired as a peace officer. Each person shall satisfactorily pass the second background check. Any person who has been the subject of a sustained, serious disciplinary action, including, but not limited to, termination, suspension, or demotion, shall not pass the background check.

(2) All internal affairs allegations or complaints, whether investigated or not, shall be logged and numbered sequentially on an annual basis. The log shall specify, but not be limited to, the following information: the sequential number of the allegation or complaint, the date of receipt of the allegation or complaint, the location or facility to which the allegation or complaint pertains, and the disposition of all actions taken, including any final action taken. The log shall be made available to the Inspector General.

(c) Consistent with the objectives expressed in subdivision (a), investigators shall conduct investigations and inquiries in a manner that provides a complete and thorough presentation of the facts regarding the allegation or complaint. All extenuating and mitigating facts shall be explored and reported. The role of the investigator is that of a factfinder. All reports prepared by an investigator shall provide the appointing authority with a complete recitation of the facts, and shall refrain from conjecture or opinion.

(1) Uncorroborated or anonymous allegations shall not constitute the sole basis for disciplinary action by the department, other than an investigation.

(2) All reports shall be submitted in a standard format, begin with a statement of the allegation or complaint, provide all relevant facts, and include the investigator's signature, certifying that the investigator has complied with the provisions of this section subject to compliance with Sections 118.1 and 148.6.

SEC. 160. Section 6126 of the Penal Code is amended to read:

6126. (a) The Inspector General shall be responsible for reviewing departmental policy and procedures for conducting investigations and audits of investigatory practices and other audits and investigations of the Department of Corrections, the

Department of the Youth Authority, the Board of Prison Terms, the Youthful Offender Parole Board, or the Board of Corrections, as requested by either the Secretary of the Youth and Adult Correctional Agency or a Member of the Legislature, pursuant to the approval of the Inspector General under policies to be developed by the Inspector General.

(b) Upon completion of an investigation or audit, the Inspector General shall provide a response to the requester.

(c) In the accomplishment of investigatory audits, the Inspector General shall also identify areas of full and partial compliance, and noncompliance, with departmental investigatory policies and procedures, specify deficiencies in the completion and documentation of investigatory processes, and recommend corrective actions, including, but not limited to, additional training with respect to investigative policies.

SEC. 161. Section 12071 of the Penal Code is amended to read:

12071. (a) (1) As used in this chapter, the term "licensee," "person licensed pursuant to Section 12071," or "dealer" means a person who has all of the following:

(A) A valid federal firearms license.

(B) Any regulatory or business license, or licenses, required by local government.

(C) A valid seller's permit issued by the State Board of Equalization.

(D) A certificate of eligibility issued by the Department of Justice pursuant to paragraph (4).

(E) A license issued in the format prescribed by paragraph (6).

(F) Is among those recorded in the centralized list specified in subdivision (e).

(2) The duly constituted licensing authority of a city, county, or a city and county shall accept applications for, and may grant licenses permitting, licensees to sell firearms at retail within the city, county, or city and county. The duly constituted licensing authority shall inform applicants who are denied licenses of the reasons for the denial in writing.

(3) No license shall be granted to any applicant who fails to provide a copy of his or her valid federal firearms license, valid seller's permit issued by the State Board of Equalization, and the certificate of eligibility described in paragraph (4).

(4) A person may request a certificate of eligibility from the Department of Justice, and the Department of Justice shall issue a certificate to an applicant if the department's records indicate that the applicant is not a person who is prohibited from possessing firearms.

(5) The department shall adopt regulations to administer the certificate of eligibility program and shall recover the full costs of

administering the program by imposing fees assessed to applicants who apply for those certificates.

(6) A license granted by the duly constituted licensing authority of any city, county, or city and county, shall be valid for not more than one year from the date of issuance and shall be in one of the following forms:

(A) In the form prescribed by the Attorney General.

(B) A regulatory or business license that states on its face "Valid for Retail Sales of Firearms" and is endorsed by the signature of the issuing authority.

(C) A letter from the duly constituted licensing authority having primary jurisdiction for the applicant's intended business location stating that the jurisdiction does not require any form of regulatory or business license or does not otherwise restrict or regulate the sale of firearms.

(7) Local licensing authorities may assess fees to recover their full costs of processing applications for licenses.

(b) A license is subject to forfeiture for a breach of any of the following prohibitions and requirements:

(1) (A) Except as provided in subparagraphs (B) and (C), the business shall be conducted only in the buildings designated in the license.

(B) A person licensed pursuant to subdivision (a) may take possession of firearms and commence preparation of registers for the sale, delivery, or transfer of firearms at gun shows or events, as defined in Section 178.100 of Title 27 of the Code of Federal Regulations, or its successor, if the gun show or event is not conducted from any motorized or towed vehicle. A person conducting business pursuant to this subparagraph shall be entitled to conduct business as authorized herein at any gun show or event in the state without regard to the jurisdiction within this state that issued the license pursuant to subdivision (a), provided that the person complies with (i) all applicable laws, including, but not limited to, the waiting period specified in subparagraph (A) of paragraph (3), and (ii) all applicable local laws, regulations, and fees, if any.

A person conducting business pursuant to this subparagraph shall publicly display his or her license issued pursuant to subdivision (a), or a facsimile thereof, at any gun show or event, as specified in this subparagraph.

(C) A person licensed pursuant to subdivision (a) may engage in the sale and transfer of firearms other than pistols, revolvers, or other firearms capable of being concealed upon the person, at events specified in subdivision (g) of Section 12078, subject to the prohibitions and restrictions contained in that subdivision.

A person licensed pursuant to subdivision (a) also may accept delivery of firearms other than pistols, revolvers, or other firearms capable of being concealed upon the person, outside the building

designated in the license, provided that the firearm is being donated for the purpose of sale or transfer at an auction or similar event specified in subdivision (g) of Section 12078.

(D) The firearm may be delivered to the purchaser, transferee, or person being loaned the firearm at one of the following places:

(i) The building designated in the license.

(ii) The places specified in subparagraph (B) or (C).

(iii) The place of residence of, the fixed place of business of, or on private property owned or lawfully possessed by, the purchaser, transferee, or person being loaned the firearm.

(2) The license or a copy thereof, certified by the issuing authority, shall be displayed on the premises where it can easily be seen.

(3) No firearm shall be delivered:

(A) Within 10 days of the application to purchase, or, after notice by the department pursuant to subdivision (d) of Section 12076, within 10 days of the submission to the department of any correction to the application, or within 10 days of the submission to the department of any fee required pursuant to subdivision (e) of Section 12076, whichever is later.

(B) Unless unloaded and securely wrapped or unloaded and in a locked container.

(C) Unless the purchaser, transferee, or person being loaned the firearm presents clear evidence of his or her identity and age to the dealer.

(D) Whenever the dealer is notified by the Department of Justice that the person is in a prohibited class described in Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code.

(4) No pistol, revolver, or other firearm or imitation thereof capable of being concealed upon the person, or placard advertising the sale or other transfer thereof, shall be displayed in any part of the premises where it can readily be seen from the outside.

(5) The licensee shall agree to, and shall act properly and promptly in, processing firearms transactions pursuant to Section 12082.

(6) The licensee shall comply with Sections 12073, 12076, and 12077, subdivisions (a) and (b) of Section 12072, and subdivision (a) of Section 12316.

(7) The licensee shall post conspicuously within the licensed premises the following warnings in block letters not less than one inch in height:

(A) "IF YOU LEAVE A LOADED FIREARM WHERE A CHILD OBTAINS AND IMPROPERLY USES IT, YOU MAY BE FINED OR SENT TO PRISON."

(B) "IF YOU KEEP A LOADED FIREARM, OR A PISTOL, REVOLVER, OR OTHER FIREARM CAPABLE OF BEING

CONCEALED UPON THE PERSON, WITHIN ANY PREMISES UNDER YOUR CUSTODY OR CONTROL, AND A PERSON UNDER THE AGE OF 16 YEARS GAINS ACCESS TO THE FIREARM, YOU MAY BE GUILTY OF A MISDEMEANOR OR A FELONY, UNLESS YOU STORED THE FIREARM IN A LOCKED CONTAINER, OR LOCKED THE FIREARM WITH A LOCKING DEVICE, TO KEEP IT FROM TEMPORARILY FUNCTIONING."

(C) "DISCHARGING FIREARMS IN POORLY VENTILATED AREAS, CLEANING FIREARMS, OR HANDLING AMMUNITION MAY RESULT IN EXPOSURE TO LEAD, A SUBSTANCE KNOWN TO CAUSE BIRTH DEFECTS, REPRODUCTIVE HARM, AND OTHER SERIOUS PHYSICAL INJURY. HAVE ADEQUATE VENTILATION AT ALL TIMES. WASH HANDS THOROUGHLY AFTER EXPOSURE."

(D) "FEDERAL REGULATIONS PROVIDE THAT IF YOU DO NOT TAKE PHYSICAL POSSESSION OF THE FIREARM THAT YOU ARE ACQUIRING OWNERSHIP OF WITHIN 30 DAYS AFTER YOU COMPLETE THE INITIAL BACKGROUND CHECK PAPERWORK, THEN YOU HAVE TO GO THROUGH THE BACKGROUND CHECK PROCESS A SECOND TIME IN ORDER TO TAKE PHYSICAL POSSESSION OF THAT FIREARM."

(8) No pistol, revolver, or other firearm capable of being concealed upon the person shall be delivered unless the purchaser, transferee, or person being loaned the firearm presents to the dealer a basic firearms safety certificate.

(9) The licensee shall offer to provide the purchaser or transferee of a firearm, or person being loaned a firearm, with a copy of the pamphlet described in Section 12080 and may add the cost of the pamphlet, if any, to the sales price of the firearm.

(10) The licensee shall not commit an act of collusion as defined in Section 12072.

(11) The licensee shall post conspicuously within the licensed premises a detailed list of each of the following:

(A) All charges required by governmental agencies for processing firearm transfers required by Sections 12076, 12082, and 12806.

(B) All fees that the licensee charges pursuant to Sections 12082 and 12806.

(12) The licensee shall not misstate the amount of fees charged by a governmental agency pursuant to Sections 12076, 12082, and 12806.

(13) The licensee shall report the loss or theft of any firearm that is merchandise of the licensee, any firearm that the licensee takes possession of pursuant to Section 12082, or any firearm kept at the licensee's place of business within 48 hours of discovery to the appropriate law enforcement agency in the city, county, or city and county where the licensee's business premises are located.

(14) In a city and county, or in the unincorporated area of a county with a population of 200,000 persons or more according to the most

recent federal decennial census or within a city with a population of 50,000 persons or more according to the most recent federal decennial census, anytime the licensee is not open for business, the licensee shall store all firearms kept in his or her licensed place of business, using one of the following methods as to each particular firearm:

(A) Store the firearm in a secure facility that is a part of, or that constitutes, the licensee's business premises.

(B) Secure the firearm with a hardened steel rod or cable of at least one-eighth inch in diameter through the trigger guard of the firearm. The steel rod or cable shall be secured with a hardened steel lock that has a shackle. The lock and shackle shall be protected or shielded from the use of a bolt cutter and the rod or cable shall be anchored in a manner that prevents the removal of the firearm from the premises.

(C) Store the firearm in a locked fireproof safe or vault in the licensee's business premises.

(15) The licensing authority in an unincorporated area of a county with a population of less than 200,000 persons according to the most recent federal decennial census, or within a city with a population of less than 50,000 persons according to the most recent federal decennial census, may impose the requirements specified in paragraph (14).

(16) The licensee shall, upon the issuance or renewal of a license, submit a copy of the license to the Department of Justice.

(17) The licensee shall maintain and make available a firearms transaction record for inspection during business hours to any peace officer, authorized local law enforcement employee, or Department of Justice employee designated by the Attorney General, upon the presentation of proper identification.

(18) (A) On the date of receipt, the licensee shall report to the Department of Justice, in a format prescribed by the department, the acquisition by the licensee of the ownership of a pistol, revolver, or other firearm capable of being concealed upon the person.

(B) This paragraph does not apply to any of the following transactions:

(i) A transaction subject to the provisions of subdivision (n) of Section 12078.

(ii) The dealer acquired the firearm from a wholesaler.

(iii) The dealer is also licensed as a secondhand dealer pursuant to Article 4 (commencing with Section 21625) of Chapter 9 of Division 8 of the Business and Professions Code.

(iv) The dealer acquired the firearm from a person who is licensed as a manufacturer or importer to engage in those activities pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and any regulations issued pursuant thereto.

97

(v) The dealer acquired the firearm from a person who resides outside this state who is licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and any regulations issued pursuant thereto.

(19) The licensee shall forward, in a format prescribed by the Department of Justice, information as required by the department on any firearm that is not delivered within the time period set forth in Section 178.102 (c) of Title 27 of the Code of Federal Regulations.

(c) (1) As used in this article, "clear evidence of his or her identity and age" means either of the following:

(A) A valid California driver's license.

(B) A valid California identification card issued by the Department of Motor Vehicles.

(2) As used in this article, a "basic firearms safety certificate" means a basic firearms certificate issued to the purchaser, transferee, or person being loaned the firearm by the Department of Justice pursuant to Article 8 (commencing with Section 12800) of Chapter 6.

(3) As used in this section, a "secure facility" means a building that meets all of the following specifications:

(A) All perimeter doorways are one of the following:

(i) A windowless steel security door equipped with both a dead bolt and a doorknob lock.

(ii) A windowed metal door that is equipped with both a dead bolt and a doorknob lock. If the window has an opening of five inches or more measured in any direction, the window shall be covered with steel bars at least one-half inch in diameter or metal grating of at least nine gauge affixed to the exterior or interior of the door.

(iii) A metal grate that is padlocked and affixed to the licensee's premises independent of the door and doorframe.

(B) All windows are covered with steel bars.

(C) Heating, ventilating, air-conditioning, and service openings are secured with steel bars, metal grating, or an alarm system.

(D) Any metal grates have spaces no larger than six inches wide measured in any direction.

(E) Any metal screens have spaces no larger than three inches wide measured in any direction.

(F) All steel bars are no further than six inches apart.

(4) As used in this section, "licensed premises," "licensed place of business," "licensee's place of business," or "licensee's business premises" means the building designated in the license.

(5) For purposes of paragraph (17) of subdivision (b):

(A) A "firearms transaction record" is a record containing the same information referred to in subdivision (a) of Section 178.124, Section 178.124a, and subdivision (e) of Section 178.125 of Title 27 of the Code of Federal Regulations.

(B) A licensee shall be in compliance with paragraph (17) of subdivision (b) if he or she maintains and makes available for inspection during business hours to any peace officer, authorized local law enforcement employee, or Department of Justice employee designated by the Attorney General, upon the presentation of proper identification, the bound book containing the same information referred to in subdivision (a) of Section 178.124 and subdivision (e) of Section 178.125 of Title 27 of the Code of Federal Regulations and the records referred to in subdivision (a) of Section 178.124 of Title 27 of the Code of Federal Regulations.

(d) Upon written request from a licensee, the licensing authority may grant an exemption from compliance with the requirements of paragraph (14) of subdivision (b) if the licensee is unable to comply with those requirements because of local ordinances, covenants, lease conditions, or similar circumstances not under the control of the licensee.

(e) Except as otherwise provided in this subdivision, the Department of Justice shall keep a centralized list of all persons licensed pursuant to subparagraphs (A) to (E), inclusive, of paragraph (1) of subdivision (a). The department may remove from this list any person who knowingly or with gross negligence violates this article. Upon removal of a dealer from this list, notification shall be provided to local law enforcement and licensing authorities in the jurisdiction where the dealer's business is located. The department shall make information about an individual dealer available, upon request, for one of the following purposes only:

(1) For law enforcement purposes.

(2) When the information is requested by a person licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code for determining the validity of the license for firearm shipments.

(3) When information is requested by a person promoting, sponsoring, operating, or otherwise organizing a show or event as defined in Section 178.100 of Title 27 of the Code of Federal Regulations, or its successor, who possesses a valid certificate of eligibility issued pursuant to Section 12071.1, if that information is requested by the person to determine the eligibility of a prospective participant in a gun show or event to conduct transactions as a firearms dealer pursuant to subparagraph (B) of paragraph (1) of subdivision (b). Information provided pursuant to this paragraph shall be limited to information necessary to corroborate an individual's current license status.

(f) The Department of Justice may inspect dealers to ensure compliance with this article. The department may assess an annual fee, not to exceed eighty-five dollars ($85), to cover the reasonable cost of maintaining the list described in subdivision (e), including the cost of inspections. Dealers whose place of business is in a jurisdiction

that has adopted an inspection program to ensure compliance with firearms law shall be exempt from that portion of the department's fee that relates to the cost of inspections. The applicant is responsible for providing evidence to the department that the jurisdiction in which the business is located has the inspection program.

(g) The Department of Justice shall maintain and make available upon request information concerning the number of inspections conducted and the amount of fees collected pursuant to subdivision (f), a listing of exempted jurisdictions, as defined in subdivision (f), the number of dealers removed from the centralized list defined in subdivision (e), and the number of dealers found to have violated this article with knowledge or gross negligence.

(h) Paragraph (14) or (15) of subdivision (b) does not apply to a licensee organized as a nonprofit public benefit or mutual benefit corporation organized pursuant to Part 2 (commencing with Section 5110) or Part 3 (commencing with Section 7110) of Division 2 of the Corporations Code, if both of the following conditions are satisfied:

(1) The nonprofit public benefit or mutual benefit corporation obtained the dealer's license solely and exclusively to assist that corporation or local chapters of that corporation in conducting auctions or similar events at which firearms are auctioned off to fund the activities of that corporation or the local chapters of the corporation.

(2) The firearms are not pistols, revolvers, or other firearms capable of being concealed upon the person.

SEC. 162. Section 12085 of the Penal Code is amended to read:

12085. (a) Commencing July 1, 1999, no person, firm, or corporation licensed to manufacture firearms pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code may manufacture firearms within this state unless licensed pursuant to Section 12086.

(b) Subdivision (a) does not apply to a person licensed to manufacture firearms pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code who manufactures fewer than 100 firearms in a calendar year within this state.

(c) If a person, firm, or corporation required to be licensed pursuant to Section 12086 ceases operations, then the records required pursuant to paragraphs (6) and (10) of subdivision (c) of Section 12086 shall be forwarded to the federal Bureau of Alcohol, Tobacco, and Firearms within three days of the closure of business.

(d) A violation of this section is a misdemeanor.

(e) (1) As used in this section and Section 12086, the term "firearm" includes the frame or receiver of the weapon.

(2) As used in this section and Section 12086, the term "firearm" includes the unfinished frame or receiver of a weapon that can be readily converted to the functional condition of a finished frame or receiver.

(3) For purposes of this section and Section 12086, the term "firearm" does not include an unloaded firearm that is defined as an "antique firearm" in paragraph (16) of subsection (a) of Section 921 of Title 18 of the United States Code.

SEC. 163. Section 12086 of the Penal Code is amended to read:

12086. (a) (1) As used in this section, "licensee" means a person, firm, or corporation that satisfies both of the following:

(A) Has a license issued pursuant to paragraph (2) of subdivision (b).

(B) Is among those recorded in the centralized list specified in subdivision (f).

(2) As used in this section, "department" means the Department of Justice.

(b) (1) The Department of Justice shall accept applications for, and shall grant licenses permitting, the manufacture of firearms within this state. The department shall inform applicants who are denied licenses of the reasons for the denial in writing.

(2) No license shall be granted by the department unless and until the applicant presents proof that he or she has all of the following:

(A) A valid license to manufacture firearms issued pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code.

(B) Any regulatory or business license, or licenses, required by local government.

(C) A valid seller's permit or resale certificate issued by the State Board of Equalization, if applicable.

(D) A certificate of eligibility issued by the Department of Justice pursuant to paragraph (4) of subdivision (a) of Section 12071.

(3) The department shall adopt regulations to administer this section and Section 12085 and shall recover the full costs of administering the program by collecting fees from license applicants. Recoverable costs shall include, but not be limited to, the costs of inspections and maintaining a centralized list of licensed firearm manufacturers. The fee for licensed manufacturers who produce fewer than 500 firearms in a calendar year within this state shall not exceed two hundred fifty dollars ($250) per year or the actual costs of inspections and maintaining a centralized list of firearm manufacturers and any other duties of the department required pursuant to this section and Section 12085, whichever is less.

(4) A license granted by the department shall be valid for no more than one year from the date of issuance and shall be in the form prescribed by the Attorney General.

(c) A licensee shall comply with the following prohibitions and requirements:

(1) The business shall be conducted only in the buildings designated in the license.

97

(2) The license or a copy thereof, certified by the department, shall be displayed on the premises where it can easily be seen.

(3) Whenever a licensee discovers that a firearm has been stolen or is missing from the licensee's premises, the licensee shall report the loss or theft within 48 hours of the discovery to all of the following:

(A) The Department of Justice, in a manner prescribed by the department.

(B) The federal Bureau of Alcohol, Tobacco, and Firearms.

(C) The police department in the city or city and county where the building designated in the license is located.

(D) If there is no police department in the city or city and county where the building designated in the license is located, the sheriff of the county where the building designated in the license is located.

(4) (A) The licensee shall require that each employee obtain a certificate of eligibility pursuant to paragraph (4) of subdivision (a) of Section 12071, which shall be renewed annually, prior to being allowed to come into contact with any firearm.

(B) The licensee shall prohibit any employee who the licensee knows or reasonably should know is within a class of persons prohibited from possessing firearms pursuant to Section 12021 or 12021.1 of this code, or Section 8100 or 8103 of the Welfare and Institutions Code, from coming into contact with any firearm.

(5) (A) Each firearm the licensee manufactures in this state shall be identified with a unique serial number stamped onto the firearm utilizing the method of compression stamping.

(B) Licensed manufacturers who produce fewer than 500 firearms in a calendar year within this state may serialize long guns only by utilizing a method of compression stamping or by engraving the serial number onto the firearm.

(C) The licensee shall stamp the serial number onto the firearm within one business day of the time the receiver or frame is manufactured.

(D) The licensee shall not use the same serial number for more than one firearm.

(6) (A) The licensee shall record the type, model, caliber, or gauge, and serial number of each firearm manufactured or acquired, and the date of the manufacture or acquisition, within one business day of the manufacture or acquisition.

(B) The licensee shall maintain permanently within the building designated in the license the records required pursuant to subparagraph (A).

(C) Backup copies of the records described in subparagraph (A), whether electronic or hard copy, shall be made at least once a month. These backup records shall be maintained in a facility separate from the one in which the primary records are stored.

(7) (A) The licensee shall allow the department to inspect the building designated in the license to ensure compliance with the requirements of this section.

(B) The licensee shall allow any peace officer, authorized law enforcement employee, or Department of Justice employee designated by the Attorney General, upon the presentation of proper identification, to inspect facilities and records during business hours to ensure compliance with the requirements of this section.

(8) The licensee shall store in a secure facility all firearms manufactured and all barrels for firearms manufactured.

(9) (A) The licensee shall notify the chief of police or other head of the municipal police department in the city or city and county where the building designated in the license is located that the licensee is manufacturing firearms within that city or city and county and the location of the licensed premises.

(B) If there is no police department in the city or city and county where the building designated in the license is located, the licensee shall notify the sheriff of the county where the building designated in the license is located that the licensee is manufacturing firearms within that county and the location of the licensed premises.

(10) For at least 10 years, the licensee shall maintain records of all firearms that are lost or stolen, as prescribed by the department.

(d) Except as otherwise provided in subdivision (e), as used in this section, a "secure facility" means that the facility satisfies all of the following:

(1) The facility is equipped with a burglar alarm with central monitoring.

(2) All perimeter entries to areas in which firearms are stored other than doors, including windows and skylights, are secured with steel window guards or an audible, silent, or sonic alarm to detect entry.

(3) All perimeter doorways are designed in one of the following ways:

(A) A windowless steel security door equipped with both a deadbolt and a doorknob lock.

(B) A windowed metal door equipped with both a deadbolt and a doorknob lock. If the window has an opening of five inches or more measured in any direction, the window is covered with steel bars of at least one-half inch diameter or metal grating of at least nine gauge affixed to the exterior or interior of the door.

(C) A metal grate that is padlocked and affixed to the licensee's premises independent of the door and doorframe.

(D) Hinges and hasps attached to doors by welding, riveting, or bolting with nuts on the inside of the door.

(E) Hinges and hasps installed so that they cannot be removed when the doors are closed and locked.

(4) Heating, ventilating, air-conditioning, and service openings are secured with steel bars, metal grating, or an alarm system.

(5) No perimeter metal grates are capable of being entered by any person.

(6) Steel bars used to satisfy the requirements of this subdivision are not capable of being entered by any person.

(7) Perimeter walls of rooms in which firearms are stored are constructed of concrete or at least 10-gauge expanded steel wire mesh utilized along with typical wood frame and drywall construction. If firearms are not stored in a vault, the facility shall use an exterior security-type door along with a high security, single-key deadbolt, or other door that is more secure. All firearms shall be stored in a separate room away from any general living area or work area. Any door to the storage facility shall be locked while unattended.

(8) Perimeter doorways, including the loading dock area, are locked at all times when not attended by paid employees or contracted employees, including security guards.

(9) Except when a firearm is currently being tested, any ammunition on the premises is removed from all manufactured guns and stored in a separate and locked room, cabinet, or box away from the storage area for the firearms. Ammunition may be stored with a weapon only in a locked safe.

(e) For purposes of this section, any licensed manufacturer who produces fewer than 500 firearms in a calendar year within this state may maintain a "secure facility" by complying with all of the requirements described in subdivision (d), or may design a security plan that is approved by the Department of Justice or the federal Bureau of Alcohol, Tobacco, and Firearms.

(1) If a security plan is approved by the federal Bureau of Alcohol, Tobacco, and Firearms, the approved plan, along with proof of approval, shall be filed with the Department of Justice and the local police department. If there is no police department, the filing shall be with the county sheriff's office.

(2) If a security plan is approved by the Department of Justice, the approved plan, along with proof of approval, shall be filed with the local police department. If there is no police department, the filing shall be with the county sheriff's office.

(f) (1) Except as otherwise provided in this subdivision, the Department of Justice shall maintain a centralized list of all persons licensed pursuant to paragraph (2) of subdivision (b). The centralized list shall be provided annually to each police department and county sheriff within the state.

(2) Except as provided in paragraph (3), the license of any licensee who violates this section may be revoked.

(3) The license of any licensee who knowingly or with gross negligence violates this section or violates this section three times

shall be revoked, and that person, firm, or corporation shall become permanently ineligible to obtain a license pursuant to this section.

(g) (1) Upon the revocation of the license, notification shall be provided to local law enforcement authorities in the jurisdiction where the licensee's business is located and to the federal Bureau of Alcohol, Tobacco, and Firearms.

(2) The department shall make information concerning the location and name of a licensee available, upon request, for the following purposes only:

(A) Law enforcement.

(B) When the information is requested by a person licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code for determining the validity of the license for firearm shipments.

(3) Notwithstanding paragraph (2), the department shall make the name and business address of a licensee available to any person upon written request.

(h) The Department of Justice shall maintain and make available upon request information concerning the number of inspections conducted and the amount of fees collected pursuant to paragraph (3) of subdivision (b), the number of licensees removed from the centralized list described in subdivision (f), and the number of licensees found to have violated this section.

SEC. 164. Section 12370 of the Penal Code is amended to read:

12370. (a) Any person who has been convicted of a violent felony, as defined in subdivision (c) of Section 667.5, under the laws of the United States, the State of California, or any other state, government, or country, who purchases, owns, or possesses body armor, as defined by Section 942 of Title 11 of the California Code of Regulations, except as authorized under subdivision (b), is guilty of a felony, punishable by imprisonment in a state prison for 16 months, or two or three years.

(b) Any person whose employment, livelihood, or safety is dependent on the ability to legally possess and use body armor, who is subject to the prohibition imposed by subdivision (a) due to a prior violent felony conviction, may file a petition with the chief of police or county sheriff of the jurisdiction in which he or she seeks to possess and use the body armor for an exception to this prohibition. The chief of police or sheriff may reduce or eliminate the prohibition, impose conditions on reduction or elimination of the prohibition, or otherwise grant relief from the prohibition as he or she deems appropriate, based on the following:

(1) A finding that the petitioner is likely to use body armor in a safe and lawful manner.

(2) A finding that the petitioner has a reasonable need for this type of protection under the circumstances.

In making its decision, the chief of police or sheriff shall consider the petitioner's continued employment, the interests of justice, any relevant evidence, and the totality of the circumstances. It is the intent of the Legislature that law enforcement officials exercise broad discretion in fashioning appropriate relief under this paragraph in cases in which relief is warranted. However, this paragraph may not be construed to require law enforcement officials to grant relief to any particular petitioner. Relief from this prohibition does not relieve any other person or entity from any liability that might otherwise be imposed.

(c) The chief of police or sheriff shall require, as a condition of granting an exception under subdivision (b), that the petitioner agree to maintain on his or her person a certified copy of the law enforcement official's permission to possess and use body armor, including any conditions or limitations.

(d) Law enforcement officials who enforce the prohibition specified in subdivision (a) against a person who has been granted relief pursuant to subdivision (b), shall be immune from any liability for false arrest arising from the enforcement of this subdivision unless the person has in his or her possession a certified copy of the permission granting the person relief from the prohibition, as required by subdivision (c). This immunity from liability does not relieve any person or entity from any other liability that might otherwise be imposed.

(e) For purposes of this section only, "violent felony" refers to the specific crimes listed in subdivision (c) of Section 667.5, and to crimes defined under the applicable laws of the United States or any other state, government, or country that are reasonably equivalent to the crimes listed in subdivision (c) of Section 667.5.

SEC. 165. Section 13515.55 of the Penal Code is amended to read:

13515.55. Every city police officer or deputy sheriff at a supervisory level who is assigned field or investigative duties shall complete a high technology crimes and computer seizure training course certified by the Commission on Peace Officer Standards and Training by January 1, 2000, or within 18 months of assignment to supervisory duties. Completion of the course may be satisfied by telecourse, video training tape, or other instruction. This training shall be offered to all city police officers and deputy sheriffs as part of continuing professional training. The training shall, at a minimum, address relevant laws, recognition of high technology crimes, and computer evidence collection and preservation.

SEC. 166. Section 13602 of the Penal Code is amended to read:

13602. (a) The Department of Corrections shall use the training academy at Galt. This academy shall be known as the Richard A. McGee Academy. The Department of the Youth Authority shall use the training center at Stockton. The training divisions, in using the funds, shall endeavor to minimize costs of administration so that a

maximum amount of the funds will be used for providing training and support to correctional peace officers while being trained by the departments.

(b) Each new cadet who attends an academy after July 1, 2000, shall complete the course of training, pursuant to standards approved by CPOST before he or she may be assigned to a post or job as a peace officer. After July 1, 2000, every newly appointed first-line or second-line supervisor shall complete the course of training, pursuant to standards approved by CPOST for that position. Every effort shall be made to provide training prior to commencement of supervisorial duties. If this training is not completed within six months of appointment to that position, any first-line or second-line supervisor shall not perform supervisory duties until the training is completed. CPOST shall report to the Governor and to the appropriate policy and fiscal committees of the Legislature by September 1, 1999, concerning the training standards determined for line correctional peace officers and supervisors of the Department of Corrections and the Department of the Youth Authority. This report shall include, but not be limited to, a description of the standards for the curriculum of the respective academies and the length of time required to satisfactorily train officers for their duties.

It is the intent of this section that the report be included in the basis for a new budget change proposal for the administration to consider in the 2000–01 Budget Act to enhance department training operations.

SEC. 167. Section 10218 of the Public Resources Code is amended to read:

10218. "Husbandry practices" means agricultural activities, such as those specified in subdivision (e) of Section 3482.5 of the Civil Code, conducted or maintained for commercial purposes in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality.

SEC. 168. Section 14575 of the Public Resources Code is amended to read:

14575. (a) If any type of empty beverage container with a refund value established pursuant to Section 14560 has a scrap value less than the sum of paragraphs (1) and (2), the department shall establish a processing fee and a processing payment for the container, by the type of the material of the container, at least equal to the difference between the scrap value offered by a statistically significant sample of container manufacturers, beverage manufacturers, processors, or willing purchasers, for each container sold by the beverage manufacturer, and the sum of both of the following:

(1) The actual cost for certified recycling centers, excluding recycling centers that receive a convenience incentive payment and certified processors that did not receive convenience incentive

payments in the year in which the processing fee is calculated or recalculated, of receiving, handling, processing, storing, transporting, and maintaining equipment for each container sold for recycling or, only if the container is not recyclable, for disposal, calculated pursuant to subdivision (c).

(2) A reasonable financial return for recycling centers and processors, calculated pursuant to subdivision (b).

(b) On January 1, 1999, and annually thereafter, the department shall calculate weighted statewide average values for the amounts specified in paragraphs (1) and (2) of subdivision (a) for each type of container material sold and a new processing fee, which shall be effective on that same date.

(c) A processing fee established pursuant to this section shall be based upon all of the following:

(1) The average scrap values paid by willing purchasers during the 1990 calendar year for the initial calculation and the average scrap values paid by willing purchasers during the calendar year directly preceding the year in which the processing fee is calculated for any subsequent calculation.

(2) The latest available data indicating the volumes of beverage containers collected by certified processors and recycling centers.

(3) The actual recycling costs for certified recycling centers and processors, as determined pursuant to paragraph (1) of subdivision (a) for the 1989 calendar year for the initial calculation, and for the second calendar year preceding the year in which the processing fee is calculated for any subsequent calculation.

(d) Every six months, or more frequently as determined to be necessary by the department, the department may adjust a processing fee established pursuant to this section if both of the following occur:

(1) The department determines that the average statewide scrap values paid by willing purchasers are less than the average scrap values used as the basis for the processing fee calculation.

(2) The department determines that adjusting the processing fee is necessary to further the objectives of this division.

(e) The calculations of the statewide weighted average values and processing fee made pursuant to subdivision (b) shall be based on audited surveys of the costs specified in subdivision (a) at existing certified recycling centers, reverse vending machines, and processors, with standardized modifications for transportation distances and factors specific to a particular region, as determined by the department, and, if the container is not recyclable, local disposal fees. The processing fee shall be calculated in a manner that furthers the purposes of this division and the fee shall be sufficient to establish sufficient recycling locations and processors to achieve the goals established pursuant to subdivision (c) of Section 14501 and Section 14571. Except for the first calculation of a processing fee made

pursuant to this section, 60 days prior to the annual calculation of the processing fee, the department shall submit a report to the Chairperson of the Assembly Natural Resources Committee and the Chairperson of the Senate Natural Resources and Wildlife Committee. The report shall include a summary of the fluctuations of costs and scrap values necessitating the recalculation. The report shall also highlight changes in markets, new technologies, and other business and economic factors. The report shall include a description of the average per container statewide costs of recycling beverage containers, by each material type, for the following recycling systems, including a description of any assumptions used to allocate undifferentiated costs among material types, and a brief statement of the reason for their adoption:

(1) Automated recycling centers.

(2) Staffed recycling centers.

(3) Recycling centers established since September 29, 1988.

(4) Recycling centers established prior to September 29, 1988.

(5) Recyclers receiving convenience incentive payments, as feasible.

(6) Nonprofit dropoff programs.

(7) Curbside recycling programs.

(f) (1) Except as provided in paragraphs (2) and (3), every beverage manufacturer shall pay to the department the applicable processing fee for each container sold or transferred to a distributor or dealer within 40 days of the sale in the form and in the manner which the department may prescribe.

(2) (A) Notwithstanding Section 14506, with respect to the payment of processing fees for beer and other malt beverages manufactured outside of the state, the beverage manufacturer shall be deemed to be the person or entity named on the certificate of compliance issued pursuant to Section 23671 of the Business and Professions Code. If the department is unable to collect the processing fee from the person or entity named on the certificate of compliance, the department shall give written notice by certified mail to that person or entity. The notice shall state that the processing fee shall be remitted in full within 30 days of issuance of the notice or the person or entity shall not be permitted to offer that beverage brand for sale within the state. If the person or entity fails to remit the processing fee within 30 days of issuance of the notice, the department shall notify the Department of Alcoholic Beverage Control that the certificate holder has failed to comply, and the Department of Alcoholic Beverage Control shall prohibit the offering or sale of that beverage brand within the state.

(B) The department shall enter into a contract with the Department of Alcoholic Beverage Control, pursuant to Section 14536.5, concerning the implementation of this paragraph, which shall include a provision reimbursing the Department of Alcoholic

Beverage Control for its costs incurred in implementing this paragraph.

(3) (A) Notwithstanding paragraph (1), a beverage manufacturer may, upon the approval of the department, elect to make a single annual payment of processing fees, if the beverage manufacturer's projected processing fees for a calendar year total less than one thousand dollars ($1,000).

(B) An annual processing fee payment made pursuant to this paragraph is due and payable on or before February 1 for every beverage container sold or transferred by the beverage manufacturer to a distributor or dealer in the previous calendar year.

(C) A beverage manufacturer shall notify the department of its intent to make an annual processing fee payment pursuant to this paragraph on or before January 31 of the calendar year preceding the year in which the payment will be due.

(4) The department shall pay the processing payments on redeemed containers to processors, in the same manner as it pays refund values pursuant to Sections 14573 and 14573.5. The department shall pay the processing fees collected on unredeemed containers into the fund. The department may not use processing fees collected on unredeemed beverage containers to pay all or a portion of the processing costs determined pursuant to subdivision (a). The processor shall pay the recycling center that portion of the processing payment representing the actual cost and financial return incurred by the recycling center, as specified in subdivision (a).

(g) When assessing processing fees pursuant to subdivision (b), the department shall assess the processing fee on each container sold, by the type of material of the container, assuming that every container sold will be redeemed for recycling, whether or not the container is actually recycled. When calculating and assessing processing fees, the department also shall not assume that redemption bonuses will be kept by recycling centers or locations.

(h) The container manufacturer, or a designated agent, shall pay to, or credit, the account of the beverage manufacturer an amount equal to the processing payment.

(i) This section shall become operative January 1, 1999.

SEC. 169. Section 33001 of the Public Resources Code is amended to read:

33001. The Legislature hereby finds and declares that the Santa Monica Mountains Zone, as defined in Section 33105, is a unique and valuable economic, environmental, agricultural, scientific, educational, and recreational resource that should be held in trust for present and future generations; that, as the last large undeveloped area contiguous to the shoreline within the greater Los Angeles metropolitan region, comprised of Los Angeles and Ventura Counties, it provides essential relief from the urban environment; that it exists as a single ecosystem in which changes that affect one

part may also affect all other parts; and that the preservation and protection of this resource is in the public interest.

SEC. 170. Section 64 of the Revenue and Taxation Code is amended to read:

64. (a) Except as provided in subdivision (i) of Section 61 and subdivisions (c) and (d) of this section, the purchase or transfer of ownership interests in legal entities, such as corporate stock or partnership or limited liability company interests, shall not be deemed to constitute a transfer of the real property of the legal entity. This subdivision is applicable to the purchase or transfer of ownership interests in a partnership without regard to whether it is a continuing or a dissolved partnership.

(b) Any corporate reorganization, where all of the corporations involved are members of an affiliated group, and that qualifies as a reorganization under Section 368 of the United States Internal Revenue Code and that is accepted as a nontaxable event by similar California statutes, or any transfer of real property among members of an affiliated group, or any reorganization of farm credit institutions pursuant to the federal Farm Credit Act of 1971 (Public Law 92-181), as amended, shall not be a change of ownership. The taxpayer shall furnish proof, under penalty of perjury, to the assessor that the transfer meets the requirements of this subdivision.

For purposes of this subdivision, "affiliated group" means one or more chains of corporations connected through stock ownership with a common parent corporation if both of the following conditions are met:

(1) One hundred percent of the voting stock, exclusive of any share owned by directors, of each of the corporations, except the parent corporation, is owned by one or more of the other corporations.

(2) The common parent corporation owns, directly, 100 percent of the voting stock, exclusive of any shares owned by directors, of at least one of the other corporations.

(c) (1) When a corporation, partnership, limited liability company, other legal entity, or any other person obtains control through direct or indirect ownership or control of more than 50 percent of the voting stock of any corporation, or obtains a majority ownership interest in any partnership, limited liability company, or other legal entity through the purchase or transfer of corporate stock, partnership, or limited liability company interest, or ownership interests in other legal entities, including any purchase or transfer of 50 percent or less of the ownership interest through which control or a majority ownership interest is obtained, the purchase or transfer of that stock or other interest shall be a change of ownership of the real property owned by the corporation, partnership, limited liability company, or other legal entity in which the controlling interest is obtained.

(2) On or after January 1, 1996, when an owner of a majority ownership interest in any partnership obtains all of the remaining ownership interests in that partnership or otherwise becomes the sole partner, the purchase or transfer of the minority interests, subject to the appropriate application of the step-transaction doctrine, shall not be a change in ownership of the real property owned by the partnership.

(d) If property is transferred on or after March 1, 1975, to a legal entity in a transaction excluded from change in ownership by paragraph (2) of subdivision (a) of Section 62, then the persons holding ownership interests in that legal entity immediately after the transfer shall be considered the "original coowners." Whenever shares or other ownership interests representing cumulatively more than 50 percent of the total interests in the entity are transferred by any of the original coowners in one or more transactions, a change in ownership of that real property owned by the legal entity shall have occurred, and the property that was previously excluded from change in ownership under the provisions of paragraph (2) of subdivision (a) of Section 62 shall be reappraised.

The date of reappraisal shall be the date of the transfer of the ownership interest representing individually or cumulatively more than 50 percent of the interests in the entity.

A transfer of shares or other ownership interests that results in a change in control of a corporation, partnership, limited liability company, or any other legal entity is subject to reappraisal as provided in subdivision (c) rather than this subdivision.

(e) To assist in the determination of whether a change of ownership has occurred under subdivisions (c) and (d), the Franchise Tax Board shall include a question in substantially the following form on returns for partnerships, banks, and corporations (except tax-exempt organizations):

If the corporation (or partnership or limited liability company) owns real property in California, has cumulatively more than 50 percent of the voting stock (or more than 50 percent of total interest in both partnership or limited liability company capital and partnership or limited liability company profits) (1) been transferred by the corporation (or partnership or limited liability company) since March 1, 1975, or (2) been acquired by another legal entity or person during the year? (See instructions.)

If the entity answers "yes" to (1) or (2) in the above question, then the Franchise Tax Board shall furnish the names and addresses of that entity and of the stock or partnership or limited liability company ownership interest transferees to the State Board of Equalization.

SEC. 171. Section 401.15 of the Revenue and Taxation Code is amended to read:

401.15. (a) Notwithstanding any other provision of law, for any county that makes available the credits provided for in Section 5096.3, the full cash values of certificated aircraft for fiscal years to the 1997–98 fiscal year, inclusive, are presumed to be those values enrolled by the county assessor or, in the case of timely escape assessments upon certificated aircraft issued on or after April 1, 1998, pursuant to Sections 531, 531.3, and 531.4, the values enrolled upon those escape assessments, provided that the escape assessment is made in accordance with the methodology in subdivision (b). For escape assessments for fiscal years to the 1997–98 fiscal year, inclusive, the assessor shall use the methodology and minimum and market values set by the California Assessors' Association for the applicable fiscal year in lieu of the methodology set forth in subparagraph (C) or (D) of paragraph (1) of subdivision (b). The assessor is not required to revise or change existing enrolled assessments that are not subject to escape assessment to reflect the methodology in this section. Nothing in this section precludes audit adjustments and offsets as set forth in Section 469 or the correction of reporting errors raised by an airline. Nothing in this section affects any presumption of correctness concerning allocation of aircraft values.

(b) (1) For the 1998–99 fiscal year to the 2002–03 fiscal year, inclusive, and including escape assessments levied on or after April 1, 1998, for any fiscal year to the 2002–03 fiscal year, inclusive, except as otherwise provided in subdivision (a), certificated aircraft shall be presumed to be valued at full market value if all of the following conditions are met:

(A) Except as provided in subparagraph (D), value is derived using original cost. The original cost shall be the greater of the following:

(i) Taxpayer's cost for that individual aircraft reported in accordance with generally accepted accounting principles, so long as that produces net acquisition cost, and to the extent not included in the taxpayer's cost, transportation costs and capitalized interest and the cost of any capital addition or modification made before a transaction described in clause (ii).

(ii) The cost established in a sale/leaseback or assignment of purchase rights transaction for that individual aircraft that transfers the benefits and burdens of ownership to the lessor for United States federal income tax purposes.

If the original cost for leased aircraft cannot be determined from information reasonably available to the taxpayer, original cost may be determined by reference to the "average new prices" column of the Airliner Price Guide for that model, series, and year of manufacture of aircraft. If information is not available in the "average new prices" column for that model, series, and year, the

original cost may be determined using the best indicator of original cost plus all conversion costs incurred for that aircraft. In the event of a merger, bankruptcy, or change in accounting methods by the reporting airline, there shall be a rebuttable presumption that the cost of the individual aircraft and the acquisition date reported by the acquired company, if available, or the cost reported prior to the change in accounting method, are the original cost and the applicable acquisition date.

(B) Original cost, plus the cost of any capital additions or modifications not otherwise included in the original cost, shall be adjusted from the date of the acquisition of the aircraft to the lien date using the producer price index for aircraft and a 16-year straight-line percent good table starting from the delivery date of the aircraft to the current owner or, in the case of a sale/leaseback or assignment of purchase rights transaction, as described in this section, the current operator with a minimum combined factor of 25 percent, unless this adjustment results in a value less than the minimum value for that aircraft computed pursuant to subparagraph (C), in which case the minimum value may be used. If original cost is determined by reference to the Airliner Price Guide "average new prices" column, the adjustments required by this paragraph shall be made by setting the acquisition date of the aircraft to be the date of the aircraft's manufacture.

(C) For certificated aircraft of a model and series that has been in revenue service for eight or more years, the minimum value shall not exceed the average of the used aircraft prices shown in columns other than the "average new prices" column for used aircraft of the oldest aircraft for that model and series in the Airliner Price Guide most recently published as of the lien date. Minimum values shall not be utilized for certificated aircraft of a model and series that has been in revenue service for less than eight years.

(D) For out-of-production aircraft that were recommended to be valued by a market approach for 1998 by the California Assessors' Association, assessments will be based at the lower of the following:

(i) The values established by the association for the 1998 lien date.

(ii) The average of the used aircraft prices shown in the columns other than the "average new prices" column for used aircraft of the five oldest years for the aircraft model and series or that lesser time for which data is available in the Airliner Price Guide.

(2) Notwithstanding paragraph (1), in computing assessed value, the assessor may allow for extraordinary obsolescence if supported by market evidence and the taxpayer may challenge the assessment for failure to do so. To constitute market evidence of extraordinary obsolescence and to permit an assessment appeal, the evidence must show that the functional and/or economic obsolescence is in excess of 10 percent of the value for the aircraft model and series otherwise

established pursuant to subparagraph (B), (C), or (D) of paragraph (1).

(3) For purposes of paragraph (1), if the Airliner Price Guide ceases to be published or the format significantly changes, a guide or adjustment agreed to by the airlines and the taxing counties shall be substituted.

(c) (1) For the 2003–04 fiscal year, certificated aircraft shall be presumed to be valued at full market value if all of the following conditions are met:

(A) Except as provided in subparagraph (D), value is derived using original cost. The original cost shall be the greater of the following:

(i) Taxpayer's cost for that individual aircraft reported in accordance with generally accepted accounting principles, so long as that produces net acquisition cost, and to the extent not included in the taxpayer's cost, transportation costs and capitalized interest and the cost of any capital addition or modification made before a transaction described in clause (ii).

(ii) Taxpayer's cost as established pursuant to this subdivision plus one-half of the incremental difference between taxpayer's cost and the cost established in a sale/leaseback or assignment of purchase rights transaction for individual aircraft that transfers the benefits and burdens of ownership to the lessor for United States federal income tax purposes.

If the original cost for leased aircraft cannot be determined from information reasonably available to the taxpayer, original cost may be determined by reference to the "average new prices" column of the Airliner Price Guide for that model, series, and year of manufacture of aircraft. If information is not available in the "average new prices" column for that model, series, and year, the original cost may be determined using the best indicator of original cost plus all conversion costs incurred for that aircraft. In the event of a merger, bankruptcy, or change in accounting methods by the reporting airline, there shall be a rebuttable presumption that the cost of the individual aircraft and the acquisition date reported by the acquired company, if available, or the cost reported prior to the change in accounting method, are the original cost and the applicable acquisition date.

(B) Original cost, plus the cost of any capital additions or modifications not otherwise included in original cost, shall be adjusted from the date of the acquisition of the aircraft to the lien date using the producer price index for aircraft and a 16-year straight-line percent good table starting from the delivery date of the aircraft to the current owner or, in the case of a sale/leaseback or assignment of purchase rights transaction, as described in this section, the current operator with a minimum combined factor of 25 percent, unless this adjustment results in a value less than the minimum value

for that aircraft computed pursuant to subparagraph (C), in which case the minimum value may be used. If original cost is determined by reference to the Airliner Price Guide "average new prices" column, the adjustments required by this paragraph shall be made by setting the acquisition date of the aircraft to be the date of the aircraft's manufacture.

(C) For certificated aircraft of a model and series that has been in revenue service for eight or more years, the minimum value shall not exceed the average of the used aircraft prices shown in columns other than the "average new prices" column for used aircraft of the oldest aircraft for that model and series in the Airliner Price Guide most recently published as of the lien date. Minimum values shall not be utilized for certificated aircraft of a model and series that has been in revenue service for less than eight years.

(D) For out-of-production aircraft that were recommended to be valued by a market approach for 1998 by the California Assessors' Association, their assessments shall be based at the lower of the following:

(i) The values established by the association for the 1998 lien date.

(ii) The average of the used aircraft prices shown in the columns other than the "average new prices" column for used aircraft of the five oldest years for the aircraft model and series or that lesser time for which data is available in the Airliner Price Guide.

(2) Notwithstanding paragraph (1), in computing assessed value, the assessor may allow for extraordinary obsolescence if supported by market evidence and the taxpayer may challenge the assessment for failure to do so. To constitute market evidence of extraordinary obsolescence and to permit an assessment appeal, the evidence must show that the functional and or economic obsolescence is in excess of 10 percent of the value for the aircraft model and series otherwise established pursuant to subparagraph (B), (C), or (D) of paragraph (1).

(3) For purposes of paragraph (1), if the Airliner Price Guide ceases to be published or the format significantly changes, a guide or adjustment agreed to by the airlines and the taxing counties shall be substituted.

(d) To calculate the values prescribed in subdivisions (b) and (c), the taxpayer shall, to the extent that information is reasonably available to the taxpayer, furnish the county assessor with an annual property statement that includes the aircraft original costs as defined in subparagraph (A) of paragraph (1) of subdivision (b) or (c). If an air carrier that has this information reasonably available to it fails to report original cost and additions, as required by Sections 441 and 442, an assessor may make an appropriate assessment pursuant to Section 501.

SEC. 172. Section 995.2 of the Revenue and Taxation Code is amended to read:

995.2. The term "basic operational program," as used in Section 995, means a computer program that is fundamental and necessary to the functioning of a computer. A basic operational program is that part of an operating system including supervisors, monitors, executives, and control or master programs that consist of the control program elements of that system.

For purposes of this section, the terms "control program" and "basic operational program" are interchangeable. A control program, as opposed to a processing program, controls the operation of a computer by managing the allocation of all system resources, including the central processing unit, main storage, input/output devices and processing programs. A processing program is used to develop and implement the specific applications that the computer is to perform. Its operation is possible only through the facilities provided by the control program. It is not in itself fundamental and necessary to the functioning of a computer.

Excluded from the term "basic operational program" are processing programs, which consist of language translators, including, but not limited to, assemblers and compilers; service programs, including, but not limited to, data set utilities, sort/merge utilities, and emulators; data management systems, also known as generalized file-processing software; and application programs, including, but not limited to, payroll, inventory control, and production control. Also excluded from the term "basic operational program" are programs or parts of programs developed for or by a user if they were developed solely for the solution of an individual operational problem of the user.

A control program, as used in this section, includes the following functions: selection, assignment, and control of input and output devices; loading of programs, including selection of programs from a system resident library; handling the steps necessary to accomplish job-to-job transition; controlling the allocation of memory; controlling concurrent operation of multiple programs or computers; and protecting data from being inadvertently destroyed as a result of operator program error.

SEC. 173. Section 3772.5 of the Revenue and Taxation Code is amended to read:

3772.5. For purposes of this chapter:

(a) "Low-income persons" means persons and families of low or moderate income, as defined by Section 50093 of the Health and Safety Code.

(b) "Nonprofit organization" means a nonprofit organization incorporated pursuant to Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code for the purpose of acquisition of either of the following:

(1) Single-family or multifamily dwellings for rehabilitation and sale or rent to low-income persons, or for other use to serve low-income persons.

(2) Vacant land for construction of residential dwellings and subsequent sale or rent to low-income persons, for other use to serve low-income persons, or for dedication of that vacant land to public use.

(c) "Rehabilitation" means repairs and improvements to a substandard building, as defined in Section 17920.3 of the Health and Safety Code, necessary to make it a building that is not a substandard building.

SEC. 174. Section 17275.6 of the Revenue and Taxation Code is amended to read:

17275.6. For taxable years beginning on or after January 1, 1998, Section 170(e)(1) of the Internal Revenue Code, relating to certain contributions of ordinary income and capital gain property, is modified to provide that for purposes of applying Section 170(e)(1) of the Internal Revenue Code in the case of a charitable contribution of stock in an "S corporation," rules similar to the rules of Section 751 of the Internal Revenue Code, relating to unrealized receivables and inventory items, shall apply in determining whether gain on the stock would have been long-term capital gain if the stock were sold by the taxpayer.

SEC. 175. Section 19057 of the Revenue and Taxation Code is amended to read:

19057. (a) Except in the case of a false or fraudulent return and except as otherwise expressly provided in this part, every notice of a proposed deficiency assessment shall be mailed to the taxpayer within four years after the return was filed. No deficiency shall be assessed or collected with respect to the year for which the return was filed unless the notice is mailed within the four-year period or the period otherwise provided. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit.

(b) The running of the period of limitations provided in subdivision (a) on mailing a notice of proposed deficiency assessment shall, in a case under Title 11 of the United States Code, be suspended for any period during which the Franchise Tax Board is prohibited by reason of that case from mailing the notice of proposed deficiency assessment and for 60 days thereafter.

(c) Where, within the 60-day period ending on the day on which the time prescribed in this section for the assessment of any tax imposed under Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001) for any taxable year would otherwise expire, the Franchise Tax Board receives a written document, other than an amended return or a report required by

Section 18622, signed by the taxpayer showing that the taxpayer owes an additional amount of that tax for that taxable year, the period for the assessment of an additional amount in excess of the amount shown on either an original or amended return shall not expire before the day 60 days after the day on which the Franchise Tax Board receives that document.

(d) If a taxpayer determines in good faith that it is an exempt organization and files a return as an exempt organization under Section 23772, and if the taxpayer is thereafter held to be a taxable organization for the taxable year for which the return is filed, that return shall be deemed the return of the organization for the purposes of this section.

SEC. 176. Section 19141.6 of the Revenue and Taxation Code is amended to read:

19141.6. (a) Each taxpayer determining its income subject to tax pursuant to Section 25101 or electing to file pursuant to Section 25110 shall, for income years beginning on or after January 1, 1994, maintain (in the location, in the manner, and to the extent prescribed in regulations promulgated by the Franchise Tax Board on or before December 31, 1995) and make available upon request all of the following:

(1) Any records as may be appropriate to determine the correct treatment of the components that are a part of one or more unitary businesses for purposes of determining the income derived from or attributable to this state pursuant to Section 25101 or 25110.

(2) Any records as may be appropriate to determine the correct treatment of amounts that are attributable to the classification of an item as business or nonbusiness income for purposes of Article 2 (commencing with Section 25120) of Chapter 17 of Part 11.

(3) Any records as may be appropriate to determine the correct treatment of the apportionment factors for purposes of Article 2 (commencing with Section 25120) of Chapter 17 of Part 11.

(4) Documents and information, including any questionnaires completed and submitted to the Internal Revenue Service, that are necessary to audit issues involving attribution of income to the United States or foreign jurisdictions under Section 882 of, or Subpart F of Part III of Subchapter N of, or similar provisions of, the Internal Revenue Code.

(b) For purposes of this section:

(1) Information for any year shall be retained for that period of time in which the taxpayers' income or franchise tax liability to this state may be subject to adjustment, including all periods in which additional income or franchise taxes may be assessed, not to exceed eight years from the due date or extended due date of the return, or during which a protest is pending before the Franchise Tax Board, or an appeal is pending before the State Board of Equalization, or a

lawsuit is pending in the courts of this state or the United States with respect to California franchise or income tax.

(2) "Related party" means corporations that are related because one owns or controls, directly or indirectly, more than 50 percent of the stock of the other or because more than 50 percent of the voting stock of each is owned or controlled, directly or indirectly, by the same interests.

(3) "Records" includes any books, papers, or other data.

(c) (1) If a corporation subject to this section fails to maintain or fails to cause another to maintain records as required by subdivision (a), that corporation shall pay a penalty of ten thousand dollars ($10,000) for each income year with respect to which the failure occurs.

(2) If any failure described in paragraph (1) continues for more than 90 days after the day on which the Franchise Tax Board mails notice of the failure to the corporation, that corporation shall pay a penalty (in addition to the amount required under paragraph (1)) of ten thousand dollars ($10,000) for each 30-day period (or fraction thereof) during which the failure continues after the expiration of the 90-day period. The additional penalty imposed by this subdivision shall not exceed a maximum of fifty thousand dollars ($50,000) if the failure to maintain or the failure to cause another to maintain is not willful. This maximum shall apply with respect to income years beginning on or after January 1, 1994, and before the earlier of the first day of the month following the month in which regulations are adopted pursuant to this section or December 31, 1995.

(3) For purposes of this section, the time prescribed by regulations to maintain records (and the beginning of the 90-day period after notice by the Franchise Tax Board) shall be treated as not earlier than the last day on which (as shown to the satisfaction of the Franchise Tax Board) reasonable cause existed for failure to maintain the records.

(d) (1) The Franchise Tax Board may apply the rules of paragraph (2) whether or not the board begins a proceeding to enforce a subpoena, or subpoena duces tecum, if subparagraphs (A), (B), and (C) apply:

(A) For purposes of determining the correct treatment under Part 11 (commencing with Section 23001) of the items described in subdivision (a), the Franchise Tax Board issues a subpoena or subpoena duces tecum to a corporation to produce (either directly or as agent for the related party) any records or testimony.

(B) The subpoena or subpoena duces tecum is not quashed in a proceeding begun under paragraph (3) and is not determined to be invalid in a proceeding begun under Section 19504 to enforce the subpoena or subpoena duces tecum.

(C) The corporation does not substantially comply in a timely manner with the subpoena or subpoena duces tecum and the

Franchise Tax Board has sent by certified or registered mail a notice to that corporation that it has not substantially complied.

(D) If the corporation fails to maintain or fails to cause another to maintain records as required by subdivision (a), and by reason of that failure, the subpoena, or subpoena duces tecum, is quashed in a proceeding described in subparagraph (B) or the corporation is not able to provide the records requested in the subpoena or subpoena duces tecum, the Franchise Tax Board may apply the rules of paragraph (2) to any of the items described in subdivision (a) to which the records relate.

(2) (A) All of the following shall be determined by the Franchise Tax Board in the Franchise Tax Board's sole discretion from the Franchise Tax Board's own knowledge or from information the Franchise Tax Board may obtain through testimony or otherwise:

(i) The components that are a part of one or more unitary businesses for purposes of determining the income derived from or attributable to this state pursuant to Section 25101 or 25110.

(ii) Amounts that are attributable to the classification of an item as business or nonbusiness income for purposes of Article 2 (commencing with Section 25120) of Chapter 17 of Part 11.

(iii) The apportionment factors for purposes of Article 2 (commencing with Section 25120) of Chapter 17 of Part 11.

(iv) The correct amount of income under Section 882 of, or Subpart F of Part III of Subchapter N of, or similar provisions of, the Internal Revenue Code.

(B) This paragraph shall apply to determine the correct treatment of the items described in subdivision (a) unless the corporation is authorized by its related parties (in the manner and at the time as the Franchise Tax Board shall prescribe) to act as the related parties' limited agent solely for purposes of applying Section 19504 with respect to any request by the Franchise Tax Board to examine records or produce testimony related to any item described in subdivision (a) or with respect to any subpoena or subpoena duces tecum for the records or testimony. The appearance of persons or the production of records by reason of the corporation being an agent shall not subject those persons or records to legal process for any purpose other than determining the correct treatment under Part 11 of the items described in subdivision (a).

(C) Determinations made in the sole discretion of the Franchise Tax Board pursuant to this paragraph may be appealed to the State Board of Equalization, in the manner and at the time prescribed by Section 19045 or 19324, or may be the subject of an action to recover tax, in the manner and at a time prescribed by Section 19382. The review of determinations by the board or the court shall be limited to whether the determinations were arbitrary or capricious, or are not supported by substantial evidence.

97

(3) (A) Notwithstanding any other law or rule of law, any reporting corporation to which the Franchise Tax Board issues a subpoena or subpoena duces tecum referred to in subparagraph (A) of paragraph (1) shall have the right to begin a proceeding to quash the subpoena or subpoena duces tecum not later than the 90th day after the subpoena or subpoena duces tecum was issued. In that proceeding, the Franchise Tax Board may seek to compel compliance with the subpoena or subpoena duces tecum.

(B) Notwithstanding any other law or rule of law, any reporting corporation that has been notified by the Franchise Tax Board that it has determined that the corporation has not substantially complied with a subpoena or subpoena duces tecum referred to in paragraph (1) shall have the right to begin a proceeding to review the determination not later than the 90th day after the day on which the notice referred to in subparagraph (C) of paragraph (1) was mailed. If the proceeding is not begun on or before the 90th day, the determination by the Franchise Tax Board shall be binding and shall not be reviewed by any court.

(C) The superior courts of the State of California for the Counties of Los Angeles, Sacramento, and San Diego, and for the City and County of San Francisco, shall have jurisdiction to hear any proceeding brought under subparagraphs (A) and (B). Any order or other determination in the proceeding shall be treated as a final order that may be appealed.

(D) If any corporation takes any action as provided in subparagraphs (A) and (B), the running of any period of limitations under Sections 19057 to 19064, inclusive (relating to the assessment and collection of tax), or under Section 19704 (relating to criminal prosecutions) with respect to that corporation shall be suspended for the period during which the proceedings, and appeals therein, are pending. In no event shall any period expire before the 90th day after the day on which there is a final determination in the proceeding.

SEC. 177. Section 19271 of the Revenue and Taxation Code is amended to read:

19271. (a) (1) For purposes of this article:

(A) "Child support" means support of a child, spouse, or family as provided in Section 150 of the Family Code.

(B) "Child support delinquency" means a child support obligation that may include or be limited to interest, fees, or penalties, on which payment then due has not been received following the expiration of 90 days from the date payment is due.

(C) "Earnings" may include the items described in Section 5206 of the Family Code.

(2) A county district attorney enforcing child support obligations pursuant to Section 11475.1 of the Welfare and Institutions Code shall refer child support delinquencies to the Franchise Tax Board for collection. If there is a child support delinquency at the time the case

is opened by the district attorney, the case shall be referred to the Franchise Tax Board no later than 90 days after receipt of the case by the district attorney. A county district attorney may also refer to the Franchise Tax Board a child support obligation that is 30 days or more past due, and any of these obligations shall be collected as if they were delinquencies otherwise described in this subdivision.

(3) Referrals shall be transmitted in the form and manner prescribed by the Franchise Tax Board.

(4) To manage the growth in the number of referrals that it may receive, the Franchise Tax Board may phase in the referrals as administratively necessary.

(5) At least 20 days prior to the date that the Franchise Tax Board commences a collection action under this article, the Franchise Tax Board shall mail notice of the amount due to the obligated parent at the last known address for payment and advise that person that failure to pay will result in collection action. If the obligated parent disagrees with the amount due, the obligated parent shall be instructed to contact the county district attorney.

(b) (1) (A) Except as otherwise provided in subparagraph (B), when a delinquency is referred to the Franchise Tax Board pursuant to subdivision (a), the amount of the child support delinquency shall be collected from any obligated parent by the Franchise Tax Board in any manner authorized under the law for collection of a delinquent personal income tax liability, including, but not limited to, issuance of an order and levy under Article 4 (commencing with Section 706.070) of Chapter 5 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure in the manner provided for earnings withholding orders for taxes. Any law providing for the collection of a delinquent personal income tax liability shall apply to any delinquency referred under this article in the same manner and with the same force and effect and to the full extent as if the language of those laws had been incorporated in full into this article, except to the extent that any provision is either inconsistent with a provision of this article or is not relevant to this article.

(B) When a delinquency is referred to the Franchise Tax Board pursuant to subdivision (a), or at any time thereafter if the obligated parent owes a delinquent personal income tax liability, the Franchise Tax Board shall not engage in, or shall cease, any involuntary collection action to collect the delinquency referred under this article until the delinquent personal income tax liability is paid in full. If the obligated parent owes a delinquent personal income tax liability when a delinquency is referred, the Franchise Tax Board shall mail the notice specified in paragraph (5) of subdivision (a). At any time thereafter, the Franchise Tax Board may mail any other notice to the obligated parent for voluntary payment as the Franchise Tax Board deems necessary. However, the Franchise Tax Board may engage in the collection of a delinquency referred

pursuant to subdivision (a) under either of the following circumstances:

(i) The delinquent personal income tax liability is discharged from accountability pursuant to Section 13940 of the Government Code.

(ii) The obligor has entered into an installment payment agreement for the delinquent personal income tax liability and is in compliance with that agreement, and the Franchise Tax Board determines that collection of the delinquency referred pursuant to subdivision (a) would not jeopardize payments under the installment agreement.

(C) For purposes of subparagraph (B):

(i) "Involuntary collection action" means those actions authorized by Section 18670, 18670.5, 18671, or 19264, by Article 3 (commencing with Section 19231), or by Chapter 5 (commencing with Section 706.010) of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure.

(ii) "Delinquent personal income tax liability" means any taxes, additions to tax, penalties, interest, fees, or other related amounts due and payable under Part 10 (commencing with Section 17001) or this part.

(iii) "Voluntary payment" means any payment made by obligated parents in response to the notice specified in paragraph (5) of subdivision (a) or any other notice for voluntary payment mailed by the Franchise Tax Board.

(2) Any compensation, fee, commission, expense, or other fee for service incurred by the Franchise Tax Board in the collection of a child support delinquency authorized under this article shall not be an obligation of, or collected from, the obligated parent. A referred child support delinquency shall be final and due and payable to the State of California upon written notice to the obligated parent by the Franchise Tax Board.

(3) For purposes of administering this article:

(A) This chapter and Chapter 7 (commencing with Section 19501) shall apply, except as otherwise provided by this article.

(B) Any services, information, or enforcement remedies available to a district attorney or the Title IV-D agency in collecting support delinquencies or locating absent or noncustodial parents shall be available to the Franchise Tax Board for purposes of collecting child support delinquencies under this article, including, but not limited to, any information that may be disclosed by the Franchise Tax Board to the California Parent Locator Service under Section 19548.

(C) A request by the Franchise Tax Board for information from a financial institution shall be treated in the same manner and to the same extent as a request for information from a district attorney referring to a support order pursuant to Section 11475.1 of the Welfare and Institutions Code for purposes of Chapter 20 (commencing with Section 7460) of Division 7 of Title 1 of the

Government Code (relating to governmental access to financial records), notwithstanding any other provision of law which is inconsistent or contrary to this paragraph.

(D) The amount to be withheld in an order and levy to collect child support delinquencies under Article 4 (commencing with Section 706.070) of Chapter 5 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure is the amount required to be withheld pursuant to an earnings withholding order for support under Section 706.052 of the Code of Civil Procedure.

(E) Nothing in this article shall be construed to modify the tax intercept provisions of Article 8 (commencing with Section 708.710) of Chapter 6 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure.

(c) Interest on the delinquency shall be computed pursuant to Section 685.010 of the Code of Civil Procedure.

(d) If the collection action would cause undue financial hardship to the obligated parent, would threaten the health or welfare of the obligated parent or his or her family, or would cause undue irreparable loss to the obligated parent, the obligated parent may notify the Franchise Tax Board, which shall, upon being notified, refer the obligated parent to the referring county district attorney, unless the Franchise Tax Board is directed otherwise by the county district attorney for purposes of more effectively administering this article.

(e) (1) In no event shall a collection under this article be construed to be a payment of income taxes imposed under this part.

(2) If an obligated parent overpays a liability imposed under this part, the overpayment shall not be credited against any delinquency collected pursuant to this article. If an overpayment of a liability imposed under this part is offset and distributed to a referring county district attorney pursuant to Sections 12419.3 and 12419.5 of the Government Code or Section 708.740 of the Code of Civil Procedure, and thereby reduces the amount of the referred delinquency, the referring county district attorney shall immediately notify the Franchise Tax Board of that reduction, unless otherwise directed for purposes of more effectively administering this article.

(3) In no event shall the district attorney refer, or the Franchise Tax Board collect, under this article any delinquency if both of the following circumstances exist:

(A) A court has ordered an obligated parent to make scheduled payments on a child support arrearages obligation.

(B) The obligated parent is in compliance with the order.

(4) A child support delinquency need not be referred to the Franchise Tax Board pursuant to this article if an earnings assignment order or a notice of assignment has been served on the obligated parent's employer and court-ordered support is being paid pursuant to the earnings assignment order or the notice of

assignment or at least 50 percent of the obligated parent's earnings are being withheld for support.

(5) A child support delinquency need not be referred to the Franchise Tax Board for collection if a jurisdiction outside this state is enforcing the support order.

(f) Except as otherwise provided in this article, any child support delinquency referred to the Franchise Tax Board pursuant to this article shall be treated as a child support delinquency for all other purposes, and any collection action by the county district attorney or the Franchise Tax Board with respect to any delinquency referred pursuant to this article shall have the same priority against attachment, execution, assignment, or other collection action as is provided by any other provision of state law.

(g) Except as otherwise specifically provided in subparagraph (B) of paragraph (1) of subdivision (b), the child support collection activities authorized by this article shall not interfere with the primary mission of the Franchise Tax Board to fairly and efficiently administer the provisions of this code for which it is responsible.

(h) Information disclosed to the Franchise Tax Board shall be considered information that may be disclosed by the Franchise Tax Board under the authority of Section 19548 and may be disseminated by the Franchise Tax Board accordingly for the purposes specified in Sections 11478 and 11478.5 of the Welfare and Institutions Code (in accordance with, and to the extent permitted by, Section 11478.1 of the Welfare and Institutions Code and any other state or federal law).

(i) A county may apply to the State Department of Social Services for an exemption from subdivision (a). The State Department of Social Services shall grant an exemption only if the county has a program for collecting delinquent child support, including hardware and software, that is similar or identical to the technology used by the Franchise Tax Board in implementing its child support collections program and the county program was in operation as of April 1, 1997.

SEC. 178. Section 23038.5 of the Revenue and Taxation Code is amended to read:

23038.5. (a) Section 7704 of the Internal Revenue Code, relating to certain publicly traded partnerships treated as corporations, shall apply, except as otherwise provided.

(b) (1) Section 7704(a) of the Internal Revenue Code shall not apply to an electing 1987 partnership.

(2) For purposes of this subdivision, the term "electing 1987 partnership" means any publicly traded partnership if all of the following apply:

(A) The partnership is an existing partnership (as defined in Section 10211(c)(2) of the Revenue Reconciliation Act of 1987).

(B) Section 7704(a) of the Internal Revenue Code has not applied (and without regard to Section 7704(c)(1) of the Internal Revenue

Code would not have applied) to that partnership for all prior taxable years beginning after December 31, 1987, and before January 1, 1998.

(C) (i) The partnership has made the election under Section 7704(g)(1)(C) of the Internal Revenue Code (as added by Public Law 105-34) for federal tax purposes.

(ii) The election for federal tax purposes described in clause (i) shall be treated as a binding election and a separate election for state tax purposes shall not be allowed under paragraph (3) of subdivision (e) of Section 23051.5.

(iii) The election for federal tax purposes described in clause (i) shall be treated as a binding consent to the application of the tax imposed under paragraph (3) and a separate election for state tax purposes shall not be allowed under paragraph (3) of subdivision (e) of Section 23051.5.

(D) A partnership which, but for this subparagraph, would be treated as an electing 1987 partnership shall cease to be so treated (and the election under subparagraph (C) shall cease to be in effect) as of the first day after December 31, 1997, that the partnership is no longer treated as an electing 1987 partnership for federal tax purposes (and the election under Section 7704(g)(1)(C) of the Internal Revenue Code (as added by Public Law 105-34) ceases to be in effect for federal tax purposes).

(3) (A) There is hereby imposed for each taxable year beginning on or after January 1, 1998, on the gross income of each electing 1987 partnership a tax equal to 1 percent of that partnership's gross income from all sources reportable to this state, taking into account Section 25101 and any election under Section 25110, attributable to the active conduct of trades and businesses by the partnership.

(B) The tax shall be due and payable on the date the return of the partnership is required to be filed under Section 18633, shall be collected and refunded in the same manner as other taxes imposed by this part, and shall be subject to interest and applicable penalties.

(C) For purposes of this paragraph, if a partnership is a partner in another partnership, the gross income referred to in subparagraph (A) shall include the partnership's distributive share of the gross income of the other partnership from all sources reportable to this state, taking into account Section 25101 and any election under Section 25110, attributable to the active conduct of trades and businesses of that other partnership. A similar rule shall apply in the case of lower-tiered partnerships.

(D) The tax imposed by this paragraph shall be treated as imposed by this part other than for purposes of determining the amount of any credit allowable under this part.

(4) The provisions of this subdivision shall apply to the taxable year for which the election described in clause (i) of subparagraph (C) of paragraph (2) is made for federal purposes and all subsequent taxable years unless revoked by the partnership for federal purposes.

Any revocation made for federal purposes shall be treated as a binding revocation under this part, but, once so revoked, may not be reinstated and a separate revocation for state purposes shall not be allowed under paragraph (3) of subdivision (e) of Section 23051.5.

(c) The amendment made to this section by the act adding this subdivision shall apply to taxable years beginning on or after January 1, 1998.

SEC. 179. Section 23610.5 of the Revenue and Taxation Code is amended to read:

23610.5. (a) (1) There shall be allowed as a credit against the "tax" (as defined by Section 23036) a state low-income housing tax credit in an amount equal to the amount determined in subdivision (c), computed in accordance with Section 42 of the Internal Revenue Code of 1986, except as otherwise provided in this section.

(2) "Taxpayer," for purposes of this section, means the sole owner in the case of a C corporation, the partners in the case of a partnership, and the shareholders in the case of an S corporation.

(3) "Housing sponsor," for purposes of this section, means the sole owner in the case of a C corporation, the partnership in the case of a partnership, and the S corporation in the case of an S corporation.

(b) (1) The amount of the credit allocated to any housing sponsor shall be authorized by the California Tax Credit Allocation Committee, or any successor thereof, based on a project's need for the credit for economic feasibility in accordance with the requirements of this section.

(A) The low-income housing project shall be located in California and shall meet either of the following requirements:

(i) The project's housing sponsor has been allocated by the California Tax Credit Allocation Committee a credit for federal income tax purposes under Section 42 of the Internal Revenue Code.

(ii) It qualifies for a credit under Section 42(h)(4)(B) of the Internal Revenue Code.

(B) The California Tax Credit Allocation Committee shall not require fees for the credit under this section in addition to those fees required for applications for the tax credit pursuant to Section 42 of the Internal Revenue Code. The committee may require a fee if the application for the credit under this section is submitted in a calendar year after the year the application is submitted for the federal tax credit.

(2) (A) The California Tax Credit Allocation Committee shall certify to the housing sponsor the amount of tax credit under this section allocated to the housing sponsor for each credit period.

(B) In the case of a partnership or an S corporation, the housing sponsor shall provide a copy of the California Tax Credit Allocation Committee certification to the taxpayer.

(C) The taxpayer shall, upon request, provide a copy of the certification to the Franchise Tax Board.

(D) All elections made by the taxpayer pursuant to Section 42 of the Internal Revenue Code shall apply to this section.

(E) For buildings located in designated difficult development areas or qualified census tracts as defined in Section 42(d)(5)(C) of the Internal Revenue Code, credits may be allocated under this section in the amounts prescribed in subdivision (c), provided that the amount of credit allocated under Section 42 of the Internal Revenue Code is computed on 100 percent of the qualified basis of the building.

(c) Section 42(b) of the Internal Revenue Code shall be modified as follows:

(1) In the case of any qualified low-income building placed in service by the housing sponsor during 1987, the term "applicable percentage" means 9 percent for each of the first three years and 3 percent for the fourth year for new buildings (whether or not the building is federally subsidized) and for existing buildings.

(2) In the case of any qualified low-income building that receives an allocation after 1989 and is a new building not federally subsidized, the term "applicable percentage" means the following:

(A) For each of the first three years, the percentage prescribed by the Secretary of the Treasury for new buildings that are not federally subsidized for the taxable year, determined in accordance with the requirements of Section 42(b)(2) of the Internal Revenue Code, in lieu of the percentage prescribed in Section 42(b)(1)(A).

(B) For the fourth year, the difference between 30 percent and the sum of the applicable percentages for the first three years.

(3) In the case of any qualified low-income building that receives an allocation after 1989 and that is a new building that is federally subsidized or that is an existing building that is "at risk of conversion," the term "applicable percentage" means the following:

(A) For each of the first three years, the percentage prescribed by the Secretary of the Treasury for new buildings that are federally subsidized for the taxable year.

(B) For the fourth year, the difference between 13 percent and the sum of the applicable percentages for the first three years.

(4) For purposes of this section, the term "at risk of conversion," with respect to an existing building means a building that satisfies all of the following criteria:

(A) The building is presently owned by a housing sponsor other than a qualified nonprofit organization.

(B) The building is a federally assisted building for which the low-income use restrictions will terminate or the building is eligible for prepayment under Subtitle 13 of the Emergency Low Income Housing Assistance Act of 1987 or under Section 502(c) of the Housing Act of 1949, anytime in the two calendar years after the year of application to the California Tax Credit Allocation Committee, and the purchaser has received preliminary approval from the applicable

federal agency for a maximum level of incentives through a plan of action.

(C) The person acquiring the building enters into a regulatory agreement that requires the building to be operated in accordance with the requirements of this section for a period equal to the greater of 55 years or the life of the building.

(D) The building satisfies the requirements of Section 42(e) of the Internal Revenue Code regarding rehabilitation expenditures, except that the provisions of Section 42(e)(3)(A)(ii)(I) shall not apply.

(d) The term "qualified low-income housing project" as defined in Section 42(c)(2) of the Internal Revenue Code is modified by adding the following requirements:

(1) The taxpayer shall be entitled to receive a cash distribution from the operations of the project, after funding required reserves, which, at the election of the taxpayer, shall be equal to:

(A) An amount not to exceed 8 percent of the lesser of:

(i) The owner equity, which shall include the amount of the capital contributions actually paid to the housing sponsor and shall not include any amounts until they are paid on an investor note, or

(ii) Twenty percent of the adjusted basis of the building as of the close of the first income year of the credit period; or

(B) The amount of the cash-flow from those units in the building that are not low-income units. For purposes of computing cash-flow under this subparagraph, operating costs shall be allocated to the low-income units using the "floor space fraction," as defined in Section 42 of the Internal Revenue Code.

(C) Any amount allowed to be distributed under subparagraph (A) that is not available for distribution during the first five years of the compliance period may accumulate and be distributed at any time during the first 15 years of the compliance period but not thereafter.

(2) The limitation on return shall apply in the aggregate to the partners if the housing sponsor is a partnership and in the aggregate to the shareholders if the housing sponsor is an S corporation.

(3) The housing sponsor shall apply any cash available for distribution in excess of the amount eligible to be distributed under paragraph (1) to reduce the rent on rent-restricted units or to increase the number of rent-restricted units subject to the tests of Section 42(g)(1) of the Internal Revenue Code.

(e) The provisions of Section 42(f) of the Internal Revenue Code shall be modified as follows:

(1) The term "credit period" as defined in Section 42(f)(1) of the Internal Revenue Code is modified by substituting "four income years" for "10 taxable years."

(2) The special rule for the first taxable year of the credit period under Section 42(f)(2) of the Internal Revenue Code shall not apply to the tax credit under this section.

(3) Section 42(f)(3) of the Internal Revenue Code is modified to read:

If, as of the close of any income year in the compliance period, after the first year of the credit period, the qualified basis of any building exceeds the qualified basis of that building as of the close of the first year of the credit period, the housing sponsor, to the extent of its tax credit allocation, shall be eligible for a credit on the excess in an amount equal to the applicable percentage determined pursuant to subdivision (c) for the four-year period beginning with the later of the income years in which the increase in qualified basis occurs.

(f) The provisions of Section 42(h) of the Internal Revenue Code shall be modified as follows:

(1) Section 42(h)(2) of the Internal Revenue Code shall not be applicable and instead the following provisions shall be applicable:

The total amount for the four-year credit period of the housing credit dollars allocated in a calendar year to any building shall reduce the aggregate housing credit dollar amount of the California Tax Credit Allocation Committee for the calendar year in which the allocation is made.

(2) Paragraphs (3), (4), (5), (6)(E)(i)(II), (6)(F), (6)(G), (6)(I), (7), and (8) of Section 42(h) of the Internal Revenue Code shall not be applicable.

(g) The aggregate housing credit dollar amount that may be allocated annually by the California Tax Credit Allocation Committee pursuant to this section, Section 12206, and Section 17058 shall be an amount equal to the sum of the following:

(1) (A) Except as provided in subparagraph (B), thirty-five million dollars ($35,000,000) for the 1997 calendar year, and each calendar year thereafter, or

(B) Fifty million dollars ($50,000,000) for each of the calendar years 1998 and 1999 ; and

(2) The unused housing credit ceiling, if any, for the preceding calendar years; and

(3) The amount of housing credit ceiling returned in the calendar year. For purposes of this paragraph, the amount of housing credit dollar amount returned in the calendar year equals the housing credit dollar amount previously allocated to any project that does not become a qualified low-income housing project within the period required by this section or to any project with respect to which an allocation is canceled by mutual consent of the California Tax Credit Allocation Committee and the allocation recipient.

(h) The term "compliance period" as defined in Section 42(i)(1) of the Internal Revenue Code is modified to mean, with respect to

97

any building, the period of 30 consecutive income years beginning with the first income year of the credit period with respect thereto.

(i) Section 42(j) of the Internal Revenue Code shall not be applicable and the following shall be substituted in its place:

The requirements of this section shall be set forth in a regulatory agreement between the California Tax Credit Allocation Committee and the housing sponsor, and this agreement shall be subordinated, when required, to any lien or encumbrance of any banks or other institutional lenders to the project. The regulatory agreement entered into pursuant to subdivision (f) of Section 50199.14 of the Health and Safety Code shall apply, provided that the agreement includes all of the following provisions:

(1) A term not less than the compliance period.

(2) A requirement that the agreement be filed in the official records of the county in which the qualified low-income housing project is located.

(3) A provision stating which state and local agencies can enforce the regulatory agreement in the event the housing sponsor fails to satisfy any of the requirements of this section.

(4) A provision that the regulatory agreement shall be deemed a contract enforceable by tenants as third-party beneficiaries thereto, and that allows individuals, whether prospective, present, or former occupants of the building, who meet the income limitation applicable to the building the right to enforce the regulatory agreement in any state court.

(5) A provision incorporating the requirements of Section 42 of the Internal Revenue Code as modified by this section.

(6) A requirement that the housing sponsor notify the California Tax Credit Allocation Committee or its designee if there is a determination by the Internal Revenue Service that the project is not in compliance with Section 42(g) of the Internal Revenue Code.

(7) A requirement that the housing sponsor, as security for the performance of the housing sponsor's obligations under the regulatory agreement, assign the housing sponsor's interest in rents that it receives from the project, provided that until there is a default under the regulatory agreement, the housing sponsor is entitled to collect and retain the rents.

(8) A provision that the remedies available in the event of a default under the regulatory agreement that is not cured within a reasonable cure period include, but are not limited to, allowing any of the parties designated to enforce the regulatory agreement to collect all rents with respect to the project; taking possession of the project and operating the project in accordance with the regulatory agreement until the enforcer determines the housing sponsor is in a position to operate the project in accordance with the regulatory agreement; applying to any court for specific performance; securing

the appointment of a receiver to operate the project; or any other relief as may be appropriate.

(j) (1) The committee shall allocate the housing credit on a regular basis consisting of two or more periods in each calendar year during which applications may be filed and considered. The committee shall establish application filing deadlines, the maximum percentage of federal and state low-income housing tax credit ceiling that may be allocated by the committee in that period, and the approximate date on which allocations shall be made. If the enactment of federal or state law, the adoption of rules or regulations, or other similar events prevent the use of two allocation periods, the committee may reduce the number of periods and adjust the filing deadlines, maximum percentage of credit allocated, and allocation dates.

(2) The committee shall adopt a qualified allocation plan, as provided in Section 42(m)(1) of the Internal Revenue Code. In adopting this plan, the committee shall comply with the provisions of Sections 42(m)(1)(B) and 42(m)(1)(C) of the Internal Revenue Code.

(3) Notwithstanding Section 42(m) of the Internal Revenue Code, the California Tax Credit Allocation Committee shall allocate housing credits in accordance with the qualified allocation plan and regulations, which shall include the following provisions:

(A) All housing sponsors, as defined by paragraph (3) of subdivision (a), shall demonstrate at the time the application is filed with the committee that the project meets the following threshold requirements:

(i) The housing sponsor shall demonstrate that there is a need for low-income housing in the community or region for which it is proposed.

(ii) The project's proposed financing, including tax credit proceeds, shall be sufficient to complete the project and shall be adequate to operate the project for the extended use period.

(iii) The project shall have enforceable financing commitments, either construction or permanent financing, for at least 50 percent of the total estimated financing of the project.

(iv) The housing sponsor shall have and maintain control of the site for the project.

(v) The housing sponsor shall demonstrate that the project complies with all applicable local land use and zoning ordinances.

(vi) The housing sponsor shall demonstrate that the project development team has the experience and the financial capacity to ensure project completion and operation for the extended use period.

(vii) The housing sponsor shall demonstrate the amount of tax credit that is necessary for the financial feasibility of the project and its viability as a qualified low-income housing project throughout the

extended use period, taking into account operating expenses, a supportable debt service, reserves, funds set aside for rental subsidies, and required equity, and a development fee that does not exceed a specified percentage of the eligible basis of the project prior to inclusion of the development fee in the eligible basis, as determined by the committee.

(B) The committee shall give a preference to those projects satisfying all of the threshold requirements of subparagraph (A) if:

(i) The project serves the lowest income tenants at rents affordable to those tenants; and

(ii) The project is obligated to serve qualified tenants for the longest period.

(C) In addition to the provisions of subparagraphs (A) and (B), the committee shall use the following criteria in allocating housing credits:

(i) Projects serving large families in which a substantial number, as defined by the committee, of all residential units are low-income units with three and more bedrooms.

(ii) Projects providing single-room occupancy units serving very low income tenants.

(iii) Existing projects that are "at risk of conversion," as defined by paragraph (4) of subdivision (c).

(iv) Projects for which a public agency provides direct or indirect long-term financial support for at least 15 percent of the total project development costs or projects for which the owner's equity constitutes at least 30 percent of the total project development costs.

(v) Projects that provide tenant amenities not generally available to residents of low-income housing projects.

(4) For purposes of allocating credits pursuant to this section, the committee shall not give preference to any project by virtue of the date of submission of its application except to break a tie when two or more of the projects have an equal rating.

(5) Not less than 20 percent of the low-income housing tax credits available annually under this section, Section 12206, and Section 17058 shall be set aside for allocation to rural areas as defined in Section 50199.21 of the Health and Safety Code. Any amount of credit set aside for rural areas remaining on or after October 31 of any calendar year shall be available for allocation to any eligible project. No amount of credit set aside for rural areas shall be considered available for any eligible project so long as there are eligible rural applications pending on October 31.

(k) Section 42(*l*) of the Internal Revenue Code shall be modified as follows:

The term "secretary" shall be replaced by the term "California Franchise Tax Board."

(*l*) In the case where the state credit allowed under this section exceeds the "tax," the excess may be carried over to reduce the "tax"

97

in the following year, and succeeding years if necessary, until the credit has been exhausted.

(m) A project that received an allocation of a 1989 federal housing credit dollar amount shall be eligible to receive an allocation of a 1990 state housing credit dollar amount, subject to all of the following conditions:

(1) The project was not placed in service prior to 1990.

(2) To the extent the amendments made to this section by the Statutes of 1990 conflict with any provisions existing in this section prior to those amendments, the prior provisions of law shall prevail.

(3) Notwithstanding paragraph (2), a project applying for an allocation under this subdivision shall be subject to the requirements of paragraph (3) of subdivision (j).

(n) The credit period with respect to an allocation of credit in 1989 by the California Tax Credit Allocation Committee of which any amount is attributable to unallocated credit from 1987 or 1988 shall not begin until after December 31, 1989.

(o) The provisions of Section 11407(a) of Public Law 101-508, relating to the effective date of the extension of the low-income housing credit, shall apply to calendar years after 1989.

(p) The provisions of Section 11407(c) of Public Law 101-508, relating to election to accelerate credit, shall not apply.

(q) (1) A corporation may elect to assign any portion of any credit allowed under this section to one or more affiliated corporations for each income year in which the credit is allowed. For purposes of this subdivision, "affiliated corporation" has the meaning provided in subdivision (b) of Section 25110, as that section was amended by Chapter 881 of the Statutes of 1993, as of the last day of the income year in which the credit is allowed, except that "100 percent" is substituted for "more than 50 percent" wherever it appears in the section, as that section was amended by Chapter 881 of the Statutes of 1993, and "voting common stock" is substituted for "voting stock" wherever it appears in the section, as that section was amended by Chapter 881 of the Statutes of 1993.

(2) The election provided in paragraph (1):

(A) May be based on any method selected by the corporation that originally receives the credit.

(B) Shall be irrevocable for the income year the credit is allowed, once made.

(C) May be changed for any subsequent income year if the election to make the assignment is expressly shown on each of the returns of the affiliated corporations that assign and receive the credits.

(r) Any unused credit may continue to be carried forward, as provided in subdivision (k), until the credit has been exhausted.

This section shall remain in effect on or after December 1, 1990, for as long as Section 42 of the Internal Revenue Code, pertaining to low-income housing credits, remains in effect.

(s) The amendments to this section made by the act adding this subdivision shall apply only to income years beginning on or after January 1, 1994, except that paragraph (1) of subdivision (q), as amended, shall apply to income years beginning on or after January 1, 1993.

SEC. 180. Section 23701t of the Revenue and Taxation Code is amended to read:

23701t. (a) A homeowners' association organized and operated to provide for the acquisition, construction, management, maintenance, and care of residential association property if all of the following apply:

(1) Sixty percent or more of the gross income of the organization for the taxable year consists solely of amounts received as membership dues, fees, and assessments from either of the following:

(A) Tenant-stockholders or owners of residential units, residences, or lots.

(B) Owners of timeshare rights to use, or timeshare ownership interests in, association property in the case of a timeshare association.

(2) Ninety percent or more of the expenditures of the organization for the taxable year are expenditures for the acquisition, construction, management, maintenance, and care of association property and, in the case of a timeshare association, for activities provided to or on behalf of members of the association.

(3) No part of the net earnings inures (other than by providing management, maintenance, and care of association property or by a rebate of excess membership dues, fees, or assessments) to the benefit of any private shareholder or individual.

(4) Amounts received as membership dues, fees, and assessments not expended for association purposes during the taxable year are transferred to and held in trust to provide for the management, maintenance, and care of association property and common areas.

(b) The term "association property" means:

(1) Property held by the organization.

(2) Property held in common by the members of the organization.

(3) Property within the organization privately held by the members of the organization.

In the case of a timeshare association, "association property" includes property in which the timeshare association, or members of the association, have rights arising out of recorded easements, covenants, or other recorded instruments to use property related to the timeshare project.

(c) A homeowners' association shall be subject to tax under this part with respect to its "homeowners' association taxable income,"

and that income shall be subject to tax as provided by Chapter 3 (commencing with Section 23501) of this part.

(1) For purposes of this section, the term "homeowners' association taxable income" of any organization for any taxable year means an amount equal to the excess over one hundred dollars ($100) (if any) of—

(A) The gross income for the taxable year (excluding any exempt function income), over

(B) The deductions allowed by this part which are directly connected with the production of the gross income (excluding exempt function income).

(2) For purposes of this section, the term "exempt function income" means any amount received as membership fees, dues, and assessments from tenant-shareholders or owners of residential units, residences, or lots, or owners of timeshare rights to use, or timeshare ownership interests in, association property in the case of a timeshare association.

(d) The term "homeowners' association" includes a condominium management association, a residential real estate management association, a timeshare association, and a cooperative housing corporation.

(e) "Cooperative housing corporation" includes, but is not limited to, a limited-equity housing cooperative, as defined in Section 33007.5 of the Health and Safety Code, organized either as a nonprofit public benefit corporation pursuant to Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code, or a nonprofit mutual benefit corporation pursuant to Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code.

(f) The term "timeshare association" means any organization (other than a condominium management association) organized and operated to provide for the acquisition, construction, management, maintenance, and care of association property if any member thereof holds a timeshare right to use, or a timeshare ownership interest in, real property constituting association property.

(g) The amendments made to this section by the act adding this subdivision shall apply to taxable years beginning on or after January 1, 1998.

SEC. 181. Section 23704 of the Revenue and Taxation Code is amended to read:

23704. For purposes of this part, an organization shall be treated as an organization organized and operated exclusively for charitable purposes, if:

(a) The organization is organized and operated solely:

(1) To perform, on a centralized basis, one or more of the following services which, if performed on its own behalf by a hospital that is an organization described in Section 23701d and exempt from taxation under Section 23701, would constitute activities in exercising

or performing the purpose or function constituting the basis for its exemption: data processing, purchasing (including the purchasing of insurance on a group basis), warehousing, billing and collection (including the purchase of patron accounts receivable on a recourse basis), food, clinical, industrial engineering, laboratory, laundry, printing, communications, record center, and personnel (including selection, testing, training, and education of personnel) services; and

(2) To perform those services solely for two or more hospitals, and for no other individuals or organizations, each of which is:

(A) An organization described in Section 23701d that is exempt from taxation under Section 23701, or

(B) A constituent part of an organization described in Section 23701d that is exempt from taxation under Section 23701 and that, if organized and operated as a separate entity, would constitute an organization described in Section 23701d, or

(C) Owned and operated by the United States, the state, a county, or political subdivision, or an agency or instrumentality of any of the foregoing.

(b) The organization is organized and operated on a cooperative basis and allocates or pays, within $8^1/_2$ months after the close of its income year, all net earnings to members on the basis of services performed for them.

(c) If the organization has capital stock, all of that stock outstanding is owned by its members.

For purposes of this part, any organization that, by reason of the preceding sentence, is an organization described in Section 23701d and exempt from taxation under Section 23701, shall be treated as a hospital and as an organization referred to in Section 23736(e).

SEC. 182. Section 24416.2 of the Revenue and Taxation Code is amended to read:

24416.2. (a) The term "qualified taxpayer" as used in Section 24416.1 includes a corporation engaged in the conduct of a trade or business within an enterprise zone designated pursuant to Chapter 12.8 (commencing with Section 7070) of Division 7 of Title 1 of the Government Code. For purposes of this subdivision, all of the following shall apply:

(1) A net operating loss shall not be a net operating loss carryback for any income year and a net operating loss for any income year beginning on or after the date that the area in which the taxpayer conducts a trade or business is designated as an enterprise zone shall be a net operating loss carryover to each of the 15 income years following the income year of loss.

(2) For purposes of this subdivision:

(A) "Net operating loss" means the loss determined under Section 172 of the Internal Revenue Code, as modified by Section 24416.1, attributable to the taxpayer's business activities within the enterprise zone (as defined in Chapter 12.8 (commencing with Section 7070)

of Division 7 of Title 1 of the Government Code) prior to the enterprise zone expiration date. That attributable loss shall be determined in accordance with Chapter 17 (commencing with Section 25101), modified for purposes of this subdivision as follows:

(i) Loss shall be apportioned to the enterprise zone by multiplying total loss from the business by a fraction, the numerator of which is the property factor plus the payroll factor, and the denominator of which is 2.

(ii) "The enterprise zone" shall be substituted for "this state."

(B) A net operating loss carryover shall be a deduction only with respect to the taxpayer's business income attributable to the enterprise zone as defined in Chapter 12.8 (commencing with Section 7070) of Division 7 of Title 1 of the Government Code.

(C) Attributable income is that portion of the taxpayer's California source business income that is apportioned to the enterprise zone. For that purpose, the taxpayer's business income attributable to sources in this state first shall be determined in accordance with Chapter 17 (commencing with Section 25101). That business income shall be further apportioned to the enterprise zone in accordance with Article 2 (commencing with Section 25120) of Chapter 17, modified for purposes of this subdivision as follows:

(i) Business income shall be apportioned to the enterprise zone by multiplying the total California business income of the taxpayer by a fraction, the numerator of which is the property factor plus the payroll factor, and the denominator of which is 2. For purposes of this clause:

(I) The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in the enterprise zone during the income year, and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used in this state during the income year.

(II) The payroll factor is a fraction, the numerator of which is the total amount paid by the taxpayer in the enterprise zone during the income year for compensation, and the denominator of which is the total compensation paid by the taxpayer in this state during the income year.

(ii) If a loss carryover is allowable pursuant to this section for any income year after the enterprise zone designation has expired, the enterprise zone shall be deemed to remain in existence for purposes of computing the limitation set forth in subparagraph (B) and allowing a net operating loss deduction.

(D) "Enterprise zone expiration date" means the date the enterprise zone designation expires, is no longer binding, or becomes inoperative.

(3) The changes made to this subdivision by the act adding this paragraph shall apply to income years beginning on or after January 1, 1998.

(b) A taxpayer who qualifies as a "qualified taxpayer" under one or more sections shall, for the income year of the net operating loss and any income year to which that net operating loss may be carried, designate on the original return filed for each year the section that applies to that taxpayer with respect to that net operating loss. If the taxpayer is eligible to qualify under more than one section, the designation is to be made after taking into account subdivision (c).

(c) If a taxpayer is eligible to qualify under this section and either Section 24416.4, 24416.5, or 24416.6 as a "qualified taxpayer," with respect to a net operating loss in an income year, the taxpayer shall designate which section is to apply to the taxpayer.

(d) Notwithstanding Section 24416, the amount of the loss determined under this section shall be the only net operating loss allowed to be carried over from that income year, and the designation under subdivision (b) shall be included in the election under Section 24416.1.

SEC. 183. Section 41136 of the Revenue and Taxation Code is amended to read:

41136. Funds in the State Emergency Telephone Number Account shall, when appropriated by the Legislature, be spent solely for the following purposes:

(a) To pay refunds authorized by this part.

(b) To pay the State Board of Equalization for the cost of the administration of this part.

(c) To pay the Department of General Services for its costs in administration of the "911" emergency telephone number system.

(d) To pay bills submitted to the Department of General Services by service suppliers or communications equipment companies for the installation of, and ongoing expenses for, the following communications services supplied to local agencies in connection with the "911" emergency phone number system:

(1) A basic system.

(2) A basic system with telephone central office identification.

(3) A system employing automatic call routing.

(4) Approved incremental costs.

(e) To pay claims of local agencies for approved incremental costs, not previously compensated for by another governmental agency.

(f) To pay claims of local agencies for incremental costs and amounts, not previously compensated for by another governmental agency, incurred prior to the effective date of this part, for the installation and ongoing expenses for the following communication services supplied in connection with the "911" emergency phone number system:

(1) A basic system.

(2) A basic system with telephone central office identification.

(3) A system employing automatic call routing.

(4) Approved incremental costs. Incremental costs shall not be allowed unless the costs are concurred in by the Division of Telecommunications of the Department of General Services.

(g) To pay the Division of Telecommunications of the Department of General Services for the costs associated with the pilot program authorized by Article 6.5 (commencing with Section 53125) of Chapter 1 of Part 1 of Division 2 of Title 5 of the Government Code.

SEC. 184. Section 65004 of the Revenue and Taxation Code is amended to read:

65004. (a) Except as provided in subdivision (b), no city, county, or city and county may impose, assess, or attempt to collect any of the following:

(1) A tax on Internet access, Online Computer Services, or the use of Internet access or any Online Computer Services.

(2) A bit tax or bandwidth tax.

(3) Any discriminatory tax on Online Computer Services or Internet access.

(b) The prohibition in subdivision (a) against the imposition of taxes shall not apply to any new or existing tax of general application, including, but not limited to, any sales and use tax, business license tax, or utility user tax that is imposed or assessed in a uniform and nondiscriminatory manner without regard to whether the activities or transactions taxed are conducted through the use of the Internet, Internet access, or Online Computer Services.

(c) A cable television franchise fee may not be imposed on Online Computer Services or Internet access delivered over a cable television system if the Federal Communications Commission, by issuing final order, or a court of competent jurisdiction, by rendering a judgment enforceable in California, finds that those are not cable services as defined in Section 522(6) of Title 47 of the United States Code and are, therefore, not subject to a franchise fee. However, if that final order or judgment is overturned or modified by further administrative, legislative, or judicial action, that action shall control. The operation of this subdivision may be suspended by contract between a cable television franchising authority and a cable television operator.

(d) This part shall become inoperative three years from the effective date of the act adding this part.

SEC. 185. Section 1095 of the Unemployment Insurance Code is amended to read:

1095. The director shall permit the use of any information in his or her possession to the extent necessary for any of the following purposes and may require reimbursement for all direct costs incurred in providing any and all information specified in this

section, except information specified in subdivisions (a) to (e), inclusive:

(a) To enable the director or his or her representative to carry out his or her responsibilities under this code.

(b) To properly present a claim for benefits.

(c) To acquaint a worker or his or her authorized agent with his or her existing or prospective right to benefits.

(d) To furnish an employer or his or her authorized agent with information to enable him or her to fully discharge his or her obligations or safeguard his or her rights under this division or Division 3 (commencing with Section 9000).

(e) To enable an employer to receive a reduction in contribution rate.

(f) To enable federal, state, or local government departments or agencies, subject to federal law, to verify or determine the eligibility or entitlement of an applicant for, or a recipient of, public social services provided pursuant to Division 9 (commencing with Section 10000) of the Welfare and Institutions Code, or Part A of Title IV of the Social Security Act, where the verification or determination is directly connected with, and limited to, the administration of public social services.

(g) To enable county administrators of general relief or assistance, or their representatives, to determine entitlement to locally provided general relief or assistance, where the determination is directly connected with, and limited to, the administration of general relief or assistance.

(h) To enable state or local governmental departments or agencies to seek criminal, civil, or administrative remedies in connection with the unlawful application for, or receipt of, relief provided under Division 9 (commencing with Section 10000) of the Welfare and Institutions Code or to enable the collection of expenditures for medical assistance services pursuant to Part 5 (commencing with Section 17000) of Division 9 of the Welfare and Institutions Code.

(i) To provide any law enforcement agency with the name, address, telephone number, birth date, social security number, physical description, and names and addresses of present and past employers, of any victim, suspect, missing person, potential witness, or person for whom a felony arrest warrant has been issued, when a request for this information is made by any investigator or peace officer as defined by Sections 830.1 and 830.2 of the Penal Code, or by any federal law enforcement officer to whom the Attorney General has delegated authority to enforce federal search warrants, as defined under Sections 60.2 and 60.3 of Title 28 of the Code of Federal Regulations, as amended, and when the requesting officer has been designated by the head of the law enforcement agency and requests this information in the course of and as a part of an

investigation into the commission of a crime when there is a reasonable suspicion that the crime is a felony and that the information would lead to relevant evidence. The information provided pursuant to this subdivision shall be provided to the extent permitted by federal law and regulations, and to the extent the information is available and accessible within the constraints and configurations of existing department records. Any person who receives any information under this subdivision shall make a written report of the information to the law enforcement agency that employs him or her, for filing under the normal procedures of that agency.

(1) This subdivision shall not be construed to authorize the release to any law enforcement agency of a general list identifying individuals applying for or receiving benefits.

(2) The department shall maintain records pursuant to this subdivision only for periods required under regulations or statutes enacted for the administration of its programs.

(3) This subdivision shall not be construed as limiting the information provided to law enforcement agencies to that pertaining only to applicants for, or recipients of, benefits.

(4) The department shall notify all applicants for benefits that release of confidential information from their records will not be protected should there be a felony arrest warrant issued against the applicant or in the event of an investigation by a law enforcement agency into the commission of a felony.

(j) To provide public employee retirement systems in California with information relating to the earnings of any person who has applied for or is receiving a disability income, disability allowance, or disability retirement allowance, from a public employee retirement system. The earnings information shall be released only upon written request from the governing board specifying that the person has applied for or is receiving a disability allowance or disability retirement allowance from its retirement system. The request may be made by the chief executive officer of the system or by an employee of the system so authorized and identified by name and title by the chief executive officer in writing.

(k) To enable the Division of Labor Standards Enforcement in the Department of Industrial Relations to seek criminal, civil, or administrative remedies in connection with the failure to pay, or the unlawful payment of, wages pursuant to Chapter 1 (commencing with Section 200) of Part 1 of Division 2 of, and Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of, the Labor Code.

(l) To enable federal, state, or local governmental departments or agencies to administer child support enforcement programs under Title IV of the Social Security Act (42 U.S.C. Sec. 651 et seq.).

97

(m) To provide federal, state, or local governmental departments or agencies with wage and claim information in its possession that will assist those departments and agencies in the administration of the victims of crime program or in the location of victims of crime who, by state mandate or court order, are entitled to restitution that has been or can be recovered.

(n) To provide federal, state, or local governmental departments or agencies with information concerning any individuals who are or have been:

(1) Directed by state mandate or court order to pay restitution, fines, penalties, assessments, or fees as a result of a violation of law.

(2) Delinquent or in default on guaranteed student loans or who owe repayment of funds received through other financial assistance programs administered by those agencies. The information released by the director for the purposes of this paragraph shall not include unemployment insurance benefit information.

(o) To provide an authorized governmental agency with any or all relevant information that relates to any specific workers' compensation insurance fraud investigation. The information shall be provided to the extent permitted by federal law and regulations. For the purposes of this subdivision, "authorized governmental agency" means the district attorney of any county, the office of the Attorney General, the Department of Industrial Relations, and the Department of Insurance. An authorized governmental agency may disclose this information to the State Bar, the Medical Board of California, or any other licensing board or department whose licensee is the subject of a workers' compensation insurance fraud investigation. This subdivision shall not prevent any authorized governmental agency from reporting to any board or department the suspected misconduct of any licensee of that body.

(p) To enable the Director of the Bureau for Private Postsecondary and Vocational Education, or his or her representatives, to access unemployment insurance quarterly wage data on a case-by-case basis to verify information on school administrators, school staff, and students provided by those schools who are being investigated for possible violations of Chapter 7 (commencing with Section 94700) of Part 59 of the Education Code.

(q) To provide employment tax information to the tax officials of Mexico, if a reciprocal agreement exists. For purposes of this subdivision, "reciprocal agreement" means a formal agreement to exchange information between national taxing officials of Mexico and taxing authorities of the State Board of Equalization, the Franchise Tax Board, and the Employment Development Department. Furthermore, the reciprocal agreement shall be limited to the exchange of information that is essential for tax administration purposes only. Taxing authorities of the State of California shall be granted tax information only on California residents. Taxing

authorities of Mexico shall be granted tax information only on Mexican nationals.

(r) To enable city and county planning agencies to develop economic forecasts for planning purposes. The information shall be limited to businesses within the jurisdiction of the city or county whose planning agency is requesting the information, and shall not include information regarding individual employees.

(s) To provide the State Department of Developmental Services with wage and employer information that will assist in the collection of moneys owed by the recipient, parent, or any other legally liable individual for services and supports provided pursuant to Chapter 9 (commencing with Section 4775) of Division 4.5 of, and Chapter 2 (commencing with Section 7200) and Chapter 3 (commencing with Section 7500) of Division 7 of, the Welfare and Institutions Code.

(t) Nothing in this section shall be construed to authorize or permit the use of information obtained in the administration of this code by any private collection agency.

(u) The disclosure of the name and address of an individual or business entity that was issued an assessment that included penalties under Section 1128 or 1128.1 shall not be in violation of Section 1094 if the assessment is final. The disclosure may also include any of the following:

(1) The total amount of the assessment.

(2) The amount of the penalty imposed under Section 1128 or 1128.1 that is included in the assessment.

(3) The facts that resulted in the charging of the penalty under Section 1128 or 1128.1.

SEC. 186. Section 2478 of the Vehicle Code is amended to read:

2478. (a) Any person who is found guilty of violating Section 2470, 2472, 2474, or 2476, or the rules and regulations promulgated under those provisions, is subject to imprisonment in the county jail for not more than one year, or a fine of not more than one thousand dollars ($1,000), or both that imprisonment and fine.

(b) If the conviction is a second or subsequent conviction of a violation described in subdivision (a), or the violation is committed with intent to defraud or mislead, the person is subject to imprisonment in the state prison, or a fine of not more than ten thousand dollars ($10,000), or both that imprisonment and fine.

SEC. 187. Section 2810 of the Vehicle Code is amended to read:

2810. (a) A member of the California Highway Patrol may stop any vehicle transporting any timber products, livestock, poultry, farm produce, crude oil, petroleum products, or inedible kitchen grease, and inspect the bills of lading, shipping or delivery papers, or other evidence to determine whether the driver is in legal possession of the load, and, upon reasonable belief that the driver of the vehicle is not in legal possession, shall take custody of the vehicle and load and turn them over to the custody of the sheriff of the county in which

the timber products, livestock, poultry, farm produce, crude oil, petroleum products, or inedible kitchen grease, or any part thereof, is apprehended.

(b) The sheriff shall receive and provide for the care and safekeeping of the apprehended timber products, livestock, poultry, farm produce, crude oil, petroleum products, or inedible kitchen grease, or any part thereof, and immediately, in cooperation with the department, proceed with an investigation and its legal disposition.

(c) Any expense incurred by the sheriff in the performance of his or her duties under this section shall be a legal charge against the county.

SEC. 188. Section 4466 of the Vehicle Code is amended to read:

4466. (a) The department shall not issue a copy, duplication, or substitution of a certificate of ownership or license plate if, after a search of the records of the department, the registered owner's address, as submitted with the application for that document, is different from that which appears in the records of the department, unless the registered owner applies for that document in person and presents all of the following:

(1) Proof of ownership of the vehicle that is acceptable to the department.

(2) A driver's license or identification card containing a picture of the licensee or cardholder issued to the registered owner by the department pursuant to Chapter 1 (commencing with Section 12500) of Division 6. The department shall conduct a search of its records to verify the authenticity of any document submitted under this paragraph.

(3) If the application is for the purpose of replacing a certificate or license plate that was stolen, a copy of a police report identifying the document as stolen.

(4) If the application is for the purpose of replacing a certificate or license plate that was mutilated or destroyed, the remnants of the mutilated or destroyed document.

(5) If the department has a record of a prior issuance of a copy, duplication, or substitution of a certificate or license plate for the vehicle, a copy of a report from the Department of the California Highway Patrol verifying the vehicle identification number of the vehicle.

(b) Subdivision (a) does not apply if the registered owner's name and driver's license or identification card number submitted on the application match the name and driver's license or identification card number contained in the department's registration record for that vehicle, or if an application is submitted by or through a dealer, a dismantler, an insurer, an agent of the insurer, or a salvage pool.

SEC. 189. Section 11614 of the Vehicle Code is amended to read:

11614. No lessor-retailer licensed under this chapter shall do any of the following in connection with any activity for which this license is required:

(a) Make or disseminate, or cause to be made or disseminated, before the public in this state, in any newspaper or other publication, or any advertising device, or by oral representation, or in any other manner or means whatever, any statement that is untrue or misleading and that is known, or which by the exercise of reasonable care should be known, to be untrue or misleading; or make or disseminate, or cause to be made or disseminated, any statement as part of a plan or scheme with the intent not to sell any vehicle, or service so advertised, at the price stated therein, or as so advertised.

(b) Advertise, or offer for sale in any manner, any vehicle not actually for sale at the premises of the lessor-retailer or available within a reasonable time to the lessor-retailer at the time of the advertisement or offer.

(c) Fail within 48 hours to give, in writing, notification to withdraw any advertisement of a vehicle that has been sold or withdrawn from sale.

(d) Advertise any specific vehicle for sale without identifying the vehicle by either its vehicle identification number or license number.

(e) Advertise the total price of a vehicle without including all costs to the purchaser at the time of delivery at the lessor-retailer's premises, except sales tax, vehicle registration fees, finance charges, certificate of compliance or noncompliance fees not exceeding thirty-five dollars ($35) pursuant to any statute, and any dealer documentary preparation charge. The dealer documentary charge shall not exceed thirty-five dollars ($35).

(f) Fail to disclose, in the newspaper display advertisement of a vehicle for sale, that there will be added to the advertised total price, at the time of sale, charges for sales tax, vehicle registration fees, the fee charged by the state for the issuance of any certificate of compliance or noncompliance pursuant to any statute, finance charges, or any dealer documentary preparation charge.

For purposes of this subdivision, "newspaper display advertisement" means any advertisement in a newspaper that is two or more newspaper columns in width or one newspaper column in width and more than seven inches in length.

(g) Advertise or otherwise represent, or knowingly allow to be advertised or represented on the lessor-retailer's behalf or at the lessor-retailer's place of business, that no downpayment is required in connection with the sale of a vehicle when a downpayment is in fact required and the buyer is advised or induced to finance the downpayment by a loan in addition to any other loan financing the remainder of the purchase price of the vehicle.

(h) Refuse to sell a vehicle to any person at the advertised total price, exclusive of sales tax, vehicle registration fees, finance charges,

certificate of compliance or noncompliance pursuant to any statute, and any dealer documentary preparation charge, which charges shall not exceed thirty-five dollars ($35) for the documentary preparation charge and thirty-five dollars ($35) for the certificate of compliance or noncompliance pursuant to any statute, while the vehicle remains unsold or unleased, unless the advertisement states the advertised total price is good only for a specified time and the time has elapsed.

(i) Engage in the business for which the licensee is licensed without having in force and effect a bond required by Section 11612.

(j) Engage in the business for which the lessor-retailer is licensed without at all times maintaining a principal place of business and any branch office location required by this chapter.

(k) Permit the use of the lessor-retailer license, supplies, or books by any other person for the purpose of permitting that person to engage in the sale of vehicles required to be registered under this code, or to permit the use of the lessor-retailer license, supplies, or books to operate a branch office location to be used by any other person, if, in either situation, the licensee has no financial or equitable interest or investment in the vehicles sold by, or the business of, or branch office location used by, the person, or has no interest or investment other than commissions, compensations, fees, or any other thing of value received for the use of the lessor-retailer license, supplies, or books to engage in the sale of vehicles.

(*l*) Violate any provision of Article 10 (commencing with Section 28050) of Chapter 5 of Division 12.

(m) Represent the dealer documentary preparation charge, or certificate of compliance or noncompliance fee, as a governmental fee.

(n) Advertise free merchandise, gifts, or services provided by a lessor-retailer contingent on the purchase of a vehicle. "Free" includes merchandise or services offered for sale at a price less than the lessor-retailer's cost of the merchandise or services.

(o) Advertise vehicles and related goods or services with the intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.

(p) Use the term "rebate" or similar words such as "cash back" in advertising the sale of a vehicle.

(q) Require a person to pay a higher price for a vehicle and related goods or services for receiving advertised credit terms than the cash price the same person would have to pay to purchase the same vehicle and related goods or services. For the purpose of this subdivision, "cash price" has the meaning as defined in subdivision (e) of Section 2981 of the Civil Code.

(r) Misrepresent the authority of a representative or agent to negotiate the final terms of a transaction.

(s) Violate any law prohibiting bait and switch advertising, including, but not limited to, the guides against bait advertising set

forth in Part 238 of Title 16 of the Code of Federal Regulations, as those regulations read on January 1, 1988.

(t) Make any untrue or misleading statement indicating that a vehicle is equipped with all the factory installed optional equipment the manufacturer offers, including, but not limited to, a false statement that a vehicle is "fully factory equipped."

(u) Advertise any underselling claim, such as "we have the lowest prices" or "we will beat any dealer's price," unless the lessor-retailer has conducted a recent survey showing that the lessor-retailer sells its vehicles at lower prices than any other licensee in its trade area and maintains records to adequately substantiate the claim. The substantiating records shall be made available to the department upon request.

(v) To display or offer for sale any used vehicle unless there is affixed to the vehicle the Federal Trade Commission's Buyer's Guide as required by Part 455 of Title 16 of the Code of Federal Regulations.

SEC. 190. Section 40000.15 of the Vehicle Code is amended to read:

40000.15. A violation of any of the following provisions shall constitute a misdemeanor, and not an infraction:

Sections 23103 and 23104, relating to reckless driving.

Section 23109, relating to speed contests or exhibitions.

Subdivision (a) of Section 23110, relating to throwing at vehicles.

Section 23152, relating to driving under the influence.

Subdivision (b) of Section 23222, relating to possession of marijuana.

Subdivision (a) or (b) of Section 23224, relating to persons under 21 years of age knowingly driving, or being a passenger in, a motor vehicle carrying any alcoholic beverage.

Section 23253, relating to officers on vehicular crossings.

Section 23332, relating to trespassing.

Section 24011.3, relating to vehicle bumper strength notices.

Section 27150.1, relating to sale of exhaust systems.

Section 27362, relating to child passenger seat restraints.

Section 28050, relating to true mileage driven.

Section 28050.5, relating to nonfunctional odometers.

Section 28051, relating to resetting odometers.

Section 28051.5, relating to devices to reset odometers.

Subdivision (d) of Section 28150, relating to possessing four or more jamming devices.

SEC. 191. Section 1062 of the Water Code is amended to read:

1062. (a) The Legislature finds and declares as follows:

(1) The watershed of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary supplies a large percentage of water used in California.

(2) The State Water Resources Control Board and the California regional water quality control boards are responsible for protecting

parents or guardians, the petitioner, or their counsel desires to present. The court may examine the child, as provided in Section 350.

The social worker shall report to the court on the reasons why the child has been removed from the parent's custody; the need, if any, for continued detention; the available services and the referral methods to those services that could facilitate the return of the child to the custody of the child's parents or guardians; and whether there are any relatives who are able and willing to take temporary custody of the child. The court shall order the release of the child from custody unless a prima facie showing has been made that the child comes within Section 300 and any of the following circumstances exist:

(a) There is a substantial danger to the physical health of the child or the child is suffering severe emotional damage, and there are no reasonable means by which the child's physical or emotional health may be protected without removing the child from the parents' or guardians' physical custody.

(b) There is substantial evidence that a parent, guardian, or custodian of the child is likely to flee the jurisdiction of the court.

(c) The child has left a placement in which he or she was placed by the juvenile court.

(d) The child indicates an unwillingness to return home, if the child has been physically or sexually abused by a person residing in the home.

The court shall also make a determination on the record as to whether reasonable efforts were made to prevent or eliminate the need for removal of the child from his or her home, pursuant to subdivision (b) of Section 306, and whether there are available services that would prevent the need for further detention. Services to be considered for purposes of making this determination are case management, counseling, emergency shelter care, emergency in-home caretakers, out-of-home respite care, teaching and demonstrating homemakers, parenting training, transportation, and any other child welfare services authorized by the State Department of Social Services pursuant to Chapter 5 (commencing with Section 16500) of Part 4 of Division 9. The court shall also review whether the social worker has considered whether a referral to public assistance services pursuant to Chapter 2 (commencing with Section 11200) and Chapter 7 (commencing with Section 14000) of Part 3, Chapter 1 (commencing with Section 17000) of Part 5, and Chapter 10 (commencing with Section 18900) of Part 6 of Division 9 would have eliminated the need to take temporary custody of the child or would prevent the need for further detention. If the child can be returned to the custody of his or her parent or guardian through the provision of those services, the court shall place the child with his or her parent or guardian and order that the services shall be provided. If the child cannot be returned to the custody of his or her parent or guardian,

the court shall determine if there is a relative who is able and willing to care for the child. Where the first contact with the family has occurred during an emergency situation in which the child could not safely remain at home, even with reasonable services being provided, the court shall make a finding that the lack of preplacement preventive efforts was reasonable. Whenever a court orders a child detained, the court shall state the facts on which the decision is based, shall specify why the initial removal was necessary, and shall order services to be provided as soon as possible to reunify the child and his or her family if appropriate.

When the child is not released from custody, the court may order that the child shall be placed in the suitable home of a relative, in an emergency shelter or other suitable licensed place, in a place exempt from licensure designated by the juvenile court, or in an appropriate certified family home for which the license is pending and all the prelicense requirements for that placement have been met as set forth in subdivision (e) of Section 361.2 for a period not to exceed 15 judicial days.

As used in this section, "relative" means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words "great," "great-great," or "grand," or the spouse of any of these persons, even if the marriage was terminated by death or dissolution. However, only the following relatives shall be given preferential consideration for placement of the child: an adult who is a grandparent, aunt, uncle, or sibling of the child.

The court shall consider the recommendations of the social worker based on the emergency assessment of the relative's suitability, including the results of a criminal records check and prior child abuse allegations, if any, prior to ordering that the child be placed with a relative. The social worker shall initiate the assessment pursuant to Section 361.3 of any relative to be considered for continuing placement.

SEC. 193. Section 366.26 of the Welfare and Institutions Code is amended to read:

366.26. (a) This section applies to children who are adjudged dependent children of the juvenile court pursuant to subdivision (c) of Section 360. The procedures specified herein are the exclusive procedures for conducting these hearings; Part 2 (commencing with Section 3020) of Division 8 of the Family Code is not applicable to these proceedings. Section 8714.7 of the Family Code is applicable and available to all dependent children meeting the requirements of that section. For children who are adjudged dependent children of the juvenile court pursuant to subdivision (c) of Section 360, this section and Sections 8604, 8605, 8606, and 8700 of the Family Code and Chapter 5 (commencing with Section 7660) of Part 3 of Division 12

of the Family Code specify the exclusive procedures for permanently terminating parental rights with regard to, or establishing legal guardianship of, the child while the child is a dependent child of the juvenile court.

(b) At the hearing, which shall be held in juvenile court for all children who are dependents of the juvenile court, the court, in order to provide stable, permanent homes for these children, shall review the report as specified in Section 361.5, 366.21, or 366.22, shall indicate that the court has read and considered it, shall receive other evidence that the parties may present, and then shall make findings and orders in the following order of preference:

(1) Terminate the rights of the parent or parents and order that the child be placed for adoption and, upon the filing of a petition for adoption in the juvenile court, order that a hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted.

(2) On making a finding under paragraph (3) of subdivision (c), identify adoption as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days.

(3) Appoint a legal guardian for the child and order that letters of guardianship issue.

(4) Order that the child be placed in long-term foster care, subject to the periodic review of the juvenile court under Section 366.3.

In choosing among the above alternatives, the court shall proceed pursuant to subdivision (c).

(c) (1) If the court determines, based on the assessment provided as ordered under subdivision (i) of Section 366.21 or subdivision (b) of Section 366.22, and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. The fact that the child is not yet placed in a pre-adoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be adopted. A finding under subdivision (b) or paragraph (1) of subdivision (e) of Section 361.5 that reunification services shall not be offered, or a finding under subdivision (e) of Section 366.21 that the whereabouts of a parent have been unknown for six months or that the parent has failed to visit or contact the child for six months or that the parent has been convicted of a felony indicating parental unfitness, or a finding under Section 366.21 or 366.22 that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances:

(A) The parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.

(B) A child 12 years of age or older objects to termination of parental rights.

(C) The child is placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent finding the child a permanent family placement if the parents cannot resume custody when residential care is no longer needed.

(D) The child is living with a relative or foster parent who is unable or unwilling to adopt the child because of exceptional circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and able to provide the child with a stable and permanent environment, and the removal of the child from the physical custody of his or her relative or foster parent would be detrimental to the emotional well-being of the child. This subparagraph does not apply to any child who is living with a nonrelative and who is either (i) under six years of age or (ii) a member of a sibling group where at least one child is under six years of age and the siblings are, or should be, permanently placed together.

If the court finds that termination of parental rights would be detrimental to the child pursuant to subparagraph (A), (B), (C), or (D), it shall state its reasons in writing or on the record.

(2) The court shall not terminate parental rights if at each and every hearing at which the court was required to consider reasonable efforts or services, the court has found that reasonable efforts were not made or that reasonable services were not offered or provided.

(3) If the court finds that termination of parental rights would not be detrimental to the child pursuant to paragraph (1) and that the child has a probability for adoption but is difficult to place for adoption and there is no identified or available prospective adoptive parent, the court may identify adoption as the permanent placement goal and, without terminating parental rights, order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days. During this 180-day period, the public agency responsible for seeking adoptive parents for each child shall, to the extent possible, contact other private and public adoption agencies regarding the availability of the child for adoption. During the 180-day period, the public agency shall conduct the search for adoptive parents in the same manner as prescribed for children in Sections 8708 and 8709 of the Family Code. At the expiration of this period, another hearing shall be held and the court shall proceed pursuant to paragraph (1), (3), or (4) of subdivision (b). For purposes of this section, a child may only be found to be difficult to place for adoption if there is no identified or available prospective

adoptive parent for the child because of the child's membership in a sibling group, or the presence of a diagnosed medical, physical, or mental handicap, or the child's age is seven years or more.

(4) If the court finds that adoption of the child or termination of parental rights is not in the best interest of the child, because one of the conditions in subparagraph (A), (B), (C), or (D) of paragraph (1) or in paragraph (2) applies, the court shall either order that the present caretakers or other appropriate persons shall become legal guardians of the child or order that the child remain in long-term foster care. Legal guardianship shall be considered before long-term foster care, if it is in the best interests of the child and if a suitable guardian can be found. When the child is living with a relative or a foster parent who is willing and able to provide a stable and permanent environment, but not willing to become a legal guardian, the child shall not be removed from the home if the court finds the removal would be seriously detrimental to the emotional well-being of the child because the child has substantial psychological ties to the relative caretaker or foster parents. The court shall also make an order for visitation with the parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child.

(5) If the court finds that the child should not be placed for adoption, that legal guardianship shall not be established, and that there are no suitable foster parents except exclusive-use homes available to provide the child with a stable and permanent environment, the court may order the care, custody, and control of the child transferred from the county welfare department to a licensed foster family agency. The court shall consider the written recommendation of the county welfare director regarding the suitability of the transfer. The transfer shall be subject to further court orders.

The licensed foster family agency shall place the child in a suitable licensed or exclusive-use home that has been certified by the agency as meeting licensing standards. The licensed foster family agency shall be responsible for supporting the child and for providing appropriate services to the child, including those services ordered by the court. Responsibility for the support of the child shall not, in and of itself, create liability on the part of the foster family agency to third persons injured by the child. Those children whose care, custody, and control are transferred to a foster family agency shall not be eligible for foster care maintenance payments or child welfare services, except for emergency response services pursuant to Section 16504.

(d) The proceeding for the appointment of a guardian for a child who is a dependent of the juvenile court shall be in the juvenile court. If the court finds pursuant to this section that legal guardianship is the appropriate permanent plan, it shall appoint the legal guardian and issue letters of guardianship. The assessment prepared pursuant to

subdivision (g) of Section 361.5, subdivision (i) of Section 366.21, and subdivision (b) of Section 366.22 shall be read and considered by the court prior to the appointment, and this shall be reflected in the minutes of the court. The person preparing the assessment may be called and examined by any party to the proceeding.

(e) The proceeding for the adoption of a child who is a dependent of the juvenile court shall be in the juvenile court if the court finds pursuant to this section that adoption is the appropriate permanent plan and the petition for adoption is filed in the juvenile court. Upon the filing of a petition for adoption, the juvenile court shall order that an adoption hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted. The full report required by Section 8715 of the Family Code shall be read and considered by the court prior to the adoption and this shall be reflected in the minutes of the court. The person preparing the report may be called and examined by any party to the proceeding. It is the intent of the Legislature, pursuant to this subdivision, to give potential adoptive parents the option of filing in the juvenile court the petition for the adoption of a child who is a dependent of the juvenile court. Nothing in this section is intended to prevent the filing of a petition for adoption in any other court as permitted by law, instead of in the juvenile court.

(f) At the beginning of any proceeding pursuant to this section, if the child or the parents are not being represented by previously retained or appointed counsel, the court shall proceed as follows:

(1) The court shall consider whether the interests of the child require the appointment of counsel. If the court finds that the interests of the child do require this protection, the court shall appoint counsel to represent the child. If the court finds that the interests of the child require the representation of counsel, counsel shall be appointed whether or not the child is able to afford counsel. The child shall not be present in court unless the child or the child's counsel so requests or the court so orders.

(2) If a parent appears without counsel and is unable to afford counsel, the court shall appoint counsel for the parent, unless this representation is knowingly and intelligently waived. The same counsel shall not be appointed to represent both the child and his or her parent. The public defender or private counsel may be appointed as counsel for the parent.

(3) Private counsel appointed under this section shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. The amount shall be paid by the real parties in interest, other than the child, in any proportions the court deems just. However, if the court finds that any of the real parties in interest are unable to afford counsel, the amount shall be paid out of the general fund of the county.

(g) The court may continue the proceeding for not to exceed 30 days as necessary to appoint counsel, and to enable counsel to become acquainted with the case.

(h) At all proceedings under this section, the court shall consider the wishes of the child and shall act in the best interests of the child.

The testimony of the child may be taken in chambers and outside the presence of the child's parent or parents if the child's parent or parents are represented by counsel, the counsel is present, and any of the following circumstances exist:

(1) The court determines that testimony in chambers is necessary to ensure truthful testimony.

(2) The child is likely to be intimidated by a formal courtroom setting.

(3) The child is afraid to testify in front of his or her parent or parents.

After testimony in chambers, the parent or parents of the child may elect to have the court reporter read back the testimony or have the testimony summarized by counsel for the parent or parents.

The testimony of a child also may be taken in chambers and outside the presence of the guardian or guardians of a child under the circumstances specified in this subdivision.

(i) Any order of the court permanently terminating parental rights under this section shall be conclusive and binding upon the child, upon the parent or parents, and upon all other persons who have been served with a citation by publication or otherwise as provided in this chapter. After making the order, the court shall have no power to set aside, change, or modify it, but nothing in this section shall be construed to limit the right to appeal the order.

(j) If the court, by order or judgment, declares the child free from the custody and control of both parents, or one parent if the other does not have custody and control, the court shall at the same time order the child referred to the State Department of Social Services or a licensed adoption agency for adoptive placement by the agency. However, no petition for adoption may be granted until the appellate rights of the natural parents have been exhausted. The State Department of Social Services or licensed adoption agency shall be responsible for the custody and supervision of the child and shall be entitled to the exclusive care and control of the child at all times until a petition for adoption is granted. With the consent of the agency, the court may appoint a guardian of the child, who shall serve until the child is adopted.

(k) Notwithstanding any other provision of law, the application of any person who, as a relative caretaker or foster parent, has cared for a dependent child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption, shall be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines

that the child has substantial emotional ties to the relative caretaker or foster parent and removal from the relative caretaker or foster parent would be seriously detrimental to the child's emotional well-being.

As used in this subdivision, "preference" means that the application shall be processed and, if satisfactory, the family study shall be completed before the processing of the application of any other person for the adoptive placement of the child.

(*l*) (1) An order by the court that a hearing pursuant to this section be held is not appealable at any time unless all of the following apply:

(A) A petition for extraordinary writ review was filed in a timely manner.

(B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record.

(C) The petition for extraordinary writ review was summarily denied or otherwise not decided on the merits.

(2) Failure to file a petition for extraordinary writ review within the period specified by rule, to substantively address the specific issues challenged, or to support that challenge by an adequate record shall preclude subsequent review by appeal of the findings and orders made pursuant to this section.

(3) The Judicial Council shall adopt rules of court, effective January 1, 1995, to ensure all of the following:

(A) A trial court, after issuance of an order directing a hearing pursuant to this section be held, shall advise all parties of the requirement of filing a petition for extraordinary writ review as set forth in this subdivision in order to preserve any right to appeal in these issues. This notice shall be made orally to a party if they are present at the time of the making of the order or by first-class mail by the clerk of the court to the last known address of a party not present at the time of the making of the order.

(B) The prompt transmittal of the records from the trial court to the appellate court.

(C) That adequate time requirements for counsel and court personnel exist to implement the objective of this subdivision.

(D) That the parent or guardian, or their trial counsel or other counsel, is charged with the responsibility of filing a petition for extraordinary writ relief pursuant to this subdivision.

(4) The intent of this subdivision is to do both of the following:

(A) Make every reasonable attempt to achieve a substantive and meritorious review by the appellate court within the time specified in Sections 366.21 and 366.22 for holding a hearing pursuant to this section.

(B) Encourage the appellate court to determine all writ petitions filed pursuant to this subdivision on their merits.

(5) This subdivision shall only apply to cases in which an order to set a hearing pursuant to this section is issued on or after January 1, 1995.

SEC. 194. Section 781 of the Welfare and Institutions Code is amended to read:

781. (a) When a petition has been filed with a juvenile court to commence proceedings to adjudge a person a ward of the court, a person is cited to appear before a probation officer or is taken before a probation officer pursuant to Section 626, or a minor is taken before any officer of a law enforcement agency, the person or the county probation officer may petition the court for sealing of the records. The petition to seal the records may be filed five years or more after the jurisdiction of the juvenile court has terminated over the person or, if no juvenile court petition was filed, five years or more after the person was cited to appear before a probation officer or was taken before a probation officer pursuant to Section 626 or was taken before any officer of a law enforcement agency, or at any time after the person has reached the age of 18 years. The petition to seal the records shall include a statement disclosing whether there is any pending civil litigation relating to the criminal act that caused the records to be created. As used in this section, "records" include records of arrest, records relating to the person's case, and records in the custody of the juvenile court, probation officer and any other agencies, including law enforcement agencies, and public officials that the petitioner alleges, in his or her petition, to have custody of the records. The court shall notify the district attorney of the county and the county probation officer, if he or she is not the petitioner, and the district attorney or probation officer or any of their deputies or any other person having relevant evidence may testify at the hearing on the petition. If, after a hearing, the court finds that since the termination of jurisdiction or action pursuant to Section 626, as the case may be, he or she has not been convicted of a felony or of any misdemeanor involving moral turpitude, that rehabilitation has been attained to the satisfaction of the court, and that the petition indicates that there is no currently pending civil litigation directly relating to, or arising from, the criminal act that caused the records to be created, it shall order all records, papers, and exhibits in the person's case in the custody of the juvenile court sealed, including the juvenile court record, minute book entries, and entries on dockets, and other records relating to the case in the custody of the other agencies and officials as are named in the order. If a ward of the juvenile court is subject to the registration requirements set forth in Section 290 of the Penal Code, a court, in ordering the sealing of the juvenile records of the person, also shall provide in the order that the person is relieved from the registration requirement and for the destruction of all registration information in the custody of the Department of Justice and other agencies and officials. Notwithstanding any other

provision of law, the court shall not order the person's records sealed in any case in which the person has been found by the juvenile court to have committed an offense listed in subdivision (b) of, paragraph (2) of subdivision (d) of, or subdivision (e) of, Section 707 until at least six years have elapsed since commission of the offense listed in those provisions. The court shall not order the records sealed in any case unless the petition indicates that there is no pending civil litigation directly relating to, or arising from, the criminal act that caused the records to be created. However, once the civil case is closed, the records may be sealed. Once the court has ordered the person's records sealed, the proceedings in the case shall be deemed never to have occurred, and the person may properly reply accordingly to any inquiry about the events, the records of which are ordered sealed. The court shall send a copy of the order to each agency and official named therein, directing the agency to seal its records and stating the date thereafter to destroy the sealed records. Each agency and official shall seal the records in its custody as directed by the order, shall advise the court of its compliance, and thereupon shall seal the copy of the court's order for sealing of records that it, he, or she received. The person who is the subject of records sealed pursuant to this section may petition the superior court to permit inspection of the records by persons named in the petition, and the superior court may so order. Otherwise, except as provided in subdivision (b), the records shall not be open to inspection.

(b) In any action or proceeding based upon defamation, a court, upon a showing of good cause, may order any records sealed under this section to be opened and admitted into evidence. The records shall be confidential and shall be available for inspection only by the court, jury, parties, counsel for the parties, and any other person who is authorized by the court to inspect them. Upon the judgment in the action or proceeding becoming final, the court shall order the records sealed.

(c) (1) Subdivision (a) does not apply to Department of Motor Vehicles records of any convictions for offenses under the Vehicle Code or any local ordinance relating to the operation, stopping and standing, or parking of a vehicle where the record of that conviction would be a public record under Section 1808 of the Vehicle Code. However, if a court orders a case record containing that conviction to be sealed under this section, and if the Department of Motor Vehicles maintains a public record of the conviction, the court shall notify the Department of Motor Vehicles of the sealing and the department shall advise the court of its receipt of the notice.

Notwithstanding any other provision of law, subsequent to the notification, the Department of Motor Vehicles shall allow access to its record of convictions only to the subject of the record and to insurers that have been granted requester code numbers by the

department. Any insurer to which a record of conviction is disclosed, when that conviction record has otherwise been sealed under this section, shall be given notice of the sealing when the record is disclosed to the insurer. The insurer may use the information contained in the record for purposes of determining eligibility for insurance and insurance rates for the subject of the record, and the information shall not be used for any other purpose nor shall it be disclosed by an insurer to any person or party not having access to the record.

(2) This subdivision shall not be construed as preventing the sealing of any record that is maintained by any agency or party other than the Department of Motor Vehicles.

(3) This subdivision shall not be construed as affecting the procedures or authority of the Department of Motor Vehicles for purging department records.

(d) Unless for good cause the court determines that the juvenile court record shall be retained, the court shall order the destruction of a person's juvenile court records that are sealed pursuant to this section as follows: five years after the record was ordered sealed, if the person who is the subject of the record was alleged or adjudged to be a person described by Section 601; or when the person who is the subject of the record reaches the age of 38 if the person was alleged or adjudged to be a person described by Section 602. Any other agency in possession of sealed records may destroy its records five years after the record was ordered sealed.

(e) This section shall not permit the sealing of a person's juvenile court records for an offense where the person is convicted of that offense in a criminal court pursuant to the provisions of Section 707.1. This subdivision is declaratory of existing law.

(f) Notwithstanding any other provision of law, the records of a juvenile who was 16 years of age or older at the time he or she committed any criminal offense listed in subdivision (b) of Section 707 shall not be destroyed.

(g) Notwithstanding any other provision of law, in any criminal prosecution in which an enhancement is alleged pursuant to Section 667 or 1170.12 of the Penal Code, the parties shall be entitled to inspect, copy, and introduce into evidence for the purpose of proving the alleged enhancement, any juvenile records of the person named in the criminal complaint or information, whether or not those records have been sealed, where the person was found to have committed, when he or she was 16 years of age or older, an offense set forth in subdivision (b) of Section 707. Except as provided herein, these records shall be confidential and available for inspection and copying only by the court, the jury, as authorized by the court, parties, counsel for the parties, and any other person authorized by the court. In the case of an acquittal or if the enhancement allegations

under Section 667 or 1170.12 of the Penal Code are stricken, the court shall order the records resealed.

SEC. 195. Section 1790 of the Welfare and Institutions Code is amended and renumbered to read:

1787. The Legislature finds and declares all of the following:

(a) A tremendous percentage of juveniles who commit status offenses including, but not limited to, running away, school truancy and incorrigibility, ultimately enter the juvenile justice system for subsequently engaging in delinquent, otherwise criminal behavior.

(b) In 1990, it was estimated that 48,629 youths ran away from their homes in California.

(c) In 1989, 776 runaway youths served by 33 nonprofit youth-runaway shelters in California, surveyed during a one-month period, identified one or more of the following as a problem:

(1) Family crisis	73%
(2) School problems	63%
(3) Victims of crime/abuse	57%
(4) Homeless/runaway	55%
(5) Substance abuse	43%
(6) Delinquent behavior	26%
(7) Other	9%

(d) It is estimated that 43 emergency shelters presently serve runaway youths as well as homeless youths and adults in California.

(e) It is estimated that 10 transitional living facilities are operated presently in California to provide youths with independent living skills, employment skills, and home responsibilities.

(f) It is conservatively projected that by the year 2000 there will be a deficit of 1,222 emergency shelter beds and 930 long-term beds statewide.

(g) Resources for runaway, homeless, and at-risk youth and their families are severely inadequate to meet their needs.

(h) The Counties of Fresno, Sacramento, San Bernardino, and Solano either (1) do not provide temporary or long-term shelter services or family crises services to runaway, homeless, and nonrunaway youth, or (2) do provide such services but at levels which substantially fail to meet the need.

The purpose of this chapter, therefore, is to establish three-year pilot projects in San Joaquin Central Valley, in the northern region of California, and in the southern region of California, whereby each project will provide temporary shelter services, transitional living shelter services, and low-cost family crisis resolution services based on a sliding fee scale to runaway youth, nonrunaway youth, and their working families. It is the intent of this chapter that services will be provided to prevent at-risk youth from engaging in delinquent and

97

criminal behavior and to reduce the numbers of at-risk families from engaging in neglectful, abusive, and criminal behavior.

SEC. 196. Section 1791 of the Welfare and Institutions Code is amended and renumbered to read:

1788. Each Runaway Youth and Families in Crisis Project established under this chapter shall provide services which shall include, but not be limited to, all of the following:

(a) Temporary shelter and related services to runaway youth. The services shall include:

(1) Food and access to overnight shelter for no more than 14 days.

(2) Counseling and referrals to services which address immediate emotional needs or problems.

(3) Screening for basic health needs and referral to public and private health providers for health care. Shelters that are not equipped to house a youth with substance abuse problems shall refer that youth to an appropriate clinic or facility. The shelter shall monitor the youth's progress and assist the youth with services upon his or her release from the substance abuse facility.

(4) Long-term planning so that the youth may be returned to the home of the parent or guardian under conditions which favor long-term reunification with the family, or so the youth can be suitably placed in a situation outside of the parental or guardian home when such reunification is not possible.

(5) Outreach services and activities to locate runaway youth and to link them with project services.

(b) Family crisis resolution services to runaway and nonrunaway youth and their families which shall include:

(1) Parent training.

(2) Family counseling.

(3) Services designed to reunify youth and their families.

(4) Referral to other services offered in the community by public and private agencies.

(5) Long-term planning so that the youth may be returned to the home of the parent or guardian under conditions which favor long-term reunification with the family, or so the youth can be suitably placed in a situation outside of the parental or guardian home when such reunification is not possible.

(6) Followup services to ensure that the return to the parent or guardian or the placement outside of the parental or guardian home is stable.

(7) Outreach services and activities to locate runaway and nonrunaway youth and to link them with project services.

(c) Transitional living services shall include:

(1) Long-term shelter.

(2) Independent living skill services.

(3) Preemployment and employment skills training.

(4) Home responsibilities training.

(d) Where appropriate and necessary, some of the services identified under this section must also be provided in the local community and in the home of project clients. Projects shall notify parents that their children are staying at a project site consistent with state and federal parent notification requirements.

SEC. 197. Section 1792 of the Welfare and Institutions Code is amended and renumbered to read:

1789. (a) A Runaway Youth and Families in Crisis Project shall be established in one or more counties in the San Joaquin Central Valley, in one or more counties in the northern region of California, and in one or more counties in the southern region of California. Each project may have one central location, or more than one site, in order to effectively serve the target population.

(b) The Office of Criminal Justice Planning shall prepare and disseminate a request for proposals to prospective grantees under this chapter within four months after this chapter has been approved and enacted by the Legislature. The Office of Criminal Justice Planning shall enter into grant award agreements for a period of no less than three years, and the operation of projects shall begin no later than four months after grant award agreements are entered into between the Office of Criminal Justice Planning and the grantee. Grants shall be awarded based on the quality of the proposal, the documented need for services in regard to runaway youth, and to organizations, as specified in subdivision (d) of this section, in localities that receive a disproportionately low share of existing federal and state support for youth shelter programs.

(c) The Office of Criminal Justice Planning shall require applicants to identify, in their applications, measurable outcomes by which the Office of Criminal Justice Planning will measure the success of the applicant's project. These measurable outcomes shall include, but not be limited to, the number of clients served and the percentage of clients who are successfully returned to the home of a parent or guardian or to an alternate living condition when reunification is not possible.

(d) Only private, nonprofit organizations shall be eligible to apply for funds under this chapter to operate a Runaway Youth and Families in Crisis Project, and these organizations shall be required to annually contribute a local match of at least 15 percent in cash or in-kind contribution to the project during the term of the grant award agreement. Preference shall be given to organizations that demonstrate a record of providing effective services to runaway youth or families in crisis for at least three years, successfully operating a youth shelter for runaway and homeless youth, or successfully operating a transitional living facility for runaway and homeless youth who do not receive transitional living services through the juvenile justice system. Additional weight shall also be given to those organizations that demonstrate a history of

collaborating with other agencies and individuals in providing such services. Priority shall be given to organizations with existing facilities. Preference shall also be given to organizations that demonstrate the ability to progressively decrease their reliance on resources provided under this chapter and to operate this project beyond the period that the organization receives funds under this chapter.

SEC. 198. Section 1793 of the Welfare and Institutions Code is amended and renumbered to read:

1789.5 The Office of Criminal Justice Planning shall monitor and evaluate the projects established under this chapter, and shall report to the Legislature after the first and third year of the program's operation the results of its evaluation. In addition, each project shall be responsible for evaluating the effectiveness of its programs and services.

SEC. 199. Section 1801 of the Welfare and Institutions Code is amended to read:

1801. (a) If a petition is filed with the court for an order as provided in Section 1800 and, upon review, the court determines that the petition, on its face, supports a finding of probable cause, the court shall order that a hearing be held pursuant to subdivision (b). The court shall notify the person whose liberty is involved and, if the person is a minor, his or her parent or guardian (if that person can be reached, and, if not, the court shall appoint a person to act in the place of the parent or guardian) of the hearing, and shall afford the person an opportunity to appear at the hearing with the aid of counsel and the right to cross-examine experts or other witnesses upon whose information, opinion, or testimony the petition is based. The court shall inform the person named in the petition of his or her right of process to compel attendance of relevant witnesses and the production of relevant evidence. When the person is unable to provide his or her own counsel, the court shall appoint counsel to represent him or her.

The probable cause hearing shall be held within 10 calendar days after the date the order is issued pursuant to this subdivision unless the person named in the petition waives this time.

(b) At the probable cause hearing, the court shall receive evidence and determine whether there is probable cause to believe that discharge of the person would be physically dangerous to the public because of his or her mental or physical deficiency, disorder, or abnormality. If the court determines there is not probable cause, the court shall dismiss the petition and the person shall be discharged from the control of the authority at the time required by Section 1766, 1769, 1770, 1770.1, or 1771, as applicable. If the court determines there is probable cause, the court shall order that a trial be conducted to determine whether the person is physically dangerous to the public

because of his or her mental or physical deficiency, disorder, or abnormality.

SEC. 200. Section 5768.5 of the Welfare and Institutions Code is amended to read:

5768.5. (a) When a mental health patient is being discharged from any facility authorized under Section 5675 or 5768, the patient and the patient's conservator, guardian, or other legally authorized representative shall be given a written aftercare plan prior to the patient's discharge from the facility. The written aftercare plan shall include, to the extent known, the following components:

(1) The nature of the illness and followup required.

(2) Medications, including side effects and dosage schedules. If the patient was given an informed consent form with his or her medications, the form shall satisfy the requirement for information on side effects of the medications.

(3) Expected course of recovery.

(4) Recommendations regarding treatment that are relevant to the patient's care.

(5) Referrals to providers of medical and mental health services.

(6) Other relevant information.

(b) The patient shall be advised by facility personnel that he or she may designate another person to receive a copy of the aftercare plan. A copy of the aftercare plan shall be given to any person designated by the patient.

(c) For purposes of this section, "mental health patient" means a person who is admitted to the facility primarily for the diagnosis or treatment of a mental disorder.

SEC. 201. Section 6609.1 of the Welfare and Institutions Code is amended to read:

6609.1. (a) When the State Department of Mental Health makes a recommendation to the court for community outpatient treatment for any person committed as a sexually violent predator, it shall notify the sheriff or chief of police, or both, the district attorney, or the county's designated counsel, that have jurisdiction over the following locations:

(1) The community in which the person may be released for community outpatient treatment.

(2) The community in which the person maintained his or her last legal residence as defined by Section 3003 of the Penal Code.

(3) The county that filed for the person's civil commitment pursuant to this article.

The department shall also notify the Sexually Violent Predator Parole Coordinator of the Department of Corrections, if the person is otherwise subject to parole pursuant to Article 1 (commencing with Section 3000) of Chapter 8 of Title 1 of Part 3 of the Penal Code.

The notice shall be given at least 15 days prior to the department's submission of its recommendation to the court.

97

(b) When the State Department of Mental Health makes a recommendation to pursue recommitment, makes a recommendation not to pursue recommitment, or seeks a judicial review of commitment status pursuant to subdivision (f) of Section 6605, of any person committed as a sexually violent predator, it shall provide written notice of that action to the sheriff or chief of police, or both, and to the district attorney, that have jurisdiction over the following locations:

(1) The community in which the person maintained his or her last legal residence as defined by Section 3003 of the Penal Code.

(2) The probable community in which the person will be released, if recommending not to pursue recommitment.

(3) The county that filed for the person's civil commitment pursuant to this article.

The State Department of Mental Health shall also notify the Sexually Violent Predator Parole Coordinator of the Department of Corrections, if the person is otherwise subject to parole pursuant to Article 1 (commencing with Section 3000) of Chapter 8 of Title 1 of Part 3 of the Penal Code. The notice shall be made at least 15 days prior to the department's submission of its recommendation to the court.

Those agencies receiving the notice referred to in this subdivision shall have 15 days from receipt of the notice to provide written comment to the department regarding the impending release. Those comments shall be considered by the department, which may modify its decision regarding the community in which the person is scheduled to be released, based on those comments.

(c) If the court orders the release of a sexually violent predator, the court shall notify the Sexually Violent Predator Parole Coordinator of the Department of Corrections. The Department of Corrections shall notify the State Department of Mental Health, the sheriff or chief of police, or both, and the district attorney, that have jurisdiction over the following locations:

(1) The community in which the person is to be released.

(2) The community in which the person maintained his or her last legal residence as defined in Section 3003 of the Penal Code.

The Department of Corrections shall make the above notifications regardless of whether the person released will be serving a term of parole after release by the court.

(d) If the person is otherwise subject to parole pursuant to Article 1 (commencing with Section 300) of Chapter 8 of Title 1 of Part 3 of the Penal Code, to allow adequate time for the Department of Corrections to make appropriate parole arrangements upon release of the person, the person shall remain in physical custody for a period not to exceed 72 hours or until parole arrangements are made by the Sexually Violent Predator Parole Coordinator of the Department of Corrections, whichever is sooner. To facilitate timely parole

arrangements, notification to the Sexually Violent Predator Parole Coordinator of the Department of Corrections of the pending release shall be made by telephone or facsimile and, to the extent possible, notice of the possible release shall be made in advance of the proceeding or decision determining whether to release the person.

(e) The notice required by this section shall be made whether or not a request has been made pursuant to Section 6609.

(f) The time limits imposed by this section are not applicable when the release date of a sexually violent predator has been advanced by a judicial or administrative process or procedure that could not have reasonably been anticipated by the State Department of Mental Health and where, as the result of the time adjustments, there is less than 30 days remaining on the commitment before the inmate's release, but notice shall be given as soon as practicable. In no case shall notice required by this section to the appropriate agency be later than the day of release.

(g) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 202. Section 10980 of the Welfare and Institutions Code is amended to read:

10980. (a) Any person who, willfully and knowingly, with the intent to deceive, makes a false statement or representation or knowingly fails to disclose a material fact in order to obtain aid under the provisions of this division or who, knowing he or she is not entitled thereto, attempts to obtain aid or to continue to receive aid to which he or she is not entitled, or to receive a larger amount than that to which he or she is legally entitled, is guilty of a misdemeanor, punishable by imprisonment in the county jail for a period of not more than six months, by a fine of not more than five hundred dollars ($500), or by both imprisonment and fine.

(b) Any person who knowingly makes more than one application for aid under the provisions of this division with the intent of establishing multiple entitlements for any person for the same period or who makes an application for that aid for a fictitious or nonexistent person or by claiming a false identity for any person is guilty of a felony, punishable by imprisonment in the state prison for a period of 16 months, two years, or three years, by a fine of not more than five thousand dollars ($5,000), or by both imprisonment and fine ; or by imprisonment in the county jail for a period of not more than one year, or by a fine of not more than one thousand dollars ($1,000), or by both imprisonment and fine.

(c) Whenever any person has, by means of false statement or representation or by impersonation or other fraudulent device, obtained or retained aid under the provisions of this division for

himself or herself or for a child not in fact entitled thereto, the person obtaining this aid shall be punished as follows:

(1) If the total amount of the aid obtained or retained is four hundred dollars ($400) or less, by imprisonment in the county jail for a period of not more than six months, by a fine of not more than five hundred dollars ($500), or by both imprisonment and fine.

(2) If the total amount of the aid obtained or retained is more than four hundred dollars ($400), by imprisonment in the state prison for a period of 16 months, two years, or three years, by a fine of not more than five thousand dollars ($5,000), or by both imprisonment and fine; or by imprisonment in the county jail for a period of not more than one year, by a fine of not more than one thousand dollars ($1,000), or by both imprisonment and fine.

(d) Any person who knowingly uses, transfers, acquires, or possesses blank authorizations to participate in the federal Food Stamp Program in any manner not authorized by Chapter 10 (commencing with Section 18900) of Part 6 with the intent to defraud is guilty of a felony, punishable by imprisonment in the state prison for a period of 16 months, two years, or three years, by a fine of not more than five thousand dollars ($5,000), or by both imprisonment and fine.

(e) Any person who counterfeits or alters or knowingly uses, transfers, acquires, or possesses counterfeited or altered authorizations to participate in the federal Food Stamp Program or to receive food stamps or electronically transferred benefits in any manner not authorized by the Food Stamp Act of 1964 (Public Law 88-525 and all amendments thereto) or the federal regulations pursuant to the act is guilty of forgery.

(f) Any person who fraudulently appropriates food stamps, electronically transferred benefits, or authorizations to participate in the federal Food Stamp Program with which he or she has been entrusted pursuant to his or her duties as a public employee is guilty of embezzlement of public funds.

(g) Any person who knowingly uses, transfers, sells, purchases, or possesses food stamps, electronically transferred benefits, or authorizations to participate in the federal Food Stamp Program in any manner not authorized by Chapter 10 (commencing with Section 18900), of Part 6, or by the federal Food Stamp Act of 1977 (Public Law 95-113 and all amendments thereto) (1) is guilty of a misdemeanor if the face value of the food stamp benefits or the authorizations to participate is four hundred dollars ($400) or less, and shall be punished by imprisonment in the county jail for a period of not more than six months, by a fine of not more than five hundred dollars ($500), or by both imprisonment and fine, or (2) is guilty of a felony if the face value of the food stamps or the authorizations to participate exceeds four hundred dollars ($400), and shall be punished by imprisonment in the state prison for a period of 16

months, two years, or three years, by a fine of not more than five thousand dollars ($5,000), or by both imprisonment and fine, or by imprisonment in the county jail for a period of not more than one year, or by a fine of not more than one thousand dollars ($1,000), or by both imprisonment and fine.

(h) (1) If the violation of subdivision (f) or (g) is committed by means of an electronic transfer of benefits, in addition and consecutive to the penalties for the violation, or attempted violation, of those subdivisions, the court shall impose the following punishment:

(A) If the electronic transfer of benefits exceeds fifty thousand dollars ($50,000), an additional term of one year in state prison.

(B) If the electronic transfer of benefits exceeds one hundred fifty thousand dollars ($150,000), an additional term of two years in state prison.

(C) If the electronic transfer of benefits exceeds one million dollars ($1,000,000), an additional term of three years in state prison.

(D) If the electronic transfer of benefits exceeds two million five hundred thousand dollars ($2,500,000), an additional term of four years.

(2) In any accusatory pleading involving multiple charges of violations of subdivision (f) or (g), or both, committed by means of an electronic transfer of benefits, the additional terms provided in paragraph (1) may be imposed if the aggregate losses to the victims from all violations exceed the amounts specified in this paragraph and arise from a common scheme or plan.

(i) A person who is punished by an additional term of imprisonment under another provision of law for a violation of subdivision (f) or (g) shall not receive an additional term of imprisonment under subdivision (h).

SEC. 203. Section 11008.19 of the Welfare and Institutions Code, as added by Section 2 of Chapter 962 of the Statutes of 1998, is amended and renumbered to read:

11008.20. (a) Notwithstanding any other provision of law, any amount, including any interest or property, received by a holocaust victim, as defined in subparagraph (A) of paragraph (2) of subdivision (b) of Section 17155 of the Revenue and Taxation Code either as compensation pursuant to the German Act Regulating Unresolved Property Claims, as amended (Gesetz zur Regelung offener Vermogensfragen), or as a result of a settlement of claims against any entity or individual for any recovered asset, shall not be considered as income or resources for purposes of determining eligibility to receive Medi-Cal benefits or public assistance benefits or the amounts of those benefits.

(b) This section shall not be construed to permit any retroactive services or payments to be provided to recipients of Medi-Cal or public assistance benefits.

97

SEC. 204. Section 11369 of the Welfare and Institutions Code is amended to read:

11369. The department shall adopt regulations, as otherwise necessary, to implement this article. Emergency regulations to implement this article may be adopted by the department in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The adoption of these regulations shall be deemed an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare.

SEC. 205. Section 11401 of the Welfare and Institutions Code is amended to read:

11401. Aid in the form of AFDC-FC shall be provided under this chapter on behalf of any child under the age of 18 years, except as provided in Section 11403, who meets the conditions of subdivision (a), (b), (c), (d), (e), or (f):

(a) The child has been relinquished, for purposes of adoption, to a licensed adoption agency, or the department, or the parental rights of either or both of his or her parents have been terminated after an action under the Family Code has been brought by a licensed adoption agency or the department, provided that the licensed adoption agency or the department, if responsible for placement and care, provides to such children all services as required by the department to children in foster care.

(b) The child has been removed from the physical custody of his or her parent, relative, or guardian as a result of a voluntary placement agreement or a judicial determination that continuance in the home would be contrary to the child's welfare and that, if the child was placed in foster care, reasonable efforts were made, consistent with Chapter 5 (commencing with Section 16500) of Part 4, to prevent or eliminate the need for removal of the child from his or her home and to make it possible for the child to return to his or her home, or, in cases where the first contact with the family occurs during an emergency situation in which the child could not safely remain at home even with reasonable efforts being provided, the child has been removed as a result of a judicial determination that lack of preplacement preventive efforts, as defined in Section 16501.1, was reasonable, and any of the following apply:

(1) The child has been adjudged a dependent child of the court on the grounds that he or she is a person described by Section 300.

(2) The child has been adjudged a ward of the court on the grounds that he or she is a person described by Sections 601 and 602.

(3) The child has been detained under a court order, pursuant to Section 319 or 636, that remains in effect.

(c) The child has been voluntarily placed by his or her parent or guardian pursuant to Section 11401.1.

(d) The child is living in the home of a nonrelated legal guardian.

(e) The child has been placed in foster care under the federal Indian Child Welfare Act. Sections 11402, 11404, and 11405 shall not be construed as limiting payments to Indian children, as defined in the federal Indian Child Welfare Act, placed in accordance with that act.

(f) To be eligible for federal financial participation, all of the following conditions shall exist:

(1) The child meets the conditions of subdivision (b).

(2) The child has been deprived of parental support or care for any of the reasons set forth in Section 11250.

(3) The child has been removed from the home of a relative as defined in Section 233.90(c)(1) of Title 45 of the Code of Federal Regulations, as amended.

(4) The requirements of Sections 671 and 672 of Title 42 of the United States Code, as amended, have been met.

SEC. 206. Section 12302.3 of the Welfare and Institutions Code is amended to read:

12302.3. (a) Notwithstanding any other provision of this article, and in a manner consistent with the powers available to public authorities created under this article, the City and County of San Francisco may do any of the following:

(1) Increase the wages of all in-home supportive services providers.

(2) Subject to the requirements of federal law, use county-only funds to fund county and state shares to meet federal financial participation requirements necessary to obtain any available personal care services reimbursement under Title XIX of the federal Social Security Act (42 U.S.C. Sec. 1396 et seq.) (Medicaid).

(3) Provide in-home supportive services workers with any wage increase the city and county may appropriate, as long as this amount is in accordance with the provisions of the Medi-Cal State Plan Amendment 94-006, as approved by the federal Health Care Financing Administration. The county-only funds shall be used exclusively to increase workers' wages and to pay any proportionate share of employer taxes and current benefits, and to pay for the cost of state and county administration of these activities as provided for in paragraph (5). Notwithstanding Section 12302.1, any wage increase for those workers employed under contract shall be passed through by the contractor to the workers, subject to the limitations specified in this paragraph. The state shall continue to provide payroll functions for all workers who are currently individual providers unless and until the in-home supportive services public authority is operational.

(4) Claim the administrative costs of the wage passthrough in accordance with the department's claiming requirements.

(5) If that federal financial participation is available for county-only payroll moneys, the following shall apply:

(A) If additional payroll costs will be incurred by the state due to the receipt and payment of federal funds, the department shall provide the city and county with a detailed estimate of the additional costs of the provision of payroll functions associated with the processing of federal funds. If the city and county elects to pay the additional costs, the department will provide these payroll functions. If the city and county does not elect to pay the additional costs, the department and the city and county may seek another, mutually satisfactory arrangement.

(B) If that federal financial participation is not available, the department shall continue to perform the existing payroll functions provided on July 28, 1995, at no additional cost to the city and county.

(b) (1) This section shall not be implemented with respect to any particular wage increase pursuant to subdivision (a) unless the department has obtained the approval of the State Department of Health Services for that wage increase prior to its execution to determine that it is consistent with federal law and to ensure federal financial participation for the services under Title XIX of the federal Social Security Act (42 U.S.C. Sec. 1396 et seq.).

(2) The Director of Health Services shall seek any federal waivers or approvals necessary for implementation of this section under Title XIX of the federal Social Security Act (42 U.S.C. Sec. 1396 et seq.).

SEC. 207. Section 16118 of the Welfare and Institutions Code is amended to read:

16118. (a) The department shall establish and administer the program to be carried out by the department or the county pursuant to this chapter. The department shall adopt any regulations necessary to carry out the provisions of this chapter.

(b) The department shall keep any records necessary to evaluate the program's effectiveness in encouraging and promoting the adoption of children eligible for the Adoption Assistance Program.

(c) The department or the county responsible for providing financial aid in the amount determined in Section 16120 shall have responsibility for certifying that the child meets the eligibility criteria and for determining the amount of financial assistance needed by the child and the adopting family.

(d) The department shall actively seek and make maximum use of federal funds that may be available for the purposes of this chapter. All gifts or grants received from private sources for the purpose of this chapter shall be used to offset public costs incurred under the program established by this chapter.

(e) For purposes of this chapter, the county responsible for determining the child's Adoption Assistance Program eligibility status and for providing financial aid in the amount determined in Sections 16120 and 16120.1 shall be the county that at the time of the adoptive placement would otherwise be responsible for making a payment pursuant to Section 11450 under the Aid to Families with

Dependent Children program or Section 11461 under the Aid to Families with Dependent Children-Foster Care program if the child had not been adopted. The responsible county for all other eligible children shall be the county where the child is physically residing prior to placement with the adoptive family. The responsible county shall certify eligibility on a form prescribed by the department.

SEC. 208. Section 16501.1 of the Welfare and Institutions Code is amended to read:

16501.1. (a) The Legislature finds and declares that the foundation and central unifying tool in child welfare services is the case plan.

(b) The Legislature further finds and declares that a case plan ensures that the child receives protection and safe and proper care and case management, and that services are provided to the child and parents or other caretakers as appropriate in order to improve conditions in the parent's home, to facilitate the safe return of the child to a safe home or the permanent placement of the child, and to address the needs of the child while in foster care. A case plan shall be based upon the principles of this section and shall document that a preplacement assessment of the service needs of the child and family, and preplacement preventive services, have been provided, and that reasonable efforts to prevent out-of-home placement have been made. In determining the reasonable services to be offered or provided, the child's health and safety shall be the paramount concerns. Reasonable services shall be offered or provided to make it possible for a child to return to a safe home environment, unless, pursuant to subdivisions (b) and (e) of Section 361.5, the court determines that reunification services shall not be provided. If reasonable services are not ordered, or are terminated, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanent plan and to complete all steps necessary to finalize the permanent placement of the child.

(c) When out-of-home placement is used to attain case plan goals, the decision regarding choice of placement shall be based upon selection of a safe setting that is the least restrictive or most familylike, and the most appropriate setting that is available and in close proximity to the parent's home, consistent with the selection of the environment best suited to meet the child's special needs and best interest, or both. The selection shall consider, in order of priority, placement with relatives, tribal members, and foster family, group care, and residential treatment pursuant to Section 7950 of the Family Code.

(d) A written case plan shall be completed within 30 days of the initial removal of the child or of the in-person response required under subdivision (f) of Section 16501 if the child has not been removed from his or her home, or by the date of the dispositional hearing pursuant to Section 358, whichever occurs first. The case plan

shall be updated as the service needs of the child and family dictate. At a minimum, the case plan shall be updated in conjunction with each status review hearing conducted pursuant to Section 366.21, and the hearing conducted pursuant to Section 366.26, but no less frequently than once every six months. Each updated case plan shall include a description of the services that have been provided to the child under the plan and an evaluation of the appropriateness and effectiveness of those services.

(e) The child welfare services case plan shall be comprehensive enough to meet the juvenile court dependency proceedings requirements pursuant to Article 6 (commencing with Section 300) of Chapter 2 of Part 1 of Division 2.

(f) The case plan shall be developed as follows:

(1) The case plan shall be based upon an assessment of the circumstances that required child welfare services intervention.

(2) The case plan shall identify specific goals and the appropriateness of the planned services in meeting those goals.

(3) The case plan shall identify the original allegations of abuse or neglect, as defined in Article 2.5 (commencing with Section 11164) of Chapter 2 of Title 1 of Part 4 of the Penal Code, or the conditions cited as the basis for declaring the child a dependent of the court pursuant to Section 300, or all of these, and the other precipitating incidents that led to child welfare services intervention.

(4) The case plan shall include a description of the schedule of the social worker contacts with the child and the family or other caretakers. The frequency of these contacts shall be in accordance with regulations adopted by the State Department of Social Services. If the child has been placed in foster care out of state, the county social worker or a social worker on the staff of the social service agency in the state in which the child has been placed shall visit the child in a foster family home or the home of a relative at least every 12 months and submit a report to the court on each visit. For children in out-of-state group home facilities, visits shall be conducted at least monthly, pursuant to Section 16516.5.

(5) When out-of-home services are used, the frequency of contact between the natural parents or legal guardians and the child shall be specified in the case plan. The frequency of those contacts shall reflect overall case goals, and consider other principles outlined in this section.

(6) When out-of-home placement is made, the case plan shall include documentation of the provisions specified in subdivisions (b), (c), and (d) of Section 16002.

(7) When out-of-home placement is made in a foster family home, group home, or other child care institution that is either a substantial distance from the home of the child's parent or out of state, the case plan shall specify the reasons why that placement is in the best interest of the child. When an out-of-state group home placement is

recommended or made, the case plan shall, in addition, specify compliance with Section 7911.1 of the Family Code.

(8) When out-of-home services are used, or when parental rights have been terminated and the case plan is placement for adoption, the case plan shall include a recommendation regarding the appropriateness of unsupervised visitation between the child and any of the child's siblings. This recommendation shall include a statement regarding the child's and the siblings' willingness to participate in unsupervised visitation. If the case plan includes a recommendation for unsupervised sibling visitation, the plan shall also note that information necessary to accomplish this visitation has been provided to the child or to the child's siblings.

(9) When out-of-home services are used and the goal is reunification, the case plan shall describe the services to be provided to assist in reunification and the services to be provided concurrently to achieve legal permanency if efforts to reunify fail.

(10) When out-of-home services are used, the child's case plan is subject to review at the first 12-month permanency hearing and, if the case plan is not adoptive placement, the case plan shall include documentation of the compelling reason or reasons why termination of parental rights is not in the child's best interest. A determination by the department, when it is acting as an adoption agency, or by a licensed adoption agency that adoption of the child is unlikely, or that one of the conditions described in paragraph (1) of subdivision (c) of Section 366.26 applies, shall be deemed a compelling reason.

(11) (A) Parents and legal guardians shall have an opportunity to review the case plan and sign it whenever possible, after which they shall receive a copy of the plan. In any voluntary service or placement agreement, the parents or legal guardians shall be required to review and sign the case plan. Whenever possible, parents and legal guardians shall participate in the development of the case plan.

(B) Parents and legal guardians shall be advised that, pursuant to Section 1228.1 of the Evidence Code, neither their signature on the child welfare services case plan nor their acceptance of any services prescribed in the child welfare services case plan shall constitute an admission of guilt or be used as evidence against the parent or legal guardian in a court of law. However, they shall also be advised that the parent's or guardian's failure to cooperate, except for good cause, in the provision of services specified in the child welfare services case plan may be used as evidence in any hearing held pursuant to Section 366.21 or 366.22.

(12) The case plan shall be included in the court report and shall be considered by the court at the initial hearing and each review hearing. Modifications to the case plan made during the period between review hearings need not be approved by the court if the casework supervisor for that case determines that the modifications further the goals of the plan.

(13) When the case plan has as its goal for the child a permanent plan of adoption or placement in another permanent home, it shall include documentation of the steps the agency is taking to find an adoptive family or other permanent living arrangements for the child; to place the child with an adoptive family, an appropriate and willing relative, a legal guardian, or in another planned permanent living arrangement; and to finalize the adoption or legal guardianship. At a minimum, the documentation shall include child-specific recruitment efforts, such as the use of state, regional, and national adoption exchanges, including electronic exchange systems, when the child has been freed for adoption.

(g) If the court finds, after considering the case plan, that unsupervised sibling visitation is appropriate and has been consented to, the court shall order that the child or the child's siblings, and the child's prospective adoptive parents, if applicable, be provided with information necessary to accomplish this visitation. Nothing in this section shall be construed to require or prohibit the social worker's facilitation, transportation, or supervision of visits between the child and his or her siblings.

(h) The case plan documentation on sibling placements required under this section shall not require modification of existing case plan forms until the Child Welfare Services Case Management System is implemented on a statewide basis.

(i) The department, in consultation with the County Welfare Directors Association and other advocates, shall develop standards and guidelines for a model relative placement search and assessment process based on the criteria established in Section 361.3. These guidelines shall be incorporated in the training described in Section 16206. These model standards and guidelines shall be developed by March 1, 1999.

SEC. 209. Section 17012.5 of the Welfare and Institutions Code, as added by Section 2 of Chapter 283 of the Statutes of 1997, is repealed.

SEC. 210. Section 17012.5 of the Welfare and Institutions Code, as added by Section 2 of Chapter 284 of the Statutes of 1997, is amended to read:

17012.5. An individual ineligible for aid under Chapter 2 (commencing with Section 11200) of Part 3 pursuant to Section 11251.3, who is a member of an assistance unit receiving aid under that chapter, shall also be ineligible for non-health-care benefits under this part.

SEC. 211. Section 8.2 of the County Water Authority Act (Chapter 545 of the Statutes of 1943), as last amended by Chapter 812 of the Statutes of 1998, is amended to read:

Sec. 8.2. (a) Any authority may, pursuant to this section, borrow money and incur indebtedness for any of the purposes for which it is authorized by law to spend money. The indebtedness shall be evidenced by short-term revenue certificates issued in the manner

and subject to the limitations set forth in this section. Any authority may also borrow money and incur indebtedness to pay the principal or interest on certificates issued pursuant to this section.

(b) Certificates issued by any authority pursuant to this section may be negotiable or nonnegotiable, and all certificates shall be, and shall recite upon their face that they are, payable both as to principal and interest out of any revenues of the authority that are made security for the certificates pursuant to an indenture or resolution duly adopted by the board of directors. The word "revenues," as used in this section, refers to any revenues derived from the sale of water and power, annexation charges (whether collected through tax levies or otherwise), grants, available tax revenues, or any other legally available funds. In no event shall any resolution or indenture preclude payment from the proceeds of sale of other certificates issued pursuant to this section or from amounts drawn on a bank, or other financial institution, line or letter of credit pursuant to subdivision (e), or any other lawfully available source of funds.

(c) To exercise the power to borrow money pursuant to this section, the board shall adopt a resolution, or approve an indenture, authorizing the sale and issuance of certificates for that purpose, which resolution or indenture shall specify all of the following:

(1) The purpose or purposes for which the proposed certificates are to be issued.

(2) The maximum principal amount of the certificates that may be outstanding at any one time.

(3) The maximum interest cost, to be determined in the manner specified in the resolution, to be incurred through the issuance of the certificates.

(4) The maximum maturities of the certificates, which shall not exceed 270 days from the date of issue.

(5) The obligations to certificate holders while the certificates are outstanding.

(d) The board may also provide, in its discretion, for any of the following:

(1) The times of sale and issuance of the certificates, the manner of sale and issuance (either through public or private sale), the amounts of the certificates, the maturities of the certificates, the rate of interest, the rate or discount from par, and any other terms and conditions deemed appropriate by the board or by the general manager of the authority or any other officer designated by the board.

(2) The appointment of one or more banks or trust companies, either inside or outside the state, as depository for safekeeping and as agent for the delivery, and the payment, of the certificates.

(3) The employment of one or more persons or firms to assist the authority in the sale of the certificates, whether as sales agents, as dealer managers, or in some other comparable capacity.

97

(4) The refunding of the certificates without further action by the board, unless and until the board specifically revokes that authority to refund.

(5) Other terms and conditions the board determines to be appropriate.

(e) The board may arrange for a bank, or other financial institution, a line or letter of credit (1) for the purpose of providing an additional source of repayment for indebtedness incurred under this section and any interest thereon or, (2) for the purpose of borrowing for any purpose for which short-term revenue certificates could be issued under this section. Amounts drawn on a line or letter of credit may be evidenced by negotiable or nonnegotiable promissory notes or other evidences of indebtedness. The board is authorized to use any of the provisions of this section in connection with the entering into of the line or letter of credit, borrowing thereunder, or repaying of the borrowings.

SEC. 212. Section 2 of Chapter 21 of the Statutes of 1998 is amended to read:

Sec. 2. The provisions of the memorandum of understanding prepared pursuant to Section 3517.5 of the Government Code and entered into by the state employer and State Bargaining Unit 6, California Correctional Peace Officers Association, that require the expenditure of funds, are hereby approved for the purposes of Section 3517.6 of the Government Code.

SEC. 213. Section 111 of Chapter 310 of the Statutes of 1998 is amended to read:

Sec. 111. (a) The sum of two million six hundred thousand dollars ($2,600,000) is hereby appropriated from the Proposition 98 Reversion Account to a consortium of county offices of education, on a one-time basis, for three-year grants, beginning with the 1998–99 fiscal year, for the purpose of supporting technical assistance and focused group training to teach school district personnel how to maximize reimbursements of federal funds for Medi-Cal services and case management.

(b) (1) There is hereby created, for purposes of this section, a technical advisory committee, which shall be composed of one representative from each of the 11 school superintendent regions, representatives from appropriate state departments and agencies, representatives from various school health and social services organizations, four members representing large school districts, four members representing medium school districts, four members representing small school districts, and representatives from various parent and community services organizations.

(2) Expenses for the technical advisory committee created pursuant to paragraph (1) shall not exceed forty-five thousand dollars ($45,000) per year of the funds appropriated by this section.

(c) For the purposes of making the computations required by Section 8 of Article XVI of the California Constitution, the appropriation made by subdivision (a) of Section 41202 of the Education Code, for the 1997–98 fiscal year, and included within the "total allocations to school districts and community college districts from General Fund proceeds of taxes appropriated pursuant to Article XVIII B," as defined in subdivision (e) of Section 41202 of the Education Code, for the 1997–98 fiscal year.

SEC. 214. Section 3 of Chapter 652 of the Statutes of 1998 is amended to read:

Sec. 3. It is the intent of the Legislature in enacting Section 4 of this act that the protections under the Newborns' and Mothers' Health Act of 1997 (Chapter 389 of the Statutes of 1997), which added Section 1367.62 to the Health and Safety Code and Section 10123.87 to the Insurance Code, shall apply equally to all pregnant women eligible for benefits under Medi-Cal.

SEC. 215. Section 1 of Chapter 722 of the Statutes of 1998 is amended to read:

Section 1. (a) The Superintendent of Public Instruction shall take steps necessary to increase the capacity of the child care system, including, but not limited to, the following:

(1) Encouraging contracting agencies to develop and maintain child care spaces during nontraditional times, including at night and on weekends.

(2) Encouraging contracting agencies to expand the capacity for infant care.

(3) Encouraging contracting agencies to expand capacity, particularly in geographic areas with high need and limited resources.

(b) The State Department of Education shall coordinate with the State Department of Social Services to prepare and present an interim report by March 31, 1999, and a final report by December 31, 1999, to the Joint Legislative Budget Committee and Department of Finance that defines the strategies, results, and effectiveness of recent expenditures and allocations for building capacity for the state's child care needs, including, but not limited to, the amounts and kinds of capacity increased by those efforts, barriers found that prevent increased capacity, and recommendations for overcoming those barriers. The report shall include recommended best practices for future capacity building activities specific to the types of care in shortest supply, such as infant and toddler care, schoolage care, care in underserved areas, and nontraditional hours care. This report shall also include the results of current pilot studies involving training CalWORKs recipients as licensed family child care providers or license-exempt providers, and recommendations on the magnitude and role of both CalWORKs recipient training and license-exempt care in meeting future needs.

BEFORE THE
COMMISSION ON STATE MANDATES

Test Claim of:
City of Newport Beach

Prevailing Wages

Chapter 1084, Statutes of 1976
Chapter 1174, Statutes of 1976
Chapter 992, Statutes of 1980
Chapter 142, Statutes of 1983
Chapter 143, Statutes of 1983
Chapter 278, Statutes of 1989
Chapter 1224, Statutes of 1989
Chapter 913, Statutes of 1992
Chapter 1342, Statutes of 1992
Chapter 83, Statutes of 1999
Chapter 220, Statutes of 1999
Chapter 881, Statutes of 2000
Chapter 954, Statutes of 2000
Chapter 938, Statutes of 2001
Chapter 1048, Statutes of 2002
8 California Code of Regulations, Sections 16000-16802

Volume III

Assembly Bill No. 302

CHAPTER 220

An act to amend Section 1720.3 of the Labor Code, relating to public works.

[Approved by Governor July 28, 1999. Filed with Secretary of State July 28, 1999.]

LEGISLATIVE COUNSEL'S DIGEST

AB 302, Floyd. Public works: prevailing wages.

(1) Existing law defines the term "public works" for purposes of requirements regarding the payment of prevailing wages, the regulation of working hours, and the securing of workers' compensation for public works projects. Existing law further requires that, except as specified, not less than the general prevailing rate of per diem wages be paid to workers employed on public works and imposes misdemeanor penalties for a violation of this requirement.

Existing law provides that for the purposes of provisions of law relating to the payment of prevailing wages, "public works" means, among other things, the hauling of refuse from a public works site to an outside disposal location with respect to contracts involving any state agency, including the California State University and the University of California.

This bill would revise the definition of "public works" for these purposes to include the hauling of refuse from a public works site to an outside disposal location with respect to contracts involving any political subdivision of the state, thereby requiring the payment of prevailing wages in connection with all such contracts involving any local public entity.

Because the violation of prevailing wage requirements by local public entities when engaged in these public works projects would result in the imposition of misdemeanor penalties, this bill would impose a state-mandated local program.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 1720.3 of the Labor Code is amended to read:

1720.3. For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California, or any political subdivision of the state.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

O

96

Senate Bill No. 1999

CHAPTER 881

An act to amend Section 1720 of the Labor Code, relating to public contracts.

[Approved by Governor September 28, 2000. Filed with Secretary of State September 29, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1999, Burton. Public work.

Existing law defines public works and establishes certain requirements that must be met by persons who enter into contracts for public works. Those requirements include provisions generally known as the prevailing wage laws. The prevailing wage laws require that all workers employed on public works be paid the general prevailing rate of per diem wages, as determined by the Director of Industrial Relations.

This bill would revise the definition of public works by providing that "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work. By requiring local government entities to comply with the provisions affecting public works, including the prevailing wage laws, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 1720 of the Labor Code is amended to read:

1720. As used in this chapter, "public works" means:

(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

For purposes of this subdivision, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

SEC. 2. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

O

93

Assembly Bill No. 1646

CHAPTER 954

An act to amend Sections 1723, 1726, 1727, and 1773.1 of, to add Sections 1741 and 1743 to, to add and repeal Sections 1742 and 1742.1 of, to repeal Sections 1730, 1731, 1732, 1733, and 1771.7 of, to repeal and amend Section 1775 of, and to repeal and add Section 1771.6 of, the Labor Code, relating to public works.

[Approved by Governor September 29, 2000. Filed with Secretary of State September 30, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1646, Steinberg. Public works: payments.

(1) Existing law regulating public works contracts requires the awarding body of a public works contract to withhold and retain from payments to the contractor all wages and penalties that have been forfeited pursuant to the contract or existing law. The awarding body is required to transfer all wages and penalties retained, to the Labor Commissioner for disbursement pursuant to specified provisions whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties withheld within 90 days after the completion of the contract and formal acceptance of the job.

This bill would require the awarding body to report promptly any suspected violations of the laws regulating public works contracts to the Labor Commission and to retain all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner.

(2) Existing law authorizes the contractor to bring suit for the limited purpose of recovery of the penalties or forfeitures withheld. Existing law permits the Division of Labor Standards Enforcement to intervene in a contractor's suit for recovery of amounts withheld, provides for the deposit of wages for workers who cannot be located into the Industrial Relations Unpaid Wages Fund, and provides for the deposit of penalties into the General Fund. Existing law, until January 1, 2003, requires a contractor to withhold moneys due a subcontractor in an amount sufficient to pay the wages that are the subject of a claim filed with the Division of Labor Standards Enforcement, as directed by the division, if the body awarding the public works contract has not withheld sufficient moneys to pay the wage claims. Existing law requires the contractor to pay those moneys to the subcontractor after receipt of notification that the claim has been resolved, or to pay those moneys to the awarding body, under specified circumstances.

This bill would repeal these provisions and instead would require the Labor Commissioner to issue a civil wage and penalty assessment to the contractor or subcontractor or both if the Labor Commissioner determines after investigation that there has been a violation of the laws regulating public works contracts. The bill would permit an affected contractor or subcontractor to obtain review of a civil wage and penalty assessment by transmitting a written request for a hearing to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment and would require an impartial hearing officer, until January 1, 2005, and then an administrative law judge appointed by the Director of Industrial Relations to commence a hearing within 90 days of receipt of the request. The bill would permit an affected contractor or subcontractor to obtain review of the decision of the director, until January 1, 2005, and then an administrative law judge by filing a petition for a writ of mandate to the superior court within 45 days after service of the decision. The bill would provide for liquidated damages in an amount equal to the amount of unpaid wages, as specified. The bill would also authorize informal settlement meetings.

The bill would provide that the contractor and subcontractor are jointly and severally liable for all amounts due pursuant to a final order or a judgment on that final order, but would require the Labor Commissioner to collect amounts due from the subcontractor before pursuing the claim against the contractor. The bill would require that the wage claim be satisfied from the amounts collected prior to those amounts being applied to penalties and that the money be prorated among all workers if an insufficient amount is recovered to pay each worker in full. The bill would require wages for workers who cannot be located to be placed in the Industrial Relations Unpaid Wage Fund, a continuously appropriated fund, and penalties to be paid into the General Fund.

(3) Existing law requires any political subdivision that enforces the laws regulating public works contracts and any court collecting fines or penalties that result from enforcement actions by political subdivisions to deposit penalties or forfeitures withheld from any contract payment in the General Fund of the political subdivision. Existing law authorizes a contractor to appeal an enforcement action by a political subdivision to the Director of Industrial Relations.

The bill would repeal and recast this provision to apply to any awarding body that enforces the laws regulating public works contracts in accordance with specified provisions of existing law. The bill would require such an awarding body to provide written notice of the withholding of contract payments to the contractor and subcontractor, as specified. The withholding of contract payments would be reviewable in the same manner as a civil penalty order of the Labor Commissioner.

(4) Existing law provides that per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, and subsistence pay, apprenticeship or other training programs, and similar purposes. Existing law requires the representative of any craft, classification, or type of worker needed to execute a public works contract entered into with the state to file with the Department of Industrial Relations, fully executed copies of the collective bargaining agreements for the particular craft, classification, or type of work involved for the purposes of determining the per diem wages.

This bill would specify the employer contributions, costs, and payments that employer payments may include and would provide that employer payments not required to be provided by state or federal law are a credit against the obligation to pay the general prevailing rate of wages. However, credits for employer payments would not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing. This bill would expand the requirement that copies of collective bargaining agreements be filed with the Department of Industrial Relations to apply to representatives of any craft, classification, or type of worker needed to execute a public works contract entered into with a public entity other than the state. The bill would revise the filing requirements to permit, if the collective bargaining agreement has not been formalized, the temporary filing of a typescript of the final draft accompanied by a statement under penalty of perjury as to its effective date. Because this bill would impose additional duties on local agency employers, expand the scope of the existing crime of perjury, and provide that a violation of these provisions is a misdemeanor, this bill would impose a state-mandated local program.

(5) This bill provides that it would become operative on July 1, 2001.

(6) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

The people of the State of California do enact as follows:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

SEC. 2. Section 1723 of the Labor Code is amended to read:

1723. "Worker" includes laborer, worker, or mechanic.

SEC. 3. Section 1726 of the Labor Code is amended to read:

1726. The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract, and shall promptly report any suspected violations to the Labor Commissioner.

If the awarding body determines as a result of its own investigation that there has been a violation of this chapter and withholds contract payments, the procedures in Section 1771.6 shall be followed.

SEC. 4. Section 1727 of the Labor Code is amended to read:

1727. (a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

(b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

SEC. 5. Section 1730 of the Labor Code is repealed.

SEC. 6. Section 1731 of the Labor Code is repealed.

SEC. 7. Section 1732 of the Labor Code is repealed.

SEC. 8. Section 1733 of the Labor Code is repealed.

SEC. 9. Section 1741 is added to the Labor Code, to read:

1741. If the Labor Commissioner or his or her designee determines after an investigation that there has been a violation of this chapter, the Labor Commissioner shall with reasonable

promptness issue a civil wage and penalty assessment to the contractor or subcontractor or both. The assessment shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures due and shall include the basis for the assessment. The assessment shall be served not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever occurs last. However, if the assessment is served after the expiration of this 180-day period, but before the expiration of an additional 180 days, and the awarding body has not yet made full payment to the contractor, the assessment is valid up to the amount of the funds retained. Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor, subcontractor, and awarding body. The assessment shall advise the contractor and subcontractor of the procedure for obtaining review of the assessment. The Labor Commissioner shall, to the extent practicable, ascertain the identity of any bonding company issuing a bond that secures the payment of wages covered by the assessment and any surety on a bond, and shall serve a copy of the assessment by certified mail to the bonding company or surety at the same time service is made to the contractor, subcontractor, and awarding body. However, no bonding company or surety shall be relieved of its responsibilities because it failed to receive notice from the Labor Commissioner.

SEC. 10. Section 1742 is added to the Labor Code, to read:

1742. (a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b) Upon receipt of a timely request, a hearing shall be commenced within 90 days before the director, who shall appoint an impartial hearing officer possessing the qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the Government Code. The appointed hearing officer shall be an employee of the department, but shall not be an employee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.

The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

Within 45 days of the conclusion of the hearing, the director shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the director shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the director may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

The director shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the director by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

90

(h) This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date.

SEC. 11. Section 1742 is added to the Labor Code, to read:

1742. (a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b) (1) Upon receipt of a timely request, a hearing shall be commenced within 90 days before an administrative law judge appointed by the Director of Industrial Relations. The appointed hearing judge shall be an employee of the department, but shall not be an employee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

(2) The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

(3) Within 45 days of the conclusion of the hearing, the administrative law judge shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the administrative law judge shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the administrative law judge may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(4) The Director of Industrial Relations shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the administrative law judge by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the

court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

(h) This section shall become operative on January 1, 2005.

SEC. 12. Section 1742.1 is added to the Labor Code, to read:

1742.1. (a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment or notice to be in error, the director shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal

proceedings. The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking administrative review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting.

This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date.

SEC. 13. Section 1742.1 is added to the Labor Code, to read:

1742.1. (a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the administrative law judge that he or she had substantial grounds for believing the assessment or notice to be in error, the administrative law judge shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal proceedings. The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section

1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking administrative review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting.

This section shall become operative on January 1, 2005.

SEC. 14. Section 1743 is added to the Labor Code, to read:

1743. (a) The contractor and subcontractor shall be jointly and severally liable for all amounts due pursuant to a final order under this chapter or a judgment thereon. The Labor Commissioner shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim against the contractor.

(b) From the amount collected, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(c) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

(d) A final order under this chapter or a judgment thereon shall be binding, with respect to the amount found to be due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond. The limitations period of any action on a payment bond shall be tolled pending a final order that is no longer subject to judicial review.

SEC. 15. Section 1771.6 of the Labor Code is repealed.

SEC. 16. Section 1771.6 is added to the Labor Code, to read:

1771.6. (a) Any awarding body that enforces this chapter in accordance with Section 1726 or 1771.5 shall provide notice of the withholding of contract payments to the contractor and subcontractor, if applicable. The notice shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures withheld. Service of the notice shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor and subcontractor, if applicable. The notice shall advise the contractor and

subcontractor, if applicable, of the procedure for obtaining review of the withholding of contract payments.

The awarding body shall also serve a copy of the notice by certified mail to any bonding company issuing a bond that secures the payment of wages covered by the notice and to any surety on a bond, if their identities are known to the awarding body.

(b) The withholding of contract payments in accordance with Section 1726 or 1771.5 shall be reviewable under Section 1742 in the same manner as if the notice of the withholding was a civil penalty order of the Labor Commissioner under this chapter. If review is requested, the Labor Commissioner may intervene to represent the awarding body.

(c) Pending a final order, or the expiration of the time period for seeking review of the notice of the withholding, the awarding body shall not disburse any contract payments withheld.

(d) From the amount recovered, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(e) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund of the awarding body that has enforced this chapter pursuant to Section 1771.5.

SEC. 17. Section 1771.7 of the Labor Code is repealed.

SEC. 18. Section 1773.1 of the Labor Code is amended to read:

1773.1. (a) Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, subsistence, and apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the contributions, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

(b) Employer payments include all of the following:

(1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.

(2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.

(3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

(c) Employer payments are a credit against the obligation to pay the general prevailing rate of per diem wages. However, no credit shall be granted for benefits required to be provided by other state or federal law. Credits for employer payments also shall not reduce

the obligation to pay the hourly straight time or overtime wages found to be prevailing.

(d) The credit for employer payments shall be computed on an annualized basis where the employer seeks credit for employer payments that are higher for public works projects than for private construction performed by the same employer, except where one or more of the following occur:

(1) The employer has an enforceable obligation to make the higher rate of payments on future private construction performed by the employer.

(2) The higher rate of payments is required by a project labor agreement.

(3) The payments are made to the California Apprenticeship Council pursuant to Section 1777.5.

(4) The director determines that annualization would not serve the purposes of this chapter.

(e) For the purpose of determining those per diem wages for contracts, the representative of any craft, classification, or type of worker needed to execute contracts shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification, or type of work involved. The collective bargaining agreements shall be filed after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids. If the collective bargaining agreement has not been formalized, a typescript of the final draft may be filed temporarily, accompanied by a statement under penalty of perjury as to its effective date.

Where a copy of the collective bargaining agreement has previously been filed, fully executed copies of all modifications and extensions of the agreement that affect per diem wages or holidays shall be filed.

The failure to comply with filing requirements of this subdivision shall not be grounds for setting aside a prevailing wage determination if the information taken into consideration is correct.

SEC. 19. Section 1775 of the Labor Code, as amended by Section 1 of Chapter 757 of the Statutes of 1997, is repealed.

SEC. 20. Section 1775 of the Labor Code, as added by Section 2 of Chapter 757 of the Statutes of 1997, is amended to read:

1775. (a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her.

The amount of this penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(1) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected upon being brought to the attention of the contractor or subcontractor.

(2) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages.

SEC. 21. This act shall become operative on July 1, 2001.

SEC. 22. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because in that regard this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

However, notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

O

90

Senate Bill No. 975

CHAPTER 938

An act to amend Section 63036 of the Government Code, and to amend Section 1720 of the Labor Code, relating to the California infrastructure and economic development bank.

[Approved by Governor October 14, 2001. Filed with Secretary of State October 14, 2001.]

LEGISLATIVE COUNSEL'S DIGEST

SB 975, Alarcon. California Infrastructure and Economic Development Bank.

Existing law, the Bergeson-Peace Infrastructure and Economic Development Bank Act, establishes the California Infrastructure and Economic Development Bank in the Trade and Commerce Agency. The act requires public works financed by the bank to comply with certain laws applicable to payment of prevailing wages on public works.

This bill would require any of those public works financed through the use of industrial development bonds under the California Industrial Development Financing Act to comply with those laws relating to payment of prevailing wages.

Existing law generally defines "public works" to include construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds.

This bill would redefine "public works" to include installation and provide that "paid for in whole or in part with public funds" means certain payments, transfers, credits, reductions, waivers, and performances of work, but does not include the construction or rehabilitation of affordable housing units for low- or moderate-income persons, as specified.

This bill would provide that certain private residential housing projects and development projects built on private property are not subject to the prevailing wage, hour, and discrimination laws that govern employment on public works projects.

This bill would also make technical, nonsubstantive changes.

The people of the State of California do enact as follows:

SECTION 1. Section 63036 of the Government Code is amended to read:

63036. It is the intent of the Legislature that the activities of the bank be fully coordinated with any future legislative plan involving growth management strategies designed to protect California's land resource, and ensure its preservation and use it in ways which are economically and socially desirable. Further, all public works financed pursuant to this division, including those projects financed through the use of industrial development bonds under Title 10 (commencing with Section 91500), shall comply with Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code.

SEC. 2. Section 1720 of the Labor Code is amended to read:

1720. (a) As used in this chapter, "public works" means:

(1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

(2) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(3) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(4) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(5) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(6) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

(b) For purposes of this section, "paid for in whole or in part out of public funds" means the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer, performance of construction work by the state or political subdivision in execution of the project, transfer of an asset of value for less than fair market price; fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value,

waived or forgiven; money to be repaid on a contingent basis; or credits applied against repayment obligations.

(c) Notwithstanding subdivision (b):

(1) Private residential projects built on private property are not subject to the requirements of this chapter if the projects are not built pursuant to an agreement with a state agency, redevelopment agency, or local public housing authority.

(2) (A) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

(B) If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

(3) The construction or rehabilitation of affordable housing units for low- or moderate-income persons pursuant to paragraph (5) or (7) of subdivision (e) of Section 33334.2 of the Health and Safety Code that are paid for solely with moneys from a Low and Moderate Income Housing Fund established pursuant to Section 33334.3 of the Health and Safety Code or that are paid for by a combination of private funds and funds available pursuant to Section 33334.2 or 33334.3 of the Health and Safety Code does not constitute a project that is paid for in whole or in part out of public funds.

(4) "Paid for in whole or in part out of public funds" shall not include tax credits provided pursuant to Section 17053.49 or 23649 of the Revenue and Taxation Code.

(d) Notwithstanding any provision of this section to the contrary, the following projects shall not, solely by reason of this section, be subject to the requirements of this chapter:

(1) Qualified residential rental projects, as defined by Section 142 (d) of the Internal Revenue Code, financed in whole or in part through the issuance of bonds that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8369.80) of the Government Code on or before December 31, 2003.

(2) Single-family residential projects financed in whole or in part through the issuance of qualified mortgage revenue bonds or qualified veterans' mortgage bonds, as defined by Section 143 of the Internal Revenue Code, or with mortgage credit certificates under a Qualified Mortgage Credit Certificate Program, as defined by Section 25 of the Internal Revenue Code, that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8869.80) of the Government Code on or before December 31, 2003.

(3) Low-income housing projects that are allocated federal or state low-income housing tax credits pursuant to Section 42 of the Internal Revenue Code, Chapter 3.6 of Division 31 (commencing with Section 50199.4) of the Health and Safety Code, or Sections 12206, 17058, or 23610.5 of the Revenue and Taxation Code, on or before December 31, 2003.

(e) If a statute, other than this section, or an ordinance or regulation, other than an ordinance or regulation adopted pursuant to this section, applies this chapter to a project, the exclusions set forth in subdivision (d) shall not apply to that project.

(f) For purposes of this section, references to the Internal Revenue Code shall mean the Internal Revenue Code of 1986, as amended, and shall include the corresponding predecessor sections of the Internal Revenue Code of 1954, as amended.

O

92

Senate Bill No. 972

CHAPTER 1048

An act to amend Section 1720 of the Labor Code, relating to public works.

[Approved by Governor September 28, 2002. Filed with Secretary of State September 28, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

SB 972, Costa. Public works: prevailing wages.

Existing law defines a project as a "public work" if the project involves construction, alteration, demolition, installation, or repair work that is done under contract and paid for in whole or in part out of public funds, as specified. Existing law generally requires that not less than the general prevailing rate of per diem wages, as specified, be paid to workers engaged in a public work, as defined, but excludes certain types of housing projects from these requirements.

This bill would exclude from the requirements of public works and prevailing wage laws the construction, expansion, or rehabilitation of privately owned residential projects that are self-help housing projects, operated on a not-for-profit basis as housing for homeless persons, or that provide for housing assistance.

This bill would specify that this provision and amendments made by a prior statute do not preempt local ordinances requiring the payment of prevailing wages on housing projects.

This bill would also make technical, nonsubstantive changes.

The people of the State of California do enact as follows:

SECTION 1. Section 1720 of the Labor Code is amended to read:

1720. (a) As used in this chapter, "public works" means:

(1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

(2) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" does not include the operation of the irrigation or drainage system of any irrigation or

reclamation district, except as used in Section 1778 relating to retaining wages.

(3) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(4) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(5) The laying of carpet in a public building done under contract and paid for in whole or in part out of public funds.

(6) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

(b) For purposes of this section, "paid for in whole or in part out of public funds" means all of the following:

(1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.

(2) Performance of construction work by the state or political subdivision in execution of the project.

(3) Transfer by the state or political subdivision of an asset of value for less than fair market price.

(4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.

(5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis.

(6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision.

(c) Notwithstanding subdivision (b):

(1) Private residential projects built on private property are not subject to the requirements of this chapter unless the projects are built pursuant to an agreement with a state agency, redevelopment agency, or local public housing authority.

(2) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no

proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

(3) If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

(4) The construction or rehabilitation of affordable housing units for low- or moderate-income persons pursuant to paragraph (5) or (7) of subdivision (e) of Section 33334.2 of the Health and Safety Code that are paid for solely with moneys from a Low and Moderate Income Housing Fund established pursuant to Section 33334.3 of the Health and Safety Code or that are paid for by a combination of private funds and funds available pursuant to Section 33334.2 or 33334.3 of the Health and Safety Code do not constitute a project that is paid for in whole or in part out of public funds.

(5) "Paid for in whole or in part out of public funds" does not include tax credits provided pursuant to Section 17053.49 or 23649 of the Revenue and Taxation Code.

(6) Unless otherwise required by a public funding program, the construction or rehabilitation of privately owned residential projects is not subject to the requirements of this chapter if one or more of the following conditions are met:

(A) The project is a self-help housing project in which no fewer than 500 hours of construction work associated with the homes are to be performed by the homebuyers.

(B) The project consists of rehabilitation or expansion work associated with a facility operated on a not-for-profit basis as temporary or transitional housing for homeless persons with a total project cost of less than twenty-five thousand dollars ($25,000).

(C) Assistance is provided to a household as either mortgage assistance, downpayment assistance, or for the rehabilitation of a single-family home.

(D) The project consists of new construction, or expansion, or rehabilitation work associated with a facility developed by a nonprofit organization to be operated on a not-for-profit basis to provide emergency or transitional shelter and ancillary services and assistance to homeless adults and children. The nonprofit organization operating the project shall provide, at no profit, not less than 50 percent of the total project cost from nonpublic sources, excluding real property that is transferred or leased. Total project cost includes the value of donated labor, materials, architectural, and engineering services.

(E) The public participation in the project that would otherwise meet the criteria of subdivision (b) is public funding in the form of below-market interest rate loans for a project in which occupancy of at least 40 percent of the units is restricted for at least 20 years, by deed or regulatory agreement, to individuals or families earning no more than 80 percent of the area median income.

(d) Notwithstanding any provision of this section to the contrary, the following projects shall not, solely by reason of this section, be subject to the requirements of this chapter:

(1) Qualified residential rental projects, as defined by Section 142 (d) of the Internal Revenue Code, financed in whole or in part through the issuance of bonds that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8869.80) of the Government Code on or before December 31, 2003.

(2) Single-family residential projects financed in whole or in part through the issuance of qualified mortgage revenue bonds or qualified veterans' mortgage bonds, as defined by Section 143 of the Internal Revenue Code, or with mortgage credit certificates under a Qualified Mortgage Credit Certificate Program, as defined by Section 25 of the Internal Revenue Code, that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8869.80) of the Government Code on or before December 31, 2003.

(3) Low-income housing projects that are allocated federal or state low-income housing tax credits pursuant to Section 42 of the Internal Revenue Code, Chapter 3.6 of Division 31 (commencing with Section 50199.4) of the Health and Safety Code, or Section 12206, 17058, or 23610.5 of the Revenue and Taxation Code, on or before December 31, 2003.

(e) If a statute, other than this section, or a regulation, other than a regulation adopted pursuant to this section, or an ordinance or a contract applies this chapter to a project, the exclusions set forth in subdivision (d) do not apply to that project.

(f) For purposes of this section, references to the Internal Revenue Code mean the Internal Revenue Code of 1986, as amended, and include the corresponding predecessor sections of the Internal Revenue Code of 1954, as amended.

(g) The amendments made to this section by either Chapter 938 of the Statutes of 2001 or the act adding this subdivision shall not be construed to preempt local ordinances requiring the payment of prevailing wages on housing projects.

O

91

Chapter 8. Office of the Director
Subchapter 3. Payment of Prevailing Wages upon Public Works
Article 1. Definitions

New query

§16000. Definitions.

The following terms are defined for general use in these regulations within Group 3, Payment of Prevailing Wages Upon Public Works and Group 4, Awarding Body Labor Compliance Programs:

Area of Determination. The area of determining the prevailing wage is the "locality" and/or the "nearest labor market area" as determined by the Director. In determining the area, the mobility of each craft, classification and type of work will be considered.

Awarding body. Any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works.

Bid. Any proposal submitted to an awarding body in competitive bidding for the construction, alteration, demolition, repair, maintenance, or improvement of any structure, building, road, property, or other improvement of any kind.

Certified. The affirmation of a person with the authority to so affirm, under the penalty of perjury that the records are originals or are full, true and correct copies of the original and depict truly, fully and correctly the craft or type of work performed, hours and days worked, and the amounts by category listed, disbursed by way of cash, check, or in whatever form or manner to each person by job classification and/or skill pursuant to a public works contract.

Chief of DAS. Chief of Division of Apprenticeship Standards or a duly authorized representative.

Chief of DLSE/Labor Commissioner. Chief of the Division of Labor Standards Enforcement or a duly authorized representative.

Chief of DLSR. Chief of the Division of Labor Statistics and Research or a duly authorized representative.

Coverage. This means being subject to the requirements of Part 7, Chapter 1 of the Labor Code as a "public work." This includes all formal coverage determinations issued by the Director of Industrial Relations.

DAS. Division of Apprenticeship Standards.

Date of Notice or Call for Bids. The date the first notice inviting bids was published in a newspaper of general circulation or promulgated in a legally sufficient manner which results in a contract being awarded with or without competitive bidding. This may also be referred to as the Bid Advertisement Date.

Days. Unless otherwise specified means calendar days.

DLSE. The Division of Labor Standards Enforcement.

DLSR. The Division of Labor Statistics and Research.

Director. The Director of the Department of Industrial Relations or his/her duly authorized representative.

Duly Authorized Representative. An employee of the Department of Industrial Relations.

Effective Date. The date upon which the determinations of the Director go into effect. This date is ten days after the issue date of the determination.

Employer Payments. Includes:

(1) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees;

(2) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the workers affected; and

(3) The rate of contribution irrevocably made by the contractor or subcontractor for apprenticeship or other training programs authorized by Section 3071 and/or 3093 of the Labor Code.

Expiration Date. The date upon which the determinations of the Director are subject to change.

General Prevailing Rate of Per Diem Wages. Includes:

(1) The prevailing basic straight-time hourly rate of pay; and

(2) The prevailing rate for holiday and overtime work; and

(3) The prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like, as specified in the applicable collective bargaining agreement;

(I) See definition of "Employer Payments," (3).

(J) other bonafide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

(b) The term "general prevailing rate of per diem wages" does not include any employer payments for:

(1) Job related expenses other than travel time and subsistence pay;

(2) Contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above;

(3) Union, organizational, professional or other dues except as they may be included in and withheld from the basic taxable hourly wage rate;

(4) Industry or trade promotion;

(5) Political contributions or activities;

(6) Any benefit for employees, their families and dependents, or retirees including any benefit enumerated above where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit; or

(7) Such other payments as the Director may determine to exclude. Interested Party. When used with reference to a particular prevailing wage determination made by the Director, includes:

(1) Any contractor or subcontractor, or any organization, association, or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determinations, and/or

(2) Any worker in the particular craft, classification, or type of work, who may be employed on a public work project subject to the particular prevailing wage determination, or any labor organization or other representative of such a person, including the recognized collective bargaining representative for the particular craft, classification, or type of work; and/or

(3) Any awarding body or association or other representative of awarding bodies concerned with the administration of a pubic works contract or proposed contract, which is subject to the particular prevailing wage determination.

Helper. Any subjourneyman classification traditionally used to assist a journeyman. Under no

circumstance may the Helper classification be used to replace statutorily required Apprentices.

Identify or Give Notice of Identity. This means to state the name, job title, address and current telephone number of a person or entity.

Interim Determination. Those determinations of the Director issued between the quarterly updates.

Issue Date-Issuance. The date upon which copies of the determination of the Director are deposited in the mail.

LCP. A labor compliance program initiated and enforced by an awarding body in accordance with these regulations.

Locality. See Labor Code Section 1724.

Maintenance. Includes:

(1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

(2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

Exception: 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.

Exception: 2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.

(3) Landscape maintenance. See Public Contract Code Section 21002.

Exception: Landscape maintenance work by "sheltered workshops" is excluded.

Mistake, Inadvertence, or Neglect. Mistake, inadvertence, or neglect in failing to pay the correct general rate of per diem wages means the lack of knowledge that any reasonable person would also be expected to have under the same or similar circumstances.

Nearest labor market Area. The nearest geographical area from which workers of the crafts, classifications, and types to be used in the performance and execution of the public work can be drawn for employment upon such public work.

Payroll Records. All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.

Person. Any individual [or legal entity, including a] partnership, corporation, association, or any local, state, regional, national or international organization, public or private, or any awarding body, or any agent or officer thereof, authorized to act for or on behalf of any of the foregoing.

Political Subdivision. See Labor Code Section 1721.

Predetermined Changes. Definite changes to the basic hourly wage rate, overtime, holiday pay rates, and employer payments which are known and enumerated in the applicable collective bargaining agreement at the time of the bid advertisement date and which are referenced in the general prevailing rate of per diem wages as defined in Section 16000 of these regulations. Contractors are obligated to pay up to the amount that was predetermined if these changes are modified prior to their effective date. Predetermined changes which are rescinded prior to their effective date shall not be enforced.

Prevailing Rate. Includes:

(1) The basic hourly rate being paid to a majority of workers engaged in the particular craft, classification or type of work within the locality and in the nearest labor market area, if a majority of such workers is paid at a single rate; if there is no single rate being paid to a majority, then the single rate (modal rate) being paid to the greater number of workers is prevailing. If there is no modal rate, then an alternate rate will be established by considering the appropriate collective bargaining agreements, Federal rates or other data such as wage survey data, including the nearest labor market area, or expanded survey as provided in Article 4 of these regulations;

(2) Other employer payments as defined in Section 16000 of these regulations and as included as part of the total hourly wage rate, from which the prevailing basic hourly wage rate was derived. In the event the total hourly wage rate does not include any employer payments, then the Director may establish a prevailing employer payment rate by the same procedure outlined in subsection (1) above.

(3) The rate for holiday or overtime work shall be those rates specified in the collective bargaining agreement when the basic hourly rate is based on a collective bargaining agreement rate. In the event the basic hourly rate is not based on a collective bargaining agreement, holidays and overtime (if any) included with the prevailing basic hourly rate of pay shall be prevailing. Public Entity. For the purpose of processing requests for inspection of payroll records or furnishing certified copies thereof, "public entity" includes: the body awarding the contracts; the Division of Apprenticeship Standards (DAS), or the Division of Labor Standards Enforcement (DLSE).

Public Funds. Includes state, local and/or federal monies.

Note: Public funds do not include money loaned to a private entity where work is to be performed under private contract, and where no portion of the work is supervised, owned, utilized, or managed by an awarding body.

Public Works. See Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

Service upon a Contractor or Subcontractor. This is the process defined in Title 8, California Code of Regulations, (CCR) Section 16801(a)(2)(A).

Serve upon the Labor Commissioner. Delivery of all documents including legal process to the Headquarters of the Labor Commissioner.

Sheltered workshop. A nonprofit organization licensed by the Chief of DLSE employing mentally and/or physically handicapped workers.

Wage Survey. An investigation conducted pursuant to Labor Code Sections 1773 and/or 1773.4 to

determine the general prevailing rate of per diem wages for the crafts/classifications in the county(ies) for which the survey questionnaire was designed.

Willful. See Labor Code Section 1777.1(d).

Worker. See Labor Code Sections 1723 and 1772.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1191.5, 1720, 1720.2, 1720.3, 1721, 1722, 1722.1, 1723, 1724, 1770, 1771, 1772, 1773.5, 1776, 2750.5, 3071 and 3093, Labor Code; and Section 21002, Public Contract Code.

HISTORY

1. Repealer of group 3 (articles 1-3, sections 16000-16004, 16100-16101 and 16200-16205) and new group 3 (articles 1-4, sections 16000-16013, 16100-16109, 16200-16206 and 16300-16305) filed 1-3-77 as an emergency; effective upon filing (Register 77, No 2). For prior history, see Register 56, No. 8.

2. New group 3 (sections 16000-16014, 16100-16109, 16200-16207.9) filed 2-8-78; effective thirtieth day thereafter (Register 78, No. 6).

3. Renumbering and amendment of former sections 16000-16006 and 16008-16019 to section 16000; renumbering and amendment of former section 16100 to section 16002; renumbering and amendment of former section 16101 to section 16203; renumbering and amendment of former sections 16102-16105 to section 16200; renumbering and amendment of former section 16106 to section 16206; renumbering and amendment of former sections 16107(a), (b) and (c) to sections 16201, 16202 and 16205; renumbering and amendment of former section 16108 to section 16204; renumbering and amendment of former section 16200 to section 16300; renumbering and amendment of former sections 16007, 16201, 16202, 16204 and 16206 to section 16302; renumbering and amendment of former section 16207 to section 16303; renumbering and amendment of former sections 16207.2 and 16207.3 to section 16304; renumbering and amendment of former section 16207.5 to section 16100; renumbering and amendment of former section 16207.7 to section 16301; renumbering and amendment of former sections 16207.10-16207.14 to section 16400; renumbering and amendment of former sections 16207.15 and 16207.16 to section 16401; renumbering and amendment of former section 16207.17 to section 16402; renumbering and amendment of former section 16207.18 to section 16403; renumbering and amendment of former section 16207.19 to section 16500; repealer of former sections 16100.1, 16109, 16203, 16205, 16207.1, 16207.4, 16207.6 and 16207.8; and new sections 16001, 16101 and 16102 filed 2-11-86; effective thirtieth day thereafter (Register 86, No. 7). For prior history, see Registers 82, No. 51; 80, No. 6; 79, No. 19; 72, No. 23 and 72, No. 13.

4. Amendment filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

5. Repealer of definition of "Predetermined Changes" filed 12-27-96; operative 1-26-97 (Register 96, No. 52).

6. Amendment of definition of "Prevailing Rate" filed 12-27-96; operative 1-26-97 (Register 96, No. 52).

7. Change without regulatory effect restoring definition of "Predetermined Changes" and repealing amendments to definition of "Prevailing Rate" filed 2-19-99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6-4-97 in Case 97CS 00471 the amendments filed 12-27-96

and effective 1-27-97 were invalidated and the prior regulations were reinstated.

Go Back to Article 1 Table of Contents

Director. The Director of the Department of Industrial Relations or his/her duly authorized representative.

Duly Authorized Representative. An employee of the Department of Industrial Relations.

Effective Date. The date upon which the determinations of the Director go into effect. This date is ten days after the issue date of the determination.

Employer Payments. Includes:

(1) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees;

(2) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the workers affected; and

(3) The rate of contribution irrevocably made by the contractor or subcontractor for apprenticeship or other training programs authorized by Section 3071 and/or 3093 of the Labor Code.

Expiration Date. The date upon which the determinations of the Director are subject to change.

General Prevailing Rate of Per Diem Wages. Includes:

(1) The prevailing basic straight-time hourly rate of pay; and

(2) The prevailing rate for holiday and overtime work; and

(3) The prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like, as specified in the applicable collective bargaining agreement;

(I) See definition of "Employer Payments," (3).

(J) other bonafide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

(b) The term "general prevailing rate of per diem wages" does not include any employer payments for:

(1) Job related expenses other than travel time and subsistence pay;

(2) Contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above;

(3) Union, organizational, professional or other dues except as they may be included in and withheld from the basic taxable hourly wage rate;

(4) Industry or trade promotion;

(5) Political contributions or activities;

(6) Any benefit for employees, their families and dependents, or retirees including any benefit enumerated above where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit; or

(7) Such other payments as the Director may determine to exclude. Interested Party. When used with reference to a particular prevailing wage determination made by the Director, includes:

(1) Any contractor or subcontractor, or any organization, association or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determinations, and/or

(2) Any worker in the particular craft, classification, or type of work, who may be employed on a public work project subject to the particular prevailing wage determination, or any labor organization or other representative of such a person, including the recognized collective bargaining representative for the particular craft, classification, or type of work; and/or

(3) Any awarding body or association or other representative of awarding bodies concerned with the administration of a pubic works contract or proposed contract, which is subject to the particular prevailing wage determination.

Helper. Any subjourneyman classification traditionally used to assist a journeyman. Under no circumstance may the Helper classification be used to replace statutorily required Apprentices.

Identify or Give Notice of Identity. This means to state the name, job title, address and current telephone number of a person or entity.

Interim Determination. Those determinations of the Director issued between the quarterly updates.

Issue Date-Issuance. The date upon which copies of the determination of the Director are deposited in the mail.

LCP. A labor compliance program initiated and enforced by an awarding body in accordance with these regulations.

Locality. See Labor Code Section 1724.

Maintenance. Includes:

(1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

(2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

EXCEPTION: 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.

EXCEPTION: 2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.

(3) Landscape maintenance. See Public Contract Code Section 21002.

EXCEPTION: Landscape maintenance work by "sheltered workshops" is excluded.

Mistake, Inadvertence, or Neglect. Mistake, inadvertence, or neglect in failing to pay the correct general rate of per diem wages means the lack of knowledge that any reasonable person would also be expected to have under the same or similar circumstances.

Nearest labor market Area. The nearest geographical area from which workers of the crafts, classifications, and types to be used in the performance and execution of the public work can be drawn for employment upon such public work.

Payroll Records. All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.

Person. Any individual [or legal entity, including a] partnership, corporation, association, or any local, state, regional, national or international organization, public or private, or any awarding body, or any agent or officer thereof, authorized to act for or on behalf of any of the foregoing.

Political Subdivision. See Labor Code Section 1721.

Predetermined Changes. Definite changes to the basic hourly wage rate, overtime, holiday pay rates, and employer payments which are known and enumerated in the applicable collective bargaining agreement

e time of the bid advertisement date and which are referenced in the ral prevailing rate of per diem wages as defined in Section 16000 of these regulations. Contractors are obligated to pay up to the amount that was predetermined if these changes are modified prior to their effective date. Predetermined changes which are rescinded prior to their effective date shall not be enforced.

Prevailing Rate. Includes:

(1) The basic hourly rate being paid to a majority of workers engaged in the particular craft, classification or type of work within the locality and in the nearest labor market area, if a majority of such workers is paid at a single rate; if there is no single rate being paid to a majority, then the single rate (modal rate) being paid to the greater number of workers is prevailing. If there is no modal rate, then an alternate rate will be established by considering the appropriate collective bargaining agreements, Federal rates or other data such as wage survey data, including the nearest labor market area, or expanded survey as provided in Article 4 of these regulations;

(2) Other employer payments as defined in Section 16000 of these regulations and as included as part of the total hourly wage rate, from which the prevailing basic hourly wage rate was derived. In the event the total hourly wage rate does not include any employer payments, then the Director may establish a prevailing employer payment rate by the same procedure outlined in subsection (1) above.

(3) The rate for holiday or overtime work shall be those rates specified in the collective bargaining agreement when the basic hourly rate is based on a collective bargaining agreement rate. In the event the basic hourly rate is not based on a collective bargaining agreement, holidays and overtime (if any) included with the prevailing basic hourly rate of pay shall be prevailing.

Public Entity. For the purpose of processing requests for inspection of roll records or furnishing certified copies thereof, "public entity" includes: the body awarding the contracts; the Division of Apprenticeship Standards (DAS), or the Division of Labor Standards Enforcement (DLSE).

Public Funds. Includes state, local and/or federal monies.

NOTE: Public funds do not include money loaned to a private entity where work is to be performed under private contract, and where no portion of the work is supervised, owned, utilized, or managed by an awarding body.

Public Works. See Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

Service upon a Contractor or Subcontractor. This is the process defined in Title 8, California Code of Regulations, (CCR) Section 16801(a)(2)(A).

Serve upon the Labor Commissioner. Delivery of all documents including legal process to the Headquarters of the Labor Commissioner.

Sheltered workshop. A nonprofit organization licensed by the Chief of DLSE employing mentally and/or physically handicapped workers.

Wage Survey. An investigation conducted pursuant to Labor Code Sections 1773 and/or 1773.4 to determine the general prevailing rate of per diem wages for the crafts/classifications in the county(ies) for which the survey questionnaire was designed.

Willful. See Labor Code Section 1777.1(d).

Worker. See Labor Code Sections 1723 and 1772.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1191.5, 1720, 1720.2, 1720.3, 1721, 1722, 1722.1, 1723, 1724, 1770, 1771, 1772, 1773.5, 1776, 2750.5, 3071 and 3093, Labor Code; and Section 21002, Public Contract Code.

HISTORY

1. Repealer of group 3 (articles 1–3, sections 16000–16004, 16100–16101 and 16200–16205) and new group 3 (articles 1–4, sections 16000–16013, 16100–16109, 16200–16206 and 16300–16305) filed 1–3–77 as an emergency; effective upon filing (Register 77, No 2). For prior history, see Register 56, No. 8.
2. New group 3 (sections 16000–16014, 16100–16109, 16200–16207.9) filed 2–8–78; effective thirtieth day thereafter (Register 78, No. 6).
3. Renumbering and amendment of former sections 16000–16006 and 16008–16019 to section 16000; renumbering and amendment of former section 16100 to section 16002; renumbering and amendment of former section 16101 to section 16203; renumbering and amendment of former sections 16102–16105 to section 16200; renumbering and amendment of former section 16106 to section 16206; renumbering and amendment of former sections 16107(a), (b) and (c) to sections 16201, 16202 and 16205; renumbering and amendment of former section 16108 to section 16204; renumbering and amendment of former section 16200 to section 16300; renumbering and amendment of former sections 16007, 16201, 16202, 16204 and 16206 to section 16302; renumbering and amendment of former section 16207 to section 16303; renumbering and amendment of former sections 16207.2 and 16207.3 to section 16304; renumbering and amendment of former section 16207.5 to section 16100; renumbering and amendment of former section 16207.7 to section 16301; renumbering and amendment of former sections 16207.10–16207.14 to section 16400; renumbering and amendment of former sections 16207.15 and 16207.16 to section 16401; renumbering and amendment of former section 16207.17 to section 16402; renumbering and amendment of former section 16207.18 to section 16403; renumbering and amendment of former section 16207.19 to section 16500; repealer of former sections 16100.1, 16109, 16203, 16205, 16207.1, 16207.4, 16207.6 and 16207.8; and new sections 16001, 16101 and 16102 filed 2–11–86; effective thirtieth day thereafter (Register 86, No. 7). For prior history, see Registers 82, No. 51; 80, No. 6; 79, No. 19; 72, No. 23 and 72, No. 13.
4. Amendment filed 2–20–92; operative 3–23–92 (Register 92, No. 13).
5. Repealer of definition of "Predetermined Changes" filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
6. Amendment of definition of "Prevailing Rate" filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
7. Change without regulatory effect restoring definition of "Predetermined Changes" and repealing amendments to definition of "Prevailing Rate" filed 2–19–99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6–4–97 in Case 97CS 00471 the amendments filed 12–27–96 and effective 1–27–97 were invalidated and the prior regulations were reinstated.

Article 2. Work Subject to Prevailing Wages

§ 16001. Public Works Subject to Prevailing Wage Law.

(a) General Coverage. State prevailing wage rates apply to all public works contracts as set forth in Labor Code Sections 1720, 1720.2, 1720.3, 1720.4, and 1771.

(1) Any interested party enumerated in Section 16000 of these regulations may file with the Director of Industrial Relations or the Director's duly authorized representative, as set forth in Section 16301 of these regulations, a request to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which that interested party believes may be subject to or excluded from coverage as public works under the Labor Code. If such a request is filed by any party other than the awarding body, a copy of the request must be served upon the awarding body, in accordance with the filing procedures set forth in Section 16302(d) of these regulations, when it is filed with the Director.

(2) Within 15 days of receipt of a copy of the request for a coverage determination, the awarding body shall forward to the Director or his/her duly authorized representative as provided for in Section 16301 of these regulations, any documents, arguments, or authorities it wishes to have considered in the coverage determination process.

(3) All parties to the coverage determination request shall have a continuing duty to provide the Director or his/her duly authorized representative as provided for in Section 16301 of these regulations, with relevant documents in their possession or control, until a determination is made. Where any party or parties' agent has a document in their possession, but refuses to release a copy, the Department shall consider that the documents, if released, would contain information adverse to the withholding party's position and may close the record and render a decision on the basis of that inference and the information received.

(b) Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort.

(c) Field Surveying Projects. Field survey work traditionally covered by collective bargaining agreements is subject to prevailing wage rates when it is integral to the specific public works project in the design, preconstruction, or construction phase.

(d) Residential Projects. Residential projects consisting of single family homes and apartments up to and including four stories are subject to payment of prevailing wages when paid for in whole or in part out of public funds, including federally–funded or assisted residential projects controlled or carried out by an awarding body.

NOTE: Such projects may require a special determination by the Director which should be requested by the awarding body at least 45 days before the commencement of advertising of the call for bids by the awarding body.

(e) Commercial Projects. All non–residential construction projects including new work, additions, alterations, reconstruction and repairs. Includes residential projects over four stories.

(f) Maintenance. Public works contracts for maintenance are subject to prevailing wage rate payment as set forth in Section 1771 of the Labor Code.

NOTE: See Article 1 for definition of term "maintenance."

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1720.4 and 1771, Labor Code.

HISTORY

1. Amendment of subsection (a) and NOTE and adoption of subsections (a)(1)–(3) and (e) and relettering former subsection (e) to (f) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).
2. Amendment of subsection (b) and (d) and NOTE filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
3. Change without regulatory effect repealing amendments to subsections (b) and (d) and NOTE filed 2–19–99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6–4–97 in Case 97CS 00471 the amendments filed 12–27–96 and effective 1–27–97 were invalidated and the prior regulations were reinstated.

§ 16002. Coverage of Worker.

The determinations of the Director will cover those crafts, classifications or types of workers employed in public works as set forth in Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

NOTE: Authority cited: Sections 1723 and 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3 and 1771, Labor Code.

§ 16002.5. Appeal of Public Work Coverage Determination.

(a) Those interested parties enumerated in Section 16000 of these regulations may appeal to the Director of Industrial Relations or the Director's duly authorized representative as set forth in Section 16301 of these regulations a determination of coverage under the public works laws (Labor Code Section 1720 et seq.) regarding either a specific project or type of work under Section 16001(a) of these regulations. Such notice of appeal must be served within 30 days of the issuance of the coverage determination. The party appealing the determination must, in accordance with the filing procedures set forth in Section 16302(d) of these regulations, give written notification to the awarding body and any other identifiable parties.

(b) The notice of appeal shall state the full factual and legal grounds upon which the determination is appealed, and whether a hearing is desired. The decision to hold a hearing is within the Director's sole discretion. The Director may appoint a hearing officer to conduct the hearing and propose a decision on the appeal. The Director shall make the final decision on the appeal.

(c) The authority of the Director to determine coverage of projects under the prevailing wage laws is quasi–legislative, and a final determination on any appeal is subject to judicial review pursuant to the Code of Civil Procedure, Section 1085.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1720.4 and 1771, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16003. Requests for Approval of Volunteer Labor.

(a) An awarding body wishing to use volunteer labor on what would otherwise be a public works project, pursuant to Labor Code Section 1720.4 shall serve a written request for approval on the Director, not less than 45 days prior to the commencement of work on the facilities or 720-tures.

(b) The request for approval shall fully set forth the awarding body's grounds for belief that the requirements of Labor Code Section 1720.4(a), (b), and (c) are satisfied, and shall list all the crafts and classifications of workers that typically perform the types of work needed for the project.

(c) The request for approval shall identify the unions which represent workers in the crafts or classifications listed in (b) within the locality in which the public work is performed.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1720.4, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 3. Duties, Responsibilities, and Rights of Parties

§ 16100. Duties, Responsibilities and Rights.

The parties listed in this section must comply with the provisions of the Labor Code applicable to the payment of prevailing wages on public works contracts.

(a) Department and Division Authority in Prevailing Wage Issues. The Director shall establish and coordinate the administration of the State's prevailing wage law, including the determination of coverage issues. The lead agency for the determination of prevailing wage rates shall be the Division of Labor Statistics and Research. The lead agency for the enforcement of the payment of prevailing wages is the Division of Labor Standards Enforcement. The lead agency for the coordination on apprenticeship is the Division of Apprenticeship Standards. This section shall not be construed to preclude any filing requirements with DLSR of appropriate agreements or petitions regarding determinations or any other documents, papers, books, etc. otherwise required by the law or these regulations.

(b) The Awarding Body shall:

(1) Obtain the prevailing wage rate from the Director in accordance with Labor Code Sections 1771 and 1773.

(2) Specify the appropriate prevailing wage rates, in accordance with Labor Code Sections 1773.2 and 1777.5.

(A) The posting requirement is applicable for each job site.

EXCEPTION: If more than one worksite exists on any project, then the applicable rates may be posted at a single location which is readily available to all workers.

(B) If a wage rate for a craft, classification or type of worker is not published in the Director's general prevailing wage determinations, a request for a special determination should be made by the awarding body to Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142, at least 45 days prior to the project bid advertisement date.

(3) Notify DAS. See Labor Code Section 1773.3.

(4) Inform prime contractors, to the extent feasible, of relevant public work requirements:

NOTE: Requirement information may be disseminated at a preacceptance of bid conference or in a call for bids or at an award of bid conference.

The public works requirements are:

(A) the appropriate number of apprentices are on the job site, as set forth in Labor Code Section 1777.5.

(B) worker's compensation coverage, as set forth in Labor Code Sections 1860 and 1861.

(C) keep accurate records of the work performed on the public works project, as set forth in Labor Code Section 1812.

(D) inspection of payroll records pursuant to Labor Code Section 1776, and as set forth in Section 16400 (e) of these regulations.

(E) and other requirements imposed by law.

(5) Withhold monies. See Labor Code Section 1727.

(6) Ensure that public works projects are not split or separated into smaller work orders or projects for the purpose of evading the applicable provisions of Labor Code Section 1771.

(7) Deny the right to bid on public work contracts to contractors or subcontractors who have violated public work laws, as set forth in Labor Code Section 1777.7.

(8) Not permit workers on public works to work more than eight hours a day or 40 hours in any one calendar week, unless compensated at not less than time and a half as set forth in Labor Code Section 1815.

EXCEPTION: If the prevailing wage determination requires a higher rate of pay for overtime work than is required under Labor Code Section 1815, then that higher overtime rate must be paid [, as specified in subsection 16200(a)(3)(F) of these regulations.]

(9) Not take or receive any portion of the workers' wages or accept a fee in connection with a public works project, as set forth in Labor Code Sections 1778 and 1779.

(10) Comply with those requirements as specified in Labor Code Sections 1776(g), 1777.5, 1810, 1813, and 1860.

(c) Contractor–subcontractor.

The contractor and subcontractor shall:

(1) Pay not less than the prevailing wage to all workers, as defined in Section 16000(a) of these regulations, and as set forth in Labor Code Sections 1771 and 1774;

(2) Comply with the provisions of Labor Code Sections 1773.5, 1775, and 1777.5 regarding public works jobsites;

(3) Provide workers' compensation coverage as set forth in Labor Code Section 1861;

(4) Comply with Labor Code Sections 1778 and 1779 regarding receiving a portion of wages or acceptance of a fee;

(5) Maintain and make available for inspection payroll records, as set forth in Labor Code Section 1776;

(6) Pay workers overtime pay, as set forth in Labor Code Section 1815 or as provided in the collective bargaining agreement adopted by the Director as set forth in Section 16200 (a) (3) of these regulations; and

(7) Comply with Section 16101 of these regulations regarding discrimination.

(8) Be subject to provisions of Labor Code Section 1777.7 which specifies the penalties imposed on a contractor who willfully fails to comply with provisions of Section 1777.5.

(9) Comply with those requirements as specified in Labor Code Sections 1810 and 1813.

(10) Comply with other requirements imposed by law.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1726, 1727, 1728, 1729, 1770, 1771, 1773, 1773.2, 1773.3, 1773.4, 1773.5, 1774, 1775, 1776, 1777.5, 1777.7, 1778, 1779, 1810, 1811, 1812, 1813, 1815, 1860 and 1861, Labor Code.

HISTORY

1. Amendment of subsection (b)(2)(B) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16101. Discrimination.

See Labor Code Sections 1735, 1777.5, 1777.6, and 3077.5.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1735, 1777.5, 1777.6 and 3077.5, Labor Code.

§ 16102. Interested Party.

An interested party, as defined in Section 16000 of these regulations, may be a source of wage data information, as provided in Section 16200(e) of these regulations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.4, Labor Code.

Article 4. Wage Determinations

16200. General; Basis for Determining Prevailing Wage Rate.

The Director shall follow those procedures specified in Sections 1773 and 1777.5 of the Labor Code and in these regulations when making a prevailing wage determination.

(a) Collective Bargaining Agreements or Wage Surveys.

(1) Filing of collective bargaining agreements.

(A) To enable the Director to ascertain and consider the applicable wage rates established by collective bargaining agreements when making prevailing wage determinations, the representatives of any crafts, classifications, or types of workers needed to execute any public works contracts shall file with the Department of Industrial Relations fully executed copies of all their collective bargaining agreements, including any and all addenda which modify the agreements, within 10 days of their execution and shall be considered as the basis for a prevailing wage determination whenever on file 30 days before the call for bids on a project.

(B) Copies of collective bargaining agreements filed with the Department of Industrial Relations pursuant to Sections 1773.1 and 1773.8 of the Labor Code, and Section 16200(a)(1)(A) of these regulations shall be addressed to: Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142.

(C) Collective bargaining agreements filed with the Division of Labor Statistics and Research must be accompanied by a signed statement which is certified as true and correct to the best of the knowledge and belief of the person preparing the statement, under penalty of perjury, and which:

1. certifies that the agreement filed is fully executed and in effect, unless it is a signed original agreement or photocopy thereof, or a printed copy of a fully executed agreement showing the names of the signatory parties, except in the case of a printed agreement the Director may require certification;

2. names or otherwise identifies all California counties within the jurisdiction of the local union or unions signatory to the agreement;

3. names and provides the address of the signatory employer association or, if there be no signatory employer association, provides the names and addresses of all contractors signatory to the agreement, unless such information is contained in the agreement;

4. provides the number of workers currently employed under the terms of the agreement and, if practicable, the number of workers in each county within the jurisdiction of the signatory local union or unions;

5. provides any other information not contained in the agreement that the Director may need to give proper consideration to applicable wage rates established by collective bargaining.

(D) Copies of collective bargaining agreements which are not bona fide shall not be deemed filed. The party filing a contract may be asked to substantiate the assertion that such collective bargaining agreement is bona fide.

(2) Criteria for using collective bargaining agreement wage rates as basis of prevailing wage determinations. Before accepting the collective bargaining agreement wage rate for the applicable craft and locality, DLSR shall take the following factors into consideration:

(A) The geographical area(s) specified in the agreement;

(B) The number of workers covered by the agreement;

(C) If signatory parties to the agreement have workers in the geographical area(s);

(D) If work has been performed in the geographical area(s) specified in the agreement in the past 12 months;

(E) The wage rates determined by the federal government as set forth in Section 16200(b).

(3) Adoption of Collective Bargaining Agreements.

(A) If the Director determines pursuant to Section 1773 of the Labor Code that the rate established by a collective bargaining agreement is the general prevailing rate of per diem wages for each craft, classification or type of worker and the Director adopts such rate by referral, the Director will publish such rate. Only those rates and employer payments specifically enumerated in the definition of "general prevailing rate of per diem wages" in Section 16000 shall be included in the rate adopted.

(B) When such rate is adopted, and in the case where the collective bargaining agreement contains definite and predetermined changes during its term which will affect the rate adopted, the Director shall incorporate such changes in the determination.

NOTE: A statement must be filed with the Director for any adjustments made to contract which are not contained in the agreement currently on file with DLSR.

(C) When such rate is adopted, and in the case where the collective bargaining agreement contains changes during its term which will affect the rate adopted, which are not definite or predetermined, the changes shall not be adopted. The prior determination will remain in effect until a new determination is issued. Any interested party may request that the Director make a new determination when contract changes become definite and determined by filing a statement as set forth in Section 16200(a)(1). The statement must summarize the amounts and effective dates of any cost-of-living adjustments, allocations of interim wage increases to wages and employer payments, and other relevant changes which will affect the rate adopted by the Director. The statement must be signed by an officer or agent of the bargaining representative and certified, under penalty of perjury, as true and correct to the best of his or her knowledge and belief.

(D) When such agreement is adopted as the basis of the prevailing wage determination, all wage classifications may be considered.

(E) Holidays. Holidays specifically named in the collective bargaining agreement or determined by wage surveys shall be included in the wage determination. Overtime pay may be required as provided in Section 16200(a)(3)(F) of these regulations.

(F) Overtime. Overtime will be paid as indicated in the wage determination.

EXCEPTION 1: If a workweek other than Monday through Friday is a fixed business practice or is required by the awarding body, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION 2: If the collective bargaining agreement provides for Saturday and Sunday work at straight-time, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION 3: If the awarding body determines that work cannot be performed during normal business hours or work is necessary at off hours to avoid danger to life or property, no overtime is required for the first eight hours in any one calendar day, and 40 hours during any one calendar week.

EXCEPTION 4: No overtime payment is required for less than 40 hours in a standard work week or for less than eight hours in a calendar workday unless specified in the collective bargaining agreement used as the basis for the prevailing wage determination.

(G) Wage rates, training contributions and apprenticeship contributions. Apprenticeship rates shall be determined by the Director of Industrial Relations using apprentice wage standards set forth in the collective bargaining agreement and/or approved by the California Apprenticeship Council. A contractor or subcontractor on a public works contract must pay training fund contributions or apprenticeship contributions in one of the following manners:

1. into the appropriate craft apprenticeship program in the area of the site of the public work; or

2. (if the trust fund is unable to accept such contributions) an equivalent amount shall be paid to the California Apprenticeship Council (CAC) administered by DAS.

3. If neither of the above will accept the funds, cash pay shall be as provided for in Section 16200(a)(3)(I) of these regulations.

(H) Rates for helpers. Rates for helpers will be published when the information available to the Director indicates that a practice of using such a subclassification prevails in a particular area, such as contained in a collective bargaining agreement, and within the parameters of the applicable collective bargaining agreement. In the absence of such determination, the helper classification may not be used as a substitute for a journeyman or apprentice. This section does not exempt the contractor from the 1-5 apprentice-journeyman ratio requirements set forth in Labor Code Section 1777.5.

(I) Credit Available For Actual Payment of Fringe Benefit Costs up to the Prevailing Amount. The contractor obligated to pay the full prevailing rate of per diem wages may take credit for amounts up to the total of all fringe benefit amounts listed as prevailing in the appropriate wage determination. This credit may be taken only as to amounts which are actual payments under Employer Payments Section 16000(1)-(3). In the event the total of Employer Payments by a contractor for the fringe benefits listed as prevailing is less than the aggregate amount set out as prev722g in the wage determination, the contractor must pay the difference directly to the employee. No amount of credit for payments over the aggregate amount of employer payments shall be taken nor shall any credit decrease the amount of direct payment of hourly wages of those amounts found to be prevailing for straight time or overtime wages.

(b) Federal Rates. In reviewing rates predetermined for federal public works, the Director will consider those rates published pursuant to the Davis-Bacon Act.

(c) Data collection shall be in accordance with Labor Code Section 1773.

(d) Wage rate factors.

NOTE: Wage surveys are conducted by DLSR.

(1) The following factors shall be considered:

(A) Type of work to be performed;

(B) Classification(s) of worker(s) needed;

(C) Geographical area of project;

(D) Nearest labor market area;

(E) If work has been performed in the geographical area in the past 12 months.

(F) Mobility of craft, classification, or type of worker needed for project;

(G) Number of workers in craft or job classification;

(H) Normal industry practice in selection of craft and classification of worker;

(I) Size (dollar amount) of project;

(J) Degree of project's remoteness from survey area.

(2) Time period used in determining prevailing wage by survey. The time period reference for establishing the prevailing wage in the area of determination shall be the 12-month period prior to the request for a wage determination unless another time period is necessary. In such cases, the Director shall establish the appropriate time period.

(e) Other information. Pursuant to Section 1773 of the Labor Code, the Director may also obtain and consider other data from interested parties, and shall give consideration to data submitted by any interested party, concerning rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area. Such data may be obtained by holding a hearing, instituting an investigation, or by such other means as the Director determines will best serve the purposes of the law. Information submitted by interested parties for the Director's consideration shall include, but not be limited to the following for each project:

(1) the name, address, job title, and telephone number of the interested party submitting the information and the basis for qualification as an interested party under Section 16102;

(2) the basic hourly wage rate, overtime and holiday pay rates, and employer payments as enumerated in Section 16000 of these regulations for each classification in question as effective for the last payroll period, or most recent payroll period, for which payments based on such rates were actually made;

(3) the number of workers employed on the project in each classification in question during the payroll period for which data is submitted;

(4) the location of the project;

(5) the name and address of the contractor or subcontractor making the payments, and of all other contractors or subcontractors on the project;

(6) the type of construction (e.g. residential, commercial building, etc.);

(7) the approximate cost of construction;

(8) the beginning date and completion date, or estimated completion date of the project;

(9) the source of data (e.g. "payroll records");

(10) the method of selection of the projects for which data is submitted, when data is not submitted for all projects recently completed or in progress in the locality or in the nearest labor market area.

NOTE: Authority cited: Sections 1773 and 1773.5, Labor Code. Reference: Sections 1770, 1771, 1773, 1773.1, 1773.5, 1773.8, 1777.5, 1810 and 1815, Labor Code.

HISTORY

Order of Repeal of subsection (a)(3)(E) filed 8-24-88 by OAL pursuant to Government Code section 11340.15 (Register 88, No. 35).

2. Amendment of subsections (a)(1), (a)(3) and (b) filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

3. Repealer of subsection (a)(3)(B), subsection relettering, and amendment of newly designated subsections (a)(3)(B), (a)(3)(D), and (a)(3)(F)(3) filed 12-27-96; operative 1-26-97 (Register 96, No. 52).

4. Amendment of subsection (b) filed 12-27-96; operative 1-26-97 (Register 96, No. 52).

5. Change without regulatory effect repealing 12-27-96 amendments filed 2-19-99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6-4-97 in Case 97CS 00471 the amendments filed 12-27-96 and effective 1-27-97 were invalidated and the prior regulations were reinstated.

§ 16201. General Area Determinations.

When the Director determines that the general prevailing rate of per diem wages for a particular craft, classification, or type of worker is uniform throughout an area, the Director shall issue a determination enumerated county by county, but covering the entire area. Such determinations will ordinarily be made for an entire county or group of counties and shall constitute the Director's determination for all localities in which public work is performed within that county or counties except as the geographic application of the determination may be specifically limited by the determination itself.

NOTE: General determinations are usually issued on a quarterly basis. However, the Director may issue an interim wage determination following the procedures set forth in Section 1773 of the Labor Code, and in these regulations. See Section 16000 as to issue date, and Section 16204 as to effective date of determination. The general determination usually applies where a collective bargaining agreement has been filed and adopted as the prevailing wage rate.

NOTE: Authority cited: Sections 1773.5 and 1773.6, Labor Code. Reference: Section 1773, Labor Code.

§ 16202. Special Determinations.

(a) Awarding body request. The awarding body shall request the Director to make a determination for a particular craft, classification or type of worker not covered by a general determination. Any such request shall be submitted at least 45 days prior to the bid advertisement date.

(b) Department of Industrial Relations initiated determination. Where an awarding body does not specify the prevailing wage rate as set forth in Labor Code Section 1773.2, any interested party (as defined in Section 16000 of these regulations) may petition the Director as set forth in Labor Code Section 1773.4 and Section 16302 of these regulations. The Labor Commissioner may, prior to the letting of the bid, request such a determination of the Director.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1773 and 1773.4, Labor Code.

§ 16203. Format.

(a) All determinations made by the Director of the general prevailing rate of per diem wages for a particular craft, classification, or type of worker will separately specify each of the following components:

(1) The prevailing basic straight-time hourly wage rate.

(2) The following statement when applicable: "In accordance with Labor Code Section 1773, holidays upon which the prevailing hourly wage rate for holiday work shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workers employed on the project, which is on file with the Director of Industrial Relations."

(3) The prevailing employer payments for benefits included in the general prevailing rate of per diem wages pursuant to Section 1773.1 of the Labor Code and enumerated in Section 16000 of these regulations.

(4) The following statement when applicable. "The contractor shall make travel and subsistence payments to each worker needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed with the Director of Industrial Relations in accordance with Labor Code Section 1773.8."

(b) Where the prevailing employer payment for any benefit is expressed in a formula or method of payment other than an hourly rate the Director may convert the rate to an hourly rate whenever such action would facilitate the administration of the law.

(c) The applicability of the apprentice rate of per diem wages shall be indicated and furnished upon request.

(d) The dates between which the applicable rate shall be paid for work performed in those periods shall be indicated.

(e) As a supplement to each determination the Director shall make available to any awarding body upon request, a list of all holidays recognized and the provision for travel and subsistence payments, taken from the applicable collective bargaining agreement.

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

§ 16204. Effective Dates of Determination and of Rates Within Determination.

(a) Effective Date of Determination.

(1) All determinations issued will be effective ten (10) days after issuance, provided that requests for copies, reprints or reissuance of prior determinations shall not affect the original effective date unless a new effective date is reflected upon the determination (see subdivision (3) below). Any call for bids put out on or after the effective date of the determination must reflect that determination unless the Director determines that subdivision (4) of this section is applicable, after notification and request by an awarding body.

(2) Determinations issued by the Director will show an issue date and will ordinarily show an expiration date.

(3) All determinations will remain in effect until their expiration date or until modified, corrected, rescinded or superseded by the Director.

(4) Determinations modified, corrected, rescinded or superseded on the basis of information contained in copies of collective bargaining agreements filed with the Department shall not be effective as to any project in which a call for bids takes place less than 30 days after the filing of the agreement.

NOTE: See Section 1773.1 of the Labor Code.

(5) It shall be the responsibility of the awarding body to ensure that the correct determination is used.

(b) Modification of Effective Date of Determination by Asterisks. Meaning of single and double asterisks. Prevailing wage determinations with a single asterisk (*) after the expiration date which are in effect on the date of advertisement for bids remain in effect for the life of the project. Prevailing wage determinations with double asterisks (**) after the expiration date indicate that the basic hourly wage rate, overtime and holiday pay rates, and employer payments to be paid for work performed after this date have been predetermined. If work is to extend past this date, the new rate must be paid and should be incorporated in contracts entered into now. The contractor should contact the Prevailing Wage Unit, DLSR, or the awarding body to obtain predetermined wage changes. All determinations that do not have double asterisks (**) after the expiration date remain in effect for the life of the project.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1773 and 1773.1, Labor Code.

HISTORY

1. Amendment of subsections (a)(3) and (b) filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

2. Amendment of subsection (a)(3), repealer and new subsection (b) and amendment of NOTE filed 12-27-96; operative 1-26-97 (Register 96, No. 52).

3. Change without regulatory effect repealing 12-27-96 amendments to section and NOTE filed 2-19-99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6-4-97 in Case 97CS 00471 the amendments filed 12-27-96 and effective 1-27-97 were invalidated and the prior regulations were reinstated.

§ 16205. Procedures for Obtaining Prevailing Wage Determinations.

An awarding body may request to be put on a mailing list for all area wage determinations for a specific county or counties or may request that a special or general prevailing wage determination be furnished when needed, by writing to Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142. All requests for special pre-

vailing wage determinations must be confirmed in writing and must specify the location where the public work is to be performed, including the county and the particular crafts, classifications, or types of workers for which a determination is needed.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

HISTORY

1. Amendment filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16206. Corrections.

Upon his or her own initiative or at the request of any interested party, the Director shall correct any error in a published determination that is the result of clerical error, such as a typographical error or a transposition of letters or digits, by issuing a corrected determination or a modification of the determination. The Director may correct any error issued in a determination by reissuing such determination.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

Article 5. Petitions to Review Prevailing Wage Determinations

§ 16300. Delegation of Authority.

(a) The Chief of DLSR is the authorized representative of the Director for the purpose of:

(1) Receiving collective bargaining agreements and other documents and papers pertaining to making prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations;

(2) Gathering information needed to make prevailing wage determinations under Part, Chapter 1, Article 2 of the Labor Code and these regulations, and may for that purpose institute investigations, conduct hearings, or employ such other means as shall best serve the purpose of the law;

(3) Issuing prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations; and

(4) Responding to petitions regarding determinations.

(b) The Director reserves the right to make all final determinations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1771, 1772, 1773 et seq., 1774, 1775, 1776, 1777, 1777.5 et seq., 1778, 1779 and 1780, Labor Code.

§ 16301. Referral of Prevailing Wage Issues to Director's Office.

Any new or unresolved issue other than of a routine nature as to coverage of or amount of the prevailing wage raised by an awarding body or other interested party may be referred to the Chief of DLSR as the Director's duly authorized representative for final determination, including appeals of any determination relating either to coverage or to the rate of the prevailing wage rate, subject only to Section 16300(b) of these regulations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.4, Labor Code.

§ 16302. Petition to Review Prevailing Wage Determinations.

Those interested parties enumerated in Section 1773.4 of the Labor Code, and defined in Section 16000 of these regulations, may file with the Director or the Chief of DLSR, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director, pursuant to Section 1773 of the Labor Code, which is specified in or referred to in the call for bids.

(a) Manner of Filing. Every petition filed pursuant to Section 1773.4 of the Labor Code shall be filed with the Director by mail to the Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142, or may be filed in person at 455 Golden Gate Avenue, 5th Floor, San Francisco, CA 94102.

(b) Filing. Where any paper, letter, petition, or document is required or permitted to be filed pursuant to these regulations or pursuant 724e prevailing wage provisions of the Labor Code, it shall be deemed filed with any person, awarding body or division upon actual delivery to and receipt by such person, awarding body, or division.

(c) Content of Petition. Every petition filed pursuant to Section 1773.4 of the Labor Code shall contain and separately state the following:

(1) The name, address, telephone number and job title of:

(A) the person filing the petition;

(B) the person verifying the petition, if different from the person filing;

(C) if applicable, petitioner's attorney or authorized representative.

(2) Whether the petitioner is an awarding body, a prospective bidder, or the representative of one or more crafts, classifications or types of workers involved in the public works contract;

(3) The nature of petitioner's business, if a prospective bidder, and a designation of each craft, classification, or type of worker represented, or types of workers involved in the public works project.

(4) (A) the official name of the awarding body;

(B) the date on which the call for bids was first published;

(C) the name and location of the newspaper in which such publication was made. An accurate copy of the call for bids as published shall be attached to the petition.

(5) If petitioner is an awarding body which is a department, board, authority or political subdivision other than a county, city and county, city, township, or regional district, the awarding body shall describe the parent or principal organization of which it is a part, and shall specify the statutory authority for undertaking public works.

(6) If the petitioner is a prospective bidder, then the parent or subsidiary corporations or associations related to such craft, classification or type of work, if any, shall be specified.

(7) The manner in which the wage rate determined by the Director fails to comply with the provisions of Labor Code Section 1773.

(A) Every petition asserting that the applicable prevailing rate for one or more crafts, classifications or types of workers needed to execute a contract is different from that ascertained by the Director shall set forth the rate the petitioner claims to be correct for each disputed rate, together with specific reference to particular facts providing the basis for such claim.

1. Whenever such facts relate to a particular employer of such crafts, classifications, or types of workers, the facts stated must identify the employer by name and address and give the number of workers involved.

2. Whenever such facts relate to an applicable collective bargaining agreement which the petitioner alleges was not considered by the Director pursuant to Section 1773 of the Labor Code, a copy of the agreement, if not already filed with the Director, should be filed concurrently with the petition in the manner provided in Section 16200(a)(1) of these regulations.

3. Whenever such facts relate to rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area, the facts stated should include all of the items of information enumerated in Section 16200(e) of these regulations.

(B) Every petition asserting that the Director has failed to ascertain and consider all applicable rates required to be considered by it shall specifically state in the petition which rates have not been considered by the Director.

(C) Where rates ascertained by the Director are the same as the applicable rates established by the collective bargaining agreement and rates of pay determined for federal public works within the locality and the nearest labor market area where the public work is performed, the petition shall specifically describe the manner and extent to which such rates do not constitute the rates actually prevailing in the locality where the public work is to be performed, and shall set forth and fully identify the existence of any rates asserted by petitioner to be prevailing in the locality and relied upon in support of the petition.

(d) Filing Copy With Awarding Body. If the petitioner is not an awarding body, the petitioner may concurrently with the filing of the original

tion, or otherwise shall within two days thereafter, excluding Saturdays, Sundays and holidays, file a copy of the petition with the awarding body and not later than five days, excluding Saturdays, Sundays and holidays, after the filing of the original petition, the petitioner shall file with the Chief of DLSR an affidavit of the filing with the awarding body. The Director may waive this requirement upon receipt of written confirmation, including a copy of such notification by the petitioner.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1773, 1773.1, 1773.4, 1773.5, 1773.8 and 1776, Labor Code.

HISTORY

1. Amendment of subsection (a) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16303. Quasi–Legislative Nature of Authority.

(a) The authority of the Director to establish the prevailing wage for any craft, classification, or type of worker is quasi–legislative. The Director has the discretion to establish these prevailing wages in a quasi–legislative manner which may include an investigation, hearing, or other action. Any hearing under this process is quasi–legislative and is subject to review pursuant to the Code of Civil Procedure Section 1085.

(b) The Director may in his or her discretion initiate an investigation or hold a hearing or take such other action as is reasonably necessary which would best effectuate the purposes of the law and of these regulations, except as such action may be expressly prohibited by law.

NOTE: Authority cited: Section 1773.5, Labor Code; and Winzler & Kelly (1981) 121 C.A. 3d 120; *Western Assn. of Engineers & Land Surveyors v. DIR*, Judicial Council Coord. Proceeding No. 449, Sac. Superior Court No. 285433. Reference: Sections 1770, 1773 and 1773.4, Labor Code; and Section 1085, Code of Civil Procedure.

16304. Hearings.

When a hearing is held, including a petition to review under Labor Code Section 1773.4, it shall be in accordance with the following procedures:

(a) Hearing Procedures.

(1) A time and place of the hearing shall be fixed.

(2) All interested parties made known to the Director shall be notified by registered or certified mail, return receipt requested, of the time and place of the hearing except that, in the event of numerous interested parties or in the event that mailing notices by registered or certified mail could cause an undue delay adverse to the interest of the parties or a timely hearing, the Director may send certified or registered notices to the petitioner and other directly interested parties that have been made known to the Director and mail notices to the other parties, and publish such notices in newspapers.

(3) Notification of the time and place of the hearing shall be at least one week in advance.

(4) The interested parties shall be given an opportunity to present evidence and oral or written arguments in support of their positions. The hearing officer may fairly allocate time for such witnesses' testimony in the interest of introducing relevant evidence. Cross examination will be permitted at the discretion of the hearing officer.

(5) The hearing need not be conducted according to technical rules relating to evidence and witnesses.

(6) All witnesses testifying before the hearing officer shall testify under oath.

(7) A full transcript of the hearing shall be recorded.

(b) Hearing Officer. The Director may appoint a hearing officer(s). The appointed hearing officer(s) shall conduct the hearing and submit to the Director the entire record of the hearing together with written recommendations. Either the appointed hearing officer(s) or the Director may request documentation subsequent to the hearing to complete the record, and shall send copies of such additional information to the petitioner, awarding body or other designated interested party or parties.

(c) Subject Matter. The subject matter of a hearing may be initiated by a petition to review, as set forth in Labor Code Section 1773.4.

(d) Decision. The decision of the Director shall reflect a summary of the evidence, findings, or matters of fact and/or law.

The decision shall be sent to all parties no later than 20 days after the hearing, except earlier or later as special circumstances warrant. The decision of the Director shall be final, for the purposes of judicial review, except that the Director upon his or her initiative only, may consider and take whatever action is appropriate or necessary to facilitate a decision on reconsideration. Notice of reconsideration shall be given to all parties in the same manner as the notice of hearings as specified in Sections 16304(a)(2) and (a)(3) above and the decision upon reconsideration shall be as specified in subdivisions (a)(2) and (a)(3) of this section.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1773.4 and 1773.5, Labor Code.

Article 6. Certified Payroll Records: Requests, Content, and Cost

§ 16400. Request for Payroll Records.

(a) Requests may be made by any person for certified copies of payroll records. Requests shall be made to any of the following:

(1) the body awarding the contract, or

(2) any office of the Division of Labor Standards Enforcement, or the Division of Apprenticeship Standards.

(b) Requests for certified copies of payroll records pursuant to Section 1776 of the Labor Code may be made by any person. However, any such request shall be in writing and contain at least the following information:

(1) The body awarding the contract;

(2) The contract number and/or description;

(3) The particular job location if more than one;

(4) The name of the contractor;

(5) The regular business address, if known.

NOTE: Requests for records of more than one contractor of subcontractor must list the information regarding that contractor individually, even if all requests pertain to the same particular public works project. Blanket requests covering an entire public works project will not be accepted; unless contractor and subcontractor responsibilities regarding the project are not clearly defined.

(c) Acknowledgment of Request. The public entity receiving a request for payroll records shall acknowledge receipt of such, and indicate the cost of providing the payroll records based on an estimate by the contractor, subcontractor or public entity. The acknowledgment of the receipt of said request for payroll records may be accomplished by the public entity's furnishing a copy of its written correspondence requesting certified copies of the payroll records sent to the specific contractor pursuant to Section 16400(d) below, to the person who requested said records.

(d) Request to Contractor. The request for copies of payroll records by the requesting public entity shall be in any form and/or method which will assure and evidence receipt thereof. The request shall include the following:

(1) Specify the records to be provided and the form upon which the information is to be provided;

(2) Conspicuous notice of the following:

(A) that the person certifying the copies of the payroll records is, if not the contractor, considered as an agent acting on behalf of the contractor; and

(B) that failure to provide certified copies of the records to the requesting public entity within 10 working days of the receipt of the request will subject the contractor to a penalty of twenty–five ($25.00) dollars per calendar day or portion thereof for each worker until strict compliance is effectuated;

(3) Cost of preparation as provided in Section 16402; and

(4) Provide for inspection.

(e) Inspection of Payroll Records. Inspection of the original payroll records at the office of the contractor(s) pursuant to subdivision (b) of Section 1776 of the Labor Code shall be limited to the public entities upon reasonable written or oral notice.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

§ 16401. Reporting of Payroll Requests.

(a) Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research P.O. Box 603 San Francisco, CA 94101

ATTENTION: Prevailing Wage Unit

Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776. If, however, the contractor does not comply with the provisions of Labor Code Section 1776, the Labor Commissioner may require the use of DIR's suggested format, "Public Works Payroll Reporting Form" (Form A–1–131).

(b) Words of Certification. The form of certification shall be as follows: "I, _____ (Name–print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named. Date:_____Signature:_____"

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1776, Labor Code.

§ 16402. Cost.

The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

NOTE: Authority cited: Section 1776, Labor Code. Reference: Section 1776(h), Labor Code.

§ 16403. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Section 1776, Labor Code.

Article 7. Withholding of Funds from Contractor—Hearing Procedure

§ 16410. Definitions.

As used in these regulations, the terms "awarding body," "contractor," and "subcontractor" shall have the same meaning as in Part 7 of Division 2 of the Labor Code. The term "affected subcontractor" shall mean a subcontractor whose alleged failure to pay the prevailing wage or to otherwise comply with the provisions of Labor Code §§ 1720–1815 resulted in the withholding of funds pursuant to Labor Code § 1727.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New article 7 (sections 16410–16414) and section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New article 7 (sections 16410–16414) and section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New article 7 (sections 16410–16414) and section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New article 7 (sections 16410–16414) and section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.
5. Certificate of Compliance as to 1–20–2000 order transmitted to OAL 3–29–2000 and filed 5–4–2000 (Register 2000, No. 18).

§ 16411. Notice to Contractor and Affected Subcontractor.

(a) Upon the decision to withhold, retain or forfeit any sum from a payment due to a contractor as permitted by Labor Code § 1727, the Division of Labor Standards Enforcement shall give written notice to the awarding body, the contractor, and to any affected subcontractor, of the withholding, retention, or forfeiture.

(b) Said notice shall include the following information:

(1) The amount to be withheld, retained or forfeited.

(2) A short statement of the factual basis upon which said amount is to be withheld, retained, or forfeited, including, but not limited to, the computation of any wages found to be due, and the computation of any penalties assessed under Labor Code § 1775.

(3) Notice of the right to request a hearing under these regulations, and of the manner in which, and the time within which a hearing must be requested.

(c) Said notice shall be sent by certified mail to the last known address of the contractor, and to the last known address of any affected subcontractor. The records of the State Contractors' License Board may be used to determine the address of a contractor or affected subcontractor.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.

Certificate of Compliance as to 1–20–2000 order transmitted to OAL 3–29–2000 and filed 5–4–2000 (Register 2000, No. 18).

§ 16412. Withholding, Retention, or Forfeiture.

(a) When notice has been sent as provided in section 16411, above, the awarding body shall proceed to withhold, retain, or forfeit the amount stated in the notice, pursuant to Labor Code § 1727. Such withholding, retention, or forfeiture shall be subject to the right of a contractor or affected subcontractor to request a hearing, as provided in section 16413, below, and further subject to the right of a contractor or a contractor's assignee to bring suit against the awarding body as provided by Labor Code §§ 1731–1733.

(b) Nothing in these regulations shall extend, or affect in any way, the statutory time limits provided by Labor Code §§ 1731–1733.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.
5. Certificate of Compliance as to 1–20–2000 order transmitted to OAL 3–29–2000 and filed 5–4–2000 (Register 2000, No. 18).

§ 16413. Request for Hearing.

(a) A contractor or subcontractor desiring a hearing regarding the withholding, retention, or forfeiture of an amount may request such a hearing by letter postmarked within 30 days of the date of the mailing of the notice provided by section 16411, above, mailed to the awarding body, and to:

DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
455 GOLDEN GATE AVENUE, 9TH FLOOR
SAN FRANCISCO, CALIFORNIA 94102

(b) A request for hearing shall contain a statement of all factual and legal grounds upon which the withholding is contested, identifying the specific element or elements, issue or issues, being contested, including, but not limited to:

(1) the classification of workers included in the computation of wages found to be due;

(2) the hours worked by such workers;

(3) the prevailing wage requirements applicable to such classifications;

(4) the amounts paid to such workers;

(5) the assessment and computation of statutory penalties;

(6) any erroneous mathematical calculations.

Assertions of fact included in the statement shall be supported by documentary evidence, e.g., time cards, canceled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidence which reflect job assignments, work schedules by days and hours, and evidence of the disbursement by way of cash, check, or in whatever form or manner, of funds to a person or persons by job classification and/or skill, and, if appropriate, declarations under penalty of perjury.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.
5. Certificate of Compliance as to 1–20–2000 order transmitted to OAL 3–29–2000 and filed 5–4–2000 (Register 2000, No. 18).

§ 16414. Hearing.

(a) Upon receipt of a timely request for a hearing, the Labor Commissioner, or his or her deputy or agent shall, within 30 days, hold a hearing to determine whether reasonable cause exists to withhold and retain the funds identified in the notice provided under section 16411, above.

(b) The hearing date may be continued at the request of the party seeking the hearing upon a showing of good cause.

(c) The burden of proof at such hearing shall be as provided in Labor Code § 1733.

(d) Within 15 days after the conclusion of the Hearing the Hearing Officer shall issue a decision which affirms, modifies or dismisses the Notice to Withhold. This decision shall consist of a notice of findings, findings, and an order which shall be served on the awarding body and on all parties to the hearing by first class mail at the last known address of the parties on file with the Labor Commissioner. The awarding body shall promptly abide by any decision of the Labor Commissioner with respect to the notice to withhold.

(e) The hearing pursuant to this section shall only determine whether reasonable cause exists for the withholding, retention, or forfeiture of funds pursuant to Labor Code § 1727. A hearing pursuant to this section shall not be deemed to be dispositive as to the contractor's (or affected subcontractor's) compliance with prevailing wage laws. Any decision rendered shall have no res judicata or collateral estoppel effect, and will not preclude the Labor Commissioner from pursuing any action provided by Labor Code § 1775 or any other statutory or common law remedy against any party. Neither the failure of a party to request a hearing nor the Labor Commissioner's decision after a hearing shall preclude the contractor or affected subcontractor from pursuing any other remedy provided by existing law.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10–4–99 as an emergency, including amendment of subsection (d); operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.
5. Certificate of Compliance as to 1–20–2000 order, including amendment of subsection (d), transmitted to OAL 3–29–2000 and filed 5–4–2000 (Register 2000, No. 18).

Subchapter 4. Awarding Body Labor Compliance Programs

Article 1. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs

§ 16425. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs.

(a) No contracts shall be subject to LCP jurisdiction nor shall the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) apply to any contract of an awarding body until after the LCP has received initial or final approval under these regulations.

(b) Contracts for which the Date of Notice or the Call for Bids are subsequent to the date of initial or final approval of a LCP are subject to Labor Code Section 1771.5. In the case of a contract for which there is no Call for Bids, the applicable date shall be the date of execution of the contract.

(c) Revocation of approval of a LCP by the Director shall not affect the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) if the date of such revocation is subsequent to the Date of Notice or Call for Bids or, in the case of a contract for which there is no Call for Bids, subsequent to the date of execution of the contract.

(d) If the Director revokes approval of a LCP, the Director shall give notice to the awarding body specifying enforcement responsibilities, including enforcement actions pending hearing, as of the date of revocation.

(e) An awarding body may voluntarily terminate its LCP. With respect to each contract pending on the date of termination, the awarding body shall:

(1) Notify the Director of its intention and the effective date of the termination;

(2) Notify the contractor(s) and the DLSE of the identity of the agent who will carry out the compliance enforcement obligations of Labor Code Section 1771.5 on the remaining contracts; and

(3) Specify the general fund into which penalties or forfeitures withheld from any contract payments shall be deposited.

(f) The Labor Commissioner may, in writing, agree to assume enforcement obligations on pending contracts of an awarding body which has voluntarily terminated its LCP. In such case, penalties and forfeitures shall be deposited in the general fund of the state.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13). For prior history of subchapter 4 (sections 16209–16209.6), see Register 82, No. 51.

Article 2. Approval and Revocation of Approval of Labor Compliance Programs by Director

§ 16426. Initial Approval.

(a) An awarding body seeking approval of a LCP shall submit evidence of its ability to operate its LCP. Prior to granting approval, the Director shall consider the following factors:

(1) Experience and training of the awarding body's personnel on public works labor compliance issues;

(2) The average number of public works contracts the awarding body annually administers;

(3) Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved;

(4) The awarding body's record of taking cognizance of Labor Code violations and of withholding in the preceding five years;

(5) The availability of legal support for the LCP;

(6) The availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body; and

(7) The method by which the awarding body will transmit notice to the Labor Commissioner of willful violations as defined in Labor Code Section 1777.1(d).

(b) The Director shall notify the awarding body within 30 days of receipt of the request for approval that initial approval is granted and the effective date of initial approval, or that the request is incomplete and of the materials necessary to complete the request or that the request is disapproved for other reasons.

(c) Initial approval of a LCP shall automatically expire one year after approval unless an extension is requested in writing and granted in writing by the Director at least thirty days prior to the anniversary date of the approval. Where necessary to coordinate with the local government's fiscal year or existing public works procedures, initial approval may be for a period up to 18 months.

(d) The Director will maintain a list of all initially approved LCPs for distribution to interested parties upon request.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5, 1771.6 and 1777.1, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16427. Final Approval.

(a) An awarding body which has operated a LCP for 11 continuous months after initial approval may apply to the Director for final approval. The awarding body bears the burden of producing evidence that it meets the criteria in (b).

(b) The Director will grant final approval if the awarding body has satisfactorily demonstrated its ability to monitor compliance with the requirements of the Labor Code and these regulations, and has filed timely, complete, and accurate reports as required by these regulations.

(c) The Director shall notify the awarding body within 30 days of the receipt of a request for final approval that final approval is granted and the effective date of final approval, or that the request for final approval is denied, the reason for the denial and the status of the LCP program.

(d) An awarding body which has received final approval of its LCP may enter into an agreement with the Labor Commissioner which may provide for procedures and for securing approval of forfeitures in a manner different from that set forth in Section 16437, and for alternate procedures for appeals of enforcement actions to the Director.

(e) The Director will maintain a list of all finally approved LCPs, for distribution to interested parties upon request. The Director may agree to alternative reporting formats under Section 16431 of these regulations and shall maintain a list of interested parties who wish notification of alternative reporting formats before adoption.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16428. Revocation of Final Approval.

(a) The Director may revoke final approval of a LCP only after giving due notice to the awarding body, conducting a hearing, and finding cause for revocation.

(1) Cause for revocation of final approval includes, but is not limited to:

(A) Failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take appropriate enforcement action for violations of which it becomes or should have become cognizant;

(B) Failure of the awarding body to file timely, complete, and accurate reports to the Director as required by Section 16431 or elsewhere in these regulations.

(b) Interested parties may request the Director revoke final approval of a LCP. A request for revocation shall include evidence of failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take enforcement action after becoming cognizant of a violation of the Labor Code or these regulations. A request for revocation shall also include any other relevant evidence.

(1) Final approval of a LCP may be revoked by the Director based on a request by an interested party after a proceeding conducted as provided in subdivision (a). A copy of the request for revocation shall be provided to the awarding body as part of the notice required under subdivision (a).

(2) As part of a proceeding for revocation of final approval based on a request by an interested party, the Director may require the awarding body to furnish a supplemental report for the period between the ending date of the last annual report filed by the awarding body pursuant to Section 16431 and the date of notice by the Director, and containing the information listed in subdivision (a) of said Section 16431.

(3) Revocation of final approval of a LCP based on a request by an interested party is solely within the discretion of the Director. The duty of an awarding body to carry out its LCP runs solely to the Director and not to any worker, contractor, or interested party. The sole remedy for failure of an awarding body's duty is revocation of approval by the Director.

(c) Upon determining that the request for revocation will be denied without hearing, the Director shall notify the LCP, awarding body and requesting party of the decision and of the reasons therefore by mail.

(d) Upon determining that a hearing is necessary, the parties will be notified and a hearing on cause for revocation of final LCP approval will be held in accordance with the procedures for notice and hearing proceedings set forth in 8 CCR Section 16304.

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

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 3. Notice and Components of LCP

§ 16429. Notice of LCP Approval.

(a) Notice of initial or final approval of an awarding body's LCP shall be given in the Call for Bids and in the contract or purchase order and shall also be posted at the job site. If more than one job site exists or where such posting would endanger public safety, the notice may be posted in the manner prescribed by 8 CCR Section 16100(b).

(b) Notice of an approved LCP shall contain, at the minimum, the effective date of the Director's initial or final approval, a statement that the limited exemption from prevailing wages pursuant to Labor Code Section 1771.5(a) applies to the contract, a telephone number to call for inquiries, questions, or assistance with regard to the LCP, and the name of the agent or office administering the LCP, if different from the awarding body.

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

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16430. Components of LCP.

(a) In accordance with Labor Code Section 1771.5(b), a LCP shall include, but not be limited to, the following requirements:

(1) The Call for Bids and the contract or purchase order shall contain appropriate language concerning the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(2) A prejob conference shall be conducted before commencement of the work with contractors and subcontractors listed in the bid, at which time federal and state labor law requirements applicable to the contract 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 presumptively meets this requirement;

(3) A requirement that certified payroll records be kept by the contractor in accordance with Labor Code Section 1776 and furnished to the awarding body at times designated in the contract or within 10 days of request by the awarding body. The awarding body may create a form meeting the minimum requirements of (a) hereinafter "Certified Weekly Payroll." Use of the current version of DIR's "Public Works Payroll Reporting Form" (A–1–131) (New 2–80) constitutes full compliance with this requirement by the awarding body. A copy of this suggested form follows Title 8 CCR Section 16500;

(4) A program for orderly review of payroll records and, if necessary, for audits to verify compliance with the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(5) A prescribed routine for withholding penalties, forfeitures, and underpayment of wages for violations of the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code;

(6) All contracts to which prevailing wage requirements apply shall include a provision that contract payments shall not be made when payroll records are delinquent or inadequate.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1771.5(b), Labor Code.

HISTORY

1. New section and Appendix filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Appendix A

Suggested Checklist of Labor Law Requirements to Review at Prejob Conference, Section 16430.

The federal and state labor law requirements applicable to the contract are composed of but not limited to the following items:

[The next page is 1414.3.]

(1) The contractor's duty to pay prevailing wages under Labor Code Section 1770 et seq., should the project exceed the exemption amounts;

(2) The contractor's duty to employ registered apprentices on the public works project under Labor Code Section 1777.5;

(3) The penalties for failure to pay prevailing wages (for non-exempt projects) and employ apprentices including forfeitures and debarment under Labor Code Sections 1775 and 1777.7;

(4) The requirement to keep and submit copies upon request of certified payroll records under Labor Code Section 1776, and penalties for failure to do so under Labor Code Section 1776(f);

(5) The prohibition against employment discrimination under Labor Code Section 1777.6; the Government Code, and Title VII of the Civil Rights Act of 1964;

(6) The prohibition against accepting or extracting kickback from employee wages under Labor Code Section 1778;

(7) The prohibition against accepting fees for registering any person for public work under Labor Code 1779; or for filling work orders on public works under Labor Code Section 1780;

(8) The requirement to list all subcontractors under Government Section 4100 et seq;

(9) The requirement to be properly licensed and to require all subcontractors to be properly licensed and the penalty for employing workers while unlicensed under Labor Code Section 1021 and under the California Contractors License Law, found at Business and Professions Code Section 7000 et seq;

(10) The prohibition against unfair competition under Business and Professions Code Section 17200–17208;

(11) The requirement that the contractor be properly insured for Workers Compensation under Labor Code Section 1861;

(12) The requirement that the contractor abide by the Occupational, Safety and Health laws and regulations that apply to the particular construction project;

(13) The requirement to provide affirmative action for women and minorities as required in the Public Contracts Code and in the contract;

(14) The prohibition against hiring undocumented workers, and the requirement to secure proof of eligibility/citizenship from all workers.

§ 16431. Annual Report.

The awarding body shall submit to the Director an annual report on the operation of its LCP within 60 days after the close of its fiscal year, or accompany its request for an extension of initial approval, whichever comes first. The annual report shall contain, at the minimum, the following information:

(1) Number of contracts awarded, and their total value;

(2) The number, description, and total value of contracts awarded which were exempt from the requirement of payment of prevailing wages pursuant to Labor Code Section 1771.5(a);

(3) A summary of penalties and forfeitures imposed and withheld, or recovered in a court of competent jurisdiction;

(4) A summary of wages due to employees resulting from failure by contractors to pay prevailing wage rates, the amount withheld from money due the contractors, and the amount recovered by action in any court of competent jurisdiction.

(b) A LCP whose contract responsibilities are statewide, or which involves widely dispersed and numerous contracts, or which is required to report contract enforcement to federal authorities in a federal format, may adopt a summary reporting format to aggregate small contracts and estimate numbers and dollar values required by (a)(1) and (2). A summary reporting format may be adopted by agreement with the Director after advance notice to interested parties, and a list of parties requesting such notice shall be kept by the Director.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5, 1771.6 and 1777.1, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16432. Audits.

(a) Audits may be conducted when deemed necessary by the awarding body and shall be conducted upon request of the Labor Commissioner.

(1) An audit consists of a comparison of payroll records to the best available information as to the actual hours worked and classifications of workers employed on the contract. An audit is sufficiently detailed when it enables the LCP, and the Labor Commissioner in reviewing proposed penalties, to draw reasonable conclusions as to compliance with the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code, and to enable accurate computation of underpayment of wages to workers and of applicable penalties and forfeitures. Records shall be made available to show that the audits conducted are sufficiently detailed to verify compliance with the requirements of Chapter 1 of Part 7 of Division 2. An audit record in the form set out in Appendix B presumptively demonstrates sufficiency.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 224, 226, 1773.2, 1776, 1777.5, 1778, 1810, 1815, 1860 and 1861, Labor Code.

HISTORY

1. New section and Appendix filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Appendix B

Audit Record Form (suggested for use with Section 16432 audits)

An audit record is sufficiently detailed to "verify compliance with the requirements of Chapter"1, Public Works, of Part 7 of Division 2, when the audit record displays that the following procedures were accomplished:

(1) Audits of the obligation to secure workers' compensation means demanding written evidence of a binder issued by the carrier, or telephone or written inquiry to the Workers' Compensation Insurance Rating Bureau;

(2) Audits of the obligations to employ and train apprentices means inquiry to the program sponsor for the apprenticeable craft or trade in the area of the public works as to: whether contract award information was received, including an estimate of journeyperson hours to be performed and the number of apprentices to be employed; whether apprentices have been requested, and whether the request has been met; whether the program sponsor knows of any amounts sent by the contractor or subcontractor to it for the training trust, or the California Apprenticeship Council; and whether persons listed on the certified payroll in that craft or trade as being paid less than the journeyperson rate are apprentices registered with that program and working under apprentice agreements approved by the Division of Apprenticeship Standards;

(3) Audits of the obligation to pass through amounts made part of the bid for apprenticeship training contributions, to either the training trust or the California Apprenticeship Council, means asking for copies of checks sent, or when the audit occurs more than 30 days after the month in which payroll has been paid, copies of canceled checks;

(4) Audits of "illegal taking of wages" means inspection of written authorizations for deductions (listed in Labor Code Section 224) in the contractor or subcontractor's files and comparison to wage deduction statements furnished employees (Labor Code Section 226), together with an interview of several employees as to any payments not shown on the wage deduction statements;

(5) Audits of the obligation to keep records of working hours, and pay not less than required by Title 8 CCR Section 16200(a)(3)(F) for hours worked in excess of 8 hours are the steps for review and audit of Certified Weekly Payrolls under Title 8 CCR Section 16432;

(6) Audits of the obligations to pay the prevailing per diem wage, means such steps for review and audit of Certified Weekly Payrolls which will produce a report covering compliance in the areas of:

(A) All elements defined as the "General Prevailing Rate of Per Diem Wages" in Title 8 CCR Section 16000, which were determined to be prevailing in the Director's determination which was in effect on the date of the call for bids, available in its principal office, and posted;

(B) All elements defined as "Employer Payments" set forth in Section 16000 of these regulations, which were determined to be prevailing in the Director's determination which was in effect on the date of the call for bids, and pursuant to Labor Code Section 1773.2 was to be specified in the call for bids, made available in its principal office and posted.

Article 4. Limited Exemption from the Requirement to Pay Prevailing Wages

§ 16433. Limited Exemption.

(a) As provided in Labor Code Section 1771.5, an awarding body having a LCP approved by the Director in accordance with these regulations shall not require payment of the general rate of per diem wages or the general rate of per diem wages for holiday and overtime work for any public works project of $25,000 or less when the project is for construction work, or of $15,000 or less when the project is for alteration, demolition, repair, or maintenance work.

(b) A project for construction, alteration, demolition, repair, or maintenance work shall be identified as such in the call for bids, and in the contract or purchase order.

(c) If the amount of a contract subject to subdivision (a) is changed and, as a result, exceeds the applicable limit under which the payment of the general rate of per diem wages is not required, workers employed on the contract after the amount due the contractor has reached the applicable limit shall be paid the general rate of per diem wages for regular, holiday or overtime work, as the case may be.

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

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 5. Enforcement

§ 16434. Duty of Awarding Body.

(a) An awarding body having an initially or finally approved LCP shall have a duty to the Director to enforce the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code and these regulations in a manner consistent with the practice of DLSE, as set forth in Divisions 2 and 3 of the Labor Code, and published regulations thereunder, where substantive standards are not set out by regulations under this Title 8, group 4.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16435. Withholding 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, 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 the information required by Labor Code Section 1776;

(2) A record which contains the required information but not certified, or certified by someone not an agent of the contractor or subcontractor;

(3) A record remaining uncorrected for one payroll period, after the awarding body has given the contractor notice of inaccuracies detected by audit or record review. Provided, however, that prompt correction will stop any duty to withhold if such inaccuracies do not amount to 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 Title 8 CCR Section 16401.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1729, 1776, 1777.5, 1778, 1813 and 1815, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16435.5. Withholding Contract Payments Equal to the Amount of Underpayment and Applicable Penalties When, After Investigation, It Is Established That Underpayment Has Occurred.

(a) "Withhold" as defined in Section 16435(a) of these regulations.

(b) "Contracts" as defined in Section 16435(b) of these regulations.

(c) "Amount equal to the underpayment" is the total of the following determined by payroll review, audit, or admission of contractor or subcontractor:

(1) The difference between amounts paid workers and the correct General Prevailing Rate of Per Diem Wages, as defined in Title 8 CCR Section 16000, and determined to be the prevailing rate due workers in such craft, classification or trade in which they were employed and the amounts paid;

(2) The difference between amounts paid on behalf of workers and the correct amounts of Employer Payments, as defined in Title 8 CCR Section 16000 and determined to be part of the prevailing rate costs of contractors due for employment of workers in such craft, classification or trade in which they were employed and the amounts paid;

(3) Estimated amounts of "illegal taking of wages";

(4) Amounts of apprenticeship training contributions paid to neither the program sponsor's training trust nor the California Apprenticeship Council;

(5) Estimated penalties under Labor Code Sections 1775, 1776, 1777.7 and 1813.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1729, 1775, 1776, 1777.5, 1777.7, 1778, 1813 and 1815, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16436. Forfeitures Requiring Approval by the Labor Commissioner.

(a) "Forfeitures" are the amounts of unpaid penalty and wage money assessed by the awarding body for violations of the prevailing wage laws, whether collected by withholding from the contract amount or by suit under the contract, or provisions of this Chapter.

(b) "Failing to pay the correct rate of prevailing wages" means those public works violations which the Labor Commissioner has exclusive authority to approve before they are recoverable by the Labor Compliance Program, and which are appealable by the contractor in court or before the Director under Labor Code Section 1771.7. Regardless of what are defined as "prevailing wages" in contract terms, non–compliance with the following are failures to pay prevailing wages.

(1) Nonpayment of items defined as "Employer Payments" and "General Prevailing Rate of Per Diem Wages" in Title 8 CCR Section 16000 and Labor Code Section 1771.

(2) Payroll records required by Labor Code Section 1776.

(3) Labor Code Section 1777.5, but only insofar as the failure consisted of paying apprentice wages lower than the journeyperson rate to a person who is not an apprentice as defined in Labor Code Section 3077, working under an apprentice agreement in a recognized program.

(4) Labor Code Section 1778, Kickbacks.

(5) Labor Code Section 1779, Fee for registration.

(6) Labor Code Sections 1813, 1815, and Title 8 CCR Section 16200(a)(3)(F) overtime for work over 8 hours in any one day or 40 hours in any one week.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771, 1771.5, 1777.5, 1776, 1779, 1813, 1815 and 3077, Labor Code.

HISTORY

1. New section filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

§ 16437. Determination of Amount of Forfeiture by the Labor Commissioner.

(a) Where the LCP of the awarding body requests a determination of the amount of forfeiture, the request shall include a file or report to the Labor Commissioner which contains at least the following information:

(1) The deadline by which contract acceptance of filing of a notice of completion, under Labor Code Section 1775, plus 90 days, will occur;

(2) Any other deadline which if missed would impede collection;

(3) Evidence of violation, in narrative form;

(4) Evidence that an "audit" or "investigation," as defined in Section 16432 of these regulations, occurred;

(5) Evidence that the contractor was given the opportunity to explain why there was no violation, or that any violation was caused by mistake, inadvertence, or neglect, before the forfeiture was sent to the Labor Commissioner, and the contractor either did not do so, or failed to convince the awarding body of its position;

(6) Where the LCP of the awarding body seeks not only amounts of wages but also a penalty as part of the forfeiture, and the contractor has unsuccessfully contended that the cause of violation was mistake, inadvertence, or neglect, a short statement should accompany the proposal for a forfeiture, with a recommended penalty amount pursuant to Labor Code Section 1775;

(7) Where the LCP of the awarding body seeks only wages or a penalty less than $50 per day as part of the forfeiture, and the contractor has successfully contended that the cause of the violation was mistake, inadvertence, or neglect, then the file should include the evidence as to the contractor's knowledge of his or her obligation, including the program's communication to the contractor of the obligation in the bid invitations, at the prejob conference agenda and records, and any other notice given as part of the contracting process. With the file should be a statement, similar to that described in (6), and recommended penalty amounts, pursuant to Labor Code Section 1775;

(8) The previous record of the contractor in meeting his or her prevailing wage obligations.

(9) Whether the LCP has been granted initial, extended initial or final approval.

(b) The file or report shall be served on the Labor Commissioner not less than 30 days before the final payment or, if that deadline has passed, not less than 90 days before the expiration of the deadline to file suit under Labor Code Section 1775.

(c) A copy of the recommended forfeiture and the file or report shall be served on the contractor at the same time as it is sent to the Labor Commissioner. The awarding body may exclude from the documents served on the contractor copies of documents secured from the contractor during an audit, investigation, or meeting if those are clearly referenced in the file or report. Along with the copy served on the contractor shall be a notice stating all deadlines and rights of the contractor to contest the amount of forfeiture. A Notice of Deadlines in the format set out in Appendix C will presumptively fulfill the requirements of this subsection;

(d) The Labor Commissioner shall affirm, reject, or modify the forfeiture in whole or in part as to penalty, and/or wages due.

(e) The Labor Commissioner's determination of the forfeiture is effective on one of the two following dates:

(1) For programs with initial approval or an extension of initial approval pursuant to Section 16426 of these regulations, on the date the Labor Commissioner serves by first class mail, on the political subdivision and on the contractor, an endorsed copy of the proposed forfeiture, or a newly drafted forfeiture statement which sets out the amount of forfeiture approved. Service on the contractor is effective if made on the last address supplied by the contractor in the record. The Labor Commissioner's approval, modification or disapproval of the proposed forfeiture shall be served within 30 days of receipt of the proposed forfeiture or no more than 30 days after the notice of completion has been filed.

(2) For programs with final approval, approval is effective 20 days after the requested forfeitures are served upon the Labor Commissioner, unless the Labor Commissioner serves a notice upon the parties, within that time period, that this forfeiture request is subject to further review. For such programs, a notice that approval will follow such a procedure will be included in the transmittal of the forfeiture request to the contractor. The Labor Commissioner's final approval, modification or disapproval of the proposed forfeiture shall be served within 30 days of the date of receipt of the proposed forfeiture or no more than 30 days after the notice of completion has been filed, unless some other procedure has been adopted pursuant to 8 CCR Section 16427(d).

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1775, Labor Code.

HISTORY

1. New section and Appendix filed 2-20-92; operative 3-23-92 (Register 92, No. 13).

Appendix C

Notice of Deadlines

(To Go to Contractor for Forfeitures under Section 16437)

"This document requests the Labor Commissioner of California to approve a forfeiture of money you otherwise would be paid. The [name of the labor compliance program] for the [name of the awarding body having this work done] is asking the Labor Commissioner of California to agree, in 20 days, that the enclosed package of materials indicates that you have violated the law."

"Failure to respond to the [name of the labor compliance program's] request that the Labor Commissioner approve a forfeiture by writing to the Labor Commissioner within 20 days of the date of service (date of postmark) of this document on you may lead the Labor Commissioner to affirm the proposed forfeiture, and may also end your right to contest those amounts further. You must serve any written response on the Labor Commissioner, the [name of the labor compliance program] and [name of the awarding body] by return receipt requested/certified mail. If you serve a written explanation, with evidence, as to why the violation did not occur, or why the penalties should not be assessed, within the 20 day period, it will be considered,"

and

"If you change address, or decide to hire an attorney, it is your responsibility to advise both the [name of the Labor Compliance Program] and the Labor Commissioner by certified mail. Otherwise, notices will be served at your last address on file, and deadlines might pass before you receive such notices."

§ 16438. Deposits of Penalties and Forfeitures Withheld.

(a) Where the involvement of the Labor Commissioner has been limited to a determination of the actual amount of penalty, forfeiture or underpayment of wages, and the matter has been resolved without litigation by or against the Labor Commissioner, the awarding body having a LCP shall deposit penalties and forfeitures in its general fund. If an approved LCP is operated through an agent, penalties and forfeitures shall be deposited as provided in the agreement designating the agent for the awarding bodies involved.

(b) Where collection of fines, penalties or forfeitures results from court action to which the Labor Commissioner and awarding body are both parties, the fines, penalties or forfeitures shall be divided between the general funds of the state and the awarding body, as the court may decide.

(c) All amounts recovered by suit brought by the Labor Commissioner and to which the awarding body is not a party, shall be deposited in the general fund of the state.

(d) All wages and benefits which belong to an employee and are withheld or collected from a contractor or sub-contractor, either by withholding or as a result of court action pursuant to Labor Code Section 1775, and which have not been paid to the employee or irrevocably committed

the employee's behalf to a benefit fund, shall be deposited with the Labor Commissioner, who shall handle such wages and benefits in accordance with Labor Code Section 96.7.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.6 and 1775, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16439. Appeals of a Labor Compliance Program Enforcement Action.

(a) A contractor may appeal the result of a LCP enforcement action by serving a notice of appeal on the Director of Industrial Relations as an alternative to going to court under Labor Code Section 1732. Such notice must be served within 20 days of the date a determination of forfeiture has been approved by the Labor Commissioner. A copy of the notice of appeal shall be served on the awarding body and the LCP at the same time as it is sent to the Director. Appeal of a LCP enforcement action to the Director of Industrial Relations waives the contractor's right to file suit pursuant to Labor Code Section 1732.

(b) The notice shall state the grounds for the appeal, and whether a hearing is desired. The decision to hold a hearing is within the sole discretion of the Director and shall be dependent upon whether the appeal is timely, the matter is within the scope of Labor Code Section 1732, and the material furnished by the record already in the file is insufficient for a fully informed decision. The Director may appoint a hearing officer to review the record below (subsection (c)), hold a hearing and recommend a decision. The Director shall make the final decision on the appeal.

(c) Upon receipt of a copy of the notice of appeal, the awarding body shall, within 30 days, forward to the Director a full copy of the record of enforcement proceedings and any further documents, arguments, or authorities it wishes to have considered in the appeals process. Accompanying those materials shall be a declaration of service on the contractor although materials already served in the process of seeking Labor Commissioner approval may be listed rather than re-served.

(d) The Director may request a supplemental report on the activities of the Labor Compliance Program. This report will be an update of the annual report required in 8 CCR Section 16431.

(e) Upon receipt of the notice of appeal, and all documentation referred to in section (c) above, the Director shall have 90 days in which to issue a determination. If additional time is required due to the complexity of the issues, or for other good cause, the Director shall have the right, upon notice to the parties to one 30 day extension of the time in which to issue the determination.

(f) The Director's ruling on the appeal shall be final.

NOTE: Authority cited: Sections 54, 55 and 1773.5, Labor Code. Reference: Section 1771.7, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 6. Severability

§ 16500. Severability.

If any provision of the regulations in Group 3 or Group 4 or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these regulations which can be given effect without the invalid provisions or applications, and to this end the provisions of these regulations are severable.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1773.5, Labor Code.

HISTORY

1. Amendment filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 8. Debarment

§ 16800. Definitions.

In addition to the definitions of "Contractor," "Subcontractor," "Awarding Body," "Political Subdivision," "Public Works," and any other applicable terms, found in Group 3. Payment of Prevailing Wages upon Public Works, article 17 section 16000, the following terms are defined for general use in this article.

"Substantial Interest" means an interest of twenty percent (20%) of a corporation, limited partnership or similar entity and includes an individual holding the position of responsible managing employee, qualifying responsible managing officer or general partner regardless of the percentage interest in the entity.

"Fraud" means a suggestion, as a fact, of that which is not true, by one who does not believe it to be true; or the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; or the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or a promise, made without any intention of performing it.

"Person" means an individual or legal entity, including, but not limited to, any firm, corporation, partnership, limited partnership, agency, association, organization or trust, and includes, where applicable, the public agencies, awarding bodies and any agent or officer thereof authorized to act for or on behalf of any of the foregoing.

"Firm" means, but is not limited to, any individual, corporation, partnership, limited partnership, agency, association, organization or trust operating a business in the State of California whether or not licensed or permitted to do so.

"Intent to Defraud" means the intent to deceive another person or entity, as defined in this article, and to induce such other person or entity, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property of any kind.

"Deliberately" means premeditated and intentional and does not include inadvertent error.

"Respondent" means any person or entity subject to the proceedings set forth in this article.

NOTE: Authority cited: Section 1777.1(e), Labor Code. Reference: Section 1777.1, Labor Code.

HISTORY

1. New section filed 4–5–90 as an emergency; operative 4–5–90 (Register 90, No. 14). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8–3–90.
2. New section filed 9–4–90 as an emergency readoption effective 9–4–90 (Register 90, No. 42). A Certificate of Compliance must be transmitted to OAL by 1–2–91 or emergency language will be repealed on the following day.
3. Repealed on January 3, 1991 by operation of Government Code section 11346.1(g) (Register 91, No. 12).
4. New section filed 2–13–91; operative 2–13–91 (Register 91, No. 12).

§ 16801. Investigations: Duties, Responsibilities and Rights of the Parties.

(a) Division of Labor Standards Enforcement. The Division of Labor Standards Enforcement (hereinafter "DLSE") may investigate any alleged violation of the provisions of chapter 1, part 7 of the California Labor Code for purposes of enforcing Labor Code section 1777.1. Investigations pursuant to section 1777.1 are for the purpose of determining a Respondent's willful violation, or violation with the intent to defraud, of the provisions of chapter 1, part 7 of the California Labor Code, with the exception of section 1777.5.

(1) Where a preliminary investigation reveals that there is insufficient evidence to continue the investigation, DLSE may close the investigation and shall notify the Respondent and awarding body in writing.

(2) In the event an investigation of any Respondent reveals a violation of Labor Code section 1777.1, DLSE shall notify the awarding body in writing and shall serve upon the Respondent a Notice of Hearing together

with a Statement of Alleged Violations, which shall specifically set forth DLSE's allegations against the Respondent.

(A) Service of both the Notice of Hearing and Statement of Alleged Violations shall be complete when mailed, by first class postage, to the last address of record for the Respondent listed with the State Contractors License Board or, in the event the Respondent is not licensed by the State Contractors License Board, the last known address of the Respondent available to the awarding body or, in the case of a subcontractor, the last known address available to the general contractor with whom the subcontractor contracted in the performance of the public works project under investigation. In the event there is neither an address of record with the State Contractors License Board or the awarding body or general contractor, the Notice of Hearing and Statement of Alleged Violations shall be served pursuant to the provisions of the Code of Civil Procedure, sections 415.10 – 415.50. concerning the service of civil summons.

(B) The Notice of Hearing shall list the date, time and place of the hearing which shall not be scheduled sooner than forty–five days after the date of the mailing of the Notice of Hearing and Statement of Alleged Violations.

(C) The Respondent shall have the opportunity to review and copy such records from the investigative file of DLSE which are not subject to either attorney–client or work product privileges. The Respondent shall be entitled to a reasonable number of subpoenas but shall be liable for any costs of service of the subpoenas, or any other witness or mileage fees incurred.

Mileage and Witness fees shall be set as specified in Government Code section 68093. In the exercise of his or her discretion, the Hearing Officer may limit the number of witnesses subpoenaed either for the purpose of corroboration or for establishing a single material fact in issue, or where the Respondent has not furnished satisfactory evidence that the witness will be able to give necessary and competent testimony material to the issues at the hearing.

[The next page is 1415.]

(D) In presiding over a hearing conducted pursuant to section 1777.1(c), the Hearing Officer shall control the order of presentation of evidence, and shall direct and rule on matters concerning the conduct of the hearing and of those persons appearing. The hearing shall be conducted in an informal setting preserving the rights of the Respondent. The formal rules of evidence shall not apply and any relevant evidence may be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. However, no determination shall be made based solely upon any evidence which would not be admissible, over objection, in a court of law in this state.

(E) The hearing shall be phonographically recorded. The Respondent may request a copy of the recording, and shall bear all costs incidental to the preparation of same. The Respondent may arrange to have the hearing reported by a certified court reporter and shall bear all cost incidental thereto. If the record of the hearing is transcribed by the Respondent, a copy thereof shall be provided to the Labor Commissioner free of any cost within five (5) days of such transcription.

(F) Oral evidence at the hearing shall be taken only upon oath or affirmation. The Respondent shall have the right to call and examine witnesses, to introduce exhibits and to rebut the evidence against him or her.

(G) Any Respondent to a proceeding hereunder may, but need not, be represented by legal counsel during the entire course of the investigation, including the hearing.

(H) Continuances of hearings scheduled pursuant to Labor Code section 1777.1(c) ordinarily will not be granted. The Hearing Officer, in the exercise of his or her sound discretion, may grant a continuance of the hearing only upon a showing of extraordinary circumstances and good cause.

(I) At the conclusion of the hearing the Hearing Officer may take the matter under submission or allow the introduction of post hearing briefs. The Hearing Officer shall prepare a Findings of Fact and Conclusions and a proposed Determination which shall contain the recommended penalty, if applicable. The Labor Commissioner or his designee shall have the right to modify, change or adopt the proposed Findings of Fact and Conclusions, the proposed Determination and any recommended penalty. No Determination or penalty shall be final until adopted by the State Labor Commissioner.

(J) The Determination of the Labor Commissioner after the hearing shall be served on the Respondent as provided in subdivision (A), above.

(K) In the event that the Determination of the Labor Commissioner results in an order to debar the Respondent, DLSE shall notify through the Division of Labor Statistics and Research all awarding bodies of such Determination immediately upon service of the Determination on the Respondent. In addition, DLSE shall maintain a record of each and every debarment under the provisions of Labor Code section 1777.1 for a period of 5 years from the date of the debarment, and shall list the name and last known address of the debarred contractor or subcontractor, the date of the debarment and the term of the debarment, and shall make that information available to the public, upon written request, which encloses a self-addressed and stamped envelope.

(b) Awarding Bodies. Any awarding body which has awarded or let a contract or purchase order to be paid for in whole or in part from public funds calling for the construction, alteration, demolition, repair, maintenance, or improvement of any structure, building, road, property, or other improvement of any kind (including the laying of carpet and the hauling of refuse from a public works site to an outside disposal location with respect to contracts involving any state agency, including the California State University and University of California) shall, in accordance with Labor Code section 1776(g), inform prime contractors of the requirements of Labor Code section 1776, and any other requirements imposed by law, in order to assist DLSE with an investigation pursuant to Labor Code 1777.1. The awarding body shall have the right to review the records from the investigative file of DLSE which are not covered by attorney- client or work product privileges, and which are not being utilized in the ongoing investigation of a criminal offense.

(c) Contractors and Subcontractors. All contractors and subcontractors, including Respondents, who have contracted to perform services on a public works project shall comply with Labor Code 1776, and any other requirements imposed by law, in order to assist DLSE with an investigation pursuant to Labor Code section 1777.1.

NOTE: Authority cited: Section 1777.1(e), Labor Code. Reference: Section 1777.1, and Section 92, Labor Code.

HISTORY

1. New section filed 4–5–90 as an emergency; operative 4–5–90 (Register 90, No. 14). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8–3–90.
2. New section filed 9–4–90 as an emergency readoption effective 9–4–90 (Register 90, No. 42). A Certificate of Compliance must be transmitted to OAL by 1–2–91 or emergency language will be repealed on the following day.
3. Repealed on January 3, 1991 by operation of Government Code section 11346.1(g) (Register 91, No. 12).
4. New section filed 2–13–91; operative 2–13–91 (Register 91, No. 12).

§ 16802. Penalties.

In the event that the Labor Commissioner determines that a violation of chapter 1 of part 7 of the Labor Code has occurred, the Hearing Officer may recommend the penalty to be imposed on the Respondent.

(a) In setting a penalty, due consideration shall be given to the nature of the offense; the amount of underpayment of wages per worker; the experience of the Respondent in the area of public works; and the Respondent's compliance with Labor Code section 1776. The above considerations shall be based upon evidence presented at the hearing and made a part of the record.

NOTE: Authority cited: Section 1777.1(e), Labor Code. Reference: Section 1777.1, Labor Code.

HISTORY

1. New section filed 4–5–90 as an emergency; operative 4–5–90 (Register 90, No. 14). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8–3–90.
2. New section filed 9–4–90 as an emergency readoption effective 9–4–90 (Register 90, No. 42). A Certificate of Compliance must be transmitted to OAL by 1–2–91 or emergency language will be repealed on the following day.
3. Repealed on January 3, 1991 by operation of Government Code section 11346.1(g) (Register 91, No. 12).
4. New section filed 2–13–91; operative 2–13–91 (Register 91, No. 12).

Subchapter 4. Employment of Aliens Not Entitled to Lawful Residence

NOTE: Authority cited: Sections 55 and 59, Labor Code. Reference: Section 2805, Labor Code.

HISTORY

1. New Group 4 (§§ 16209, 16209.1–16209.6) filed 3–24–72 as an emergency; effective upon filing (Register 72, No. 13).
2. Certificate of Compliance filed 6–2–72 (Register 72, No. 23).
3. Repealer of Group 4 (Article 1, Sections 16209, 16209.1–16209.6) filed 12–15–82 by OAL pursuant to Government Code Section 11349.7(j) (Register 82, No. 51).

Subchapter 5. Department of Industrial Relations—Conflict of Interest Code

§ 17000. General Provisions.

The Political Reform Act, Government Code Sections 81000, et seq., requires state and local government agencies to adopt and promulgate Conflict of Interest Codes. The Fair Political Practices Commission has adopted a regulation, 2 Cal. Code Regs. Section 18730, which contains the terms of a standard Conflict of Interest Code, which can be incorporated by reference, and which may be amended by the Fair Political Practices Commission to conform to amendments in the Political Reform Act after public notice and hearings. Therefore, the terms of 2 Cal. Code Regs. Section 18730 and any amendments to it duly adopted by the Fair Political Practices Commission, along with the attached Appendix in which officials and employees are designated and disclosure categories

are set forth, are hereby incorporated by reference and constitute the Conflict of Interest Code of the Department of Industrial Relations.

Pursuant to Section 4(A) of the standard Code, designated employees shall file statements of economic interests with the agency. Upon receipt of the statement of the Director, the agency shall make and retain a copy and forward the original of this statement to the Fair Political Practices Commission.

NOTE: Authority cited: Section 87306, Government Code. Reference: Sections 87300–87302 and 87306, Government Code.

HISTORY

1. New Group 5 (Articles 1–7, Sections 17000–17800, not consecutive) filed 12–2–77; effective thirtieth day thereafter. Approved by the Fair Political Practices Commission 1–19–77 (Register 77, No. 49).
2. Repealer of Group 5 (Articles 1–7, Sections 17000–17800, not consecutive) and new Group 5 (Section 17000 and Appendix) filed 2–26–81; effective thirtieth day thereafter. Approved by Fair Political Practices Commission 12–1–80 (Register 81, No. 9).
3. Repealer of section and Appendix and new section and Appendix filed 3–3–2003; operative 4–2–2003. Approved by Fair Political Practices Commission 12–19–2002 (Register 2003, No. 10).

Appendix

Department of Industrial Relations
Disclosure Categories

Category 1:

Designated employees assigned to Category 1 shall report as follows:

Investments, interests in real property, business positions and income from any source that: (1) is subject to the authority of the Department of Industrial Relations or any of its organizational components; (2) is an organization or association composed primarily of persons or entities subject to the authority of the Department of Industrial Relations or any of its organizational components; or (3) engages in or derives any of its income from providing consulting services or education seminars on matters subject to the authority of the Department of Industrial Relations or any of its organizational components.

Category 2:

Designated employees assigned to Category 2 shall report as follows:

Investments, business positions and income from any source that: (1) is subject to the authority of the Department of Industrial Relations or any of its organizational components; (2) is an organization or association composed primarily of persons or entities subject to the authority of the Department of Industrial Relations or any of its organizational components; or (3) engages in or derives any of its income from providing consulting services or educational seminars on matters subject to the authority of the Department of Industrial Relations or any of its organizational components.

Category 3:

Designated employees assigned to Category 3 shall report as follows:

Investments, interests in real property, business positions and income from any source which has sold, rented, or leased goods, facilities, supplies or equipment to the Department of Industrial Relations, or any of its organizational components, within a two year period preceding the filing date of the designated employee's disclosure statement.

Category 4:

Designated employees assigned to Category 4 shall report as follows:

Investments, business positions and income from any source which sells, rents, or leases computer or information technology equipment, supplies, facilities, software, training or consulting services.

Category 5:

Designated employees assigned to Category 5 shall report as follows:

Investments, business positions and income from any source that: (1) is subject to the authority of the Division of Workers' Compensation or the Workers' Compensation Appeals Board, including but not limited to physicians (as defined in Labor Code § 3209.3), medical facilities, language interpreters, vocational rehabilitation practitioners, investigators, medical billing and lien collection agencies, workers' compensation insurance carriers and claims administrators, and self–insured employers; (2) is an organization or association composed primarily of persons or entities subject to the authority of the Division of Workers' Compensation or the Workers' Compensation Appeals Board; or (3) engages in or derives any of its income from providing consulting services or educational seminars on workers' compensation issues. Workers' Compensation Judges shall also comply with the California Code of Judicial Ethics.

Category 6:

Designated employees assigned to Category 6 shall report as follows:

Investments, business positions and income from any source that: (1) is subject to the authority of the Industrial Medical Council or the Division of Workers' Compensation, including but not limited to physicians (as defined in Labor Code § 3209.3), medical facilities, language interpreters, vocational rehabilitation practitioners, investigators, medical billing and lien collection agencies, workers' compensation insurance carriers and claims administrators, and self–insured employers; (2) is an organization or association composed primarily of persons or entities subject to the authority of the Industrial Medical Council or the Division of Workers' Compensation; or (3) engages in or derives any of its income from providing consulting services or educational seminars on workers' compensation issues.

Category 7:

Designated employees assigned to Category 7 shall report as follows:

Investments, business positions and income from any source that: (1) is subject to the authority of the Division of Labor Standards Enforcement; (2) is an organization or association composed primarily of persons or entities subject to the authority of the Division of Labor Standards Enforcement; or (3) engages in or derives any of its income from providing consulting services or educational seminars concerning labor or prevailing wage law.

Category 8:

Designated employees assigned to Category 8 shall report as follows:

Investments, business positions and income from any source that: (1) is subject to the authority of the Division of Workers' Compensation or the Office of Self Insurance Plans, including but not limited to physicians (as defined in Labor Code § 3209.3), medical facilities, language interpreters, vocational rehabilitation practitioners, investigators, medical billing and lien collection agencies, workers' compensation insurance carriers and claims administrators, and self–insured employers; (2) is an organization or association composed primarily of persons or entities subject to the authority of the Division of Workers' Compensation or the Office of Self Insurance Plans; or (3) engages in or derives any of its income from providing consulting services or educational seminars on workers' compensation issues.

Category 9:

Designated employees assigned to Category 9 shall report as follows:

Investments, business positions and income from any source that: (1) is subject to the authority of either the Division of Occupational Safety and Health, the Occupational Safety and Heath Standards Board, or the Occupational Safety and Health Appeals Board; (2) is an organization or association composed primarily of persons or entities subject to the authority of either the Division of Occupational Safety and Health, the Occupational Safety and Heath Standards Board, or the Occupational Safety and Health Appeals Board; or (3) engages in or derives any of its income from providing consulting services or educational seminars concerning occupational safety and health, industrial hygiene, or safety engineering.

Category 10:

Designated employees assigned to Category 10 shall report as follows:

Investments, business positions and income from any source that: (1) is subject to the authority of either the Division of Occupational Safety and Health, the Occupational Safety and Heath Standards Board, or the Occupational Safety and Health Appeals Board, within the subject matter area over which the employee exercises exercise jurisdiction; (2) is an organization or association composed primarily of persons or entities subject to the authority of either the Division of Occupational Safety and Health, the Occupational Safety and Heath Standards Board, or the Occupational Safety and Health Appeals Board, within the subject matter area over which the employee exercises exercise jurisdiction; or (3) engages in or derives any of its income from providing consulting services

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF ADMINISTRATION
Office of the Director-Legal Unit
320 W. Fourth St, Suite 600
Los Angeles, CA 90013

Tel. No (213) 576-7725
Fax (213) 576-7735

EXHIBIT B

October 16, 2003

Paula Higashi, Executive Director
Commission on State Mandates
980-Ninth Street, Suite 300
Sacramento, CA 95814

RE: City of Newport Beach
Test Claim No.: 03-TC-13
Prevailing Wage Rates

Dear Ms. Higashi:

This office is the primary representative of the Department of Industrial Relations in this matter. Please change your official address record to direct all correspondence to me at the above address.

In addition to changing your address record as requested above, we are requesting an additional 90 days from November 3, 2003, in which to respond. In part, the request for more time is based on the complexity of the claim just filed but is also based on the fact that the current deadline is less than two weeks before a new Governor is scheduled to be sworn into office. As we do not know who will be Director of Industrial Relations or what a new Director's position will be on this Test Claim, we are requesting sufficient time to be able to brief the new Director fully and prepare a formal response consistent with the Director's views. If our request for an extension is granted, our response would be due on or before Monday, February 2, 2004.

Thank you in advance for your anticipated cooperation.

Yours truly,

Anthony Mischel

ASM/ms

cc: See Attached Mailing List

PROOF OF SERVICE

(Code Civ. Proc. §§ 1013a, 2015.5)

Re: Prevailing Wage Rate, 03-TC-13
City of Newport Beach, Claimant
Labor Code Section 1720, et al.
Public Contract Code Section 22022
Title 8, CCR, Section 16000 et al.
Statutes 2001, Chapter 938 et al.
And Affected Parties and State Agencies

I am employed in the City and County of Sacramento, California. I am over the age of eighteen years and not a party to the within action; my business address is 320 W. Fourth Street, Suite 600, Los Angeles, CA 90013.

On October 17, 2003, I served the enclosed **Letter to Paula Higashi, Executive Director, dated October 16, 2003,** on the parties listed below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit, for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepared, to be deposited in a recognized place of deposit of the U.S. Mail in Loa Angeles, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee by a member of the staff of the Department of Industrial Relations, Office of the Director Legal Unit, on the date last written below.

(C) By Messenger Service: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit for messenger delivery, and I caused each such envelope to be delivered to a courier employed by Golden State Overnight, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address at the place and on the date last written below.

(D) By Facsimile Transmission: I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action, pursuant to oral and/or written agreement between such parties regarding service by facsimile by transmitting a true copy to the following fax numbers:

TYPE OF SERVICE	ADDRESSEE & FAX NUMBER (IF APPLICABLE)	PARTY REPRESENTED
A	Mr. Glen Everroad Revenue Manager City of Newport Beach 3300 Newport Blvd. P.O. Box 1768 Newport Beach, CA 92659	Claimant
A	Mr. Allan Burdick MAXIMUS 4320 Auburn Blvd., Suite 2000 Sacramento, CA 95841	Claimant Representative
A	Mr. Keith Gmeinder Department of Finance 915 L Street, 8th Floor Sacramento, CA 95814	Interested Party
A	Mr. Michael Havey State Controller's Office Division of Accounting and Reporting 3301 C. Street, Suite 500 Sacramento, CA 95816	State Agency
A	Mr. Paul Minney Spector, Middleton, Young & Minney, LLP 7 Park Center Drive Sacramento, CA 95825	Interested Party
A	David Wellhouse David Wellhouse & Associates, Inc. 9175 Kiefer Blvd., Suite 121 Sacramento, CA 95826	Interested Party
A	Ms. Harmeet Barkschat Mandate Resource Service 5325 Elkhorn Blvd., Suite 307 Sacramento, CA 95842	Interested Party
A	Ms. Annette Chinn Cost Recovery Systems 705-2 East Bidwell Street, Suite 294 Folsom, CA 95630	Interested Party

A	Mr. Steve Smith, CEO Mandated Cost Systems, Inc. 11130 Sun Center Drive, Suite 100 Rancho Cordova, CA 95670	Interested Party
A	Mr. Leonard Kaye County of Los Angeles Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	State Agency
A	Ms. Cindy Sconce Centration, Inc. 12150 Tributary Point Drive, Suite 140 Gold River, CA 95670	Interested Party

Executed on October 17, 2003, at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Maria Salazar, Declarant

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

October 22, 2003

Mr. Anthony Mischel
Department of Industrial Relations
Division of Administration
Office of the Director-Legal Unit
320 W. Fourth St., Suite 600
Los Angeles, CA 90013

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

RE: **Request for Extension of Time**
Prevailing Wages, 03-TC-13
City of Newport Beach, Claimant
Labor Code Sections 1720, et al.

Dear Mr. Mischel:

Your request for an extension of time to file comments on the above-named matter is approved for good cause. Comments from state agencies are now due on or before **February 2, 2004.**

Please contact Nancy Patton at (916) 323-8217 if you have questions.

Sincerely,

SHIRLEY OPIE
Assistant Executive Director

j:mandates/2003/tc/03tc13/extok

MAILED: ✓ FAXED: _____
DATE: 10/22/03 INITIAL: VS
CHRON: _____ FILE: ✓
WORKING BINDER: _____

Commission on State Mandates

Original List Date: 10/3/2003
Last Updated: 10/21/2003
List Print Date: 10/22/2003
Claim Number: 03-TC-13
Issue: Prevailing Wages

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Glen Everroad
City of Newport Beach
3300 Newport Blvd.
P. O. Box 1768
Newport Beach, CA 92659-1768

Claimant

Tel: (949) 644-3127

Fax: (949) 644-3339

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Claimant Representative

Tel: (916) 485-8102

Fax: (916) 485-0111

Mr. Paul Minney
Spector, Middleton, Young & Minney, LLP
7 Park Center Drive
Sacramento, CA 95825

Tel: (916) 646-1400

Fax: (916) 646-1300

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Tel: (916) 368-9244

Fax: (916) 368-5723

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Tel: (916) 727-1350

Fax: (916) 727-1734

Ms. Annette Chinn
Cost Recovery Systems
705-2 East Bidwell Street, #294
Folsom, CA 95630

Tel: (916) 939-7901

Fax: (916) 939-7801

Mr. Steve Smith Mandated Cost Systems, Inc. 11130 Sun Center Drive, Suite 100 Rancho Cordova, CA 95670	Tel: Fax:	(916) 669-0888 (916) 669-0889
Mr. Leonard Kaye, Esq. County of Los Angeles Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: Fax:	(213) 974-8564 (213) 617-8106
Ms. Cindy Sconce Centration, Inc. 12150 Tributary Point Drive, Suite 140 Gold River, CA 95670	Tel: Fax:	(916) 351-1050 (916) 351-1020
Mr. Keith Gmeinder Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Tel: Fax:	(916) 445-8913 (916) 327-0225
Mr. Michael Havey State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 500 Sacramento, CA 95816	Tel: Fax:	(916) 445-8757 (916) 323-4807
Mr. Anthony Mischel Department of Industrial Relations Division of Administration 320 W. Fourth St., Suite 600 Los Angeles, CA 90013	Tel: Fax:	(213) 576-7725 (213) 576-7735

Exhibit D

DEPARTMENT OF FINANCE
ARNOLD SCHWARZENEGGER
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

February 2, 2004

RECEIVED
FEB 02 2004
COMMISSION ON STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of October 7, 2003, the Department of Finance has reviewed the test claim submitted by the City of Newport Beach (claimant) asking the Commission to determine whether specified costs incurred under the following statutes and regulations, are reimbursable state mandated costs (Claim No. CSM-03-TC-13 "Prevailing Wages"):

Chapter 1084, Statutes of 1976,
Chapter 1174, Statutes of 1976,
Chapter 992, Statutes of 1980,
Chapter 142, Statutes of 1983,
Chapter 143, Statutes of 1983,
Chapter 278, Statutes of 1989,
Chapter 1224, Statutes of 1989,
Chapter 913, Statutes of 1992,
Chapter 1342, Statutes of 1992,
Chapter 83, Statutes of 1999,
Chapter 220, Statutes of 1999,
Chapter 881, Statutes of 2000,
Chapter 954, Statutes of 2000,
Chapter 938, Statutes of 2001,
Chapter 1048, Statutes of 2002,
California Code of Regulations, Title No. 8, Section Number(s) 16000-16802, last amended January 26, 1997.

Commencing with page 1, of the test claim, claimant has identified the following new duties, which it asserts are reimbursable state mandates:

- Increased costs associated with an increasing number of projects that have been designated public works projects by statute since 1975. Claimant asserts that a public works determination increases project costs by 15-30%, if a private contractor is utilized to perform the services.

- Increases in administrative, legal and contract costs for public works projects that would require the payment of prevailing wages.

- Increased costs associated with regulating Federal prohibitions against discrimination in the workplace.

- Increased administrative and legal costs associated with judgments and disputes regarding prevailing wage determinations and prevailing wage payment violations by contractors.

- Increased costs associated with the training of personnel regarding the heightened scrutiny required to ensure that labor laws are enforced in the oversight of project costs that require the payment of prevailing wages

The claimant further asserts that costs and requirements associated with several alternative options from the prevailing wage requirement have greatly increased, thereby making these options prohibitive and burdensome. A large portion of this claim outlines the prohibitive costs associated with maintaining a Labor Compliance Program, which is an alternative to paying the prevailing wage, however, does not include the costs of these options as a part of this claim.

As a result of our review, we have concluded that these claims do not constitute a state reimbursable mandate.

The claimant did not establish a clear or concise argument that the claimant is mandated to pay prevailing wages for public works projects. The prevailing wage laws only apply to private contractors bidding for, and working on, public works contracts paid for by local governments or school districts. Though the definition of what constitutes a public works project has substantially increased in statute since 1975, under existing state law, local governments and school districts are not limited to private contractors to build, repair or maintain public works projects. Therefore, because local governments are free to utilize their own employees for projects, and are also allowed to purchase, rather than construct, structures for government purposes mandated under state law, the payment of prevailing wages cannot be considered mandatory for local governments.

As the result of our review, we have concluded that the courts have held that costs to a local entity resulting from an action undertaken at the option of the local entity are not reimbursable as "costs mandated by the state". Specifically, in City of Merced v. State of California, 153 Cal. App. 3d 777 (1984), the court said:

> "We agree that the Legislature intended for payment of goodwill to be discretionary. ...whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost."

In County of Contra Costa v State of California, 177 Cal App. 3d 62,79(1986) the court affirmed the City of Merced decision. Based on these court cases, the Department of Finance believes that the provisions of California Code of Regulations, Title No. 8, Section Number(s) 16000-16802, last amended January 26, 1997 simply make an optional program available to local governments, the costs of which are not reimbursable because they are not costs mandated by the state.

In addition to these findings, we clarify that all penalties and enforcement duties imposed for non-compliance with prevailing wage laws cannot be considered state-reimbursable mandates because Article XIIIB, Section 6 of the California Constitution does not apply to the creation of new crimes or costs related to the enforcement of crimes. Federally mandated labor laws also do not apply to Article XIIIB, Section 6 of the California Constitution.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your October 7, 2003 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Jennifer Osborn, Principal Program Budget Analyst at (916) 445-8913 or Keith Gmeinder, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

James E. Tilton
Program Budget Manager

Attachments

Attachment A

DECLARATION OF NONA MARTINEZ
DEPARTMENT OF FINANCE
CLAIM NO. CSM-03-TC-13

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that Chapter 1084, Statutes of 1976, Chapter 1174, Statutes of 1976, Chapter 992, Statutes of 1980, Chapter 142, Statutes of 1983, Chapter 143, Statutes of 1983, Chapter 278, Statutes of 1989, Chapter 1224, Statutes of 1989, Chapter 913, Statutes of 1992, Chapter 1342, Statutes of 1992, Chapter 83, Statutes of 1999, Chapter 220, Statutes of 1999, Chapter 881, Statutes of 2000, Chapter 954, Statutes of 2000, Chapter 938, Statutes of 2001, Chapter 1048, Statutes of 2002, California Code of Regulations, Title No. 8, Section Number(s) 16000-16802, last amended January 26, 1997, sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this document.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

February 2, 2004
at Sacramento, CA

Nona Martinez
Nona Martinez

PROOF OF SERVICE

Test Claim Name: Prevailing Wages
Test Claim Number: CSM-03-TC-13

I, Mary Latorre, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 8 Floor, Sacramento, CA 95814.

On February 2, 2004, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8 Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-8
Mr. Michael Havey
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Room 500
Sacramento, CA 95816

Mr. Gary O'Mara
Department of Industrial Relations
Office of the Director
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102

League of California Cities
Attention: Ernie Silva
1400 K Street
Sacramento, CA 95815

Mr. Steve Smith
Mandated Cost Systems, Inc.
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670

Newport Beach
3300 Newport Blvd.
P.O. Box 1768
Newport Beach, CA 92659-1768

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Mr. Paul Minney
Spector, Middleton, Young and Minney, LLP
7 Park Center Drive
Sacramento, CA 95825

Mr. David Wellhouse
David Wellhouse and Associates, INC.
9175 Keifer Blvd, Suite 121
Sacramento, CA 95826

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd #307
Sacramento, CA 95824

Ms. Annette Chinn
Cost Recovery Systems
705-2 East Bidwell Street, #294
Folsom, CA 95630

Ms. Cindy Sconce
Centration, Inc.
12150 Tributary Point Drive, Suite 140
Gold River, CA 95670

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on February 2, 2004 at Sacramento, California.

Mary Latorre

Exhibit E

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF ADMINISTRATION
Office of the Director-Legal Unit
320 W. Fourth Street, Suite 600
Los Angeles, CA 90013

Arnold Schwar

Telephone No.: (213) 576-7725
Facsimile No.: (213) 576-7735

March 2, 2004

VIA OVERNIGHT MAIL

Paula Higashi, Executive Director
Commission on State Mandates
980-Ninth Street, Suite 300
Sacramento, CA 95814

RE: City of Newport Beach
Test Claim No.: 03-TC-13
Prevailing Wage Rates

Dear Ms. Higashi:

On January 27, 2004, I wrote to ask for an extension of time to respond to the above claim but unfortunately made the request in the Clovis Unified School District Claim (No. 01-TC-28). See attached letter. When you granted the request, you similarly granted in the Clovis matter, for which no response was pending.

It was not until today that I found my mistake, for which I apologize. Please consider this a late request to file the Department's response in this case. Enclosed is the Department's response.

If you have any questions, feel free to contact me.

Yours truly,

Anthony Mischel

ASM/ms

cc: See Attached Mailing List

Enclosure

STATE OF CALIFORNIA — Arnold Schwarzenegger, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF ADMINISTRATION
Office of the Director-Legal Unit
320 W. Fourth Street, Suite 600
Los Angeles, CA 90013

Telephone No.: (213) 576-7725
Facsimile No.: (213) 576-7735

January 27, 2004

VIA OVERNIGHT MAIL

Paula Higashi, Executive Director
Commission on State Mandates
980-Ninth Street, Suite 300
Sacramento, CA 95814

RE: Clovis Unified School District
Test Claim No.: 01-TC-28
Prevailing Wage Rates

Dear Ms. Higashi:

This office is the primary representative of the Department of Industrial Relations in this matter. The Department is supposed to file a Response to the above claim by February 2, 2004, after being granted a 90 day extension from the prior November 3, 2003, deadline. Unfortunately, neither the Department of Industrial Relations nor the Labor and Workforce Development Agency have had permanent appointments made to Director or Secretary yet. As a result, the administration's position on some prevailing wage issues, including some that are affected by this Test Claim, has yet to be formulated in full.

We are therefore not sure what position the new administration wishes to take on this Test Claim. I am hopeful that enough clarity will be provided within the next three weeks that I can file a proper response to the Test Claim. I am therefore requesting an additional 30 days from February 4, 2004, in which to respond. If our request for an extension is granted, our response would be due on or before Monday, March 3, 2004.

Thank you in advance for your anticipated cooperation.

Yours truly,

Anthony Mischel

ASM/ms

cc: See Attached Mailing List

PROOF OF SERVICE
(Code Civ. Proc. §§ 1013a, 2015.5)

Re: **Prevailing Wage Rate, 01-TC-28**
Clovis Unified School District, Claimant
Labor Code Section 1720, et al.
Public Contract Code Section 22022
Title 8, CCR, Section 16000 et al.
Statutes 2001, Chapter 938 et al.

And Affected Parties and State Agencies

I am employed in the City and County of Sacramento, California. I am over the age of eighteen years and not a party to the within action; my business address is 320 W. Fourth Street, Suite 600, Los Angeles, CA 90013.

On January 27, 2004, I served the enclosed **Letter to Paula Higashi, Executive Director, dated January 27, 2004,** on the parties listed below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit, for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepared, to be deposited in a recognized place of deposit of the U.S. Mail in Loa Angeles, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee by a member of the staff of the Department of Industrial Relations, Office of the Director Legal Unit, on the date last written below.

(C) By Messenger Service: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit for messenger delivery, and I caused each such envelope to be delivered to a courier employed by Golden State Overnight, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address at the place and on the date last written below.

(D) By Facsimile Transmission: I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action, pursuant to oral and/or written agreement between such parties regarding service by facsimile by transmitting a true copy to the following fax numbers:

TYPE OF SERVICE	ADDRESSEE & FAX NUMBER (IF APPLICABLE)	PARTY REPRESENTED
A	Ms. Shirley Opie Asst. Executive Director Commission on State Mandates 980-Ninth Street, Suite 300 Sacramento, CA 95814	State Agency
A	Mr. Ramon dela Guardia Deputy Attorney General Department of Justice 1300 I. Street, Suite 125 Sacramento, CA 95814	State Agency
A	Ms. Harmeet Barkschat Mandate Resource Service 5325 Elkhorn Blvd., Suite 307 Sacramento, CA 95842	Interested Party
A	Dr. Carol Berg Education Mandated Cost Network 1121 L. Street, Suite 1060 Sacramento, CA 95814	Interested Party
A	Executive Director, (E-08) State Board of Education 721 Capitol Mall, Room 558 Sacramento, CA 95814	State Agency
A	Mr. Michael Havey State Controller's Office Division of Accounting and Reporting 3301 C. Street, Suite 500 Sacramento, CA 95816	State Agency
A	Ms. Beth Hunter, Director Centration, Inc. 8316 Red Oak Street, Suite 101 Rancho Cucamonga, CA 91730	Interested Person

A	Mr. Tom Lutzenberger (A-15) Principal Analyst Department of Finance 915 L. Street, 6th Floor Sacramento, CA 95814	State Agency
A	Mr. Bill McGuire Assistant Superintendent Clovis Unified School District 1450 Herndon Clovis, CA 93611-0599	Claimant
A	Mr. Paul Minney Spector, Middleton, Young & Minney, LLP 7 Park Center Drive Sacramento, CA 95825	Interested Person
A	Mr. Keith B. Petersen President SixTen & Associates 5252 Balboa Avenue, Suite 807 San Diego, CA 92117	Claimant
A	Mr. Gerald Shelton, Director (E-8) California Department of Education Fiscal & Administrative Services Division 1430 N. Street, Suite 2213 Sacramento, CA 95814	State Agency
A	Mr. Steve Shields Shields Consulting Group, Inc. 1536 - 36th Street Sacramento, CA 95816	Interested Party
A	Mr. Steve Smith, CEO Mandated Cost Systems, Inc. 11130 Sun Center Drive, Suite 100 Rancho Cordova, CA 95670	Interested Party
A	Mr. Scott Kronland Altshuler, Berzon, Nassbaum, Rubin & Demain 177 Post Street, Suite 300 San Francisco, CA 94108	Interested Party

A	Ms. Sandy Reynolds Reynolds Consulting Group, Inc. P.O. Box 987 Sun City, CA 92586	Interested Party
A	Mr. Keith Gmeinder Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Interested Party

Executed on January 27, 2004, at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Maria Salazar, Declarant

PROOF OF SERVICE
(Code Civ. Proc. §§ 1013a, 2015.5)

Re: **Prevailing Wage Rate, 03-TC-13**
City of Newport Beach, Claimant
Labor Code Section 1720, et al.
Public Contract Code Section 22022
Title 8, CCR, Section 16000 et al.
Statutes 2001, Chapter 938 et al.

And Affected Parties and State Agencies

I am employed in the City and County of Sacramento, California. I am over the age of eighteen years and not a party to the within action; my business address is 320 W. Fourth Street, Suite 600, Los Angeles, CA 90013.

On March 2, 2004, I served the enclosed **Letter to Paula Higashi, Executive Director, dated March 2, 2004,** on the parties listed below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit, for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepared, to be deposited in a recognized place of deposit of the U.S. Mail in Loa Angeles, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee by a member of the staff of the Department of Industrial Relations, Office of the Director Legal Unit, on the date last written below.

(C) By Messenger Service: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit for messenger delivery, and I caused each such envelope to be delivered to a courier employed by Golden State Overnight, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address at the place and on the date last written below.

(D) By Facsimile Transmission: I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action, pursuant to oral and/or written agreement between such parties regarding service by facsimile by transmitting a true copy to the following fax numbers:

TYPE OF SERVICE	ADDRESSEE & FAX NUMBER (IF APPLICABLE)	PARTY REPRESENTED
A	Mr. Glen Everroad Revenue Manager City of Newport Beach 3300 Newport Blvd. P.O. Box 1768 Newport Beach, CA 92659	Claimant
A	Mr. Allan Burdick MAXIMUS 4320 Auburn Blvd., Suite 2000 Sacramento, CA 95841	Claimant Representative
A	Mr. Paul Minney Spector, Middleton, Young & Minney, LLP 7 Park Center Drive Sacramento, CA 95825	Interested Party
A	David Wellhouse David Wellhouse & Associates, Inc. 9175 Kiefer Blvd., Suite 121 Sacramento, CA 95826	Interested Party
A	Ms. Harmeet Barkschat Mandate Resource Service 5325 Elkhorn Blvd., Suite 307 Sacramento, CA 95842	Interested Party
A	Ms. Annette Chinn Cost Recovery Systems 705-2 East Bidwell Street, Suite 294 Folsom, CA 95630	Interested Party
A	Mr. Steve Smith, CEO Mandated Cost Systems, Inc. 11130 Sun Center Drive, Suite 100 Rancho Cordova, CA 95670	Interested Party
A	Mr. Leonard Kaye County of Los Angeles Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	State Agency

A	Ms. Cindy Sconce Centration, Inc. 12150 Tributary Point Drive, Suite 140 Gold River, CA 95670	Interested Party
A	Mr. Keith Gmeinder Mr. James E. Tilton Department of Finance 915 L Street, 8th Floor Sacramento, CA 95814	Interested Party
A	Mr. Michael Havey State Controller's Office Division of Accounting and Reporting 3301 C. Street, Suite 500 Sacramento, CA 95816	State Agency

Executed on March 2, 2004, at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Maria Salazar, Declarant

BEFORE THE COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim of City of Newport Beach, Test Claimant, Re: California Prevailing Wage Law.	Test Claim No: 03 – TC –13

Department of Industrial Relations's

Response to Commission On State Mandates

Concerning Petition on Prevailing Wages

Vanessa L. Holton, Acting Chief Counsel
Anthony Mischel, Counsel
Gary J. O'Mara, Counsel
Office of Director, Legal Unit
320 W. Fourth St.
Suite 600
Los Angeles, CA 90013
213-576-7725
213-576-7738 (fax)

Attorneys for Respondent Department of Industrial Relations

INTRODUCTION

This Test Claim seeks subvention (including the cost of training lawyers) for alleged changes in California's Public Works Law ("CPWL") since 1975. According to Claimant, subvention is necessary because the sometimes unspecified statutory and regulatory changes create mandates only on local governments to fulfill a state policy "in honor of the contributions of unions and to assure that this is one area which guarantees workers union wages." (Test Claim, pg. 19).

The Test Claim asserts that new mandates have been created, that only local governments are affected, and that there have been increased costs of compliance. None of these assertions are correct. The very decision to perform construction using private contractors and private workers is a voluntary act, and the results that flow from this voluntary act are not subject to subvention. Further, local and state governments share the responsibility to comply with the CPWL with private employers. When viewed as a whole, the inevitable changes over almost 30 years in the CPWL have reduced the burdens on local governments by shifting more responsibility to the state for determining public works, setting prevailing wages, and enforcing the obligation to pay prevailing wages. For this reason, the claim should be denied.

NATURE AND HISTORY OF PUBLIC WORKS LEGISLATION

Public Works And Prevailing Wages

With some exceptions noted below, prevailing wages must be paid to construction workers by private contractors on public works.[1] "The California Prevailing Wage Law is a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds." *Road Sprinkler*

[1] The statutory term is General Prevailing Rate of Per Diem Wages. Labor Code §§ 1770, *et al.* This term comes from a period when wages were not calculated on an hourly basis but rather on a daily basis. See, Labor Code § 1810 [definition of a day of work]. The more common vernacular term now used is "prevailing wage," which now is calculated on an hourly basis and will be used throughout this response.

Fitters, Local Union 669 v. G & G Fire Sprinkler, Inc. (2002) 102 Cal.App.4th 765, 776, (citations omitted).

> The overall purpose of the prevailing wage law...is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 987 (citations omitted)

The basic definition of a public work has not changed since well before 1975. A public work is construction performed under contract paid for in whole or in part with public funds. Compare Labor Code § 1720 [1975 version] and Labor Code § 1720(a)(1) [current version].[2] There are three basic elements to the determination of whether a project is a public work ("coverage determination"): 1) the project must be for construction; 2) the project must be performed under contract and not by public employees (*Bishop v. City of San* Jose (1969) 1 Cal.3rd 56); and 3) the project has to be paid for at least in part with public funds. Thus, if a city funds only a portion of a project, for example, providing 10 percent of the funding, the private contractors whose workers are on the project have to pay prevailing wages for all the work on the project.[3] Labor

---

[2] Throughout, Respondents will refer to the 1975 Labor Code as the state of the law as of January 1, 1975 and the 2003 version as the current state of the law. Both versions of the applicable sections of the Labor Code are found in the Appendices, as are all other references. Unless otherwise noted, all references to the Labor Code are the current version.

[3] The statute excepts projects under $1000. Labor Code § 1771. The threshold is raised 15 to 25 times higher, for cities that voluntarily take advantage of the offer in Labor Code § 1771.5 to establish a Labor Compliance Programs ('LCP")

Code § 1772 [1975 version]. Since all of the workers on a public work are employees of private contractors, the obligation to pay prevailing wage applies solely to private employers and not to cities.

The prevailing wage rate is that rate most commonly paid for the specific craft or trade in the local geographical area where the construction project takes place. Labor Code §§ 1773, 1773.9. It is not, as Test Claimant states, union scale for the same work. (Test Claim, pg. 1). Enforcement is always against a private employer. Cities have to ensure that private employers pay the proper prevailing wages, however.[4]

This means that cities have two primary connections to public works and the payment of prevailing wages: they enforce the obligations that private parties have to pay prevailing wages; and they, like private developers, private contractors, and private subcontractors, are subject to whatever changes in the scope of the definition of public work might occur. As seen below, however, subvention would only be appropriate when new mandates arise in cities' enforcement role.

A Brief History Of Public Works And Prevailing Wages Prior To 1975

Determinations of Public Works ("Coverage Determinations") Before 1975, cities, such as the Test Claimant, made their own determinations of whether a specific project was a public work. Cities had to apply the standards of Labor Code section 1720 described above. There was no formal process to review determinations of coverage determinations made by cities. Instead, coverage determination challenges occurred as part of court litigation, where the city was sued and had to defend the lawsuit, most often in the context of its enforcement of the prevailing wage law.

Determinations of Prevailing Wage Rate ("Rate Determinations") Cities also determined what the prevailing wage rate was. This meant each city had to know (or do the investigation and research to find out) what union construction workers received,

[4] Cities are referred to throughout this Response because Test Claimant is a city. In fact, the responsibilities discussed in this response extend to the state and all political subdivisions (Labor Code § 1721), as well as private contractors.

what non-union construction workers received, and what federal public work construction workers received before it determined what wage rate "prevailed" for a craft, classification, or type of worker. Labor Code § 1773 [1975 version]. Requests to review cities' initial rate determinations were directed to the Director of Industrial Relations. Labor Code § 1773.4 [1975 version].[5] That is, if a private potential bidder (such as a contractor or private developer), a union, or a member of the public believed that the specified prevailing wage rate was incorrect, they filed a challenge with the Director of Industrial Relations, and the city had to defend its rate determination.

Enforcement Against Private Contractors Cities had the primary responsibility for enforcement of the obligation to pay prevailing wages. This meant that cities had to monitor each public work project to ensure that prevailing wages were paid. The main enforcement tool available to cities was the ability to withhold contract payments to a private contractor for the prevailing wage violations by the contractor. Labor Code § 1727 [1975 version]. When a dispute arose between the city and a contractor over whether payments were properly withheld, the city had to defend a civil lawsuit brought by the contractor or subcontractor. Labor Code§§ 1730-1734 [1975 version]. In 1957, the Division of Labor Law Enforcement (now, Division of Labor Standards Enforcement or Labor Commissioner) was permitted by the legislature to assist cities. Stats 1957, ch. 398, § 1.

A Brief Synopsis Of Public Works And Prevailing Wage Enforcement As Of 2003

Coverage Determinations Currently, public works coverage determinations are made by the Director of Industrial Relations upon the request of any interested party, including cities. Labor Code § 1773.4. 8 Cal. Code Regs., tit 8, §§ 16001-16002.5

[5] The Director delegated this function to the Labor Commissioner until 1977. Compare Cal. Code Regs., tit.8, §§ 16000 et seq. [1956 version] with Cal. Code Regs., tit. 8, § 16000 [1977 version].

[current version].[6] This does not mean that a request for a coverage determination is a prerequisite for a city to proceed with every public work project. Normally, a city makes its own determination of public works coverage but can request a Director's coverage determination to resolve close cases. Appeals of coverage determinations to the Director continue to be available, as before 1975. Private contractors and subcontractors continue to be responsible for the actual payment of prevailing wages.

Since the passage of Proposition 13, cities have had lower tax revenues with which to pay for the entire cost of public works. See, Koyama, "Financing Local Government In The Post-Proposition 13 Era: The Use And Effectiveness Of Nontaxing Revenue Sources" 22 Pac. L.J. 1333 (1991). Cities have, therefore, sought public/private funding mechanisms whereby construction that benefits the public can occur with fewer public dollars. Increasingly, therefore, the fiscal impact of the determination that a project is a public work, and therefore subject to the payment of prevailing wages, is felt not by cities but by private developers.[7] The Director continues to issue determinations, some of which are published as precedential, of his interpretation of section 1720. Cal. Code. Regs., tit 8, § 16001 [current version].

Coverage determinations are made based on how specific sets of facts presented by the proposed construction problems apply to the definition of "public work." These determinations are fact intensive and interpret existing statutes. Over time, the legislature has adopted some of these interpretations as glosses on the overarching definition of "public work." For example, in 1999, the legislature added the sentence "For purposes of this paragraph, "construction" includes work performed during the design and

---

[6] Unless otherwise noted, all references to the California Code of Regulations are to the current version.

[7] In fact, a public agency may pay very little or no money for a project to be a public work. Under Labor Code section 1720(b), public funds can consist of below market transfers of land. *See, California State University, San Marcos*, PW 2002-012 (October 21, 2002). This means that a below market transfer can result in the obligation for a private contractor to pay the prevailing wage but at the same time not increase any public agency cost. See also, Labor Code § 1720(b) [SB 975].

preconstruction phases of construction including, but not limited to, inspection and land surveying work." (Stats. 2000, ch. 881). The legislative history of this amendment shows that the legislature was simply adopting the Director's interpretation of section 1720 as it existed in 1975.

More extensive changes to section 1720 occurred in 2001 with the adoption of SB 975 (Stats. 2001, ch. 938) and the following year with the adoption of SB 972 (Stats. 2002, 1048). Of special note, section 1720(b) was amended to describe some forms of payment that would constitute public funds. Test Claimant asserts that these changes are expansions of the definition of public funds. Subsections 1720(c) and 1720(d) describe projects that are not considered public works even though they meet the basic definition of "public work" under section 1720(a)(1).

Rate Determinations The rates for prevailing wages are now investigated, calculated, published ("determined") and defended in court (when challenged) by the Director rather than by cities.[8] This relieves cities of having the obligation continually to update their research and investigation into what rate is most commonly paid for similar work in the local area. Instead, the Division of Labor Statistics and Research employs 10 to 12 statisticians and clerks to maintain this information and semi-annually publishes rates for each craft and trade by county ("General Determinations"). This information is sent to each city when effective. These rates are also available on the World Wide Web. Where a craft, classification or type of worker called for by the city's project does not appear in the published General Determinations, the city (or any interested party) has the ability to request a "special determination" just for the city's specific public work. Cal. Code Regs., tit. 8, § 16202. See also, for example, Cal. Code Regs., tit. 8, § 16001(d).

Enforcement The obligation to pay prevailing wages now is primarily enforced by the Labor Commissioner, although a city has a duty to the "take cognizance" of

---

[8] For a fuller description of the current methodology for setting prevailing wages (not subject to this claim), see *California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal. App. 4th 651, 121 Cal. Rptr.2nd 38.

violations, which is a reduction from its prior responsibility to enforce. Labor Code § 1726. Cities also enforce prevailing wage payment obligations when they have chosen to exercise their former independence from the Labor Commissioner by being approved and authorized as LCPs. Labor Code § 1771.5. The Labor Commissioner, after an investigation, issues a citation to any contractor or subcontractor violating the prevailing wage law. The Labor Commissioner may request that a city withhold funds either from a contractor or subcontractor up to the amount of the citations, just as a city did when it was the enforcer. An LCP likewise can order a city to withhold contract funds if it determines that a contractor or subcontractor has not been complying with the prevailing wage law. Labor Code § 1771.6.

Between 1975 and July 1, 2001, a private contractor or subcontractor challenged a withholding by filing suit in civil court to recover the money, as was done prior to 1975. The city either had to defend this suit, as before, or ask the Labor Commissioner to defend it. The Labor Commissioner also could file suit directly against the private contractor or subcontractor for the failure to pay prevailing wages, without a city's involvement. Labor Code §§ 1730, 1731, 1732, 1733 [repealed, 2001].[9] Since July 1, 2001, a private contractor or subcontractor can challenge a DLSE assessment or an LCP withholding by an administrative proceeding. Labor Code § 1742. Cities (other than as LCPs) are not necessary parties to these administrative proceedings unless a city actively seeks to intervene in a specific case. To date, no city (other than as an LCP) has been a party to an administrative appeal.

ALLEGED CHANGES REQUIRING SUBVENTION

Expanded Definition of Public Work Under Labor Code section 1720

Test Claimants generally allege that statutory changes to Labor Code section 1720 have expanded the definition of "public work" yet never specify what changes to this

[9] Copies of these repealed sections are from the 1999 version of the Labor Code.

section it contends have created such an expansion. This makes a specific response to all of the changes to section 1720 difficult for the following reasons: first, some of the changes in section 1720 in fact narrowed the scope of the definition of public work, some changes exempted certain projects that otherwise would be a public work, and some changes merely codified pre-existing standards that long had been the policy of the Department. For this reason, the Department does not feel able adequately to address all of the general allegations found at pages one through six of the Test Claim. The Department requests that prior to any hearing in this matter Test Claim provide more specificity as to its claim for subvention for alleged changes under section 1720.

Test Claimant asserts two broad consequences of a project being a public work. Without any real support, Test Claimant asserts that payment of prevailing wages increases construction costs 10-30%. Test Claimant also claims an increased cost because the expansion of the scope of public work means that more projects will be covered by whatever enforcement responsibilities a city has under the Labor Code. It is the Department's belief that there has not been a net gain in any enforcement responsibility by Test Claimant as a result of the various changes in the CPWL, as more fully described below.

Coverage of Labor Code section 1720.3

Prior to 1975, there was no coverage by the prevailing wage law for hauling refuse from a public work project. This meant that an employee who worked as a refuse hauler was not entitled to prevailing wages from his private employer, even for removing refuse from a public work.

As of January 1, 2000, refuse haulers became entitled to prevailing wages if they haul refuse from public work in which the city is a signatory to the contract. This means the obligation to pay prevailing wage was that of the **private** refuse hauler or **private** contractor. Any increase in responsibility by a city was a minimal record keeping responsibility in an already existing public work.

In fact, the amendment to section 1720.3 specifically provided that it did not create a mandate because the bill created a new crime. See, Stats. 1999, ch. 220, § 3. Therefore, this new provision would not be subject to subvention. Government Code § 17556(g). Presumably the crime created is adding to the list of prevailing wage violations that are crimes. Labor Code § 1777 [current version].

Coverage Under Labor Code section 1720.4

Prior to 1989, construction that was paid for with public funds but performed with volunteer labor was a public work. Stats. 1989, ch. 1224. Volunteers had to be paid prevailing wages for the work, and cities had to continue oversight for compliance with the CPWL. Section 1720.4 was added to allow a city to avoid any prevailing wage obligation if it met the statutory requirements for an exemption. Nothing in 1720.4, however, requires that a city seek to exempt a volunteer labor project from coverage under section 1720, as it existed in 1975. Thus, there is no required action and therefore there is no mandate.

Determining Public Works Coverage

Prior to 1975, there was no explicit procedure for issuing coverage determinations. The Director on request might do so, but there was no formalized process. Cities decided whether a project was a public work, and any challenge to this decision was through court litigation between the contractor and the city or the Labor Commissioner. Implicit in the right of cities to withhold funds was the ability to make a coverage determination. See, *Lusardi v. Aubry, supra.*

Starting in approximately 1977, the Director began informally to review coverage determinations. See, *Winzler v. Kelly,* (1981) 121 Cal.App.3rd 120. In approximately 1986, the Director issued regulations formalizing this review process to interpret Labor Code section 1720. Cal. Code Regs., tit. 8, § 16001 [1986 version]. This was pursuant to his authority under the Labor Code. Labor Code § 1773.5 [1975 version]. The Director's authority was affirmed in *Lusardi, supra*, which recognized the inherent ability to make

coverage determinations that accompany enforcement.

Cities' ability to determine whether a project is a public work continues to this date. Should a dispute arise over whether a project is a public work, the Director may be asked to determine whether the project is a public work either by a city or an interested party. Cities are not required to participate in the Director's review of a project, although they are always asked for their opinion.

Determining Prevailing Wages

Prior to 1975, when cities determined local prevailing wages, the duty to obtain the correct prevailing wage was subsumed in the requirement that the agencies ensure they were using the correct rate. However, any interested party could request review of the city's determination, and the city then had to justify its determination. Labor Code § 1773.4 [1975 version].

In exchange for the Director making rate determinations, cities now only have to obtain the correct prevailing wages from the Director. Labor Code § 1770 [current version]. This task no longer requires cities to do the actual investigations, surveys, and calculation ("determination") of the prevailing wage. That is, while the cities assume the burden of sending a letter, making a phone call, or checking the Department's website, this writing, sending or calling is substantially less expensive than was their prior obligation to investigate and calculate prevailing wages for each craft or trade on public works projects. If the rate obtained is not correct, in the city's view, it may challenge the correctness. Labor Code § 1773.4 [current version].

Prior to 1975, a prospective bidder, union representative, or city could request the Director to review the city's determination of the applicable prevailing wage rate. Labor Code § 1773.4; Cal. Code Regs., tit. 8, §§ 16200, *et seq.* [1956 version]. This provision has not changed at all since 1975, and all of the post 1975 regulations apply the provisions of the 1975 version of section 1773.4. The language of the statute continues to

be permissive.[10] The provision allows an interested party to either accept the prevailing wage set by the Director or to challenge the wage set. A city can either accept the general determination by DLSR for a craft or trade or it can choose to obtain a special determination. Procedural changes were made in 1977 after the Director became responsible for rate determinations. Cal. Code Regs., tit. 8, §§ 16200, *et seq.* [1977 version]. There is nothing in the Labor Code or the Director's regulations that requires such a petition. There is no fiscal or other compulsion to use or challenge the general determinations issued by DLSR twice each year.

Public Works Contract Requirements

Prior to 1975, when a city announced a bid for a public work, it had to specify in the bid announcement, the bid specification, and the contract itself what general rates would apply. The city had the alternative of keeping a copy of the rates in its office and referring to them in the bid announcement, bid specification, and contract. Labor Code § 1773.2 [1975 version]. Cities also had to insert into all public works contracts the requirement to make travel and subsistence payments to workers. Labor Code § 1773.8.

The requirement under section 1773.2 has not changed since 1975. Labor Code § 1773.2 [current version]. Labor Code section 1773.8 was repealed in 1999.

Enforcement Under Labor Code sections 1726, 1727

Prior to 1975, cities were required both to "take cognizance" of violations and to withhold funds owed to contractors for prevailing wage violations. Labor Code §§ 1726, 1727 [1975 version]. If there were insufficient funds available for withholding, then cities notified the Labor Commissioner of the violation. The city, with the Labor Commissioner's assistance filed civil lawsuits against the offending contractors. *Id.*

---

[10] Labor Code section 1773.4: "Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body **may**, within 20 days after commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code." (emphasis added).

This obligation to report violations to the Labor Commissioner has not changed. Enforcement of prevailing wage violations was removed from cities in 2001. Stats. 2000, ch. 954. In exchange for this reduction in work for cities, the legislature added a reporting responsibility. *Id.*[11] The second paragraph of the current version of section 1726 applies to LCPs.

Enforcement Under Labor Code section 1742

The Test Claim is correct that prior to 1975, there was no administrative adjudication of citations by the Labor Commissioner. Instead, the private contractor's remedy was a civil suit against the awarding body, which then had to pay attorneys to represent it in court. See description in *G & G Fire Sprinkler* cases, *infra* at n. 12. The awarding body could proffer the defense to the Labor Commissioner. Labor Code § 1733

A new administrative adjudication system was created in Labor Code section 1742.[12] Overall, this reduces the role of the cities. Now, a city is no longer even a nominal plaintiff defended by the Labor Commissioner. There is no requirement in the new statute or in the regulations that cities participate in the hearing process, (unless the city has availed itself of the option to become an LCP.) The regulations specifically define a "party" as "an Affected Contractor or Subcontractor who has requested review of either an Assessment or a Notice of Withholding of Contract Payments, the Enforcing Agency that issued the Assessment or the Notice of Withholding of Contract Payments from which review is sought, and any other Person who has intervened under subparts (a),

---

[11] This simultaneous reduction of work and minor addition of responsibility is not subject to subvention. Government Code § 17556(e).

[12] In 2000, the legislature passed AB 1646, which added new Labor Code sections 1741 and 1742. Section 1741 provided for a new system of citations by DLSE against contractors and subcontractors who failed to comply with the prevailing wage law.

The legislature passed Stats. 2000, ch. 954 (AB1646) in response to the Ninth Circuit Court of Appeal's decision in *G & G Fire Sprinkler v. Bradshaw*, 204 Fed.3rd 941 (9th Cir. 2000), which held, in part, that a subcontractor's due process rights were violated because the Labor Code did not give them a direct right to challenge withholding by cities. After the passage of AB 1646, the Supreme Court reversed the Ninth Circuit in *Lujan v. G& G Fire Sprinkler*, 532 U.S. 189, 121 S.Ct. 1446 (2001).

(b), or (c) of Rule 08." Cal. Code Reg., tit 8, § 17202(j).[13] This means that a city is not automatically a party to these proceedings and, therefore, has no mandatory duty to participate in them.

A city's participation only occurs when it seeks to intervene in a proceeding under Labor Code section 1742. Under the regulation for intervention, a city could intervene as "any other person."[14] In fact, no city, other than one acting as an LCP, has participated as a party.

Test Claimant asserts without explanation that somehow this new adjudicatory process has increased the burden on it to monitor contract payments whereas under the former system where the cities had to participate in court actions, with the inevitable delays, depositions, discovery, and trials.

Labor Compliance Programs

Prior to 1975, Labor Compliance Programs did not exist. All enforcement of the obligation to pay prevailing wages was accomplished by the city, with assistance from the Labor Commissioner. In an attempt to allow more local control over public works, as well as potentially reducing costs and increasing revenues, the legislature gave cities an alternative for enforcement of the CPWL.

Labor compliance programs offer two inducements to cities to enforce the state prevailing wage law. First, they increase the monetary ceiling before a project is subject to prevailing wages. Labor Code § 1771.5. Second, where the LCP elects to enforce, the fines, penalties, and forfeitures collected are deposited in the city's treasury. Cal. Code

---

[13] Regulations were approved for the 1742 adjudicative process on January 15, 2002, and the regulations are now codified at Cal. Code Regs., tit 8 §§ 17200 et seq.

[14] "Any other Person may move to participate as an interested Person in a proceeding in which that Person claims a substantial interest in the issues or underlying controversy and in which that Person's participation is likely to assist and not hinder or protract the hearing and determination of the case by the Hearing Officer and the Director. Interested Persons who are permitted to participate under this Rule shall not be regarded as Parties to the proceeding for any purpose, but may be provided notices and the opportunity to present arguments under such terms as the Hearing Officer deems appropriate." Cal. Code Regs., tit. 8, § 17208(d).

Regs., tit. 8, § 16438. This is an exception to the general rule that fines, penalties, and forfeitures go into the state's General Fund. Labor Code §§ 1730 (repealed 2001), 1731 (repealed 2001) and 1734 [1999 version]. This is not a so-called "carrot and stick" program in that there is no sanction for a city that decides not to participate.

Should a city choose to become an LCP, there are both initial and continuing requirements it must meet in order to retain its approval status with the Department. These requirements are found at Cal. Code Regs., tit. 8, §§ 16425 to 16500. Nowhere is this program mandated.[15]

Test Claimant asserts that the decision to become an LCP is a "Hobson's choice," an apparently free choice in which there is no real alternative. (Test Claim, pg. 9). If there were really no choice , then all who qualify, including Test Claimant, would have become LCPs. That Test Claimant has not become an LCP is clear evidence that there is a real choice whether to become an LCP. Once a city makes this voluntary decision to become an LCP, there are certain requirements it must meet, which Test Claimant has set forth.[16]

A Mandate Not To Discriminate

Since 1939, the Labor Code has prohibited discrimination on public works projects. In recent years, as the legislature has expanded the classes protected by California's anti-discrimination laws, it has similarly expanded the classes protected under this section. That is, the cities have been required to ensure compliance with the same anti-discrimination requirements that almost all employers already have. Somehow, Test Claimant finds this meets the requirements for subvention.[17]

---

[15] The Commission should also note that Test Claimant is not an LCP and therefore may not have standing to bring this portion of its Claim.

[16] The onerous material Test Claimant describes at page 15 is primarily model program information and forms to make the application process easier for those cities that choose to become LCPs.

[17] This claim is almost as silly as Test Claimant's claim of a mandate because of the change in language in Labor Code section 1773.5 from "The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out the prevailing wage provisions of this article." [1939 version] to "The Director of Industrial

STANDARDS FOR JUDGING ALLEGED MANDATES

Certain "costs mandated by the state" on local governments are subject to subvention. Government Code § 17550. The Claim procedure was created to ensure that the Legislature, in an effort to balance its own books, did not make cities pay for services that the state believed should be provided to the public and to provide an administrative mechanism for resolving these claims. *County of Los Angeles v. State of California* (1987) 43 Cal.3rd 46. Therefore, "new programs" or "higher levels of service" imposed on a city are entitled to subvention if the legislature or executive branch mandates them. Cal. Const., Art XIIIB, § 6. "[L]ocal entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or increased level of service imposed on them by the state." *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3rd 830, 835. Voluntary acts, even if sanctioned or regulated by state law, are not mandates; and subvention is not allowed. *City of Merced v. State of California* (1984) 153 Cal.App.3rd 777.

"Costs mandated by the state" is specifically defined in Government Code section 17514. Costs must be incurred by cities after July 1, 1980, as a result of one of two occurrences:

1. Any statute enacted on or after January 1, 1975; or
2. Any executive order that implements a statute that was enacted after January 1, 1975.

The new enactment or implementation of a new enactment must mandate a "new program" or "higher level of service".

To obtain subvention, Test Claimant must show it is under a legal compulsion to act as a result of some legislative action after January 1, 1975. Executive orders that were issued after January 1, 1975 to implement pre 1975 enactments do not constitute a

---

Relations may establish rules and regulations for the purpose of carrying out this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter." [current version] (Test Claim, pg. 9).

mandate. Similarly, where the Director, through his prevailing wage determinations, interprets the scope of the pre-1975 Labor Code, there is no ground to claim a "cost mandated by the state." It would therefore follow that post 1975 legislative enactments that merely restate prior interpretations based on the law as of January 1, 1975, similarly do not fall within the definition of section 17514 as no new program or higher level of service is being required. See, for example, Government Code § 17556(b).[18]

There Are No Grounds For Subvention.

In *Department of Finance v. Commission on State Mandates (Kern High School District)* (2003) 30 Cal.4th 727, 134 Cal.Rptr.2nd 237 ("*Kern*") disposed of many of the specific Test Claims, including those that fall within the broad category of voluntary activities. *Kern* addressed several unsettled issues defining those programs that constitute a "new program or increased level of service." The case arose from a Commission subvention order on nine education-related programs, all of which at their inception were mandatory programs. One of the requirements for these programs was the creation of local governing councils, which required compliance with the Brown Open Meeting Act's (Government Code § 54950.5 *et seq.*) requirement of notice of the local council meetings for all the governing councils.[19] During the period for which subvention was sought, eight of the programs became voluntary; once a school district decided to participate, however, the notice requirements were mandatory.

The Court made four significant rulings, three of which have some application to the Claim in this case:

1. What is a "Program": "First, we reject claimants' assertion that they have been legally compelled to incur notice and agenda costs,

---

[18] This means that should the Commission find any mandate from changes in the Labor Code, costs could only be asserted for those specific construction projects that would not have been public works under the 1975 version of section 1720 or for which prevailing wages were previously required. This means dissecting each city's construction history during the relevant period of the Test Claim.

[19] The Brown Act requirements were superceded by comparable Education Code requirements.

and hence are entitled to reimbursement from the state, based merely upon the circumstance that the notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, without regard to whether a claimant's participation in the underlying program is voluntary or compelled."

2. Effect of Voluntary Activities: "Second, we conclude that as to *eight* of the nine underlying funded programs here at issue, claimants have not been legally compelled to participate in those programs, and hence cannot establish a reimbursable state mandate as to those programs based upon a theory of legal compulsion."
3. Scope of No Reasonable Alternative Claim: "Finally, we reject claimants' alternative contention that even if they have not been *legally* compelled to participate in the underlying funded programs, as a *practical* matter they have been compelled to do so and hence to incur notice-and agenda-related costs."

Id., 30 Cal.4th at 731.

The *Kern* Court reached the obvious conclusion that, for subvention purposes, the proper focus was on the governmental agency's actual activity, to wit, the educational programs themselves and not the associated notice requirements. The Court found that even though all the programs initially were mandatory, their voluntary nature during the Claim period controlled. The Court held that any economic incentive provided for voluntary participation did not create a mandate, and the mandatory notice requirements once voluntary participation occurred were not subjects for subvention. In doing so, the Court approved the analysis in *City of Merced v. State of California, supra.* In doing so, the Court adopted *Merced*'s narrow definition of what constituted a "mandate." In approving *Merced*, the Court held:

[I]f a school district elects to participate in or continue participation in any

underlying *voluntary* education-related funded programs, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.

...the proper focus [of the] legal compulsion inquiry is upon the nature of claimants' participation in the underlying programs themselves.

Id., 30 Cal.4th at 743.

The Court's reaffirmation of *Merced* means that the focus of the Commission's inquiry must be on the governmental activity that underlies the Claim and not necessarily on the resulting compliance requirements. In this case, the "program" would be the cities' decision to engage in construction under contract, paid for in whole or in part with public funds. The question is whether the cities are under a "legal compulsion" to engage in construction under contract, paid for in whole or in part with public funds. Labor Code § 1720(a). The enforcement responsibilities in the Labor Code that flow as a consequence of the cities' activities do not, in themselves, constitute mandates because the enforcement activities are not the "program" subject to subvention. If there is no legal compulsion for a construction project built with private labor, then there can be no subvention for any enforcement costs that flow from a city's decision to engage in a specific public work.

The test now set by the Supreme Court, as applied here, will require a two step inquiry in this case:

(1) Is a city legally compelled to engage in construction using public funds?

(2) If so, is the city legally compelled to do so under contract (i.e., not with its own workforce)?

Only if the answers to these questions are both affirmative can there be a legally compelled "program" in the public works context. Test Claimant has argued it is under a realistic compulsion to maintain roads, streets, sidewalks, but has not shown any reason this work has to be performed by private contractors. Under *Kern*, the Test Claimant

must make this showing.

None Of The Specific Alleged Changes Meet The Requirements for Subvention.

Even if Test Claimant can show that each of its construction projects had to be built with private labor, the individual elements of the Test Claim fail for one or more of three reasons:

1. The alleged change in the CPWL is not a new program or increased level of service
2. The alleged change in the CPWL simply does not exist; or
3. The alleged change in the CPWL is not a mandate but regulation of voluntary activity by cities.

Some Changes Are Not "New Programs" Or "Higher Levels of Service" Because The Requirements Do Not Uniquely Affect Governmental Entities.

Some aspects of the Claim fall for the most basic of reasons; the changes in the CPWL are mandates for private parties who deal with cities, not for the cities themselves. "New programs" or "higher levels of service", if they exist, must be **unique** to governments. If a change in state law affects a larger population, including the public and private citizens, then the change is not subject to reimbursement. *County of Los Angeles v. State of California, supra.* The Supreme Court held that for a new program or higher level of service to exist:

> We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term ["higher level of service"]-- programs that carry out the **governmental function of providing services to the public**, or laws which, to implement a state policy, **impose unique requirements on local governments** and do not apply generally to all residents and entities in the state
>
> *County of Los Angeles, supra,* 4 Cal.3rd at 56 (emphasis added)

The Court held that a change in workers' compensation benefits that affects all

employers (but does not affect employee responsibilities, and is irrelevant to independent contractors, unemployed, or retirees) is not a mandate within the meaning of the Government Code. The Court delineated between those increased costs that **only** government organizations face versus increased costs that both governments and members of the public share alike. Compare, *Carmel Valley Fire Protection v. State of California* (1987) 190 Cal.App.3rd 521 [fire fighting unique government program] and *County of Sacramento v. State of California* (1990) 50 Cal.3rd 51 [paying unemployment insurance premiums not unique government program]

Changes in the method of making coverage determinations (including rate determinations) and enforcing the CPWL are clearly unique government functions (collectively "enforcement changes"). The Test Claimant conflates these enforcement changes with the **indirect effects** of refinements or changes in the scope of public works ("public works changes"). As seen below, the mandatory enforcement responsibilities for cities [determinations, rate setting, enforcement of obligation to pay prevailing wages] have decreased, not increased. The remaining claimed enforcement changes [LCPS, voluntary labor] are actually voluntary.

The direct effect of the Director's coverage determinations, and conforming legislation is on private parties. Some of the claims are that the public works changes increased the number of projects that are considered public works. Payment of prevailing wages, however, is uniquely a responsibility of private parties, as cities are never subject to pay their own employees prevailing wages. Labor Code § 1771. See also, *Bishop v. City of San Jose*, *supra*. Therefore, any public works coverage changes affect primarily the private parties who hire workers, not cities. This includes private developers of blighted areas, developers of large tracts of vacant land that have to provide public infrastructure, commercial landlords, and all the myriad contractors, subcontractors, haulers, and the like. The expansion of the definition of public works does not affect the cities directly.

Were there an increased cost of construction because a project is covered as a public work, the cost of the increase is not necessarily borne directly by the cities alone; nor is there any reason to think that the entire increase in the cost of construction that is attributable to changes in coverage would necessarily be passed on to the city as an increased cost. Therefore, the additional costs that might have arisen to cities are "an incidental impact of a law that applies generally to all entities [and] is not the type of expense that the voters had in mind when they adopted section 6 of California Constitution, article XIIIB." *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 277.

Some Claims Are Not Changes In State Law. Cities Have Less Responsibilities Than Before January 1, 1975.

It is a *sine qua non* that state law has to change for grounds to exist for a test claim. As seen above, in many aspects, cities are under no new obligations from 1975. For example, parties have always been able to request the Director to review coverage determinations, to seek review of rate determinations, and to appeal coverage determinations. Cities have always had to notify contractors of their obligations to pay prevailing wages, withhold funds from illegally operating contractors, *et cetera*. These unchanged responsibilities can be seen by comparing the 1975 and 2003 Labor Codes. These unchanged responsibilities for cities, as seen above, are not entitled to subvention. This much should be obvious.

In fact, during the almost 30 years covered by the Test Claim, the legislature, in an effort to create a statewide system for the payment of prevailing wage coverage and enforcement, has relieved cities of much of the responsibilities for prevailing wage enforcement. This has resulted in an overall reduction in how much the cities have to do. Some of these reductions have been simultaneous with different responsibilities for cities (such as the change from cities making rate determinations to requesting them from the Director). None of these reductions have been accounted for in the Claim.

The Director's interpretations of the definition of "construction" in the pre 1975 version of section 1720 are similarly not new mandates that are subject to subvention under Government Code section 17514. For example, the Director relied on the pre 1975 definition of "construction" to include landscape maintenance, land surveying, installation, inspection, and pre-construction activities. Even assuming that the Director's prevailing wage determinations are "executive orders," these determinations do not meet the standard in Government Code section 17514 because these orders merely implemented legislation enacted before January 1, 1975, regardless of when the determinations were issued. Similarly, post 1975 law that puts into law these interpretations of pre 1975 enactments are not changes or new mandates under the precise language of Government Code section 17514.

Some of the Changes Are Not Mandatory.

For a new mandate to occur, the city must be under a compulsion to act. *City of Sacramento v. State of California, supra,* 50 Cal.3rd at 51. Cities that voluntarily adopt new programs are not eligible for reimbursement. *City of Merced v. State of California, supra*, 153 Cal.App.3rd at 777 [the decision to proceed by eminent domain not a mandatory duty and not reimbursable]. Some of the Claims are not mandates since the new provisions control voluntary programs, such as the use of volunteer labor, the LCP provisions and the new administrative appeal system for the failure to pay prevailing wages. These are, in the words of the Supreme Court, "true choices." *City of Sacramento v. State of California, supra*, 50 Cal.3rd at 76. If there were any argument on the scope of the voluntary participation requiring subvention, the *Kern* decision removed it .

Conclusion

There are a myriad of reasons why the Claim should be denied in its entirety. There is no liability for any changes, mandatory or not, since the very decision by a city to

use private contractors for construction is a voluntary act, and no consequence that flows from that decision is subject to subvention. In the end, none of the changes alleged as requiring subvention meet the requirements of the Government Code.

Dated: 2 March 2004

Respectfully submitted,

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR-LEGAL UNIT
VANESSA L. HOLTON, Acting Chief Counsel
ANTHONY MISCHEL, Counsel
GARY J. O'MARA, Counsel

ANTHONY MISCHEL
ATTORNEY FOR DEPARTMENT OF
INDUSTRIAL RELATIONS

Verification

I, ANTHONY MIISCHEL, declare under penalty of perjury that I have read the attached **Department of Industrial Relations's Response to Commission On State Mandates Concerning Petition On Prevailing Wages** and know it is true and correct to the best of my knowledge.

Executed this 2nd day of March 2004, at Los Angeles, California.

ANTHONY MISCHEL, Declarant

or other place where visitors might be. It was, in short, located in a place where it was relatively safe from public intrusion, or so the occupant could reasonably believe. The trash can cannot logically be distinguished from the marijuana plants.

This case does not deal with "open fields," but with the yard adjacent to a private residence. (Compare Hester v. United States (1924) 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898.) The resident cannot reasonably expect privacy in those portions of the yard open to the public, or if not to the public, at least to a substantial number of people. (Compare People v. Terry, supra, 71 A.C. 101, 77 Cal.Rptr. 460, 454 P.2d 36, permitting a search in the common garage of a large apartment building.) Nor can he expect privacy for things in plain sight from such public areas. (People v. Terry, supra, 71 A.C. 101, 77 Cal.Rptr. 460, 454 P.2d 36; People v. Willard, supra, 238 Cal.App.2d 292, 47 Cal.Rptr. 734.) But he can reasonably, and probably does, expect privacy for the remainder of the property. No evidence in this case shows that the marijuana plants could be seen until the officer left the area open to the public and approached to a point approximately one foot from the plants. Consequently, the evidence must be excluded.

PETERS and SULLIVAN, JJ., concur.

460 P.2d 137
1 Cal.3d 56

[1-56] Charles BISHOP, Plaintiff and Appellant,
v.
CITY OF SAN JOSE et al., Defendants and Respondents.

S. F. 22677.

Supreme Court of California, In Bank.

Oct. 30, 1969.

Rehearing Denied Nov. 26, 1969.

Action wherein plaintiff, who filed suit as a resident and taxpayer of defendant city, as business agent of labor union local, and as assignee of certain union members employed by the city as electricians, alleged, inter alia, that the city had failed to pay its electricians the prevailing rate of per diem wages for their craft, pursuant to the prevailing wage law. The Santa Clara County Superior Court, O. Vincent Bruno, J., entered judgment against plaintiff, and he appealed. The Supreme Court, Burke, J., held that the setting and payment of salaries for the city's own year-round, full-time, civil service employees were purely municipal affairs to which the prevailing wage law as set forth in the Labor Code was inapplicable.

Judgment affirmed.

Peters, Mosk and Sims, JJ., dissented.

Opinion, Cal.App., 76 Cal.Rptr. 308, vacated.

1. Municipal Corporations ⇐79

As to matters which are of statewide concern, home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation. West's Ann.Const. art. 11, §§ 6, 8, 8(j), 11; West's Ann.Labor Code, §§ 1770 et seq., 1771 et seq.; St.1957, p. 4344; St.1965, p. 5122.

2. Municipal Corporations ⇐57, 64, 78, 79

Local governments, whether chartered or not, do not lack the power, nor are they constitutionally forbidden, to legislate on matters not of a local nature, nor is the legislature forbidden to legislate with respect to local municipal affairs of a home rule municipality; rather, in the event of conflict between state and local regulations, or if state legislation discloses an intent to preempt field, the question becomes one of predominance or superiority as between general state laws and local regulations. West's Ann.Const. art. 11, §§ 6, 8, 8(j), 11; West's Ann.Labor Code, §§ 1770 et seq., 1771 et seq.; St.1957, p. 4344; St.1965, p. 5122.

3. Counties ⇐21½
Municipal Corporations ⇐592(1)

In exercising judicial function of deciding whether matter is a municipal affair or of statewide concern, courts will give great weight to legislative purpose in enacting general laws which disclose intent to preempt field to exclusion of local regulation; however, mere fact that legislature has attempted to deal with particular subject on statewide basis is not determinative, nor does it impair the constitutional authority of a home rule city or county to enact and enforce its own regulations to the exclusion of general laws should the subject be held by courts to be a municipal affair; disapproving In re Hubbard (1964) 62 Cal.2d 119, 127–128, 41 Cal.Rptr. 393, 396 P.2d 809, and City of Redwood City v. Moore (1965) 231 Cal.App.2d 563, 580–581, 42 Cal.Rptr. 72.

4. Labor Relations ⇐1130

Setting and payment of salaries for city's own year-round, full-time, civil service employees were purely municipal affairs to which the prevailing wage law as set forth in the Labor Code was inapplicable. West's Ann.Const. art. 11, §§ 6, 8, 8(j), 11; West's Ann.Labor Code, §§ 1770 et seq., 1771 et seq.; St.1957, p. 4344; St.1965, p. 5122.

5. Labor Relations ⇐1129

Labor Code section providing that "Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed * * * shall be paid to all workmen employed in public works exclusive of maintenance work" applies only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. West's Ann.Labor Code, § 1771.

6. Statutes ⇐212.1

Statutes are to be interpreted by assuming that the Legislature was aware of the existing judicial decisions.

7. Statutes ⇐220

Failure to make changes in a given statute in a particular respect when the subject is before the legislature, and changes are made in other respects, is indicative of an intention to leave the law unchanged in that respect.

8. Injunction ⇐22

An injunction would not be issued enjoining defendant city from failing to seek competitive bids for improvement and construction projects involving an expenditure in excess of $2,500, in view of evidence that the city had instituted and was following workable and effective procedures to guard against any violations of its charter requirements with respect to the necessity of competitive bids for projects involving expenditures exceeding $2,500, and in view of evidence that the city intended in good faith to comply with such charter requirements.

Morgan, Beauzay & Hammer, Morgan, Beauzay, Wylie, Ferrari & Leahy, Robert Morgan, Eleanor M. Kraft and Kraft & Kraft, San Jose, for plaintiff and appellant.

Brundage & Hackler, Daniel Feins, Los Angeles, Charles P. Scully and Donald C. Carroll, San Francisco, amici curiae on behalf of plaintiff and appellant.

Ferdinand P. Palla, City Atty., Richard K. Karren, Asst. City Atty., and Harry Kevorkian, Deputy City Atty, for defendants and respondents.

John D. Maharg, County Counsel, Los Angeles, Edward H. Gaylord, Assistant County Counsel, Leonard Putnam, City Atty., Long Beach, Charles E. Greenberg, Deputy City Atty., Rutan & Tucker, Santa Ana, Harry J. Keaton, Los Angeles, James E. Erickson, Santa Ana, J. Nicholas Counter III, Santa Ana, E. K. Davis, David S. Kaplan, Sacramento, John B. Reilley, Frank E. Howard, Oakland, and Wayne N. Witchez amici curiae on behalf of defendants and respondents.

BURKE, Justice. [1] [69]

Plaintiff appeals from a judgment declaring the prevailing wage provisions found in certain sections of the Labor

Code to be inapplicable to the employees of defendant city, and denying relief sought by way of injunction and damages.[1] As hereinafter appears, we have concluded that the trial court ruled correctly with respect to the prevailing wage law, that no other ground for reversal has been shown, and that the judgment should be affirmed.

160 Plaintiff contends that from 1958 to 1966 defendant city unlawfully failed to pay its electricians the prevailing rate of per diem wages for work of a similar character, pursuant to the prevailing wage law (Lab. Code, § 1770 et seq.), and also failed to seek competitive bids for certain improvement and construction projects, pursuant to provisions of the city charter.

The city is a freeholders' charter city organized under the Constitution and laws of this state. Until May 1965 the city operated under its 1915 charter, as amended, and since 1965 it has operated under its 1965 charter, as amended. Both charters contain "home rule" provisions (Cal.Const., art. XI, §§ 6, 8, subd. (j)), and provisions requiring that all public buildings and works costing more than a specified amount shall be done by contract and let to the lowest responsible bidder.[2] Neither charter contains any provisions relating to prevailing wages; however, the city council periodically enacts prevailing wage ordinances.

Plaintiff's assignors are among some 17 electricians employed by the city who work under the city electrician and have performed additions, modification, maintenance and repair of city electrical facilities, buildings and equipment, including street lights, traffic signals, fire alarm boxes 161

1. Plaintiff instituted this action as a resident and taxpayer of defendant city, as the business agent of a labor union local, and as the assignee of certain union members employed by the city as electricians.

2. *1915* charter, section 89: "All public buildings and works, when the expenditure therefor shall exceed one thousand dollars ($1,000.00), shall be done by contract and shall be let to the lowest responsible bidder, after advertising * * *." (Stats.1957, p. 4844.)

1965 charter, section 1217: "Except as hereinafter otherwise provided, each purchase of supplies and materials the expenditure for which exceeds One Thousand Dollars ($1,000), each purchase of equipment and expenditure for which exceeds Two Thousand Dollars ($2,000) and each specific 'public works project,' hereinafter defined, the expenditure for which (excluding the cost of any materials which the City may have already lawfully acquired therefor) exceeds the amount which a general law City of the State of California may legally expend for a public project (as defined by State law) without a contract let to a lowest responsible bidder after notice, shall be contracted for and let to the lowest responsible bidder after notice; provided, however, that in no event shall the above apply to any specific 'public works project' the expenditure for which (excluding the cost of any materials which the City may have already lawfully acquired therefor) does not exceed Two Thousand Five Hundred Dollars ($2,500).

" * * *

"For purposes of this Section, 'public works project' shall be deemed to mean and is hereby defined as a project for the construction, erection, improvement or demolition of any public building, street, bridge, drain, ditch, canal, dam, tunnel, sewer, water system, fire alarm system, electrical traffic control system, street lighting system, parking lot, park or playground; provided and excepting that 'public works project' shall not be deemed to mean or include the maintenance of any of said things, or any repairs incidental to such maintenance, * * *. Also, the provisions of this Section shall not apply to any of the following: * * * (b) the purchase of any supplies, materials or equipment which can be obtained from only one vendor or manufacturer; * * * (f) work involving highly technical or professional skill where the peculiar technical or professional skill or ability of the person selected to do such work is an important factor in his selection; (g) expenditures deemed by the Council to be of urgent necessity for the preservation of life, health or property, provided the same are authorized by resolution of the Council adopted by the affirmative vote of at least five (5) members of the Council and containing a declaration of the facts constituting the urgency; and (h) situations where solicitation of bids would for any reason be an idle act." (Stats.1965, pp. 5122, 5158.)

and systems, etc. The electricians are civil service employees of the city, and since 1958 have been paid monthly salaries on a year-round, full-time basis,[3] plus extra pay for overtime and holiday work, and plus various other benefits such as holidays, vacation and sick leave, health insurance and retirement benefits. In 1963 the work of the city electricians was approximately 40 percent new construction, but at the time of trial (1965–1966) the workload was only some 16 percent construction with maintenance taking up the other 84 percent.

Plaintiff's complaint focuses on four kinds of work[4] done by the city electricians between 1958 and 1966, assertedly in violation of the prevailing wage law and of the respective $1,000 and $2,500 project limits of the 1915 and the 1965 city charters. (Fn. 2, ante.) The trial court ruled, among other things, that both the four kinds of work and the setting and payment of salaries for the city's own year-round, full-time, civil service employees are purely municipal affairs to which, under the home rule provisions of article XI of the California Constitution, the prevailing wage provisions of Labor Code sections 1771 et seq., relied upon by plaintiff, cannot be applied; that in any event the prevailing wage law does not as a matter of statutory construction apply to the setting of such salaries. The court also found that the city at all times acted in the good faith belief that the prevailing wage provisions do not apply to the salaries paid to its own employees.

At all times since adoption of the Constitution in 1879, section 11 of article XI has specified that "*Any* county, *city*, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." (Italics added.) In 1896 section 6 of article XI was amended to provide a limited amount of autonomy for freeholders' charter cities, and in 1914 sections 6 and 8 of article XI were amended to permit such cities, by appropriate charter amendments, to acquire autonomy with respect to all municipal affairs. A city which adopted such "home rule" amendments thereby gained exemption, with respect to its municipal affairs, from the "conflict with general laws" restrictions of section 11 of article XI.

[1] As to matters which are of statewide concern, however, home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation (the preemption doctrine). (Pac. Tel. & Tel. Co. v. City & County of San Francisco (1959) 51 Cal.2d 766, 768–769, 336 P.2d 514; Pipoly v. Benson (1942) 20 Cal.2d 366, 369–370, 125 P.2d 482, 147 A.L.R. 515.) 162

[2] As is made clear in the leading case of Pipoly v. Benson, *supra*, local governments (whether chartered or not) do not lack the power, nor are they forbidden by the Constitution, to legislate upon matters which are not of a local nature, nor is the Legislature forbidden to legislate with respect to the local municipal affairs of a home rule municipality. Instead, in the event of conflict between the regulations of state and of local governments, or if the state legislation discloses an intent to preempt the field to the exclusion of local regulation, the question becomes one of predominance or superiority as between general state laws on the one hand and the local regulations on the other. (See also e. g. Galvan v. Superior Court (1969) 70 A.C. 905, 910–920, 76 Cal.Rptr. 642, 452 P.2d 930; Abbott v. City of Los Angeles (1960) 53 Cal.2d 674, 681–684, 3 Cal.Rptr.

3. The pre-1958 earnings of the electricians are not in issue here, but were apparently based on a union scale.

4. The four kinds of work: (1) fire alarm system; (2) overhead traffic signals; (3) IBM project; (4) miscellaneous electrical work at the municipal airport, in a park, and inside the city hall.

158, 349 P.2d 974, 82 A.L.R.2d 385;[5] Chavez v. Sargent (1959) 52 Cal.2d 162, 176–177, 339 P.2d 801; Agnew v. City of Los Angeles (1958) 51 Cal.2d 1, 5, 330 P.2d 385; Wilson v. Beville (1957) 47 Cal.2d 852, 856–861, 306 P.2d 789; Eastlick v. City of Los Angeles (1947) 29 Cal.2d 661, 665–666, 177 P.2d 558, 170 A.L.R. 225; Southern California Roads Co. v. McGuire (1934) 2 Cal.2d 115, 123, 39 P.2d 412.)

If resolution of that question requires a determination as to whether the matter regulated is a state or a municipal affair, then, as declared in Professional Fire Fighters, Inc. v. City of Los Angeles (1963) 60 Cal.2d 276, 294, 32 Cal.Rptr. 830, 841, 384 P.2d 158, 169, "Because the various sections of article XI fail to define municipal affairs, it becomes necessary for the courts to decide, under the facts of each case, whether the subject matter under discussion is of municipal or statewide concern." In other words, "No exact definition of the term 'municipal affairs' can be formulated, and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case. The comprehensive nature of the power is, however, conceded in all the decisions, * *." (Butterworth v. Boyd (1938) 12 Cal.2d 140, 147, 82 P.2d 434, 438, 126 A.L.R. 838; see also City of Pasadena v. Charleville (1932) 215 Cal. 384, 392, 10 P.2d 745 [5].)

163 Further, the "constitutional concept of municipal affairs * * * changes with the changing conditions upon which it is to operate. What may at one time have been a matter of local concern may at a later time become a matter of state concern controlled by the general laws of the state. [Citations.]" Pac. Tel. & Tel. Co. v. City & County of San Francisco, *supra*, 51 Cal.2d 766, 771, 775–776, 336 P.2d 514, 517; Butterworth v. Boyd, *supra*.

[3] In exercising the judicial function of deciding whether a matter is a municipal affair or of statewide concern, the courts will of course give great weight to the purpose of the Legislature in enacting general laws which disclose an intent to preempt the field to the exclusion of local regulation (see Ex parte Daniels (1920) 183 Cal. 636, 639–640, 192 P. 442, 21 A.L.R. 1172), and it may well occur that in some cases the factors which influenced the Legislature to adopt the general laws may likewise lead the courts to the conclusion that the matter is of statewide rather than merely local concern. However, the fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs, nor does it impair the constitutional authority of a home rule city or county to enact and enforce its own regulations to the exclusion of general laws if the subject is held by the courts to be a municipal affair rather than of statewide concern; stated otherwise, the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern.[6]

5. That the statement appearing in *Abbott* (p. 681 [5] of 53 Cal.2d, p. 163 of 3 Cal.Rptr., p. 979 of 349 P.2d) that "A city has *no power* to legislate upon matters which are not of a local nature" was improvident is made clear by the later opinion of the same author, in Galvan v. Superior Court, *supra*, 70 A.C. 905, 910–920, 76 Cal.Rptr. 642, 452 P.2d 930. (Italics added.)

6. Any statements to the contrary found in In re Hubbard (1964) 62 Cal.2d 119, 127–128, 41 Cal.Rptr. 393, 306 P.2d 809, were not only unnecessary to the decision there but are overruled if they be deemed authoritative. In City of Redwood City v. Moore (1965) 231 Cal.App.2d 563, 580–581, 42 Cal.Rptr. 72, the court was misled into contrary statements by overemphasis on the comment in Professional Fire Fighters, Inc. v. City of Los Angeles, *supra*, 60 Cal.2d 276, 294, 32 Cal.Rptr. 830, 841, 384 P.2d 158, 169, that the question as to whether a matter is of municipal or statewide concern "must be determined [by the courts] from the legislative purpose in each individual instance." As we have noted, the courts will give great weight to the legislative purpose and may be influenced by the

[4] In the present case it clearly appears from the provisions of the prevailing wage law here involved that the Legislature did not intend that that law apply to the setting of the salaries of employees of a city, whether chartered or not.

[5] Section 1771 of the Labor Code,[7] relied upon by plaintiff, is found in chapter 1 of part 7.[8] Part 7 is entitled "Public Works and Public Agencies." Chapter 1 deals with "Public Works" and commences with section 1720. Section 1720 defines public works[9] as used in chapter 1, and section 1724 defines the expression "Locality in which public work is performed."[10] Inasmuch as section 1771 directs that the wage to be paid is that prevailing in the "locality in which the public work is performed," and section 1724 states that that expression encompasses only situations in which a contract to do public work has been awarded, it becomes at once apparent that section 1771 is by its own terms applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces.

Plaintiff also points to the clause in section 1773 directing that the "body awarding any contract for public work, or *otherwise undertaking any public work*, * * *," shall ascertain the prevailing wage rate.[11] (Plaintiff's emphasis.) Again, however, as is clear from the entire provision, from which plaintiff has extracted a portion out of context, the direction to ascertain the prevailing wage not only is tied to the "locality" definition (see fn. 10, *ante*) and thus to the area in which the *contracted work* is to be performed, but the direction of section 1773 is that after such wage has been ascertained it shall be specified in the call for bids for the *contract* and in the *contract*. Accordingly, nothing found in section 1773 lends a scintilla of support to plaintiff's contention that the prevailing wage law was intended by the Legislature to apply to other than public work let out to contract. No useful purpose would be served by here undertaking to detail other sections of the prevailing wage law as set forth in chapter 1 of part 7 of the Labor Code, but it is appropriate to note that the entire tenor thereof discloses a legislative purpose to deal only with contracted public work, and not with work done by a municipality by force account. (See, e. g., §§ 1773.3, 1773.4, 1774, 1775, 1776.)

[6, 7] Additionally, the court so construed the law in Beckwith v. County of Stanislaus (1959) 175 Cal.App.2d 40, 48, 345 P.2d 363, 369, with the declaration that

same factors as was the Legislature; but the view expressed in *Moore*, *supra*, that the Legislature has "the power to change a municipal affair into a matter of statewide concern," is disapproved.

7. Section 1771, in pertinent part: "Not less than the general prevailing rate of per diem wages for work of a similar character *in the locality in which the public work is performed*, * * * shall be paid to *all workmen employed on public works* exclusive of maintenance work." (Italics added.)

8. Subsequent section references herein are to the Labor Code, unless otherwise stated.

9. For purposes of this opinion it may be assumed, without deciding, that the four kinds of work on which plaintiff's complaint focuses (see fn. 4, *ante*) fall within the section 1720 definition of public works.

10. Section 1724: "'Locality in which public work is performed' means the county in which the public work is done in cases in which *the contract is awarded* by the State, and means the limits of the political subdivision on whose behalf *the contract is awarded* in other cases." (Italics added.)

It is also noted that as used in chapter 1, "Political subdivision" is defined by section 1721 to include "any" city.

11. The full sentence of section 1773 from which plaintiff has quoted reads in pertinent part: "The body awarding any contract for public work, or otherwise undertaking any public work, *shall ascertain* the general *prevailing* rate of per diem *wages in the locality in which the public work is to be performed* * * * *and* shall *specify in the call for bids for* the *contract*, * * * *and in the contract* itself, *what the general prevailing rate of* * * * *wages* * * * *in the locality is* * * *." (Italics added.)

"The prevailing wage and competitive bidding statutes have no application to work undertaken by force account or day labor." Since *Beckwith* the statute has remained unchanged in any aspect material here, although amended in other respects.[12] "Statutes are to be interpreted by assuming that the Legislature was aware of the existing judicial decisions. [Citation.] Moreover, failure to make changes in a given statute in a particular respect when the subject is before the Legislature, and changes are made in other respects, is indicative of an intention to leave the law unchanged in that respect." (Williams v. Industrial Acc. Commission (1966) 64 Cal.2d 618, 620, 51 Cal.Rptr. 277, 278, 414 P.2d 405, 406, and cases there cited; Alter v. Michael (1966) 64 Cal.2d 480, 482, 50 Cal.Rptr. 553, 413 P.2d 153; Kusior v. Silver (1960) 54 Cal.2d 603, 618, 7 Cal.Rptr. 129, 354 P.2d 657.)

[8] With respect to the project limitations of $1,000 and $2,500 specified, respectively, in the 1915 and 1965 charters (fn. 2, *ante*), the trial court found and concluded, among other things, that the city has instituted and is following workable and effective procedures to guard against any violations of the requirements of section 1217 of the 1965 charter and intends in good faith to comply with such requirements. Plaintiff has thus shown no impropriety in the denial by the trial court of injunctive relief.

Other than plaintiff's claim that his assignors as city employees would have received higher earnings under the prevailing wage law, which we hold did not apply, plaintiff does not suggest that he made any showing which would controvert the trial court's ruling that neither plaintiff, his assignors, his union, nor members of his union have suffered any loss or damage by reason of the work done by the city's own employees. Accordingly, it is unnecessary in this opinion to attempt to weigh the four kinds of work as against the charter project limitations. Ample preventive remedies are available to taxpayers and citizens in the event of any attempt or threat to violate the public bidding requirements of the charter. We in no way condone any past evasion of those provisions, as public bidding serves many sound governmental purposes. However, in our view plaintiff's requested remedy by way of award for the benefit of his assignors is neither a proper remedy after the event nor a desirable preventive measure, and would fail to reach the real issue of possible violations of the charter.

The judgment is affirmed.

TRAYNOR, C. J., McCOMB, J., and DRAPER, J. pro tem.*, concur.

PETERS, Justice (dissenting).

I disagree with the majority in three fundamental respects: (1) as to the effect to be given to the "home rule" provisions of article XI of the California Constitution; (2) as to the proper construction of section 1720 et seq. of the Labor Code; and (3) as to the effect to be given to the violations of the city's own charter.

I

I cannot agree with the statements in the majority opinion that a city which adopted "home rule" amendments to its charter pursuant to sections 6 and 8 of article XI of the California Constitution "thereby gained exemption, with respect to its municipal affairs, from the 'conflict with general laws' restrictions of section 11 of article XI," that "in the event of conflict between the regulations of state and of local governments, or if the state legislation discloses an intent to preempt the field to the exclusion of local regulation, the question becomes one of predominance or superiority as between gener-

12. See Statutes 1963, chapter 467, page 1320, and chapter 1786, page 3592; Statutes 1965, chapter 283, page 1284; Statutes 1968, chapters 690, 880, 1411.

* Assigned by Chairman of the Judicial Council.

al state laws on the one hand and the local regulations on the other," and that in "[e]xercising the judicial function of deciding whether a matter is a municipal affair or of statewide concern, the courts will of course give great weight to the purpose of the Legislature in enacting general laws which disclose an intent to preempt the field to the exclusion of local regulation (see Ex parte Daniels (1920) 183 Cal. 636, 639–640, 192 P. 442, 21 A.L.R. 1172), and it may well occur that in some cases the factors which influenced the Legislature to adopt the general laws may likewise lead the courts to the conclusion that the matter is of statewide rather than merely local concern. However, the fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs, nor does it impair the constitutional authority of a home rule city or county to enact and enforce its own regulations to the exclusion of general laws if the subject is held by the courts to be a municipal affair rather than of statewide concern; stated otherwise, the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern." (pp. 468–469; footnote omitted.)

I cannot agree that in cases where there is a conflict between local and state law or where there is a legislative intent to preempt the field, the problem is whether the subject matter is a municipal rather than state concern. The proper rule is that set forth in Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal.2d 276, 292, 32 Cal.Rptr. 830, 840, 384 P.2d 158, 168, "general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern." In other words, in cases of conflict and preemption, the inquiry ends once a statewide concern is found, and there is no need to weigh the state and municipal concerns or to determine which should predominate.

[1]We applied the principle in *Professional Fire Fighters* where we recognized that the statutory provisions permitting unionization of firemen "may impinge" upon local control but held that since the statutory provisions were part of a scheme of legislation to create uniform fair labor practices throughout the state they were a matter of state concern. (60 Cal.2d at pp. 294–295, 32 Cal.Rptr. 830, 384 P.2d 158.) Twenty-two cases were cited in the *Professional Fire Fighters* opinion "all dealing with various phases of municipal affairs held to be subject to general laws on the basis of statewide concern." (60 Cal.2d at pp. 293–294, 32 Cal.Rptr. at p. 841, 384 P.2d at p. 169.)

The majority has impliedly overruled *Professional Fire Fighters* and these twenty-two cases. There is no justification for this grave departure from existing law. The rigid approach suggested by the majority, that matters are either a municipal affair or of state concern, ignores the basic realities of most situations. Logically, there are four categories. First is the situation where there are solely state concerns, and the subject matters of the municipal regulation and the state statute do not affect municipal affairs. Second is the situation where the subject matter of the municipal regulation and the state statute is a matter which involves both municipal and statewide concerns. Third is the situation where although the subject matter is one ordinarily subject to municipal regulations, such as relations with municipal employees, parts of the subject may also involve matters of statewide concern. Fourth is the situation where the subject matter solely involves municipal affairs and no matters of statewide concern are involved.

The first situation is reflected by Wilson v. Beville, 47 Cal.2d 852, 856–857, 306 P.2d 789, where this court held that claim requirements for the taking of property by eminent domain is not a municipal affair

but is a matter of statewide concern that may be regulated only by the Legislature. (See In re Hubbard, 62 Cal.2d 119, 127, 41 Cal.Rptr. 393, 396 P.2d 809.) The court held invalid a city charter claim-filing provision insofar as it applied to actions in inverse condemnation.[1]

The second situation is reflected by In re Hubbard, *supra*, 62 Cal.2d 119, 127–128, 41 Cal.Rptr. 393, 396 P.2d 809, where we recognized that the regulation of gambling is a matter of both local and statewide concern. We there held that in the absence of conflict with general law "chartered counties and cities have full power to legislate in regard to municipal affairs unless: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality." (62 Cal.2d at p. 128, 41 Cal. Rptr. at p. 398–399, 396 P.2d at p. 814–815.) It should be pointed out that each of the three categories mentioned in the case is dependent upon a statewide concern, which because of legislative action or the subject matter, takes precedence over municipal affairs.

The third situation is reflected by *Professional Fire Fighters*, where the general subject in issue is a municipal affair but there are also matters of statewide concern. There it was recognized that the relations of a municipality with its employees in general is a matter of municipal concern but that the creation of uniform fair labor practices throughout the state is a matter of state concern and that regulations of a chartered city in conflict with statutes governing labor relations of firemen were invalid. (60 Cal.2d at p. 289, 32 Cal.Rptr. 830, 384 P.2d 158 et seq.)

The fourth situation, where the subject is solely municipal affairs so that enactments of the Legislature will be held invalid as applied to chartered cities and counties, is difficult to illustrate. The only case of this court cited by the majority, and the most recent one that I have found where it was held that legislation could not be validly held applicable to a chartered city or county is City of Pasadena v. Charleville (1932) 215 Cal. 384, 10 P.2d 745, and, as will appear hereinafter, that case should be disapproved. Furthermore, the two most recent cases discussing the problem of conflict between local and state law contain language indicating that the state law must always prevail. (Galvan v. Superior Court, 70 A.C. 905, 910, 76 Cal. Rptr. 642, 452 P.2d 930; Bellus v. City of Eureka, 69 Cal.2d 336, 346, 71 Cal.Rptr. 135, 444 P.2d 711; see also Nat. Milk, etc., Assn. v. City, etc., of San Francisco, 20 Cal.2d 101, 110, 124 P.2d 25.)

I must confess that I find it somewhat incongruous that a chartered city may authorized conduct the state has prohibited, prohibit conduct that the state has authorized, engage in activities that the state has prohibited or refuse to comply with state law where the Legislature has clearly declared its intent that its statutes are to be applicable in and to the chartered city. Nevertheless, cases have continued to state that as to solely municipal affairs, ordi-

1. The majority does not disapprove *Wilson*, although it does disapprove a statement in Abbott v. City of Los Angeles, 53 Cal. 2d 674, 681, 3 Cal.Rptr. 158, 163, 349 P. 2d 974, 979, 82 A.L.R.2d 385, that a "city has no power to legislate upon matters which are not of a local nature." (Ditto Opn., p. 469, fn. 5.) The next succeeding sentence of the *Abbott* opinion, which deals with matters which are a "mixed concern" of both municipalities and the state, makes it clear that the disapproved statement is concerned with matters solely of statewide concern. In my view, we should adhere to the statements of *Abbott* and *Hubbard*, and the holding of *Wilson*.

nances of chartered cities will take precedence over conflicting statutes. (E.g., Professional Fire Fighters, Inc. v. City of Los Angeles, *supra*, 60 Cal.2d 276, 291, 32 Cal.Rptr. 830, 384 P.2d 158; Pipoly v. Benson, 20 Cal.2d 366, 369, 125 P.2d 482, 147 A.L.R. 515.)

If it be assumed that there are some [69] matters so local in nature that the Legislature's power to regulate will be limited to nonchartered cities and counties, it is apparent that such matters must be very rare. Equally rare are cases coming within the first situation where there are no local concerns so that even in the absence of state regulation chartered cities and counties may not act.

Most if not all matters upon which the state or chartered cities and counties legislate fall within the second and third categories where in the absence of conflicting state statutes or state occupation of the field chartered cities and counties may properly act. When the Legislature adopts a conflicting statute or occupies the field in such a case, the ordinance or the local regulation becomes invalid. This is the basis of *Professional Fire Fighters*, where we held that although ordinarily labor relations of municipal employees are a matter of local concern, uniform fair labor practices are a matter of state concern, and when the Legislature adopted a statute establishing uniform fair labor practices, a matter involving statewide concerns, the statute was controlling against conflicting municipal law. In other words, in the overwhelming majority of situations, if not all situations, as stated by Justice Molinari in City of Redwood City v. Moore, 231 Cal.App.2d 563, 580–581, 42 Cal.Rptr. 72, 84, "the Legislature does have the power to change a municipal affair into a matter of statewide concern, and thus impinge upon local control, where it is the legislative purpose to deal with the particular subject matter under discussion on a statewide basis." Accordingly, I cannot agree with the majority that this language should be disapproved.

For the same reason I cannot agree with the majority's disapproval of In re Hubbard, *supra*, 62 Cal.2d 119, 127–128, 41 Cal.Rptr. 393, 396 P.2d 809. Moreover, in disapproving *Hubbard*, the majority fails to deal with the specific problem dealt with there and leaves the law in an uncertain state as to an important problem which often arises in law enforcement. *Hubbard* held that the Long Beach ordinance prohibiting gambling was valid "except insofar as the ordinance may be applied to the 12 games and one class of activity prohibited by Penal Code section 330." (62 Cal.2d at p. 128, 41 Cal.Rptr. at p. 399, 396 P.2d at p. 815.) Under *Hubbard* violations of the Penal Code section are prosecuted under state law, and other gambling infractions under the ordinance. In overruling *Hubbard* the majority does not tell us whether gambling is now to be considered a matter "predominately" of local or statewide concern. I do not understand the majority to repudiate the long-standing rule that where both state and local law prohibit the same conduct, there is a conflict and only one is valid (e.g., In re Sic, 73 Cal. 142, 146–149, 14 P. 405; Ex parte Daniels, *supra*, 183 Cal. 636, 645, 192 P. 442, 21 A.L.R. 1172; Abbott v. City of Los Angeles, *supra*, 53 Cal.2d 674, 683, 3 Cal.Rptr. 158, 349 P.2d 974, 82 A.L.R.2d 385), and prosecutors and judges will be required to guess whether conduct prohibited by both state and local gambling laws should be prosecuted under the state or the local law.

Rather than weigh whether local or state- [70]
wide concerns should predominate, I would adhere to the rule of *Professional Fire Fighters*, that even in regard to matters which would otherwise be deemed to be strictly municipal affairs, general law prevails where the subject matter of the general law is of statewide concern. The prevailing wage law clearly reflects statewide concerns. The statutes before us deal with labor relations of persons employed on public works projects and the minimum wages to be paid them. *Professional Fire Fighters*, as we have seen, establishes that the subject of uniform fair labor practices

is a proper subject of statewide concern, and it seems clear that minimum wages for employees is also such a matter. Although municipal employment is obviously a matter of local concern, the Legislature, in view of the statewide concerns, may properly adopt and make applicable to chartered cities and counties the statutes before us.

City of Pasadena v. Charleville, *supra*, 215 Cal. 384, 388–393, 10 P.2d 745, which dealt with the predecessors of the statutes before us, held that the state could not properly require a chartered city to provide for prevailing wages in its call for bids for a contract for a municipal improvement. The court suggested that general minimum wage laws applicable to public and private employees might be unconstitutional under Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785. The *Adkins* case has long been repudiated, and it is now recognized that minimum wages are a proper subject of state concern. (West Coast Hotel Co. v. Parrish (1937) 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703.) City of Pasadena v. Charleville, *supra*, should also be overruled.

II

In concluding that the prevailing wage law as set in chapter I of part 7 of division 2 of the Labor Code deals only with contracted public work and not with work done by force account, the majority largely ignores the first section of the chapter which makes clear that the prevailing wage law is not limited to contracted work but applies also to certain work done by force account. That section, 1720, provides:

"As used in this chapter 'public works' means: (a) Construction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds, * * *.

"(b) Work done for irrigation, utility, reclamation and improvement districts, and other districts of this type. 'Public work' shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, * * *.

"(c) Street, sewer or other improvement work done under the direction and supervision or by the authority of any officer or public body of the State, or of any political subdivision or district thereof, whether such political subdivision or district 171
operates under a freeholder's charter or not."

It seems clear that improvement work let by contract would come under subdivision (a) of the section and that unless subdivision (c) is read to include within the definition of "public works" improvement work done by force account, subdivision (c) is meaningless. In addition subdivision (c) expressly provides that it applies to chartered cities and counties.

Section 1771 of the Labor Code requires the payment of the prevailing rate of wages to "all workmen employed on public works exclusive of maintenance work." Section 1771 provides: "Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, *shall be paid to all workmen employed on public works exclusive of maintenance work.*" (Italics added.) It seems clear to me that the scope of the prevailing wage law is set forth by the italicized matter and the definition of "public works" set forth in the first section of the chapter.

Likewise, section 1773 provides that the "body awarding any contract for public work, *or otherwise undertaking any public work*, shall ascertain the general prevailing rate of per diem wages in the locality in which the public work is to be performed * * *." (Italics added.) The italicized words show that the prevailing wage law is not limited to situations where contracts are awarded.

The majority rely upon the phrase "locality in which public work is performed" appearing in sections 1771 and 1773 and defined in section 1724 as showing that the prevailing wage law is only applicable

where contracts are let. Although it is true that section 1724 in defining the quoted term speaks of contracts, this, at most, can only create a conflict within the literal language of sections 1771 and 1773, and it is clear to me that the term "public works" is used in those sections to show the scope of the application of the prevailing wage law whereas the phrase relied upon by the majority is not intended to limit the scope of the law but only to establish the method of computation. In determining the legislative intent as to the scope of the statute, we should look at the language used by the Legislature in the statute to define the scope of the applicability of the prevailing wage law rather than a phrase which merely relates to the computation of the prevailing wage. When this is done, the definition of "public works" as set forth in the first section of the chapter requires the conclusion that the prevailing wage law applies to all workmen employed on public works exclusive of maintenance work whether or not the public works have been let by contract.

The majority also rely on the rule of
172 statutory construction that statutes are to be interpreted by assuming that the Legislature was aware of existing judicial decisions and that the failure to make changes in a statute in a particular respect, although making changes in other respects, is indicative of an intention to leave the law unchanged in that respect. This rule of construction in a proper case is entitled to great weight, but in the circumstances of this case it is entitled to little or no weight. The only judicial construction of the statutes is a statement made without citation of authority in Beckwith v. County of Stanislaus, 175 Cal.App.2d 40, 48, 345 P.2d 363, that the prevailing wage and competitive bidding statutes have no application to work undertaken by force account or day labor. The prevailing wage law was not directly involved in the case, and not only is there no citation to any authority for the statement but, more importantly, the opinion does not cite the prevailing wage statute or any section of the Labor Code. The headnotes of the official report of the case and of the West Publishing Company report (345 P.2d 363–364) make no mention whatsoever of the statement relied upon by the majority. The rule of construction relied upon by the majority is premised on the theory that the Legislature is aware of the judicial construction of the statute, and in the circumstances there is little reason to believe that the Legislature, when it was considering amending the statute in other respects, became aware of the statement in *Beckwith*.

In any event, any weight which the rule of construction relied upon by the majority might be entitled to in the present case is clearly counterbalanced because the Attorney General in two opinions reached a contrary construction of the prevailing wage law. In 1944 he expressly pointed out that construction of improvements by day labor was controlled by section 1771 of the Labor Code. (3 Ops.Cal.Atty.Gen. 399, 401.) In 1960, he pointed out that improvements by county employees, in accordance with the views expressed above, would not come under subdivision (a) of section 1720 which related solely to contracted work but would come under subdivision (c) of the section and that the prevailing wage law was applicable to such improvements. (35 Ops.Cal.Atty.Gen. 1, 2.) Unlike the opinion of the Court of Appeal relied upon by the majority, the opinions of the Attorney General both cited and analyzed the relevant code sections, and, if any weight is to be placed upon legislative inaction, it seems more reasonable to assume that the Legislature in refusing to act was more likely aware of the Attorney General's opinion than of the Court of Appeal opinion.

III

Finally, even if we assume that the prevailing wage law (Lab.Code, § 1720 et seq.), is applicable ordinarily only to contracts for improvements and is not ordinarily applicable to work done by force account, it nevertheless appears that plain-

tiff is entitled to recover in this action. Had the city complied with its own charter, it would, under the undisputed facts, have been required to let a substantial portion of the work by contract, and the persons who performed that work, plaintiff's assignors, would have been entitled to payment of, at least, the prevailing wage. The city should not be permitted to profit from its own wrong in violating its charter, and the workingmen who worked on the improvements should not, because of the city's wrongful violation of its charter, be deprived of the compensation they are entitled to under statute.

I would reverse the judgment.

MOSK, J., and SIMS, J. pro tem.*, concur.

Rehearing denied; PETERS, MOSK and SIMS, JJ., dissenting.

DRAPER and SIMS, JJ., sitting pro tem. in place of TOBRINER and SULLIVAN, JJ., who deemed themselevs disqualified.

* Assigned by the Chairman of the Judicial Council.

ter recommending Wiz seek a tolling agreement. In that letter, Kronemyer told Arthur Tendler that if the court of appeal were to determine Stroock never was Wiz's attorney, it would not be possible for Wiz to assert a malpractice claim. Stroock argues a jury could infer—from this statement and from Arthur Tendler's earlier declaration that Stroock represented Wiz in connection with blue sky issues—that Kronemyer's advice was actually that the success of a malpractice claim hinged on whether the Tendlers got away with "what [they] knew was a false allegation." Stroock is mistaken, because it again confuses an erroneous legal conclusion—that Stroock represented Wiz—with "false declarations," of which there were none.[28]

In sum, while the Rosen firm may be faulted for bringing an action based on a theory it knew or should have known was groundless, no evidence supports the claims the Tendlers failed to disclose all the facts, made false factual allegations, or otherwise acted in bad faith in following the firm's advice. Accordingly, summary judgment in their favor was appropriate.

DISPOSITION

The judgment entered in favor of the Tendlers is affirmed. The order granting Rosen's special motion to strike is reversed, and the trial court is directed to vacate its order and enter an order denying the motion. The Tendlers are to recover their costs on appeal, and Stroock is to recover from Rosen the costs attributable to its appeal of the order granting the special motion to strike.

We concur: COOPER, P.J., and RUBIN, J.

28. Stroock makes two other arguments. One is that the trial court erroneously based its rulings on expert opinions proffered by the Tendlers on probable cause, when it is well-established that expert testimony on the legal issue of probable cause is improper. Assuming the expert declarations were addressed to the issue of probable cause, which the Tendlers dispute, the argument is irrelevant, as the trial court's grant of summary judgment was explicitly based solely on the Tendlers' affirmative defense of reliance on the advice of counsel. Stroock also contends the trial court should have granted Stroock's request for a continuance to allow additional discovery, particularly depositions, under Code of Civil Procedure section 437c, subdivision (h), even though "considerable written discovery" had already been conducted. As of the date of the summary judgment hearing on November 21, 2000, Stroock had noticed no depositions, even during an unrelated six-week postponement of the hearing. We see no error in the trial court's denial of Stroock's request.

CALIFORNIA SLURRY SEAL ASSOCIATION, Plaintiff and Appellant,

v.

DEPARTMENT OF INDUSTRIAL RELATIONS et al., Defendants and Respondents,

Southern California District Council of Laborers et al., Interveners and Respondents.

No. G027691.

Court of Appeal, Fourth District, Division 3.

May 21, 2002.

Association of slurry seal contractors filed petition for writ of mandate to challenge decision of Department of Industrial Relations that rescinded prevailing wage

determination for slurry seal workers. The Superior Court, Orange County, No. 00CC02949, John C. Woolley, J., denied writ petition. Association appealed. The Court of Appeal, Moore, J., held that: (1) association had not failed to exhaust its administrative remedies, but (2) Department followed appropriate procedures in rescinding prevailing wage determination.

Affirmed.

1. Labor Relations ⇐1450

Under statutory provision establishing method for challenging prevailing rate specified in call for bids, to challenge rescission of prevailing wage determination by Department of Industrial Relations, association of slurry seal contractors was not required to file verified petition to review determination of rate, where there was no call for bids and association did not seek to undo any contract for public work. West's Ann.Cal.Labor Code § 1773.4.

2. Labor Relations ⇐1451.1

Association of slurry seal contractors sufficiently exhausted its administrative remedies before seeking judicial review of decision of Department of Industrial Relations to rescind one prevailing wage determination for slurry seal workers without rescinding a second determination; association sent two letters to Department requesting review of both prevailing wages, and Department made clear that it chose not to entertain request to review second determination. West's Ann.Cal.Labor Code § 1773.4.

3. Labor Relations ⇐1268

Authority of Department of Industrial Relations pertaining to prevailing wage determinations is quasi-legislative and it has legislative discretion with respect to such decisions.

4. Mandamus ⇐72

Mandamus cannot be applied to control discretion as to a matter lawfully entrusted to a governmental agency.

5. Mandamus ⇐12

Mandate may lie to compel an exercise of discretion but not to control it, i.e. to order its exercise in a particular manner, unless discretion can be lawfully exercised only one way under the facts.

6. Mandamus ⇐176

In granting mandamus relief, court's judicial power relative to legislative acts is severely circumscribed.

7. Labor Relations ⇐1451.1

Court independently reviews issues of law involving decisions of Department of Industrial Relations pertaining to the prevailing wage for workers; court will only overturn the Department's quasi-legislative decision if it is arbitrary or capricious or in conflict with the clear terms of the Department's statutory mandate.

8. Labor Relations ⇐1450

In rescinding prevailing wage for slurry seal workers, rather than modifying it, which resulted in requirement that entire slurry seal industry pay another prevailing wage, Department of Industrial Relations did not violate statute setting forth method for establishing prevailing rates; Department determined that there was no current collective bargaining agreement setting rates for slurry seal workers per se, and Department then considered additional data. West's Ann.Cal.Labor Code § 1773.

9. Labor Relations ⇐1268

Statute setting forth methodology Director of Industrial Relations is required to utilize in determining prevailing wage rate for public work does not require a wage survey, but instead gives Depart-

ment of Industrial Relations discretion to consider one. West's Ann.Cal.Labor Code § 1773.9(b)(1).

10. Labor Relations ⇐1268

Though the Department of Industrial Relations must not determine a prevailing wage before considering relevant collective bargaining agreements, prevailing wages on federal projects, and other pertinent information, nothing in the statutory scheme prevents it from determining that the information provided to it is insufficient to support a wage determination, or that new information has eliminated the basis for an existing determination. West's Ann.Cal.Labor Code § 1773 et seq.

Musick, Peeler & Garrett, Stuart D. Tochner, Los Angeles, and Bethany A. Pelliconi for Plaintiff and Appellant.

John M. Rea, San Francisco, and Anthony Stefan Mischel for Defendants and Respondents Department of Industrial Relations and Stephen J. Smith, as Director, etc.

Reich, Adell, Crost & Cvitan, Alexander B. Cvitan and Esteban Lizardo, Los Angeles, for Interveners and Respondents Southern California District Council of Laborers and Laborers' International Union of North America, Highway & Street Stripers, Local 1184, AFL–CIO.

OPINION

MOORE, J.

At the request of a labor organization, the Department of Industrial Relations (the Department) evaluated whether to rescind a 10–year–old prevailing wage determination for slurry seal workers. The Department rescinded the determination, upon concluding it no longer represented prevailing wage. When the Department did so, another preexisting prevailing wage determination, based on a collective bargaining agreement and previously applicable to only a small segment of the industry, became the prevailing wage determination applicable to all Southern California slurry seal workers.

An association of slurry seal contractors filed a petition for a writ of mandate to challenge the rescission. It claimed the Department abused its discretion in rescinding one prevailing wage determination when the net effect was to supplant it with a second prevailing wage determination which did not in fact represent prevailing wage. The trial court denied the writ petition, holding the Department had not abused its discretion and the association had failed to exhaust its administrative remedies.

The association appeals, reiterating that the Department abused its discretion, and contending the trial court erred in concluding otherwise and in determining the association had failed to exhaust its administrative remedies. Because we agree the Department did not abuse its discretion in rescinding the first prevailing wage determination, we affirm.

I.

FACTS

In 1989, the Department issued General Prevailing Wage Determination No. SC–830–X–70–89–1 (the Slurry Seal Workers' Determination) establishing wage rates for various categories of slurry seal workers. The wage rates ranged from $7.99 to $15.15 for workers in Orange, Riverside and San Bernardino Counties.

Subsequently, the Southern California District Council of Laborers and Laborers' International Union of North America,

Highway & Street Stripers, Local 1184, AFL–CIO (the Laborers) requested a wage determination for slurry seal workers based upon the Laborers' collective bargaining agreement. In 1995, the Department granted the request and added slurry seal work into the wage determination affecting the Laborers, then designated as No. SC–23–102–2–96–1 (the Laborers' Determination),[1] at the rate set forth in the Laborers' collective bargaining agreement. Since that time, the Department has published two distinct wage determinations for slurry seal work—the Slurry Seal Workers' Determination and the Laborers' Determination. According to the California Slurry Seal Association (the Association), the Department has periodically increased the slurry seal wage rate in the Laborers' Determination, to correspond with increases set forth in the Laborers' collective bargaining agreement. As of 1999, the slurry seal wage rate under the Laborers' Determination was $18.18.

By letter dated March 5, 1999, the Laborers requested the Department to rescind the Slurry Seal Workers' Determination. The Laborers asserted that the underpinnings of the 10–year–old determination no longer supported it for numerous reasons and the wage rates contained therein were no longer the prevailing rates. Shortly thereafter, the Association, claiming its contractor members performed nearly 98 percent of all California slurry seal work and employed approximately 95 percent of all California slurry seal workers, sent a letter to the Department, requesting it to conduct a wage survey before taking action on the Laborers' request.

The Department set a hearing on the matter. The Association then sent the Department another letter, in which it reiterated its request for a wage survey and indicated there was a need for review of not only the Slurry Seal Workers' Determination, but the Laborers' Determination as well. The Association subsequently sent further correspondence to the Department in which it more clearly articulated a request for the Department to review both of the determinations. The Department chose to limit the scope of the hearing to a review of the Slurry Seal Workers' Determination.

The hearing took place in December 1999. The Association and the Laborers each submitted evidence. The Association characterizes its evidence as "showing that its members were not paying the rate of $18.18 set forth in the Laborers' [ ] Determination."

In February 2000, the Department issued a 20–page memorandum of decision pursuant to which it rescinded the Slurry Seal Workers' Determination because the wage rates set forth therein were not actually prevailing rates. In the memorandum of decision, the Department stated that upon rescission of the Slurry Seal Workers' Determination, slurry seal work would have to be paid in accordance with the Laborers' Determination, which remained in effect. In response to the Association's argument that the Laborers' Determination did not represent prevailing wage either, the Department made several com-

1. The identifying number of the wage determination premised in relevant part on the wage rate for slurry seal work as set forth in the Laborers' collective bargaining agreement has changed from time to time. It was No. SC–23–102–2–96–1 initially and No. SC–23–102–2–99–1 at the time of the Department's decision at issue here. The California Slurry Seal Association informs us the identifier was subsequently changed to No. SC–23–102–2–2000–1. The applicable determinations shall be referred to hereinafter collectively as the "Laborers' Determination."

ments. Among other things, it stated that the accuracy of the Laborers' Determination was not the subject of the proceedings then before it, the Laborers' Determination was properly supported by a current collective bargaining agreement and a predetermined federal rate, and Labor Code section 1773 required the Department to fix a rate *not less than* the prevailing rate (implying a higher rate was permissible).

The Association then filed an application for an order to show cause re preliminary injunction and a petition for a writ of mandate to challenge the action of the Department and its director, Stephen J. Smith, in rescinding the Slurry Seal Workers' Determination, with the effect of making the Laborers' Determination apply to the entire Southern California slurry seal industry. The Laborers filed a motion for leave to intervene, which was granted. The trial court denied both the application for a preliminary injunction and the writ petition. It found that the Department had not abused its discretion in rescinding the Slurry Seal Workers' Determination and that the Association had failed to exhaust its administrative remedies. The Association filed a notice of appeal from the judgment and related orders and rulings.

II

DISCUSSION

A. Exhaustion of Administrative Remedies

1. Background

In its opposition to the Association's petition for a writ of mandate, the Department said the Association sought to "attack the accuracy" of the Laborers' Determination, but had failed to exhaust its administrative remedies. It stated that the statutory scheme has provided only one method for launching the attack—the filing of a petition pursuant to Labor Code section 1773.4, and the Association had filed no such petition. In ruling on the petition, the trial court found the Association had failed to exhaust its administrative remedies.

The Association appears to interpret this finding as meaning that the trial court was precluded from reaching the merits of any portion of the petition, not just any argument that might be construed as a direct challenge to the Laborers' Determination. The Department does not view it this way. It asserts the finding pertained only to the failure to exhaust administrative remedies with respect to a challenge to the Laborers' Determination, not with respect to a challenge to the rescission of the Slurry Seal Workers' Determination.

The record is unclear. The judgment gives two grounds for denying the writ petition: (1) the Association did not exhaust its administrative remedies; and (2) the Department did not abuse its discretion. It does not specify that the failure to exhaust ground applies only to issues pertaining to the Laborers' Determination itself. While that intention might seem obvious to the Department, because of the way the Department framed its opposition to the writ petition, this is not free from doubt. As the Laborers put it, "the Association presented a petition which focused on the Laborers' Determination, which was not reviewed in the underlying administrative process. As such, the trial court correctly determined that it was unable to reach the merits of the petition as it was presented by the Association." Under either interpretation, however, the doctrine of exhaustion of administrative remedies does not bar judicial review of the matters the Association raises, as we shall explain.

2. Labor Code provisions

[1] Labor Code section 1771 [2] requires that "not less than the general prevailing rate of per diem wages" be paid on public works projects exceeding $1,000. "The body awarding any contract for public work ... shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract." (§ 1773.2.) In order to correctly state the prevailing rate in the call for bids and in the bid specifications, the awarding body shall obtain the requisite information from the Director of the Department of Industrial Relations. (§ 1773.) Certain parties are permitted to challenge the prevailing rate quoted in the call for bids. (§ 1773.4.)

More particularly, section 1773.4 provides in pertinent part: "Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body may, within 20 days after commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code." This provision clearly establishes the method for challenging a prevailing rate specified in a call for bids. The Department sees the application of section 1773.4 as being even broader, applying in the case before us even when no party sought to challenge the rates set forth in a call for bids.

In support of its position, the Department cites to *Hoffman v. Pedley School Dist.* (1962) 210 Cal.App.2d 72, 26 Cal. Rptr. 109. In *Hoffman*, a union representative filed a complaint to challenge the wage rate being paid under a public works contract. But he had not filed a section 1773.4 petition challenging the prevailing rate as stated in the call for bids. Rather, the representative omitted that step and simply filed a lawsuit four months after the call for bids was published and two months after a contract for the public work had been signed. His motion for a temporary restraining order to block the expenditure of public funds on the contract was denied, and the appellate court affirmed on the basis of failure to exhaust administrative remedies. Clearly, the statute was designed to protect against exactly the sort of challenge the union representative brought. (*Id.* at p. 75, 26 Cal.Rptr. 109.) As the court there explained, the statutory "procedure is reasonably prompt and efficacious and eliminates unconscionable delays in getting public work done." (*Id.* at p. 76, 26 Cal.Rptr. 109.) It sets forth a particular manner and a specific period of time in which a challenge may be made, and limits the number of days for the Department to render its decision. The purpose is for the rates as determined by the Department in response to the petition to be included in the contract, so the work thereunder can be performed promptly. (*Id.* at pp. 75–76, 26 Cal.Rptr. 109; § 1773.4.)

But in the case before us, there was no call for bids and the Association does not seek to undo any contract for public work. While the section 1773.4 procedures dictate the manner for challenging a wage rate quoted in a call for bids, they do not specify the procedures to be followed in a situation such as this, where the Department had already undertaken the review of the prevailing rate for slurry seal work in response to the informal request of an-

2. All subsequent statutory references are to the Labor Code, unless otherwise indicated.

other party. Furthermore, we observe the Department did not require the Laborers to file a section 1773.4 petition in bringing their challenge.

3. Department proceedings

[2] The Laborers are the ones who initiated these proceedings, not the Association. They are the ones who chose to challenge the prevailing rate established by the Slurry Seal Workers' Determination. They did not follow section 1773.4 in commencing that challenge. There was no call for bids at issue and the Laborers filed no petition. They sought the Department's review of the Slurry Seal Workers' Determination by the simple mechanism of a two-page letter requesting rescission. The Association, playing by the same rules as the Laborers, sent the Department a letter of its own requesting the Department to conduct a wage survey before taking action on the matter. The Department, in its discretion, was receptive to the letter-writing method of challenge and notified the parties of its intent to hold a hearing.

Two weeks later, the Association sent the Department a supplemental letter, stating that a hearing limited to the issue whether to rescind the Slurry Seal Workers' Determination would not resolve the problems with the Department's prevailing wage determinations pertaining to slurry seal work. The Association noted that the apposite prevailing wage determinations included both the Slurry Seal Workers' Determination and the Laborers' Determination and that "none of the rates listed in either of those determinations correctly reflect[ed] the current prevailing wages for slurry seal workers in California." In effect, this letter was a request, made in the same form and manner as that utilized by the Laborers to challenge the Slurry Seal Workers' Determination, for the Department to reevaluate the Laborers' Determination at the same time as it reevaluated the Slurry Seal Workers' Determination.

About three months later, the Department sent a formal notice rescheduling the hearing date and detailing the type of evidence the parties should be prepared to present. Absent was any indication that the Department was going to entertain the Association's request as it had the Laborers' request. Consequently, the Association sent further correspondence to the Department in which the Association requested clarification concerning the scope of the hearing "because there [were then] two prevailing wage determinations that ostensibly [applied] to slurry seal workers in Southern California"—the Slurry Seal Workers' Determination and the Laborers' Determination, the latter allegedly inapplicable to 98 percent of all slurry seal work performed in California. The Association asserted it was "not possible to make a decision on the rescission of [the Slurry Seal Workers' Determination] without consideration of whether the [Laborers' Determination] correctly [listed] the prevailing wage for slurry seal workers." The Association further claimed that "since neither of these wage determinations correctly [listed] the prevailing wage for slurry seal workers, a 'rescission' without a modification would be arbitrary and capricious."

After some discussion between the Association and the Department, the Department sent the Association a letter confirming the scope of the hearing. In its letter, the Department's hearing officer reiterated that the participants would be afforded an opportunity to address whether the Slurry Seal Workers' Determination should or should not be rescinded. He also acknowledged that the Association sought modification of that determination, rather than rescission, and stated that the Association would be allowed to present

evidence and argument in support of its position. By this letter, the Department made clear that it chose not to entertain the Association's request to review the Laborers' Determination at the same time as it undertook review of the Slurry Seal Workers' Determination.

No one challenges the Department's discretion in making this choice. Nonetheless, we can see no more the Association could have done to encourage the Department to consider the broader prevailing rate issues as part of the review process it had already undertaken. As an integral part of the proceedings, the Association raised the issue of modification of the Slurry Seal Workers' Determination, pointing out that rescission without modification could result in the Laborers' Determination becoming applicable to the entire Southern California slurry seal industry. We can see no reason why the Association would have been required to find a call for bids to challenge in order to draw this matter to the Department's attention, when the matter was, in essence, already pending before it.[3]

Moreover, before the Slurry Seal Workers' Determination was rescinded, the Association had no reason to file a petition challenging the wage rates contained in the Laborers' Determination. The Laborers' Determination was not applicable to the Association's members until the Slurry Seal Workers' Determination was rescinded without modification. Only then did the Laborers' Determination become a matter of concern to the Association. The Association tried to anticipate this result by drawing the matter to the Department's attention before the situation arose, but to no avail.

4. Issues on appeal

Perhaps more importantly, the Association is not seeking rescission or modification of the Laborers' Determination; it is attacking the Department's decision to rescind the Slurry Seal Workers' Determination without modification, under the totality of the circumstances. The Association frames one legal issue: Did the Department violate statutory mandates, and thus abuse its discretion, in rescinding the Slurry Seal Workers' Determination instead of modifying it to reflect the wage rate actually prevailing, when doing so had the effect of making the preexisting Laborers' Determination applicable to the entire Southern California slurry seal industry?

Neither the Department nor the Laborers contend judicial review of the power of the Department to rescind the Slurry Seal Worker's Determination without modification is barred by the doctrine of exhaustion of administrative remedies. And the scope of the Department's power in this regard is the thrust of this appeal. There is no question the Association's challenge to the Department's compliance with relevant Labor Code provisions in the rescission of the Slurry Seal Workers' Determination is subject to judicial review.

B. Substantive Issues

1. Introduction

[3–6] The Department's authority pertaining to prevailing wage determinations

3. Nonetheless, after it filed its petition for a writ of mandate in the proceedings below, the Association filed petitions challenging the rates for slurry seal work quoted in the calls for bids published by three separate awarding bodies. The Department denied each of those petitions. The Association then filed a petition for a writ of mandate in Riverside County Superior Court (*California Slurry Seal Association v. Department of Industrial Relations* (Super. Ct. Riverside County, 2001, No. RIC 350514)), challenging those three denials. The writ petition was denied by judgment filed April 9, 2001.

is quasi-legislative and it has legislative discretion with respect to such decisions. (*Pipe Trades Dist. Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1467–1468, 49 Cal.Rptr.2d 208.) The Association here seeks a writ of mandate compelling the Department to exercise that discretion in a certain way. But " 'mandamus cannot be applied to control discretion as to a matter lawfully entrusted to a governmental agency. [Citation.]' " (*Id.* at p. 1468, 49 Cal.Rptr.2d 208.) " 'Mandate may lie to *compel* an exercise of discretion but not to *control* it, i.e. to order its exercise in a particular manner [citation], unless discretion can be lawfully exercised only one way under the facts [citation].' (Italics in original.)" (*Id.* at p. 1469, 49 Cal.Rptr.2d 208.) Our " 'judicial power relative to legislative acts is severely circumscribed.' [Citation.]" (*Ibid.*)

[7] We independently review issues of law involving the Department's decision pertaining to the prevailing wage for slurry seal workers. (*International Brotherhood of Electrical Workers v. Aubry* (1996) 41 Cal.App.4th 1632, 1635–1636, 49 Cal.Rptr.2d 759.) "We will only overturn the [Department's] quasi-legislative decision if it is 'arbitrary or capricious' or in conflict with the clear terms of the [Department's] statutory mandate. [Citations.]" (*Id.* at p. 1636, 49 Cal.Rptr.2d 759.)

2. Labor Code section 1770 et seq.

The Association claims the Department violated the applicable statutory provisions, and thus abused its discretion, when it rescinded the Slurry Seal Workers' Determination while leaving the Laborers' Determination in place to fill the void. It cites to section 1770 et seq.

Section 1770 mandates that "[t]he Director of the Department of Industrial Relations shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Sect 1773, and the director's determination the matter shall be final except as provided in Section 1773.4." The Association maintains that, in making the Laborers' Determination applicable to the entire Southern California slurry seal industry, the Department contravened the mandates of both section 1773 and related section 1773.9.

3. Labor Code section 1773

[8] With respect to prevailing rates, section 1773 provides in pertinent part: "In determining the rates, the Director of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and the rates that may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where the rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification, or type of work involved. The rate fixed for each craft, classification, or type of work shall be not less than the prevailing rate paid in the craft, classification, or type of work."

The Association contends the Department violated this provision by rescinding the Slurry Seal Workers' Determination, rather than modifying it, and thereby requiring the entire Southern California slurry seal industry to pay the $18.18 wage rate listed in the Laborers' Determination, when that was not a prevailing wage. On a careful reading of section 1773, however, we disagree.

Section 1773 first requires the Department to "ascertain and consider the applicable wage rates established by collective

bargaining agreements . . . ." It did so. It determined there was no current collective bargaining agreement setting rates for slurry seal workers per se, but observed that slurry seal work was included in certain broader worker classifications covered by the Laborers' collective bargaining agreement.

Assuming the Association was correct and the rates set forth in the Laborers' collective bargaining agreement did not actually prevail in the locality, or adopting the Department's viewpoint that there was no applicable collective bargaining agreement at all, section 1773 next directed the Department to consider additional data. Section 1773 continues: "Where the rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned . . . ." This is exactly what the Department did. Before the hearing, the Department sent the parties a formal notice stating they should be prepared to present information pertaining to slurry seal work, including but not limited to: (1) the name, location, owner, type and duration of each public and private project performed in the preceding 12 months in specified geographic areas; (2) peak employment data from each public and private project worked in the preceding 12 months in the specified geographic areas; (3) information regarding trust fund or employer paid benefits for employees on each project; and (4) payroll documents related to each project. In response, both parties provided their evidence to the Department and the Department considered the same. Thus, the Association has not demonstrated any failure on the part of the Department to follow the mandates of section 1773.

4. Labor Code section 1773.9

The methodology the Director of Industrial Relations is required to utilize in determining the prevailing wage rate is set forth in section 1773.9, subdivision (b). (§ 1773.9, subd. (a).) At issue is the following portion of subdivision (b): "The general prevailing rate of per diem wages includes all of the following: [¶] (1) The basic hourly wage rate being paid to a majority of workers engaged in the particular craft, classification, or type of work within the locality and in the nearest labor market area, if a majority of the workers is paid at a single rate. If no single rate is being paid to a majority of the workers, then the single rate being paid to the greatest number of workers, or modal rate, is prevailing. If a modal rate cannot be determined, then the director shall establish an alternative rate, consistent with the methodology for determining the modal rate, by considering the appropriate collective bargaining agreements, federal rates, rates in the nearest labor market area, or other data such as wage survey data."

First, the Association argues section 1773.9 "prohibit[s] the Department from maintaining wage determinations that do not reflect the wage rates that are actually being paid to a majority or the greatest number of workers performing work in any given classification." But the Association fails to recognize that section 1773.9 provides a step-by-step *methodology* for determining the prevailing rate and that all appearances are that the Department followed the individual steps as required.

Step one required the Department to determine whether a basic hourly wage rate was being paid to a majority of workers. It determined this was not the case. In fact, based on the certified payroll records the Association submitted, the Department found the Association's members paid their 200–plus slurry seal employees

more than 100 different basic hourly rates. The Association does not challenge this finding.

Step two provided that, if no single rate was being paid to the majority of workers, then the single rate being paid to the greatest number of workers (the "modal" rate) would be the prevailing rate. The Department determined that the information provided indicated there was no statistically meaningful modal rate, either. Despite the unwieldy array of hourly rates paid by the members of the Association, the Association argues the Department abused its discretion in failing to set the prevailing wage at the rate paid to the greatest number of workers. It contends that "if there is a single wage rate that is common to as few as two or three employees, that rate could constitute a modal rate even if 100 different rates are paid to the remaining employees performing slurry seal work."

Yet the Association, on appeal, identifies no single rate common to as few as two or three employees in a given classification. It appears the Association, when making its presentation to the Department, asserted there was a determinable modal rate for shuttlepersons in certain counties and for squeegeepersons in other counties. In rejecting the assertion, the Department explained at length why the documentation presented in support of it was inconsistent and unreliable. Among other things, the Department cited the testimony of one Association member to the effect that its certified payroll records did not in fact accurately reflect the basic hourly wage paid to its employees. In addition, the Department pointed out that some of the Association's members had failed to produce records for wages paid on private projects, and some had not submitted records for the full 12–month period requested. Given these and other cited irregularities in the evidence, we cannot conclude the Department abused its discretion in determining there was no ascertainable modal rate.

Since no modal rate could be determined, the final step under section 1773.9, subdivision (b)(1) was for the Department to "establish an alternative rate ... by considering the appropriate collective bargaining agreements, federal rates, rates in the nearest labor market area, or other data such as wage survey data." It did indeed consider additional information, as required. As already stated, the Department considered whether there was any applicable collective bargaining agreement, and concluded there was none, except to the extent the Laborers' collective bargaining agreement included slurry seal workers within certain classifications. It also considered whether there were any relevant federal rates. It noted that the United States Department of Labor (DOL) did not have a separate determination for Southern California slurry seal workers, but that those workers were covered by DOL's General Decision Number CA990033. The Department further explained that General Decision Number CA990033 established the rates contained in the Laborers' collective bargaining agreement as prevailing. In addition, the Department considered the information provided by the Association and the Laborers. It fully complied with the section 1773.9 requirements concerning the consideration of information in the decision-making process.

The Association disagrees. It argues section 1773.9 required the Department to conduct a wage survey and it seeks a writ of mandate compelling the Department to perform a survey of the wages the Association's members were paying as of December 1999. The Association contends that because the collective bargaining agree-

ment applied to only a fraction of the industry, the wage rates therein did not represent prevailing wage and the Department was not at liberty to base its prevailing wage determination thereon. The Association then leaps to the conclusion a wage survey was required because a prevailing wage determination could not be based on the collective bargaining agreement. As the Association sees it, wage surveys are mandatory when a modal rate cannot be ascertained from appropriate collective bargaining agreements.

[9] But that very simply is not what the statute says. When no modal rate can be determined, section 1773.9, subdivision (b)(1) requires the Department to consider other information, including, inter alia, collective bargaining agreements, "or other data such as wage survey data." The statute clearly uses disjunctive language, inasmuch as it contains the word "or." In other words, it does not *require* a wage survey, but gives the Department the discretion to consider one. (Cf. *Pipe Trades Dist. Council No. 51 v. Aubry, supra,* 41 Cal.App.4th at p. 1467, 49 Cal.Rptr.2d 208 [language of § 1773 makes clear Department has substantial discretion as to sources it consults in determining prevailing wage].) Indeed, the Association cites no case construing the statute as requiring a wage survey.

While section 1773.9 does not require consideration of a wage survey, it encourages consideration of appropriate collective bargaining agreements. The Association, however, maintains it was unconstitutional for the Department to base its prevailing wage determination on a wage rate established by a collective bargaining agreement applicable to a fraction of the industry. As the Association views it, by doing so, the Department delegated to the Laborers its responsibility to maintain prevailing wage determinations in accordance with the applicable Labor Code provisions. (See *Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345, 354, 28 Cal.Rptr.2d 550. [delegation of legislative rulemaking authority to private parties with pecuniary interest may be unconstitutional].)

But as we have explained, the record indicates the Department complied with the statutory mandates in determining prevailing wage in this matter. The Department did not delegate its responsibility. Rather, it exercised its statutory discretion to consider certain information, including the collective bargaining agreement, in its evaluation process. The final determination was that of the Department, not the Laborers. (See *Independent Roofing Contractors v. Department of Industrial Relations, supra,* 23 Cal.App.4th at pp. 354–355, 28 Cal.Rptr.2d 550 [no unconstitutional delegation of authority when nothing in record suggests that Department failed to exercise legislative discretion in decision to eliminate wage determination or that private party dictated decision].)

5. Additional Arguments

The Association also contends the Department's own summary of the evidence proves the Association's point—that $18.18 was not the prevailing wage, because it was not what the Association members were paying. The Department summarized the wage information provided by each of eight Association members. As stated above, the Department found the Association's members paid their slurry seal employees more than 100 different basic hourly rates. While the Department's summary of those rates shows that the members collectively paid at many rates less than $18.18 for various worker classifications, it also shows that six out of eight of the members paid at certain rates

higher than $18.18. A number of the rates were considerably higher. Indeed, one Association member paid up to $36.88 for certain unidentified classifications.

The Department considered more than 100 different basic hourly rates. As it did so, it grappled with incomplete and inconsistent evidence. At the end of the day, it concluded there was insufficient evidence upon which to base a revised determination. We can hardly substitute our judgment for that of the Department and say what figure it should have picked. (*California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 212–213 & fn. 30, 157 Cal.Rptr. 840, 599 P.2d 31.)

Even though the Association does not propose a figure either, it insists the Department abused its discretion in concluding the Slurry Seal Workers' Determination was obsolete. In an effort to cast blame on the Department, the Association suggests the reason for any obsolescence was the failure of the Department to do a wage survey in the years since the adoption of the Slurry Seal Workers' Determination. Yet at the same time, it attempts to suggest that the determination was not in fact obsolete. This is a stunning suggestion considering the Association states in its opening brief that the evidence it submitted showed "most [of its] members were paying their employees wage rates that exceeded those in the Slurry Seal [Workers'] Determination." It also admitted in pre-hearing correspondence with the Department that none of the rates listed in the Slurry Seal Workers' Determination correctly reflected prevailing wage rates for California slurry seal workers. The Association's change of position on this point is untenable.

6. Conclusion

[10] "Though the Department must not determine a prevailing wage before considering relevant collective bargaining agreements, prevailing wages on federal projects, and other pertinent information, nothing in the statutory scheme prevents it from determining that the information provided to it is insufficient to support a wage determination, or that new information has eliminated the basis for an existing determination. Appellant['s] claim that the Department's act was arbitrary for failure to discover a basis for a different determination is therefore without merit." (*Independent Roofing Contractors v. Department of Industrial Relations, supra*, 23 Cal.App.4th at p. 359, 28 Cal.Rptr.2d 550 [Department's rescission of outdated prevailing wage determination upheld].)

The point of the matter is that the Department concluded the evidence clearly showed the rates set forth in the Slurry Seal Workers' Determination, then over ten years old, were no longer prevailing wage. The issue was whether to rescind that determination, and the Department exercised its discretion to do so. True that had the effect of making $18.18 the prevailing rate, because the Laborers' Determination then became the only prevailing wage determination for Southern California slurry seal workers remaining in effect. But the Department is empowered, by section 1773, to fix a rate "for each craft, classification, or type of work [that] shall be *not less than* the prevailing rate paid in the craft, classification, or type of work." (Italics added.) This appears to be exactly what the Department did.

The Association insists the Department violated "the statutory mandate of section 1773, which requires that the [Department] not simply accept a rate stated in a collective bargaining agreement at face value, but also determine whether the rate in question is 'actually prevailing' before

authorizing it. [Citations.] [Fn. omitted.]" (*International Brotherhood of Electrical Workers v. Aubry*, *supra*, 41 Cal. App.4th at p. 1639, 49 Cal.Rptr.2d 759.) The Association overlooks two points. First, the issuance of the Laborers' Determination is not at issue. The decision to issue that determination was made years ago. Second, to the extent we construe the Laborers' Determination as newly establishing the prevailing rate, in the sense that it is being newly applied to the largest segment of the industry, it remains supported by a current collective bargaining agreement and a predetermined federal rate. Moreover, the Department considered the additional data supplied by the Association and the Laborers and followed the requisite statutory methodology in arriving at its result. The data supplied by the Association very simply did not compel the Department to select a figure other than the one contained in the Laborers' Determination. At any rate, if indeed the Association is correct and $18.18 did not represent prevailing wage at the time the Department rendered its decision, it is a result that might have been avoided had the Association provided more complete and carefully prepared documentation.

III

REQUESTS FOR JUDICIAL NOTICE

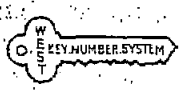
The Association filed a request for judicial notice of certain documents prepared by the Department. The request is granted. (Evid.Code, § 452, subd. (h).) This court will take notice of the documents attached to the Association's request filed on April 13, 2001. The Department filed a request for judicial notice of the judgment filed in *California Slurry Seal Association v. Department of Industrial Relations* (Super. Ct. Riverside County, 2001, No. RIC 350514) and a supplemental request for judicial notice. The request as supplemented is granted. (Evid.Code, § 452, subd. (d).) This court will take notice of the document attached to the supplemental request for judicial notice the Department filed on March 8, 2002.

IV

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

WE CONCUR: SILLS, P.J., and RYLAARSDAM, J.



Steven WHITE, Plaintiff and Appellant,

v.

Gray DAVIS, as Governor, etc., et al., Defendants and Respondents.

Howard Jarvis Taxpayers Association et al., Plaintiffs and Respondents,

v.

Kathleen Connell, as Controller, etc., Defendant and Appellant;

California State Employees Association, Local 1000, SEIU, AFL–CIO, CLC et al., Interveners and Appellants.

[And three other cases.*].

No. B122178 & B123992.

Court of Appeal, Second District, Division 4.

May 29, 2002.

Taxpayer brought action for declaratory and injunctive relief against state offi-

* *Connell v. Superior Court* (B124395); *California State Employees Assn. v. Superior Court* (B124397); *California Correctional Peace Officers Assn. v. Superior Court* (B124398).

204 F.3d 941
140 Lab.Cas. P 58,862, 5 Wage & Hour Cas.2d (BNA) 1573, 00 Cal. Daily Op. Serv. 1370,
2000 Daily Journal D.A.R. 1921, 2000 Daily Journal D.A.R. 2349
(Cite as: 204 F.3d 941)

United States Court of Appeals,
Ninth Circuit.

G & G FIRE SPRINKLERS, INC., Plaintiff-Appellee,
v.
Victoria L. BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; Lloyd W. Aubry, Jr., an individual in his official capacity as Director of the Department of Industrial Relations of the State of California; Daniel Dellarocca, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; Roger Miller, an individual in his official capacity as Deputy Labor Commissioner of the State of California; Rosa Frazier, an individual in her capacity as Deputy Labor Commissioner of the State of California, Defendants-Appellants.
G & G Fire Sprinklers, Inc., Plaintiff-Appellee,
v.
Victoria L. Bradshaw, an individual in her official capacity as Labor Commissioner of the State of California; Lloyd W. Aubry, Jr., an individual in his official capacity as Director of the Department of Industrial Relations of the State of California; Daniel Dellarocca, an individual in his official capacity as Deputy Labor Commissioner of the State of California; Roger Miller, an individual in his official capacity as Deputy Labor Commissioner of the State of California; Rosa Frazier, an individual in her official capacity as Deputy Labor Commissioner of the State of California; Division of Labor Standards Enforcement, an agency of the State of California; Department of Industrial Relations, an agency of the State of California, Defendants-Appellants.

Nos. 95-56639, 96-55194.

Argued and Submitted Sept. 14, 1999.
On Remand from the United States Supreme Court April 19, 1999.
Filed Feb. 23, 2000.

Public works subcontractor brought action against State of California's Labor Commissioner and others challenging constitutionality of California statutes authorizing state, without notice or hearing, to withhold money and impose penalties for subcontractor's failure to comply with prevailing wage requirements. The United States District Court for the Central District of California, Manuel L. Real, Chief District Judge, entered summary judgment for subcontractor. Labor Commissioner and others appealed. The Court of Appeals, 156 F.3d 893, affirmed in part and reversed and remanded in part. The Supreme Court granted certiorari, vacated judgment, and remanded for further consideration. The Court of Appeals reinstated its prior opinion and held that: (1) subcontractor did not have right under due process clause to payment of funds withheld pending outcome of hearing; (2) State violated subcontractor's due process rights when if failed to afford subcontractor a hearing prior to withholding funds; and (3) withholding of funds constituted state action.

Affirmed in part; reversed and remanded in part.

Kozinski, Circuit Judge, dissented and filed opinion.

West Headnotes

[1] Constitutional Law ⇐254(2)
92k254(2)

"State action" within the meaning of the due process clause requires some deprivation of a constitutional right, and the party charged with the deprivation must be fairly said to be a state actor. U.S.C.A. Const.Amend. 14.

[2] Constitutional Law ⇐275(3)
92k275(3)

[2] Labor Relations ⇐1421
232Ak1421

Public works subcontractor did not have right under due process clause to payment of funds withheld by State of California from public works contractor pending outcome of hearing to determine whether funds should be disbursed directly to subcontractor's employees as result of subcontractor's failure to comply with prevailing wage requirements. U.S.C.A.

Const.Amend. 14; West's Ann.Cal.Labor Code § 1727.

[3] Constitutional Law ⚖275(3)
92k275(3)

[3] Labor Relations ⚖1437
232Ak1437

State of California violated public works subcontractor's due process rights when if failed to afford it a hearing prior to withholding funds from public works contractor pending outcome of hearing to determine whether funds should be disbursed directly to subcontractor's employees as result of subcontractor's failure to comply with prevailing wage requirements. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Labor Code § 1727.

[4] Constitutional Law ⚖277(1)
92k277(1)

The definition of a "property interest" protected by the due process clause often includes a temporal component. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law ⚖254(4)
92k254(4)

Withholding of funds from public works contractor, pending outcome of hearing to determine whether funds should be disbursed directly to subcontractor's employees as result of subcontractor's failure to comply with prevailing wage requirements, was compelled by State of California, and thus constituted "state action" for purposes of subcontractor's due process claim, inasmuch as withholding was specifically directed by State officials in environment where withholding party had no discretion. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Labor Code § 1727.

*942 Before: REINHARDT, KOZINSKI and HAWKINS, Circuit Judges.

Order; Dissent by Judge KOZINSKI.

ORDER

In *G & G Fire Sprinklers, Inc. v. Bradshaw*, 156 F.3d 893 (9th Cir.1998), we held that California Labor Code provisions authorizing the state to seize money and impose penalties for a subcontractor's failure to comply with prevailing wage requirements violated the Due Process Clause of the Fourteenth Amendment. *See id.* at 904. The Supreme Court granted certiorari, vacated our judgment, and remanded "for further consideration in light of *American Manufacturers Mutual Insurance Company v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999)." *Bradshaw v. G & G Fire Sprinklers, Inc.*, -- U.S. ----, 119 S.Ct. 1450, 143 L.Ed.2d 538 (1999). Having determined that *Sullivan* is fully consistent with our analysis, we reinstate the judgment and opinion.

DISCUSSION

Sullivan involved the Pennsylvania Workers' Compensation Act, under which an employer or its insurer must pay for all "reasonable" and "necessary" medical treatment for work-related injuries. *See* 119 S.Ct. at 982. Under the Pennsylvania scheme, an insurance company could withhold payment for medical treatment if it disputed the reasonableness or necessity of that treatment. *See* Pa. Stat. Ann. *943 § 531(5) ("All payments to providers for treatment ... shall be made within thirty (30) days of receipt of such bills and records unless the employer or insurer disputes the reasonableness or necessity of the treatment."). The *Sullivan* plaintiffs claimed that the failure to pay their contested benefit claims within thirty days, before a process was provided to resolve the dispute about the "reasonableness" of their treatment, amounted to a deprivation of due process.

Sullivan dealt with two questions: (1) whether the insurance company's decision to withhold payment for disputed medical treatment was fairly attributable to the State so as to subject insurers to the constraints of the Fourteenth Amendment, 119 S.Ct. at 984; and (2) whether the Due Process Clause requires workers' compensation insurers to immediately pay disputed medical bills prior to a determination that the medical treatment was reasonable and necessary. *Id.* at 985.

[1] The first question concerns whether there is state action, since the Fourteenth Amendment does not reach private acts or actors. *Sullivan* repeats a familiar calculus to determine the presence of state action: there must be some deprivation of a constitutional right and the party charged with the deprivation must be fairly said to be a state actor. *Id.* at 986. The second question turns on whether the claimant has a property interest in the matter complained of.

The Supreme Court found that the *Sullivan* plaintiffs did not possess a property interest in the *immediate*, unconditional payment for all medical treatment under the Pennsylvania statute. Nevertheless, the Court stated that the plaintiffs did have an interest in payment

of "reasonable" medical costs, *see Sullivan*, 119 S.Ct. at 990, and went out of its way to make clear that its holding did not upset previous Supreme Court precedent supporting the conclusion that the plaintiffs had a property interest in their *claims* for payment. *See id.* at n. 13 ("Respondents do not contend that they have a property interest in their claims for payment, as distinct from the payments themselves, such that the State, the arguments goes, could not finally reject their claims without affording them appropriate procedural protections.") (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982)). Justice Ginsburg, who provided the fifth vote necessary to make the due process discussion in *Sullivan* an opinion of the Court, further clarified this distinction in her concurrence:

> I join Part III of the Court's opinion on the understanding that the Court rejects specifically, and only, respondent's demands for constant payment of each medical bill, within 30 days of receipt, *pending determination of the necessity or reasonableness of the medical treatment.* I do not doubt, however, that due process requires fair procedures for the adjudication of respondents' claims for workers' compensation benefits, including medical care.

Sullivan, 119 S.Ct. at 991 (emphasis added) (citation omitted).

[2][3][4][5] Our opinion adopts the approach explicitly preserved by the *Sullivan* majority and unequivocally adopted in Justice Ginsburg's concurrence. We specifically held that G & G did not have a right to payment of the disputed funds pending the outcome of whatever kind of hearing would be afforded to determine whether G & G complied with the California prevailing wage laws. *See G & G Fire Sprinklers*, 156 F.3d at 903-04. To the contrary, we explicitly authorized the withholding of payments pending the hearing. *See id.* G & G's due process rights were violated, we held, not because it was denied immediate payment, but because the California statutory scheme afforded no hearing at all when state officials directed that payments *944 be withheld. [FN1] *See id.* at 904. Nor can there be any doubt whether the action at issue here was compelled by the State. The withholding in *Sullivan* was carried out by a private insurer exercising its discretion in a way permitted by State law. The withholding here was specifically directed by State officials in an environment where the withholding party has no discretion at all. Moreover, in their complaint the plaintiffs directly attack the notices of withholding issued by the state agency, alleging that they were issued "arbitrarily and unreasonably."

> FN1. It is true that our opinion addressed the withholding of payments pending the outcome of the hearing to determine contractor compliance in its discussion of the "process due" to a protected property interest, and not in its discussion of the nature of the property interest protected. In contrast, the above discussion in *Sullivan* is situated in the Supreme Court's discussion of the existence or nonexistence of a protected property interest. But this does not reduce the relevance of *Sullivan* 's reasoning. As the Court recognized in the seminal due process case *Mathews v. Eldridge*, the definition of a protected property interest often includes a temporal component. *See* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (identifying the property interest at stake as the beneficiary's interest in continuing to receive benefits for approximately one year). For this reason, issues of timing can arise at either the property-determination or the process-determination stage.

Because our holding is not contrary to the Court's ruling in *Sullivan*, and because our opinion's reasoning fits comfortably within the analytic framework set forth in *Sullivan*, we REINSTATE the judgment and the opinion reported at 156 F.3d 893 (9th Cir.1998).

KOZINSKI, Circuit Judge, dissenting:

I dissented from the original opinion in this case because I do not believe that relations among contracting parties are governed by the Due Process Clause merely because one of the parties happens to be a state. *See G & G Fire Sprinklers, Inc. v. Bradshaw*, 156 F.3d 893, 908 (1998) (Kozinski, J., dissenting). I continue to adhere to that view. But the Supreme Court has now directed us to reconsider our opinion in light of *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). *See Bradshaw v. G & G Fire Sprinklers, Inc.*, — U.S. ---, 119 S.Ct. 1450, 143 L.Ed.2d 538 (1999). In response, the majority reinstates its original opinion without amendment, claiming that its reasoning "fits comfortably within the analytic framework set forth in *Sullivan*." Reinstatement Order at 1970. I must dissent once again, because *Sullivan* fits the majority's rationale about as comfortably as Cinderella's slipper on the wicked step-sister's foot.

Sullivan teaches that, to state a claim for relief under section 1983, G & G must identify both an alleged

constitutional deprivation and a state actor who is responsible for it. *See Sullivan*, 119 S.Ct. at 985 (rejecting the argument that "we need not concern ourselves with 'the identity of the defendant' "). In deciding whether G & G has succeeded in this, *Sullivan* explains that we must begin "by identifying 'the specific conduct of which the plaintiff complains.' " *Id.* at 985 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)). Here the only deprivation alleged by G & G was effected by the prime contractor, who withheld funds which G & G claims under a contract. [FN1] There's no state action.

FN1. *See G & G*, 156 F.3d at 901 n. 4 ("Here, G & G was not paid by its respective principal obligor, the prime contractor, and it is asking for an opportunity to contest that deprivation.")

The majority waves a magic wand by asserting that "[t]he withholding here was specifically directed by state officials in an environment where the withholding party has no discretion at all." Reinstatement Order at 1970. This would be true had the prime contractor been ordered, under penalty of law, to withhold funds from G & G. It was not. The only entity "specifically directed" to withhold funds was the awarding body, which withheld funds only from *945 the prime contractor, not from G & G. While the challenged provision *authorized*-even *encouraged*-the prime to withhold an equivalent amount from G & G, the prime was free to pay G & G the full amount specified by the contract. *Sullivan* clearly holds that mere authorization and encouragement do not render a private entity's decisions "fairly attributable" to the state. 119 S.Ct. at 986. Under *Sullivan*, then, the prime contractor who chose to deprive G & G of its alleged property was not a state actor.

This presents the same problem for G & G as it did for the plaintiffs in *Sullivan*. The Court's description of the *Sullivan* plaintiffs' attempt to get around this problem is equally apt here: "Perhaps hoping to avoid the traditional application of our state-action cases, respondents attempt to characterize their claim as a 'facial' or 'direct' challenge to the [provisions in question.]" *Id.* at 985. In like manner, G & G's claim comes to us in the garb of a "direct constitutional challenge to the state's regulatory power as embodied in these statutes...." *G & G*, 156 F.3d at 902. The reinstated opinion assumes that, so long as standing requirements are satisfied, G & G may bring such a challenge. It then goes on to find a "causal link between G & G's injury and the state's action" sufficient to support standing. *Id.* at 900.

The problem is that standing deals only with whether the plaintiff "is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen*, 392 U.S. 83, 100, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). If the state's conduct does not violate the Constitution, there can be no question of standing-standing to challenge *what?* The violation alleged here is an unconstitutional deprivation of property. *Sullivan* tells us that the deprivation at issue cannot be attributed to the state. Therefore, the state cannot have violated G & G's right to due process. G & G is left with two alternatives: suing a depriver who is not a state actor, or suing a state actor who has committed no deprivation. The panel's opinion lets G & G get away with the latter, by substituting the normal causation prong of standing analysis for the more intimate causal relationship required by the state action doctrine. [FN2] Were it permissible to thus turn a pumpkin into a carriage, the Court should have allowed the *Sullivan* plaintiffs to bring their "facial challenge," on the theory that, while the private insurers in that case were not state actors, the state bureau's authorization of their withholding created a "causal link" sufficient to support standing. [FN3]

FN2. *Compare G & G*, 156 F.3d at 899-900 (causation requirement for standing satisfied where choices of third party have been made " 'in such a manner as to produce causation and permit redressability' ") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)), *with Sullivan*, 119 S.Ct. at 986 (no state action unless the state has " 'exercised coercive power' " or provided such significant encouragement that " 'the choice must in law be deemed to be that of the State' ") (quoting *Blum*, 457 U.S. at 1004, 102 S.Ct. 2777).

FN3. Like G & G, the *Sullivan* plaintiffs had also named as defendants the state officials who administered the challenged act. *See Sullivan*, 119 S.Ct. at 984. Yet after holding that the private insurers regulated by the act were not state actors, the Court held that this alone would be sufficient to reverse the Third Circuit's holding that the act violated due process. *See id.* at 989. The Court nevertheless went on to address the merits of the claim, because it thought the question an important one. *See id.*

In addition to ignoring *Sullivan* 's state action holding,

the majority fails to apply the other teaching of the case-that before finding a deprivation, we must carefully identify the nature of the property interest at stake. *See Sullivan*, 119 S.Ct. at 989-90 (holding that a statutory entitlement to payment for "reasonable" and "necessary" medical treatment cannot give rise to a property interest until the payments in question have been proven to be reasonable and necessary). The opinion reinstated today asserts that G & G has a protectable *946 property interest "in being paid in full for the construction work it has completed." *G & G*, 156 F.3d at 901. This cannot be so, for just as the *Sullivan* plaintiffs had no property interest in receiving payment for medical treatments that had not been shown to be "reasonable" and "necessary," G & G can have no property interest in being paid for work that has not been shown to satisfy the contractual condition that it be completed in accordance with prevailing wage requirements. Nevertheless, though the majority now attempts to recharacterize its position, *see* Reinstatement Order at 1969, its opinion remains unambiguous in holding that G & G has *already suffered* a deprivation for which the state is required to provide a post-deprivation hearing. *See G & G*, 156 F.3d at 903-04.

Even if the reinstated opinion actually rested on the rationale now attributed to it, we would still have a case of premature remediation. The majority's current position is that its holding is in line with previous Supreme Court precedent protecting plaintiffs' "property interest in their *claims* for payment." Reinstatement Order at 1968. If the property interest at stake here is G & G's *claim* for payment, however, when and how was G & G deprived of it? This is not a case like *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), where the plaintiff had filed a timely claim that was dismissed because of a procedural default committed by the state. *See id.* at 426-27, 102 S.Ct. 1148. G & G has yet to attempt to file a claim in state court. How can the state have deprived G & G of a legal claim it has never asked the state to enforce? [FN4]

> FN4: *Cf. Sullivan*, 119 S.Ct. at 988 (noting that the legal obligation to pay on a contract arises only after one has "initiated a claim and reduced it to a judgment").

The reinstated opinion forces the state to create an entirely new administrative machinery if it wishes to withhold funds in accordance with the terms of its contract. *See G & G*, 156 F.3d at 905-06. The majority appears to believe this is justified by Justice Ginsburg's concurring statement in *Sullivan* that " 'due process requires fair procedures for the adjudication [of claims.]' " Reinstatement Order at 1969 (quoting *Sullivan*, 119 S.Ct. at 991 (Ginsburg, J., concurring)). No doubt it does. But this is not a case like *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), where the Court, having identified a previously unrecognized property interest in welfare benefits, was obliged to create a new procedural regime to protect it. This is a claim for payment on a contract. There is a well-established "fair procedure" for dealing with such claims: an action for breach of contract in state court. It seems unlikely that Justice Ginsburg would regard such a time-honored procedure as inadequate to satisfy the demands of due process. The majority has not explained why working on a government contract heightens one's interest in receiving prompt payment so as to require procedural safeguards not available to other parties that have a disputed claim under a contract.

It is true that the law does not on its face guarantee that a subcontractor will attain an assignment enabling it to sue the awarding body. But G & G has not tried to obtain such an assignment from the prime contractor, nor has it given the state courts a chance to decide whether a subcontractor who has been denied such assignment nevertheless has an equitable right to sue under state law. Until these questions have been resolved against G & G, it simply cannot be said that the state has " 'finally reject[ed] their claims without affording them appropriate procedural protections.' " Reinstatement Order at 1968 (quoting *Sullivan*, 119 S.Ct. at 990 n. 13).

To sum up, the reinstated opinion papers over a state action deficiency with standing analysis, identifies a property interest the Court has told us can't yet exist, and holds that due process entitles G & G *947 to the creation of a new procedure bypassing the one all other unpaid contractors are required to use. A fairy godmother could do no more. Once again, I must respectfully dissent.

204 F.3d 941, 140 Lab.Cas. P 58,862, 5 Wage & Hour Cas.2d (BNA) 1573, 00 Cal. Daily Op. Serv. 1370, 2000 Daily Journal D.A.R. 1921, 2000 Daily Journal D.A.R. 2349

END OF DOCUMENT

121 S.Ct. 1446
149 L.Ed.2d 391, 143 Lab.Cas. P 59,189, 6 Wage & Hour Cas.2d (BNA) 1537, 1 Cal. Daily Op. Serv. 3004, 2001 Daily Journal D.A.R. 3701, 14 Fla. L. Weekly Fed. S 167
(Cite as: 532 U.S. 189, 121 S.Ct. 1446)

Supreme Court of the United States

Arthur S. LUJAN, Labor Commissioner of California, et al., Petitioners,
v.
G & G FIRE SPRINKLERS, INC.

No. 00-152.

Argued Feb. 26, 2001.
Decided April 17, 2001.
Rehearing Denied June 11, 2001.
See 533 U.S. 912, 121 S.Ct. 2264.

Public works subcontractor brought action against State of California's Labor Commissioner and others challenging constitutionality under Due Process Clause of California statutes authorizing state, without notice or hearing, to withhold money and impose penalties for subcontractor's failure to comply with prevailing wage requirements of Labor Code. The United States District Court for the Central District of California, Manuel L. Real, Chief District Judge, entered summary judgment for subcontractor. The Ninth Circuit Court of Appeals, 156 F.3d 893, affirmed in part and reversed and remanded in part, on basis that statutory scheme did not provide a hearing before or after payments were withheld. The Supreme Court granted certiorari, vacated judgment, and remanded for further consideration. On remand, the Court of Appeals, 204 F.3d 941, reinstated its prior opinion. Labor Commissioner again petitioned for certiorari. The Supreme Court, Chief Justice Rehnquist, held that: (1) Labor Code provisions did not deprive subcontractor of property without due process if California makes ordinary judicial process available to subcontractor to resolve its contractual dispute, and (2) California law, by allowing contractor to assign to subcontractor statutory right of suit to recover withheld payments, and by appearing to permit common-law breach of contract suit, provided adequate means by which subcontractor might pursue claim.

Reversed.

West Headnotes

[1] **Constitutional Law** ⇐277(1)
92k277(1) Most Cited Cases

[1] **Constitutional Law** ⇐278(1)
92k278(1) Most Cited Cases

Where a state law is challenged on due process grounds, inquiry is whether State has deprived the claimant of a protected property interest, and whether the State's procedures comport with due process. U.S.C.A. Const.Amend. 14.

[2] **Constitutional Law** ⇐275(3)
92k275(3) Most Cited Cases

[2] **Labor Relations** ⇐1268
232Ak1268 Most Cited Cases

Statutory scheme authorizing State to withhold payments to contractor based on subcontractor's failure to comply with prevailing wage requirements in public works contract did not deprive subcontractor of procedural due process, if California made ordinary judicial process available to subcontractor for resolving contractual dispute. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Labor Code §§ 1731, 1732.

[3] **Constitutional Law** ⇐275(3)
92k275(3) Most Cited Cases

[3] **Labor Relations** ⇐1268
232Ak1268 Most Cited Cases

California Labor Code, by allowing public works contractor to assign to subcontractor right to bring claim to recover payments withheld based on subcontractor's violation of prevailing wage requirements, satisfies procedural due process, by providing a means by which subcontractor may bring claim for breach of contract to recover wages and penalties withheld. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Labor Code §§ 1731, 1732.

[4] **Constitutional Law** ⇐275(3)
92k275(3) Most Cited Cases

[4] **Labor Relations** ⇐1268
232Ak1268 Most Cited Cases

Under Labor Code sections that authorize

withholding of payments and penalties based on violation of prevailing wage requirements for public works contract, suit under Labor Code to recoup withheld amounts is adequate to satisfy due process, even though awarding body retains wages and penalties while suit is pending. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Labor Code §§ 1731, 1732.

[5] Labor Relations ⇐1268
232Ak1268 Most Cited Cases

Provision of California Labor Code making suit on public works contract against awarding body "exclusive remedy" of contractor or his assignees to recover wages and penalties withheld from contract payments for subcontractor's violation of prevailing wage requirements is not exclusive remedy for subcontractor who does not receive assignment. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Labor Code §§ 1731, 1732.

[6] Constitutional Law ⇐48(1)
92k48(1) Most Cited Cases

Party challenging statutory withholding scheme bears the burden of demonstrating its unconstitutionality.

[7] Constitutional Law ⇐275(3)
92k275(3) Most Cited Cases

[7] Labor Relations ⇐1268
232Ak1268 Most Cited Cases

Provisions of California Labor Code authorizing State to withhold payments to contractor based on subcontractor's failure to comply with prevailing wages requirements in public works contract, and allowing contractor in turn to withhold monies from subcontractor's payments, did not violate due process rights of subcontractor, given availability of assignment of contractor's right to suit against State to resolve contractual dispute and apparent availability of standard breach of contract suit against contractor. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Labor Code §§ 1731, 1732.

**1447 *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

The California Labor Code (Code) authorizes the State to order withholding of payments due a contractor on a public works project if a subcontractor on the project fails to comply with certain Code requirements; permits the contractor, in turn, to withhold similar sums from the subcontractor; and permits the contractor, or his assignee, to sue the awarding body for alleged breach of the contract in not making payment to recover the wages or penalties withheld. After petitioner State Division of Labor Standards Enforcement (DLSE) determined that respondent G & G Fire Sprinklers, Inc. (G & G), as a subcontractor on three public works projects, had violated the Code, it issued notices directing the awarding bodies on those projects to withhold from the contractors an amount equal to the wages and penalties forfeited due to G & G's violations. The awarding bodies withheld payment from the contractors, who in turn withheld G & G's payment. G & G filed a 42 U.S.C. § 1983 suit against DLSE and other state petitioners in the District Court, claiming that the issuance of the notices without a hearing deprived it of property without due process in violation of the Fourteenth Amendment. The court granted G & G summary judgment, declared the relevant Code sections unconstitutional, and enjoined the State from enforcing the provisions against G & G. The Ninth Circuit affirmed. This Court granted certiorari, vacated that judgment, and remanded for reconsideration in light of its decision in *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130, that the respondents there had no property interest in payment for disputed medical treatment pending review of the treatment's reasonableness and necessity, as authorized by state law. On remand, the Ninth Circuit reinstated its prior judgment and opinion, explaining that G & G's rights were violated not because it was deprived of immediate payment, but because the state statutory scheme afforded no hearing at all.

**1448 *Held:* Because state law affords G & G

sufficient opportunity to pursue its claim for payment under its contracts in state court, the statutory scheme does not deprive it of due process. In each of this Court's *190 cases relied upon by the Ninth Circuit, the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation. See, *e.g., United States v. James Daniel Good Real Property,* 510 U.S. 43, 62, 114 S.Ct. 492, 126 L.Ed.2d 490. Unlike those claimants, G & G has not been deprived of any present entitlement. It has been deprived of payment that it contends it is owed under a contract, based on the State's determination that it failed to comply with the contract's terms. That property interest can be fully protected by an ordinary breach-of-contract suit. If California makes ordinary judicial process available to G & G for resolving its contractual dispute, that process is due process. Here, the Code, by allowing a contractor to assign the right of suit, provides a means by which a subcontractor may bring a breach-of-contract suit to recover withheld payments. That damages may not be awarded until the suit's conclusion does not deprive G & G of its claim. Even if G & G could not obtain assignment, it appears that a breach-of- contract suit against the contractor remains available under state common law, although final determination of the question rests in the hands of the California courts. Pp. 1450-1452.

204 F.3d 941, reversed.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

Thomas S. Kerrigan, Van Nuys, CA, for petitioners.

Jeffrey A. Lamken, Washington, DC, for United States as amicus curiae, by special leave of the Court.

Stephen A. Seideman, Los Angeles, CA, for respondent.

For U.S. Supreme Court Briefs See:

2001 WL 43586 (Resp.Brief)

2001 WL 137346 (Reply.Brief)

2000 WL 1792987 (Pet.Brief)

2000 WL 1803647 (Amicus.Brief)

2000 WL 1922620 (Amicus.Brief)

For Transcript of Oral Argument See:

2001 WL 209816 (U.S.Oral.Arg.)

*191 Chief Justice REHNQUIST delivered the opinion of the Court.

The California Labor Code (Code or Labor Code) authorizes the State to order withholding of payments due a contractor on a public works project if a subcontractor on the project fails to comply with certain Code requirements. The Code permits the contractor, in turn, to withhold similar sums from the subcontractor. The Court of Appeals for the Ninth Circuit held that the relevant Code provisions violate the Due Process Clause of the Fourteenth Amendment because the statutory scheme does not afford the subcontractor a hearing before or after such action is taken. We granted certiorari, 531 U.S. 924, 121 S.Ct. 297, 148 L.Ed.2d 239 (2000), and we reverse.

Petitioners are the California Division of Labor Standards Enforcement (DLSE), the California Department of Industrial Relations, and several state officials in their official capacities. Respondent G & G Fire Sprinklers, Inc. (G & G), is a fire-protection company that installs fire sprinkler systems. G & G served as a subcontractor on several California public works projects. "Public works" include construction work done under contract and paid for in whole or part by public funds. Cal. Lab.Code Ann. § 1720 (West Supp.2001). The department, board, authority, officer, or agent awarding a contract for public work is called the "awarding body." § 1722 (West 1989). The California Labor Code requires that contractors and subcontractors on such projects pay their workers a prevailing wage that is determined by the State. §§ 1771, 1772, 1773 (West 1989 and Supp.2001). At the time relevant here, if workers were not paid the prevailing wage, the contractor was required **1449 to pay each worker the

difference between the prevailing wage and the wages paid, in addition to forfeiting a penalty to the State. § 1775 *192 (West Supp.2001). [FN1] The awarding body was required to include a clause in the contract so stipulating. *Ibid.*

FN1. The Code also imposes restrictions on recordkeeping and working hours, and at the time relevant here, the contractor was similarly penalized if the contractor or subcontractor failed to comply with them. Cal. Lab.Code Ann. §§ 1776(a), (b), (g) (West Supp.2001), 1813 (West 1989). The awarding body was required to include a clause in the contract so stipulating. §§ 1776(h), 1813.
Sections 1775, 1776, and 1813 were subsequently amended to provide that both contractors and subcontractors may be penalized for failure to comply with the Labor Code. §§ 1775(a), 1776(g), 1813 (West Supp.2001). Amendments to § 1775 also state that either the contractor or the subcontractor may pay workers the difference between the prevailing wage and wages paid. § 1775(a).

The Labor Code provides that "[b]efore making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter." § 1727. If money is withheld from a contractor because of a subcontractor's failure to comply with the Code's provisions, "[i]t shall be lawful for [the] contractor to withhold from [the] subcontractor under him sufficient sums to cover any penalties withheld." § 1729 (West 1989). [FN2]

FN2. Amendments to the Labor Code effective July 1, 2001, impose additional requirements on contractors. See § 1727(b) (West Supp.2001) (contractor shall withhold money from subcontractor at request of Labor Commissioner in certain circumstances); § 1775(b)(3) (contractor shall take corrective action to halt subcontractor's failure to pay prevailing wages if aware of the failure or be subject to penalties).

The Labor Code permits the contractor, or his assignee, to bring suit against the awarding body "on the contract for alleged breach thereof in not making ... payment" to recover the wages or penalties withheld. §§ 1731, 1732 (West Supp.2001) . The suit must be brought within 90 days of completion of the contract and acceptance of the job. § 1730. Such a suit "is the exclusive remedy of the contractor *193 or his or her assignees." § 1732. The awarding body retains the wages and penalties "pending the outcome of the suit." § 1731. [FN3]

FN3. Sections 1730-1733 of the Code have been repealed, effective July 1, 2001. Section 1742 has replaced them. It provides that "[a]n affected contractor or subcontractor may obtain review of a civil wage and penalty assessment [under the Code] by transmitting a written request to the office of the Labor Commissioner." § 1742(a). The contractor or subcontractor is then entitled to a hearing before the Director of Industrial Relations, who shall appoint an impartial hearing officer. Within 45 days of the hearing, the director shall issue a written decision affirming, modifying, or dismissing the assessment. A contractor or subcontractor may obtain review of the director's decision by filing a petition for a writ of the mandate in state superior court. §§ 1742(b), (c). These provisions are not yet in effect and these procedures were not available to respondent at the time of the withholding of payments at issue here.

In 1995, DLSE determined that G & G, as a subcontractor on three public works projects, had violated the Labor Code by failing to pay the prevailing wage and failing to keep and/or furnish payroll records upon request. DLSE issued notices to the awarding bodies on those projects, directing them to withhold from the contractors an amount

equal to the wages and penalties forfeited due to G & G's violations. The awarding bodies withheld payment from the contractors, who in turn withheld payment from G & G. The total withheld, according to respondent, exceeded $135,000. App. 68.

G & G sued petitioners in the District Court for the Central District of California. G & G sought declaratory and injunctive relief pursuant to Rev. Stat. § 1979, 42 U.S.C. § 1983, claiming that the issuance of withholding notices without a hearing **1450 constituted a deprivation of property without due process of law in violation of the Fourteenth Amendment. The District Court granted respondent's motion for summary judgment, declared §§ 1727, 1730-1733, 1775, 1776(g), and 1813 of the Labor Code unconstitutional, and enjoined the State from enforcing these provisions *194 against respondent. App. to Pet. for Cert. A85-A87. Petitioners appealed.

A divided panel of the Court of Appeals for the Ninth Circuit affirmed. *G & G Fire Sprinklers, Inc. v. Bradshaw*, 156 F.3d 893, 898 (1998) *(Bradshaw I)*. The court concluded that G & G "has a property interest in being paid in full for the construction work it has completed," *id.*, at 901, and found that G & G was deprived of that interest "as a result of the state's action," *id.*, at 903. It decided that because subcontractors were "afforded neither a pre- nor post-deprivation hearing when payments [were] withheld," the statutory scheme violated the Due Process Clause of the Fourteenth Amendment. *Id.*, at 904.

Following *Bradshaw I*, we decided *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999), where respondents also alleged a deprivation of property without due process of law, in violation of the Fourteenth Amendment. *Sullivan* involved a challenge to a private insurer's decision to withhold payment for disputed medical treatment pending review of its reasonableness and necessity, as authorized by state law. We held that the insurer's action was not "fairly attributable to the State," and that respondents therefore failed to satisfy a critical element of their § 1983 claim. *Id.*, at 58, 119 S.Ct. 977. We also decided that because state law entitled respondents to reasonable and necessary medical treatment, respondents had no property interest in payment for medical treatment not yet deemed to meet those criteria. *Id.*, at 61, 119 S.Ct. 977. We granted certiorari in *Bradshaw I*, vacated the judgment of the Court of Appeals, and remanded for reconsideration in light of *Sullivan*. *Bradshaw v. G & G Fire Sprinklers, Inc.*, 526 U.S. 1061, 119 S.Ct. 1450, 143 L.Ed.2d 538 (1999).

On remand, the Court of Appeals reinstated its prior judgment and opinion, again by a divided vote. The court held that the withholding of payments was state action because it was "specifically directed by State officials ... [and] the withholding party has no discretion." *195*G & G Fire Sprinklers, Inc. v. Bradshaw*, 204 F.3d 941, 944 (C.A.9 2000). In its view, its prior opinion was consistent with *Sullivan* because it "specifically held that G & G did not have a right to payment of the disputed funds pending the outcome of whatever kind of hearing would be afforded," and "explicitly authorized the withholding of payments pending the hearing." 204 F.3d, at 943. The court explained that G & G's rights were violated not because it was deprived of immediate payment, but "because the California statutory scheme afforded no hearing at all when state officials directed that payments be withheld." *Id.*, at 943-944.

[1] Where a state law such as this is challenged on due process grounds, we inquire whether the State has deprived the claimant of a protected property interest, and whether the State's procedures comport with due process. *Sullivan, supra*, at 59, 119 S.Ct. 977. We assume, without deciding, that the withholding of money due respondent under its contracts occurred under color of state law, and that, as the Court of Appeals concluded, respondent has a property interest of the kind we considered in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), in its claim for payment under its contracts. 204 F.3d, at 943-944. Because we believe that California law affords respondent sufficient opportunity to pursue that claim in state court, we conclude that the California statutory scheme does not deprive G & G of its claim for payment without due process of law. See *Logan, supra*, at 433, 102 S.Ct. 1148 ("[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged").

**1451 The Court of Appeals relied upon several of our cases dealing with claims of deprivation of a property interest without due process to hold that G & G was entitled to a reasonably prompt hearing when payments were withheld. *Bradshaw I, supra,* at 903-904 (citing *United States v. James Daniel Good Real Property,* 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993); *FDIC v. Mallen,* 486 U.S. 230, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988); **196 Barry v. Barchi,* 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 1979)). In *Good,* we held that the Government must afford the owner of a house subject to forfeiture as property used to commit or to facilitate commission of a federal drug offense notice and a hearing before seizing the property. 510 U.S., at 62, 114 S.Ct. 492. In *Barchi,* we held that a racetrack trainer suspended for 15 days on suspicion of horse drugging was entitled to a prompt postdeprivation administrative or judicial hearing. 443 U.S., at 63-64, 99 S.Ct. 2642. And in *Mallen,* we held thatthe president of a Federal Deposit Insurance Corporation (FDIC) insured bank suspended from office by the FDIC was accorded due process by a notice and hearing procedure which would render a decision within 90 days of the suspension. 486 U.S., at 241-243, 108 S.Ct. 1780. See also *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) (holding that due process requires notice and a hearing before wages may be garnished).

[2] In each of these cases, the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation. Unlike those claimants, respondent has not been denied any present entitlement. G & G has been deprived of payment that it contends it is owed under a contract, based on the State's determination that G & G failed to comply with the contract's terms. G & G has only a claim that it did comply with those terms and therefore that it is entitled to be paid in full. Though we assume for purposes of decision here that G & G has a property interest in its claim for payment, see *supra,* at 1450, it is an interest, unlike the interests discussed above, that can be fully protected by an ordinary breach-of-contract suit.

In *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961) (citations omitted), we said:

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. " '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed *197 content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions ....' "

We hold that if California makes ordinary judicial process available to respondent for resolving its contractual dispute, that process is due process.

[3] The California Labor Code provides that "the contractor or his or her assignee" may sue the awarding body "on the contract for alleged breach thereof" for "the recovery of wages or penalties." §§ 1731, 1732 (West Supp.2001). There is no basis here to conclude that the contractor would refuse to assign the right of suit to its subcontractor. In fact, respondent stated at oral argument that it has sued awarding bodies in state superior court pursuant to § § 1731-1733 of the Labor Code to recover payments withheld on previous projects where it served as a subcontractor. See Tr. of Oral Arg. 27, 40-41, 49-50. Presumably, respondent brought suit as an assignee of the contractors on those projects, as the Code requires. § 1732 (West Supp.2001). Thus, the Labor Code, by allowing assignment, provides a means by which a subcontractor may bring a claim for breach of contract to recover wages and penalties withheld.

[4] Respondent complains that a suit under the Labor Code is inadequate because the awarding body retains the wages and penalties "pending the outcome of the **1452 suit," § 1731, which may last several years. Tr. of Oral Arg. 51. A lawsuit of that duration, while undoubtedly something of a hardship, cannot be said to deprive respondent of its claim for payment under the contract. Lawsuits are not known for expeditiously resolving claims, and the standard practice in breach-of-contract suits is to award damages, if appropriate, only at the conclusion of the case.

[5] Even if respondent could not obtain assignment of the right to sue the awarding body under the contract, it appears that a suit for breach of contract against the contractor remains available under

California common law. See 1 *198 B. Witkin, Summary of California Law §§ 791, 797 (9th ed.1987) (defining breach as the "unjustified or unexcused ... failure to perform a contract" and describing the remedies available under state law). To be sure, § 1732 of the Labor Code provides that suit on the contract against the awarding body is the "exclusive remedy of the contractor or his or her assignees" with respect to recovery of withheld wages and penalties. § 1732 (West Supp.2001). But the remedy is exclusive only with respect to the contractor and his assignees, and thus by its terms not the exclusive remedy for a subcontractor who does not receive assignment. See, *e.g., J & K Painting Co., Inc. v. Bradshaw,* 45 Cal.App.4th 1394, 1402, 53 Cal.Rptr.2d 496, 501 (1996) (allowing subcontractor to challenge Labor Commissioner's action by petition for a writ of the mandate).

[6][7] In *J & K Painting,* the California Court of Appeal rejected the argument that § 1732 requires a subcontractor to obtain an assignment and that failure to do so is "fatal to any other attempt to secure relief." *Id.,* at 1401, n. 7, 53 Cal.Rptr.2d, at 501, n. 7. The Labor Code does not expressly impose such a requirement, and that court declined to infer an intent to "create remedial exclusivity" in this context. *Ibid.* It thus appears that subcontractors like respondent may pursue their claims for payment by bringing a standard breach-of-contract suit against the contractor under California law. Our view is necessarily tentative, since the final determination of the question rests in the hands of the California courts, but respondent has not convinced us that this avenue of relief is closed to it. See *id.,* at 1401, and n. 4, 53 Cal.Rptr.2d, at 500, and n. 4 (noting that the contractor might assert a variety of defenses to the subcontractor's suit for breach of contract without evaluating their soundness). As the party challenging the statutory withholding scheme, respondent bears the burden of demonstrating its unconstitutionality. Cf. *INS v. Chadha,* 462 U.S. 919, 944, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (statutes presumed constitutional). We *199 therefore conclude that the relevant provisions of the California Labor Code do not deprive respondent of property without due process of law. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

121 S.Ct. 1446, 532 U.S. 189, 149 L.Ed.2d 391, 143 Lab.Cas. P 59,189, 6 Wage & Hour Cas.2d (BNA) 1537, 1 Cal. Daily Op. Serv. 3004, 2001 Daily Journal D.A.R. 3701, 14 Fla. L. Weekly Fed. S 167

END OF DOCUMENT

active service, these provisions are invalid as violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

"'Where a statute is defective because of underinclusion . . . there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.'" (*Califano v. Westcott* (1979) 443 U.S. 76, 89, 99 S.Ct. 2655, 2663, 61 L.Ed.2d 382 quoting conc. opn. of Harlan, J., in *Welsh v. United States* (1970) 398 U.S. 333, 361, 90 S.Ct. 1792, 1807, 26 L.Ed.2d 308.) Being guided by the intent of the Legislature to aid veterans, and the agreement of the parties that extension of benefits is the appropriate remedy, we direct that the second remedial alternative be embraced.

We affirm the judgment of the Court of Appeal and remand to the Court of Appeal with directions to remand the cause to the superior court for further proceedings not inconsistent with this opinion.

LUCAS, C.J., and PANELLI, KENNARD, ARABIAN, BAXTER and GEORGE, JJ., concur.

824 P.2d 643
1 Cal.4th 976

[1976] **LUSARDI CONSTRUCTION COMPANY, Plaintiff and Respondent,**

v.

Lloyd W. AUBRY, Jr., as Labor Commissioner, etc., et al., Defendants and Appellants.

No. S011121.

Supreme Court of California, In Bank.

Feb. 24, 1992.

Contractor filed action for declaratory and injunctive relief against the enforcement of prevailing wage laws on a hospital construction project. The Superior Court, San Diego County, No. 579903, Vincent P. DiFiglia, J., entered summary judgment for contractor and enjoined Division of Labor Standards Enforcement from attempting to enforce prevailing wage law provisions as to hospital project. The Court of Appeal, 259 Cal.Rptr. 250, affirmed. The Supreme Court granted review, 265 Cal.Rptr. 111, superseding the opinion of the Court of Appeal, and, in an opinion by Kennard, J., held that: (1) statutory obligation to pay prevailing wage law on public works project had an independent statutory basis; (2) Director of Department of Industrial Relations was statutorily authorized to make administrative determination that contract for the construction of a public improvement was one for public works within meaning of prevailing wage law; (3) doctrine of equitable estoppel did not prevent Director from proceeding against contractor absent privity or identity of interest between Director and local hospital district involved in project; but (4) equitable considerations precluded imposition of statutory penalties against public work contractor for failing to pay prevailing wage where contractor acted in good faith.

Judgment of Court of Appeal reversed.

Panelli, J., filed concurring and dissenting opinion, in which Baxter, J., joined.

Arabian and Baxter, JJ., each filed concurring and dissenting opinions.

1. **Labor Relations** ⇐1268

Overall purpose of the prevailing wage law for construction projects financed in whole or in part by public funds is to protect and benefit employees on public works projects. West's Ann.Cal.Labor Code §§ 1720–1861.

2. **Labor Relations** ⇐1268

The obligation of a contractor on a public works project to pay the prevailing wage flows from the statutory duty to pay

the prevailing wage imposed on the contractor independent of any contractual requirement. West's Ann.Cal.Labor Code §§ 1773.2, 1775, 1776(g), 1777, 1777.5.

3. Statutes ⇐184

The object a statute seeks to achieve is of primary importance in statutory interpretation.

4. Labor Relations ⇐1268

The prevailing wage law applied to public works construction projects, regardless of whether the contractor and public entity included in the contract language which required compliance with the prevailing wage law. West's Ann.Cal.Labor Code §§ 1773.2, 1775, 1776(g), 1777, 1777.5.

5. Labor Relations ⇐1268

Director of the Department of Industrial Relations has the authority to determine that a construction project is a "public work" within the meaning of the Labor Code and thus subject to the statutory requirement that prevailing wages be paid. West's Ann.Cal.Labor Code §§ 50.5, 51, 54, 55, 59.

See publication Words and Phrases for other judicial constructions and definitions.

6. Administrative Law and Procedure ⇐388

Labor Relations ⇐513

Director of the Department of Industrial Relations has plenary authority to promulgate rules to enforce the Labor Code. West's Ann.Cal.Labor Code §§ 50.5, 51, 54, 55, 59.

7. Administrative Law and Procedure ⇐442

Constitutional Law ⇐275(3)

Labor Relations ⇐598

Determination by Director of Department of Industrial Relations that a project was a public work was not an "adjudication" resulting in a deprivation requiring procedural due process; director was authorized only to bring charges in court against contractor for failing to pay prevailing wage, but the court had sole power to determine whether contractor was liable for any underpayment and to make binding order that payments be made. West's Ann.Cal.Labor Code § 1775.

See publication Words and Phrases for other judicial constructions and definitions.

8. Constitutional Law ⇐251.6

A person against whom criminal or civil charges may be filed has no procedural due process right to notice and a hearing until and unless an executive branch actually files formal civil or criminal charges. U.S.C.A. Const.Amends. 5, 14.

9. Administrative Law and Procedure ⇐453, 470

Constitutional Law ⇐275(3)

Labor Relations ⇐1268

Determination by Director of Department of Industrial Relations that hospital construction project was a public work to which prevailing wage law applied, did not implicate any procedural due process rights of contractor, who had no right to notice and hearing unless and until the director officially brought court action to recover amounts due under prevailing wage law. West's Ann.Cal.Labor Code § 1775; U.S.C.A. Const.Amends. 5, 14.

10. Constitutional Law ⇐275(3)

Labor Relations ⇐1268

Contractor failed to show that any application of prevailing wage laws against it requiring payment of higher wages to its employees on hospital construction project or subjecting it to penalties for failing to comply with prevailing wage laws amounted to "retroactive enforcement" in violation of state and federal due process guarantees, as contractor's obligation to pay prevailing wages on public work was statutory in nature. West's Ann.Cal.Labor Code § 1775; U.S.C.A. Const.Amends. 5, 14.

11. Estoppel ⇐62.2(2)

Equitable estoppel could not be used to bar the Director of the Department of Industrial Relations from determining that a hospital construction project was a public work, as there was no privity or identity of interest between the local public hospital district, which had represented project not to be a public work, and the Director of the Department of Industrial Relations.

12. Estoppel ⇐52.15

In order for equitable estoppel to apply, the party to be estopped must have been aware of the facts, that party must either intend that its act or omission be acted upon or must so act that the party asserting estoppel has a right to believe it was intended, the party asserting estoppel must be unaware of the true facts, and the party asserting estoppel must rely on the other party's conduct to its detriment.

13. Estoppel ⇐62.1

Even when all elements of equitable estoppel are present, estoppel will not be applied against the government if to do so would nullify a strong rule of policy adopted for the benefit of public.

14. Administrative Law and Procedure ⇐496

The acts of one public agency will bind another public agency only when there is privity or an identity of interests between the agencies.

15. Labor Relations ⇐1541

Equitable considerations precluded imposition of statutory penalties against a public works contractor for failing to pay prevailing wage where the contractor acted in good faith in entering into contract on the basis of public hospital district's representations, assertedly on the advice of its attorneys, that the project was not subject to the prevailing wage law, thus contractor's exposure to liability was limited to the amount of underpayments. West's Ann.Cal.Labor Code §§ 1720(a), 1773.2, 1775.

16. Forfeitures ⇐9
Penalties ⇐11

When a party incurs a loss in the nature of a forfeiture or penalty, but makes full compensation to the injured party, he or she may be relieved from forfeiture or penalty except when there has been a grossly negligent, willful or fraudulent breach of duty. West's Ann.Cal.Civ.Code § 3275.

17. Constitutional Law ⇐69

Court would not issue advisory opinion on constitutionality of prevailing wage law penalty provision. West's Ann.Cal.Labor Code § 1776(f).

[1981] H. Thomas Cadell Jr., Dept. of Indus. Relations, Chief Counsel, D.I.R., San Francisco, for defendants and appellants.

John W. Prager Jr., Santa Ana, for plaintiff and respondent.

KENNARD, Justice.

The prevailing wage law governs wages and other conditions of employment on public works, which include "[c]onstruction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds . . ." (Lab.Code, § 1720, subd. (a); all further unlabeled statutory references are to the Labor Code.) "Public works" contracts awarded to private contractors must include stipulations requiring the contractors and subcontractors to pay their employees no less than the applicable prevailing wage rates, as determined by the Director of the Department of Industrial Relations (the Director). (§§ 1773.2, 1775.)

This case involves an $18 million expansion of a public hospital. To keep the construction costs as low as possible, the public entity entered into a written agreement with a third party corporation, which appointed the public [1982] entity as its agent for all purposes on the construction project. The public entity, purportedly acting as agent for the third party corporation, then hired a private contractor to construct the project, without entering into the statutorily required stipulations that the contractor pay its employees the prevailing wage rates.

The Director sought to require the contractor to pay its employees prevailing wages; the contractor then brought this action challenging enforcement of the law against it. The trial court granted injunctive and declaratory relief, and the Court of Appeal affirmed, concluding on constitutional and equitable grounds that the Director could not enforce the prevailing wage law against the contractor.

This case involves the following issues:

First, does the prevailing wage law apply only when the contractor agrees to comply with it as part of the contract, or does the obligation to pay prevailing wages have an independent statutory basis?

Second, is the Director statutorily authorized to make the administrative determination that a contract for the construction of a public improvement is one for a public work? If so, does the making of such a determination constitute an adjudication, so that procedural due process protections are required?

Third, does the doctrine of equitable estoppel preclude any determination that in this case the contractor is bound by the prevailing wage law?

Fourth, is a civil penalty sought to be imposed on the contractor by the state invalid?

We hold that the statutory obligation to pay the prevailing wage does not depend on the contractor's assent, that the Director may validly and constitutionally determine that a given project is for a public work, and that the doctrine of equitable estoppel does not prevent the Director from proceeding against the contractor. We emphasize, however, that the contractor may be entitled to indemnity from the public entity if it reasonably relied on the public entity's representations that the project was not subject to the prevailing wage law, and that when, as here, a contractor does rely in good faith on such representations, equity prohibits the imposition of statutory penalties against the contractor for failing to pay the prevailing wage.

We conclude that the judgment of the Court of Appeal should be reversed.

[693] FACTS

The parties stipulated to these facts: Tri-City Hospital District (the District) is a public hospital district and an independent political subdivision of the State of California. In 1983, the District wanted to expand its hospital facilities. On June 28, 1983, the District entered into a written agreement with Imperial Municipal Services Group, Inc. (Imperial), a private corporation, for the construction of new facilities at Tri-City Hospital (the Expansion Project). The contract with Imperial specified that the sole role of Imperial was that of the seller of the property, and that the District was appointed as Imperial's "agent and attorney-in-fact for all purposes respecting construction of the Expansion Project, including, without limitation, the engagement of contractors ..., and the management and supervision of the construction of the Expansion Project." The contract further provided that "Purchaser [the District], as agent, shall cause contractors under such contracts to ... pay prevailing wages in accordance with the California Labor Code..."

Although Lusardi Construction Company (Lusardi) had served as a contractor on many public works, it made a business decision not to perform any public works contracts after 1980. During its negotiations with the District, Lusardi told the District that it did not enter into contracts for the construction of public works. The District represented to Lusardi that: (1) the Expansion Project was a private work and not a public work under the prevailing wage law, and therefore the payment of prevailing wages and keeping of payroll records was not required; (2) the District had received legal opinions determining that the Expansion Project was not a public work; and (3) Lusardi should compute its construction costs on the basis that the project was not a public work. Lusardi relied on the District's representations in calculating its construction costs.

With the District purportedly acting as Imperial's "agent," Imperial and Lusardi then entered into a contract for the construction of the Expansion Project. Lusardi agreed to construct a "four-phase," 108,000-square-foot addition to Tri-City Hospital at a maximum cost of $18,350,000. The contract between Imperial and Lusardi did not refer to prevailing wages.

In July 1983, Lusardi began work on the project. Lusardi and its subcontractors did not pay the prevailing wage, and did not comply with prevailing wage law require-

ments governing the hiring of apprentices and the maintenance of certified payroll records. After two and one-half years, Lusardi had completed significant portions of the project.

In January 1986, the Director informed the District in writing of his tentative determination that the Expansion Project was a public work. In 1984 May, the Division of Labor Standards Enforcement (the DLSE), a part of the Department of Industrial Relations (the Department), requested Lusardi to submit payroll records, and warned that failure to comply would subject Lusardi to statutory penalties. In August, the Department's Director notified Lusardi and the District that he had made a final determination that the Expansion Project was a public work. In September, the Division of Apprenticeship Standards (the DAS), another arm of the Department, requested evidence of compliance with the statutory apprenticeship requirements from Lusardi.

When Lusardi did not submit the certified payroll records, the DLSE sent a "penalty assessment letter" to the District in November 1986, with a copy to Lusardi. The DLSE purported to assess a statutory penalty of $25 per day per employee, calculated on the basis of a minimum of 200 employees, retroactive to August 1986. Although the construction contract provided that Lusardi was paid by Imperial and not by the District, the DLSE directed the District to withhold future payments due Lusardi, and to increase the amount withheld by $5,000 a day for each day of noncompliance beyond November 13, 1986.

The DAS wrote to Lusardi on November 13, 1986, that if it did not receive satisfactory proof of compliance with the statutory apprenticeship requirements within five days of the letter's receipt, it would initiate "proceedings for determination of willful noncompliance ... pursuant to Labor Code section 1777.7...." The DLSE and the DAS warned Lusardi that it could be subject to back-wage payments, civil penalties, public work debarment, and civil and administrative litigation.

In November 1986, Lusardi filed this lawsuit and ceased all work on the Expansion Project. Lusardi's complaint sought declaratory and injunctive relief, alleging that the prevailing wage provisions of the Labor Code could not lawfully be applied to it consistent with due process.[1]

The trial court issued a temporary restraining order and a preliminary injunction restraining defendants from enforcing or attempting to enforce the prevailing wage law against Lusardi. It subsequently granted Lusardi's motion for summary judgment. Based on the stipulated facts, the trial court ruled that the prevailing wage law could not be applied to Lusardi because of 1985 the absence of the requisite contractual provisions and because Lusardi's due process rights had been violated.

The trial court determined that under the prevailing wage law the responsibility for ensuring that the prevailing wage provisions were in a public work contract was on the agency awarding the contract. Because the contract contained no provisions requiring the prevailing wage to be paid, the trial court ruled that Lusardi had acted reasonably as a matter of law in concluding that the prevailing wage law did not apply to it. The trial court also concluded that the Department's application of the public works standards to Lusardi violated Lusardi's right to reasonable notice and an opportunity to respond.

The Court of Appeal affirmed, holding that the Director's determination that the project was a public work without giving Lusardi notice and an opportunity to be heard violated procedural due process, and that the Director was barred under the doctrine of equitable estoppel from proceeding against Lusardi.

1. The DLSE filed a cross-complaint against the District alleging that the District had engaged in an unlawful scheme to circumvent the prevailing wage law in an effort to reduce its construction costs. The trial court sustained the District's demurrer without leave to amend, and dismissed the cross-complaint. The Court of Appeal affirmed, and we granted review. *Aubry v. Tri-City Hospital Dist.* (1989) 234 Cal.App.3d 510, 265 Cal.Rptr. 451, review granted March 15, 1990 (S011123), is now pending in this court.

DISCUSSION

1. *Overview of the Prevailing Wage Law*

The Legislature has declared that it is the public policy of California "to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a).). The conditions of employment on construction projects financed in whole or in part by public funds are governed by the prevailing wage law. (§§ 1720–1861.)

[1] The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects. (*O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 458, 127 Cal.Rptr. 799,). Subject to an exception not relevant here, under section 1720, subdivision (a), "public works" include "[c]onstruction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds . . . ." Section 1771 provides that not less than the general prevailing rate of wages must be paid to all workers employed on public works projects costing more than $1,000. Section 1770 requires the Director to make the prevailing wage rate determination, based on a method defined in section 1773.

[986] Section 1773 requires the public entity "awarding any contract for public work, or otherwise undertaking any public work," to obtain from the Director the general prevailing rate for each craft, classification or type of worker needed to execute the contract. The public entity must specify those rates in its call for bids, in bid specifications, and in the contract or, alternatively, must specify in those documents that the prevailing wage rates are on file in its principal office. (§ 1773.2.)

A contractor for a public works project that fails to pay the prevailing rate to its workers is liable for the deficiency and is subject to a statutory penalty. (§ 1775.) Deficiencies and penalties are to be withheld by the awarding body from sums due under the contract. (§ 1727.) If the money due a contractor from an awarding body is insufficient to pay all of the imposed penalties and deficiencies, or if the public works contract does not provide for payments by the awarding body to the contractor, the DLSE is authorized to bring an action to recover the deficiencies due and penalties assessed. (§ 1775.)[2]

2. *Statutory Obligation by Contractor on Public Work to Pay Prevailing Wages*

[2] The threshold issue here is whether the obligation of a contractor on a public works project to pay the prevailing wage is based exclusively on contractual provisions, or whether such an obligation flows from a statutory duty to pay the prevailing wage imposed on the contractor independent of

2. Each contractor and subcontractor must maintain complete and accurate records showing the names, occupations, addresses and Social Security numbers of all workers employed on public works projects, and detailing the actual hours worked and wages paid. (§ 1776, subd. (a).) The awarding body must insert stipulations in the construction contract requiring compliance with the recordkeeping provisions. (§ 1776, subd. (g).) Certified copies of these records must be made available for inspection or furnished upon request to representatives of the awarding body or the Department. (§ 1776, subd. (b).) Failure to do so within 10 days after receipt of the request subjects the contractor or subcontractor to forfeiture of $25 "for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated." (§ 1776, subd. (f).) Additionally, noncompliance may lead to prosecution on a misdemeanor charge. (§ 1777.)

This statutory scheme also governs the employment of apprentices. Section 1777.5 requires the employment of apprentices on public works projects under the terms of a statutory formula, and mandates that the awarding body insert stipulations in the construction contract requiring compliance with the apprenticeship provisions of the prevailing wage law. Section 1777.7 specifies sanctions for failure to comply with the apprenticeship requirements, including debarment from public works contracting and monetary penalties.

Any public agent who wilfully fails to comply with any provision of the prevailing wage law is guilty of a misdemeanor. (§ 1777.)

any contractual requirement. The Court of Appeal implicitly assumed, without deciding, that the contractor's duty to pay prevailing wages arose from statute.

[987]As noted above, sections 1773.2, 1775, 1776, subdivision (g), and 1777.5 generally require the contracting public entity, either through specifications in the notice for bids or by stipulations in any resulting contract, to notify the contractor of the applicability of the prevailing wage law and the possibility of penalties and forfeitures in the event of noncompliance. Lusardi contends that these statutes reflect a legislative intent that the prevailing wage laws are enforceable only when a provision requiring their observance is contained in the contract between the public agency and the contractor. We disagree.

Lusardi's proposed interpretation violates section 1771, which provides that "[e]xcept for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages[] . . . *shall be paid* to all workers employed on public works." (Italics added.) By its express language, this statutory requirement is not limited to those workers whose employers have contractually agreed to pay the prevailing wage; it applies to "*all* workers employed on public works." (Italics added.)

[3] Moreover, Lusardi's proposed interpretation would defeat the legislative objective. The object that a statute seeks to achieve is of primary importance in statutory interpretation. (*People v. Jeffers* (1987) 43 Cal.3d 984, 997, 239 Cal.Rptr. 886, 741 P.2d 1127; *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 669, 150 Cal.Rptr. 250, 586 P.2d 564.) The overall purpose of the prevailing wage law, as noted earlier, is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees. (*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 123, 270 Cal.Rptr. 75; *O.G. Sansone Co. v. Department of Transportation, supra,* 55 Cal.App.3d at pp. 458–460, 127 Cal.Rptr. 799.) These objectives would be defeated if we were to accept Lusardi's interpretation.

[4] As the facts of this case show, both the awarding body and the contractor may have strong financial incentives not to comply with the prevailing wage law. To construe the prevailing wage law as applicable only when the contractor and the public entity have included in the contract language requiring compliance with the prevailing wage law would encourage awarding bodies and contractors to legally circumvent the law, resulting in payment of less than the prevailing wage to workers on construction projects [988]that would otherwise be deemed public works. To allow this would reduce the prevailing wage law to merely an advisory expression of the Legislature's view.

Lusardi argues that the legislative history of the prevailing wage law supports its position that the law applies only when the contractor agrees to it in writing. Yet there is nothing in the legislative history that establishes an intent by the Legislature that contractors on public works projects who failed to execute such agreements are not bound by the prevailing wage laws.[3] The awarding body and con-

3. At least one feature in the legislative history of the statutory scheme strongly favors the conclusion that the Legislature intended the contractor's obligation to pay prevailing wages to be both statutory and contractual. Section 1781, before its repeal in 1957 (Stats.1957, ch. 396, § 1, p. 1240), read: "The penalties and remedies provided for in sections 1775 and 1777 shall be the exclusive penalties and remedies against any contractor or subcontractor for any violation of sections 1770 to 1777 *or* of the provisions inserted in any call for bids, specifications or contracts pursuant thereto." (Italics added.)

tractor are required to take steps to assure that the prevailing wage law is observed. It does not follow, however, that the law is intended to be optional with the contracting parties.

For these reasons, Lusardi's argument that the prevailing wage law applies only when the contractor assents to it in writing should be rejected.

3. *Director's Authority to Determine Coverage*

[5] The Court of Appeal assumed for the purpose of analysis that the Director could make the determination that a project was a public work. Lusardi contends that the Director has no statutory authority to determine that a construction project is a "public work" within the meaning of the Labor Code, and thus subject to the statutory requirement that "prevailing wages" be paid. We disagree.

The Director is the chief officer of the Department. (§ 51.) The stated function of the Department is to "foster, promote and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment." (§ 50.5.) The Director's statutory authority is broad: "The director shall perform all duties, exercise all powers and jurisdiction, assume and discharge all responsibilities, and carry out and effect all purposes vested by law in the department, [989] except as otherwise expressly provided by this code." (§ 54.) The Director possesses explicit authority to make rules. Section 55 provides in pertinent part: "[T]he director may, in accordance with the provisions of [the Administrative Procedure Act], make such rules and regulations as are necessary to carry out the provisions of this chapter and to effectuate its purposes." [4]

[6] These statutes establish a legislative intent to give the Director plenary authority to promulgate rules to enforce the Labor Code. Although no statute expressly gives the Director the authority to make regulations governing coverage, such authority is implied. "'[T]he authority of an administrative board or officer, ... to adopt reasonable rules and regulations which are deemed necessary to the due and efficient exercise of the powers expressly granted cannot be questioned. This authority is implied from the power granted.'" (*California Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 303, 140 P.2d 657.) Thus, this court has previously upheld labor regulations under the same general statutory scheme "for which there is no express statutory or constitutional authority." (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 330, 19 Cal.Rptr. 492, 369 P.2d 20.)

Under these standards, the Director's interpretation of the statutes as authorizing the making of regulations governing coverage of the prevailing wage laws is well within the broad scope of his authority. Exercising that authority, the Director has made regulations governing coverage of the prevailing wage law.[5] Under the regu-

The Legislature's use of the disjunctive "or" in this provision indicates that it viewed contractors and subcontractors as liable *either* for violation of their statutory obligation to pay prevailing wages, *or* for violation of their contractual stipulations to do so. The repeal of the statute does not change this, but merely clarifies that the Legislature no longer intends the statutory remedies to be exclusive. (See Comment, *Employee Rights: Enforcement of the Public Works Prevailing Wage Obligation* (1981) 14 Loyola L.A.L.Rev. 311, 328, fn. 110.)

4. Section 59, part of the same chapter as sections 54 and 55, provides: "The department through its appropriate officers shall administer and enforce all laws imposing any duty, power, or function upon the offices or officers of the department."

5. At the time of the coverage determination in this case, California Administrative Code, title 8, section 16207.5 provided in relevant part: "The Director shall establish and coordinate the administration of the State's prevailing wage law, including the determination of coverage issues." (This regulation has since been recodified at California Code of Regulations, title 8, section 16100.) California Administrative Code, title 8, section 16207.7 specified: "Any issue as to coverage of or amount of the prevailing wage raised by an awarding body or other interested party shall be referred to the Director, except that if it involves an issue raised after a contract is let, DLSE shall exercise discretion in the

lations, issues of coverage of the prevailing wage law are determined by the Director or the DLSE as the Director's designee. Lusardi does not contend that the regulations themselves are invalid. For the reasons discussed earlier, we hold that the Director's interpretation of his statutory authority is reasonable, and that the Director has the power to determine that a construction project is a "public work."

4. *Due Process Implications of Director's Coverage Determinations*

Lusardi contends that the Director's determination in August 1986 that the Expansion Project was a public work without affording Lusardi notice and an opportunity to be heard violated its right to procedural due process under the state and federal Constitutions. This argument mirrors the reasoning of the Court of Appeal, which held that because the administrative finding that a project was a public work was of great importance to the contractor, procedural due process attached. We disagree.

The Court of Appeal correctly observed that procedural due process "does not require any particular form of notice or type of hearing." Thereafter, the Court of Appeal focused exclusively on the importance of the interests involved. The court stated that whether the project was a public work was "a matter of great importance to the contractor." The court found it significant that the Director had promulgated regulations allowing for hearings to determine prevailing wage rates; this was, in the court's view, another "important determination" to be made in connection with the prevailing wage law, though not directly relevant to this case. The court observed that it could "conceive of no adjudication under the prevailing wage law more important to a contractor than the foundational adjudication of the very nature of the job—whether it is 'public' or 'private' works." The court then concluded that Lusardi's due process rights had been violated by this adjudication.

[7] The Court of Appeal erred in assuming that the Director's determination that the project was a public work is an "adjudication" resulting in a deprivation requiring procedural due process.

Careful review of the statutory scheme, however, makes clear that the Director has no power to adjudicate whether a project is a public work, or to independently deprive a contractor such as Lusardi of any property interest. Instead, when the contract does not provide for a money payment from the awarding body to the contractor, the Director is authorized under the statute only to bring charges in court against a contractor for failing to pay the prevailing wage. The court has the sole power to determine whether the contractor is liable for any underpayment, and to make a binding order that the payments be made. The Director's role in this process is purely prosecutorial.

The statute governing this case is section 1775. It provides, in pertinent part: "[I]n all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the [DLSE] of the violation and the [DLSE], if necessary with the assistance of the awarding body, *may maintain an action in any court of competent jurisdiction* to recover the penalties and the amounts due provided in this section." (Italics added.)

Here, the contract did not provide for a money payment from the District to Lusardi. Accordingly, the Director, through the DLSE, was authorized to bring an action in court for recovery of the underpayment. Contrary to the Court of Appeal's assumption, the Director was not authorized to, and did not, "adjudicate" anything. The Director's role in deciding that the prevailing wage law had been violated was no more "adjudicatory" than a district attor-

enforcement of the law.... DLSE shall refer ... any issue as to coverage which is not routine to the Director's office as soon as possible to coordinate with Departmental policy." (This regulation appears now in somewhat different language in California Code of Regulations, title 8, section 16301.)

ney's decision that a criminal statute has been violated.

It is true that after the Director made his determination that the project was a public work, he caused the DLSE to direct the District to withhold purported future payments to Lusardi. This did not result in a deprivation of property. Because "the contract does not provide for a money payment by the awarding body to the contractor" (§ 1775), this purported direction to withhold payments was meaningless.[6] The DLSE ordered the District to perform an impossible act.

The Director did not order Lusardi to begin paying the prevailing wage, nor did the Director have any power to do so. The DAS did warn Lusardi that if it did not comply with the statutory apprenticeship requirements, the DAS would initiate "proceedings for determination of willful noncompliance . . . pursuant to . . . section 1777.7 . . . ." The DAS has not, however, initiated such proceedings.

Thus, what the Director and his designees did in this case was to notify the District and Lusardi that, in the view of the authorities, the project was a public work and the prevailing wage law applied. There is no statute requiring the Director to so notify an awarding body or contractor; apparently the Director did so in the hope that voluntary compliance could avoid the necessity to bring an action under section 1775. But before the Director could bring a court action to recover the amounts due under section 1775, Lusardi sued the Director, claiming its due process rights were violated.

[8, 9] 1992There is apparently no case that is precisely on point. But there is a substantial body of case law that is wholly supportive of the conclusion that a party in Lusardi's situation has no procedural due process rights to notice or a hearing until an executive branch official files formal civil or criminal charges against it.

Thus, in *SEC v. Jerry T. O'Brien, Inc.* (1984) 467 U.S. 735, 742, 104 S.Ct. 2720, 2725, 81 L.Ed.2d 615, the high court stated that "because an administrative investigation adjudicates no legal rights," the due process clause of the federal Constitution is "not implicated. . . ." In the context of administrative process that, unlike the main procedure at issue here, does include an administrative hearing, the courts have consistently held that "due process do[es] not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." (*Opp Cotton Mills v. Administrator* (1941) 312 U.S. 126, 152–153, 61 S.Ct. 524, 536, 85 L.Ed. 624; see *Hodel v. Virginia Surface Mining & Recl. Assn.* (1981) 452 U.S. 264, 303, 101 S.Ct. 2352, 2374, 69 L.Ed.2d 1.)

In the more closely related context of official action that, like a criminal prosecution and the procedure under section 1775, contemplates not an administrative hearing but a court trial after an executive official has filed charges, the courts have also refused to hold that procedural due process requires notice and a hearing prior to the filing of charges.

A representative analysis is found in *Baltimore Gas & Elec. Co. v. Heintz* (4th Cir.1985) 760 F.2d 1408, 1419, cert. den. 474 U.S. 847, 106 S.Ct. 141, 88 L.Ed.2d 116: "The mere determination to enforce the statute or regulation in some cases and not to enforce [it] in others, without more, may entitle one to an explanation from the agency designed to facilitate judicial review of the decision; but such an action does not constitute a deprivation of due process.

6. In this case the District, though it did not directly award the contract to Lusardi, is the awarding body within the meaning of the statutory scheme. As explained earlier, the District entered into a contract under which Imperial, a private corporation, would build the Expansion Project and sell the completed Expansion Project to the District; the contract provided that the District was appointed as Imperial's "agent . . . for all purposes . . . including, the engagement of contractors . . . and the management and supervision of the Expansion Project." As Imperial's "agent," the District negotiated with Lusardi for the award of the construction contract. Under section 1722, "awarding body" means "department, board, authority, officer or *agent* awarding a contract for public work." (Italics added.)

That standard has 'generated an almost unbroken line of cases upholding prosecutors' powers to decide who and how to charge.' [Citations.]" (Accord, e.g., *United States v. Patterson* (9th Cir.1972) 466 F.2d 360, 361, cert. den. 409 U.S. 1038, 93 S.Ct. 516, 34 L.Ed.2d 487 ["It is sufficient if a hearing is had prior to the final order which deprives the person of his liberty."].)

Thus, the case law establishes that a person against whom criminal or civil charges may be filed has no procedural due process right to notice and a hearing until and unless an executive branch official actually files formal civil or criminal charges.

A contrary conclusion would result in serious mischief. For example, a place of prostitution that learned that the district attorney planned to file a |993 civil "red light" action against it to abate a nuisance could demand that, before charges were filed, a hearing be held on the prosecutor's decision to file. (But see Pen.Code, § 11225 et seq.) Or the Attorney General, having decided to seek an injunction under the unfair competition statute to halt a campaign of false advertising targeting senior citizens, would be required to subject the decision to proceed to a hearing. (But see Bus. & Prof.Code, § 17200 et seq.) Or the Division of Medical Quality of the Medical Board of California, having determined as a result of an investigation that charges should be brought against a physician for unprofessional conduct, would be required to provide the physician, under Lusardi's theory, with notice and an opportunity to be heard before an accusation could be brought. (But see Gov.Code, § 11500 et seq.; Bus. & Prof.Code, § 2220 et seq.) The examples could easily be multiplied.

The Director's decision that a project is a public work may lead to further action that triggers due process rights. Should the DLSE seek to recover underpayments of the prevailing wage from Lusardi in a court action under section 1775, Lusardi will be entitled to fully litigate the issue of its liability in the trial court. But at the time the Director's preliminary determination is made, no process is due.

5. *Coverage Determinations and Judicial Powers*

Lusardi argues that the Director's determination that a contract is a public work impermissibly intrudes on judicial powers under the standards set forth in *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 261 Cal.Rptr. 318, 777 P.2d 91. We do not agree.

In *McHugh v. Santa Monica Rent Control Bd., supra*, 49 Cal.3d 348, 261 Cal.Rptr. 318, 777 P.2d 91, this court held that administrative agencies that are legislatively authorized to hold hearings and order relief may constitutionally do so when the exercise of such power is reasonably necessary to effectuate the agency's legitimate regulatory purposes, and "the 'essential' judicial power (i.e., the power to make enforceable, binding judgments) remains ultimately in the courts, through review of agency determinations." (*Id.*, at p. 372, 261 Cal.Rptr. 318, 777 P.2d 91, italics omitted.)

Here, the Director's determination that a project is a public work does not violate the principles set forth in *McHugh v. Santa Monica Rent Control Bd., supra*, 49 Cal.3d 348, 261 Cal.Rptr. 318, 777 P.2d 91. The Director's determination cannot be accurately characterized as "judicial," because it does not encompass the conduct of a hearing or a binding order for any type of relief.

6. *Lusardi Has Not Demonstrated Impermissible "Retroactive Enforcement" of the Prevailing Wage Law*

[10] Lusardi argues that *any* application of the prevailing wage laws against it requiring the payment of higher wages to its employees on the |994 Expansion Project, or subjecting it to penalties for failing to comply with the prevailing wage laws, violates state and federal due process guarantees and amounts to impermissible "retroactive enforcement." Lusardi's theory, which the Court of Appeal found unnecessary to address, is that because the contract contained no provision requiring it to pay the prevailing wage, it had no notice of such a requirement. In support of this

theory Lusardi relies on *Lambert v. California* (1957) 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228.

Lusardi's retroactive enforcement argument is premised on its contention that the obligation to pay prevailing wages arises solely from the contract. As shown above, however, this is incorrect; the obligation of a contractor to pay prevailing wages on a public work is statutory in nature.

In *Lambert v. California*, *supra*, 355 U.S. 225, 78 S.Ct. 240, the United States Supreme Court held that an ordinance making it a criminal offense for a person convicted of a felony to fail to register with a city if the person remained for more than five days in the city was unconstitutional as applied to a person who had no actual knowledge of the ordinance, when no showing was made of the probability of such knowledge. *Lambert* solely concerns the state of mind requisite to an individual's criminal liability. (*Texaco, Inc. v. Short* (1982) 454 U.S. 516, 537 fn. 33, 102 S.Ct. 781, 796 fn. 33, 70 L.Ed.2d 738; see *United States v. Freed* (1971) 401 U.S. 601, 608–609, 91 S.Ct. 1112, 1117–1118, 28 L.Ed.2d 356.) Thus, it has no application here.

7. *Equitable Issues*

[11] The Court of Appeal was persuaded that the doctrine of equitable estoppel bars the Director from determining that the Expansion Project was a public work. Lusardi renews that contention here, arguing that it relied on the District's representations that the project was not subject to the prevailing wage law, and that to now allow the Director to enforce the prevailing wage law against it would violate equitable principles. Not so.

[12, 13] Generally, four elements must be present for the doctrine of equitable estoppel to apply. First, the party to be estopped must have been aware of the facts. Second, that party must either intend that its act or omission be acted upon, or must so act that the party asserting estoppel has a right to believe it was intended. Third, the party asserting estoppel must be unaware of the true facts. Fourth, the party asserting estoppel must rely on the other party's conduct, to its detriment. (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 398–399, 261 Cal.Rptr. 310, 777 P.2d 83.) Even when these elements are present, estoppel will not be applied against the government if to do so would nullify a strong rule of policy adopted for the benefit of the [998]public. (*Ibid.*; accord, e.g., *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488, 91 Cal.Rptr. 23, 476 P.2d 423.)

Lusardi's attempt to invoke the doctrine against the Director must fail because the elements of equitable estoppel are entirely lacking against the Director. Lusardi does not and cannot claim that it justifiably relied on acts or omissions of the Director. Rather, Lusardi argues that the actions of the District led to Lusardi's reliance, and that the acts of the District should be attributed to the Director.

[14] The acts of one public agency will bind another public agency only when there is privity, or an identity of interests between the agencies. (*City and County of San Francisco v. Grant Co.* (1986) 181 Cal.App.3d 1085, 1092, 227 Cal.Rptr. 154; *California Tahoe Regional Planning Agency v. Day & Night Electric, Inc.* (1985) 163 Cal.App.3d 898, 904–905, 210 Cal.Rptr. 48; see *Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 397–399, 29 Cal.Rptr. 657, 380 P.2d 97.)

In this case, there is no privity or identity of interest between the District and the Director. Instead, there is a direct and palpable conflict. As its actions clearly evidence, the District had an interest in obtaining the lowest possible cost for construction of the hospital expansion project. The interest of the Director is in enforcing the prevailing wage laws. Contractors that do not pay the prevailing wage to their workers enjoy a competitive advantage over contractors that do, and may be preferred by local government agencies for public works projects, because the construction dollar will purchase more when a contractor paying less than the prevailing wage is selected. The facts of this case

illustrate this conflict of interest: the District seeks to avoid the prevailing wage law, while the Director seeks to enforce it.

Lusardi argues that *Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal.App.3d 635, 237 Cal.Rptr. 546 (hereafter *Waters*) supports a finding that the Director is estopped from determining that the project is subject to the prevailing wage law. We disagree.

In *Waters, supra*, 192 Cal.App.3d 635, 237 Cal.Rptr. 546, a city published a notice for bids on a construction project stating that, under section 1773, prevailing wages were to be paid by the contractor, but failing to set forth the prevailing wage rates or to include a statement that the rates were on file with the city, as required by section 1773.2. The contractor consulted with a city architect, who mistakenly indicated that the prevailing rates for carpentry were considerably lower than the applicable rate established by the Director. Based on [1996] this incorrect information, the contractor concluded that the rates paid by his carpentry subcontractor were greater than the prevailing wage. Thereafter, the DLSE determined that the carpenters had been underpaid, it levied a penalty for the underpayment, and ordered the city to withhold the amount of the underpayment plus the penalty from payments due the contractor. The contractor sued the DLSE. On appeal from a judgment in favor of the contractor, the appellate court held that although the contractor was liable for the underpayment, the DLSE was estopped by the actions of the city from collecting the penalty. (192 Cal.App.3d at pp. 639–642, 237 Cal.Rptr. 546.)

The *Waters* court declined to apply estoppel to preclude enforcement of the prevailing wage law against the contractor, and held that the contractor was liable for the difference between the amount paid and the prevailing wage rate. (*Waters, supra*, 192 Cal.App.3d at p. 639, 237 Cal.Rptr. 546.) Thus, *Waters* does not support an application of the doctrine of estoppel to preclude a determination that a project is a public work. Moreover, the *Waters* court never considered the question whether the city and the DLSE shared the requisite privity or identity of interests.

[15] *Waters* does, however, contain an insight of considerable value to this case. The *Waters* court concluded that there was no "strong rule of policy" that would require the imposition of a penalty on the contractor, who had reasonably and in good faith attempted to comply with the requirements of the prevailing wage law. (*Waters, supra*, 192 Cal.App.3d at pp. 641–642, 237 Cal.Rptr. 546.) We agree that in a proper case equitable considerations may preclude the imposition of statutory penalties against a public work contractor for failing to pay the prevailing wage. This is such a case. Here, Lusardi acted in good faith in entering into the contract on the basis of the District's representations, assertedly on the advice of its attorneys, that the project was not subject to the prevailing wage law. Under the circumstances of this case it would be inequitable for Lusardi to be held liable for penalties for failure to pay the prevailing wage. Lusardi's exposure to liability must be limited to the amount of underpayment.

[16] This conclusion comports with this state's policy, reflected in Civil Code section 3275, that when a party incurs a loss in the nature of a forfeiture or penalty, but makes full compensation to the injured party, he or she may be relieved from the forfeiture or penalty except when there has been a grossly negligent, willful or fraudulent breach of a duty. California courts have applied this principle when necessary to accomplish substantial justice. (See *Valley View Home of Beaumont, Inc. v. Department of Health Services* (1983) 146 Cal.App.3d 161, 168, 194 Cal.Rptr. 56.) Similarly, courts refuse to impose civil penalties against a party who acted with a good [1997] faith and reasonable belief in the legality of his or her actions. (*Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d 240, 263, 220 Cal.Rptr. 2; *No Oil, Inc. v. Occidental Petroleum Corp.* (1975) 50 Cal.App.3d 8, 30, 123 Cal.Rptr. 589.) In this case substantial justice would not be achieved by a resolution that left Lusardi liable for statutory penal-

ties under section 1775 for failing to pay the prevailing wage when it acted in good faith and on the express representations of a governmental entity. Based on these equitable principles, Lusardi should also not be liable for penalties under either section 1777.7 (relating to failure to comply with the apprenticeship provisions of the prevailing wage law) or section 1813 (involving noncompliance with overtime provisions of the prevailing wage law) based on violations allegedly occurring before Lusardi ceased work on the project in this case.

We also note in connection with the equitable issues raised in this case that although the contract between Imperial and the District specified that the prevailing wage was to be paid, the stipulation of the parties makes clear that the District expressly represented to Lusardi that the construction project was not a public work and therefore the prevailing wage law did not apply, and that Lusardi relied in good faith on these representations. These facts strongly suggest that Lusardi has remedies against the District, Imperial, and perhaps others for indemnification of any sums it may be required to pay as a result of application of the prevailing wage law. (See generally, *Rozay's Transfer v. Local Freight Drivers L.* (9th Cir.1988) 850 F.2d 1321; *Southwest Administrators, Inc. v. Rozay's Transfer* (9th Cir.1986) 791 F.2d 769.) Moreover, if the District made material misrepresentations to Lusardi, as the stipulated facts suggest, Lusardi may be entitled to recover for all other consequential damages it suffered as a result of such wrongful conduct, in addition to indemnification for amounts due under the prevailing wage law. (Civ.Code, § 3333.)

8. *Section 1776 Penalties*

[17] Lusardi separately challenges numerous specific provisions of the prevailing wage law relating to penalties. The Court of Appeal did not reach Lusardi's specific challenges.

As described above, in May 1986 the DLSE directed Lusardi to submit certified payroll records and warned that failure to do so would subject Lusardi to statutory penalties. Lusardi did not comply with the request. In November 1986, the DLSE sent a "penalty assessment letter" to the District, with a copy to Lusardi. The letter purported to assess a statutory penalty of $25 per day per employee, under section 1776, subdivision (f), calculated on the basis that there were a minimum of 200 employees, and made retroactive to August 30, 1986. The DLSE directed the District to withhold $380,000 from future progress payments due Lusardi, and to increase the amount withheld by $5,000 per day for each day of noncompliance beyond November 13, 1986.

Lusardi contends that the penalties imposed against it violate procedural due process guarantees because they constitute a deprivation of its property without a hearing. Lusardi also argues that section 1776, subdivision (f), violates the prohibition of unreasonable searches and seizures under the Fourth Amendment to the United States Constitution. We do not reach the merits of these arguments because, as we shall explain, the DLSE's letter purporting to impose the penalty was ineffective.

Under subdivision (f) of section 1776, a contractor has 10 days in which to comply with a request to submit certified payroll records. If the contractor fails to do so, the statute provides: "[T]he contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon request of the [DAS] or the [DLSE], these penalties shall be withheld from progress payments then due."

In this case, there was no contract between Lusardi and the District. The only contract to which Lusardi was a party was the construction contract between it and Imperial. The District itself had no funds to withhold from Lusardi; thus, the DLSE's letter directing the District to withhold funds had no legal force.

Because the DLSE has taken no effective steps to impose a penalty on Lusardi under section 1776, subdivision (f), Lusardi is in

the same position as if the DLSE had never asserted the applicability of that subdivision. In this context, a ruling on the constitutionality of section 1776, subdivision (f), would be purely advisory. We have no assurance that Lusardi would refuse to comply with a renewed request for records. Nor is there any reason to believe that the DLSE would necessarily seek penalties before affording Lusardi an opportunity to contest the matter in court. We decline to reach the questions regarding the constitutionality of section 1776 in this hypothetical context. (See *Hodel v. Virginia Surface Min. & Reclam. Assn., supra,* 452 U.S. 264, 304, 101 S.Ct. 2352, 2374, 69 L.Ed.2d 1; *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 173–174, 188 Cal.Rptr. 104, 655 P.2d 306.)

[9] *Additional Issues*

Lusardi argues that sections 1727 through 1733 are unconstitutional because they authorize the seizure of property without a hearing, and that sections 1775, 1777.7 and 1813 are unconstitutional because they provide for excessive penalties that are imposed without a hearing. As we have explained earlier, Lusardi is not liable for penalties under the latter three sections based on any violation allegedly occurring before it ceased work on the Expansion Project. Accordingly, we do not address Lusardi's contentions regarding these sections.

Sections 1727 through 1733 generally govern the circumstances under which awarding bodies may withhold sums from contractors, and provide for recovery of withheld sums. As noted above, here there was no contract between the contractor and the awarding body, and no sums were or could have been withheld from Lusardi by the District. The Director has not sought to apply any of these statutes against Lusardi. Under the circumstances, sections 1727 through 1733 are inapplicable. We decline to address the merits of legal questions not posed by the facts of this case.

DISPOSITION

The judgment of the Court of Appeal is reversed.

LUCAS, C.J., and MOSK and GEORGE, JJ., concur.

PANELLI, Justice, concurring and dissenting.

I dissent from the majority's holding that the obligation of a contractor on a public works project to pay the prevailing wages arises from a statutory duty independent of any contractual agreement or notice to the contractor. (Maj. opn., *ante,* at pp. 842–844 of 4 Cal.Rptr.2d, at pp. 648–650 of 824 P.2d.) The majority bases its conclusion on the language of one of the public works law's provisions that the prevailing wage "'shall be paid to all workers employed on public works.'" (*Id.* at p. 843 of 4 Cal.Rptr.2d, at p. 649 of 824 P.2d, quoting Lab.Code, § 1771.[1]) The majority also asserts that requiring contractors to comply with the public works laws only when their contracts require it would defeat the legislative objective of ensuring that workers on public works be paid the prevailing wages. (Maj. opn., *ante,* at p. 843 of 4 Cal.Rptr.2d, at p. 649 of 824 P.2d.) I disagree with the majority's interpretation of the prevailing wage laws. In my view, the statutory scheme as a whole does not disclose a legislative intent to hold contractors liable for paying the prevailing wages when the contract does not require those wages to be paid; rather, it reflects a view that the Legislature intended contractors to be aware of their obligations under the prevailing wage laws before entering into a contract for public works. As a consequence, the result that the majority in this case reaches is patently unfair and, in my view, unconstitutional as a violation of due process; there is no evidence that the Legislature intended such a result.

In interpreting the prevailing wage laws, we must look at the statutory scheme as a whole in order to harmonize the various elements. (*Mattice Investments, Inc. v. Division of Labor Standards Enforce-*

1. All further statutory references are to the Labor Code unless otherwise noted.

ment (1987) 190 Cal.App.3d 918, 923, 235 Cal.Rptr. 502; *Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 489, 134 Cal. Rptr. 630, 556 P.2d 1081.) While it is true, as the majority states, that section 1771 provides that the prevailing wage "shall be paid to all workers employed on public works," it is also evident that the statutory scheme establishes detailed procedures designed to ensure that contractors are aware of their responsibilities under the public works laws before entering into a public works contract. (See §§ 1773.2, 1775, 1776, subd. (g), 1777.5.) In particular, the public body awarding the contract is required either to specify the prevailing wage in the call for bids, the bid specifications, and the contract itself, or to include a statement in those documents that copies of the prevailing rate of wages are on file and available for inspection. (§ 1773.2.) In addition, the awarding public body is required to have the contract include a stipulation that the contractor will comply with the forfeiture and penalty provisions if any workers employed by the contractor or any subcontractor are underpaid. (§ 1775.)

These provisions for precontract notice indicate that the Legislature intended contractors to be fully aware of their responsibility to pay the prevailing wages and of the consequences of failure to pay those wages before entering into a contract for the construction of public works. The Legislature also intended contractors to agree to those obligations in the contract. The statutory scheme can most reasonably be read to allow the prevailing wage laws to be enforced against the contractor only when the contract specifies that the project is a public work. The *stipulated* facts in this case indicate that Lusardi Construction Company's (Lusardi's) contract did not state that the prevailing wage laws were applicable; in fact, Lusardi's representative made clear that the company would not enter the contract if it was for a public works project. I do not believe that the Legislature intended contractors to be held liable for the prevailing wages under these factual circumstances.

This interpretation is consistent with that of the Courts of Appeal that have considered the question of when a contractor can be required to pay prevailing wages on a public works project. As will be discussed, those courts have held without exception, that the contractor could be held liable because, *in each case, the contractor had agreed in the contract to be subject to the prevailing wage laws.*

In *Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 270 Cal.Rptr. 75, the Court of Appeal held that a contractor could be required to pay the prevailing wage to workers who fell into a job classification for which the public entity awarding the contract had not specified the prevailing wage. The court reasoned that this deficiency did not relieve the contractor of its obligation to pay all its workers prevailing wages, because *the contractor had expressly agreed in the contract to pay prevailing wages.* (221 Cal.App.3d at pp. 125–126 & fn. 21, 270 Cal.Rptr. 75.)

Two cases in which payments were withheld from contractors after the contractors failed to ensure that prevailing wages were paid also conclude that the duty to pay prevailing wages arises from the contract. In *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 127 Cal.Rptr. 799 the court held that contractor could be required to pay penalties and the difference between actual wages and the prevailing wage rate when a subcontractor failed to pay the prevailing wages. The court reasoned that the public works provisions of the Labor Code did not place an involuntary burden on the contractor, since "'[the contractors'] execution of the contract with knowledge of the penalties to be imposed if they or their subcontractors failed to pay the prevailing wages required under the contract was voluntary, and constituted consent to the [prevailing wage provisions.]' [Citation.]" (55 Cal. App.3d at p. 455, 127 Cal.Rptr. 799.) Therefore the court held that "[w]hen the contractor submits his bid *based on the prevailing wage determination* and freely enters into a contract for the public work involved, *in which contract he stipulates*

to be subject to the penalty provisions of the prevailing wage law, he cannot be heard to say that he was denied due process of law with respect to the enforcement of the penalty provisions." (*Ibid.*, emphasis added.)

The court in *Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal.App.3d 635, 237 Cal.Rptr. 546 (*Waters*), applied a similar analysis. There, the contracting public entity withheld payments from a contractor to cover penalties and extra wages when a subcontractor failed to pay the prevailing rate. The city contracting for the project had not specified what the prevailing rates were, nor that those rates were on file in the city's office. However, the contract between the city and Waters, the contractor, did provide that the prevailing wage rates were to be paid to the workers. The court held that Waters could be required to pay the difference between the prevailing rates and the wages actually paid, *because "[t]he contract documents ... did alert Waters, as he so testified, that the wages must not be less* [1002] *than the prevailing general rate."* (192 Cal.App.3d at p. 640, 237 Cal.Rptr. 546, emphasis added.)[2] The court stated, "[w]hen a contractor freely enters into an agreement for a public work in which he stipulates to pay the prevailing wage rate ..., he will be required to comply with the terms of his contract." (*Id.* at p. 639, 237 Cal.Rptr. 546.)

Thus, the courts that have considered the applicability of the requirement to pay prevailing wages in circumstances in which the public entity did not fully comply with its obligations agree that *"the duty to pay the prevailing wage [is] triggered once the contractor so agree[s] in the contract."* (*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.*, *supra*, 221 Cal.App.3d at p. 126, fn. 21, 270 Cal.Rptr. 75, emphasis added.) Under this analysis, a contractor is not liable for paying prevailing wages or for any penalties for underpayment unless he was on notice of the requirements at the time that he entered into the contract for the public work and agreed to pay the prevailing wages in the contract. I believe that this conclusion is correct.

Under the majority's interpretation, a contractor may be held liable for extra wages although he had no notice that the prevailing wage requirements would be applicable and, like Lusardi, he would not have entered into the contract if he had had that notice. In that case, if a contractor enters into a contract in a good faith belief that it is for a private work, *as the stipulated facts state that Lusardi did*, and the project is later determined to be a public work, the contractor would effectively have been forced against his will into accepting a public works contract. To say that the contractor will only be liable for the extra wages and not for any penalties does not mitigate the fundamental unfairness of this outcome. I see no reason to conclude that the Legislature intended such an unfair result. (See *County of Madera v. Gendron* (1963) 59 Cal.2d 798, 803, 31 Cal.Rptr. 302, 382 P.2d 342 [court reluctant to construe statute in a way that would cause "harsh and unjust result" in the absence of "clear indication" of legislative intent]; see also *Johnson v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 235, 242, 207 Cal.Rptr. 857, 689 P.2d 1127.)

The majority attempts to soften the harshness of its holding by saying that Lusardi may be entitled to indemnity from the Tri-City Hospital District (the District). In my view, the fundamental unfairness remains. The majority's conclusion would place on Lusardi the primary responsibility for paying the excess wages, as well as the additional burden of showing that it was entitled to indemnity. This is a considerable burden to place on a contractor that, as the stipulated facts state, relied in good faith on the District's assurances that the expansion project was a private work.

[1003] I am also troubled by the due process implications of the majority's conclusion

2. It also held that, under the doctrine of equitable estoppel, Waters could not be required to pay the statutory penalties because he had made a reasonable attempt to find out what the prevailing wages were. (*Waters, supra*, 192 Cal.App.3d at pp. 640–641, 237 Cal.Rptr. 546.)

imposing liability on Lusardi. In this case, the Director, after the contract was entered into, made a determination that the project was a public work and directed the District to withhold payments due Lusardi. The majority concludes that this action did not result in a deprivation of property without due process of law, since there was no money due from the District to Lusardi, but rather, all money due Lusardi was owed by Imperial. Accordingly, under the majority's view, the Director would have had to institute a court action, giving Lusardi notice and an opportunity to be heard before any deprivation of its property occurred. (Maj. opn., *ante*, at pp. 845–847 of 4 Cal.Rptr.2d, at pp. 651–653 of 824 P.2d; see § 1775.)

This reasoning, in my view, is unsound. The contract between the District and Imperial stated that "[Imperial] hereby appoints and constitutes [the District] as its agent and attorney-in-fact for all purposes respecting construction of the [Expansion Project], including, without limitation, the engagement of contractors . . . and the management and supervision of the construction of the [Expansion Project] . . . [The District], as agent, shall . . . supervise and provide for, or cause to be supervised and provided for, as agent for [Imperial], the complete acquisition and construction of the [Expansion Project]." Thus, the District had complete responsibility for managing the construction of the project. Moreover, the majority concludes that as the agent of Imperial, the District is the "awarding body."

If the District is the "awarding body," it elevates form over substance to say that there was no money owing from the District to the contractor. If the District did owe money to Lusardi, then the Director would not have ordered an "impossible act" when he ordered the District to withhold funds from Lusardi. (See maj. opn., *ante*, at p. 846 of 4 Cal.Rptr.2d, at p. 652 of 824 P.2d.) This withholding of funds would clearly violate Lusardi's due process rights, since the contractor would have been deprived of its property without notice or an opportunity to be heard. (See *O.G. Sansone Co. v. Department of Transportation*, *supra*, 55 Cal.App.3d at p. 455, 127 Cal.Rptr. 799.)

The majority has expressed concern that if contractors cannot be bound by the public works laws in the absence of agreement in the contract, the policy of ensuring that workers are paid the prevailing wage will be defeated. However, I do not see any state policy that can only be served by holding contractors liable in these circumstances. The Legislature has seen fit to place on the contracting *public entities* the obligation to require public works contractors to pay the prevailing wages. "By the express terms of the statutes, the Legislature has imposed upon the awarding body . . . the responsibility for providing advance notice to the contractor that wages must 1004 be paid in accordance with the general prevailing rate . . . [Citation.]" (*Waters*, *supra*, 192 Cal.App.3d at p. 640, 237 Cal.Rptr. 546.) The statutory objective of guaranteeing that workers on public works are paid prevailing wages can be served by requiring public entities to carry out their obligations under the public works law.

Enforcing the public works laws against awarding bodies only and not against the contractors in these circumstances would be both reasonable and fair. The public works law imposes a duty *on the public agency* to put bidders on notice of the potential liability that a successful bidder will incur. Nowhere does the public works law suggest that bidders not notified of the implications of a successful bid will nonetheless be subject to an obligation imposed upon them after the fact, resulting from the failure of a public agency to follow the dictates of the law. Nor would it be unreasonable to place upon the public agency itself the financial burden of its failure to comply with the public works law. By not adhering to its obligation under the law, the public agency is, presumptively, the beneficiary of a less costly project; had the public agency advised bidders of their obligations under the public works law to pay prevailing wages the project would have been more costly to the public agency. Hence it would not be unfair to require the

public agency to bear any obligation to pay the extra wages.

The majority has also raised the possibility that, if contractors are not held liable in these circumstances, public entities and contractors might collude to evade the prevailing wage laws. However, the statutory scheme provides criminal sanctions that will serve to discourage collusion. Section 1777 makes it a misdemeanor for any officer, agent, or representative of the state or any political subdivision to wilfully violate any provision of the prevailing wage law statutory scheme. I presume that collusion with a contractor to evade the laws would fall under this section.

Therefore, I dissent from the majority's conclusion that contractors' obligation to pay the prevailing wages arises purely from the statutory scheme. In my view, Lusardi cannot be required to pay the difference between the prevailing wages and the wages actually paid because it did not have notice that the prevailing wage laws applied before entering into the contract to construct the expansion project and did not agree in the contract to pay those wages. Like the majority, I also conclude that Lusardi cannot be required to pay the statutory penalties.

BAXTER, J., concurs.

ARABIAN, Justice, concurring and dissenting.

Although I agree that the obligation to pay prevailing wage derives from statute as well as contract [1005] and that the Director of the Department of Industrial Relations (the Director) retains the inherent and necessary authority ultimately to determine a project's public work status, I cannot support the majority's refusal to accord Lusardi Construction Company (Lusardi) a modicum of fairness under this scenario. In my view, the circumstances "clearly establish that a grave injustice would be done if an equitable estoppel were not applied." (*Cal. Cigarette Concessions v. City of L.A.* (1960) 53 Cal.2d 865, 869, 3 Cal.Rptr. 675, 350 P.2d 715.) I would, therefore, affirm the judgment of the Court of Appeal.

The stipulated facts establish that the contract between Lusardi and Imperial Municipal Services Group, Inc. (Imperial) did not contain any reference to the status of the expansion project as a public work or to any obligation to pay prevailing wages; that Lusardi inquired as to the nature of the project, expressly declining to enter into a public works contract; that in response the Tri-City Hospital District (the District) gave assurances, based on representations of its legal counsel, that the construction was private and no prevailing wage or payroll record obligations obtained; that Lusardi premised its agreement with Imperial upon those assurances and representations; and that in so doing Lusardi acted in good faith. Lusardi did all a business could do.

A simple recitation of these facts should thus suffice to confirm the right to invoke equitable estoppel: Lusardi acted to its detriment in justifiable reliance upon the inaccurate representations of a governmental agency charged with implementation and enforcement of the law. Nevertheless, the majority demur based upon an asserted lack of privity between the Director and the District and the potential nullification of "a strong rule of policy adopted for the benefit of the public." (Maj. opn., *ante*, p. 848 of 4 Cal.Rptr.2d, p. 654 of 824 P.2d.)

To reach its conclusion, the majority analysis hews to the "elements" of equitable estoppel. (See *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489, 91 Cal.Rptr. 23, 476 P.2d 423.) Dispensing equitable relief, however, depends upon a measure of flexibility as well as fairness and must accommodate compelling circumstances that may not precisely conform to "the rigid rules of law." (*Bechtel v. Wier* (1907) 152 Cal. 443, 446, 93 P. 75.) "Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention." (*Times-Mirror Co. v. Superior Court* (1935) 3 Cal.2d 309, 331, 44 P.2d 547; *Bisno v. Sax* (1959) 175 Cal.App.2d 714, 729, 346 P.2d 814 [" 'no inflexible rule has been permitted to circumscribe the power of equity to do justice' "]; cf. *Farina v. Bevilacqua* (1961) 192 Cal.

App.2d 681, 685, 13 Cal.Rptr. 791 [inability to restore precise status quo not invariable bar to rescission]; *Nadell & Co. v. Grasso* (1959) 175 Cal.App.2d 420, 431, 346 P.2d 505 ["peculiar, and perhaps unique, facts" justified enforcement of restrictive covenant as to services; equitable servitudes not limited to chattels].)

Moreover, I am unpersuaded under the facts that equity should not charge the Director with the consequences of the District's conduct. As head of the Department of Industrial Relations, the Director assumes primary responsibility for determining, monitoring, and enforcing prevailing wage laws on public works. (See generally Lab.Code, § 1770 et seq.) The awarding body has interrelated notification and implementation obligations pursuant to which it works in conjunction with the Director to ensure compliance. (See, e.g., Lab.Code, §§ 1773.2, 1773.3, 1773.4, 1775, 1776; cf. *City and County of San Francisco v. Grant Co.* (1986) 181 Cal.App.3d 1085, 1092, 227 Cal.Rptr. 154 [city not acting as arm or agent of state in failing to enforce building code regulations since city had initial and independent enforcement responsibility within its territory].) The statutory scheme thus contemplates a confluence of governmental interests and duties sufficient in my estimation to establish privity. (See *Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 397–399, 29 Cal.Rptr. 657, 380 P.2d 97, and cases cited at fn. 10.) In finding to the contrary, the majority rely on the fact that the District in actuality assumed a position antagonistic to the Director. Lusardi, however, had no reason to anticipate such an eventuality, whereas the Director could well have taken measures to forestall the possibility. (See Lab.Code, § 1773.5 [Director may "establish rules and regulations for the purpose of carrying out this chapter, including, ... the responsibilities and duties of awarding bodies"].) Lusardi should not bear the burden of the Director's default in failing to maintain adequate administrative controls over awarding bodies that share responsibility for implementing and enforcing prevailing wage laws.[1]

Furthermore, the Director retains the inherent authority to characterize a given project as a public work thereby invoking the obligation to pay prevailing wages. (Maj. opn., *ante*, pp. 844–845 of 4 Cal.Rptr. 2d, pp. 650–651 of 824 P.2d.) Accordingly, at any and all times the Director could have intervened, notified Lusardi that the project constituted a public work, and mandated wage and reporting compliance. Cynically, I note such intervention did not occur until Lusardi had substantially completed the project in reliance upon contractual provisions and express representations by a governmental agency to the contrary. "[N]egligence or silence in the face of a duty to speak may suffice [to invoke estoppel]. [Citation.]" (*City and County of San Francisco v. Grant Co., supra*, 181 Cal.App.3d at p. 1091, 227 Cal.Rptr. 154; see also *Dettamanti v. Lompoc Union School Dist.* (1956) 143 Cal.App.2d 715, 721, 300 P.2d 78; cf. *People v. Department of Housing & Community Dev.* (1975) 45 Cal.App.3d 185, 195–196, 119 Cal.Rptr. 266 [comparing estoppel and laches]; 11 Witkin, Summary of Cal.Law (9th ed. 1990) Equity, § 14, pp. 690–692 [defense of laches].) While the District's misfeasance may have instigated this predicament, the Director's nonfeasance perpetuated it to Lusardi's detriment.

As to the majority's policy argument, I cannot agree that the Legislature enacted the prevailing wage laws "for the benefit of the public." (See *County of San Diego*

1. Whether based on equity or otherwise, this court does not lack precedent for holding one governmental agency accountable for the actions of another. (See, e.g., *People v. Sims* (1982) 32 Cal.3d 468, 481–482, 186 Cal.Rptr. 77, 651 P.2d 321 [criminal charges of welfare fraud dismissed on collateral estoppel after evidence found insufficient in administrative hearing; "The People cannot now take advantage of the fact that the County avoided its litigation responsibilities and chose not to present evidence at the prior proceeding."]; *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827–829, 48 Cal.Rptr. 366, 409 P.2d 206 [under Pen.Code, § 654, misdemeanor conviction will generally bar felony prosecution based on same act or course of conduct even when crimes are prosecuted by different public law offices]; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 351–352, 272 Cal.Rptr. 767, 795 P.2d 1223 [for reasons of public policy collateral estoppel does not preclude criminal prosecution after People fail to establish violation of probation based on same underlying conduct].)

v. Cal. Water etc. Co. (1947) 30 Cal.2d 817, 826–828, 186 P.2d 124.) Whatever incidental salutary effect the general public may derive, in the words of the majority, "[t]he overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." (Maj. opn., *ante*, p. 842 of 4 Cal.Rptr.2d, p. 648 of 824 P.2d; see Lab.Code, § 90.5, subd. (a); *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 458, 127 Cal.Rptr. 799; cf. 11 Witkin, Summary of Cal.Law, *supra*, Equity, § 183, at pp. 864–866, and cases cited therein ["no estoppel where it would defeat operation of a policy protecting the public"].) As between the two, the District, not Lusardi, had the primary statutory obligation to safeguard the interests of employees with respect to minimum labor standards. (See Lab.Code, § 1720 et seq.) Indemnification notwithstanding, I see no public policy fostered by requiring a nondefaulting party to assume that responsibility.[2] (*Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal.App.3d 635, 641–642, 237 Cal.Rptr. 546.)

As the Court of Appeal below summarized, "We have here a fact situation which shouts estoppel." If no equitable mechanism exists by which Lusardi can extricate itself from the very litigation it attempted in good faith to avoid, then rectitude and fair dealing have ceased to function within our judicial framework. Regrettably, the chancellor's conscience has fallen victim to the very rigidity of the rule of law it should seek to ameliorate. (See 1008*Bechtel v. Wier, supra*, 152 Cal. 443, 446, 93 P. 75; *City of Los Angeles v. Cohn* (1894) 101 Cal. 373, 376–378, 35 P. 1002.)

BAXTER, Justice, concurring and dissenting.

I agree with the majority that Lusardi Construction Company (Lusardi) cannot be held liable for statutory penalties. I respectfully dissent, however, from the remainder of the judgment and the majority's reasoning. I have concurred in Justice Panelli's explanation of why Lusardi should not be required to pay the difference between the prevailing wages and the wages that Lusardi contracted to pay. (Conc. and dis. opn. of Panelli, J., at pp. 851–855 of 4 Cal.Rptr.2d, at pp. 657–661 of 824 P.2d, *ante*.) I write separately only to state that I also agree with Justice Arabian's conclusion that the majority opinion results in a miscarriage of justice. (Conc. and dis. opn. of Arabian, J., at pp. 855–857 of 4 Cal.Rptr.2d, at pp. 661–663 of 824 P.2d, *ante*.) As he explains and as the Court of Appeal observed, this case cries out for application of equitable estoppel.

In an apparent attempt to render its harsh result more palatable, the majority suggests that Lusardi "has remedies against the District, Imperial, and perhaps others for indemnification. . . ." (Maj. opn., at p. 850 of 4 Cal.Rptr.2d, at p. 656 of 824 P.2d, *ante*.) This result not only delays justice to Lusardi, it unnecessarily consumes court resources.

824 P.2d 663

1 Cal.4th 1105

Robert CONNOLLY, et al., Plaintiffs and Respondents,

v.

COUNTY OF ORANGE, et al., Defendants and Appellants.

No. S016686.

Supreme Court of California, In Bank.

Feb. 27, 1992.

As Modified March 26, 1992.*

Board of regents of state university, university housing authority, and professor

2. In no respect do the facts imply a case of unjust enrichment or an unfair profit by Lusardi at the expense of employees who may otherwise have been entitled to a higher wage. Lusardi and the District premised their negotiations and the final terms of the contract on the absence of any prevailing wage obligations.

* Editor's Note: The final star pagination of the modified State Report opinion was not available for the bound volume.

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, Plaintiff and Respondent,

v.

G & G FIRE SPRINKLERS, INC., Defendant and Appellant.

No. C035386.

Court of Appeal, Third District.

Oct. 1, 2002.

Certified for Partial Publication.

Union brought action against fire suppression sprinkler subcontractor for the construction of new wing of county hospital, alleging subcontractor's failure to pay prevailing wage rate and benefits. The Superior Court, San Joaquin County, No. 294737, William J. Murray, Jr., J., awarded the union $230,630.60 for deficiency wages, unpaid benefits, waiting time penalty wages, interest, attorney fees, and costs. Subcontractor appealed. The Court of Appeal, Blease, Acting P.J., held that: (1) a worker on a public works project has a private statutory cause of action against a contractor to recover unpaid prevailing wages and waiting time wages, and (2) an award of waiting time penalty wages was warranted.

Affirmed.

1. Appeal and Error ⇐173(9)

Fire suppression sprinkler subcontractor for the construction of new wing of county hospital waived appellate review of its claim that union's action against subcontractor, alleging subcontractor's failure to pay prevailing wage rate, was barred by the res judicata effect of the final judgment in the Department of Labor Standards Enforcement's (DLSE) action against general contractor, where subcontractor failed to raise the res judicata defense in the trial court.

2. Judgment ⇐540

The doctrine of "res judicata" or "claim preclusion" gives preclusive effect to former judgments on the merits and bars relitigation of the same cause of action in a subsequent suit between the same parties or parties in privity with them.

See publication Words and Phrases for other judicial constructions and definitions.

3. Judgment ⇐540

The res judicata doctrine promotes judicial economy by limiting multiple litigation.

4. Judgment ⇐948(1), 951(5)

The defense of res judicata must be pleaded and proven.

5. Judgment ⇐678(2)

"Privity," for purposes of res judicata, involves a person so identified in interest with another that he represents the same legal right.

See publication Words and Phrases for other judicial constructions and definitions.

6. Appeal and Error ⇐842(8)

Because an assignment is a written instrument, in the absence of parol evidence, the appellate court reviews the assignment independently, looking to the language of the assignment.

7. Public Contracts ⇐46

A payment bond is the practical substitute for a mechanic's lien in the public works context, when a stop notice is inadequate because insufficient funds remain to be paid by the awarding body.

8. Public Contracts ⇐25

Workers have no mechanic's lien rights regarding the performance of public work. West's Ann.Cal.Civ.Code § 3109.

9. Labor Relations ⇐1491

When seeking recovery for deficiency wages for breach of a public works contract, the plaintiff must plead a common law cause of action for breach of contract and must allege the public works contract, by its terms, requires the payment of prevailing wages.

10. Labor Relations ⇐1471

Assignment from workers to union, of "any and all statutory and private bond rights" with respect to recovery of prevailing wage rate and benefits from subcontractor for public works project, did not assign the workers' personal or contractual rights.

11. Labor Relations ⇐1492.1

In a suit to recover deficiency wages by a union as an assignee of an aggrieved worker who is a third party beneficiary of the public works contract, the union has the burden of proof and must establish the factual elements of its standing as a third party beneficiary.

12. Labor Relations ⇐1494

Department of Labor Standards Enforcement (DLSE) need not obtain an assignment from an aggrieved worker before bringing suit against the contractor on behalf of the worker for recovery of deficiency wages. West's Ann.Cal.Labor Code § 96.7.

13. Labor Relations ⇐1101.1

Central purpose of the prevailing wage law is to protect and benefit employees on public works projects. West's Ann.Cal.Labor Code § 1720 et seq.

14. Labor Relations ⇐1268

Provision of Prevailing Wage Law, authorizing Department of Labor Standards Enforcement (DLSE) to maintain civil action to recover deficiency wages and penalties from a contractor on a public works project who fails to pay the prevailing rate to his workers, does not specify exclusive remedies; DLSE also may file suit on behalf of workers against awarding body on third party beneficiary theory, and against surety on payment bond. West's Ann.Cal.Labor Code § 1775.

15. Labor Relations ⇐1471

A worker on a public works project may maintain a private suit against the contractor to recover deficiency wages as a third party beneficiary of the public contract if the contract provides for the payment of prevailing wages.

16. Labor Relations ⇐1471

A worker on a public works project has a private statutory cause of action against a contractor to recover unpaid prevailing wages. West's Ann.Cal.Labor Code §§ 1194, 1774.

17. Labor Relations ⇐1268

California's prevailing wage law is a minimum wage law which guarantees a minimum cash wage for employees hired to work on public works contracts. West's Ann.Cal.Labor Code § 1720 et seq.

18. Labor Relations ⇐1101.1, 1268

Prevailing wage law serves the important public policy goals of protecting employees on public works projects, competing union contractors, and the public. West's Ann.Cal.Labor Code § 1720 et seq.

19. Labor Relations ⇐1471

Workers on public works projects have a private statutory right to sue their employer for waiting time wages. West's Ann.Cal.Labor Code § 203.

20. Master and Servant ⇐79

"Wages," within meaning of statute requiring prompt payment of wages when a worker who does not have a written contract for a definite period quits his employment, includes health benefits and

other fringe benefits. West's Ann.Cal.Labor Code §§ 200, 202.

See publication Words and Phrases for other judicial constructions and definitions.

21. Master and Servant ⇐79

"Willful," within meaning of statute authorizing waiting time penalties if an employer willfully fails to promptly pay wages when a worker who does not have a written contract for a definite period quits his employment, means the employer intentionally failed or refused to perform an act which was required to be done; it does not mean that the employer's refusal to pay wages must necessarily be based on a deliberate evil purpose to defraud workers of wages which the employer knows to be due. West's Ann.Cal.Labor Code §§ 202, 203.

See publication Words and Phrases for other judicial constructions and definitions.

22. Master and Servant ⇐79

Fire suppression sprinkler subcontractor for construction of new wing of county hospital was liable to fire sprinkler fitters for waiting time penalties, relating to subcontractor's failure to promptly pay prevailing wage upon fitters' termination of employment, though subcontractor had paid fitters more than prevailing wage for pipe tradesmen; fitters had been entitled to prevailing wage for sprinkler fitter classification, rather than the lower wage for a pipe tradesman. West's Ann.Cal.Labor Code §§ 202, 203.

23. Appeal and Error ⇐1010.1(6), 1011.1(5)

The power of an appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact.

24. Appeal and Error ⇐1012.1(2)

The appellate court will not reweigh the evidence.

25. Appeal and Error ⇐931(1)

A reviewing court begins with the presumption that the record contains evidence to sustain every finding of fact.

26. Labor Relations ⇐1268

Master and Servant ⇐79

Failure of fire suppression sprinkler subcontractor for construction of new wing of county hospital to promptly pay prevailing wage upon fire sprinkler fitters' termination of employment was "willful," within meaning of statute authorizing waiting time penalties if an employer willfully fails to promptly pay wages when a worker who does not have a written contract for a definite period quits his employment; subcontractor's erroneous classification of the fitters in the lower-wage category of pipe tradesmen was not a good faith legal mistake, because it was clear the fitters belonged in the higher-paying sprinkler fitter classification. West's Ann.Cal.Labor Code §§ 202, 203.

27. Master and Servant ⇐79

An employer's good faith mistaken belief regarding whether wages are owed may negate a finding of willfulness, for purposes of statute authorizing waiting time penalties if an employer willfully fails to promptly pay wages when a worker who does not have a written contract for a definite period quits his employment. West's Ann.Cal.Labor Code §§ 202, 203.

Horvitz & Levy, David M. Axelrad, Sandra J. Smith, Encino, Stephanie Rae Williams, Jon B. Eisenberg, Oakland; Robert G. Klein, for Defendant and Appellant.

Roger Frommer & Associates and Roger Frommer, Los Angeles, for Plaintiff and Respondent.

Robert N. Villalovos, Sacramento, and Michelle Yu, Los Angeles, for Division of

Labor Standards Enforcement as Amicus Curiae on behalf of Plaintiff and Respondent.

BLEASE, Acting P.J.

This case is the result of a dispute arising from the construction of a new wing of the San Joaquin General Hospital, in which the subcontractor, G & G Fire Sprinklers, Inc. (G & G), failed to pay its workers the prevailing wage rate for their labor classification.

Road Fitters Sprinklers Local Union No. 669 (the Union), acting on the assignment of the statutory rights of four workers, sued G & G to recover their unpaid, prevailing wages under Labor Code section 1774 [1] and for waiting time penalty wages under section 203.

G & G appeals from the judgment in favor of the Union, raising several contentions. It claims this matter is pre-empted by the National Labor Relations Act and that the National Labor Relations Board has exclusive jurisdiction over this case, the Union has no standing to sue because its standing is limited to recovery of the workers' statutory rights and the workers have no private statutory right to recover unpaid prevailing wages, G & G's reasonable good faith choice of job classification defeats the Union's claim, the trial court's erroneous rulings on the burden of proof and the admission of evidence require a new trial, and G & G is not liable for waiting time penalty wages.

In the published portion of the opinion we conclude the Union, as assignee of the workers' statutory rights, has standing to assert G & G's statutory duty to pay prevailing wages under section 1774, because a prevailing wage is a minimum wage, and therefore the workers may assert their express rights to recover their unpaid prevailing wages under the minimum wage provisions of section 1194.[2]

We find no error and affirm the judgment and award of damages.

FACTUAL AND PROCEDURAL BACKGROUND [3]

On September 28, 1993, the County of San Joaquin awarded Perini Building Company, Inc. (Perini) a public works construction contract to build a new wing of the San Joaquin County General Hospital. On November 23, 1993, Perini selected G & G as the subcontractor to install the fire suppression sprinkler system for the hospital. Pursuant to a written subcontract, G & G agreed to perform this work for $398,000.

A fire suppression sprinkler system may be installed only by workers classified as fire sprinkler fitters, a skilled classification of the plumbers craft responsible for installing and maintaining several types of fire suppression systems.

In its call for bids and in the public works contract, San Joaquin County published the prevailing wages for the work classifications necessary to execute the contract. Included in the publication was the basic prevailing hourly wage rate for fire sprinkler fitters. Including benefits, the rate was $33.73 per hour in 1994 when the work was performed.

G & G hired a number of workers to install the fire suppression system it had

1. All further section references are to the Labor Code unless otherwise specified.

2. Under California Rules of Court, rules 976(b) and 976.1, the Reporter of Decisions is directed to publish the opinion except for Parts I, and III through V of the Discussion.

3. The Statement of Facts are taken primarily from the trial court's Statement of Intended Decision.

agreed to provide under its subcontract with Perini. Four of these workers were Thomas Browning, Dennis Marlowe, Kenneth Ahoff, and Stephen Ledford. They are fire sprinkler fitters by trade with years of experience in the trade and belong to the Union. G & G hired Browning as the foreman and paid him the basic rate for the classification of fire sprinkler fitter, but failed to provide him with the required benefits. G & G paid Marlowe, Ahoff, and Ledford as pipe tradesmen, a classification that carries a lower per diem prevailing wage rate than a fire sprinkler fitter. G & G also failed to provide these men with benefits.

Browning, Marlowe, Ahoff and Ledford filed complaints with the Department of Labor Standards Enforcement (DLSE) protesting their rate of pay and lack of benefits, triggering an investigation by DLSE. After an initial review of the matter, a DLSE investigator advised G & G it was using the wrong classification to pay its men and advised it to cease that practice. G & G did not heed the advice. DLSE subsequently filed a Notice to Withhold Payment against G & G in the amount of $93,867.08 for wages and penalties. DLSE determined the total amount of underpaid wages and penalties owed by G & G was $219,929.25.

G & G called only one witness, Mr. Itai Ben–Artzi, to testify concerning its claim it paid Browning, Marlowe, Ahoff, and Ledford their required benefits and that it had reasonably and in good faith relied on information provided by government officials in making its determination that Marlowe, Ahoff, and Ledford should be classified as pipe tradesmen and paid the prevailing wage for that classification.

Browning, Marlowe, Ahoff, and Ledford signed a document assigning the Union their "statutory" rights to collect underpaid wages and benefits.

The DLSE filed a complaint against Perini and its sureties to recover the underpaid wages and benefits for 17 workers, and penalties. The Union, as assignee of Browning, Marlowe, Ahoff, and Ledford, filed a complaint against the County of San Joaquin, Perini, G & G, and the sureties for their underpaid wages and waiting time penalty wages. Pursuant to a stipulation and order, the Union agreed to abate its action against the County, Perini, and the sureties, and these defendants were dismissed from the action without prejudice. The two matters were consolidated and tried before the court.

The trial court found in favor of DLSE [4] and the Union. The court awarded the Union $230,630.60 against G & G for deficiency wages, unpaid benefits, waiting time penalty wages, interest, attorneys' fees, and costs.[5] The amount awarded for deficiency wages, $93,633.41, was included in the total awards to both the Union and DLSE and was made joint and several. The award to the Union for waiting time wages, interest, attorneys' fees, and costs was made several.

G & G filed a timely notice of appeal from the judgment in favor of the Union.

DISCUSSION [6]

4. DLSE was awarded a total of $343,839.26 against Perini and $215,820 against the sureties.

5. The total award of $230, 630.60 is calculated as the sum of the following items of damages: deficiency wages: $93,633.41; interest: $41,257.19; waiting time wages (§ 203) $32,380.00; interest: $40,860; and, attorney's fees: $22,500.

6. At oral argument, G & G raised the defense of res judicata for the first time, citing to footnote 12 in *Mycogen Corporation v. Monsanto Co.* (2002) 28 Cal.4th 888, 123 Cal. Rptr.2d 432, 51 P.3d 297, arguing that the final judgment in DLSE's case against Perini

I.*

II.

Standing

[1–5] G & G contends the Union lacks standing to assert the workers' claims for unpaid prevailing wages and benefits. G & G claims the Union was assigned only the right to recover for the workers' statutory rights and the workers have no private, statutory rights to sue a subcontractor for unpaid prevailing wages and benefits.

The Union argues the employees transferred to the Union "any and all statutory rights" which include the power to collect the unpaid prevailing wages under section 1774, as well as under a third-party beneficiary theory. We agree with the Union although we differ in our analysis of the statutory basis for standing. We agree with G & G that the rights conveyed by the assignments are limited, for purposes of our discussion, to the workers' statutory rights, but conclude the workers have private statutory rights to recover unpaid prevailing wages under sections 1194 and 1774 and waiting time wages under section 203.

A. The Assignment

The assignments state as follows:

"The undersigned does hereby authorize the filing of Mechanics Liens or Stop Notices, on my behalf with respect to the job site at San Joaquin General Hospital, French Camp, whereon my Employer G & G FIRE SPRINKLER CO., INC. ("G & G") was engaged, and whereon the undersigned worked, for which work I failed to receive payment of state prevailing wages; and further transfers and assigns for purposes of collection, all of my rights and causes of action under the Mechanics Lien Law to Road Sprinkler Fitters Local Union, 669 ("Union"), and does further transfer and assign all interest in and to, any and all parties named therein (owners, awarding bodies, etc.) to said Union. *This Assignment includes any and all statutory and private bond rights.*" (Emphasis added, fn. omitted.)

The trial court found that while the assignment is "less than artfully drafted," it included the workers' statutory rights under section 1774 and any third-party bene-

and its sureties, bars recovery by the Union against G & G under principles of res judicata.

This claim has no merit. The doctrine of res judicata, or "claim preclusion," gives preclusive effect to former judgments on the merits and bars relitigation of the same cause of action in a subsequent suit between the same parties or parties in privity with them. (*Mycogen, supra.*) The doctrine promotes judicial economy by limiting multiple litigation. (*Ibid.*; 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 280, p. 820.) In *Mycogen*, the Supreme Court held that a final judgment in an action for declaratory relief and specific performance is a bar to a separate subsequent action for damages on the same underlying claim.

The defense of res judicata must be pleaded and proven. Failure to properly raise it in the trial court waives it. (7 Witkin, *supra*, Judgment, §§ 281, 291, pp. 821, 836–837.) G & G waived this claim by failing to raise it in the trial court. Moreover, among the many hurdles that G & G would have to overcome to successfully assert this defense would be to establish privity of interest between the DLSE and the Union.

" '[P]rivity involves a person so identified in interest with another that he represents the same legal right.' " (*Zaragosa v. Craven* (1949) 33 Cal.2d 315, 318, 202 P.2d 73; 7 Witkin, *supra*, Judgment, § 392, p. 961.) G & G must also establish identity of claim. (*Mycogen, supra.*) As we discuss ante, the legal claims and factual issues raised and litigated in the suit by DLSE against Perini and its sureties were significantly different from those claims and issues raised by the Union as the workers' assignee against G & G. (See fn. 13.)

* See footnote 2, *ante*.

ficiary theory based on the prevailing wage contract.

[6–8] Because the assignment is a written instrument, in the absence of parol evidence we review the assignment independently, looking to the language of the assignment. (*Parsons v. Bristol Dev. Co.* (1965) 62 Cal.2d 861, 865–866, 44 Cal.Rptr. 767, 402 P.2d 839; *Gifford v. City of Los Angeles* (2001) 88 Cal.App.4th 801, 806, 106 Cal.Rptr.2d 164.) By its own terms, the assignment is limited to the filing of Mechanics' Liens and Stop Notices, and for purposes of collection, "all . . . causes of action under the Mechanics Lien Law", and "any and all *statutory* and private bond rights." (Emphasis added.) Because these rights are expressed in the conjunctive, we understand the causes of action under the "Mechanics Lien Law" to be separate from and not a limitation on "all statutory and private bond rights." For reasons we footnote, the workers have no mechanics lien rights regarding the performance of public work.[11]

[9] For these reasons no doubt, the Union bases its standing to sue G & G on the assignment of "statutory" rights under section 1774 and on a third party beneficiary theory.[12] As discussed more fully in part B, the right to recover prevailing wages under the statutory scheme is separate from the right to recover under the public works contract. At the risk of stating the obvious, the right to recover under the statute arises from the statutory scheme, (§§ 1771, 1774, 1775; see *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 986–988, 4 Cal.Rptr.2d 837, 824 P.2d 643), while the right to recover on a contract theory arises from the common law right to sue for breach of the express terms of the contract as a third party beneficiary of the public works contract. (*Aubry v. Tri–City Hospital Dist.* (1992) 2 Cal.4th 962, 971, 9 Cal.Rptr.2d 92, 831 P.2d 317 (*Aubry*); *Tippett v. Terich* (1995) 37 Cal.App.4th 1517, 1532–1534, 44 Cal.Rptr.2d 862, overruled on other grounds in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 171, 96 Cal.Rptr.2d 518, 999 P.2d 706; *Department of Industrial Relations v. Fidelity Roof Co., supra*, 60 Cal.App.4th at pp. 425–426, 70 Cal.Rptr.2d 465 [a worker has a private common law right of action to recover unpaid wages against a contractor as a third party beneficiary of the public works contract].)[13]

[10] The limited language of the assignments purports to transfer only the

11. A mechanic's lien is a procedural device for obtaining payment of a debt owned by a property owner for the performance of labor or the furnishing of materials used in construction. (Civ.Code, §§ 3109–3154.) However, mechanic's liens are not applicable to the performance of a public work. (Civ.Code, § 3109; *Department of Industrial Relations v. Fidelity Roof Co.* (1997) 60 Cal.App.4th 411, 418, 70 Cal.Rptr.2d 465.) A payment bond is the practical substitute for a mechanic's lien in the public works context when a stop notice is inadequate because insufficient funds remain to be paid by the awarding body. (*Id.* at p. 423, 70 Cal.Rptr.2d 465.) A payment bond is required by statute and affords an additional or cumulative remedy. (*Ibid.*) The assignment therefore assigns to the Union, the right to sue the surety on the payment bond. Because the language regarding the Mechanics Lien Law is without legal effect, it adds nothing to the Union's argument.

12. At oral argument, G & G agreed that "private" modifies "bond rights," to the effect that the assignment is of statutory rights and private bond rights.

13. When seeking recovery for deficiency wages for breach of a public works contract, the plaintiff must plead a common law cause of action for breach of contract and must allege the public works contract, by its terms, requires the payment of prevailing wages. (*Aubry, supra*, 2 Cal.4th at p. 971, 9 Cal.Rptr.2d 92, 831 P.2d 317.) It has not done so.

right to recover unpaid wages under a statute, not under the contract. No personal or contractual rights are included within the assignment.

[11, 12] The Union argues that because the cases were consolidated by defendants and the issues and facts are identical for the consolidated plaintiffs, "it makes little difference under whose assignment the claimants are cloaked, for the Labor Commissioner may take wage claims without assignment." Aside from the inaccuracy of this claim,[14] we fail to see its relevancy in determining the scope of the assignment, which turns on its terms.

For these reasons, we conclude the assignment is limited to the workers' statutory rights to sue G & G for recovery of unpaid prevailing wages.

B. The Private Statutory Right to Recover Unpaid Prevailing Wages Against the Subcontractor

G & G contends that sections 1774 and 1775 do not create a private right of action to recover unpaid prevailing wages from a subcontractor. It argues the statutory scheme gives DLSE the exclusive statutory right to sue a contractor for unpaid prevailing wages and penalties, that section 1775 details the procedures for suits to recover such wages and penalties, and the statutory scheme makes no mention of suits by individuals.

As discussed above in sub-part A, Browning, Marlowe, Ahoff, and Ledford assigned the Union their statutory rights to recover unpaid wages. The assignee "stands in the shoes" of the assignor and his rights are no greater than those of the assignor. (Civ.Code, § 1459; Code Civ. Proc., § 368; Rest.2d, Contracts § 336; 4 Corbin § 892 et seq.) We therefore determine whether the workers have a private statutory right to recover unpaid wages from G & G.

The California Prevailing Wage Law is a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds. (§§ 1720–1861; see *Lusardi Construction Co. v. Aubry, supra*, 1 Cal.4th at p. 985, 4 Cal.Rptr.2d 837, 824 P.2d 643 (*Lusardi*); *Independent Roofing*

14. The legal and factual issues in a suit by the assignee of a worker against the subcontractor are not identical to the legal and factual issues raised in a suit by the DLSE against a contractor. In a suit to recover deficiency wages by the Union as an assignee of an aggrieved worker who is a third party beneficiary of the public works contract, the Union has the burden of proof (Evid.Code, § 500 ["a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"]; *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205, 52 Cal.Rptr.2d 518), and must establish the factual elements of its standing as a third party beneficiary (*Tippett v. Terich, supra*, 37 Cal.App.4th at pp. 1531–1532, 44 Cal.Rptr.2d 862), the breach of the terms of the contract (*Ibid.*), and the assignment.

In a suit by the DLSE against a contractor under former section 1775, the only issue to be determined is the contractor's liability for the penalties and deficiency payments, and the contractor has the burden of proving that the penalties and amounts demanded in the action are not due. Additionally, the contractor's liability for penalties is subject to statutory defenses, including his willful failure to pay the correct rates of pay and his knowledge of his or her obligations under the statutory scheme. (§ 1775, Stats.1992, ch. 1342, § 9, pp. 6602–6603.)

Unlike the Union, the DLSE need not obtain an assignment from an aggrieved worker before bringing suit against the contractor on behalf of the worker for recovery of deficiency wages. (§ 96.7; *Department of Industrial Relations v. Fidelity Roof Co., supra*, 60 Cal.App.4th at pp. 426–427, 70 Cal.Rptr.2d 465.) In sum, the burden of proof and the legal and factual issues in suits brought by DLSE against a contractor and by the assignee of a worker against a subcontractor are significantly different.

Contractors v. Department of Industrial Relations (1994) 23 Cal.App.4th 345, 351, 28 Cal.Rptr.2d 550.)

Under the prevailing wage law, all workers employed on public works costing more than $1,000 must be paid not less than the general prevailing rate of per diem wages as determined by the Director of the Department of Industrial Relations for work of a similar character and not less than the general prevailing per diem wage for holiday and overtime work. (§§ 1770, 1771, 1772 & 1774; *Lusardi, supra,* 1 Cal.4th at p. 987, 4 Cal.Rptr.2d 837, 824 P.2d 643; *O.G. Sansone Co. v. Department of Transp.* (1976) 55 Cal.App.3d 434, 441, 127 Cal.Rptr. 799.) Per diem wages include employer payments for health and welfare, pension, vacation, travel time, and subsistence pay as provided for in the applicable collective bargaining agreement. (§ 1773.1, and former § 1773.8, repealed by Stats. 1999, ch. 1224, § 5.) The duty to pay the prevailing wage to employees on a public works project extends to both the prime contractor and all subcontractors. (§ 1774.)

[13] The central purpose of the prevailing wage law is to protect and benefit employees on public works projects. (*Lusardi, supra,* 1 Cal.4th at p. 985, 4 Cal.Rptr.2d 837, 824 P.2d 643; *O.G. Sansone Co. v. Department of Transportation, supra,* 55 Cal.App.3d at p. 458, 127 Cal.Rptr. 799.) It also includes several goals which serve "to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees." (*Lusardi, supra,* 1 Cal.4th at p. 987, 4 Cal.Rptr.2d 837, 824 P.2d 643.)

[14] Former section 1775 authorizes the Department of Labor Standards Enforcement to maintain a civil action to recover deficiency wages and penalties from a contractor on a public works project who fails to pay the prevailing rate to his workers. (§ 1775, as amended by Stats.1992, ch. 1342, § 9, pp. 6602–6603.) However, the remedies specified in section 1775 are not exclusive. (*Tippett v. Terich, supra,* 37 Cal.App.4th at pp. 1531–1532, 44 Cal.Rptr.2d 862.) The DLSE also may file suit on behalf of the workers against the awarding body on a third party beneficiary theory (*Aubry, supra,* 2 Cal.4th at p. 971, 9 Cal.Rptr.2d 92, 831 P.2d 317) and against a surety on the payment bond. (*Department of Industrial Relations v. Fidelity Roof Co., supra,* 60 Cal.App.4th at p. 425, 70 Cal.Rptr.2d 465.)

[15] Additionally, a worker on a public works project may maintain a private suit against the contractor to recover deficiency wages as a third party beneficiary of the public contract if the contract provides for the payment of prevailing wages. (*Tippett v. Terich, supra,* 37 Cal.App.4th at pp. 1531–1532, 44 Cal.Rptr.2d 862; *Department of Industrial Relations v. Fidelity Roof Co., supra,* 60 Cal.App.4th at pp. 425–426, 70 Cal.Rptr.2d 465; *Aubry, supra,* 2 Cal.4th at p. 971, 9 Cal.Rptr.2d 92, 831 P.2d 317.)

[16] With this background in mind, we turn to the question whether a worker has a private *statutory* cause of action against a contractor to recover the prevailing wage. While the question has not been decided, it has been discussed. (*Aubry, supra,* 2 Cal.4th at p. 969, fn. 5, and at p. 972, 9 Cal.Rptr.2d 92, 831 P.2d 317, dis. opn. of Kennard, J.)

In *Aubry,* a contractor (*Lusardi*) brought suit for injunctive and declaratory relief against the DLSE seeking a determination the prevailing wage law did not

apply to a hospital facility constructed by the contractor for a third party who would sell it to the public hospital district on completion. After the trial court granted summary judgment for the contractor, the DLSE cross-complained against the public hospital district under tort claims provisions of Government Code section 815.6, seeking damages for violation of the prevailing wage law. The district's demurrer to that claim was sustained and the DLSE appealed.

The Supreme Court held that Government Code section 815.6 does not provide a cause of action against a public entity that fails to comply with its obligation under the prevailing wage law. The court reasoned that section 815.6 is part of the Tort Claims Act which does not protect the type of injury arising from the failure to pay prevailing wages, i.e., injuries that " 'would be actionable if inflicted by a private person.' " (*Id.* at p. 968, 9 Cal.Rptr.2d 92, 831 P.2d 317.)

Justice Kennard, writing in dissent, was of the view the interest injured was one protected in an action between private persons. "The worker can proceed [under section 1194] against the contractor in an action to which no public entity need be a party—an 'action between private persons.' " (*Id.* at pp. 972, 976, 9 Cal.Rptr.2d 92, 831 P.2d 317.) Responding to the dissent, Justice Panelli writing for the majority, pointed out the Court had not yet decided this issue and dismissed the dissent's view on the grounds that "even if such an action is available, it does not bring the present action within the scope of the Tort Claims Act. Any action by a worker against a contractor for wages must necessarily be based on the worker's contractual relationship with the contractor.... Thus, a worker's action against an employer for unpaid statutorily required wages sounds in contract." (*Id.* at p. 969, fn. 5, 9 Cal.Rptr.2d 92, 831 P.2d 317.)

This case tenders the issue not reached by the majority in *Aubry* and we therefore consider the applicability of the provisions of section 1194, which provides as follows:

"(a) Notwithstanding any agreement to work for a lesser wage, *any employee* receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee *is entitled to recover in a civil action* the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." (Emphasis added.)

Section 1194 grants to an employee the statutory right to recover in a civil action for unpaid minimum wages and overtime compensation. (See *Ghory v. Al–Lahham* (1989) 209 Cal.App.3d 1487, 1492, 257 Cal.Rptr. 924 [overtime compensation].) In the context of overtime compensation, the court in *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1430, 95 Cal.Rptr.2d 57, explained, "[a]n employee's right to wages and overtime compensation clearly have different sources. Straight-time wages (above the minimum wage) are a matter of private contract between the employer and employee. Entitlement to over-time compensation, on the other hand, is mandated by statute and is based on an important public policy.... 'The duty to pay overtime wages is a duty imposed by the state; it is not a matter left to the private discretion of the employer. [Citations omitted.] California courts have long recognized [that] wage and hours laws 'concern not only the health and welfare of the workers themselves, but also the public health and general welfare.' ' [Citation.]" (Emphasis omitted.)

[17, 18] It is well established that California's prevailing wage law is a minimum wage law (*Metropolitan Water Dist. v. Whitsett* (1932) 215 Cal. 400, 417–418, 10

P.2d 751; *O.G. Sansone Co. v. Department of Transportation*, *supra*, 55 Cal.App.3d at p. 448, 127 Cal.Rptr. 799; see also *People v. Hwang* (1994) 25 Cal.App.4th 1168, 1181, 31 Cal.Rptr.2d 61), which guarantees a minimum cash wage for employees hired to work on public works contracts. (*Department of Industrial Relations v. Nielsen Construction Co.* (1996) 51 Cal.App.4th 1016, 1026, 59 Cal.Rptr.2d 785.) Like overtime compensation (*Earley v. Superior Court*, *supra*, 79 Cal.App.4th at p. 1430, 95 Cal.Rptr.2d 57), the prevailing wage law serves the important public policy goals of protecting employees on public works projects, competing union contractors and the public. (*Lusardi*, *supra*, 1 Cal.4th at pp. 985, 987, 4 Cal.Rptr.2d 837, 824 P.2d 643.) The duty to pay prevailing wages is mandated by statute and is enforceable independent of an express contractual agreement. (§§ 1771, 1774–1775; *Lusardi*, *supra*, 1 Cal.4th at pp. 986–987, 4 Cal.Rptr.2d 837, 824 P.2d 643.) Thus, while the obligation to pay prevailing wages arises from an employment relationship which gives rise to contractual obligations and claims (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 22–23, 157 Cal.Rptr. 706, 598 P.2d 866), the duty to pay the prevailing wage is statutory. (§§ 1771, 1774.)

For these reasons we conclude that, because the prevailing wage law is a minimum wage law mandated by statute and serves important public policy goals, section 1194 provides an employee with a private statutory right to recover unpaid prevailing wages from an employer who fails to pay that minimum wage.

C. The Private Statutory Right to Recover Waiting Time Wages

The Union also sought and was awarded waiting time wages under section 203.[15] It compels the prompt payment of earned wages (*Triad Data Services, Inc. v. Jackson* (1984) 200 Cal.Rptr. 418, 153 Cal.App.3d Supp. 1, 9), and provides an employee who is discharged or quits with a statutory cause of action against his or her employer if the employer fails to pay earned wages immediately upon the employee's termination. (§ 203; *Division of Labor Law Enforcement v. El Camino Hospital Dist.* (1970) 87 Cal.Rptr. 476, 8 Cal.App.3d Supp. 30, 35.)

Thus, under section 203, if G & G owed the workers wages at the time their employment terminated and failed to pay them, it is liable to the employee for penalties which the employee has a statutory cause of action to recover.

[19] For these reasons we hold that workers on public works projects have a private statutory right to sue their employer for failure to pay the prevailing wage (§§ 1194, 1771, 1774) and for waiting time wages. (§ 203.) Because workers have private statutory remedies against their employer, the assignment of their "statutory rights" was sufficient to give the Union

15. The version of section 203 governing the instant proceedings, provides as follows:

"If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days. No employee who secretes or absents himself to avoid payment to him, or who refuses to receive the payment when fully tendered to him, including any penalty then accrued under this section, shall be entitled to any benefit under this section for the time during which he so avoids payment.

Suit may be filed for such penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise." (Stats.1975, ch. 43, § 1, p. 75, emphasis added.)

standing to sue G & G for recovery of unpaid prevailing wages and waiting times wages.

III.–V.**

VI.

Section 203 Waiting Time Wages

G & G contends it is not liable for section 203 waiting time penalties because it paid all of the wages due, its failure to pay the prevailing wage for sprinkler fitters was not willful, and it acted in good faith after requesting guidance from the State. The Union contends section 203 penalty wages were properly imposed. We agree with the Union.

The trial court awarded the Union $32,380 in waiting time penalties under section 203. The purpose of section 203 is to "compel the prompt payment of earned wages . . . ." (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7, 177 Cal.Rptr. 803 (*Barnhill*); *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492, 80 Cal.Rptr.2d 175.) Former section 203 mandates the payment of penalties under the following circumstances: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days." (§ 203, amended by Stats.1975, ch. 43, p. 75, § 1.)

Section 202 provides that when an employee who does not have a written contract for a definite period quits his employment, his wages become "due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting."

[20] Wages are defined to include "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." (§ 200, subd. (a).) "Wages" include health benefits (*People v. Alves* (1957) 320 P.2d 623, 155 Cal.App.2d Supp. 870, 872) and other fringe benefits. (*Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1972) 24 Cal.App.3d 35, 44, 100 Cal.Rptr. 791; *Suastez v. Plastic Dress–Up Co.* (1982) 31 Cal.3d 774, 780, 183 Cal.Rptr. 846, 647 P.2d 122.)

[21] Thus, section 203 requires the payment of an additional penalty if the employer willfully fails to comply with section 202. The term "willful" within the meaning of section 203, means the employer "intentionally failed or refused to perform an act which was required to be done." (*Barnhill, supra*, 125 Cal.App.3d at pp. 7–8, 177 Cal.Rptr. 803, emphasis omitted; *Ghory v. Al–Lahham* (1989) 209 Cal.App.3d 1487, 1492, 257 Cal.Rptr. 924.) It does not mean that the employer's refusal to pay wages must necessarily be based on a deliberate evil purpose to defraud workers of wages which the employer knows to be due. (*Barnhill, supra*, 125 Cal.App.3d at p. 7, 177 Cal.Rptr. 803; *Davis v. Morris* (1940) 37 Cal.App.2d 269, 274, 99 P.2d 345.)

[22] The evidence was clear. G & G's workers were sprinkler fitters entitled to the prevailing wage for that classification. Because G & G failed to promptly pay these workers their due upon their termination of employment, G & G also owed them penalty wages under section 203.

** See footnote 2, *ante*.

G & G argues that because it paid its workers more than the prevailing wage as pipe tradesmen, and paid full benefits in cash, it could not be held liable for failure to pay wages or waiting time penalties under section 203. G & G also argues that it paid Browning the full wage and benefits for a fire sprinkler fitter and that a contrary conclusion is not supported by substantial evidence.

[23, 24] In considering G & G's contention, the crucial determination is whether there is substantial evidence in support of the trial court's findings of fact. " '[T]he power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' " (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881, 92 Cal.Rptr. 162, 479 P.2d 362, orig. emphasis.) It will not reweigh the evidence. (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465, 46 Cal.Rptr.2d 427, 904 P.2d 834.)

The first of G & G's claims is premised on the factual claim it did not owe the workers the prevailing wage for sprinkler fitters. It ignores the trial court's contrary findings of fact that G & G had erroneously classified its workers as pipe tradesmen, that they should have been classified as fire sprinkler fitters and paid the prevailing wage for that classification. The second claim is also contrary to the trial court's finding that G & G failed to enroll Browning in any of its benefit plans.

[25] A reviewing court begins with the " 'presumption that the record contains evidence to sustain every finding of fact.' " (*Foreman & Clark Corp. v. Fallon*, *supra*, at p. 881, 92 Cal.Rptr. 162, 479 P.2d 362.) To overcome the trial court's factual findings, G & G must " 'demonstrate that there is *no* substantial evidence to support the challenged findings.' . . . A recitation of only defendants' evidence is not the 'demonstration' contemplated under the above rule. [Citation.] Accordingly, if . . . 'some particular issue of fact is not sustained, [defendants] are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived.' " (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881, 92 Cal.Rptr. 162, 479 P.2d 362, emphasis in original.) G & G sets forth only its own evidence, ignoring the trial court's findings and the evidence in support of those findings. It has therefore waived its substantial evidence claim.

[26] Second, G & G claims it did not act willfully in failing to pay the prevailing wage, arguing that "[m]ore than a simple mistake is required to impose the statutory penalties." G & G applies the wrong legal standard and again ignores the factual findings.

[27] An employer's good faith mistaken belief that wages are owed may negate a finding of willfulness. In *Barnhill*, *supra*, 125 Cal.App.3d 1, 177 Cal.Rptr. 803, the employee was owed wages upon her discharge but she owed the employer on a debt she incurred. The employer exercised its right of set-off against the employee's wages, bringing the amount due to the employee to zero. The court held the employer did not have a right of set-off and was therefore liable to the employee for wages due at the time of her discharge. Nevertheless, because the question of set-off was one of law and the law was not clear at the time of the employee's discharge, the employer's good faith belief he had a right of set-off negated a finding his nonpayment of wages was willful within the meaning of section 203. (*Id.* at pp. 8–9, 177 Cal.Rptr. 803.)

By contrast, in the instant case, the trial court found that "G & G's error in classification is clear. Marlowe, Ahoff, and Led-

ford should have been classified as Fire Sprinkler Fitters and paid the prevailing wage for that classification." The trial court also found that G & G did not act in good faith in determining the workers' classification and failing to pay the proper prevailing wage and benefits. Thus, unlike the employer in *Barnhill*, G & G did not make a reasonable good faith legal mistake in failing to pay its workers their full wages upon termination of their employment. Moreover, because G & G does not set forth all the material substantial evidence in support of these findings, its substantial evidence claim is waived. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881, 92 Cal.Rptr. 162, 479 P.2d 362.)

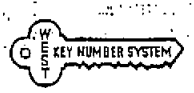
Third, relying on *Lusardi*, *supra*, 1 Cal.4th at pages 996–997, 4 Cal.Rptr.2d 837, 824 P.2d 643, *Division of Labor Standards Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 129, 270 Cal.Rptr. 75, and *Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal.App.3d 635, 639–642, 237 Cal.Rptr. 546, G & G contends that equity precludes imposition of waiting time penalties because it acted reasonably and in good faith after requesting guidance from the State.

G & G failed to raise this claim in the trial court and has waived it on appeal. (*Forman v. Chicago Title Co.*, *supra*, 32 Cal.App.4th at pp. 1015–1016, 38 Cal.Rptr.2d 790.) Moreover, for the same reasons discussed above, because it is not supported by the trial court's findings and the substantial evidence in support of those findings, G & G has waived its claim. (*Foreman & Clark, Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881, 92 Cal.Rptr. 162, 479 P.2d 362.) Accordingly, we hold that the trial court's imposition of waiting time wages was proper.

DISPOSITION

The judgment and award of damages is affirmed. Plaintiff is awarded its costs on appeal. (Cal. Rules of Court, rule 26(a).)

We concur: DAVIS, and RAYE, JJ.



Theodore KELLOGG et al., Plaintiffs and Appellants,

v.

Ronald GARCIA et al., Defendants and Respondents.

No. C037628.

Court of Appeal, Third District.

Oct. 2, 2002.

Landowners brought quiet title action against neighbors, asserting easement by necessity over their properties. The Superior Court, Calaveras County, No. CV23054, John E. Martin, J., entered judgment for neighbors. Landowners appealed. The Court of Appeal, Kolkey, J., held that: (1) federal government could be common grantor for purposes of easement; (2) evidence showed that government owned surrounding land; and (3) landowners showed strict necessity justifying easement.

Reversed and remanded with directions.

1. Easements ⇐18(1)

An easement by way of necessity arises when it is established that: (1) there is a strict necessity for the right-of-way, as when a claimant's property is landlocked, and (2) the dominant and servient tene-

121 Cal.App.3d 120

[120] WINZLER & KELLY [and four other cases],* Plaintiffs and Respondents,

v.

DEPARTMENT OF INDUSTRIAL RELATIONS, et al., Defendants and Appellants,

Western Association of Engineers, Operating Engineers Local Union No. 3, Intervenors and Respondents.

Civ. 50341.

Court of Appeal, First District, Division 4.

June 17, 1981.

As Modified June 29, 1981.

Actions were brought against the director of the Department of Industrial Relations for writ of mandate and related relief with respect to coverage and wage rate determinations for field surveyors. The actions were consolidated and transferred. The Superior Court, San Francisco County, Eugene F. Lynch, J., entered judgment that the challenged determinations were void and remanded the case. The Department appealed. The Court of Appeal, Caldecott, P.J., held that although the determination of the director of the Department of Industrial Relations that field surveying is performed by the type of worker intended to be covered by the prevailing wage law was a quasi-legislative action and amounted to a regulation, the coverage determination, as integral part of the wage determination process, was exempted from the prior hearing requirements of the APA and thus there was no requirement that the director grant a hearing prior to the determination of the type of work covered.

Reversed.

Labor Relations ⇐1437

Although the determination of the director of the Department of Industrial Relations that field surveying is performed by the type of worker intended to be covered by the prevailing wage law was a quasi-legislative action and amounted to a regulation, the coverage determination, as integral part of the wage determination process, was exempted from the prior hearing requirements of the APA and thus there was no requirement that the director grant a hearing prior to the determination of the type of work covered. West's Ann.Labor Code, §§ 1720, 1723; West's Ann.Gov.Code, §§ 11371, 11380, 11380(a)(1), 11421 (Repealed).

Christine C. Curtis, Peter H. Weiner, Department of Industrial Relations, San Francisco, for defendants and appellants.

Edgar B. Washburn, David C. Spielberg, Washburn, Kemp & Wagenseil, San Francisco, Larry P. Schapiro, Littler, Mendelson, Fastiff & Tichy, San Francisco, Littler, Mendelson, Fastiff & Tichy, Fresno, Archie G. Parker, Rowland & Parker, Sacramento, Leo H. Scheuring, Sacramento, for plaintiffs and respondents.

Steven M. Bernard, McKeehan, Bernard & Wood, Fremont, for intervenors and respondents Operating Engineers Local Union #3.

[123] CALDECOTT, Presiding Justice.

Defendants Department of Industrial Relations and Donald Vial, the director of the department (appellants) appeal from an adverse judgment rendered in an action brought for writ of mandate and related relief.

THE FACTS

The director of the Department of Industrial Relations (hereafter director or depart-

* Hogan-Schoch & Assoc., Inc., Sonoma County Sup.Ct. No. 92318; Hogan-Schoch & Assoc., Inc., Sonoma County Sup.Ct. No. 93338; McGlasson & Assoc., Kings County Sup.Ct. No. 28567; Siegfried & Assoc., San Joaquin County Sup.Ct. No. 139553.

ment) was asked by an employer group, representing local awarding bodies, whether surveyor classifications were covered under the prevailing wage laws. On May 26, 1977, the director issued a determination that field surveying is performed by the type or classification of worker (certified chief of party, chief of party, rodman/chairman and instrument man) intended to be covered by the Act. (Lab. Code § 1772.) The coverage determination of the director was made in a letter dated the same day, addressed to Paul L. Schoch of Hogan-Schoch & Associates, Inc. (Hogan-Schoch) and signed by Christine Curtis on behalf of the director. The trial court found that, although contained in a letter addressed to a specific firm, the coverage determination of May 26, 1977, had a statewide impact which necessarily applied to all public entities letting contracts for public works and all employers of field survey workers or public work contracts.

Hogan-Schoch protested both the coverage determination and the lack of a hearing and filed a petition for writ of mandate in the Sonoma County Superior Court. On July 13, 1977, at the request of Hogan-Schoch, the department held a hearing on the inclusion of surveyors in the prevailing wage law. This hearing, of course, could not affect the coverage determination of May 26, 1977, because it was held subsequent to its issuance. Nonetheless, on August 5, 1977, the director reaffirmed his initial coverage determination based upon the July 13, 1977 post-hearing.

On August 12, 1977, the director announced that as a consequence of his prior coverage determination he was making a sweeping "wage rate determination" for surveyors throughout northern California. This wage rate determination in fact involved two separate provisions: first, the director purported to establish an "appropriate labor market area" consisting of all 46 northern California counties; and second, he declared that the wage rate prevailing in that "market area" was the San Francisco Bay area wage scale of Operating Engineers Local Union No. 3's (Local 3) "master" collective bargaining agreements. The court below found that "the August 12, 1977 general determination was separate and distinct from the May 26, 1977 general determination."

Both the coverage determination and the wage rate determination were challenged in several lawsuits filed by petitioners Winzler & Kelly, Hogan-Schoch, Western Association of Engineers and Land Surveyors, McGlasson & Associates, Consulting Engineers Association of California, and Siegfried & Associates (hereafter respondents) in several courts around the state. On motion by the department these lawsuits were ordered coordinated as Judicial Council Coordination Proceeding No. 449 (entitled Surveyor Classification Cases).

The trial judge determined that the issuance of the two general determinations was a quasi-legislative action which should be reviewed under Code of Civil Procedure section 1085. He concluded that the director was required under the Administrative Procedure Act (APA) (Gov.Code § 11370 et seq.)[1] to hold administrative hearings *prior* to issuing any of the challenged determinations and that he had failed to do so. Accordingly, he held that the challenged determinations were void and remanded the entire matter to the department for further proceedings consistent with the APA and his order. Judgment was entered accordingly. The appeal at bench has been taken from the judgment.

THE ISSUE

The sole issue presented on appeal is whether the director was required to hold a hearing prior to issuing the determination that the field surveying work was covered by the California prevailing wage law (Lab. Code, § 1720 et seq.).

1. Unless otherwise indicated, all further references will be made to the Government Code. We also note that Government Code sections 11371–11445 were repealed by Stats. 1979, ch. 567, § 2, effective July 1, 1980, and substantially reenacted as Government Code sections 11342–11351. Since the former provisions were in effect all relevant times herein, we cite the former code sections in this opinion.

Before discussing and analyzing the principal issue at bench, as a threshold matter we note that, as the parties themselves concede, there is no constitutional requirement to hold a public hearing in quasi-legislative matters. The parties are also in agreement that prior hearing is not required under the statutes regulating the prevailing wage law [125] either. Consequently, in order to determine the issue here raised (i. e., whether a prior hearing is required before a coverage determination under the California prevailing wage law) we are compelled to resort to the APA, which establishes minimum procedural requirements applicable to quasi-legislative and quasi-judicial actions by state agencies. In doing so we follow the established principles which hold that the different codes blend into each other and constitute a single statute for the purposes of statutory construction and that the legislative intent may be determined not only from an individual code but the whole body of law. (*Pesce v. Dept. of Alcoholic Bev. Control* (1958) 51 Cal.2d 310, 312, 333 P.2d 15; *American Friends Service Committee v. Procunier* (1973) 33 Cal.App.3d 252, 260, 109 Cal.Rptr. 22.) The rationale behind this rule is the assumption that the Legislature was aware of the existing, related laws and intended to maintain a consistent body of statutes. (*Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805, 249 P.2d 241; *Lambert v. Conrad* (1960) 185 Cal. App.2d 85, 93, 8 Cal.Rptr. 56.) It follows that in the instant case we must construe the prevailing wage law together with the APA in order to arrive at the determination of whether the Legislature intended that the department hold a public hearing prior to a coverage determination.

With these introductory observations, we now turn to the statutory scheme outlined in the APA. We start with Chapter 4.5 of the APA (§ 11371 et seq.), which applies to the quasi-legislative actions of state agencies. Section 11420 describes the coverage by providing that: "It is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in Section 11421, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly."

"Regulation" is defined in section 11371, subdivision (b), which sets forth in pertinent part that: " 'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it . . . ."

[The exceptions referred to in section [126] 11420 are described in section 11421, subdivision (a), which reads in part that: "The provisions of this article shall not apply to any regulation not required to be filed with the Secretary of State under this chapter, and only this section and Section 11422 of this article shall apply to any regulation prescribing an agency's organization or procedure or to an emergency regulation adopted pursuant to subdivision (b) of this section."

The requirements for filing regulations and exceptions to those requirements are set out in section 11380. It spells out in relevant portion that: "Every state agency shall: (a) Transmit to the department for filing with the Secretary of State and with the Rules Committee of each house of the Legislature a certified copy of every regulation adopted by it except one which: (1) Establishes or fixes rates, prices or tariffs. . . . (3) Is directed to a specifically named person or to a group of persons and does not apply generally throughout the State."

Finally, sections 11423 through 11425 detail the applicable notice and hearing requirements. Section 11423 provides that notice must be given "[a]t least 30 days,

prior to the adoption, amendment or repeal of a regulation . . . ." Section 11424 outlines the required contents of the notice. Lastly, section 11425 sets forth the hearing requirements by providing in part that: "On the date and at the time and place designated in the notice the state agency shall afford any interested person or his duly authorized representative, or both, the opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present the same orally. The state agency shall consider all relevant matter presented to it before adopting, amending or repealing any regulation."

Thus the aforecited statutory provisions make it clear that the director's coverage determination would be subject to the APA if the following three conditions coexist: (1) the determination is a quasi-legislative action; (2) it amounts to a "regulation" within the meaning of section 11371, subdivision (b); and (3) it is not expressly exempted by either the APA or the prevailing wage law.

In addressing these subissues, first we point out that the parties agreed (and the trial court so found) that the coverage determination in dispute was a quasi-legislative function. We are likewise persuaded that the May 26, 1977 determination of the director constituted a regulation within the purview of the law. As spelled out before, [1127] in the definition of section 11371, subdivision (b), "regulation" includes orders or *standards of general application* which are adopted by state agencies in order to implement, interpret or make specific the law enforced by such agencies. Clearly, the coverage determination in dispute amounted to a standard of general application because it had a statewide impact and applied not only to the individual firm to which it was addressed but also to all public entities letting contracts for public works and to all employees who engaged the services of field surveying workers on public work projects. The eventuality that the director entitled his action as a "general determination" rather than a "regulation" is of no legal consequence. Whether the action of a state agency constitutes a regulation does not depend on the designation of the action, but rather on its effect and impact on the public. If the action is not only of local concern, but of statewide importance, it qualifies as a regulation despite the fact that it is called "resolutions," "guidelines," "rulings" and the like (*State Comp. Ins. Fund v. McConnell* (1956) 46 Cal.2d 330, 343, 294 P.2d 440; see also *Davies v. Contractors' State License Bd.* (1978) 79 Cal.App.3d 940, 145 Cal.Rptr. 284; *City of San Marcos v. California Highway Com.* (1976) 60 Cal.App.3d 383, 131 Cal.Rptr. 804).

Moreover, the second criterion of the statutory definition of "regulation" is also present in this case. As appears from the record, the coverage determination of the director was issued for the purpose of interpreting the terms "public works" and "workman" in Labor Code sections 1720 and 1723 and to apply those interpretations to the surveying profession. In sum, since the coverage determination had statewide significance and applicability and was issued to implement, interpret and make specific the prevailing wage law, it undoubtedly qualifies as a "regulation" within the meaning of section 11371 and is subject to the APA unless specifically exempted.

This leads us to the next important issue, i. e., whether the director's action was exempted from the APA's requirements. There are three possible places where such an exemption might be found: in the organic legislation establishing the department, in the prevailing wage law, or in the APA itself.

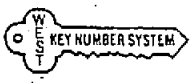
Section 11421 exempts regulations not required to be filed with the Secretary of State under section 11380. Section 11380, subdivision (a)(1) exempts regulations which inter alia "[e]stablishes or fixes rates, prices or tariffs." While the director's wage determination of August 12, 1977, is exempt under this latter section, there is no specific exemption in section 11380 or anywhere for the director's *coverage* determination. [1128] The trial court concluded "The general determination of May 26, 1977 was a determination of the coverage of the pub-

lic works law and not an order fixing rates, prices or tariffs as provided in Government Code § 11380, subdivision (a)(1)," so was not exempt.

Appellant argues that the coverage determination should be exempted from the APA requirements because it is part of the rate setting process. Labor Code section 1773 provides the method to be used by the director in determining general prevailing rates. In this determination the director shall fix the rate for each craft, classification or type of work. Thus, the determination of the classification or type of work covered is an essential step in the wage determination process and a rate cannot be fixed without such a determination. As the wage determination process is exempted from the prior hearing requirements of the APA, coverage determination, as an integral part of that process, is also exempted. There is no requirement that the director grant a hearing prior to the determination of the type of work covered.

The judgment is reversed.

RATTIGAN and CHRISTIAN, JJ., concur.



120 Cal.App.3d 517

1517 Minoru SHIMOYAMA, Plaintiff and Appellant,

v.

The BOARD OF EDUCATION OF the LOS ANGELES UNIFIED SCHOOL DISTRICT, et al., Defendants and Respondents.

Civ. 59994.

Court of Appeal, Second District, Division 4.

June 17, 1981.

Teacher appealed from judgment of the Superior Court, Los Angeles County, Elisabeth E. Zeigler, J., which denied to teacher declaration that he was entitled to be reinstated as head football coach, and an injunction against removing him from that position. The Court of Appeal, Foster, J., assigned, held that: (1) personal attacks by teacher upon principal contained in letter sent in response to principal's reprimand of teacher for deficiencies in performance of his duties, were not protected by the First Amendment so as to prevent principal from disciplining the teacher for such remarks; (2) trial judge could accept testimony of principal that he thought he would have still dismissed teacher from that position even if teacher had not sent letter to him containing remarks both protected and not protected by the First Amendment; therefore any connection between the letter and the principal's decision did not meet the requirement of legal causation; and (3) in view of fact that teacher never sought a hearing for an opportunity to clear his name, and that the only relief sought by teacher in his suit was reinstatement to the position of football coach, issue of whether dismissal of teacher violated his right to due process as a deprivation of a liberty interest without a hearing would not be considered on appeal.

Affirmed.

1. Schools ⇐141(4)

It is an established principle that a teacher may not be denied a position in retaliation for his exercise of a First Amendment right, even if the teacher has no contractual or statutory right of tenure. U.S.C.A.Const. Amend. 1.

2. Schools ⇐141(5)

In determining whether a teacher has been deprived of a position because of his exercise of a constitutional right, the teacher has the burden of proving that his conduct was constitutionally protected, and that it was a motivating factor in the decision of the employer not to renew his assignment; the employer may negate legal

Labor Code

1975

874

STATE OF CALIFORNIA
Department of General Services
Documents and Publications Section
P.O. Box 20191, Sacramento 95820

1700.44. In cases of controversy arising under this chapter the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo. To stay any award for money, the party aggrieved shall execute a bond approved by the superior court in a sum not exceeding twice the amount of the judgment. In all other cases the bond shall be in a sum of not less than one thousand dollars ($1,000) and approved by the superior court.

The Labor Commissioner may certify without a hearing that there is no controversy within the meaning of this section if he has by investigation established that there is no dispute as to the amount of the fee due. Service of such certification shall be made upon all parties concerned by registered or certified mail with return receipt requested and such certification shall become conclusive 10 days after the date of mailing if no objection has been filed with the Labor Commissioner during that period.

(Amended by Stats. 1967, Ch. 1567.)

1700.45. Notwithstanding Section 1700.44 of the Labor Code, a provision in a contract providing for the decision by arbitration of any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid:

(a) If the provision is contained in a contract between an artists' manager and a person for whom such artists' manager under the contract undertakes to endeavor to secure employment,

(b) If the provision is inserted in the contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to an artists' manager,

(c) If the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and

(d) If the contract provides that the Labor Commissioner or his authorized representative has the right to attend all arbitration hearings.

Except as otherwise provided in this section, any such arbitration shall be governed by the provisions of Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure.

If there is such an arbitration provision in such a contract, the contract need not provide that the artists' manager agrees to refer any controversy between the applicant and the artists' manager regarding the terms of the contract to the Labor Commissioner for adjustment; and Section 1700.44 shall not apply to controversies pertaining to the contract.

A provision in a contract providing for the decision by arbitration of any controversy arising under this chapter which does not meet the requirements of this section is not made valid by Section 1281 of the Code of Civil Procedure.

(Amended by Stats. 1961, Ch. 461.)

1700.46. Any person, or agent or officer thereof, who violates any provision of this chapter is guilty of a misdemeanor, punishable by a fine of not less than twenty-five dollars ($25) nor more than two hundred fifty dollars ($250) or imprisonment for a period of not more than 60 days, or both.

(Added by Stats. 1959, Ch. 888.)

PART 7. PUBLIC WORKS AND PUBLIC AGENCIES

CHAPTER 1. PUBLIC WORKS

Article 1. Scope and Operation

1720. As used in this chapter "public works" means:

(a) Construction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

(b) Work done for irrigation, utility, reclamation and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether such political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(Amended by Stats. 1973, Ch. 77.)

1720.2. For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public works" also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but, upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

(c) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

(Added by Stats. 1974, Ch. 1027.)

1721. "Political subdivision" includes any county, city, district, township, public housing authority, or public agency of the State, and assessment or improvement districts.

(Amended by Stats. 1953, Ch. 1283.)

1722. "Awarding body" or "body awarding the contract" means department, board, authority, officer or agent awarding a contract for public work.

1723. "Workman" includes laborer, workman, or mechanic.

1724. "Locality in which public work is performed" means the county in which the public work is done in cases in which the contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases.

1725. "Alien" means any person who is not a born or fully naturalized citizen of the United States.

1726. The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract.

1727. Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained

or forfeited, except from the final payment, without a full investigation by either the Division of Labor Law Enforcement or by the awarding body.
(Amended by Stats. 1945, Ch. 1431.)

1728. In cases of contracts with assessment or improvement districts where full payment is made in the form of a single warrant, or other evidence of full payment, after completion and acceptance of the work, the awarding body shall accept from the contractor in cash a sum equal to, and in lieu of, any amount required to be withheld, retained, or forfeited under the provisions of this section, and said awarding body shall then release the final warrant or payment in full.

1729. It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law.

1730. Every awarding body that withholds any penalty or forfeiture from any contract payment, for failure of a contractor or subcontractor to comply with any provision of this chapter or any of the labor laws on public works, or with any provision of a contract based on such labor laws, shall at the expiration of 90 days after the completion of the contract and the formal acceptance of the job, transfer all penalties and forfeitures, whether withheld from a progress payment or final payment, to the State Treasurer to become a part of the general fund.

1731. If suit is brought against the awarding body within the 90-day period and formal notice thereof is given to the awarding body within the 90-day period either by service of summons or by registered mail which is received within the 90-day period, the penalties and forfeitures shall be retained by the awarding body pending the outcome of the suit, and be forwarded to the State Treasurer only in the event of a final court judgment against the contractor or his assignee. Otherwise the penalties and forfeitures are subject to any final judgment which is obtained by the contractor or his assignee.

1732. The time for action by the contractor or his assignee for the recovery of penalties or forfeitures is limited to the 90-day period and such suit on the contract or alleged breach thereof in not making the payment is the exclusive remedy of the contractor or his assignees with reference to such penalties or forfeitures.

1733. Suit may be brought by the contractor or his assignee without permission from the State or other authority and is limited to the recovery of the penalties or forfeitures without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in such case and the burden shall be on the plaintiff to establish his right to the penalties or forfeitures withheld. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body.

The Division of Labor Law Enforcement may, upon written request of any awarding body, assist in the defense of such action.
(Amended by Stats. 1957, Ch. 398.)

1734. Any court collecting any fines or penalties under the criminal provisions of this chapter or any of the labor laws pertaining to public works shall as soon as practicable after the receipt thereof deposit same with the county treasurer of the county in which such court is situated. Amounts so deposited shall be paid at least once a month by warrant of the county auditor drawn upon requisition of the judge or clerk of said court, to the State Treasurer for deposit in the General Fund.
(Amended by Stats. 1953, Ch. 523.)

1735. No discrimination shall be made in the employment of persons upon public works because of the race, color, national origin or ancestry, or religion of such persons and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter.
(Amended by Stats. 1965, Ch. 283.)

1740. Notwithstanding any other provision of this chapter or any other law of this State, except limitations imposed by the Constitution, the legislative body of a political subdivision which has received or is to receive a loan or grant of funds from the Federal Government or a federal department or agency for public works of that political subdivision, may provide in its call for bids in connection with such public works that all bid specifications and contracts and other procedures in connection with bids or contracts shall be subject to modification to comply with revisions in federal minimum wage schedules without the necessity of republication or duplication of other formal statutory requirements.
(Added by Stats. 1957, Ch. 1992.)

Article 2. Wages

1770. The body awarding the contract or authorizing the public work shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773, and its determination in the matter shall be final except as provided in Sections 1773.4 and 1773.6. Nothing in this article, however, shall prohibit the payment of more than the general prevailing rate of wages to any workman employed on public work. Nothing in this act shall permit any overtime work in violation of Article 3 of this chapter.
(Amended by Stats. 1953, Ch. 1706.)

1771. Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workmen employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.
(Amended by Stats. 1974, Ch. 1202.)

1772. Workmen employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

1773. The body awarding any contract for public work, or otherwise undertaking any public work, shall ascertain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract. The holidays upon which such rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workman employed on the project.

In determining such rates, the awarding body shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the

actually prevailing in the locality, the awarding body shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.

If the awarding body determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the awarding body may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the awarding body determines that another rate should be adopted.

(Amended by Stats. 1971, Ch. 785.)

1773.1. Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, apprenticeship or other training programs authorized by Section 3093, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

For the purpose of determining such per diem wages for contracts entered into with the state, the representative of any craft, classification or type of workmen needed to execute the contracts entered into with the state shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids.

(Amended by Stats. 1969, Ch. 1502.)

1773.2. The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification or type of workman needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may refer to copies thereof on file at its principal office, which shall be made available to any interested party on request. In the event that the awarding body chooses to refer to a copy of the prevailing rate of per diem wages on file at its principal office, in lieu of specifying them in each call for bids, and in the bid specifications and in the contract itself, the awarding body shall publish its determination of the prevailing rate of wages at least one time in a newspaper of general circulation during each year, and in such event, the awarding body shall cause a copy thereof to be posted at each jobsite.

(Amended by Stats. 1974, Ch. 876.)

Note: Stats. 1974, Ch. 876, also contains the following provisions:

SEC. 2. The amendment of this section made by the 1973–74 Regular Session of the Legislature does not constitute a change in, but is declaratory of, existing law.

1773.3. The awarding body of each city, county and city and county shall file, annually, with the Director of Industrial Relations its determination, pursuant to Section 1773 of this code, of general prevailing rates of per diem wages in the locality in which the public work is to be performed. If during any annual period the awarding body determines that there has been a change in any prevailing rate of per diem wages in such locality it shall notify the Director of Industrial Relations within 10 days thereof.

Where the body awarding or authorizing the public work is a state agency, except as provided in Section 1773.6, it shall file, annually, with the Director of Industrial Relations its determination of general prevailing rates of per diem wages for those localities in which public work is to be performed. If during any annual period the state agency determines that there has been a change in any prevailing rate of per diem wages in any locality it shall notify the Director of Industrial Relations within 10 days thereof.

(Added by Stats. 1959, Ch. 1787.)

1773.4. Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body may, within 20 days after commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code. Within two days thereafter, a copy of such petition shall be filed with the awarding body. The petition shall set forth the facts upon which it is based. The Director of Industrial Relations or his authorized representative shall, upon notice to the petitioner, the awarding body and such other persons as he deems proper, including the recognized collective bargaining representatives for the particular crafts, classifications or types of work involved, institute an investigation or hold a hearing. Within 20 days after the filing of such petition, or within such longer period as agreed upon by the director, the awarding body, and all the interested parties, he shall make a determination and transmit the same in writing to the awarding body and to the interested parties.

Such determination shall be final and shall be the determination of the awarding body. Upon receipt by it of the notice of the filing of such petition the body awarding the contract or authorizing the public work shall extend the closing date for the submission of bids or the starting of work until five days after the determination of the general prevailing rates of per diem wages pursuant to this section.

Upon the filing of any such petition, notice thereof shall be set forth in the next and all subsequent publications by the awarding body of the call for bids. No other notice need be given to bidders by the awarding body by publication or otherwise. The determination of the director shall be included in the contract.

(Amended by Stats. 1969, Ch. 301.)

1773.5. The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out the prevailing wage provisions of this article.

(Added by Stats. 1953, Ch. 1706.)

1773.6. Where the body awarding the contract or authorizing the public work is the State Department of Public Works, the Department of General Services, or the State Department of Water Resources or any division thereof, it shall file, quarterly, its determination of general prevailing rates of per diem wages for those localities in which public work is to be performed, in the office of the Director of Industrial Relations, commencing not later than January 10, 1954. Such determination shall be final except as hereinafter provided. If during any quarterly period the Director of Industrial Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall immediately notify the awarding body of such change and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any contract for which the notice to bidders has been published.

(Amended by Stats. 1963, Ch. 1786.)

S—88533

1773.7. The provisions of Sections 1773.4 and 1773.5 shall not apply to the State Department of Public Works, the Department of General Services, or the State Department of Water Resources or any division thereof.

(Amended by Stats. 1963, Ch. 1786.)

1773.8. The body awarding any contract for public work shall include in the specifications for the contract a requirement requiring the payment of travel and subsistence payments to each workman needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed in accordance with this section.

To establish such travel and subsistence payments for contracts entered into with the state, each city, county and city and county, the representative of any craft, classification or type of workman needed to execute the contracts shall file with the Department of Industrial Relations fully executed copies of collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter shall establish such travel and subsistence payments whenever filed 30 days prior to the call for bids.

(Added by Stats. 1968, Ch. 880.)

1774. The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

1775. The contractor shall, as a penalty to the State or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each workmen paid less than the stipulated prevailing rates for such work or craft in which such workman is employed for any public work done under the contract by him or by any subcontractor under him. The difference between such stipulated prevailing wage rates and the amount paid to each workman for each calendar day or portion thereof for which each workman was paid less than the stipulated prevailing wage rate shall be paid to each workman by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that the provisions of this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813 of this chapter, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify, provided that in the case of a workman claiming the difference between the prevailing wage rate and the amount paid him the awarding body has first been given the notice mentioned in Section 1190.1 of the Code of Civil Procedure, the Division of Labor Law Enforcement of such violation and the Division of Labor Law Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided for herein. Such action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of such public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in such action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in such action are not due.

Out of any money withheld or recovered or both there shall first be paid the amount due each workman and if insufficient funds are withheld or recovered or both to pay each workman in full the money shall be prorated among all such workmen.

(Amended by Stats. 1963, Ch. 467.)

1776. Every contractor and subcontractor shall keep an accurate record showing the name, occupation, and the actual per diem wages paid to each workman employed by him in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the body awarding the contract and to the Division of Labor Law Enforcement.

(Amended by Stats. 1949, Ch. 127.)

1777. Any officer, agent, or representative of the State or of any political subdivision who wilfully violates any provision of this article, and any contractor, or subcontractor, or agent or respresentative thereof, doing public work who neglects to comply with any provision of Section 1776 is guilty of a misdemeanor.

1777.5. Nothing in this chapter shall prevent the employment of properly indentured apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he is employed, and shall be employed only at the work of the craft or trade to which he is indentured.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing at Section 3070), Division 3, of the Labor Code, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract, employs workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area of the site of the public work. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as otherwise provided in this section.

The contractor or subcontractor, if he is covered by this section, shall, upon the issuance of the approval certificate, or if he has been previously approved in such craft or trade, shall, employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each eight journeymen, the Division of Apprenticeship Standards shall grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section. This section shall not apply to prime contracts involving less than thirty thousand dollars ($30,000) or 20 working days or to contracts of subcontr[illegible]s not bidding for work through a general or prime contractor, involving less [illegible] two thousand dollars ($2,000) or fewer than five working days.

878

"Apprenticeable craft or trade," as used in this section, shall mean a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) In the event unemployment for the previous three-month period in such area exceeds an average of 15 percent, or

(b) In the event the number of apprentices in training in such area exceeds a ratio of 1 to 5, or

(c) If there is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either (1) on a statewide basis, or (2) on a local basis.

(d) If assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When such exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, provided they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such contributions in computing his bid for the contract. The Division of Labor Law Enforcement is authorized to enforce the payment of such contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

In the event a contractor willfully fails to comply with this section, such contractor shall be denied the right to bid on a public works contract for a period of six months from the date the determination is made.

The interpretation and enforcement of this section shall be in accordance with the rules and procedures prescribed by the Apprenticeship Council.

All decisions of the joint apprenticeship committee under this section are subject to the provisions of Section 3081.

(Amended by Stats. 1974, Ch. 965.)

1777.6. It shall be unlawful for an employer or a labor union to refuse to accept otherwise qualified employees as indentured apprentices on any public works,

solely on the ground of the race, religious creed, color, national origin, ancestry, or sex of such employee.

(Amended by Stats. 1971, Ch. 280.)

1778. Every person, who individually or as a representative of an awarding or public body or officer, or as a contractor or subcontractor doing public work, or agent or officer thereof, who takes, receives, or conspires with another to take or receive, for his own use or the use of any other person any portion of the wages of any workman or working subcontractor, in connection with services rendered upon any public work is guilty of a felony.

1779. Any person or agent or officer thereof who charges, collects, or attempts to charge or collect, directly or indirectly, a fee or valuable consideration for registering any person for public work, or for giving information as to where such employment may be procured, or for placing, assisting in placing, or attempting to place, any person in public work, whether the person is to work directly for the State, or any political subdivision or for a contractor or subcontractor doing public work is guilty of a misdemeanor.

1780. Any person acting on behalf of the State or any political subdivision, or any contractor or subcontractor or agent or representative thereof, doing any public work who places any order for the employment of a workman on public work where the filling of the order for employment involves the charging of a fee, or the receiving of a valuable consideration from any applicant for employment is guilty of a misdemeanor.

Article 3. Working Hours

1810. Eight hours labor constitutes a legal day's work in all cases where the same is performed under the authority of any law of this State, or under the direction, or control, or by the authority of any officer of this State acting in his official capacity, or under the direction, or control or by the authority of any municipal corporation, or of any officer thereof. A stipulation to that effect shall be made a part of all contracts to which the State or any municipal corporation therein is a party.

1811. The time of service of any workman employed upon public work is limited and restricted to 8 hours during any one calendar day, and 40 hours during any one calendar week, except as hereinafter provided for under Section 1815.

(Amended by Stats. 1963, Ch. 964.)

1812. Every contractor and subcontractor shall keep an accurate record showing the name of and actual hours worked each calendar day and each calendar week by each workman employed by him in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the awarding body and to the Division of Labor Law Enforcement.

(Amended by Stats. 1963, Ch. 964.)

1813. The contractor shall, as a penalty to the State or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which such workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall

879

report them to the officer of the State or political subdivision who is authorized to pay the contractor money due him under the contract.
(Amended by Stats. 1963, Ch. 964.)

1814. Any officer, agent, or representative of the State or any political subdivision who violates any provision of this article and any contractor or subcontractor or agent or representative thereof doing public work who neglects to comply with any provision of Section 1812 is guilty of a misdemeanor.
(Added by renumbering Section 1816 by Stats. 1961, Ch. 238.)

1815. Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1½ times the basic rate of pay.
(Amended by Stats. 1963, Ch. 964.)

Article 5. Securing Workmen's Compensation
(Article 5 added by Stats. 1965, Ch. 1000)

1860. The awarding body shall cause to be inserted in every public works contract a clause providing that, in accordance with the provisions of Section 3700 of the Labor Code, every contractor will be required to secure the payment of compensation to his employees.
(Added by Stats. 1965, Ch. 1000.)

1861. Each contractor to whom a public works contract is awarded shall sign and file with the awarding body the following certification prior to performing the work of the contract: "I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workmen's compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract."
(Added by Stats. 1965, Ch. 1000.)

CHAPTER 2. PUBLIC AGENCIES

Article 1. Municipal Employees

1900. Every employee of a city whose hours of labor exceed 120 in a week is entitled to be off duty at least three hours during every 24 hours for the purpose of procuring meals. No deduction of salary shall be made by reason thereof.

1901. Any officer or agent of a city having supervision and control of employees covered by this article who violates any provision hereof is guilty of a misdemeanor.

CHAPTER 4. FIREFIGHTERS
(Chapter 4 added by Stats. 1959, Ch. 723)

1960. Neither the State nor any county, political subdivision, incorporated city, town, nor any other municipal corporation shall prohibit, deny or obstruct the right of firefighters to join any bona fide labor organization of their own choice.
(Added by Stats. 1959, Ch. 723.)

1961. As used in this chapter, the term "employees" means the employees of the fire departments and fire services of the State, counties, cities, cities and counties, districts, and other political subdivisions of the State.
(Added by Stats. 1959, Ch. 723.)

1962. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to present grievances and recommendations regarding wages, salaries, hours, and working conditions to the governing body, and to discuss the same with such governing body, through such an organization, but shall not have the right to strike, or to recognize a picket line of a labor organization while in the course of the performance of their official duties.
(Added by Stats. 1959, Ch. 723.)

1963. The enactment of this chapter shall not be construed as making the provisions of Section 923 of this code applicable to public employees.
(Added by Stats. 1959, Ch. 723.)

PART 8. UNEMPLOYMENT RELIEF

CHAPTER 1. EXTENSION OF PUBLIC WORKS

2010. As used in this chapter, "State agency" means any department, division, board, bureau, or commission of the State.

2011. The Department of Finance shall ascertain and secure from the several State agencies tentative plans for the extension of public works which are best adapted to supply increased opportunities for advantageous public labor during periods of temporary unemployment. Such plans shall [illegible]de estimates of the amount, character, and duration of employment, the [illegible] employees who could be profitably employed therein, together wi[illegible]es and other information which the Department of Finance de[illegible]

2012. The Division of Labor Statistics an[illegible]stantly advised of industrial conditions throughout th[illegible]ent of labor. Whenever the Governor represen[illegible] that a period of extraordinary unempl[illegible] exists in the State, it shall immediate[illegible] thereto, and report to the Governo[illegible]
(Amended by Stats. 1945, Ch. 1431.)

2013. If the Division of Lab[illegible] that a condition of extraordi[illegible] does exist within this St[illegible] available Emergency Fi[illegible] the public works of th[illegible] which the Departm[illegible] public interest by [illegible] the most useful[illegible]
(Amended b[illegible]

2014. T[illegible] publica[illegible] unem[illegible] pre[illegible] ir[illegible]

3097. The Department of Industrial Relations, Division of Apprenticeship Standards, shall provide services to the Department of Human Resources Development, as requested by and contracted for, with that department. Such federal funds as are available to the Department of Industrial Relations, Division of Apprenticeship Standards, for the purpose of developing and maintaining apprenticeship and on-the-job training programs for eligible persons described in Section 10500 of the Unemployment Insurance Code, shall be directed to the support of the Department of Human Resources Development clients.

The Division of Apprenticeship Standards shall continue in the Department of Industrial Relations but shall exert maximum effort to persuade sponsors of its registered, nonfederally funded, voluntary apprenticeship and on-the-job training programs to accept to the maximum possible extent the eligible persons as described in Section 10500 of the Unemployment Insurance Code.

The Department of Human Resources Development may request, within the limitations of the funds available to it for this purpose, assignment of at least one Division of Apprenticeship Standards consultant to each area designated by the Director of the Department of Human Resources Development. Such apprenticeship consultant services, when funded and requested, shall be provided to the area offices of the Department of Human Resources Development.

(Added by Stats. 1968, Ch. 1460.)

3098. An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. When specifically requested by a local joint apprenticeship committee, the division shall notify the local joint apprenticeship committee regarding all such awards applicable to the joint apprenticeship committee making the request. Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.

(Amended by Stats. 1974, Ch. 1095.)

PARKER'S 1999 CALIFORNIA LABOR CODE

LEXIS LAW PUBLISHING

710.18. Enacted 1961. Repealed 1967 ch. 1505.

1710.19-1710.25. Enacted 1961. Repealed 1970 1399.

1710.23a-1710.236. Enacted 1965. Repealed 0 ch. 1399.

1710.30-1710.53. Enacted 1961. Repealed 1970 1399.

PART 7

PUBLIC WORKS AND PUBLIC AGENCIES

Chapter 1

Public Works

Article 1

Scope and Operation

Article 1.5

Right of Action

Article 2

Wages

Article 3

Working Hours

Article 4

Employment of Aliens [Repealed]

Article 5

Securing Workers' Compensation

Article 1

Scope and Operation

§ 1720. Public Works—Defined

As used in this chapter, "public works" means:

(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

(1937 ch. 90, 1953 ch. 1706, 1972 ch. 717, 1973 ch. 77, 1989 ch. 278 urgency eff. Aug. 7, 1989)

Compliance: All contracts that are governed by Sections 1775, 1776, and 1813 of the Labor Code shall comply with the provisions of Chapter 1 (commencing with Section 1720 of Part of Division 2 of the Labor Code that are applicable to contracts for public works projects. (1997 ch 757)

§ 1720.2. Public Works—Under Private Contract

For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public works" also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

(c) Either of the following conditions exist:

(1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

(2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work.

(1974 ch. 1027, 1980 ch. 962)

§ 1720.3. Public Works—Refuse Hauling

For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California.

(1976 ch. 1084, 1983 chs. 142, 143)

§ 1720.4. Work Not Deemed "Public Works"

For the limited purposes of this chapter, "public works" shall not include any otherwise covered work which meets all the following conditions:

(a) The work is performed entirely by volunteer labor.

(b) The work involves facilities or structures which are, or will be, used exclusively by, or primarily for or on behalf of, private nonprofit community organizations including, but not limited to, charitable, youth, service, veterans, and sports groups or associations.

(c) The work will not have an adverse impact on employment.

(d) The work is approved by the Director of Industrial Relations as meeting the requirements of this section.

For purposes of subdivision (c), the director shall request information on whether or not the work will have an adverse impact on employment from the appropriate local or state organization of duly authorized employee representatives of workers employed on public works.

(1989 ch. 1224)

§ 1721. Political Subdivision—Defined

"Political subdivision" includes any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts.

(1937 ch. 90, 1953 ch. 1283, 1985 ch. 239)

§ 1722. Awarding Body—Defined

"Awarding body" or "body awarding the contract" means department, board, authority, officer or agent awarding a contract for public work.

(1937 ch. 90)

§ 1722.1. Contractor, Subcontractor—Defined

For the purposes of this chapter, "contractor" and "subcontractor" include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works pursuant to this article and Article 2 (commencing with Section 1770).

(1978 ch. 1249, 1982 ch. 454)

§ 1723. Workman—Defined

"Workman" includes laborer, workman, or mechanic.

(1937 ch. 90)

§ 1724. Locality in Which Public Work Performed—Defined

"Locality in which public work is performed" means the county in which the public work is done in cases in which the contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases.

(1937 ch. 90)

§ 1725. Alien—Defined

"Alien" means any person who is not a born or fully naturalized citizen of the United States.

(1937 ch. 90)

§ 1726. Awards of Contracts—Cognizance of Violations

The body awarding the contract for public work shall take cognizance of violations of the provisions of this

chapter committed in the course of the execution of the contract.

(1937 ch. 90)

§ 1727. Withholding of Forfeited Sums

Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body.

(1937 ch. 90, 1945 ch. 1431, 1992 ch. 1342)

§ 1728. Cash in Lieu of Forfeited Sum

In cases of contracts with assessment or improvement districts where full payment is made in the form of a single warrant, or other evidence of full payment, after completion and acceptance of the work, the awarding body shall accept from the contractor in cash a sum equal to, and in lieu of, any amount required to be withheld, retained, or forfeited under the provisions of this section, and said awarding body shall then release the final warrant or payment in full.

(1937 ch. 90)

§ 1729. Withholding of Penalties from Subcontractor

It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law.

(1937 ch. 90)

§ 1730. Transfer of Wages and Penalties to Labor Commissioner

Every awarding body shall transfer all wages and penalties that have been withheld pursuant to Section 1727 to the Labor Commissioner, for disbursement pursuant to Section 1775, whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties that are withheld pursuant to Section 1727 within 90 days after the completion of the contract and formal acceptance of the job.

(1992 ch. 1342)

Former section 1730: Enacted 1937 and repealed 1992 ch. 1342.

§ 1731. Suit Against Awarding Body—Wages and Penalties Retained

If suit is brought against the awarding body within the 90-day period and formal notice thereof is given to the awarding body within the 90-day period either by service of summons or by registered mail which is received within the 90-day period, the wages and penalties shall be retained by the awarding body pending the outcome of the suit, and be forwarded to the Labor Commissioner for disbursement pursuant to Section 1775 if the contractor does not prevail in the action. Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

(1937 ch. 90, 1992 ch. 1342)

§ 1732. Recovery of Wages or Penalties—Time for Action

Notwithstanding any other provision of law, the time for action by the contractor or his or her assignee for the recovery of wages or penalties is limited to the 90-day period and suit on the contract for alleged breach thereof in not making the payment is the exclusive remedy of the contractor or his or her assignees with reference to those wages or penalties.

(1937 ch. 90, 1992 ch. 1342)

§ 1733. Recovery of Wages and Penalties—Suit

Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the contractor or his or her assignee to establish his or her right to the wages or penalties withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body or the Division of Labor Standards Enforcement.

The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action.

(1937 ch. 90, 1957 ch. 398, 1988 ch. 160, 1992 ch. 1342)

§ 1734. Fines, Penalties—Deposit

Any court collecting any fines or penalties under the criminal provisions of this chapter or any of the labor laws pertaining to public works shall as soon as practicable after the receipt thereof deposit same with the county treasurer of the county in which such court is situated. Amounts so deposited shall be paid at least once a month by warrant of the county auditor drawing upon requisition of the judge or clerk of said court, to the State Treasurer for deposit in the General Fund.

(1937 ch. 90, 1953 ch. 623)

§ 1735. Employment Discrimination—Prohibited

No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of such persons, except as provided in Section 12940 of the Government Code, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter.

(1939 ch. 643, 1965 ch. 283, 1976 ch. 1174, 1980 ch. 992, 1992 ch. 913)

§§ 1736-1739. Reserved.

§ 1740. Bids Subject to Modification

Notwithstanding any other provision of this chapter or any other law of this State, except limitations imposed by the Constitution, the legislative body of a political subdivision which has received or is to receive a loan or grant of funds from the Federal Government or a federal department or agency for public works of that political subdivision, may provide in its call for bids in connection with such public works that all bid specifications and contracts and other procedures in connection with bids or contracts shall be subject to modification to comply with revisions in federal minimum wage schedules without the necessity of republication or duplication of other formal statutory requirements.

(1957 ch. 1992)

§ 1741. Enacted 1963. Repealed 1971 ch. 438.

Article 1.5

Right of Action

§ 1750. Cause of Action by Second Lowest Bidder

(a)(1) The second lowest bidder, and any person, firm, association, trust, partnership, labor organization, corporation, or other legal entity which has, prior to the letting of the bids on the public works project in question, entered into a contract with the second lowest bidder, that suffers damage as a proximate result of a competitive bid for a public works project, as defined in subdivision (b), not being accepted due to the successful bidder's violation, as evidenced by the conviction of the successful bidder therefor, of any provision of Division 4 (commencing with Section 3200) or of the Unemployment Insurance Code, may bring an action for damages in the appropriate state court against the violating person or legal entity.

(2) There shall be a rebuttable presumption that a successful bidder who has been convicted of a violation of any provision of Division 4 (commencing with Section 3200) of this code or of the Unemployment Insurance Code, or of both, was awarded the bid because that successful bidder was able to lower the bid due to this violation or these violations occurring on the contract for public work awarded by the public agency.

(b) For purposes of this article:

(1) "Public works project" means the construction, repair, remodeling, alteration, conversion, modernization, improvement, rehabilitation, replacement, or renovation of a public building or structure.

(2) "Second lowest bidder" means the second lowest qualified bidder deemed responsive by the public agency awarding the contract for public work.

(3) The "second lowest bidder" and the "successful bidder" may include any person, firm, association, corporation, or other legal entity.

(c) In an action brought pursuant to this section, the court may award costs and reasonable attorney's fees, in an amount to be determined in the court's discretion, to the prevailing party.

(d) For purposes of an action brought pursuant to this section, employee status shall be determined pursuant to Division 4 (commencing with Section 3200) with respect to alleged violations of that division, pursuant to the Unemployment Insurance Code with respect to alleged violations of that code, and pursuant to Section 2750.5 with respect to alleged violations of either Division 4 (commencing with Section 3200) or of the Unemployment Insurance Code.

(e) The right of action established pursuant to this article shall not be construed to diminish rights of action established pursuant to Section 19102 of, and Article 1.8 (commencing with Section 20104.70) of Chapter 1 of Part 3 of Division 2 of, the Public Contract Code.

(f) A second lowest bidder who has been convicted of a violation of any provision of Division 4 (commencing with Section 3200) of the Labor Code or of the Unemployment Insurance Code, or both, within one year prior to filing the bid for public work, and who has failed to take affirmative steps to correct that violation or those violations, is prohibited from taking any action authorized by this section.

(1991 ch. 906)

Article 2

Wages

§ 1770. Determination of Prevailing Per Diem Wage—Director

The Director of the Department of Industrial Relations shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773, and the director's determination in the matter shall be final except as provided in Section 1773.4. Nothing in this article, however, shall prohibit the payment of more than the general prevailing rate of wages to any workman employed on public work. Nothing in this act shall permit any overtime work in violation of Article 3 of this chapter.

(1937 ch. 90, 1953 ch. 1706, 1976 ch. 281)

§ 1771. Prevailing Per Diem Wage Required

Except for public works projects of one thousand dollars ($1,000) or less, not less that the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

(1937 ch. 90, 1953 ch. 1706, 1974 ch. 1202, 1976 ch. 861, 1981 ch. 449)

§ 1771.5. Projects Excluded from Prevailing Per Diem Wage Requirement upon Election of Labor Compliance Program

(a) Notwithstanding Section 1771, an awarding body shall not require the payment of the general prevailing rate [illegible] diem wages or the general prevailing rate of per [illegible] wages for holiday and overtime work for any public works project of twenty-five thousand dollars ($25,000) or less when the project is for construction work, or for any public works project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program pursuant to subdivision (b) for every public works project under the authority of the awarding body.

(b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements:

(1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of this chapter.

(2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.

(3) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.

(4) The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chap

(5) [illegible] awarding body shall withhold contract payments when payroll records are delinquent or inadequate.

(6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

(1989 ch. 1224)

§ 1771.6. Deposit of Fines or Penalties into General Fund

Notwithstanding Sections 1730, 1731, and 1734, any political subdivision which enforces this chapter in accordance with Section 1771.5 shall, at the expiration of 90 days after the completion of the contract and the formal acceptance of the job, deposit all penalties or forfeitures withheld from any contract payment in the general fund of the political subdivision. Any court collecting any fines or penalties under the criminal provisions of this chapter, or any of the labor laws pertaining to public works, when the fines and penalties resulted from enforcement actions by a political subdivision pursuant to Section 1771.5, shall deposit the fines or penalties in the general fund of the political subdivision.

(1989 ch. 1224)

§ 1771.7. Appeal of Enforcement Action

A contractor may appeal an enforcement action by a political subdivision pursuant to Section 1771.5 to the Director of Industrial Relations. Any ruling by the director shall be final and, notwithstanding Section 1732, any appeal shall waive the contractor's right to bring court action on the same issue.

(1989 ch. 1224)

§ 1772. Workers Employed Upon Public Work

Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

(1937 ch. 90, 1992 ch. 1342)

§ 1773. Adoption of Prevailing Per Diem Wage

The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract from the Director of the Department of Industrial Relations. The holidays upon which such rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workman employed on the project.

In determining such rates, the Director of the Department of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.

If the director determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the director may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the director determines that another rate should be adopted.

(1937 ch. 90, 1953 ch. 1706, 1968 ch. 699 oper. July 1, 1969, 1971 ch. 785, 1976 ch. 281)

§ 1773.1. Per Diem Wages—Inclusions

Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel time, and subsistence pay as provided for in Section 1773.8, apprenticeship or other training programs authorized by Section 3093, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

For the purpose of determining such per diem wages for contracts entered into with the state, the representative of any craft, classification or type of workman needed to execute the contracts entered into with the state shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids.

(1959 ch. 2173, 1969 ch. 1502, 1976 ch. 281)

§ 1773.2. Call for Bids—Specification of Wage Rates

The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site.

(1971 ch. 785, 1974 ch. 876, 1977 ch. 423, 1992 ch. 1342)

§ 1773.3. Apprenticeship Standards Division—Public Works Awards

An awarding agency whose public works contract falls within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. When specifically requested by a local joint apprenticeship committee, the division shall notify the local joint apprenticeship committee regarding all such awards applicable to the joint apprenticeship committee making the request. Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.

(Formerly § 3098, 1972 ch. 1399, 1974 ch. 1095, renumbered § 1773.3, 1978 ch. 1249)

Former section 1773.3: Enacted 1959 and repealed 1976 ch. 281.

§ 1773.4. Petition to Review Wage Rate Determination

Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body may, within 20 days after commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code. Within two days thereafter, a copy of such petition shall be filed with the awarding body. The petition shall set forth the facts upon which it is based. The Director of Industrial Relations or his authorized representative shall, upon notice to the petitioner, the awarding body and such other persons as he deems proper, including the recognized collective bargaining representatives for the particular crafts, classifications or types of work involved, institute an investigation or hold a hearing. Within 20 days after the filing of such petition, or within such longer period as agreed upon by the director, the awarding body, and all the interested parties, he shall make a determination and transmit the same in writing to the awarding body and to the interested parties.

Such determination shall be final and shall be the determination of the awarding body. Upon receipt by it of the notice of the filing of such petition the body awarding the contract or authorizing the public work shall extend the closing date for the submission of bids or the starting of work until five days after the determination of the general prevailing rates of per diem wages pursuant to this section.

Upon the filing of any such petition, notice thereof shall be set forth in the next and all subsequent publications by the awarding body of the call for bids. No other notice need be given to bidders by the awarding body by publication or otherwise. The determination of the director shall be included in the contract.

(1953 ch. 1706, 1968 ch. 699 oper. July 1, 1969, 1969 ch. 301)

§ 1773.5. Enforcement of Public Works Labor Laws

The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out

this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter.

(1953 ch. 1706, 1989 ch. 1224)

§ 1773.6. Change in Prevailing Wage Rate

If during any quarterly period the Director of Industrial Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall make such change available to the awarding body and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any contract for which the notice to bidders has been published.

(1953 ch. 1706, 1957 ch. 1932, 1963 ch. 1786 urgency eff. Oct. 1, 1963, 1976 ch. 281)

§ 1773.7. Applicability of Government Code

The provisions of Section 11250 of the Government Code shall not be applicable to Sections 1773, 1773.4, and 1773.6.

(1[illegible] ch. 281)

Former section 1773.7: Enacted 1953 and repealed 1976 ch. 281.

§ 1773.8. Payment of Travel, Subsistence Payments

The body awarding any contract for public work shall include in the specifications for the contract a requirement requiring the payment of travel and subsistence payments to each workman needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed in accordance with this section.

To establish such travel and subsistence payments for contracts entered into with the state, each city, county and city and county, the representative of any craft, classification or type of workman needed to execute the contracts shall file with the Department of Industrial Relations fully executed copies of collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter shall establish such travel and subsistence payments whenever filed 30 days prior to the call for bids.

(1968 ch. 880)

§ 17 Specified Prevailing Wage—Must Be Paid

The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

(1937 ch. 90)

[Section 1775 effective until January 1, 2003; see also Section 1775 set out below]

§ 1776. Payment Less Than Stipulated Rate—Penalty

(a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the mistake, inadvertence, or neglect of the contractor or subcontractor in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or the willful failure by the contractor or subcontractor to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor or subcontractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages. If the Division of Labor Standards Enforcement determines that employees of a subcontractor were not paid the general prevailing rate of per diem wages and if the body awarding the contract under which the employees performed work did not retain sufficient money under the contract to pay those employees the balance of wages owed under the general prevailing rate of per diem wages, the contractor shall withhold an amount of moneys due the subcontractor sufficient to pay those employees the general prevailing rate of per diem wages if requested by the Division of Labor Standards Enforcement. The contractor shall pay any money retained from and owed to a subcontractor upon receipt of notification by the Division of Labor Standards Enforcement that the wage complaint has been resolved. If notice of the resolution of the wage complaint has not been received by the contractor within 180 days of the filing of a valid notice of completion or acceptance of the public works project, whichever occurs later, the contractor shall pay all moneys retained from the subcontractor to the awarding body. The moneys shall be retained by the awarding body pending the final decision of an enforcement action, and be forwarded to the Labor Commissioner for disbursement pursuant to subdivision (d) if the subcontractor does not prevail in the action. Wages for workers who cannot be located after a diligent search by the Labor Commissioner shall be deposited in the Industrial Relations Unpaid Wage Fund pursuant to subdivision (c) of Section 96.7. Penalties shall be paid into the General Fund.

If the subcontractor prevails in the enforcement action, the awarding body shall release any funds retained pursuant to this subdivision to the contractor within 10 working days from the date of the final decision of the court.

(d) To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section or Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the division, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor and subcontractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor and subcontractor to establish that the penalties and amounts demanded in the action are not due. The contractor and subcontractor shall be jointly and severally liable in an enforcement action for any wages due. Following entry of a judgment for joint and several liability, the division shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim for wages against the contractor. From the amount collected from the subcontractor, the wage claim shall be satisfied prior to the amount being applied to penalties.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

(e) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

(1937 ch. 90, 1957 ch. 397, 1963 ch. 467, 1978 ch. 1249, 1989 ch. 1224, 1992 ch. 1342, 1997 ch. 757)

Compliance: All contracts that are governed by Sections 1775, 1776, and 1813 of the Labor Code shall comply with the provisions of Chapter 1 (commencing with Section 1720 of Part of Division 2 of the Labor Code that are applicable to contracts for public works projects. (1997 ch 757)

[Section 1775 operative January 1, 2003; see also Section 1775 set out above]

§ 1775. Payment Less Than Stipulated Rate—Penalty

The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the

Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

This section shall become operative on January 1, 200

/ ch. 90, 1957 ch. 397, 1963 ch. 467, 1978 ch. 1249, 1989 ch. 1224, 1992 ch. 1342, 1997 ch. 757)

[Section 1776 effective until January 1, 2003; see also Section 1776 set out below]

§ 1776. Payroll Records Required

(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision shall be certified and shall be available for insp at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated in a manner so as to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

(1978 ch. 1249, 1983 ch. 681, 1992 ch. 1342, 1993 ch. 589, 1997 ch. 757)

Compliance: All contracts that are governed by Sections 1776, 1775, and 1813 of the Labor Code shall comply with the provisions of Chapter 1 (commencing with Section 1720 of Part of Division 2 of the Labor Code that are applicable to contracts for public works projects. (1997 ch. 757)

Former section 1776: Enacted 1937 and repealed 1978 ch. 1249.

[Section 1776 effective January 1, 2003; see also Section 1776 set out above]

§ 1776. Payroll Records Required

(a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement, shall be marked or obliterated in a manner so as to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title 1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(j) This section shall become operative January 1, 2003.

(1978 ch. 1249, 1983 ch. 681, 1992 ch. 1342, 1993 ch. 589, 1997 ch. 757, 1998 ch. 485 oper. Jan. 1, 2003)

§ 1777. Violation—Misdemeanor

Any officer, agent, or representative of the State or of any political subdivision who wilfully violates any provision of this article, and any contractor, or subcontractor, or agent or representative thereof, doing public work who neglects to comply with any provision of Section 1776 is guilty of a misdemeanor.

(1937 ch. 90)

§ 1777.1. Violation of Chapter with Intent to Defraud—Ineligibility to Bid on Contract

(a) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible for a period of not less than one year or more than three years to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

(b) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

(c) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

Not less than semiannually, the Labor Commissioner shall publish and distribute to awarding bodies a list of contractors who are ineligible to bid on or be awarded a public works contract, or to perform work as a subcontractor on a public works project pursuant to this chapter. The list shall contain the name of the contractor, the Contractor's State License Board license number of the contractor, and the effective period of debarment of the contractor.

(d) The Labor Commissioner shall adopt rules and regulations for the administration and enforcement of this section, the definition of terms, and appropriate penalties.

(Amended ch. 1224, 1998 ch. 443)

§ 1777.5. Apprentices—Employment upon Public Works

Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed, and shall be employed only at the work of the craft or trade to which he or she is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him or her, in performing any of the work under the contract or subcontract, employs workers in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. Every contractor and subcontractor shall submit contract award information to the applicable joint apprenticeship committee that includes an estimate of journeyman hours to be performed under the contract, the number of apprentices to be employed, and the approximate dates the apprentices will be employed. There is an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of work performed by apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentices work for every five hours of labor performed by a journeyman. However, the minimum ratio for the land surveyor classification shall not be less than one apprentice for each five journeymen.

Any ratio shall apply during any day or portion of a day when any journeyman, or the higher standard stipulated by the joint apprenticeship committee, is employed at the job site and shall be computed on the basis of the hours worked during the day by journeymen so employed, except for the land surveyor classification. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract. However, the contractor shall endeavor, to

the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the job site. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of a joint apprenticeship committee, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

The contractor or subcontractor, if he or she is covered by this section, upon the issuance of the approval certificate, or if he or she has been previously approved in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he or she employs apprentices in the craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by a journeyman or, in the land surveyor classification, one apprentice for each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio as set forth in this section. This section does not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor, when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000) or 20 working days. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the hourly ratio required by this section.

"Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council. The joint apprenticeship committee has the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(b) The number of apprentices in training in the area exceeds a ratio of 1 to 5.

(c) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis.

(d) Assignment of an apprentice to any work performed under a public works contract would create a condition that would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When exemptions are granted to an organization that represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis, the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him or her, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he or she employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but, where the trust fund administrators are unable to accept the funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of the contributions in computing his or her bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of the contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to Section 3081.

(1937 ch. 872, 1939 ch. 971, 1957 ch. 699, 1968 ch. 1411, 1969 ch. 1260 urgency eff. Aug. 31, 1969, 1972 chs. 1087, 1399, 1974 ch. 965, 1976 chs. 538, 1179 urgency eff. Sept. 22, 1976, 1989 ch. 1224, 1997 ch. 17)

§ 1777.6. Employment Discrimination—Unlawful

It shall be unlawful for an employer or a labor union to refuse to accept otherwise qualified employees as registered apprentices on any public works, on the ground of the race, religious creed, color, national origin, ancestry, sex, or age, except as provided in Section 3077, of such employee.

(1951 ch. 1192, 1965 ch. 283, 1971 ch. 280, 1976 ch. 1179 urgency eff. Sept. 22, 1976)

§ 1777.7. Noncompliance with Law Governing Apprenticeship

(a) In the event a contractor or subcontractor willfully fails to comply with Section 1777.5, the Director of Industrial Relations shall deny to the contractor or subcontractor, both individually and in the name of the business entity under which the contractor or subcontractor is doing business, the right to bid on, or to receive, any public works contract for a period of up to one year for the first violation and for a period of up to three years for the second and subsequent violations. Each period of debarment shall run from the date the determination of noncompliance by the Administrator

of Apprenticeship becomes an order of the California Apprenticeship Council.

(b) A contractor or subcontractor who violates Section 1777.5 shall forfeit as a civil penalty the sum of fifty dollars ($50) for each calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(c) In lieu of the penalty provided for in subdivision (a) or (b), the director may for a first time violation and with the concurrence of the joint apprenticeship committee, order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the period of noncompliance.

(d) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(e) The interpretation and enforcement of Section 1777.5 and this section shall be in accordance with the rules and procedures of the California Apprenticeship Council.

(1989 ch. 1224)

Former section 1777.7: Enacted 1976 and repealed 1989 ch. 1224.

§ 1777.8. Enacted 1990. Repealed 1991 ch. 640.

§ 1778. Illegal Taking of Wages—Felony

Every person, who individually or as a representative of an awarding or public body or officer, or as a contractor or subcontractor doing public work, or agent or officer thereof, who takes, receives, or conspires with another to take or receive, for his own use or the use of any other person any portion of the wages of any workman or working subcontractor, in connection with services rendered upon any public work is guilty of a felony.

(1937 ch. 90)

§ 1779. Fees for Employment Registration, Information—Misdemeanor

Any person or agent or officer thereof who charges, collects, or attempts to charge or collect, directly or indirectly, a fee or valuable consideration for registering any person for public work, or for giving information as to where such employment may be procured; or for placing, assisting in placing, or attempting to place, any person in public work, whether the person is to work directly for the State, or any political subdivision or for a contractor or subcontractor doing public work is guilty of a misdemeanor.

(1937 ch. 90)

§ 1780. Fees for Filling Work Orders—Misdemeanor

Any person acting on behalf of the State or any political subdivision, or any contractor or subcontractor or agent or representative thereof, doing any public work who places any order for the employment of a workman on public work where the filling of the order for employment involves the charging of a fee, or the receiving of a valuable consideration from any applicant for employment is guilty of a misdemeanor.

(1937 ch. 90)

§ 1781. Enacted 1937. Repealed 1957 ch. 396.

Article 3

Working Hours

§ 1810. Legal Day's Work—Eight Hours

Eight hours labor constitutes a legal day's work in all cases where the same is performed under the authority of any law of this State, or under the direction, or control, or by the authority of any officer of this State acting in his official capacity, or under the direction, or control or by the authority of any municipal corporation, or of any officer thereof. A stipulation to that effect shall be made a part of all contracts to which the State or any municipal corporation therein is a party.

(1937 ch. 90)

§ 1811. Time of Service

The time of service of any workman employed upon public work is limited and restricted to 8 hours during any one calendar day, and 40 hours during any one calendar week, except as hereinafter provided for under Section 1815.

(1937 ch. 90, 1961 ch. 238, 1963 ch. 964)

§ 1812. Records of Working Hours—Maintenance

Every contractor and subcontractor shall keep an accurate record showing the name of and actual hours worked each calendar day and each calendar week by each worker employed by him or her in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the awarding body and to the Division of Labor Standards Enforcement.

(Formerly § 1814, 1937 ch. 90, 1945 ch. 1431, renumbered § 1812, 1961 ch. 238, 1963 ch. 964, 1988 ch. 160)

[Section 1813 effective until January 1, 2003; see also Section 1813 set out below]

§ 1813. Working Hours Violations—Penalty

The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which the workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the officer of the state or political subdivision who is authorized to pay the contractor money due him or her under the contract.

This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

(Formerly § 1815, 1937 ch. 90, 1957 ch. 399, renumbered § 1813, 1961 ch. 238, 1963 ch. 964, 1997 ch. 757)

Compliance: All contracts that are governed by Sections 1775, 1776, and 1813 of the Labor Code shall comply with the provisions of Chapter 1 (commencing with Section 1720 of Part of Division 2 of the Labor Code that are applicable to contracts for public works projects. (1997 ch. 757)

Former section 1813: Enacted 1937 and repealed 1961 ch. 238.

[Section 1813 effective January 1, 2003; see also Section 1813 set out above]

§ 1813. Working Hours Violations—Penalty

The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which the workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the officer of the state or political subdivision who is authorized to pay the contractor money due him or her under the contract.

This section shall become operative January 1, 2003.

(Formerly § 1815, 1937 ch. 90, 1957 ch. 399, renumbered § 1813, 1961 ch. 238, 1963 ch. 964, 1997 ch. 757, 1998 ch. 485 oper. Jan. 1, 2003)

§ 1814. Violation—Misdemeanor

Any officer, agent, or representative of the State or any political subdivision who violates any provision of this article and any contractor or subcontractor or agent or representative thereof doing public work who neglects to comply with any provision of Section 1812 is guilty of a misdemeanor.

(Formerly § 1816, 1937 ch. 90, renumbered § 1814, 1961 ch. 238)

§ 1815. Overtime—Compensation

Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1 ½ times the basic rate of pay.

(Formerly § 1817, 1941 ch. 759, renumbered § 1815, 1961 ch. 238, 1963 ch. 964)

§ 1816. Renumbered § 1814 and amended 1961 ch. 238.

§ 1817. Renumbered § 1815 and amended 1961 ch. 238.

Article 4

Employment of Aliens

[Repealed]

§§ 1850-1854. Enacted 1937. Repealed 1970 ch. 652.

Article 5

Securing Workers' Compensation

§ 1860. Payment of Workers' Compensation—Required

The awarding body shall cause to be inserted in every public works contract a clause providing that, in accordance with the provisions of Section 3700 of the Labor Code, every contractor will be required to secure payment of compensation to his employees.

(1965 ch. 1000)

§ 1861. Certificate of Awareness of Compensation Requirements

Each contractor to whom a public works contract is awarded shall sign and file with the awarding body the following certification prior to performing the work of the contract: "I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract."

(1965 ch. 1000, 1979 ch. 373)

Chapter 2

Public Agencies

Article 1

Municipal Employees

PARKER'S 2003 CALIFORNIA LABOR CODE

With Excerpts from the Legislative Counsel's
Digest of New and Amended Code Sections

LexisNexis™

Article 1

Scope and Operation

§ 1720. "Public works"; "Paid for in whole or in part out of public funds"

(a) As used in this chapter, "public works" means:

(1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

(2) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" does not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(3) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(4) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(5) The laying of carpet in a public building done under contract and paid for in whole or in part out of public funds.

(6) Public transportation demonstration projects authorized pursuant to Section 143 of the Street
Highways Code.

(b) For purposes of this section, "paid for in wl
in part out of public funds" means all of the foll

(1) The payment of money or the equivalent of
by the state or political subdivision directly to
behalf of the public works contractor, subcontrac
developer.

(2) Performance of construction work by the s
political subdivision in execution of the project.

(3) Transfer by the state or political subdivisio
asset of value for less than fair market price.

(4) Fees, costs, rents, insurance or bond prer
loans, interest rates, or other obligations that
normally be required in the execution of the co
that are paid, reduced, charged at less than fair
value, waived, or forgiven by the state or p
subdivision.

(5) Money loaned by the state or political subd
that is to be repaid on a contingent basis.

(6) Credits that are applied by the state or p
subdivision against repayment obligations to th
or political subdivision.

(c) Notwithstanding subdivision (b):

(1) Private residential projects built on privat
erty are not subject to the requirements of this
unless the projects are built pursuant to an agr
with a state agency, redevelopment agency, o
public housing authority.

(2) If the state or a political subdivision req
private developer to perform construction, alt
demolition, installation, or repair work on a
work of improvement as a condition of reg
approval of an otherwise private development
and the state or political subdivision contrib
more money, or the equivalent of money, to the
project than is required to perform this public in
ment work, and the state or political subdivisio
tains no proprietary interest in the overall proje
only the public improvement work shall ther
come subject to this chapter.

(3) If the state or a political subdivision reimb
private developer for costs that would norm
borne by the public, or provides directly or indi
public subsidy to a private development project
de minimis in the context of the project, an otl
private development project shall not thereby
subject to the requirements of this chapter.

(4) The construction or rehabilitation of af
housing units for low- or moderate-income
pursuant to paragraph (5) or (7) of subdivisio
Section 33334.2 of the Health and Safety Code
paid for solely with moneys from a Low and M
Income Housing Fund established pursuant to
33334.3 of the Health and Safety Code or that
for by a combination of private funds and fund
able pursuant to Section 33334.2 or 33334.3
Health and Safety Code do not constitute a proj
is paid for in whole or in part out of public fun

(5) "Paid for in whole or in part out of publi
does not include tax credits provided purs

tion 17053.49 or 23649 of the Revenue and Taxation
de.

(6) Unless otherwise required by a public funding program, the construction or rehabilitation of privately owned residential projects is not subject to the requirements of this chapter if one or more of the following conditions are met:

(A) The project is a self-help housing project in which fewer than 500 hours of construction work associated with the homes are to be performed by the homebuyers.

(B) The project consists of rehabilitation or expansion work associated with a facility operated on a not-for-profit basis as temporary or transitional housing for homeless persons with a total project cost of less than twenty-five thousand dollars ($25,000).

(C) Assistance is provided to a household as either mortgage assistance, downpayment assistance, or for the rehabilitation of a single-family home.

(D) The project consists of new construction, or expansion, or rehabilitation work associated with a facility developed by a nonprofit organization to be operated on a not-for-profit basis to provide emergency or transitional shelter and ancillary services and assistance to homeless adults and children. The nonprofit organization operating the project shall provide, at no profit, not less than 50 percent of the total project cost from nonpublic sources, excluding real property that is transferred or leased. Total project cost includes the value of donated labor, materials, architectural, and engineering services.

(E) The public participation in the project that would otherwise meet the criteria of subdivision (b) is public funding in the form of below-market interest rate loans for a project in which occupancy of at least 40 percent of the units is restricted for at least 20 years, by deed or regulatory agreement, to individuals or families earning no more than 80 percent of the area median income.

(d) Notwithstanding any provision of this section to the contrary, the following projects shall not, solely by reason of this section, be subject to the requirements of this chapter:

(1) Qualified residential rental projects, as defined by Section 142 (d) of the Internal Revenue Code, financed in whole or in part through the issuance of bonds that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8869.80) of the Government Code on or before December 31, 2003.

(2) Single-family residential projects financed in whole or in part through the issuance of qualified mortgage revenue bonds or qualified veterans' mortgage bonds, as defined by Section 143 of the Internal Revenue Code, or with mortgage credit certificates under a Qualified Mortgage Credit Certificate Program, as defined by Section 25 of the Internal Revenue Code, that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8869.80) of the Government Code on or before December 31, 2003.

(3) Low-income housing projects that are allocated federal or state low-income housing tax credits pursuant to Section 42 of the Internal Revenue Code, Chapter 3.6 of Division 31 (commencing with Section 50199.4) of the Health and Safety Code, or Section 12206, 17058, or 23610.5 of the Revenue and Taxation Code, on or before December 31, 2003.

(e) If a statute, other than this section, or a regulation, other than a regulation adopted pursuant to this section, or an ordinance or a contract applies this chapter to a project, the exclusions set forth in subdivision (d) do not apply to that project.

(f) For purposes of this section, references to the Internal Revenue Code mean the Internal Revenue Code of 1986, as amended, and include the corresponding predecessor sections of the Internal Revenue Code of 1954, as amended.

(g) The amendments made to this section by either Chapter 938 of the Statutes of 2001 or the act adding this subdivision shall not be construed to preempt local ordinances requiring the payment of prevailing wages on housing projects.

Enacted 1937. Amended Stats 1953 ch 1706 § 1; Stats 1972 ch 717 § 1; Stats 1973 ch 77 § 19; Stats 1989 ch 278 § 1. Amended Stats 2000 ch 881 § 1 (SB 1999); Stats 2001 ch 938 § 2 (SB 975). Amended Stats 2002 ch 1048 § 1 (SB 972).

§ 1720.2. "Public works" as including construction work done under private contract

For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public works" also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

(c) Either of the following conditions exist:

(1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

(2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work.

Added Stats 1974 ch 1027 § 1. Amended Stats 1980 ch 962 § 1.

§ 1720.3. Public works as including hauling of refuse

For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California, or any political subdivision of the state.

Added Stats 1976 ch 1084 § 1. Amended 1983 Stats ch 143 § 201 (ch 142 prevails), ch 142 § 101. Amended Stats 1999 ch 220 § 1 (AB 302).

§ 1720.4. Work not included under "public works"

For the limited purposes of this chapter, "public works" shall not include any otherwise covered work which meets all the following conditions:

(a) The work is performed entirely by volunteer labor.

(b) The work involves facilities or structures which are, or will be, used exclusively by, or primarily for or on behalf of, private nonprofit community organizations including, but not limited to, charitable, youth, service, veterans, and sports groups or associations.

(c) The work will not have an adverse impact on employment.

(d) The work is approved by the Director of Industrial Relations as meeting the requirements of this section.

For purposes of subdivision (c), the director shall request information on whether or not the work will have an adverse impact on employment from the appropriate local or state organization of duly authorized employee representatives of workers employed on public works.

Added Stats 1989 ch 1224 § 1.

§ 1721. "Political subdivision"

"Political subdivision" includes any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts.

Enacted 1937. Amended Stats 1953 ch 1283 § 1; Stats 1985 ch 239 § 1.

§ 1722. "Awarding body" or "body awarding contract"

"Awarding body" or "body awarding the contract" means department, board, authority, officer or agent awarding a contract for public work.

Enacted 1937.

§ 1722.1. "Contractor" and "subcontractor"

For the purposes of this chapter, "contractor" and "subcontractor" include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works pursuant to this article and Article 2 (commencing with Section 1770).

Added Stats 1978 ch 1249 § 1. Amended Stats 1982 ch 454 § 132.

§ 1723. "Worker"

"Worker" includes laborer, worker, or mechanic.

Enacted 1937. Amended Stats 2000 ch 954 § 2 (AB 1646), operative July 1, 2001.

Note—Stats 2000 ch 954 provides:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 Code of Civil Procedure. It is not the intent of this act to remedies otherwise authorized by law to remedy violations chapter.

SEC. 21. This act shall become operative on July 1, 2001.

§ 1724. "Locality in which public work is performed"

"Locality in which public work is performed" me the county in which the public work is done in cas which the contract is awarded by the State, and me the limits of the political subdivision on whose be the contract is awarded in other cases.

Enacted 1937.

§ 1725. "Alien"

"Alien" means any person who is not a born or n naturalized citizen of the United States.

Enacted 1937.

§ 1726. Cognizance of violations by body awarding contract

The body awarding the contract for public work g take cognizance of violations of the provisions of chapter committed in the course of the execution of contract, and shall promptly report any suspe violations to the Labor Commissioner.

If the awarding body determines as a result of own investigation that there has been a violation of chapter and withholds contract payments, the pr dures in Section 1771.6 shall be followed.

Enacted 1937. Amended Stats 2000 ch 954 § 3 (AB 1646), ope July 1, 2001.

Note—Stats 2000 ch 954 provides:

SECTION 1. The Legislature declares that its intent in adoptin act is to provide contractors and subcontractors with a prompt a istrative hearing in the event that the contractor or subcontrac alleged by the Labor Commissioner or an awarding body to violated Labor Code provisions governing the obligations of contr and subcontractors on public works projects, and to provide th exclusive method for review of the decision after the administ hearing is by petition for writ of mandate under Section 1094.5 Code of Civil Procedure. It is not the intent of this act to pr remedies otherwise authorized by law to remedy violations chapter.

SEC. 21. This act shall become operative on July 1, 2001.

§ 1727. Withholding payment of amounts forfeited

(a) Before making payments to the contracto money due under a contract for public work, the awarding body shall withhold and retain therefrom amounts required to satisfy any civil wage and pe assessment issued by the Labor Commissioner u this chapter. The amounts required to satisfy a wage and penalty assessment shall not be disburs the awarding body until receipt of a final order th no longer subject to judicial review.

(b) If the awarding body has not retained suffi money under the contract to satisfy a civil wage penalty assessment based on a subcontractor's

ions, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

Enacted 1937. Amended Stats 1945 ch 1431 § 50; Stats 1992 ch 1342 § 1 (SB 222); Stats 2000 ch 954 § 4 (AB 1646), operative July 1, 2001.

Note—Stats 2000 ch 954 provides:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

SEC. 21. This act shall become operative on July 1, 2001.

§ 1728. Acceptance of cash in lieu of amount withheld, retained or forfeited; Release

In cases of contracts with assessment or improvement districts where full payment is made in the form of a single warrant, or other evidence of full payment, after completion and acceptance of the work, the awarding body shall accept from the contractor in cash a sum equal to, and in lieu of, any amount required to be withheld, retained, or forfeited under the provisions of this section, and said awarding body shall then release the final warrant or payment in full.

Enacted 1937.

§ 1729. Withholding sums by contractor from subcontractor; Recovery of penalty from subcontractor

It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law.

Enacted 1937.

§ 1730. [Section repealed 2001.]

Stats 1992 ch 1342 § 3. Repealed Stats 2000 ch 954 § 5 (AB 1646), operative July 1, 2001. The repealed section related to disposition of penalties and forfeitures.

Former Sections:

Former § 1730, similar to the present section, was enacted in 1937 and repealed Stats 1992 ch 1342 § 2.

§ 1731. [Section repealed 2001.]

Enacted 1937. Amended Stats 1992 ch 1342 § 4 (SB 222). Repealed Stats 2000 ch 954 § 6 (AB 1646), operative July 1, 2001. The repealed section related to retention of wages and penalties pending suit against awarding body.

§ 1732. [Section repealed 2001.]

Enacted 1937. Amended Stats 1992 ch 1342 § 5 (SB 222). Repealed Stats 2000 ch 954 § 7 (AB 1646), operative July 1, 2001. The repealed section related to time for action by contractor and assignee to recover penalties.

§ 1733. [Section repealed 2001.]

Enacted 1937. Amended Stats 1957 ch 398 § 1; Stats 1988 ch 160 § 122. Amended Stats 1992 ch 1342 § 6 (SB 222). Repealed Stats 2000 ch 954 § 8 (AB 1646), operative July 1, 2001. The repealed section related to action by contractor or assignee to recover wages and penalties.

§ 1734. Fines or penalties; Transmission to State Treasurer

Any court collecting any fines or penalties under the criminal provisions of this chapter or any of the labor laws pertaining to public works shall as soon as practicable after the receipt thereof deposit same with the county treasurer of the county in which such court is situated. Amounts so deposited shall be paid at least once a month by warrant of the county auditor drawn upon requisition of the judge or clerk of said court, to the State Treasurer for deposit in the General Fund.

Enacted 1937. Amended Stats 1953 ch 523 § 5.

§ 1735. Prohibited employment discrimination

No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of such persons, except as provided in Section 12940 of the Government Code, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter.

Added Stats 1939 ch 643 § 1. Amended Stats 1965 ch 283 § 8; Stats 1976 ch 1174 § 1; Stats 1980 ch 992 § 10. Amended Stats 1992 ch 913 § 36 (AB 1077).

§ 1736. Confidentiality of employee reporting violation

During any investigation conducted under this part, the Division of Labor Standards Enforcement shall keep confidential the name of any employee who reports a violation of this chapter and any other information that may identify the employee.

Added Stats 1999 ch 302 § 1 (AB 1395).

§ 1740. Legislative body receiving federal aid; Provision for compliance of bids or contracts with revisions in federal minimum wage schedules

Notwithstanding any other provision of this chapter or any other law of this State, except limitations imposed by the Constitution, the legislative body of a political subdivision which has received or is to receive a loan or grant of funds from the Federal Government or a federal department or agency for public works of that political subdivision, may provide in its call for

bids in connection with such public works that all bid specifications and contracts and other procedures in connection with bids or contracts shall be subject to modification to comply with revisions in federal minimum wage schedules without the necessity of republication or duplication of other formal statutory requirements.

Added Stats 1957 ch 1992 § 1.

§ 1741. Violation of chapter

If the Labor Commissioner or his or her designee determines after an investigation that there has been a violation of this chapter, the Labor Commissioner shall with reasonable promptness issue a civil wage and penalty assessment to the contractor or subcontractor or both. The assessment shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures due and shall include the basis for the assessment. The assessment shall be served not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever occurs last. However, if the assessment is served after the expiration of this 180-day period, but before the expiration of an additional 180 days, and the awarding body has not yet made full payment to the contractor, the assessment is valid up to the amount of the funds retained. Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor, subcontractor, and awarding body. The assessment shall advise the contractor and subcontractor of the procedure for obtaining review of the assessment. The Labor Commissioner shall, to the extent practicable, ascertain the identity of any bonding company issuing a bond that secures the payment of wages covered by the assessment and any surety on a bond, and shall serve a copy of the assessment by certified mail to the bonding company or surety at the same time service is made to the contractor, subcontractor, and awarding body. However, no bonding company or surety shall be relieved of its responsibilities because it failed to receive notice from the Labor Commissioner.

Added Stats 2000 ch 954 § 9 (AB 1646), operative July 1, 2001.

§ 1742. (First of two; Operative until January 1, 2005) Review of assessment

(a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b) Upon receipt of a timely request, a hearing shall be commenced within 90 days before the director, who shall appoint an impartial hearing officer possessing the qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the G ment Code. The appointed hearing officer shall employee of the department, but shall not be a ployee of the Division of Labor Standards Enforce The contractor or subcontractor shall be provide opportunity to review evidence to be utilized by Labor Commissioner at the hearing within 20 da the receipt of the written request for a hearing, evidence obtained by the Labor Commissioner su quent to the 20-day cutoff shall be promptly disclose the contractor or subcontractor.

The contractor or subcontractor shall have the b den of proving that the basis for the civil wage penalty assessment is incorrect. The assessment sh be sufficiently detailed to provide fair notice to contractor or subcontractor of the issues at the hear

Within 45 days of the conclusion of the hearing, director shall issue a written decision affirming, mo fying, or dismissing the assessment. The decision of director shall consist of a notice of findings, findin and an order. This decision shall be served on parties and the awarding body pursuant to Sec 1013 of the Code of Civil Procedure by first-class m at the last known address of the party on file with Labor Commissioner. Within 15 days of the issuanc the decision, the director may reconsider or modify decision to correct an error, except that a clerical er may be corrected at any time.

The director shall adopt regulations setting fo procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may tain review of the decision of the director by filin petition for a writ of mandate to the appropri superior court pursuant to Section 1094.5 of the Cod Civil Procedure within 45 days after service of decision. If no petition for writ of mandate is fi within 45 days after service of the decision, the or shall become final. If it is claimed in a petition for of mandate that the findings are not supported by evidence, abuse of discretion is established if the c determines that the findings are not supported substantial evidence in the light of the whole reco

(d) A certified copy of a final order may be filed by Labor Commissioner in the office of the clerk of superior court in any county in which the affe contractor or subcontractor has property or has or a place of business. The clerk, immediately upon filing, shall enter judgment for the state against person assessed in the amount shown on the cert order.

(e) A judgment entered pursuant to this section bear the same rate of interest and shall have the effect as other judgments and shall be given the preference allowed by law on other judgments ren for claims for taxes. The clerk shall not charge fo service performed by him or her pursuant to section.

(f) An awarding body that has withheld fun response to a civil wage and penalty assessment this chapter shall, upon receipt of a certified cop final order that is no longer subject to judicial r promptly transmit the withheld funds, up t

mount of the certified order, to the Labor ommissioner.

(g) This section shall provide the exclusive method r review of a civil wage and penalty assessment by ie Labor Commissioner under this chapter or the ecision of an awarding body to withhold contract ayments pursuant to Section 1771.5.

(h) This section shall remain in effect only until anuary 1, 2005, and as of that date is repealed, unless later enacted statute, that is enacted before January 2005, deletes or extends that date.

dded Stats 2000 ch 954 § 10 (AB 1646), operative July 1, 2001, perative until January 1, 2005.

ote—Stats 2000 ch 954 provides:

ECTION. 1. The Legislature declares that its intent in adopting this ct is to provide contractors and subcontractors with a prompt adminitrative hearing in the event that the contractor or subcontractor is lleged by the Labor Commissioner or an awarding body to have iolated Labor Code provisions governing the obligations of contractors nd subcontractors on public works projects, and to provide that the xclusive method for review of the decision after the administrative earing is by petition for writ of mandate under Section 1094.5 of the ode of Civil Procedure. It is not the intent of this act to preclude ther remedies otherwise authorized by law to remedy violations of this hapter.

EC. 21. This act shall become operative on July 1, 2001.

1742. (Second of two; Operative January 1, 005) Review of assessment

(a) An affected contractor or subcontractor may obain review of a civil wage and penalty assessment nder this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days fter service of the assessment, the assessment shall ecome final.

(b)(1) Upon receipt of a timely request, a hearing hall be commenced within 90 days before an administrative law judge appointed by the Director of Industrial Relations. The appointed hearing judge shall be employee of the department, but shall not be an mployee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided opportunity to review evidence to be utilized by the bor Commissioner at the hearing within 20 days of receipt of the written request for a hearing. Any vidence obtained by the Labor Commissioner subsent to the 20-day cutoff shall be promptly disclosed to contractor or subcontractor.

(2) The contractor or subcontractor shall have the rden of proving that the basis for the civil wage and nalty assessment is incorrect. The assessment shall sufficiently detailed to provide fair notice to the ntractor or subcontractor of the issues at the hearing.

(3) Within 45 days of the conclusion of the hearing, administrative law judge shall issue a written inion affirming, modifying, or dismissing the assess-

(4) The decision of the administrative law judge shall consist of a notice of findings, findings, and an This decision shall be served on all parties and awarding body pursuant to Section 1013 of the of Civil Procedure by first-class mail at the last address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the administrative law judge may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(4) The Director of Industrial Relations shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the administrative law judge by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

(h) This section shall become operative on January 1, 2005.

Added Stats 2000 ch 954 § 11 (AB 1646), operative January 1, 2005.

§ 1742.1. (First of two; Operative until January 1, 2005) Liquidated damages

(a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liqui-

dated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment or notice to be in error, the director shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal proceedings. The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking administrative review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting.

This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date.

Added Stats 2000 ch 954 § 12 (AB 1646), operative July 1, 2001, operative until January 1, 2005.

Note—Stats 2000 ch 954 provides:

SECTION. 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

SEC. 21. This act shall become operative on July 1, 2001.

§ 1742.1. (Second of two; Operative January 1, 2005) Liquidated damages

(a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety bond or bonds issued to secure the payment of wa covered by the assessment or notice shall be liable liquidated damages in an amount equal to the wa or portion thereof, that still remain unpaid. If assessment or notice subsequently is overturned modified after administrative or judicial review, li dated damages shall be payable only on the wa found to be due and unpaid. If the contractor subcontractor demonstrates to the satisfaction of administrative law judge that he or she had substan grounds for believing the assessment or notice to b error, the administrative law judge shall waive pa ment of the liquidated damages. Any liquidated da ages collected shall be distributed to the emplo along with the unpaid wages. Section 203.5 shall apply to claims for prevailing wages under this cha

(b) The Labor Commissioner shall, upon receipt request from the affected contractor or subcontra within 30 days following the service of a civil wage penalty assessment under Section 1741, afford contractor or subcontractor the opportunity to m with the Labor Commissioner or his or her designee attempt to settle a dispute regarding the assessm without the need for formal proceedings. The award body shall, upon receipt of a request from the affe contractor or subcontractor within 30 days follow the service of a notice of withholding under subdivi (a) of Section 1771.6, afford the contractor or subc tractor the opportunity to meet with the designee of awarding body to attempt to settle a dispute regard the notice without the need for formal proceedings. settlement meeting may be held in person or by phone and shall take place before the expiration of 60-day period for seeking administrative review evidence of anything said or any admission made the purpose of, in the course of, or pursuant to settlement meeting is admissible or subject to dis ery in any administrative or civil proceeding. No ing prepared for the purpose of, in the course of pursuant to, the settlement meeting, other than a settlement agreement, is admissible or subject to covery in any administrative or civil proceeding. assessment or notice shall advise the contractor subcontractor of the opportunity to request a set ment meeting.

This section shall become operative on Januar 2005.

Added Stats 2000 ch 954 § 13 (AB 1646), operative January

§ 1743. Joint and several liability

(a) The contractor and subcontractor shall be jo and severally liable for all amounts due pursuant final order under this chapter or a judgment the The Labor Commissioner shall first exhaust all re able remedies to collect the amount due from subcontractor before pursuing the claim against contractor.

(b) From the amount collected, the wage cla be satisfied prior to the amount being applied alties. If insufficient money is recovered to pa

ker in full, the money shall be prorated among all kers.

) Wages for workers who cannot be located shall be ed in the Industrial Relations Unpaid Wage Fund held in trust for the workers pursuant to Section 7. Penalties shall be paid into the General Fund.

d) A final order under this chapter or a judgment reon shall be binding, with respect to the amount nd to be due, on a bonding company issuing a bond t secures the payment of wages and a surety on a id. The limitations period of any action on a payment id shall be tolled pending a final order that is no ger subject to judicial review.

ded Stats 2000 ch 954 § 14 (AB 1646), operative July 1, 2001.

Article 1.5

Right of Action

1750. Action for damages

(a) (1) The second lowest bidder, and any person, m, association, trust, partnership, labor organiza- n, corporation, or other legal entity which has, prior the letting of the bids on the public works project in estion, entered into a contract with the second lowest dder, that suffers damage as a proximate result of a mpetitive bid for a public works project, as defined in ubdivision (b), not being accepted due to the successful dder's violation, as evidenced by the conviction of the ccessful bidder therefor, of any provision of Division commencing with Section 3200) or of the Unemploy- ent Insurance Code, may bring an action for damages the appropriate state court against the violating rson or legal entity.

(2) There shall be a rebuttable presumption that a ccessful bidder who has been convicted of a violation any provision of Division 4 (commencing with Section 00) of this code or of the Unemployment Insurance de, or of both, was awarded the bid because that ccessful bidder was able to lower the bid due to this lation or these violations occurring on the contract public work awarded by the public agency.

(b) For purposes of this article:

(1) "Public works project" means the construction, r, remodeling, alteration, conversion, moderniza- improvement, rehabilitation, replacement, or ren- ion of a public building or structure.

(2) "Second lowest bidder" means the second lowest lified bidder deemed responsive by the public y awarding the contract for public work.

(3) The "second lowest bidder" and the "successful r" may include any person, firm, association, ration, or other legal entity.

(c) In an action brought pursuant to this section, the may award costs and reasonable attorney's fees, mount to be determined in the court's discretion, prevailing party.

(d) For purposes of an action brought pursuant to tion, employee status shall be determined pur- to Division 4 (commencing with Section 3200) spect to alleged violations of that division, t to the Unemployment Insurance Code with respect to alleged violations of that code, and pursuant to Section 2750.5 with respect to alleged violations of either Division 4 (commencing with Section 3200) or of the Unemployment Insurance Code.

(e) The right of action established pursuant to this article shall not be construed to diminish rights of action established pursuant to Section 19102 of, and Article 1.8 (commencing with Section 20104.70) of Chapter 1 of Part 3 of Division 2 of, the Public Contract Code.

(f) A second lowest bidder who has been convicted of a violation of any provision of Division 4 (commencing with Section 3200) of the Labor Code or of the Unemployment Insurance Code, or both, within one year prior to filing the bid for public work, and who has failed to take affirmative steps to correct that violation or those violations, is prohibited from taking any action authorized by this section.

Added Stats 1991 ch 906 § 1 (AB 1754).

Article 2

Wages

§ 1770. General prevailing wage rate; Determination; Payment of more than prevailing rate; Overtime work

The Director of the Department of Industrial Relations shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773, and the director's determination in the matter shall be final except as provided in Section 1773.4. Nothing in this article, however, shall prohibit the payment of more than the general prevailing rate of wages to any workman employed on public work. Nothing in this act shall permit any overtime work in violation of Article 3 of this chapter.

Enacted 1937. Amended Stats 1953 ch 1706 § 2; Stats 1976 ch 281 § 2.

§ 1771. Requirement of prevailing local rate for work under contract

Except for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

Enacted 1937. Amended Stats 1953 ch 1706 § 3; Stats 1974 ch 1202 § 1; Stats 1976 ch 861 § 2; Stats 1981 ch 449 § 1.

§ 1771.2. Action against employer that fails to pay prevailing wage

A joint labor-management committee established pursuant to the federal Labor Management Coopera-

tion Act of 1978 (Section 175a of Title 29 of the United States Code) may bring an action in any court of competent jurisdiction against an employer that fails to pay the prevailing wage to its employees, as required by this article. This action shall be commenced not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever last occurs.

Added Stats 2001 ch 804 § 1 (SB 588).

§ 1771.5. Labor compliance program

(a) Notwithstanding Section 1771, an awarding body shall not require the payment of the general prevailing rate of per diem wages or the general prevailing rate of per diem wages for holiday and overtime work for any public works project of twenty-five thousand dollars ($25,000) or less when the project is for construction work, or for any public works project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program pursuant to subdivision (b) for every public works project under the authority of the awarding body.

(b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements:

(1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of this chapter.

(2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.

(3) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.

(4) The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chapter.

(5) The awarding body shall withhold contract payments when payroll records are delinquent or inadequate.

(6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

Added Stats 1989 ch 1224 § 2. Amended Stats 1999 ch 83 § 132 (SB 966).

§ 1771.6. Notice of withholding

(a) Any awarding body that enforces this chapter in accordance with Section 1726 or 1771.5 shall provide notice of the withholding of contract payments to the contractor and subcontractor, if applicable. The notice shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures withheld. Service of the notice shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor and subcontractor, if applicable. The shall advise the contractor and subcontractor, if cable, of the procedure for obtaining review withholding of contract payments.

The awarding body shall also serve a copy of notice by certified mail to any bonding company a bond that secures the payment of wages covered the notice and to any surety on a bond, if their ad ties are known to the awarding body.

(b) The withholding of contract payments in dance with Section 1726 or 1771.5 shall be review under Section 1742 in the same manner as if the of the withholding was a civil penalty order of Labor Commissioner under this chapter. If revie requested, the Labor Commissioner may interven represent the awarding body.

(c) Pending a final order, or the expiration of the period for seeking review of the notice of the withh ing, the awarding body shall not disburse any con payments withheld.

(d) From the amount recovered, the wage claim a be satisfied prior to the amount being applied to alties. If insufficient money is recovered to pay worker in full, the money shall be prorated among workers.

(e) Wages for workers who cannot be located shall placed in the Industrial Relations Unpaid Wage Fu and held in trust for the workers pursuant to Sec 96.7. Penalties shall be paid into the General Fund the awarding body that has enforced this chap pursuant to Section 1771.5.

Added Stats 2000 ch 954 § 16 (AB 1646), operative July 1, 2001.

Note—Stats 2000 ch 954 provides:

SECTION 1. The Legislature declares that its intent in adopting act is to provide contractors and subcontractors with a prompt ad istrative hearing in the event that the contractor or subcontracto alleged by the Labor Commissioner or an awarding body to h violated Labor Code provisions governing the obligations of contrac and subcontractors on public works projects, and to provide that exclusive method for review of the decision after the administra hearing is by petition for writ of mandate under Section 1094.5 of Code of Civil Procedure. It is not the intent of this act to pre remedies otherwise authorized by law to remedy violations of chapter.

SEC. 21. This act shall become operative on July 1, 2001.

§ 1771.7. Use of funds derived from Kindergarten-University Public Education Facilities Bond Act of 2002 or Kindergarten-University Public Education Facilities Bond Act of 2004

(a) An awarding body that chooses to use fun derived from either the Kindergarten-University Pu lic Education Facilities Bond Act of 2002 or the Kind garten-University Public Education Facilities Bond of 2004 for a public works project, shall initiate enforce, or contract with a third party to initiate enforce, a labor compliance program, as describ subdivision (b) of Section 1771.5, with respect to public works project.

(b) This section shall apply to public works commence on or after April 1, 2003. For purposes

livision, work performed during the design and onstruction phases of construction, including, but limited to, inspection and land surveying work, s not constitute the commencement of a public

)(1) For purposes of this section, if any campus of California State University chooses to use the ds described in subdivision (a), then the "awarding ty" is the Chancellor of the California State Univer-. For purposes of this subdivision, if the chancellor equired by subdivision (a) to initiate and enforce, or contract with a third party to initiate and enforce, labor compliance program described in that subdi-ion, then in addition to the requirements imposed on an awarding body by subdivision (b) of Section 71.5, the Chancellor of the California State Univer-ty shall review the payroll records described in para-raphs (3) and (4) of subdivision (b) of Section 1771.5 on least a monthly basis to ensure the awarding body's mpliance with the labor compliance program.

(2) For purposes of this subdivision, if an awarding dy described in subdivision (a) is the University of alifornia or any campus of that university, and that warding body is required by subdivision (a) to initiate nd enforce, or to contract with a third party to initiate nd enforce, the labor compliance program described in hat subdivision, then in addition to the requirements mposed upon an awarding body by subdivision (b) of ection 1771.5, the payroll records described in para-raphs (3) and (4) of subdivision (b) of Section 1771.5 hall be reviewed on at least a monthly basis to ensure awarding body's compliance with the labor compli-nce program.

(d)(1) An awarding body described in subdivision (a) hall make a written finding that the awarding body as initiated and enforced, or has contracted with a hird party to initiate and enforce, the labor compliance rogram described in subdivision (a).

(2)(A) If an awarding body described in subdivision is a school district, the governing body of that strict shall transmit to the State Allocation Board, in manner determined by that board, a copy of the ding described in paragraph (1).

(B) The State Allocation Board may not release the nds described in subdivision (a) to an awarding body is a school district until the State Allocation Board received the written finding described in paragraph

(C) If the State Allocation Board conducts a ward audit procedure with respect to an award of funds described in subdivision (a) to an awarding that is a school district, the State Allocation Board verify, in the manner determined by that board, the school district has complied with the require-of this subdivision.

(3) If an awarding body described in subdivision (a) is community college district, the Chancellor of the lifornia State University, or the office of the Presi-of the University of California or any campus of niversity of California, that awarding body shall mit, in the manner determined by the Director of partment of Industrial Relations, a copy of the finding described in paragraph (1) to the director of that department, or the director of any successor agency that is responsible for the oversight of employee wage and employee work hours laws.

(e) Notwithstanding Section 17070.63 of the Education Code, for purposes of this act, the State Allocation Board shall increase as soon as feasible, but no later than July 1, 2003, the per pupil grant amounts as described in Sections 17072.10 and 17074.10 of the Education Code to accommodate the state's share of the increased costs of a new construction or modernization project due to the initiation and enforcement of the labor compliance program.

Added Stats 2002 ch 868 § 2 (AB 1506).

§ 1771.8. Labor compliance program for certain public works projects

(a) The body awarding any contract for a public works project financed in any part with funds made available by the Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002 (Division 26.5 (commencing with Section 79500) of the Water Code) shall adopt and enforce, or contract with a third party to adopt and enforce, a labor compliance program pursuant to subdivision (b) of Section 1771.5 for application to that public works project.

(b) This section shall become operative only if the Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002 (Division 26.5 (commencing with Section 79500) of the Water Code) is approved by the voters at the November 5, 2002, statewide general election.

Added Stats 2002 ch 892 § 2 (SB 278).

§ 1772. Workers deemed employed upon public work

Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

Enacted 1937. Amended Stats 1992 ch 1342 § 7 (SB 222).

§ 1773. Ascertainment of prevailing rate; Data considered

The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification, or type of worker needed to execute the contract from the Director of Industrial Relations. The holidays upon which those rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in theapplicable collective bargaining agreement. If the prevailing rate is not based on a collectively bargained rate, the holidays upon which the prevailing rate shall be paid shall be as provided in Section 6700 of the Government Code.

In determining the rates, the Director of Industrial Relations shall ascertain and consider the applicable

wage rates established by collective bargaining agreements and the ratesthat may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where the rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification, or type of work involved. The rate fixed for each craft, classification, or type of work shall be not less than the prevailing rate paid in the craft, classification, or type of work.

If the director determines that the rate of prevailing wage for any craft, classification, or type ofworker is the rate established by a collective bargaining agreement, the director may adopt that rate by reference as provided for inthe collective bargaining agreement and that determination shall be effective for the life of the agreement or until the director determines that another rate should be adopted.

Enacted 1937. Amended Stats 1953 ch 1706 § 4; Stats 1968 ch 699 § 1, operative July 1, 1969; Stats 1971 ch 785 § 1; Stats 1976 ch 281 § 3. Amended Stats 1999 ch 30 § 1 (SB 16).

§ 1773.1. Payments included in "per diem wages"

(a) Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, subsistence, and apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the contributions, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

(b) Employer payments include all of the following:

(1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.

(2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.

(3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

(c) Employer payments are a credit against the obligation to pay the general prevailing rate of per diem wages. However, no credit shall be granted for benefits required to be provided by other state or federal law. Credits for employer payments also shall not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing.

(d) The credit for employer payments shall be computed on an annualized basis where the employer seeks credit for employer payments that are higher for public works projects than for private construction performed by the same employer, except where one or more of the following occur:

(1) The employer has an enforceable obligation to make the higher rate of payments on future private construction performed by the employer.

(2) The higher rate of payments is required project labor agreement.

(3) The payments are made to the California Apprenticeship Council pursuant to Section 1777.5.

(4) The director determines that annualization would not serve the purposes of this chapter.

(e) For the purpose of determining those per diem wages for contracts, the representative of any craft, classification, or type of worker needed to execute contracts shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification, or type of work involved. The collective bargaining agreements shall be filed after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids. If the collective bargaining agreement has not been formalized, a typescript of the final draft may be filed temporarily, accompanied by a statement under penalty of perjury as to its effective date.

Where a copy of the collective bargaining agreement has previously been filed, fully executed copies of all modifications and extensions of the agreement that affect per diem wages or holidays shall be filed.

The failure to comply with filing requirements of this subdivision shall not be grounds for setting aside a prevailing wage determination if the information taken into consideration is correct.

Added Stats 1959 ch 2173 § 1. Amended Stats 1969 ch 1502 § 1; Stats 1976 ch 281 § 4; Stats 1999 ch 30 § 2 (SB 16); Stats 2000 ch 954 § 1 (AB 1646), operative July 1, 2001.

Note—Stats 2000 ch 954 provides:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

SEC. 21. This act shall become operative on July 1, 2001.

§ 1773.2. Specification of prevailing wage rates in call for bids

The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site.

Added Stats 1971 ch 785 § 2. Amended Stats 1974 ch 876 § 2; Stats 1977 ch 423 § 1. Amended Stats 1992 ch 1342 § 8 (SB 222).

1773.3. Notifications of award of public works contract and of discrepancy in prentices-journeymen ratio

An awarding agency whose public works contract is within the jurisdiction of Section 1777.5 shall, thin five days of the award, send a copy of the award the Division of Apprenticeship Standards. When ecifically requested by a local joint apprenticeship mmittee, the division shall notify the local joint prenticeship committee regarding all such awards plicable to the joint apprenticeship committee mak- g the request. Within five days of a finding of any screpancy regarding the ratio of apprentices to jour- ymen, pursuant to the certificated fixed number of prentices to journeymen, the awarding agency shall tify the Division of Apprenticeship Standards.

ded Stats 1972 ch 1399 § 2 as § 3098. Amended Stats 1974 ch 1095 1. Renumbered Stats 1978 ch 1249 § 6.

ormer Sections:

ormer § 1773.3, relating to requirements for filing general prevailing tes of per diem wages by awarding bodies, was added by Stats 1959 1787 § 1 and repealed by Stats 1976 ch 281 § 5.

1773.4. Procedure for review of rates

Any prospective bidder or his representative, any epresentative of any craft, classification or type of workman involved, or the awarding body may, within 20 days after commencement of advertising of the call for bids by the awarding body, file with the Director of ndustrial Relations a verified petition to review the determination of any such rate or rates upon the round that they have not been determined in accor- ance with the provision of Section 1773 of this code. Within two days thereafter, a copy of such petition hall be filed with the awarding body. The petition shall at forth the facts upon which it is based. The Director f Industrial Relations or his authorized representative hall, upon notice to the petitioner, the awarding body nd such other persons as he deems proper, including he recognized collective bargaining representatives for the particular crafts, classifications or types of work involved, institute an investigation or hold a hearing. Within 20 days after the filing of such petition, or within such longer period as agreed upon by the direc- or the awarding body, and all the interested parties, he shall make a determination and transmit the same in writing to the awarding body and to the interested parties.

Such determination shall be final and shall be the determination of the awarding body. Upon receipt by it of the notice of the filing of such petition the body warding the contract or authorizing the public work hall extend the closing date for the submission of bids the starting of work until five days after the deter- nation of the general prevailing rates of per diem ges pursuant to this section.

Upon the filing of any such petition, notice thereof all be set forth in the next and all subsequent blications by the awarding body of the call for bids. other notice need be given to bidders by the awarding body by publication or otherwise. The determination of the director shall be included in the contract.

Added Stats 1953 ch 1706 § 4.5. Amended Stats 1968 ch 699 § 2, operative July 1, 1969; Stats 1969 ch 301 § 1.

§ 1773.5. Rules and regulations

The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter.

Added Stats 1953 ch 1706 § 5. Amended Stats 1989 ch 1224 § 5.

§ 1773.6. Change in prevailing per diem wage rate

If during any quarterly period the Director of Industrial Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall make such change available to the awarding body and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any contract for which the notice to bidders has been published.

Added Stats 1953 ch 1706 § 6. Amended Stats 1957 ch 1932 § 486; Stats 1963 ch 1786 § 68, operative October 1, 1963; Stats 1976 ch 281 § 6.

§ 1773.7. Charges for interagency services

The provisions of Section 11250 of the Government Code shall not be applicable to Sections 1773, 1773.4, and 1773.6.

Added Stats 1976 ch 281 § 8.

Former Sections:

Former § 1773.7, relating to exemption of certain departments from provisions of Sections 1773.4 and 1773.5, was added Stats 1953 ch 1706 § 7, amended Stats 1957 ch 1932 § 487, Stats 1963 ch 1786 § 69, and repealed Stats 1976 ch 281 § 7.

§ 1773.8. [Section repealed 1999.]

Added Stats 1968 ch 880 § 1. Repealed Stats 1999 ch 30 § 3 (SB 16). The repealed section related to specification requiring payment of travel and subsistence payment, and filing collective bargaining agreements to establish payment.

§ 1773.9. Determination of general prevailing rate of per diem wages

(a) The Director of Industrial Relations shall use the methodology set forth in subdivision (b) to determine the general prevailing rate of per diem wages in the locality in which the public work is to be performed.

(b) The general prevailing rate of per diem wages includes all of the following:

(1) The basic hourly wage rate being paid to a majority of workers engaged in the particular craft, classification, or type of work within the locality and in the nearest labor market area, if a majority of the workers is paid at a single rate. If no single rate is being paid to a majority of the workers, then the single rate being paid to the greatest number of workers, or modal

rate, is prevailing. If a modal rate cannot be determined, then the director shall establish an alternative rate, consistent with the methodology for determining the modal rate, by considering the appropriate collective bargaining agreements, federal rates, rates in the nearest labor market area, or other data such as wage survey data.

(2) Other employer payments included in per diem wages pursuant to Section 1773.1 and as included as part of the total hourly wage rate from which the basic hourly wage rate was derived. In the event the total hourly wage rate does not include any employer payments, the director shall establish a prevailing employer payment rate by the same procedure set forth in paragraph (1).

(3) The rate for holiday and overtime work shall be those rates specified in the collective bargaining agreement when the basic hourly rate is based on a collective bargaining agreement rate. In the event the basic hourly rate is not based on a collective bargaining agreement, the rate for holidays and overtime work, if any, included with the prevailing basic hourly rate of pay shall be prevailing.

(c) If the director determines that the general prevailing rate of per diem wages is the rate established by a collective bargaining agreement, and that the collective bargaining agreement contains definite and predetermined changes during its term that will affect the rate adopted, the director shall incorporate those changes into the determination. Predetermined changes that are rescinded prior to their effective date shall not be enforced.

Added Stats 1999 ch 30 § 4 (SB 16).

Note—Stats 1999 ch 30 provides:

SEC. 5. The Legislature declares that the intent of Section 1773.9 of the Labor Code, as added by Section 4 of this act, is to give effect to Assembly Concurrent Resolution No. 17 of the 1997–98 Regular Session of the Legislature (Res. Ch. 34, Stats. 1997) by codifying the methodology for calculating the general prevailing rate of per diem wages. In Assembly Concurrent Resolution No. 17, the Legislature declared that it "has relied on the long-established definitions of general prevailing rate of per diem wages in amending and extending the prevailing wage law contained in the California Labor Code on numerous occasions, and that it would be contrary to the intent of the Legislature for those definitions to be changed by administrative action, because the definitions have become incorporated by implication into these statutory provision."

§ 1774. Payment of not less than specified prevailing rates to workmen

The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

Enacted 1937.

§ 1775. Forfeiture for paying less than prevailing rate; Rights of workers

(a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as det by the director for the work or craft in which the is employed for any public work done under tract by him or her or, except as provided in sub (b), by any subcontractor under him or her. The of this penalty shall be determined by the Commissioner based on consideration of both following:

(1) Whether the failure of the contractor or sub tractor to pay the correct rate of per diem wages good faith mistake and, if so, the error was pro and voluntarily corrected upon being brought attention of the contractor or subcontractor.

(2) Whether the contractor or subcontractor prior record of failing to meet its prevailing obligations.

The determination of the Labor Commissioner the amount of the penalty shall be reviewable only abuse of discretion. The difference between the prev ing wage rates and the amount paid to each worke each calendar day or portion thereof for which eac worker was paid less than the prevailing wage shall be paid to each worker by the contractor subcontractor, and the body awarding the contra shall cause to be inserted in the contract a stipulati that this section will be complied with.

(b) If a worker employed by a subcontractor on public works project is not paid the general prevaili per diem wages by the subcontractor, the prime co tractor of the project is not liable for any penalti under subdivision (a) unless the prime contractor th knowledge of that failure of the subcontractor to p the specified prevailing rate of wages to those worke or unless the prime contractor fails to comply with all the following requirements:

(1) The contract executed between the contractor a the subcontractor for the performance of work on th public works project shall include a copy of the pro sions of Sections 1771, 1775, 1776, 1777.5, 1813, a 1815.

(2) The contractor shall monitor the payment of t specified general prevailing rate of per diem wages the subcontractor to the employees, by periodic revi of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the su contractor to pay his or her workers the specifi prevailing rate of wages, the contractor shall diligen take corrective action to halt or rectify the failu including, but not limited to, retaining sufficient fun due the subcontractor for work performed on the pub works project.

(4) Prior to making final payment to the subcontr tor for work performed on the public works project, t contractor shall obtain an affidavit signed under p alty of perjury from the subcontractor that the subc tractor has paid the specified general prevailing rate per diem wages to his or her employees on the pub works project and any amounts due pursuant to S tion 1813.

(c) The Division of Labor Standards Enforcem shall notify the contractor on a public works proj within 15 days of the receipt by the Division of La

andards Enforcement of a complaint of the failure of subcontractor on that public works project to pay orkers the general prevailing rate of per diem wages.

dded Stats 1997 ch 757 § 2 (SB 1328), operative until July 1, 2001. mended Stats 2000 ch 954 § 20 (AB 1646), operative July 1, 2001.

ote—Stats 1997 ch 757 provides:

EC. 7. All contracts that are governed by Section 1775, 1776, and 1813 the Labor Code shall comply with the provisions of Chapter 1 commencing with Section 1720 of Part of Division 2 of the Labor Code hat are applicable to contracts for public works projects.

Note—Stats 2000 ch 954 provides:

SEC. 21. This act shall become operative on July 1, 2001.

§ 1776. Payroll record of wages paid; Inspection; Forms; Effect of noncompliance; Penalties

(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or the subcontractor performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (Section 175a of Title 29 of the United States Code) shall be marked or obliterated only to prevent disclosure of an individual's name and social security number. A joint labor management committee may maintain an action in a court of competent jurisdiction against an employer who fails to comply with Section 1774. The court may award restitution to an employee for unpaid wages and may award the joint labor management committee reasonable attorney's fee and costs incurred in maintaining the action. An action under this subdivision may not be based on the employer's misclassification of the craft of a worker on its certified payroll records. Nothing in this subdivision limits any other available remedies for a violation of this chapter.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.

(i) The director shall adopt rules consistent with the California Public Records Act, (Chapter 3.5 (commencing with Section 6250), Division 7, Title 1, Government Code) and the Information Practices Act of 1977, (Title

1.8 (commencing with Section 1798), Part 4, Division 3, Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

Added Stats 1997 ch 757 § 4 (SB 1328), operative until January 1, 2003. Amended Stats 2001 ch 804 § 2 (SB 588), repealed January 1, 2003; Stats 2002 ch 28 § 1 (AB 1448) (ch 28 prevails), Stats 2002 ch 664 § 161 (AB 3034), repealed January 1, 2003.

Former Sections:

Former § 1776, similar to the present section, was enacted 1937, amended Stats 1949 ch 127 § 7, Stats 1976 ch 599 § 1, and repealed Stats 1978 ch 1249 § 3.

§ 1777. Violation of article or noncompliance with section setting requirements for payroll records as misdemeanor

Any officer, agent, or representative of the State or of any political subdivision who wilfully violates any provision of this article, and any contractor, or subcontractor, or agent or representative thereof, doing public work who neglects to comply with any provision of section 1776 is guilty of a misdemeanor.

Enacted 1937.

§ 1777.1. Penalties for willful violations of chapter; Notice; Hearing

(a) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has any interest is ineligible for a period of not less than one year or more than three years to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

(b) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has any interest is ineligible for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter to do either of the following:

(1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

(c) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

(d) Not less than semiannually, the Labor Commissioner shall publish and distribute to awarding bodies a list of contractors who are ineligible to bid on, or be awarded a public works contract, or to perform work as a subcontractor on a public works project pursuant to this chapter. The list shall contain the name of each contractor, the Contractor's State License Board license number of the contractor, and the effective period of debarment of the contractor. The commissioner shall also place advertisements in construction industry publications targeted to the contractors and subcontractors, chosen by the commissioner, that state the effective period of the debarment and the reason for debarment. The advertisements shall appear one time for each debarment of a contractor in each publication chosen by the commissioner. The debarred contractor or subcontractor shall be liable to the commissioner for the reasonable cost of the advertisements, not to exceed five thousand dollars ($5,000). The amount paid to the commissioner for the advertisements shall be credited against the contractor's or subcontractor's obligation to pay civil fines or penalties for the same willful violation of this chapter.

(e) For purposes of this section, "contractor or subcontractor" means a firm, corporation, partnership, or association and its responsible managing officer, as well as any supervisors, managers, and officers found by the Labor Commissioner to be personally and substantially responsible for the willful violation of this chapter.

(f) For the purposes of this section, the term "any interest" means an interest in the entity bidding or performing work on the public works project, whether as an owner, partner, officer, manager, employee, agent, consultant, or representative. "Any interest" includes, but is not limited to, all instances where the debarred contractor or subcontractor receives payments, whether cash or any other form of compensation, from any entity bidding or performing work on the public works project, or enters into any contracts or agreements with the entity bidding or performing work on the public works project for services performed or to be performed for contracts that have been or will be assigned or sublet, or for vehicles, tools, equipment, or supplies that have been or will be sold, rented, or leased during the period from the initiation of the debarment proceedings until the end of the term of the debarment period. "Any interest" does not include shares held in a publicly traded corporation if the shares were not received as compensation after the initiation of debarment from an entity bidding or performing work on a public works project.

(g) For the purposes of this section, the term "entity" is defined as a company, limited liability company, association, partnership, sole proprietorship, limited liability partnership, corporation, business trust, or organization.

(h) The Labor Commissioner shall adopt rules and regulations for the administration and enforcement of this section.

Added Stats 1989 ch 1224 § 10. Amended Stats 1998 ch 443 § 1 (AB 1569); Stats 2000 ch 970 § 1 (AB 2513).

§ 1777.5. Employment of apprentices on public works

(a) Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

(b) Every apprentice employed upon public works shall be paid the prevailing rate of per diem wages for apprentices in the trade to which he or she is registered and shall be employed only at the work of the craft or trade to which he or she is registered.

(c) Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed at the apprentice wage rate on public works. The employment and training of each apprentice shall be in accordance with either of the following:

(1) The apprenticeship standards and apprentice agreements under which he or she is training.

(2) The rules and regulations of the California Apprenticeship Council.

(d) When the contractor to whom the contract is awarded by the state or any political subdivision, in performing any of the work under the contract, employs workers in any apprenticeable craft or trade, the contractor shall employ apprentices in at least the ratio set forth in this section and may apply to any apprenticeship program in the craft or trade that can provide apprentices to the site of the public work for a certificate approving the contractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, the decision of the apprenticeship program to approve or deny a certificate shall be subject to review by the Administrator of Apprenticeship. The apprenticeship program or programs, upon approving the contractor, shall arrange for the dispatch of apprentices to the contractor. A contractor covered by an apprenticeship program's standards shall not be required to submit any additional application in order to include additional public works contracts under that program. "Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council. As used in this section, "contractor" includes any subcontractor under a contractor who performs any public works not excluded by subdivision (o).

(e) Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work. The information submitted shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices proposed to be employed, and the approximate dates the apprentices should be employed. A copy of this information shall also be submitted to the awarding body if requested by the awarding body. Within 60 days after concluding work on the contract, each contractor and subcontractor shall submit to the awarding body, if requested, and to the apprenticeship program a verified statement of the journeyman and apprentice hours performed on the contract. The information under this subdivision shall be public. The apprenticeship programs shall retain this information for 12 months.

(f) The apprenticeship program that can supply apprentices to the area of the site of the public work shall ensure equal employment and affirmative action in apprenticeship for women and minorities.

(g) The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

(h) This ratio of apprentice work to journeyman work shall apply during any day or portion of a day when any journeyman is employed at the jobsite and shall be computed on the basis of the hours worked during the day by journeymen so employed. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the ratio. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract or, in the case of a subcontractor, before the end of the subcontract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the jobsite. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Chief of the Division of Apprenticeship Standards, upon application of an apprenticeship program, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

(i) A contractor covered by this section that has agreed to be covered by an apprenticeship program's standards upon the issuance of the approval certificate, or that has been previously approved for an apprenticeship program in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the applicable apprenticeship standards, but in no event less than the 1-to-5 ratio required by subdivision (g).

(j) Upon proper showing by a contractor that he or she employs apprentices in a particular craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by journeymen, the Chief of the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio, as set forth in this section for that craft or trade.

(k) An apprenticeship program has the discretion to grant to a participating contractor or contractor association a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting the contractor from the 1-to-5 ratio set forth in

this section when it finds that any one of the following conditions is met:

(1) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(2) The number of apprentices in training in the area exceeds a ratio of 1 to 5.

(3) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis.

(4) Assignment of an apprentice to any work performed under a public works contract would create a condition that would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large, or the specific task to which the apprentice is to be assigned is of a nature that training cannot be provided by a journeyman.

(l) When an exemption is granted pursuant to subdivision (k) to an organization that represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis, the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

(m)(1) A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract.

(2) At the conclusion of the 2003–04 fiscal year and each fiscal year thereafter, the California Apprenticeship Council shall distribute training contributions received by the council under this subdivision, less the expenses of the Division of Apprenticeship Standards for administering this subdivision, by making grants to approved apprenticeship programs for the purpose of training apprentices. The funds shall be distributed as follows:

(A) If there is an approved multiemployer apprenticeship program serving the same craft or trade and geographic area for which the training contributions were made to the council, a grant to that program shall be made.

(B) If there are two or more approved multiemployer apprenticeship programs serving the same craft or trade and geographic area for which the training contributions were made to the council, the grant shall be divided among those programs based on the number of apprentices registered in each program.

(C) All training contributions not distributed under subparagraphs (A) and (B) shall be used to defray the future expenses of the Division of Apprenticeship Standards.

(3) All training contributions received pursuant this subdivision shall be deposited in the Apprenti ship Training Contribution Fund, which fund is here created in the State Treasury. Notwithstanding S tion 13340 of the Government Code, all money in t Apprenticeship Training Contribution Fund is here continuously appropriated for the purpose of carryi out this subdivision and to pay the expenses of t Division of Apprenticeship Standards.

(n) The body awarding the contract shall cause to inserted in the contract stipulations to effectuate th section. The stipulations shall fix the responsibility compliance with this section for all apprenticeab occupations with the prime contractor.

(o) This section does not apply to contracts of gener contractors or to contracts of specialty contractors n bidding for work through a general or prime contract when the contracts of general contractors or tho specialty contractors involve less than thirty thousan dollars ($30,000).

(p) All decisions of an apprenticeship program unde this section are subject to Section 3081.

Added Stats 1937 ch 872. Amended Stats 1939 ch 971 § 1; Stats 195 ch 699 § 1; Stats 1968 ch 1411 § 1; Stats 1969 ch 1260 § 1, effectiv August 31, 1969; Stats 1972 ch 1087 § 1, ch 1399 § 1; Stats 1974 c 965 § 1; Stats 1976 ch 1179 § 2, effective September 22, 1976; Stat 1989 ch 1224 § 11. Amended Stats 1997 ch 17 § 91 (SB 947); Stat 1999 ch 903 § 2 (AB 921); Stats 2000 ch 135 § 124 (AB 2539) (ch 87 prevails), ch 875 § 1 (AB 2481). Amended Stats 2002 ch 1124 § 43 (AB 3000), effective September 30, 2002.

Note—Stats 1999 ch 903 provides:

SECTION 1. The Legislature finds and declares that apprenticeship programs are a vital part of the educational system in California. It is the purpose and goal of this legislation to strengthen the regulation of apprenticeship programs in California, to ensure that all apprenticeship programs approved under Chapter 4 (commencing with Section 3070) of Division 3 of the Labor Code meet the high standards necessary to prepare apprentices for the workplaces of the future and to prevent the exploitation of apprentices by employers or apprenticeship programs. It is further the intent of the Legislature that apprenticeship programs should make active efforts to recruit qualified men, women, and minorities and train them in the skills needed for the workplace.

§ 1777.6. Prohibited discrimination in employment of apprentices

It shall be unlawful for an employer or a labor union to refuse to accept otherwise qualified employees as registered apprentices on any public works, on the ground of the race, religious creed, color, national origin, ancestry, sex, or age, except as provided in Section 3077, of such employee.

Added Stats 1951 ch 1192 § 1. Amended Stats 1965 ch 283 § 8; Stats 1971 ch 280 § 1; Stats 1976 ch 1179 § 2, effective September 22, 1976.

§ 1777.7. Penalties for noncompliance with provisions involving employment of apprentices

(a)(1) A contractor or subcontractor that is determined by the Chief of the Division of Apprenticeship Standards to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars ($100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Chief if the amount of the penalty would

disproportionate to the severity of the violation. A contractor or subcontractor that knowingly commits a second or subsequent violation of Section 1777.5 within a three-year period, where the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars ($300) for each full calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed by the Chief, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(2) In lieu of the penalty provided for in this subdivision, the Chief may, for a first-time violation and with the concurrence of an apprenticeship program described in subdivision (d), order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided to apprentices during the period of noncompliance.

(f) In the event a contractor or subcontractor is determined by the Chief to have knowingly committed a serious violation of any provision of Section 1777.5, the Chief may also deny to the contractor or subcontractor, and to its responsible officers, the right to bid on or be awarded or perform work as a subcontractor on a public works contract for a period of up to one year for the first violation and for a period of up to three years for a second or subsequent violation. Each period of debarment shall run from the date the determination of noncompliance by the Chief becomes a final order of the Administrator of Apprenticeship.

(g)(1) An affected contractor, subcontractor, or responsible officer may obtain a review of the determination of the Chief imposing the debarment or civil penalty by transmitting a written request to the office of the Administrator within 30 days after service of the determination of debarment or civil penalty. A copy of the request shall also be served on the Chief. If the Administrator does not receive a timely request for review of the determination of debarment or civil penalty made by the Chief, the order shall become the final order of the Administrator.

(2) Within 20 days of the timely receipt of a request for review, the Chief shall provide the contractor, subcontractor, or responsible officer the opportunity to review any evidence the Chief may offer at the hearing. The Chief shall also promptly disclose any nonprivileged documents obtained after the 20-day time limit at the time set forth for exchange of evidence by the Administrator.

(3) Within 90 days of the timely receipt of a request for review, a hearing shall be commenced before the Administrator or an impartial hearing officer designated by the Administrator and possessing the qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the Government Code. The affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5.

(4) Within 45 days of the conclusion of the hearing, the Administrator shall issue a written decision affirming, modifying, or dismissing the determination of debarment or civil penalty. The decision shall contain a statement of the factual and legal basis for the decision and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party that the party has filed with the Administrator. Within 15 days of issuance of the decision, the Administrator may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(5) An affected contractor, subcontractor, or responsible officer who has timely requested review and obtained a decision under paragraph (4) may obtain review of the decision of the Administrator by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the final decision. If no timely petition for a writ of mandate is filed, the decision shall become the final order of the Administrator. The decision of the Administrator shall be affirmed unless the petitioner shows that the Administrator abused his or her discretion. If the petitioner claims that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the entire record.

(6) The Chief may certify a copy of the final order of the Administrator and file it with the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order. A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and be given the same preference allowed by the law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section. An awarding body that has withheld funds in response to a determination by the Chief imposing a penalty under this section shall, upon receipt of a certified copy of a final order of the Administrator, promptly transmit the withheld funds, up to the amount of the certified order, to the Administrator.

(d) If a subcontractor is found to have violated Section 1777.5, the prime contractor of the project is not liable for any penalties under subdivision (a), unless the prime contractor had knowledge of the subcontractor's failure to comply with the provisions of Section 1777.5 or unless the prime contractor fails to comply with any of the following requirements:

(1) The contract executed between the contractor and the subcontractor or the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall continually monitor a subcontractor's use of apprentices required to be employed on the public works project pursuant to subdivision (d) of Section 1777.5, including, but not limited to, periodic

review of the certified payroll of the subcontractor.

(3) Upon becoming aware of a failure of the subcontractor to employ the required number of apprentices, the contractor shall take corrective action, including, but not limited to, retaining funds due the subcontractor for work performed on the public works project until the failure is corrected.

(4) Prior to making the final payment to the subcontractor for work performed on the public works project, the contractor shall obtain a declaration signed under penalty of perjury from the subcontractor that the subcontractor has employed the required number of apprentices on the public works project.

(e) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(f) The Chief shall consider, in setting the amount of a monetary penalty, in determining whether a violation is serious, and in determining whether and for how long a party should be debarred for violating this section, all of the following circumstances:

(1) Whether the violation was intentional.

(2) Whether the party has committed other violations of Section 1777.5.

(3) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.

(4) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.

(5) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

If a party seeks review of a decision by the Chief to impose a monetary penalty or period of debarment, the Administrator shall decide de novo the appropriate penalty, by considering the same factors set forth above.

(g) The interpretation of Section 1777.5 and this section shall be in accordance with the regulations of the California Apprenticeship Council. The Administrator may adopt regulations to establish guidelines for the imposition of monetary penalties and periods of debarment and may designate precedential decisions under Section 11425.60 of the Government Code.

Added Stats 1989 ch 1224 § 13. Amended Stats 1999 ch 903 § 3 (AB 921); Stats 2000 ch 135 § 126 (AB 2539) (ch 875 prevails), ch 875 § 2 (AB 2481).

Former Sections:

Former § 1777.7, similar to the present section, was added Stats 1976 ch 538 § 2, amended Stats 1976 ch 1249 § 5, and repealed Stats 1989 ch 1224 § 12.

Note—Stats 1999 ch 903 provides:

SECTION 1. The Legislature finds and declares that apprenticeship programs are a vital part of the educational system in California. It is the purpose and goal of this legislation to strengthen the regulation of apprenticeship programs in California, to ensure that all apprenticeship programs approved under Chapter 4 (commencing with Section 3070) of Division 3 of the Labor Code meet the high standards necessary to prepare apprentices for the workplaces of the future and to prevent the exploitation of apprentices by employers or apprenticeship programs. It is further the intent of the Legislature that apprenticeship programs should make active efforts to recruit qualified men, women, and minorities and train them in the skills needed for the workplace.

§ 1777.8. [Section repealed 1991.]

Added Stats 1990 ch 451 § 1 (AB 116), effective July 31, 1990. Repealed Stats 1991 ch 640 § 1 (AB 64). The repealed section related to regulations regarding assessment of fees.

§ 1778. Taking or receiving portion of wages of workman or working subcontractor as felony

Every person, who individually or as a representative of an awarding or public body or officer, or as contractor or subcontractor doing public work, or agent or officer thereof, who takes, receives or conspires with another to take or receive, for his own use or the use of any other person any portion of the wages of any workman or working subcontractor, in connection with services rendered upon any public work is guilty of a felony.

Enacted 1937.

§ 1779. Charging fee for registration, giving information, or placing or assisting in placing person in public work as misdemeanor

Any person or agent or officer thereof who charges, collects, or attempts to charge or collect, directly or indirectly, a fee or valuable consideration for registering any person for public work, or for giving information as to where such employment may be procured, or for placing, assisting in placing, or attempting to place any person in public work, whether the person is to work directly for the State, or any political subdivision, or for a contractor or subcontractor doing public work, is guilty of a misdemeanor.

Enacted 1937.

§ 1780. Placing order for employment where fee or valuable consideration involved as misdemeanor

Any person acting on behalf of the State or any political subdivision, or any contractor or subcontractor or agent or representative thereof, doing any public work who places any order for the employment of a workman on public work where the filling of the order for employment involves the charging of a fee, or the receiving of a valuable consideration from any applicant for employment is guilty of a misdemeanor.

Enacted 1937.

§ 1781. [Section repealed 1957.]

Enacted 1937. Repealed Stats 1957 ch 396 § 1. The repealed section related to penalties and remedies provided by §§ 1775 and 1777.

Article 3

Working Hours

§ 1810. Hours constituting day's work; Stipulation in contracts

Eight hours labor constitutes a legal day's work in all cases where the same is performed under the authority

y law of this State, or under the direction, or ol, or by the authority of any officer of this State g in his official capacity, or under the direction, or ol or by the authority of any municipal corpora- or of any officer thereof. A stipulation to that effect be made a part of all contracts to which the State y municipal corporation therein is a party.

ed 1937.

811. Limitation as to hours of service; eption

ne time of service of any workman employed upon lic work is limited and restricted to 8 hours during one calendar day, and 40 hours during any one ndar week, except as hereinafter provided for un- Section 1815.

ted 1937. Amended Stats 1961 ch 238 § 1; Stats 1963 ch 964 § 1.

1812. Record of hours worked; Availability inspection

Every contractor and subcontractor shall keep an curate record showing the name of and actual hours orked each calendar day and each calendar week by ch worker employed by him or her in connection with public work. The record shall be kept open at all asonable hours to the inspection of the awarding dy and to the Division of Labor Standards Enforce- ent.

ted 1937 as § 1814. Amended Stats 1945 ch 1431 § 51. Renum- ed Stats 1961 ch 238 § 4. Amended Stats 1963 ch 964 § 2; Stats ch 160 § 123.

1813. Penalty when workman required to rk excess hours; Stipulation in contract; nizance and report of violations

The contractor or subcontractor shall, as a penalty to state or political subdivision on whose behalf the act is made or awarded, forfeit twenty-five dollars for each worker employed in the execution of the act by the respective contractor or subcontractor each calendar day during which the worker is ired or permitted to work more than 8 hours in any alendar day and 40 hours in any one calendar in violation of the provisions of this article. In ding any contract for public work, the awarding shall cause to be inserted in the contract a ion to this effect. The awarding body shall take ance of all violations of this article committed in rse of the execution of the contract, and shall them to the Division of Labor Standards ment.

1997 ch 757 § 6 (SB 1328), operative until January 1, ed Stats 2002 ch 28 § 3 (AB 1448).

tions:

1813 relating to report of nature of emergency, was enacted pealed Stats 1961 ch 238 § 3.

Violation of article or noncompliance ion requiring records of hours worked eanor

agent, or representative of the State or subdivision who violates any provision of this article and any contractor or subcontractor or agent or representative thereof doing public work who neglects to comply with any provision of Section 1812 is guilty of a misdemeanor.

Enacted 1937 as § 1816. Amended and renumbered Stats 1961 ch 238 § 6.

§ 1815. Work performed in excess of specified hour limitations; Compensation

Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1½ times the basic rate of pay.

Added Stats 1941 ch 759 § 1, effective June 17, 1941, as § 1817. Amended and renumbered Stats 1961 ch 238 § 7. Amended Stats 1963 ch 964 § 4.

§ 1816. [Section renumbered 1961.]

Enacted 1937. Amended and renumbered § 1814 Stats 1961 ch 238 § 6.

§ 1817. [Section renumbered 1961.]

Added Stats 1941 ch 759 § 1, effective June 17, 1941. Amended and renumbered § 1815 Stats 1961 ch 238 § 7.

Article 4

Employment of Aliens

[Repealed]

§ 1850. [Section repealed 1970.]

Enacted 1937. Amended Stats 1957 ch 727 § 1. Repealed Stats 1970 ch 652 § 1.

§ 1851. [Section repealed 1970.]

Enacted 1937. Repealed Stats 1970 ch 652 § 1.

§ 1851.5. [Section repealed 1970.]

Added Stats 1957 ch 727 § 2. Repealed Stats 1970 ch 652 § 1.

§ 1852. [Section repealed 1970.]

Enacted 1937. Amended Stats 1945 ch 1431 § 52. Repealed Stats 1970 ch 652 § 1.

§§ 1853, 1854. [Sections repealed 1970.]

Enacted 1937. Repealed Stats 1970 ch 652 § 1.

Article 5

Securing Workers' Compensation

§ 1860. Contract clause requiring contractor to secure payment of compensation to employees

The awarding body shall cause to be inserted in every public works contract a clause providing that, in accor-

CHAPTER 1224

An act to amend Sections 1773.5, 1775, and 1777.5 of, to add Sections 1720.4, 1771.5, 1771.6, 1771.7, and 1777.1 to, and to repeal and add Section 1777.7 of, the Labor Code, relating to public works.

[Approved by Governor October 1, 1989. Filed with Secretary of State October 1, 1989.]

The people of the State of California do enact as follows:

SECTION 1. Section 1720.4 is added to the Labor Code, to read:

1720.4. For the limited purposes of this chapter, "public works" shall not include any otherwise covered work which meets all the following conditions:

(a) The work is performed entirely by volunteer labor.

(b) The work involves facilities or structures which are, or will be, used exclusively by, or primarily for or on behalf of, private nonprofit community organizations including, but not limited to, charitable, youth, service, veterans, and sports groups or associations.

(c) The work will not have an adverse impact on employment.

(d) The work is approved by the Director of Industrial Relations as meeting the requirements of this section.

For purposes of subdivision (c), the director shall request information on whether or not the work will have an adverse impact on employment from the appropriate local or state organization of duly authorized employee representatives of workers employed on public works.

SEC. 2. Section 1771.5 is added to the Labor Code, to read:

1771.5. (a) Nothwithstanding Section 1771, an awarding body shall not require the payment of the general prevailing rate of per diem wages or the general prevailing rate of per diem wages for holiday and overtime work for any public works project of twenty-five thousand dollars ($25,000) or less when the project is for construction work, or for any public works project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program pursuant to subdivision (b) for every public works project under the authority of the awarding body.

(b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements:

(1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of this chapter.

(2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.

(3) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll

containing a statement of compliance signed under penalty of perjury.

(4) The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chapter.

(5) The awarding body shall withhold contract payments when payroll records are delinquent or inadequate.

(6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

SEC. 3. Section 1771.6 is added to the Labor Code, to read:

1771.6. Notwithstanding Sections 1730, 1731, and 1734, any political subdivision which enforces this chapter in accordance with Section 1771.5 shall, at the expiration of 90 days after the completion of the contract and the formal acceptance of the job, deposit all penalties or forfeitures withheld from any contract payment in the general fund of the political subdivision. Any court collecting any fines or penalties under the criminal provisions of this chapter, or any of the labor laws pertaining to public works, when the fines and penalties resulted from enforcement actions by a political subdivision pursuant to Section 1771.5, shall deposit the fines or penalties in the general fund of the political subdivision.

SEC. 4. Section 1771.7 is added to the Labor Code, to read:

1771.7. A contractor may appeal an enforcement action by a political subdivision pursuant to Section 1771.5 to the Director of Industrial Relations. Any ruling by the director shall be final and, notwithstanding Section 1732, any appeal shall waive the contractor's right to bring court action on the same issue.

SEC. 5. Section 1773.5 of the Labor Code is amended to read:

1773.5. The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter.

SEC. 6. Section 1775 of the Labor Code is amended to read:

1775. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wages and the

amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both to pay each worker in full, the money shall be prorated among all workers.

SEC. 7. Section 1775 of the Labor Code is amended to read:

1775. The employer shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or under subcontract by the subcontractor. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the employer, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due an employer to cover all penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the employer, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due under this section. This action shall be commenced not later than six months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than six months after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the employer for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the employer to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all the workers.

"Employer," as used in this section, means the contractor or the subcontractor, whichever one employs the worker.

SEC. 8. Section 1775 of the Labor Code is amended to read:

1775. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all wages and penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and

915

in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the wages and penalties due under this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. The division may maintain a court action whether or not it has an assignment of the wage claim of the worker. No issue other than that of the liability of the contractor for the wages and penalties due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all the workers.

SEC. 9. Section 1775 of the Labor Code is amended to read:

1775. The employer shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or under subcontract by the subcontractor. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the employer, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due an employer to cover all wages and penalties forfeited and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the employer the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with

the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the wages and penalties due under this section. This action shall be commenced not later than six months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than six months after acceptance of the public work, whichever last occurs. The division may maintain a court action whether or not it has an assignment of the wage claim of the worker. No issue other than that of the liability of the employer for the wages and penalties due shall be determined in the action, and the burden shall be upon the employer to establish that the wages and penalties demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all the workers.

"Employer," as used in this section, means the contractor or the subcontractor, whichever one employs the worker.

SEC. 10. Section 1777.1 is added to the Labor Code, to read:

1777.1. (a) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible to bid on or to receive any public works contract for a period of not less than one year or more than three years. The period of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(b) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible to bid on or to receive any public works contract for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter. These periods of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(c) Any determination by the Labor Commissioner shall be made after a full investigation by the Labor Commissioner and a fair and impartial hearing and reasonable notice.

(d) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

(e) The Labor Commissioner shall promulgate rules and regulations for the administration and enforcement of this section,

the definition of terms, and appropriate penalties.

SEC. 11. Section 1777.5 of the Labor Code is amended to read:

1777.5. Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed, and shall be employed only at the work of the craft or trade to which he or she is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him or her, in performing any of the work under the contract or subcontract, employs workers in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. Every contractor and subcontractor shall submit contract award information to the applicable joint apprenticeship committee which shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices to be employed, and the approximate dates the apprentices will be employed. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of work performed by apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentices work for every five hours of labor performed by a journeyman. However, the minimum ratio for the land surveyor classification shall not be less than one apprentice for each five journeymen.

Any ratio shall apply during any day or portion of a day when any journeyman, or the higher standard stipulated by the joint apprenticeship committee, is employed at the job site and shall be computed on the basis of the hours worked during the day by journeymen so employed, except for the land surveyor classification. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the job site. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of a joint apprenticeship committee, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

The contractor or subcontractor, if he or she is covered by this section, upon the issuance of the approval certificate, or if he or she has been previously approved in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he or she employs apprentices in the craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by a journeyman, or in the land surveyor classification, one apprentice for each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio as set forth in this section. This section shall not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor, when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000) or 20 working days. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week, shall not be used to calculate the hourly ratio required by this section.

"Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(b) The number of apprentices in training in such area exceeds a

ratio of 1 to 5.

(c) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis, or on a local basis.

(d) Assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him or her, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he or she employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept the funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of the contributions in computing his or her bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of the contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to Section 3081.

SEC. 12. Section 1777.7 of the Labor Code is repealed.

SEC. 13. Section 1777.7 is added to the Labor Code, to read:

1777.7. (a) In the event a contractor or subcontractor willfully fails to comply with Section 1777.5, the Director of Industrial Relations shall deny to the contractor or subcontractor, both individually and in the name of the business entity under which the contractor or subcontractor is doing business, the right to bid on, or to receive any public works contract for a period of up to one year for the first violation and for a period of up to three years for the second and subsequent violations. Each period of debarment shall run from the date the determination of noncompliance by the Administrator of Apprenticeship becomes an order of the California Apprenticeship Council.

(b) A contractor or subcontractor who violates Section 1777.5 shall forfeit as a civil penalty the sum of fifty dollars ($50) for each calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(c) In lieu of the penalty provided for in subdivision (a) or (b), the director may for a first time violation and with the concurrence of the joint apprenticeship committee, order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the period of noncompliance.

(d) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(e) The interpretation and enforcement of Section 1777.5 and this section shall be in accordance with the rules and procedures of the California Apprenticeship Council.

SEC. 14. (a) Section 7 of this bill incorporates amendments to Section 1775 of the Labor Code proposed by both this bill and AB 254. It shall only become operative if (1) both bills are enacted and become effective January 1, 1990, (2) each bill amends Section 1775 of the Labor Code, and (3) SB 197 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after AB 254, in which case Sections 6, 8, and 9 of this bill shall not become operative.

(b) Section 8 of this bill incorporates amendments to Section 1775 of the Labor Code proposed by both this bill and SB 197. It shall only become operative if (1) both bills are enacted and become effective January 1, 1990, (2) each bill amends Section 1775 of the Labor Code, (3) AB 254 is not enacted or as enacted does not amend that section, and (4) this bill is enacted after SB 197 in which case Sections 6, 7, and 9 of this bill shall not become operative.

(c) Section 9 of this bill incorporates amendments to Section 1775 of the Labor Code proposed by this bill, AB 254, and SB 197. It shall only become operative if (1) all three bills are enacted and become effective January 1, 1990, (2) all three bills amend Section 1775 of the Labor Code, and (3) this bill is enacted after AB 254 and SB 197, in which case Sections 6, 7, and 8 of this bill shall not become operative.

BILL NUMBER: AB 302 CHAPTERED
BILL TEXT

CHAPTER 220
FILED WITH SECRETARY OF STATE JULY 28, 1999
APPROVED BY GOVERNOR JULY 28, 1999
PASSED THE SENATE JULY 15, 1999
PASSED THE ASSEMBLY MAY 27, 1999
AMENDED IN ASSEMBLY MARCH 25, 1999

INTRODUCED BY Assembly Member Floyd

FEBRUARY 8, 1999

An act to amend Section 1720.3 of the Labor Code, relating to public works.

LEGISLATIVE COUNSEL'S DIGEST

AB 302, Floyd. Public works: prevailing wages.

(1) Existing law defines the term "public works" for purposes of requirements regarding the payment of prevailing wages, the regulation of working hours, and the securing of workers' compensation for public works projects. Existing law further requires that, except as specified, not less than the general prevailing rate of per diem wages be paid to workers employed on public works and imposes misdemeanor penalties for a violation of this requirement.

Existing law provides that for the purposes of provisions of law relating to the payment of prevailing wages, "public works" means, among other things, the hauling of refuse from a public works site to an outside disposal location with respect to contracts involving any state agency, including the California State University and the University of California.

This bill would revise the definition of "public works" for these purposes to include the hauling of refuse from a public works site to an outside disposal location with respect to contracts involving any political subdivision of the state, thereby requiring the payment of prevailing wages in connection with all such contracts involving any local public entity.

Because the violation of prevailing wage requirements by local public entities when engaged in these public works projects would result in the imposition of misdemeanor penalties, this bill would impose a state-mandated local program.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1720.3 of the Labor Code is amended to read:

1720.3. For the limited purposes of Article 2 (commencing with

Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California, or any political subdivision of the state.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIIIB of the California Constitution.

BILL NUMBER: SB 1999 CHAPTERED
BILL TEXT

CHAPTER 881
FILED WITH SECRETARY OF STATE SEPTEMBER 29, 2000
APPROVED BY GOVERNOR SEPTEMBER 28, 2000
PASSED THE SENATE AUGUST 30, 2000
PASSED THE ASSEMBLY AUGUST 28, 2000
AMENDED IN ASSEMBLY AUGUST 23, 2000
AMENDED IN ASSEMBLY AUGUST 18, 2000
AMENDED IN ASSEMBLY AUGUST 7, 2000
AMENDED IN SENATE APRIL 24, 2000

INTRODUCED BY Senator Burton

FEBRUARY 25, 2000

An act to amend Section 1720 of the Labor Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 1999, Burton. Public work.

Existing law defines public works and establishes certain requirements that must be met by persons who enter into contracts for public works. Those requirements include provisions generally known as the prevailing wage laws. The prevailing wage laws require that all workers employed on public works be paid the general prevailing rate of per diem wages, as determined by the Director of Industrial Relations.

This bill would revise the definition of public works by providing that "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work. By requiring local government entities to comply with the provisions affecting public works, including the prevailing wage laws, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1720 of the Labor Code is amended to read:

1720. As used in this chapter, "public works" means:

(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to

order of the Public Utilities Commission or other public authority. For purposes of this subdivision, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

SEC. 2. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

BILL NUMBER: AB 1646 CHAPTERED
BILL TEXT

CHAPTER 954
FILED WITH SECRETARY OF STATE SEPTEMBER 30, 2000
APPROVED BY GOVERNOR SEPTEMBER 29, 2000
PASSED THE ASSEMBLY SEPTEMBER 1, 2000
PASSED THE SENATE AUGUST 30, 2000
AMENDED IN SENATE AUGUST 29, 2000
AMENDED IN SENATE AUGUST 25, 2000
AMENDED IN SENATE AUGUST 7, 2000
AMENDED IN SENATE AUGUST 30, 1999
AMENDED IN SENATE AUGUST 16, 1999
AMENDED IN SENATE JULY 1, 1999
AMENDED IN SENATE JUNE 24, 1999

INTRODUCED BY Assembly Member Steinberg

MARCH 4, 1999

An act to amend Sections 1723, 1726, 1727, and 1773.1 of, to add Sections 1741 and 1743 to, to add and repeal Sections 1742 and 1742.1 of, to repeal Sections 1730, 1731, 1732, 1733, and 1771.7 of, to repeal and amend Section 1775 of, and to repeal and add Section 1771.6 of, the Labor Code, relating to public works.

LEGISLATIVE COUNSEL'S DIGEST

AB 1646, Steinberg. Public works: payments.

(1) Existing law regulating public works contracts requires the awarding body of a public works contract to withhold and retain from payments to the contractor all wages and penalties that have been forfeited pursuant to the contract or existing law. The awarding body is required to transfer all wages and penalties retained, to the Labor Commissioner for disbursement pursuant to specified provisions whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties withheld within 90 days after the completion of the contract and formal acceptance of the job.

This bill would require the awarding body to report promptly any suspected violations of the laws regulating public works contracts to the Labor Commission and to retain all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner.

(2) Existing law authorizes the contractor to bring suit for the limited purpose of recovery of the penalties or forfeitures withheld.

Existing law permits the Division of Labor Standards Enforcement to intervene in a contractor's suit for recovery of amounts withheld, provides for the deposit of wages for workers who cannot be located into the Industrial Relations Unpaid Wages Fund, and provides for the deposit of penalties into the General Fund. Existing law, until January 1, 2003, requires a contractor to withhold moneys due a subcontractor in an amount sufficient to pay the wages that are the subject of a claim filed with the Division of Labor Standards Enforcement, as directed by the division, if the body awarding the public works contract has not withheld sufficient moneys to pay the wage claims. Existing law requires the contractor to pay those moneys to the subcontractor after receipt of notification that the

claim has been resolved, or to pay those moneys to the awarding body, under specified circumstances.

This bill would repeal these provisions and instead would require the Labor Commissioner to issue a civil wage and penalty assessment to the contractor or subcontractor or both if the Labor Commissioner determines after investigation that there has been a violation of the laws regulating public works contracts. The bill would permit an affected contractor or subcontractor to obtain review of a civil wage and penalty assessment by transmitting a written request for a hearing to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment and would require an impartial hearing officer, until January 1, 2005, and then an administrative law judge appointed by the Director of Industrial Relations to commence a hearing within 90 days of receipt of the request. The bill would permit an affected contractor or subcontractor to obtain review of the decision of the director, until January 1, 2005, and then an administrative law judge by filing a petition for a writ of mandate to the superior court within 45 days after service of the decision. The bill would provide for liquidated damages in an amount equal to the amount of unpaid wages, as specified. The bill would also authorize informal settlement meetings.

The bill would provide that the contractor and subcontractor are jointly and severally liable for all amounts due pursuant to a final order or a judgment on that final order, but would require the Labor Commissioner to collect amounts due from the subcontractor before pursuing the claim against the contractor. The bill would require that the wage claim be satisfied from the amounts collected prior to those amounts being applied to penalties and that the money be prorated among all workers if an insufficient amount is recovered to pay each worker in full. The bill would require wages for workers who cannot be located to be placed in the Industrial Relations Unpaid Wage Fund, a continuously appropriated fund, and penalties to be paid into the General Fund.

(3) Existing law requires any political subdivision that enforces the laws regulating public works contracts and any court collecting fines or penalties that result from enforcement actions by political subdivisions to deposit penalties or forfeitures withheld from any contract payment in the General Fund of the political subdivision. Existing law authorizes a contractor to appeal an enforcement action by a political subdivision to the Director of Industrial Relations.

The bill would repeal and recast this provision to apply to any awarding body that enforces the laws regulating public works contracts in accordance with specified provisions of existing law. The bill would require such an awarding body to provide written notice of the withholding of contract payments to the contractor and subcontractor, as specified. The withholding of contract payments would be reviewable in the same manner as a civil penalty order of the Labor Commissioner.

(4) Existing law provides that per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, and subsistence pay, apprenticeship or other training programs, and similar purposes. Existing law requires the representative of any craft, classification, or type of worker needed to execute a public works contract entered into with the state to file with the Department of Industrial Relations, fully executed copies of the collective bargaining agreements for the particular craft, classification, or type of work involved for the purposes of determining the per diem wages.

This bill would specify the employer contributions, costs, and

payments that employer payments may include and would provide that employer payments not required to be provided by state or federal law are a credit against the obligation to pay the general prevailing rate of wages. However, credits for employer payments would not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing. This bill would expand the requirement that copies of collective bargaining agreements be filed with the Department of Industrial Relations to apply to representatives of any craft, classification, or type of worker needed to execute a public works contract entered into with a public entity other than the state. The bill would revise the filing requirements to permit, if the collective bargaining agreement has not been formalized, the temporary filing of a typescript of the final draft accompanied by a statement under penalty of perjury as to its effective date. Because this bill would impose additional duties on local agency employers, expand the scope of the existing crime of perjury, and provide that a violation of these provisions is a misdemeanor, this bill would impose a state-mandated local program.

(5) This bill provides that it would become operative on July 1, 2001.

(6) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature declares that its intent in adopting this act is to provide contractors and subcontractors with a prompt administrative hearing in the event that the contractor or subcontractor is alleged by the Labor Commissioner or an awarding body to have violated Labor Code provisions governing the obligations of contractors and subcontractors on public works projects, and to provide that the exclusive method for review of the decision after the administrative hearing is by petition for writ of mandate under Section 1094.5 of the Code of Civil Procedure. It is not the intent of this act to preclude remedies otherwise authorized by law to remedy violations of this chapter.

SEC. 2. Section 1723 of the Labor Code is amended to read:

1723. "Worker" includes laborer, worker, or mechanic.

SEC. 3. Section 1726 of the Labor Code is amended to read:

1726. The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract, and shall promptly report any suspected violations to the Labor Commissioner.

If the awarding body determines as a result of its own investigation that there has been a violation of this chapter and withholds contract payments, the procedures in Section 1771.6 shall be followed.

SEC. 4. Section 1727 of the Labor Code is amended to read:

1727. (a) Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all amounts required to satisfy any civil wage and penalty assessment issued by the Labor Commissioner under this chapter. The amounts required to satisfy a civil wage and penalty assessment shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

(b) If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

SEC. 5. Section 1730 of the Labor Code is repealed.

SEC. 6. Section 1731 of the Labor Code is repealed.

SEC. 7. Section 1732 of the Labor Code is repealed.

SEC. 8. Section 1733 of the Labor Code is repealed.

SEC. 9. Section 1741 is added to the Labor Code, to read:

1741. If the Labor Commissioner or his or her designee determines after an investigation that there has been a violation of this chapter, the Labor Commissioner shall with reasonable promptness issue a civil wage and penalty assessment to the contractor or subcontractor or both. The assessment shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures due and shall include the basis for the assessment. The assessment shall be served not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever occurs last. However, if the assessment is served after the expiration of this 180-day period, but before the expiration of an additional 180 days, and the awarding body has not yet made full payment to the contractor, the assessment is valid up to the amount of the funds retained. Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor, subcontractor, and awarding body. The assessment shall advise the contractor and subcontractor of the procedure for obtaining review of the assessment. The Labor Commissioner shall, to the extent practicable, ascertain the identity of any bonding company issuing a bond that secures the payment of wages covered by the assessment and any surety on a bond, and shall serve a copy of the assessment by certified mail to the bonding company or surety at the same time service is made to the contractor, subcontractor, and awarding body. However, no bonding company or surety shall be relieved of its responsibilities because it failed to receive notice from the Labor Commissioner.

SEC. 10. Section 1742 is added to the Labor Code, to read:

1742. (a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b) Upon receipt of a timely request, a hearing shall be commenced within 90 days before the director, who shall appoint an impartial

hearing officer possessing the qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the Government Code. The appointed hearing officer shall be an employee of the department, but shall not be an employee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

Within 45 days of the conclusion of the hearing, the director shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the director shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the director may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

The director shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the director by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

(h) This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted

statute, that is enacted before January 1, 2005, deletes or extends that date.

SEC. 11. Section 1742 is added to the Labor Code, to read:

1742. (a) An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment. If no hearing is requested within 60 days after service of the assessment, the assessment shall become final.

(b) (1) Upon receipt of a timely request, a hearing shall be commenced within 90 days before an administrative law judge appointed by the Director of Industrial Relations. The appointed hearing judge shall be an employee of the department, but shall not be an employee of the Division of Labor Standards Enforcement. The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

(2) The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect. The assessment shall be sufficiently detailed to provide fair notice to the contractor or subcontractor of the issues at the hearing.

(3) Within 45 days of the conclusion of the hearing, the administrative law judge shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the administrative law judge shall consist of a notice of findings, findings, and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party on file with the Labor Commissioner. Within 15 days of the issuance of the decision, the administrative law judge may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time.

(4) The Director of Industrial Relations shall adopt regulations setting forth procedures for hearings under this subdivision.

(c) An affected contractor or subcontractor may obtain review of the decision of the administrative law judge by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision. If no petition for writ of mandate is filed within 45 days after service of the decision, the order shall become final. If it is claimed in a petition for writ of mandate that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) A certified copy of a final order may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the affected contractor or subcontractor has property or has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order.

(e) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and shall be given the same preference allowed by law on other judgments rendered for claims for taxes. The clerk shall not charge for the service performed by him or her pursuant to this

section.

(f) An awarding body that has withheld funds in response to a civil wage and penalty assessment under this chapter shall, upon receipt of a certified copy of a final order that is no longer subject to judicial review, promptly transmit the withheld funds, up to the amount of the certified order, to the Labor Commissioner.

(g) This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter or the decision of an awarding body to withhold contract payments pursuant to Section 1771.5.

(h) This section shall become operative on January 1, 2005.

SEC. 12. Section 1742.1 is added to the Labor Code, to read:

1742.1. (a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment or notice to be in error, the director shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal proceedings. The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking administrative review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting.

This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2005, deletes or extends that date.

SEC. 13. Section 1742.1 is added to the Labor Code, to read:

1742.1. (a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable

for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the administrative law judge that he or she had substantial grounds for believing the assessment or notice to be in error, the administrative law judge shall waive payment of the liquidated damages. Any liquidated damages collected shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a civil wage and penalty assessment under Section 1741, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding the assessment without the need for formal proceedings. The awarding body shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of a notice of withholding under subdivision (a) of Section 1771.6, afford the contractor or subcontractor the opportunity to meet with the designee of the awarding body to attempt to settle a dispute regarding the notice without the need for formal proceedings. The settlement meeting may be held in person or by telephone and shall take place before the expiration of the 60-day period for seeking administrative review. No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, the settlement meeting is admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, the settlement meeting, other than a final settlement agreement, is admissible or subject to discovery in any administrative or civil proceeding. The assessment or notice shall advise the contractor or subcontractor of the opportunity to request a settlement meeting.

This section shall become operative on January 1, 2005.

SEC. 14. Section 1743 is added to the Labor Code, to read:

1743. (a) The contractor and subcontractor shall be jointly and severally liable for all amounts due pursuant to a final order under this chapter or a judgment thereon. The Labor Commissioner shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim against the contractor.

(b) From the amount collected, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(c) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

(d) A final order under this chapter or a judgment thereon shall be binding, with respect to the amount found to be due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond. The limitations period of any action on a payment bond shall be tolled pending a final order that is no longer subject to judicial review.

SEC. 15. Section 1771.6 of the Labor Code is repealed.

SEC. 16. Section 1771.6 is added to the Labor Code, to read:

1771.6. (a) Any awarding body that enforces this chapter in accordance with Section 1726 or 1771.5 shall provide notice of the

withholding of contract payments to the contractor and subcontractor, if applicable. The notice shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures withheld. Service of the notice shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor and subcontractor, if applicable. The notice shall advise the contractor and subcontractor, if applicable, of the procedure for obtaining review of the withholding of contract payments.

The awarding body shall also serve a copy of the notice by certified mail to any bonding company issuing a bond that secures the payment of wages covered by the notice and to any surety on a bond, if their identities are known to the awarding body.

(b) The withholding of contract payments in accordance with Section 1726 or 1771.5 shall be reviewable under Section 1742 in the same manner as if the notice of the withholding was a civil penalty order of the Labor Commissioner under this chapter. If review is requested, the Labor Commissioner may intervene to represent the awarding body.

(c) Pending a final order, or the expiration of the time period for seeking review of the notice of the withholding, the awarding body shall not disburse any contract payments withheld.

(d) From the amount recovered, the wage claim shall be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.

(e) Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund of the awarding body that has enforced this chapter pursuant to Section 1771.5.

SEC. 17. Section 1771.7 of the Labor Code is repealed.

SEC. 18. Section 1773.1 of the Labor Code is amended to read:

1773.1. (a) Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, subsistence, and apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the contributions, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

(b) Employer payments include all of the following:

(1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.

(2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.

(3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

(c) Employer payments are a credit against the obligation to pay the general prevailing rate of per diem wages. However, no credit shall be granted for benefits required to be provided by other state or federal law. Credits for employer payments also shall not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing.

(d) The credit for employer payments shall be computed on an annualized basis where the employer seeks credit for employer payments that are higher for public works projects than for private construction performed by the same employer, except where one or more of the following occur:

(1) The employer has an enforceable obligation to make the higher rate of payments on future private construction performed by the employer.

(2) The higher rate of payments is required by a project labor agreement.

(3) The payments are made to the California Apprenticeship Council pursuant to Section 1777.5.

(4) The director determines that annualization would not serve the purposes of this chapter.

(e) For the purpose of determining those per diem wages for contracts, the representative of any craft, classification, or type of worker needed to execute contracts shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification, or type of work involved. The collective bargaining agreements shall be filed after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids. If the collective bargaining agreement has not been formalized, a typescript of the final draft may be filed temporarily, accompanied by a statement under penalty of perjury as to its effective date.

Where a copy of the collective bargaining agreement has previously been filed, fully executed copies of all modifications and extensions of the agreement that affect per diem wages or holidays shall be filed.

The failure to comply with filing requirements of this subdivision shall not be grounds for setting aside a prevailing wage determination if the information taken into consideration is correct.

SEC. 19. Section 1775 of the Labor Code, as amended by Section 1 of Chapter 757 of the Statutes of 1997, is repealed.

SEC. 20. Section 1775 of the Labor Code, as added by Section 2 of Chapter 757 of the Statutes of 1997, is amended to read:

1775. (a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(1) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected upon being brought to the attention of the contractor or subcontractor.

(2) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the

subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages.

SEC. 21. This act shall become operative on July 1, 2001.

SEC. 22. No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution for certain costs that may be incurred by a local agency or school district because in that regard this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIIIB of the California Constitution.

However, notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

Senate Bill No. 975

CHAPTER 938

An act to amend Section 63036 of the Government Code, and to amend Section 1720 of the Labor Code, relating to the California infrastructure and economic development bank.

[Approved by Governor October 14, 2001. Filed with Secretary of State October 14, 2001.]

LEGISLATIVE COUNSEL'S DIGEST

SB 975, Alarcon. California Infrastructure and Economic Development Bank.

Existing law, the Bergeson-Peace Infrastructure and Economic Development Bank Act, establishes the California Infrastructure and Economic Development Bank in the Trade and Commerce Agency. The act requires public works financed by the bank to comply with certain laws applicable to payment of prevailing wages on public works.

This bill would require any of those public works financed through the use of industrial development bonds under the California Industrial Development Financing Act to comply with those laws relating to payment of prevailing wages.

Existing law generally defines "public works" to include construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds.

This bill would redefine "public works" to include installation and provide that "paid for in whole or in part with public funds" means certain payments, transfers, credits, reductions, waivers, and performances of work, but does not include the construction or rehabilitation of affordable housing units for low- or moderate-income persons, as specified.

This bill would provide that certain private residential housing projects and development projects built on private property are not subject to the prevailing wage, hour, and discrimination laws that govern employment on public works projects.

This bill would also make technical, nonsubstantive changes.

The people of the State of California do enact as follows:

SECTION 1. Section 63036 of the Government Code is amended to read:

63036. It is the intent of the Legislature that the activities of the bank be fully coordinated with any future legislative plan involving growth management strategies designed to protect California's land resource, and ensure its preservation and use it in ways which are economically and socially desirable. Further, all public works financed pursuant to this division, including those projects financed through the use of industrial development bonds under Title 10 (commencing with Section 91500), shall comply with Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code.

SEC. 2. Section 1720 of the Labor Code is amended to read:

1720. (a) As used in this chapter, "public works" means:

(1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

(2) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(3) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(4) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(5) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(6) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

(b) For purposes of this section, "paid for in whole or in part out of public funds" means the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer, performance of construction work by the state or political subdivision in execution of the project, transfer of an asset of value for less than fair market price; fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value,

waived or forgiven; money to be repaid on a contingent basis; or credits applied against repayment obligations.

(c) Notwithstanding subdivision (b):

(1) Private residential projects built on private property are not subject to the requirements of this chapter if the projects are not built pursuant to an agreement with a state agency, redevelopment agency, or local public housing authority.

(2) (A) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

(B) If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

(3) The construction or rehabilitation of affordable housing units for low- or moderate-income persons pursuant to paragraph (5) or (7) of subdivision (e) of Section 33334.2 of the Health and Safety Code that are paid for solely with moneys from a Low and Moderate Income Housing Fund established pursuant to Section 33334.3 of the Health and Safety Code or that are paid for by a combination of private funds and funds available pursuant to Section 33334.2 or 33334.3 of the Health and Safety Code does not constitute a project that is paid for in whole or in part out of public funds.

(4) "Paid for in whole or in part out of public funds" shall not include tax credits provided pursuant to Section 17053.49 or 23649 of the Revenue and Taxation Code.

(d) Notwithstanding any provision of this section to the contrary, the following projects shall not, solely by reason of this section, be subject to the requirements of this chapter:

(1) Qualified residential rental projects, as defined by Section 142 (d) of the Internal Revenue Code, financed in whole or in part through the issuance of bonds that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8369.80) of the Government Code on or before December 31, 2003.

(2) Single-family residential projects financed in whole or in part through the issuance of qualified mortgage revenue bonds or qualified veterans' mortgage bonds, as defined by Section 143 of the Internal Revenue Code, or with mortgage credit certificates under a Qualified Mortgage Credit Certificate Program, as defined by Section 25 of the Internal Revenue Code, that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8869.80) of the Government Code on or before December 31, 2003.

(3) Low-income housing projects that are allocated federal or state low-income housing tax credits pursuant to Section 42 of the Internal Revenue Code, Chapter 3.6 of Division 31 (commencing with Section 50199.4) of the Health and Safety Code, or Sections 12206, 17058, or 23610.5 of the Revenue and Taxation Code, on or before December 31, 2003.

(e) If a statute, other than this section, or an ordinance or regulation, other than an ordinance or regulation adopted pursuant to this section, applies this chapter to a project, the exclusions set forth in subdivision (d) shall not apply to that project.

(f) For purposes of this section, references to the Internal Revenue Code shall mean the Internal Revenue Code of 1986, as amended, and shall include the corresponding predecessor sections of the Internal Revenue Code of 1954, as amended.

O

92

Senate Bill No. 972

CHAPTER 1048

An act to amend Section 1720 of the Labor Code, relating to public works.

[Approved by Governor September 28, 2002. Filed with Secretary of State September 28, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

SB 972, Costa. Public works: prevailing wages.

Existing law defines a project as a "public work" if the project involves construction, alteration, demolition, installation, or repair work that is done under contract and paid for in whole or in part out of public funds, as specified. Existing law generally requires that not less than the general prevailing rate of per diem wages, as specified, be paid to workers engaged in a public work, as defined, but excludes certain types of housing projects from these requirements.

This bill would exclude from the requirements of public works and prevailing wage laws the construction, expansion, or rehabilitation of privately owned residential projects that are self-help housing projects, operated on a not-for-profit basis as housing for homeless persons, or that provide for housing assistance.

This bill would specify that this provision and amendments made by a prior statute do not preempt local ordinances requiring the payment of prevailing wages on housing projects.

This bill would also make technical, nonsubstantive changes.

The people of the State of California do enact as follows:

SECTION 1. Section 1720 of the Labor Code is amended to read:

1720. (a) As used in this chapter, "public works" means:

(1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

(2) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" does not include the operation of the irrigation or drainage system of any irrigation or

reclamation district, except as used in Section 1778 relating to retaining wages.

(3) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(4) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(5) The laying of carpet in a public building done under contract and paid for in whole or in part out of public funds.

(6) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

(b) For purposes of this section, "paid for in whole or in part out of public funds" means all of the following:

(1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.

(2) Performance of construction work by the state or political subdivision in execution of the project.

(3) Transfer by the state or political subdivision of an asset of value for less than fair market price.

(4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.

(5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis.

(6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision.

(c) Notwithstanding subdivision (b):

(1) Private residential projects built on private property are not subject to the requirements of this chapter unless the projects are built pursuant to an agreement with a state agency, redevelopment agency, or local public housing authority.

(2) If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no

proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter.

(3) If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

(4) The construction or rehabilitation of affordable housing units for low- or moderate-income persons pursuant to paragraph (5) or (7) of subdivision (e) of Section 33334.2 of the Health and Safety Code that are paid for solely with moneys from a Low and Moderate Income Housing Fund established pursuant to Section 33334.3 of the Health and Safety Code or that are paid for by a combination of private funds and funds available pursuant to Section 33334.2 or 33334.3 of the Health and Safety Code do not constitute a project that is paid for in whole or in part out of public funds.

(5) "Paid for in whole or in part out of public funds" does not include tax credits provided pursuant to Section 17053.49 or 23649 of the Revenue and Taxation Code.

(6) Unless otherwise required by a public funding program, the construction or rehabilitation of privately owned residential projects is not subject to the requirements of this chapter if one or more of the following conditions are met:

(A) The project is a self-help housing project in which no fewer than 500 hours of construction work associated with the homes are to be performed by the homebuyers.

(B) The project consists of rehabilitation or expansion work associated with a facility operated on a not-for-profit basis as temporary or transitional housing for homeless persons with a total project cost of less than twenty-five thousand dollars ($25,000).

(C) Assistance is provided to a household as either mortgage assistance, downpayment assistance, or for the rehabilitation of a single-family home.

(D) The project consists of new construction, or expansion, or rehabilitation work associated with a facility developed by a nonprofit organization to be operated on a not-for-profit basis to provide emergency or transitional shelter and ancillary services and assistance to homeless adults and children. The nonprofit organization operating the project shall provide, at no profit, not less than 50 percent of the total project cost from nonpublic sources, excluding real property that is transferred or leased. Total project cost includes the value of donated labor, materials, architectural, and engineering services.

(E) The public participation in the project that would otherwise meet the criteria of subdivision (b) is public funding in the form of below-market interest rate loans for a project in which occupancy of at least 40 percent of the units is restricted for at least 20 years, by deed or regulatory agreement, to individuals or families earning no more than 80 percent of the area median income.

(d) Notwithstanding any provision of this section to the contrary, the following projects shall not, solely by reason of this section, be subject to the requirements of this chapter:

(1) Qualified residential rental projects, as defined by Section 142 (d) of the Internal Revenue Code, financed in whole or in part through the issuance of bonds that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8869.80) of the Government Code on or before December 31, 2003.

(2) Single-family residential projects financed in whole or in part through the issuance of qualified mortgage revenue bonds or qualified veterans' mortgage bonds, as defined by Section 143 of the Internal Revenue Code, or with mortgage credit certificates under a Qualified Mortgage Credit Certificate Program, as defined by Section 25 of the Internal Revenue Code, that receive allocation of a portion of the state ceiling pursuant to Chapter 11.8 of Division 1 (commencing with Section 8869.80) of the Government Code on or before December 31, 2003.

(3) Low-income housing projects that are allocated federal or state low-income housing tax credits pursuant to Section 42 of the Internal Revenue Code, Chapter 3.6 of Division 31 (commencing with Section 50199.4) of the Health and Safety Code, or Section 12206, 17058, or 23610.5 of the Revenue and Taxation Code, on or before December 31, 2003.

(e) If a statute, other than this section, or a regulation, other than a regulation adopted pursuant to this section, or an ordinance or a contract applies this chapter to a project, the exclusions set forth in subdivision (d) do not apply to that project.

(f) For purposes of this section, references to the Internal Revenue Code mean the Internal Revenue Code of 1986, as amended, and include the corresponding predecessor sections of the Internal Revenue Code of 1954, as amended.

(g) The amendments made to this section by either Chapter 938 of the Statutes of 2001 or the act adding this subdivision shall not be construed to preempt local ordinances requiring the payment of prevailing wages on housing projects.

O

91

expense of the self-insurer, not more frequently than once each calendar year, and the expense incurred in making such examination and audit shall be paid by the self-insurer.

GROUP 3. PAYMENT OF PREVAILING WAGES UPON PUBLIC WORKS

Article 1. Definitions

16000. Person. The term "person" means any individual, partnership, corporation, association, or any local state, regional, national or international labor union, or any other organization, or any agent or officer thereof, authorized to act for and on behalf of any of the foregoing.

NOTE: Authority cited for group 3: Section 1773.5, Labor Code.

History: New group 3 (§§ 16000-16001, 16100-16101 and 16200-16205) filed 4-27-56; effective thirtieth day thereafter (Register 56, No. 8).

16001. Filing. Except where otherwise specifically provided by these Rules, the term "filing" means the deposit in the United States mail, postage prepaid and addressed to the person or agency with whom a paper or document is to be filed, except that in any event any paper or document required or permitted to be filed pursuant to these rules or pursuant to the prevailing wage provisions of the Labor Code, shall be deemed filed upon actual delivery to and receipt by such person or agency.

16002. Nearest Labor Market Area. The term "nearest labor market area" means that geographical area from which workmen of the crafts, classifications, and types to be used in the performance and execution of the public work will be drawn for employment upon such public work.

16003. Prevailing Rate. The term "prevailing rate" means the rate being paid to a majority of workmen engaged in the particular craft, classification or type of work within the locality if a majority of such workmen be paid at a single rate; if there be no single rate being paid to a majority, then the rate being paid the greater number.

16004. Wages. The term "wages" means all compensation of whatever description or form, and however ascertained or calculated, paid by employers to, for or on behalf of the employees.

Article 2. Determination and Publication of Prevailing Wage Rates

16100. Hourly Rates. Whenever there is no daily rate of wages generally prevailing for a given craft, classification or type of work, then the general prevailing rate of wages per hour shall be ascertained by the body awarding the contract or authorizing the public work for such craft, classification or type of work, and in such event the general prevailing rate of per diem wages shall be expressed as an hourly rate and shall be identified accordingly in the call for bids.

16101. Publication of Rates. In specifying wage rates in the published call for bids pursuant to Section 1773 of the Labor Code, the body awarding any contract for public work or otherwise undertaking public work shall directly list, identify and separately state in each published call for bids the prevailing rate of wages for each craft, classification or type of workmen needed to execute the contract.

Article 3. Petitions to Review Prevailing Wage Rate Determinations

16200. Authority Delegated to Labor Commissioner. The Labor Commissioner is the authorized representative of the Director of Industrial Relations for the purpose of acting on petitions filed pursuant to Labor Code Section 1773.4.

16201. Manner of Filing. Every petition pursuant to Section 1773.4 of the Labor Code shall be filed in triplicate with the director by delivery to the Labor Commissioner, 965 Mission Street, San Francisco 3, California. Petitions may be filed in person or by mail. The date of receipt of the petition by the Labor Commissioner shall constitute the date on which the petition is deemed filed.

16202. Form. Every petition or other document filed or served pursuant to these rules shall be printed or written upon good white paper of letter or legal size. The petition or other document, and all copies thereof served or filed, shall be clear and legible and if typewritten, shall be double-spaced, paged at the bottom, and all copies shall conform in all respects to the original petition or document. The petition or document shall be securely bound or stapled. The name, address and telephone of the organization filing the petition, or its attorney if the petition is filed by an attorney shall appear in the upper left-hand corner of the first page of the petition.

16203. Content. Every petition filed pursuant to Section 1773.4 of the Labor Code shall contain and separately state the following:

(a) The name and address of the person filing the petition, together with the name and address of the person verifying the petition if different from the person filing the same.

(b) Whether the petitioner is a prospective bidder or the representative of a prospective bidder, or the representative of one or more crafts, classifications or types of workmen involved in the public work contract, together with a specific designation of the nature of petitioner's business, if he be a prospective bidder, or a designation of each craft, classification or type of workmen represented by him if the petitioner be a representative of one or more crafts, classifications or types of workmen involved in the public works project.

(c) The official name of the awarding body, together with the date on which the call for bids was first published and the name and location of the newspaper in which such publication was made. A true and correct full copy of the call for bids as published shall be attached to the petition.

(d) If petitioner be an awarding body which is a department, board, authority or political subdivision other than a county, city and county, city or township, the awarding body shall describe the parent or principal organization of which it is a part, and shall specify the statutory authority for undertaking public works.

(e) The manner in which the wage rate determination by the awarding body fails to comply with the provisions of Labor Code Section 1773.

(1) Every petition asserting that the applicable prevailing rate for one or more crafts, classifications or types of work needed to execute a contract is different from that ascertained by the awarding body shall set forth the rate the petitioner claims to be correct for each disputed rate, together with specific reference to particular facts providing the basis for such claim. Whenever such facts relate to a particular employer of such craft, classification or type of work, the facts stated must identify the employer by name and address and give the number or approximate number of workers involved.

(2) Every petition asserting that the awarding body has failed to ascertain and consider all applicable rates required to be considered by it shall specifically state in the petition which rates have not been considered by the awarding body.

(3) Where the rates ascertained by the awarding body are the same as the applicable rates established by the collective bargaining agreement and rates of pay determined for federal public works within the locality and the nearest labor market area where the public work is to be performed, the petition shall specifically describe the manner and extent to which such rates do not constitute the rates actually prevailing in the locality where the public work is to be performed, and shall set forth and fully identify the existence of any rates asserted by petitioner to be prevailing in the locality and relied upon in support of the petition.

16204. Failure to Include Copy of Call for Bids. If the petition fails to contain a copy of the call for bids as provided in Section 16203(c), the director may dismiss the petition forthwith or may, if in his judgment good cause is shown, permit the petition to be amended to include such copy.

16205. Filing Copy With Awarding Body. If the petitioner be other than an awarding body, the petitioner may concurrently with the filing of the original petition, or otherwise shall within two days thereafter, file a copy of the petition with the awarding body. Immediately upon the filing of such copy with the awarding body, and not later than five days after the filing of the original petition, the petitioner shall file with the Labor Commissioner an affidavit of the filing with the awarding body.

(Next page is 901)

949

REVISION RECORD FOR REGISTER 56, No. 8

(May 5, 1956)

TITLE 18. PUBLIC REVENUES

CHAPTER 2. BOARD OF EQUALIZATION

SUBCHAPTER 4. SALES AND USE TAX

This part of Register 56, No. 8, contains all the additions, amendments, and repeals affecting the above-entitled portion of the California Administrative Code which were filed with the Secretary of State from April 21, 1956, to and including May 5, 1956.

It is important that the holders of the above-entitled portion of the code check the section numbers listed below as well as the page numbers when inserting this material in the code and removing the superseded material. In case of doubt rely upon the section numbers rather than the page numbers since the section numbers must run consecutively even though there may be an error in the paging.

SECTION CHANGES

Unless otherwise noted, the sections listed below are amended herein.

Section	Section
2203 added	2205 added
2204 added	2206 added

PAGE CHANGES

REMOVE Old Pages	INSERT Attached Pages
501-502	501-502
	548.1 through 548.4

Do Not Throw Away Superseded Material. Save it and place it in a separate file under the original heading (either the appropriate title or register heading). It will then always be possible to find the prior wording of any section by using the history notes provided.

NOTE: This revision sheet is not a part of the code and should not be inserted therein. It is chiefly for filing purposes. If preserved with the removed pages, it will afford a ready reference to the sections affected by agency action.

(Precedes page 501, Title 18)

GROUP 3. PAYMENT OF PREVAILING WAGES UPON PUBLIC WORKS

Article 1. Definitions

16000. Director. The term "Director" means the Director of the Department of Industrial Relations or a duly authorized representative.

NOTE: Authority cited for Group 3: Sections 54 and 1773.5, Labor Code. Reference: Sections 1770–1773.8, Labor Code.

History: 1. Repealer of Group 3, (Articles 1–3, Sections 16000–16004, 16100–16101 and 16200–16205) and new Group 3 (Articles 1–4, Sections 16000–16013, 16100–16109, 16200–16206 and 16300–16305) filed 1-3-77 as an emergency; effective upon filing (Register 77, No. 2). For prior history, see Register 56, No. 8.

16001. Division. The term "Division" means the Division of Labor Statistics and Research within the Department of Industrial Relations.

16002. Chief. The term "Chief" means the Chief of the Division of Labor Statistics and Research or a duly authorized representative, within the Department of Industrial Relations.

16003. Person. The term "person" means any individual, partnership, corporation, association, or any local, state, regional, national or international organization, public or private, or any awarding body, or any agent or officer thereof, authorized to act for or on behalf of any of the foregoing.

16004. Public Works. The term "public works" as used in these regulations shall be as defined in Sections 1720, 1720.2 and 1720.3 of the Labor Code.

16005. Political Subdivision. The term "political subdivision" includes any county, city, district, township, public housing authority, or public agency of the State, and assessment or improvement districts.

16006. Awarding Body. The term "awarding body" means any state or local governmental agency, department, board, commission, bureau, district, office, authority, political subdivision, officer or agent awarding a contract for public work.

16007. Filing. Where any paper, letter, petition, or document is required or permitted to be filed pursuant to these rules or pursuant to the prevailing wage provisions of the Labor Code, it shall be deemed filed with any person, awarding body, or the Division upon actual delivery to and receipt by such person, awarding body, or the Division.

16008. Nearest Labor Market Area. The term "nearest labor market area", for the purpose of following the procedures specified in Section 1773 of the Labor Code, means the nearest geographical area from which workers of the crafts, classifications, and types to be used in the performance and execution of the public work can be drawn for employment upon such public work.

16009. Locality. "Locality" or "locality in which public work is performed" means the county in which the public work is done in cases in which the contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases.

16010. Employer Payments. The term "employer payments" includes:

(a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees.

(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents, or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the workers affected.

16011. Prevailing Rate. The term "prevailing rate" shall have the following meaning:

(a) When applied to the basic hourly rate of pay, the term means the rate being paid to a majority of workers engaged in the particular craft, classification or type of work within the locality and in the nearest labor market area, if a majority of such workers be paid at a single rate; if there be no single rate being paid to a majority, then the single rate being paid the greater number.

(b) When applied to other employer payments included in per diem wages pursuant to Section 1773.1 of the Labor Code and enumerated in Section 16012, (3), below, the term means, for each such type of payment, the single rate of contribution or cost being paid to or for the greater number of workers in the particular craft, classification or type of work who are paid the prevailing basic hourly rate of pay as defined in Section 16011(a), above.

(c) When applied to the rate for holiday or overtime work, the term means the single rate paid to or for the greater number of workers in the particular craft, classification or type of work who are paid the prevailing basic hourly rate of pay as defined in Section 16011(a), above.

16012. General Prevailing Rate of Per Diem Wages. (a) The term "general prevailing rate of per diem wages", and similar terms descriptive of determinations made by the Director pursuant to Sections 1773, 1773.1 and 1773.8 of the Labor Code and these rules and regulations, includes:

(1) the prevailing basic straight-time hourly rate of pay; and

(2) the prevailing rate for holiday and overtime work; and

(3) the prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like;

(I) apprenticeship or other training programs authorized by Section 3093 of the Labor Code;

(J) other bona fide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

(b) *Provided,* that the term "general prevailing rate of per diem wages" does not include any employer payments for:

(1) job related expenses other than travel time and subsistence pay;

(2) contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above in Section 16012;

(3) union, organizational, professional or other dues except as they may be included in and withheld from the basic hourly wage rate;

(4) industry or trade promotion;

(5) political contributions or activities;

(6) any benefit for employees, their families and dependents, or retirees, including any benefit enumerated above in Section 16012(3), where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit;

(7) such other payments as the Director may determine to exclude.

16013. Interested Party. Except where otherwise specifically provided by these rules and regulations, the term "interested party" means, when used with reference to a particular prevailing wage determination made by the Director,

(1) Any contractor or subcontractor, or any organization, association, or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determination, and/or

(2) Any worker in the particular craft, classification, or type of work, who may be employed on a public work project subject to the particular prevailing wage determination, or any labor organization or other representative of such a person, including the recognized collective bargaining representative for the particular craft, classification, or type of work, and/or

(3) Any awarding body concerned with the administration of a public works contract or proposed contract, which is subject to the particular prevailing wage determination.

Article 2. Determination of General Prevailing Rate of Per Diem Wages. Requesting and Publishing Determinations

16100. Recognized Crafts. The determinations of the Director will be limited to those crafts, classifications or types of workers employed in public works pursuant to Sections 1720, 1720.2 and 1720.3 of the Labor Code.

16101. Form of Expression. (a) All determinations made by the Director of the general prevailing rate of per diem wages for a particular craft, classification, or type of worker will separately specify each of the following components:

(1) The prevailing basic straight-time hourly wage rate.

(2) The formula or method for calculating the prevailing hourly wage rate for overtime and holiday work and determining the hours of work for which overtime is paid.

(3) The following statement when applicable: "In accordance with Labor Code Section 1773, holidays upon which the prevailing hourly wage rate for holiday work shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of worker employed on the project, which is on file with the Director of Industrial Relations."

(4) The prevailing employer payments for benefits included in the general prevailing rate of per diem wages pursuant to Section 1773.1 of the Labor Code and enumerated in Section 16012, (3), of these rules and regulations.

(5) The following statement when applicable: "The contractor shall make travel and subsistence payments to each worker needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed with the Director of Industrial Relations in accordance with Labor Code Section 1773.8".

(b) Where the prevailing employer payment for any benefit is expressed in a formula or method of payment other than an hourly rate the Director may (1) express the rate in the determination by specifying the formula or method used or (2) convert the rate to an hourly rate whenever such action would facilitate the administration of the law.

(c) As a supplement to each determination the Director will make available to any awarding body upon request, a list of all holidays recognized and the provision for travel and subsistence payments, taken from the applicable collective bargaining agreement.

16102. Method of Determination. The Director shall follow those procedures specified in Section 1773 of the Labor Code and in these rules and regulations when making prevailing wage determinations.

16103. Collective Bargaining Agreements. Filing. (a) To enable the Director to ascertain and consider the applicable wage rates established by collective bargaining agreements when making prevailing wage determinations, the representatives of any crafts, classifications, or types of workers needed to execute any public works contracts shall file with the Department of Industrial Relations fully executed copies of all of their collective bargaining agreements including any addenda which modify the agreements, as soon as practicable after their execution.

(b) Copies of collective bargaining agreements filed with the Department of Industrial Relations pursuant to Sections 1773.1 and 1773.8 of the Labor Code and Section 16103, (a), of these rules and regulations shall be filed with and addressed to: Chief, Division of Labor Statistics and Research, P. O. Box 603, San Francisco, CA 94101.

(c) Collective bargaining agreements filed with the Division must be accompanied by a signed statement which is certified as true and correct to the best of the knowledge and belief of the person preparing the statement, under penalty of perjury, and which:

(1) certifies that the agreement filed is fully executed and in effect, unless it is a signed original agreement or a photocopy thereof, or a printed copy of a fully executed agreement showing the names of signatory parties, except in the case of a printed agreement the Director may require certification.

(2) names or otherwise identifies all California counties within the jurisdiction of the local union or unions signatory to the agreement and provides any maps or additional information that may be needed to determine its precise geographic scope, if this is not clearly specified in the agreement;

(3) names and provides the address of the signatory employer association or, if there be no signatory employer association, provides the names and addresses of all contractors signatory to the agreement, unless such information is contained in the agreement;

(4) provides an estimate of the approximate number of workers currently employed under the terms of the agreement in California and, if practicable, in each county within the jurisdiction of the signatory local union or unions;

(5) provides any other information not contained in the agreement that the Director may need to give proper consideration to applicable wage rates established by collective bargaining.

16104. Consideration of Other Data. Pursuant to Section 1773 of the Labor Code, the Director may also obtain and consider further data from interested parties, and will give consideration to data submitted by any interested party, concerning the rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area. Such data may be obtained by holding a hearing, instituting an investigation, or by such other means as the Director determines will best serve the purposes of the law. Information submitted by interested parties for the Director's consideration shall include but not be limited to the following for each project:

(a) The name, address, and telephone number of the interested party submitting the information and the basis for qualification as an interested party under Section 16013;

(b) The basic hourly wage rate, overtime and holiday pay rates, and employer payments as enumerated in Section 16012 of these rules and regulations for each classification in question as effective for the last payroll period, or most recent payroll period, for which payments based on such rates were actually made;

(c) The number of workers employed on the project in each classification in question during the payroll period for which data is submitted;

(d) The location of the project;

(e) The name and address of the contractor or subcontractor making the payments, and of all other contractors or subcontractors on the project;

(f) The type of construction (e.g. residential, commercial building, etc.);

(g) The approximate cost of construction;

(h) The beginning date and completion date, or estimated completion date, of the project;

(i) The source of data (e.g. "payroll records");

(j) The method of selection of the projects for which data is submitted, when data is not submitted for all projects recently completed or in progress in the locality or in the nearest labor market area.

16105. Collective Bargaining Agreements. Adoption. (a) If the Director determines pursuant to Section 1773 of the Labor Code that the rate established by a collective bargaining agreement is the general prevailing rate of per diem wages for any craft, classification or type of worker and the Director adopts such rate by referral, the Director will publish such rate in the form prescribed by these rules and regulations. Only those rates and employer payments specifically enumerated in Section 16012 of these rules and regulations shall be included in the rate adopted.

(b) When such rate is adopted, and in the case where the collective bargaining agreement contains definite and predetermined changes during its term which will affect the rate adopted, the Director will incorporate such changes in the determination.

(c) When such rate is adopted, and in the case where the collective bargaining agreement contains changes during its term which will affect the rate adopted, which are not definite or predetermined, the changes shall not be adopted. The determination of the Director will remain in effect until a new determination is issued. Any interested party may request that the Director make a new determination when said changes become definite and determined. A statement must be filed in the same manner as collective bargaining agreements are filed under Section 16103 of these rules and regulations. The statement must summarize the amounts and effective dates of any cost-of-living adjustments, allocations of interim wage increases to wages and employer payments, and other relevant changes which will affect the rate adopted by the Director. The statement must be signed by an officer or agent of the bargaining representative and certified, under penalty of perjury, as true and correct to the best of his or her knowledge and belief.

16106. Errors. Corrections. Upon his or her own initiative or at the request of any interested party, the Director shall correct any error in a published determination that is the result of clerical error, such as a typographical error or a transposition of letters or digits, by issuing a corrected determination or a modification of the determination.

16107. Requesting Determinations. (a) When the Director determines that the general prevailing rate of per diem wages for a particular craft, classification, or type of worker is uniform throughout a large geographic area, the Director will issue an "area" determination based on that agreement. Area determinations will ordinarily be made for an entire county or group of counties and shall constitute the Director's determination for all localities in which public work is performed within that county or counties except as the geographic application of the determination may be specifically limited by the determination itself.

(b) An awarding body may request the Director to make a determination for particular crafts, classifications, or types of workers for which an area determination has not been made or issued, or has expired.

(c) Any awarding body may request to be put on a mailing list for all area wage determinations for a specific county or counties or may request that a prevailing wage determination be furnished when needed, by writing to Chief, Division of Labor Statistics and Research, P.O. Box 603, San Francisco, CA 94101. All requests for prevailing wage determinations must be in writing and must specify the location where the public work is to be performed, including the county, and the particular crafts, classifications, or types of workers for which a determination is needed.

16108. Effective Dates of Determinations. Area determinations issued by the Director will ordinarily show an issue date and an expiration date and will be effective until that expiration date, unless earlier modified, corrected, rescinded, or superseded by the Director; other determinations made on request will show an issue date but may not show an expiration date; *provided;* that determinations modified, corrected, rescinded, or superseded on the basis of information contained in copies of collective bargaining agreements filed with the Department shall not be effective as to any project in which the call for bids takes place less than 30 days after the filing of the agreement (see Section 1773.1 of the Labor Code).

16109. Publication of Prevailing Rates by Awarding Bodies. To the extent that an awarding body is required to specify the general prevailing rate of per diem wages in the published call for bids, in the bid specifications, and in the contract itself, pursuant to Section 1773.2 of the Labor Code, the rates as determined by the Director for each craft, classification, or type of worker needed to execute the contract, and in the form of expression adopted by the Director, shall be used. In lieu of specifying the rates in the call for bids, the bid specifications, and the contract, the awarding body may, pursuant to Section 1773.2 refer to copies of the applicable determinations of the Director on file at its principal office.

Article 3. Delegation of Authority: Petition to Review

16200. Delegation of Authority. Chief, Division of Labor Statistics and Research. (a) The Chief of the Division of Labor Statistics and Research is the authorized representative of the Director for the purpose of receiving collective bargaining agreements, petitions, and other documents and papers pertinent to making prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these rules and regulations.

(b) The Chief is the authorized representative of the Director for the purpose of gathering information needed to make prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code or these rules and regulations, and may for that purpose institute investigations, conduct hearings, or employ such other means as shall best serve the purposes of the law.

(c) The Chief is the authorized representative of the Director for the purpose of responding to petitions to review determinations filed pursuant to Section 1773.4 of the Labor Code.

(d) All final determinations shall be made by the Director.

16201. Petition to Review. Those interested parties enumerated in Section 1773.4 of the Labor Code may file with the Chief, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director, pursuant to Section 1773 of the Labor Code, which is specified in or referred to in the call for bids.

16202. Manner of Filing. Petition to Review. Every petition filed pursuant to Section 1773.4 of the Labor Code shall be filed in triplicate with the Director by delivery to the Chief, Division of Labor Statistics and Research, P.O. Box 603, San Francisco, CA 94101. Petitions may be filed in person or by mail.

16203. Form. Every petition or other document filed or served pursuant to Section 1773.4 of the Labor Code and Article 3 of these rules and regulations shall be printed or written upon good white paper of letter size (8½ × 11), except as such is a copy of a prior executed petition, document, letter or paper. The petition or other document, and all copies thereof served or filed, shall be clear and legible and if typewritten, shall be double-spaced, paged at the bottom, and all copies shall conform in all respects to the original petition or document. Where attachments are referred to and used, they must be noted, attached and identified properly. The petition or document shall be securely bound or stapled. The name, address and telephone number of the person filing the petition or other document, letter or paper, or of the attorney representing the person, shall appear in the upper left-hand corner of the first page of said item. The signature of the person verifying said item shall appear in the lower right-hand corner of the last page.

16204. Content. Petition to Review. Every petition filed pursuant to Section 1773.4 of the Labor Code shall contain and separately state the following:

(a) The name, address, and telephone number of the person filing the petition, together with the name, address and telephone number of the person verifying the petition, if different from the person filing the same.

(b) Whether the petitioner is an awarding body, or a prospective bidder or the representative of a prospective bidder, or the representative of one or more crafts, classifications or types of workers involved in the public work contract together with a specific designation of the nature of petitioner's business, if a prospective bidder, or a designation of each craft, classification or type of worker represented, if the petitioner be a representative of one or more crafts, classifications or types of workers involved in the public works project.

(c) The official name of the awarding body, together with the date on which the call for bids was first published and the name and location of the newspaper in which such publication was made. A true and correct full copy of the call for bids as published shall be attached to the petition.

(d) If petitioner be an awarding body which is a department, board, authority or political subdivision other than a county, city and county, city or township, the awarding body shall describe the parent or principal organization of which it is a part, and shall specify the statutory authority for undertaking public works.

(e) The manner in which the wage rate determination by the director fails to comply with the provisions of Labor Code Section 1773.

(1) Every petition asserting that the applicable prevailing rate for one or more crafts, classifications or types of workers needed to execute a contract is different from that ascertained by the Director shall set forth the rate the petitioner claims to be correct for each disputed rate, together with specific reference to particular facts providing the basis for such claim.

(A) Whenever such facts relate to a particular employer of such crafts, classifications or types of workers, the facts stated must identify the employer by name and address and give the number or approximate number of workers involved.

(B) Whenever such facts relate to an applicable collective bargaining agreement which the petitioner alleges was not considered by the Director pursuant to Section 1773 of the Labor Code, a copy of the agreement, if not already filed with the Director, should be filed concurrently with the petition in the manner provided in Section 16103 of these rules and regulations.

(C) Whenever such facts relate to rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area, the facts stated should include all of the items of information enumerated in Section 16105 of these rules and regulations.

(2) Every petition asserting that the Director has failed to ascertain and consider all applicable rates required to be considered by it shall specifically state in the petition which rates have not been considered by the Director.

(3) Where the rates ascertained by the Director are the same as the applicable rates established by the collective bargaining agreement and rates of pay determined for federal public works within the locality and the nearest labor market area where the public work is to be performed, the petition shall specifically describe the manner and extent to which such rates do not constitute the rates actually prevailing in the locality where the public work is to be performed, and shall set forth and fully identify the existence of any rates asserted by petitioner to be prevailing in the locality and relied upon in support of the petition.

16205. Failure to Include Copy of Call for Bids. If the petition fails to contain a copy of the call for bids as provided in Section 16204(c), the Director may dismiss the petition forthwith or may, if good cause is shown, permit the petition to be amended to include such copy.

16206. Filing Copy With Awarding Body. If the petitioner be other than an awarding body, the petitioner may concurrently with the filing of the original petition, or otherwise shall within two days thereafter, file a copy of the petition with the awarding body. Immediately upon the filing of such copy with the awarding body, and not later than five days after the filing of the original petition, the petitioner shall file with the Chief an affidavit of the filing with the awarding body.

Article 4. Hearing Procedures, Decision, Miscellaneous

16300. Director's Discretion to Act. The Director may in his or her discretion initiate an investigation or hold a hearing or take such other action as is reasonably necessary which would best effectuate the purposes of the law and of these rules and regulations, except as such action may be expressly prohibited by the law.

16301. Director's Choice of Action. In any matter or proceeding under these regulations, whether it be on the initiative of the Director, petition, or request by an interested party the Director shall take those actions he or she deems necessary in the best interest of the law and these regulations except as may be specifically provided otherwise by the law or these regulations.

16302. Hearings. When a hearing is held, it shall be in accordance with the following procedures:

(a) A time and place of the hearing shall be fixed.

(b) All interested parties made known to the Director shall be notified by registered or certified mail, return receipt requested, of the time and place of the hearing.

(c) Notification shall be at least one week in advance.

(d) The interested parties shall be given an opportunity to present evidence and oral or written arguments in support of their positions.

(e) The hearing need not be conducted according to technical rules relating to evidence and witnesses.

(f) All witnesses testifying before the hearing officer shall testify under oath.

(g) A full transcript of the hearing shall be recorded.

16303. Hearing Officer. Decision. (a) The appointed hearing officer shall conduct the hearing and submit to the Director the entire record of the hearing together with written recommendations.

(b) The decisions of the Director shall reflect a summary of the evidence, findings, or matters of fact and or law.

(c) The decision shall be sent, by certified or registered mail with return receipt requested, to all parties no later than 20 days after the hearing, except as may be earlier required in a Petition to Review pursuant to Section 1773.4 of the Labor Code.

(d) The decision of the Director shall be final, for the purposes of judicial review, except that the Director upon his or her initiative only, may reconsider and take whatever action is appropriate or necessary to facilitate a decision on reconsideration. Notice of reconsideration shall be given all parties in the same manner as the notice of hearings as specified in Sections 16302, (b), (c), and (d) above and the decision upon reconsideration shall be as specified in (b), and (c) of this Section.

16304. Public Hearings. The hearing procedures enumerated in Sections 16302 and 16303, above, shall in no way be construed to affect the responsibilities or procedures pursuant to Title 2, Division 3, Part 1, Chapter 4.5 of the Government Code (commencing with Section 11371).

16305. Severability. If any provision of these regulations or the application thereof to any person, party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of these regulations which can be given effect without the invalid provision or application, and to this end the provisions of these regulations are severable.

REVISION RECORD FOR REGISTER 77, No. 2
(January 8, 1977)

TITLE 18. PUBLIC REVENUES

CHAPTER 3. FRANCHISE TAX BOARD

SUBCHAPTER 3.5. BANK AND CORPORATION TAX

This part of Register 77, No. 2, contains all the additions, amendments, and repeals affecting the above-entitled portion of the California Administrative Code which were filed with the Secretary of State from 1-1-77, to and including 1-8-77. The latest prior register containing regulations of the above agency is Register 76, No. 46 (11-13-76).

It is suggested that the section numbers listed below as well as the page numbers be checked when inserting this material in the code and removing the superseded material. In case of doubt rely upon the section numbers rather than the page numbers since the section numbers must run consecutively. It is further suggested that superseded material be retained with this revision record sheet so that the prior wording of any section can be easily ascertained.

SECTION CHANGES

Unless otherwise noted, the sections listed below are repealed and added herein.

24349(k)
24349(k)(1) Repealed
24349(l)
24349(m) Repealed

PAGE CHANGES

Remove Old Pages	Insert Attached Pages
1802.4.1–1802.4.2	1802.4.1–1802.4.2
	1818.1–1818.10
1819–1820	1819–1820
1820A–1820B	
1820.1–1820.4	1820.1–1820.4

been filed, and after consideration of such exceptions the director shall decide that the exceptions to the report of the service do raise substantial and material factual issues, he shall direct the hearing officer to issue a notice of hearing, whereupon the procedures for a hearing and the issuance of the hearing officer's report provided for in subsection (e) of this section (including the provision for filing exceptions to the hearing officer's report) shall be followed. The director may adopt the recommendations of the hearing officer issued under subsection (d) or the report of the hearing officer issued under subsection (e) as his own. The service shall thereafter promptly proceed to take such action as may be called for by the decision of the director, after which the proceedings will be closed.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. Amendment filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

§ 15875. Runoff Elections.

(a) The service shall conduct a runoff election, without further order of the director, when an election in which a ballot providing for not less than three choices (i.e. at least two representatives and "neither" or "none") results in no choice receiving a majority of the valid ballots cast, which runoff election shall be held promptly following final disposition of any challenges, objections or exceptions which followed the prior election as provided in Section 15870. Only one runoff election shall be held pursuant to this section.

(b) Employees who were eligible to vote in the election and who are employed in an eligible category on the date of the runoff election shall be the only employees eligible to vote in the runoff election.

(c) The ballot in the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of votes.

(d) In the event the number of votes cast in an inconclusive election in which the ballot provided for a choice among two or more representatives and "neither" or "none" is equally divided among the several choices, or in the event the number of ballots cast for one choice in such election is equal to the number cast for another of the choices but less than the number cast for the third choice, the director shall declare the first election a nullity and shall conduct another election among the three choices which received the greatest number of ballots in the original election; provided that in the event there was a tie in the original election between the third and fourth choices or among the third, fourth and other choices, the director shall in the runoff election include on the ballot all such tied choices. In the event two or more choices receive the same number of ballots, and if either (1) there are no challenged ballots which would affect the results of the election, or (2) after all challenges have been disposed of it is found that all eligible voters have cast valid ballots, there shall be no runoff election and the petition shall be dismissed. Only one such further election pursuant to this subsection (d) may be held.

(e) The provisions of Section 15870 above shall be applicable to a runoff election.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. Amendment filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

§ 15875.1. Relevant Federal Law.

In resolving questions of representation, the Director shall apply the relevant federal law and administrative practice developed under the Labor Management Relations Act, 1947, as amended.

NOTE: Authority and reference cited: Section 54, Labor Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300b, 95651, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60–102.72.

HISTORY

1. New section filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

Subchapter 2.3. Election Procedure Under San Francisco Bay Area Rapid Transit District Law

NOTE: Authority cited for Group 2.3: Section 54, Labor Code and Section 28851, Public Utilities Code.

HISTORY

1. New Group 2.3 (§§ 15900–15926) filed 1–5–73; effective thirtieth day thereafter (Register 73, No. 1).
2. Repealer of Group 2.3 (Sections 15900–15926) filed 7–29–83; effective thirtieth day thereafter (Register 83, No. 31).

Subchapter 3. Payment of Prevailing Wages upon Public Works

Article 1. Definitions

§ 16000. Definitions.

The following terms are defined for general use in these regulations within Group 3, Payment of Prevailing Wages Upon Public Works and Group 4, Awarding Body Labor Compliance Programs:

Area of Determination. The area of determining the prevailing wage is the "locality" and/or the "nearest labor market area" as determined by the Director. In determining the area, the mobility of each craft, classification and type of work will be considered.

Awarding body. Any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works.

Bid. Any proposal submitted to an awarding body in competitive bidding for the construction, alteration, demolition, repair, maintenance, or improvement of any structure, building, road, property, or other improvement of any kind.

Certified. The affirmation of a person with the authority to so affirm, under the penalty of perjury that the records are originals or are full, true and correct copies of the original and depict truly, fully and correctly the craft or type of work performed, hours and days worked, and the amounts by category listed, disbursed by way of cash, check, or in whatever form or manner to each person by job classification and/or skill pursuant to a public works contract.

Chief of DAS. Chief of Division of Apprenticeship Standards or a duly authorized representative.

Chief of DLSE/Labor Commissioner. Chief of the Division of Labor Standards Enforcement or a duly authorized representative.

Chief of DLSR. Chief of the Division of Labor Statistics and Research or a duly authorized representative.

Coverage. This means being subject to the requirements of Part 7, Chapter 1 of the Labor Code as a "public work." This includes all formal coverage determinations issued by the Director of Industrial Relations.

DAS. Division of Apprenticeship Standards.

Date of Notice or Call for Bids. The date the first notice inviting bids was published in a newspaper of general circulation or promulgated in a legally sufficient manner which results in a contract being awarded with or without competitive bidding. This may also be referred to as the Bid Advertisement Date.

Days. Unless otherwise specified means calendar days.

DLSE. The Division of Labor Standards Enforcement.

DLSR. The Division of Labor Statistics and Research.

Director. The Director of the Department of Industrial Relations or his/her duly authorized representative.

Duly Authorized Representative. An employee of the Department of Industrial Relations.

Effective Date. The date upon which the determinations of the Director go into effect. This date is ten days after the issue date of the determination.

Employer Payments. Includes:

(1) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program for the benefit of employees, their families and dependents, or retirees;

(2) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to employees, their families and dependents or to retirees pursuant to an enforceable commitment or agreement to carry out a financially responsible plan or program which was communicated in writing to the workers affected; and

(3) The rate of contribution irrevocably made by the contractor or subcontractor for apprenticeship or other training programs authorized by Section 3071 and/or 3093 of the Labor Code.

Expiration Date. The date upon which the determinations of the Director are subject to change.

General Prevailing Rate of Per Diem Wages. Includes:

(1) The prevailing basic straight–time hourly rate of pay; and

(2) The prevailing rate for holiday and overtime work; and

(3) The prevailing rate of employer payments for any or all programs or benefits for employees, their families and dependents, and retirees which are of the types enumerated below:

(A) medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;

(B) retirement plan benefits;

(C) vacations and holidays with pay, or cash payments in lieu thereof;

(D) compensation for injuries or illnesses resulting from occupational activity;

(E) life, accidental death and dismemberment, and disability or sickness and accident insurance;

(F) supplemental unemployment benefits;

(G) thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;

(H) occupational health and safety research, safety training, monitoring job hazards, and the like, as specified in the applicable collective bargaining agreement;

(I) See definition of "Employer Payments," (3).

(J) other bonafide benefits for employees, their families and dependents, or retirees as the Director may determine; and

(4) travel time and subsistence pay as provided for in Labor Code Section 1773.8.

(b) The term "general prevailing rate of per diem wages" does not include any employer payments for:

(1) Job related expenses other than travel time and subsistence pay;

(2) Contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefit plans enumerated above;

(3) Union, organizational, professional or other dues except as they may be included in and withheld from the basic taxable hourly wage rate;

(4) Industry or trade promotion;

(5) Political contributions or activities;

(6) Any benefit for employees, their families and dependents, or retirees including any benefit enumerated above where the contractor or subcontractor is required by Federal, State, or local law to provide such benefit; or

(7) Such other payments as the Director may determine to exclude. Interested Party. When used with reference to a particular prevailing wage determination made by the Director, includes:

(1) Any contractor or subcontractor, or any organization, association, or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determinations, and/or

(2) Any worker in the particular craft, classification, or type of work who may be employed on a public work project subject to the particular prevailing wage determination, or any labor organization or other representative of such a person, including the recognized collective bargaining representative for the particular craft, classification, or type of work; and/or

(3) Any awarding body or association or other representative of awarding bodies concerned with the administration of a pubic works contract or proposed contract, which is subject to the particular prevailing wage determination.

Helper. Any subjourneyman classification traditionally used to assist a journeyman. Under no circumstance may the Helper classification be used to replace statutorily required Apprentices.

Identify or Give Notice of Identity. This means to state the name, job title, address and current telephone number of a person or entity.

Interim Determination. Those determinations of the Director issued between the quarterly updates.

Issue Date–Issuance. The date upon which copies of the determination of the Director are deposited in the mail.

LCP. A labor compliance program initiated and enforced by an awarding body in accordance with these regulations.

Locality. See Labor Code Section 1724.

Maintenance. Includes:

(1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

(2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

EXCEPTION: 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.

EXCEPTION: 2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.

(3) Landscape maintenance. See Public Contract Code Section 21002.

EXCEPTION: Landscape maintenance work by "sheltered workshops" is excluded.

Mistake, Inadvertence, or Neglect. Mistake, inadvertence, or neglect in failing to pay the correct general rate of per diem wages means the lack of knowledge that any reasonable person would also be expected to have under the same or similar circumstances.

Nearest labor market Area. The nearest geographical area from which workers of the crafts, classifications, and types to be used in the performance and execution of the public work can be drawn for employment upon such public work.

Payroll Records. All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.

Person. Any individual [or legal entity, including a] partnership, corporation, association, or any local, state, regional, national or international organization, public or private, or any awarding body, or any agent or officer thereof, authorized to act for or on behalf of any of the foregoing.

Political Subdivision. See Labor Code Section 1721.

Predetermined Changes. Definite changes to the basic hourly wage rate, overtime, holiday pay rates, and employer payments which are known and enumerated in the applicable collective bargaining agreement

at the time of the bid advertisement date and which are referenced in the general prevailing rate of per diem wages as defined in Section 16000 of these regulations. Contractors are obligated to pay up to the amount that was predetermined if these changes are modified prior to their effective date. Predetermined changes which are rescinded prior to their effective date shall not be enforced.

Prevailing Rate. Includes:

(1) The basic hourly rate being paid to a majority of workers engaged in the particular craft, classification or type of work within the locality and in the nearest labor market area, if a majority of such workers is paid at a single rate; if there is no single rate being paid to a majority, then the single rate (modal rate) being paid to the greater number of workers is prevailing. If there is no modal rate, then an alternate rate will be established by considering the appropriate collective bargaining agreements, Federal rates or other data such as wage survey data, including the nearest labor market area, or expanded survey as provided in Article 4 of these regulations;

(2) Other employer payments as defined in Section 16000 of these regulations and as included as part of the total hourly wage rate, from which the prevailing basic hourly wage rate was derived. In the event the total hourly wage rate does not include any employer payments, then the Director may establish a prevailing employer payment rate by the same procedure outlined in subsection (1) above.

(3) The rate for holiday or overtime work shall be those rates specified in the collective bargaining agreement when the basic hourly rate is based on a collective bargaining agreement rate. In the event the basic hourly rate is not based on a collective bargaining agreement, holidays and overtime (if any) included with the prevailing basic hourly rate of pay shall be prevailing.

Public Entity. For the purpose of processing requests for inspection of payroll records or furnishing certified copies thereof, "public entity" includes: the body awarding the contracts; the Division of Apprenticeship Standards (DAS), or the Division of Labor Standards Enforcement (DLSE).

Public Funds. Includes state, local and/or federal monies.

NOTE: Public funds do not include money loaned to a private entity where work is to be performed under private contract, and where no portion of the work is supervised, owned, utilized, or managed by an awarding body.

Public Works. See Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

Service upon a Contractor or Subcontractor. This is the process defined in Title 8, California Code of Regulations, (CCR) Section 16801(a)(2)(A).

Serve upon the Labor Commissioner. Delivery of all documents including legal process to the Headquarters of the Labor Commissioner.

Sheltered workshop. A nonprofit organization licensed by the Chief of DLSE employing mentally and/or physically handicapped workers.

Wage Survey. An investigation conducted pursuant to Labor Code Sections 1773 and/or 1773.4 to determine the general prevailing rate of per diem wages for the crafts/classifications in the county(ies) for which the survey questionnaire was designed.

Willful. See Labor Code Section 1777.1(d).

Worker. See Labor Code Sections 1723 and 1772.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1191.5, 1720, 1720.2, 1720.3, 1721, 1722, 1722.1, 1723, 1724, 1770, 1771, 1772, 1773.5, 1776, 2750.5, 3071 and 3093, Labor Code; and Section 21002, Public Contract Code.

HISTORY

1. Repealer of group 3 (articles 1–3, sections 16000–16004, 16100–16101 and 16200–16205) and new group 3 (articles 1–4, sections 16000–16013, 16100–16109, 16200–16206 and 16300–16305) filed 1–3–77 as an emergency; effective upon filing (Register 77, No 2). For prior history, see Register 56, No. 8.
2. New group 3 (sections 16000–16014, 16100–16109, 16200–16207.9) filed 2–8–78; effective thirtieth day thereafter (Register 78, No. 6).
3. Renumbering and amendment of former sections 16000–16006 and 16008–16019 to section 16000; renumbering and amendment of former section 16100 to section 16002; renumbering and amendment of former section 16101 to section 16203; renumbering and amendment of former sections 16102–16105 to section 16200; renumbering and amendment of former section 16106 to section 16206; renumbering and amendment of former sections 16107(a), (b) and (c) to sections 16201, 16202 and 16205; renumbering and amendment of former section 16108 to section 16204; renumbering and amendment of former section 16200 to section 16300; renumbering and amendment of former sections 16007, 16201, 16202, 16204 and 16206 to section 16302; renumbering and amendment of former section 16207 to section 16303; renumbering and amendment of former sections 16207.2 and 16207.3 to section 16304; renumbering and amendment of former section 16207.5 to section 16100; renumbering and amendment of former section 16207.7 to section 16301; renumbering and amendment of former sections 16207.10–16207.14 to section 16400; renumbering and amendment of former sections 16207.15 and 16207.16 to section 16401; renumbering and amendment of former section 16207.17 to section 16402; renumbering and amendment of former section 16207.18 to section 16403; renumbering and amendment of former section 16207.19 to section 16500; repealer of former sections 16100.1, 16109, 16203, 16205, 16207.1, 16207.4, 16207.6 and 16207.8; and new sections 16001, 16101 and 16102 filed 2–11–86; effective thirtieth day thereafter (Register 86, No. 7). For prior history, see Registers 82, No. 51; 80, No. 6; 79, No. 19; 72, No. 23 and 72, No. 13.
4. Amendment filed 2–20–92; operative 3–23–92 (Register 92, No. 13).
5. Repealer of definition of "Predetermined Changes" filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
6. Amendment of definition of "Prevailing Rate" filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
7. Change without regulatory effect restoring definition of "Predetermined Changes" and repealing amendments to definition of "Prevailing Rate" filed 2–19–99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6–4–97 in Case 97CS 00471 the amendments filed 12–27–96 and effective 1–27–97 were invalidated and the prior regulations were reinstated.

Article 2. Work Subject to Prevailing Wages

§ 16001. Public Works Subject to Prevailing Wage Law.

(a) General Coverage. State prevailing wage rates apply to all public works contracts as set forth in Labor Code Sections 1720, 1720.2, 1720.3, 1720.4, and 1771.

(1) Any interested party enumerated in Section 16000 of these regulations may file with the Director of Industrial Relations or the Director's duly authorized representative, as set forth in Section 16301 of these regulations, a request to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which that interested party believes may be subject to or excluded from coverage as public works under the Labor Code. If such a request is filed by any party other than the awarding body, a copy of the request must be served upon the awarding body, in accordance with the filing procedures set forth in Section 16302(d) of these regulations, when it is filed with the Director.

(2) Within 15 days of receipt of a copy of the request for a coverage determination, the awarding body shall forward to the Director or his/her duly authorized representative as provided for in Section 16301 of these regulations, any documents, arguments, or authorities it wishes to have considered in the coverage determination process.

(3) All parties to the coverage determination request shall have a continuing duty to provide the Director or his/her duly authorized representative as provided for in Section 16301 of these regulations, with relevant documents in their possession or control, until a determination is made. Where any party or parties' agent has a document in their possession, but refuses to release a copy, the Department shall consider that the documents, if released, would contain information adverse to the withholding party's position and may close the record and render a decision on the basis of that inference and the information received.

(b) Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort.

(c) Field Surveying Projects. Field survey work traditionally covered by collective bargaining agreements is subject to prevailing wage rates when it is integral to the specific public works project in the design, preconstruction, or construction phase.

(d) Residential Projects. Residential projects consisting of single family homes and apartments up to and including four stories are subject to payment of prevailing wages when paid for in whole or in part out of public funds, including federally–funded or assisted residential projects controlled or carried out by an awarding body.

NOTE: Such projects may require a special determination by the Director which should be requested by the awarding body at least 45 days before the commencement of advertising of the call for bids by the awarding body.

(e) Commercial Projects. All non–residential construction projects including new work, additions, alterations, reconstruction and repairs. Includes residential projects over four stories.

(f) Maintenance. Public works contracts for maintenance are subject to prevailing wage rate payment as set forth in Section 1771 of the Labor Code.

NOTE: See Article 1 for definition of term "maintenance."

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1720.4 and 1771, Labor Code.

HISTORY

1. Amendment of subsection (a) and NOTE and adoption of subsections (a)(1)–(3) and (e) and relettering former subsection (e) to (f) filed 2–20–92; operative 3–23–92 (Register 92, No. 13).
2. Amendment of subsection (b) and (d) and NOTE filed 12–27–96; operative 1–26–97 (Register 96, No. 52).
3. Change without regulatory effect repealing amendments to subsections (b) and (d) and NOTE filed 2–19–99 (Register 99, No. 8). Pursuant to Sacramento Superior Court Order Issued 6–4–97 in Case 97CS 00471 the amendments filed 12–27–96 and effective 1–27–97 were invalidated and the prior regulations were reinstated.

§ 16002. Coverage of Worker.

The determinations of the Director will cover those crafts, classifications or types of workers employed in public works as set forth in Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code.

NOTE: Authority cited: Sections 1723 and 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3 and 1771, Labor Code.

§ 16002.5. Appeal of Public Work Coverage Determination.

(a) Those interested parties enumerated in Section 16000 of these regulations may appeal to the Director of Industrial Relations or the Director's duly authorized representative as set forth in Section 16301 of these regulations a determination of coverage under the public works laws (Labor Code Section 1720 et seq.) regarding either a specific project or type of work under Section 16001(a) of these regulations. Such notice of appeal must be served within 30 days of the issuance of the coverage determination. The party appealing the determination must, in accordance with the filing procedures set forth in Section 16302(d) of these regulations, give written notification to the awarding body and any other identifiable parties.

(b) The notice of appeal shall state the full factual and legal grounds upon which the determination is appealed, and whether a hearing is desired. The decision to hold a hearing is within the Director's sole discretion. The Director may appoint a hearing officer to conduct the hearing and propose a decision on the appeal. The Director shall make the final decision on the appeal.

(c) The authority of the Director to determine coverage of projects under the prevailing wage laws is quasi–legislative, and a final determination on any appeal is subject to judicial review pursuant to the Code of Civil Procedure, Section 1085.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1720, 1720.2, 1720.3, 1720.4 and 1771, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16003. Requests for Approval of Volunteer Labor.

(a) An awarding body wishing to use volunteer labor on what would otherwise be a public works project, pursuant to Labor Code Section 1720.4 shall serve a written request for approval on the Director, not less than 45 days prior to the commencement of work on the facilities or structures.

(b) The request for approval shall fully set forth the awarding body's grounds for belief that the requirements of Labor Code Section 1720.4(a), (b), and (c) are satisfied, and shall list all the crafts and classifications of workers that typically perform the types of work needed for the project.

(c) The request for approval shall identify the unions which represent workers in the crafts or classifications listed in (b) within the locality in which the public work is performed.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1720.4, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Article 3. Duties, Responsibilities, and Rights of Parties

§ 16100. Duties, Responsibilities and Rights.

The parties listed in this section must comply with the provisions of the Labor Code applicable to the payment of prevailing wages on public works contracts.

(a) Department and Division Authority in Prevailing Wage Issues. The Director shall establish and coordinate the administration of the State's prevailing wage law, including the determination of coverage issues. The lead agency for the determination of prevailing wage rates shall be the Division of Labor Statistics and Research. The lead agency for the enforcement of the payment of prevailing wages is the Division of Labor Standards Enforcement. The lead agency for the coordination on apprenticeship is the Division of Apprenticeship Standards. This section shall not be construed to preclude any filing requirements with DLSR of appropriate agreements or petitions regarding determinations or any other documents, papers, books, etc. otherwise required by the law or these regulations.

(b) The Awarding Body shall:

(1) Obtain the prevailing wage rate from the Director in accordance with Labor Code Sections 1771 and 1773.

(2) Specify the appropriate prevailing wage rates, in accordance with Labor Code Sections 1773.2 and 1777.5.

(A) The posting requirement is applicable for each job site.

EXCEPTION: If more than one worksite exists on any project, then the applicable rates may be posted at a single location which is readily available to all workers.

(B) If a wage rate for a craft, classification or type of worker is not published in the Director's general prevailing wage determinations, a request for a special determination should be made by the awarding body to Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142, at least 45 days prior to the project bid advertisement date.

(3) Notify DAS. See Labor Code Section 1773.3.

(4) Inform prime contractors, to the extent feasible, of relevant public work requirements:

NOTE: Requirement information may be disseminated at a preacceptance of bid conference or in a call for bids or at an award of bid conference.

The public works requirements are:

(A) the appropriate number of apprentices are on the job site, as set forth in Labor Code Section 1777.5.

(B) worker's compensation coverage, as set forth in Labor Code Sections 1860 and 1861.

(C) keep accurate records of the work performed on the public works project, as set forth in Labor Code Section 1812.

(D) inspection of payroll records pursuant to Labor Code Section 1776, and as set forth in Section 16400 (e) of these regulations.

(E) and other requirements imposed by law.

(5) Withhold monies. See Labor Code Section 1727.

(6) Ensure that public works projects are not split or separated into smaller work orders or projects for the purpose of evading the applicable provisions of Labor Code Section 1771.

(C) When such rate is adopted, and in the case where the collective bargaining agreement contains changes during its term which will affect the rate adopted, which are not definite or predetermined, the changes shall not be adopted. The prior determination will remain in effect until a new determination is issued. Any interested party may request that the Director make a new determination when contract changes become definite and determined by filing a statement as set forth in Section 16200(a)(1). The statement must summarize the amounts and effective dates of any cost-of-living adjustments, allocations of interim wage increases to wages and employer payments, and other relevant changes which will affect the rate adopted by the Director. The statement must be signed by an officer or agent of the bargaining representative and certified, under penalty of perjury, as true and correct to the best of his or her knowledge and belief.

(D) When such agreement is adopted as the basis of the prevailing wage determination, all wage classifications may be considered.

(E) Holidays. Holidays specifically named in the collective bargaining agreement or determined by wage surveys shall be included in the wage determination. Overtime pay may be required as provided in Section 16200(a)(3)(F) of these regulations.

(F) Overtime. Overtime will be paid as indicated in the wage determination.

EXCEPTION 1: If a workweek other than Monday through Friday is a fixed business practice or is required by the awarding body, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION 2: If the collective bargaining agreement provides for Saturday and Sunday work at straight-time, no overtime payment is required for the first eight hours on Saturday or Sunday.

EXCEPTION 3: If the awarding body determines that work cannot be performed during normal business hours or work is necessary at off hours to avoid danger to life or property, no overtime is required for the first eight hours in any one calendar day, and 40 hours during any one calendar week.

EXCEPTION 4: No overtime payment is required for less than 40 hours in a standard work week or for less than eight hours in a calendar workday unless specified in the collective bargaining agreement used as the basis for the prevailing wage determination.

(G) Wage rates, training contributions and apprenticeship contributions. Apprenticeship rates shall be determined by the Director of Industrial Relations using apprentice wage standards set forth in the collective bargaining agreement and/or approved by the California Apprenticeship Council. A contractor or subcontractor on a public works contract must pay training fund contributions or apprenticeship contributions in one of the following manners:

1. into the appropriate craft apprenticeship program in the area of the site of the public work; or

2. (if the trust fund is unable to accept such contributions) an equivalent amount shall be paid to the California Apprenticeship Council (CAC) administered by DAS.

3. If neither of the above will accept the funds, cash pay shall be as provided for in Section 16200(a)(3)(I) of these regulations.

(H) Rates for helpers. Rates for helpers will be published when the information available to the Director indicates that a practice of using such a subclassification prevails in a particular area, such as contained in a collective bargaining agreement, and within the parameters of the applicable collective bargaining agreement. In the absence of such determination, the helper classification may not be used as a substitute for a journeyman or apprentice. This section does not exempt the contractor from the 1-5 apprentice-journeyman ratio requirements set forth in Labor Code Section 1777.5.

(I) Credit Available For Actual Payment of Fringe Benefit Costs up to the Prevailing Amount. The contractor obligated to pay the full prevailing rate of per diem wages may take credit for amounts up to the total of all fringe benefit amounts listed as prevailing in the appropriate wage determination. This credit may be taken only as to amounts which are actual payments under Employer Payments Section 16000(1)-(3). In the event the total of Employer Payments by a contractor for the fringe benefits listed as prevailing is less than the aggregate amount set out as prevailing in the wage determination, the contractor must pay the difference directly to the employee. No amount of credit for payments over the aggregate amount of employer payments shall be taken nor shall any credit decrease the amount of direct payment of hourly wages of those amounts found to be prevailing for straight time or overtime wages.

(b) Federal Rates. In reviewing rates predetermined for federal public works, the Director will consider those rates published pursuant to the Davis-Bacon Act.

(c) Data collection shall be in accordance with Labor Code Section 1773.

(d) Wage rate factors.

NOTE: Wage surveys are conducted by DLSR.

(1) The following factors shall be considered:

(A) Type of work to be performed;

(B) Classification(s) of worker(s) needed;

(C) Geographical area of project;

(D) Nearest labor market area;

(E) If work has been performed in the geographical area in the past 12 months.

(F) Mobility of craft, classification, or type of worker needed for project;

(G) Number of workers in craft or job classification;

(H) Normal industry practice in selection of craft and classification of worker;

(I) Size (dollar amount) of project;

(J) Degree of project's remoteness from survey area.

(2) Time period used in determining prevailing wage by survey. The time period reference for establishing the prevailing wage in the area of determination shall be the 12-month period prior to the request for a wage determination unless another time period is necessary. In such cases, the Director shall establish the appropriate time period.

(e) Other information. Pursuant to Section 1773 of the Labor Code, the Director may also obtain and consider other data from interested parties, and shall give consideration to data submitted by any interested party, concerning rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area. Such data may be obtained by holding a hearing, instituting an investigation, or by such other means as the Director determines will best serve the purposes of the law. Information submitted by interested parties for the Director's consideration shall include, but not be limited to the following for each project:

(1) the name, address, job title, and telephone number of the interested party submitting the information and the basis for qualification as an interested party under Section 16102;

(2) the basic hourly wage rate, overtime and holiday pay rates, and employer payments as enumerated in Section 16000 of these regulations for each classification in question as effective for the last payroll period, or most recent payroll period, for which payments based on such rates were actually made;

(3) the number of workers employed on the project in each classification in question during the payroll period for which data is submitted;

(4) the location of the project;

(5) the name and address of the contractor or subcontractor making the payments, and of all other contractors or subcontractors on the project;

(6) the type of construction (e.g. residential, commercial building, etc.);

(7) the approximate cost of construction;

(8) the beginning date and completion date, or estimated completion date of the project;

(9) the source of data (e.g. "payroll records");

(10) the method of selection of the projects for which data is submitted, when data is not submitted for all projects recently completed or in progress in the locality or in the nearest labor market area.

NOTE: Authority cited: Sections 1773 and 1773.5, Labor Code. Reference: Sections 1770, 1771, 1773, 1773.1, 1773.5, 1773.8, 1777.5, 1810 and 1815, Labor Code.

vailing wage determinations must be confirmed in writing and must specify the location where the public work is to be performed, including the county and the particular crafts, classifications, or types of workers for which a determination is needed.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

HISTORY

1. Amendment filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16206. Corrections.

Upon his or her own initiative or at the request of any interested party, the Director shall correct any error in a published determination that is the result of clerical error, such as a typographical error or a transposition of letters or digits, by issuing a corrected determination or a modification of the determination. The Director may correct any error issued in a determination by reissuing such determination.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770 and 1773, Labor Code.

Article 5. Petitions to Review Prevailing Wage Determinations

§ 16300. Delegation of Authority.

(a) The Chief of DLSR is the authorized representative of the Director for the purpose of:

(1) Receiving collective bargaining agreements and other documents and papers pertaining to making prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations;

(2) Gathering information needed to make prevailing wage determinations under Part, Chapter 1, Article 2 of the Labor Code and these regulations, and may for that purpose institute investigations, conduct hearings, or employ such other means as shall best serve the purpose of the law;

(3) Issuing prevailing wage determinations under Part 7, Chapter 1, Article 2 of the Labor Code and these regulations; and

(4) Responding to petitions regarding determinations.

(b) The Director reserves the right to make all final determinations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1770, 1771, 1772, 1773 et seq., 1774, 1775, 1776, 1777, 1777.5 et seq., 1778, 1779 and 1780, Labor Code.

§ 16301. Referral of Prevailing Wage Issues to Director's Office.

Any new or unresolved issue other than of a routine nature as to coverage of or amount of the prevailing wage raised by an awarding body or other interested party may be referred to the Chief of DLSR as the Director's duly authorized representative for final determination, including appeals of any determination relating either to coverage or to the rate of the prevailing wage rate, subject only to Section 16300(b) of these regulations.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Section 1773.4, Labor Code.

§ 16302. Petition to Review Prevailing Wage Determinations.

Those interested parties enumerated in Section 1773.4 of the Labor Code, and defined in Section 16000 of these regulations, may file with the Director or the Chief of DLSR, within 20 days after commencement of advertising of a call for bids by any awarding body, a petition to review a determination of any rate or rates made by the Director, pursuant to Section 1773 of the Labor Code, which is specified in or referred to in the call for bids.

(a) Manner of Filing. Every petition filed pursuant to Section 1773.4 of the Labor Code shall be filed with the Director by mail to the Chief, Division of Labor Statistics and Research, P.O. Box 420603, San Francisco, CA 94142, or may be filed in person at 455 Golden Gate Avenue, 5th Floor, San Francisco, CA 94102.

(b) Filing. Where any paper, letter, petition, or document is required or permitted to be filed pursuant to these regulations or pursuant to the prevailing wage provisions of the Labor Code, it shall be deemed filed with any person, awarding body or division upon actual delivery to and receipt by such person, awarding body, or division.

(c) Content of Petition. Every petition filed pursuant to Section 1773 of the Labor Code shall contain and separately state the following:

(1) The name, address, telephone number and job title of:

(A) the person filing the petition;

(B) the person verifying the petition, if different from the person filing;

(C) if applicable, petitioner's attorney or authorized representative.

(2) Whether the petitioner is an awarding body, a prospective bidder, or the representative of one or more crafts, classifications or types of workers involved in the public works contract;

(3) The nature of petitioner's business, if a prospective bidder, and a designation of each craft, classification, or type of worker represented, or types of workers involved in the public works project.

(4) (A) the official name of the awarding body;

(B) the date on which the call for bids was first published;

(C) the name and location of the newspaper in which such publication was made. An accurate copy of the call for bids as published shall be attached to the petition.

(5) If petitioner is an awarding body which is a department, board, authority or political subdivision other than a county, city and county, city, township, or regional district, the awarding body shall describe the parent or principal organization of which it is a part, and shall specify the statutory authority for undertaking public works.

(6) If the petitioner is a prospective bidder, then the parent or subsidiary corporations or associations related to such craft, classification or type of work, if any, shall be specified.

(7) The manner in which the wage rate determined by the Director fails to comply with the provisions of Labor Code Section 1773.

(A) Every petition asserting that the applicable prevailing rate for one or more crafts, classifications or types of workers needed to execute a contract is different from that ascertained by the Director shall set forth the rate the petitioner claims to be correct for each disputed rate, together with specific reference to particular facts providing the basis for such claim.

1. Whenever such facts relate to a particular employer of such crafts, classifications, or types of workers, the facts stated must identify the employer by name and address and give the number of workers involved.

2. Whenever such facts relate to an applicable collective bargaining agreement which the petitioner alleges was not considered by the Director pursuant to Section 1773 of the Labor Code, a copy of the agreement, if not already filed with the Director, should be filed concurrently with the petition in the manner provided in Section 16200(a)(1) of these regulations.

3. Whenever such facts relate to rates actually paid on public or private projects under construction or recently completed in the locality and in the nearest labor market area, the facts stated should include all of the items of information enumerated in Section 16200(e) of these regulations.

(B) Every petition asserting that the Director has failed to ascertain and consider all applicable rates required to be considered by it shall specifically state in the petition which rates have not been considered by the Director.

(C) Where rates ascertained by the Director are the same as the applicable rates established by the collective bargaining agreement and rates of pay determined for federal public works within the locality and the nearest labor market area where the public work is performed, the petition shall specifically describe the manner and extent to which such rates do not constitute the rates actually prevailing in the locality where the public work is to be performed, and shall set forth and fully identify the existence of any rates asserted by petitioner to be prevailing in the locality and relied upon in support of the petition.

(d) Filing Copy With Awarding Body. If the petitioner is not an awarding body, the petitioner may concurrently with the filing of the original

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Sections 1773.5 and 1776, Labor Code.

§ 16401. Reporting of Payroll Requests.

(a) Reporting Format. The format for reporting of payroll records requested pursuant to Labor Code Section 1776 shall be on a form provided by the public entity. Copies of the forms may be procured at any office of the Division of Labor Standards Enforcement (DLSE) throughout the state and/or:

Division of Labor Statistics & Research P.O. Box 603 San Francisco, CA 94101

ATTENTION: Prevailing Wage Unit

Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776. If, however, the contractor does not comply with the provisions of Labor Code Section 1776, the Labor Commissioner may require the use of DIR's suggested format, "Public Works Payroll Reporting Form" (Form A–1–131).

(b) Words of Certification. The form of certification shall be as follows: I, _____ (Name–print) the undersigned, am _____ (position in business) with the authority to act for and on behalf of _____, (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named. Date:_____Signature:_____

A public entity may require a more strict and/or more extensive form of certification.

NOTE: Authority cited: Sections 54 and 1773.5, Labor Code. Reference: Section 1776, Labor Code.

§ 16402. Cost.

The cost of preparation to each contractor, subcontractor, or public entity when the request was made shall be provided in advance by the person seeking the payroll record. Such cost shall be $1 for the first page of the payroll record and 25 cents for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. Payment in the form of cash, check or certified money order shall be made prior to release of the documents to cover the actual costs of preparation.

NOTE: Authority cited: Section 1776, Labor Code. Reference: Section 1776(h), Labor Code.

§ 16403. Privacy Considerations.

(a) Records received from the employing contractor shall be kept on file in the office or entity that processed the request for at least 6 months following completion and acceptance of the project. Thereafter, they may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of dispute resolution, are in process. Copies on file shall not be obliterated in the manner prescribed in subdivision (b) below;

(b) copies provided to the public upon written request shall be marked, obliterated or provided in such a manner that the name, address and Social Security number, and other private information pertaining to each employee cannot be identified. All other information including identification of the contractor shall not be obliterated;

(c) the public entity may affirm or deny that a person(s) was or is employed on a public works contract (by a specific contractor) when asked, so long as the entity requires such information of an identifying nature which will reasonably preclude release of private or confidential information.

NOTE: Authority cited: Sections 54, 1773.5 and 1776, Labor Code. Reference: Section 1776, Labor Code.

Article 7. Withholding of Funds from Contractor—Hearing Procedure

§ 16410. Definitions.

As used in these regulations, the terms "awarding body," "contractor," and "subcontractor" shall have the same meaning as in Part 7 of Division 2 of the Labor Code. The term "affected subcontractor" shall mean a subcontractor whose alleged failure to pay the prevailing wage or to otherwise comply with the provisions of Labor Code §§ 1720–1815 resulted in the withholding of funds pursuant to Labor Code § 1727.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New article 7 (sections 16410–16414) and section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New article 7 (sections 16410–16414) and section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New article 7 (sections 16410–16414) and section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New article 7 (sections 16410–16414) and section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.
5. Certificate of Compliance as to 1–20–2000 order transmitted to OAL 3–29–2000 and filed 5–4–2000 (Register 2000, No. 18).

§ 16411. Notice to Contractor and Affected Subcontractor.

(a) Upon the decision to withhold, retain or forfeit any sum from a payment due to a contractor as permitted by Labor Code § 1727, the Division of Labor Standards Enforcement shall give written notice to the awarding body, the contractor, and to any affected subcontractor, of the withholding, retention, or forfeiture.

(b) Said notice shall include the following information:

(1) The amount to be withheld, retained or forfeited.

(2) A short statement of the factual basis upon which said amount is to be withheld, retained, or forfeited, including, but not limited to, the computation of any wages found to be due, and the computation of any penalties assessed under Labor Code § 1775.

(3) Notice of the right to request a hearing under these regulations, and of the manner in which, and the time within which a hearing must be requested.

(c) Said notice shall be sent by certified mail to the last known address of the contractor, and to the last known address of any affected subcontractor. The records of the State Contractors' License Board may be used to determine the address of a contractor or affected subcontractor.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY

1. New section filed 2–16–99 as an emergency; operative 2–16–99 (Register 99, No. 8). A Certificate of Compliance must be transmitted to OAL by 6–16–99 or emergency language will be repealed by operation of law on the following day.
2. New section refiled 6–14–99 as an emergency; operative 6–14–99 (Register 99, No. 25). A Certificate of Compliance must be transmitted to OAL by 10–12–99 or emergency language will be repealed by operation of law on the following day.
3. New section refiled 10–4–99 as an emergency; operative 10–4–99 (Register 99, No. 41). A Certificate of Compliance must be transmitted to OAL by 2–1–2000 or emergency language will be repealed by operation of law on the following day.
4. New section refiled 1–20–2000 as an emergency; operative 2–2–2000 (Register 2000, No. 3). A Certificate of Compliance must be transmitted to OAL by 6–1–2000 or emergency language will be repealed by operation of law on the following day.

Subchapter 4. Awarding Body Labor Compliance Programs

Article 1. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs

§ 16425. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs.

(a) No contracts shall be subject to LCP jurisdiction nor shall the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) apply to any contract of an awarding body until after the LCP has received initial or final approval under these regulations.

(b) Contracts for which the Date of Notice or the Call for Bids are subsequent to the date of initial or final approval of a LCP are subject to Labor Code Section 1771.5. In the case of a contract for which there is no Call for Bids, the applicable date shall be the date of execution of the contract.

(c) Revocation of approval of a LCP by the Director shall not affect the limited exemption from payment of prevailing wages pursuant to Labor Code Section 1771.5(a) if the date of such revocation is subsequent to the Date of Notice or Call for Bids or, in the case of a contract for which there is no Call for Bids, subsequent to the date of execution of the contract.

(d) If the Director revokes approval of a LCP, the Director shall give notice to the awarding body specifying enforcement responsibilities, including enforcement actions pending hearing, as of the date of revocation.

(e) An awarding body may voluntarily terminate its LCP. With respect to each contract pending on the date of termination, the awarding body shall:

(1) Notify the Director of its intention and the effective date of the termination;

(2) Notify the contractor(s) and the DLSE of the identity of the agent who will carry out the compliance enforcement obligations of Labor Code Section 1771.5 on the remaining contracts; and

(3) Specify the general fund into which penalties or forfeitures withheld from any contract payments shall be deposited.

(f) The Labor Commissioner may, in writing, agree to assume enforcement obligations on pending contracts of an awarding body which has voluntarily terminated its LCP. In such case, penalties and forfeitures shall be deposited in the general fund of the state.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13). For prior history of subchapter 4 (sections 16209–16209.6), see Register 82, No. 51.

Article 2. Approval and Revocation of Approval of Labor Compliance Programs by Director

§ 16426. Initial Approval.

(a) An awarding body seeking approval of a LCP shall submit evidence of its ability to operate its LCP. Prior to granting approval, the Director shall consider the following factors:

(1) Experience and training of the awarding body's personnel on public works labor compliance issues;

(2) The average number of public works contracts the awarding body annually administers;

(3) Whether the LCP is a joint or cooperative venture among awarding bodies, and how the resources and expanded responsibilities of the LCP compare to the awarding bodies involved;

(4) The awarding body's record of taking cognizance of Labor Co violations and of withholding in the preceding five years;

(5) The availability of legal support for the LCP;

(6) The availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body; and

(7) The method by which the awarding body will transmit notice to the Labor Commissioner of willful violations as defined in Labor Code Section 1777.1(d).

(b) The Director shall notify the awarding body within 30 days of receipt of the request for approval that initial approval is granted and the effective date of initial approval, or that the request is incomplete and of the materials necessary to complete the request or that the request is disapproved for other reasons.

(c) Initial approval of a LCP shall automatically expire one year after approval unless an extension is requested in writing and granted in writing by the Director at least thirty days prior to the anniversary date of the approval. Where necessary to coordinate with the local government's fiscal year or existing public works procedures, initial approval may be for a period up to 18 months.

(d) The Director will maintain a list of all initially approved LCPs for distribution to interested parties upon request.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5, 1771.6 and 1777.1, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16427. Final Approval.

(a) An awarding body which has operated a LCP for 11 continuous months after initial approval may apply to the Director for final approval. The awarding body bears the burden of producing evidence that it meets the criteria in (b).

(b) The Director will grant final approval if the awarding body has satisfactorily demonstrated its ability to monitor compliance with the requirements of the Labor Code and these regulations, and has filed timely, complete, and accurate reports as required by these regulations.

(c) The Director shall notify the awarding body within 30 days of the receipt of a request for final approval that final approval is granted and the effective date of final approval, or that the request for final approval is denied, the reason for the denial and the status of the LCP program.

(d) An awarding body which has received final approval of its LCP may enter into an agreement with the Labor Commissioner which may provide for procedures and for securing approval of forfeitures in a manner different from that set forth in Section 16437, and for alternate procedures for appeals of enforcement actions to the Director.

(e) The Director will maintain a list of all finally approved LCPs, for distribution to interested parties upon request. The Director may agree to alternative reporting formats under Section 16431 of these regulations and shall maintain a list of interested parties who wish notification of alternative reporting formats before adoption.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1771.6, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16428. Revocation of Final Approval.

(a) The Director may revoke final approval of a LCP only after giving due notice to the awarding body, conducting a hearing, and finding cause for revocation.

(1) Cause for revocation of final approval includes, but is not limited to:

(A) Failure of the awarding body to monitor compliance with the requirements of the Labor Code and these regulations or to take appropriate enforcement action for violations of which it becomes or should have become cognizant;

(1) The contractor's duty to pay prevailing wages under Labor Code Section 1770 et seq., should the project exceed the exemption amounts;

(2) The contractor's duty to employ registered apprentices on the public works project under Labor Code Section 1777.5;

(3) The penalties for failure to pay prevailing wages (for non-exempt projects) and employ apprentices including forfeitures and debarment under Labor Code Sections 1775 and 1777.7;

(4) The requirement to keep and submit copies upon request of certified payroll records under Labor Code Section 1776, and penalties for failure to do so under Labor Code Section 1776(f);

(5) The prohibition against employment discrimination under Labor Code Section 1777.6; the Government Code, and Title VII of the Civil Rights Act of 1964;

(6) The prohibition against accepting or extracting kickback from employee wages under Labor Code Section 1778;

(7) The prohibition against accepting fees for registering any person for public work under Labor Code 1779; or for filling work orders on public works under Labor Code Section 1780;

(8) The requirement to list all subcontractors under Government Section 4100 et seq;

(9) The requirement to be properly licensed and to require all subcontractors to be properly licensed and the penalty for employing workers while unlicensed under Labor Code Section 1021 and under the California Contractors License Law, found at Business and Professions Code Section 7000 et seq;

(10) The prohibition against unfair competition under Business and Professions Code Section 17200–17208;

(11) The requirement that the contractor be properly insured for Workers Compensation under Labor Code Section 1861;

(12) The requirement that the contractor abide by the Occupational, Safety and Health laws and regulations that apply to the particular construction project;

(13) The requirement to provide affirmative action for women and minorities as required in the Public Contracts Code and in the contract;

(14) The prohibition against hiring undocumented workers, and the requirement to secure proof of eligibility/citizenship from all workers.

§ 16431. Annual Report.

The awarding body shall submit to the Director an annual report on the operation of its LCP within 60 days after the close of its fiscal year, or accompany its request for an extension of initial approval, whichever comes first. The annual report shall contain, at the minimum, the following information:

(1) Number of contracts awarded, and their total value;

(2) The number, description, and total value of contracts awarded which were exempt from the requirement of payment of prevailing wages pursuant to Labor Code Section 1771.5(a);

(3) A summary of penalties and forfeitures imposed and withheld, or recovered in a court of competent jurisdiction;

(4) A summary of wages due to employees resulting from failure by contractors to pay prevailing wage rates, the amount withheld from money due the contractors, and the amount recovered by action in any court of competent jurisdiction.

(b) A LCP whose contract responsibilities are statewide, or which involves widely dispersed and numerous contracts, or which is required to report contract enforcement to federal authorities in a federal format, may adopt a summary reporting format to aggregate small contracts and estimate numbers and dollar values required by (a)(1) and (2). A summary reporting format may be adopted by agreement with the Director after advance notice to interested parties, and a list of parties requesting such notice shall be kept by the Director.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5, 1771.6 and 1777.1, Labor Code.

HISTORY

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16432. Audits.

(a) Audits may be conducted when deemed necessary by the awarding body and shall be conducted upon request of the Labor Commissioner.

(1) An audit consists of a comparison of payroll records to the best available information as to the actual hours worked and classifications of workers employed on the contract. An audit is sufficiently detailed when it enables the LCP, and the Labor Commissioner in reviewing proposed penalties, to draw reasonable conclusions as to compliance with the requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code, and to enable accurate computation of underpayment of wages to workers and of applicable penalties and forfeitures. Records shall be made available to show that the audits conducted are sufficiently detailed to verify compliance with the requirements of Chapter 1 of Part 7 of Division 2. An audit record in the form set out in Appendix B presumptively demonstrates sufficiency.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 224, 226, 1773.2, 1776, 1777.5, 1778, 1810, 1815, 1860 and 1861, Labor Code.

HISTORY

1. New section and Appendix filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Appendix B

Audit Record Form (suggested for use with Section 16432 audits)

An audit record is sufficiently detailed to "verify compliance with the requirements of Chapter"1, Public Works, of Part 7 of Division 2, when the audit record displays that the following procedures were accomplished:

(1) Audits of the obligation to secure workers' compensation means demanding written evidence of a binder issued by the carrier, or telephone or written inquiry to the Workers' Compensation Insurance Rating Bureau;

(2) Audits of the obligations to employ and train apprentices means inquiry to the program sponsor for the apprenticeable craft or trade in the area of the public works as to: whether contract award information was received, including an estimate of journeyperson hours to be performed and the number of apprentices to be employed; whether apprentices have been requested, and whether the request has been met; whether the program sponsor knows of any amounts sent by the contractor or subcontractor to it for the training trust, or the California Apprenticeship Council; and whether persons listed on the certified payroll in that craft or trade as being paid less than the journeyperson rate are apprentices registered with that program and working under apprentice agreements approved by the Division of Apprenticeship Standards;

(3) Audits of the obligation to pass through amounts made part of the bid for apprenticeship training contributions, to either the training trust or the California Apprenticeship Council, means asking for copies of checks sent, or when the audit occurs more than 30 days after the month in which payroll has been paid, copies of canceled checks;

(4) Audits of "illegal taking of wages" means inspection of written authorizations for deductions (listed in Labor Code Section 224) in the contractor or subcontractor's files and comparison to wage deduction statements furnished employees (Labor Code Section 226), together with an interview of several employees as to any payments not shown on the wage deduction statements;

(5) Audits of the obligation to keep records of working hours, and pay not less than required by Title 8 CCR Section 16200(a)(3)(F) for hours worked in excess of 8 hours are the steps for review and audit of Certified Weekly Payrolls under Title 8 CCR Section 16432;

(6) Audits of the obligations to pay the prevailing per diem wage, means such steps for review and audit of Certified Weekly Payrolls which will produce a report covering compliance in the areas of:

(A) All elements defined as the "General Prevailing Rate of Per Diem Wages" in Title 8 CCR Section 16000, which were determined to be prevailing in the Director's determination which was in effect on the date of the call for bids, available in its principal office, and posted;

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771, 1771.5, 1777.5, 1776, 1779, 1813, 1815 and 3077, Labor Code.

History

1. New section filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

§ 16437. Determination of Amount of Forfeiture by the Labor Commissioner.

(a) Where the LCP of the awarding body requests a determination of the amount of forfeiture, the request shall include a file or report to the Labor Commissioner which contains at least the following information:

(1) The deadline by which contract acceptance of filing of a notice of completion, under Labor Code Section 1775, plus 90 days, will occur;

(2) Any other deadline which if missed would impede collection;

(3) Evidence of violation, in narrative form;

(4) Evidence that an "audit" or "investigation," as defined in Section 16432 of these regulations, occurred;

(5) Evidence that the contractor was given the opportunity to explain why there was no violation, or that any violation was caused by mistake, inadvertence, or neglect, before the forfeiture was sent to the Labor Commissioner, and the contractor either did not do so, or failed to convince the awarding body of its position;

(6) Where the LCP of the awarding body seeks not only amounts of wages but also a penalty as part of the forfeiture, and the contractor has unsuccessfully contended that the cause of violation was mistake, inadvertence, or neglect, a short statement should accompany the proposal for a forfeiture, with a recommended penalty amount pursuant to Labor Code Section 1775;

(7) Where the LCP of the awarding body seeks only wages or a penalty less than $50 per day as part of the forfeiture, and the contractor has successfully contended that the cause of the violation was mistake, inadvertence, or neglect, then the file should include the evidence as to the contractor's knowledge of his or her obligation, including the program's communication to the contractor of the obligation in the bid invitations, at the prejob conference agenda and records, and any other notice given as part of the contracting process. With the file should be a statement, similar to that described in (6), and recommended penalty amounts, pursuant to Labor Code Section 1775;

(8) The previous record of the contractor in meeting his or her prevailing wage obligations.

(9) Whether the LCP has been granted initial, extended initial or final approval.

(b) The file or report shall be served on the Labor Commissioner not less than 30 days before the final payment or, if that deadline has passed, not less than 90 days before the expiration of the deadline to file suit under Labor Code Section 1775.

(c) A copy of the recommended forfeiture and the file or report shall be served on the contractor at the same time as it is sent to the Labor Commissioner. The awarding body may exclude from the documents served on the contractor copies of documents secured from the contractor during an audit, investigation, or meeting if those are clearly referenced in the file or report. Along with the copy served on the contractor shall be a notice stating all deadlines and rights of the contractor to contest the amount of forfeiture. A Notice of Deadlines in the format set out in Appendix C will presumptively fulfill the requirements of this subsection;

(d) The Labor Commissioner shall affirm, reject, or modify the forfeiture in whole or in part as to penalty, and/or wages due.

(e) The Labor Commissioner's determination of the forfeiture is effective on one of the two following dates:

(1) For programs with initial approval or an extension of initial approval pursuant to Section 16426 of these regulations, on the date the Labor Commissioner serves by first class mail, on the political subdivision and on the contractor, an endorsed copy of the proposed forfeiture, or a newly drafted forfeiture statement which sets out the amount of forfeiture approved. Service on the contractor is effective if made on the last address supplied by the contractor in the record. The Labor Commissioner's approval, modification or disapproval of the proposed forfeiture shall be served within 30 days of receipt of the proposed forfeiture or no more than 30 days after the notice of completion has been filed.

(2) For programs with final approval, approval is effective 20 days after the requested forfeitures are served upon the Labor Commissioner, unless the Labor Commissioner serves a notice upon the parties, within that time period, that this forfeiture request is subject to further review. For such programs, a notice that approval will follow such a procedure will be included in the transmittal of the forfeiture request to the contractor. The Labor Commissioner's final approval, modification or disapproval of the proposed forfeiture shall be served within 30 days of the date of receipt of the proposed forfeiture or no more than 30 days after the notice of completion has been filed, unless some other procedure has been adopted pursuant to 8 CCR Section 16427(d).

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1771.5 and 1775, Labor Code.

History

1. New section and Appendix filed 2–20–92; operative 3–23–92 (Register 92, No. 13).

Appendix C

Notice of Deadlines

(To Go to Contractor for Forfeitures under Section 16437)

"This document requests the Labor Commissioner of California to approve a forfeiture of money you otherwise would be paid. The [name of the labor compliance program] for the [name of the awarding body having this work done] is asking the Labor Commissioner of California to agree, in 20 days, that the enclosed package of materials indicates that you have violated the law."

"Failure to respond to the [name of the labor compliance program's] request that the Labor Commissioner approve a forfeiture by writing to the Labor Commissioner within 20 days of the date of service (date of postmark) of this document on you may lead the Labor Commissioner to affirm the proposed forfeiture, and may also end your right to contest those amounts further. You must serve any written response on the Labor Commissioner, the [name of the labor compliance program] and [name of the awarding body] by return receipt requested/certified mail. If you serve a written explanation, with evidence, as to why the violation did not occur, or why the penalties should not be assessed, within the 20 day period, it will be considered."

and

"If you change address, or decide to hire an attorney, it is your responsibility to advise both the [name of the Labor Compliance Program] and the Labor Commissioner by certified mail. Otherwise, notices will be served at your last address on file, and deadlines might pass before you receive such notices."

§ 16438. Deposits of Penalties and Forfeitures Withheld.

(a) Where the involvement of the Labor Commissioner has been limited to a determination of the actual amount of penalty, forfeiture or underpayment of wages, and the matter has been resolved without litigation by or against the Labor Commissioner, the awarding body having a LCP shall deposit penalties and forfeitures in its general fund. If an approved LCP is operated through an agent, penalties and forfeitures shall be deposited as provided in the agreement designating the agent for the awarding bodies involved.

(b) Where collection of fines, penalties or forfeitures results from court action to which the Labor Commissioner and awarding body are both parties, the fines, penalties or forfeitures shall be divided between the general funds of the state and the awarding body, as the court may decide.

(c) All amounts recovered by suit brought by the Labor Commissioner and to which the awarding body is not a party, shall be deposited in the general fund of the state.

(d) All wages and benefits which belong to an employee and are withheld or collected from a contractor or sub–contractor, either by withholding or as a result of court action pursuant to Labor Code Section 1775, and which have not been paid to the employee or irrevocably committed

with a Statement of Alleged Violations, which shall specifically set forth DLSE's allegations against the Respondent.

(A) Service of both the Notice of Hearing and Statement of Alleged Violations shall be complete when mailed, by first class postage, to the last address of record for the Respondent listed with the State Contractors License Board or, in the event the Respondent is not licensed by the State Contractors License Board, the last known address of the Respondent available to the awarding body or, in the case of a subcontractor, the last known address available to the general contractor with whom the subcontractor contracted in the performance of the public works project under investigation. In the event there is neither an address of record with the State Contractors License Board or the awarding body or general contractor, the Notice of Hearing and Statement of Alleged Violations shall be served pursuant to the provisions of the Code of Civil Procedure, sections 415.10 – 415.50, concerning the service of civil summons.

(B) The Notice of Hearing shall list the date, time and place of the hearing which shall not be scheduled sooner than forty–five days after the date of the mailing of the Notice of Hearing and Statement of Alleged Violations.

(C) The Respondent shall have the opportunity to review and copy such records from the investigative file of DLSE which are not subject to either attorney–client or work product privileges. The Respondent shall be entitled to a reasonable number of subpoenas but shall be liable for any costs of service of the subpoenas, or any other witness or mileage fees incurred.

Mileage and Witness fees shall be set as specified in Government Code section 68093. In the exercise of his or her discretion, the Hearing Officer may limit the number of witnesses subpoenaed either for the purpose of corroboration or for establishing a single material fact in issue, or where the Respondent has not furnished satisfactory evidence that the witness will be able to give necessary and competent testimony material to the issues at the hearing.

[The next page is 1415.]

Category 22

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know has within the preceding two years contracted or plans to contract with the Division of Labor Statistics and Research to provide services, supplies, materials, or machinery of any type for purposes of data processing, reproduction, or microfilming, to the Division, or has so contracted or plans to contract with the Department to so serve the Division.

Category 23

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know engages in or derives its income from, in whole or in part, a Transit District subject to the jurisdiction of the State Conciliation Service.

Category 24

Designated employees assigned to this category must report:

Any investment in a business entity and any source of income that they know or have reason to know is directly and materially subject to regulation by the Fair Employment Practices Commission.

Subchapter 6. Prevailing Wage Hearings

Article 1. General

§ 17201. Scope and Application of Rules.

(a) These Rules govern proceedings for review of civil wage and penalty assessments and the withholding of contract payments under Articles 1 and 2 of Division 2, Part 7, Chapter 1 (commencing with section 1720) of the Labor Code, as well as any notice assessing penalties for noncompliance with payroll record obligations under Labor Code section 1776. The provisions of Labor Code section 1742 and these Rules apply to all such assessments and notices served on a contractor or subcontractor on or after July 1, 2001 and provide the exclusive method for an Affected Contractor or Subcontractor to obtain review of any such notice or assessment. These Rules also apply to transitional cases in which notices were served but no court action was filed under Labor Code sections 1731–1733 prior to July 1, 2001, in accordance with Section 17270 (Rule 70) below.

(b) These Rules do not govern debarment proceedings under Labor Code section 1777.1, nor proceedings to review determinations with respect to the violation of apprenticeship obligations under Labor Code sections 1777.5 and 1777.7, nor any criminal prosecution.

(c) These Rules do not preclude any remedies otherwise authorized by law to remedy violations of Division 2, Part 7, Chapter 1 of the Labor Code.

(d) For easier reference, individual sections within these prevailing wage hearing regulations are referred to as "Rules" using only their last two digits. For example, this Section 17201 may be referred to as Rule 01.

NOTE: Authority cited: sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742, 1771.5, 1771.6(b), 1773.5, 1776 and 1777.1–1777.7, Labor Code; and Stats. 2000, Chapter 954, §1.

HISTORY

1. New subchapter 6 (articles 1–7, sections 17201–17270), article 1 (sections 17201–17212) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17202. Definitions.

For the purpose of these Rules:

(a) "Affected Contractor or Subcontractor" means a contractor or subcontractor (as defined under Labor Code section 1722.1) to whom the Labor Commissioner has issued a civil wage and penalty assessment pursuant to Labor Code section 1741, or to whom an Awarding Body has issued a notice of the withholding of contract payments pursuant to Labor Code section 1771.6, or to whom the Labor Commissioner or the Division of Apprentice Standards has issued a notice assessing penalties for noncompliance with payroll record obligations under Labor Code section 1776;

(b) "Assessment" means a civil wage and penalty assessment issued by the Labor Commissioner or his or her designee pursuant to Labor Code section 1741, and it also includes a notice issued by either the Labor Commissioner or the Division of Apprenticeship Standards pursuant to Labor Code section 1776;

(c) "Awarding Body" means an awarding body or body awarding the contract (as defined in Labor Code section 1722) that exercises enforcement authority under Labor Code section 1726 or 1771.5;

(d) "Department" means the Department of Industrial Relations;

(e) "Director" means the Director of the Department of Industrial Relations;

(f) "Enforcing Agency" means the entity which has issued an Assessment or Notice of Withholding of Contract Payments and with which a Request for Review has been filed; *i.e.*, it refers to the Labor Commissioner when review is sought from an Assessment, the Awarding Body when review is sought from a Notice of Withholding of Contract Payments, and the Division of Apprenticeship Standards when review is sought from a notice issued by that agency that assesses penalties under Labor Code section 1776;

(g) "Hearing Officer" means any person appointed by the Director pursuant to Labor Code section 1742(b) to conduct hearings and other proceedings under Labor Code section 1742 and these Rules;

(h) "Joint Labor–Management Committee" means a joint labor–management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (section 175a of Title 29 of the United States Code).

(i) "Labor Commissioner" means the Chief of the Division of Labor Standards Enforcement and includes his or her designee who has been authorized to carry out the Labor Commissioner's functions under Chapter 1, Part 7 of Division 2 (commencing with section 1720) of the Labor Code;

(j) "Party" means an Affected Contractor or Subcontractor who has requested review of either an Assessment or a Notice of Withholding of Contract Payments, the Enforcing Agency that issued the Assessment or the Notice of Withholding of Contract Payments from which review is sought, and any other Person who has intervened under subparts (a), (b), or (c) of Rule 08 [Section 17208];

(k) "Person" means an individual, partnership, limited liability company, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character;

(*l*) "Representative" means a person authorized by a Party to represent that Party in a proceeding before a Hearing Officer or the Director, and includes the Labor Commissioner when the Labor Commissioner has intervened to represent the Awarding Body in a review proceeding pursuant to Labor Code section 1771.6(b).

(m) "Rule" refers to a section within this subchapter 6. The Rule number corresponds to the last two digits of the full section number. (For example, Rule 08 is the same as section 17208.)

(n) "Surety" has the meaning set forth in Civil Code section 2787 and refers to the entity that issues the public works bond provided for in Civil Code sections 3247 and 3248 or any other surety bond that guarantees the payment of wages for labor.

(o) "Working Day" means any day that is not a Saturday, Sunday, or State holiday, as determined with reference to Code of Civil Procedure sections 12(a) and 12(b) and Government Code sections 6700 and 6701.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 2787, 3247 and 3248, Civil Code; Sections 12a and 12b, Code of Civil Procedure; Sections 6700, 6701, 11405.60 and 11405.70, Government Code; Sections 1720 et seq., 1722, 1722.1, 1726, 1741, 1742, 1742(b), 1771.5, 1771.6, 1771.6(b) and 1776, Labor Code; and 29 U.S.C. §175a.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17203. Computation of Time and Extensions of Time to Respond or Act.

(a) In computing the time within which a right may be exercised or an act is to be performed, the first day shall be excluded and the last day shall be included. If the last day is not a Working Day, the time shall be extended to the next Working Day.

(b) Unless otherwise indicated by proof of service, if the envelope was properly addressed, the mailing date shall be presumed to be: a postmark date imprinted on the envelope by the U.S. Postal Service if first-class postage was prepaid; or the date of delivery to a common carrier promising overnight delivery as shown on the carrier's receipt.

(c) Where service of any notice, decision, pleading or other document is by first class mail, and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time within which such right may be exercised or act performed is extended five days if the place of address is within the State of California, and 10 days if the place of address is outside the State of California but within the United States. However, this Rule shall not extend the time within which the Director may reconsider or modify a decision to correct an error (other than a clerical error) under Labor Code section 1742(b).

(d) Where service of any notice, pleading, or other document is made by an authorized method other than first class mailing, extensions of time to respond or act shall be calculated in the same manner as provided under section 1013 of the Code of Civil Procedure, unless a different requirement has been specified by the appointed Hearing Officer or by another provision of these Rules.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1010–1013, Code of Civil Procedure; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17204. Appointment of Hearing Officers; Delegation of Appointment Authority to Chief Counsel.

(a) Upon receipt of a Request for Review of an Assessment or of a Notice of Withholding of Contract Payments, the Director, acting through the Chief Counsel (*see* subpart (c) below), shall appoint an impartial Hearing Officer to conduct the review proceeding.

(b) The appointed Hearing Officer shall be an attorney employed by the Office of the Director — Legal Unit. However, if no attorney employed by the Office of the Director — Legal Unit is available or qualified to serve in a particular matter, the appointed Hearing Officer may be any attorney or administrative law judge employed by the Department, other than an employee of the Division of Labor Standards Enforcement.

(c) Any person appointed to serve as a Hearing Officer in any matter shall possess at least the minimum qualifications for service as an administrative law judge pursuant to Government Code section 11502(b) and shall be someone who is not precluded from serving under Government Code section 11425.30.

(d) The Director's authority under Labor Code section 1742(b) to appoint an impartial Hearing Officer, is delegated in all cases to the Chief Counsel of the Office of the Director or to the Chief Counsel's designated Assistant or Acting Chief Counsel when the Chief Counsel is unavailable or disqualified from participating in a particular matter. This delegation includes all related authority under Rule 40 [Section 17240] below to appoint a different Hearing Officer to conduct all or any part of a review proceeding as well as the authority to consider and decide or to assign to another Hearing Officer for consideration and decision any motion to disqualify an appointed Hearing Officer.

NOTE: Authority cited: Sections 7, 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 11425.30 and 11502(b), Government Code; and Sections 7, 55, 59 and 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17205. Authority of Hearing Officers.

(a) In any proceeding assigned for hearing and decision under the provisions of Labor Code section 1742, the appointed Hearing Officer shall have full power, jurisdiction and authority to hold a hearing and asc[illegible] facts for the information of the Director, to hold a prehearing confer[illegible] to issue a subpoena and subpoena duces tecum for the attendance of a Person and the production of testimony, books, documents, or other things, to compel the attendance of a Person residing anywhere in the state, to certify official acts, to regulate the course of a hearing, to grant a withdrawal, disposition or amendment, to order a continuance, to approve a stipulation voluntarily entered into by the Parties, to administer oaths and affirmations, to rule on objections, privileges, defenses, and the receipt of relevant and material evidence, to call and examine a Party or witness and introduce into the hearing record documentary or other evidence, to request a Party at any time to state the respective position or supporting theory concerning any fact or issue in the proceeding, to extend the submittal date of any proceeding, to exercise such other and additional authority as is delegated to Hearing Officers under these Rules or by an express written delegation by the Director, and to prepare a recommended decision, including a notice of findings, findings, and an order for approval by the Director.

(b) There shall be no right of appeal to or review by the Director of any decision, order, act, or refusal to act by an appointed Hearing Officer other than through the Director's review of the record in issuing or reconsidering a written decision under Rules 60 [Section 17260] and 61 [Section 17261] below.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11512, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17206. Access to Hearing Records.

(a) Hearing case records shall be available for inspection and copying by the public, to the same extent and subject to the same policies and [illegible] cedures governing other records maintained by the Department. Hea[illegible] case records normally will be available for review in the office of the appointed Hearing Officer; *provided however*, that a case file may be temporarily unavailable when in use by the appointed Hearing Officer or by the Director or his or her designee.

(b) Nothing in this Rule shall authorize the disclosure of any record or exhibit that is required to be kept confidential or is otherwise exempt from disclosure by law or that has been ordered to be kept confidential by an appointed Hearing Officer.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 6250 et seq. Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17207. Ex Parte Communications.

(a) Except as provided in this Rule, once a Request for Review is filed, and while the proceeding is pending, there shall be no direct or indirect communication regarding any issue in the proceeding to the appointed Hearing Officer or the Director, from the Enforcing Agency or any other Party or other interested Person, without notice and the opportunity for all Parties to participate in the communication.

(b) A communication made on the record in the hearing is permissible.

(c) A communication concerning a matter of procedure or practice is presumed to be permissible, unless the topic of the communication appears to the Hearing Officer to be controversial in the context of the specific case. If so, the Hearing Officer shall so inform the other participant and may terminate the communication or continue it until after giving all Parties notice and an opportunity to participate. Any written communication concerning a matter of procedure or practice, and any written response, or a written memorandum identifying the participants and st[illegible] the substance of any such oral communication or response, shall be ad[illegible] to the case file so that all Parties have a reasonable opportunity to review it. Unless otherwise provided by statute or these Rules, the appointed

AUTHORIZED REPRESENTATIVE OR PARTY WITHOUT ATTORNEY (Name, Address, and Telephone):	*For ODL use only:*
STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS	
In the matter of the Request for Review of: Requesting Party, vs. Enforcing Agency.	
AUTHORIZATION FOR REPRESENTATION BY NON-ATTORNEY (Rule 9(b))	Case No.: - PWH

(Name of Party) _____ designates the following individual or firm, who is not an attorney at law,* to serve as our authorized representative in this matter and to receive all notices in our behalf unless and until this Authorization is terminated or withdrawn by further written notice.

Specify Name, Address, and Telephone Number of Representative: _____

_____

_____

_____

Date: _____

_____
(TYPE OR PRINT NAME OF ! OWNER, ! OFFICER, OR ! MANAGING AGENT WHO IS MAKING THIS DESIGNATION)

_____
(SIGNATURE)
Owner, Officer, or Managing Agent of Party

I accept this authorization.

Date: _____

_____
Authorized Representative

** This form is not required for an authorized representative who is an Owner, Officer, or Managing Agent of the Party*

HISTORY

1. New article 2 (sections 17220–17229) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17221. Opportunity for Early Settlement.

(a) The Affected Contractor or Subcontractor may, within 30 days following the service of an Assessment or Notice of Withholding of Contract Payments, request a meeting with the Enforcing Agency for the purpose of attempting to settle the dispute regarding the Assessment or Notice.

(b) Upon receipt of a timely written request for a settlement meeting, the Enforcing Agency shall afford the Affected Contractor or Subcontractor a reasonable opportunity to meet for such purpose. The settlement meeting may be held in person or by telephone and shall take place before expiration of the 60–day limit for filing a Request for Review under Rule 22 [Section 17222].

(c) Nothing herein shall preclude the Parties from meeting or attempting to settle a dispute after expiration of the time for making a request or after the filing of a Request for Review.

(d) Neither the making or pendency of a request for a settlement meeting, nor the fact that the Parties have met or have failed or refused to meet as required by this Rule shall serve to extend the time for filing a Request for Review under Rule 22 [Section 17222] below.

(e) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, such a settlement meeting shall be admissible or subject to discovery in any administrative or civil proceeding. No writing prepared for the purpose of, in the course of, or pursuant to, such a settlement meeting, other than a final settlement agreement, shall be admissible or subject to discovery in any administrative or civil proceeding.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742, 1742.1 and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17222. Filing of Request for Review.

(a) Any Request for Review of an Assessment or of a Notice of Withholding of Contract Wages shall be transmitted in writing to the Enforcing Agency within 60 days after service of the Assessment or Notice. Failure to request review within 60 days shall result in the Assessment or the Withholding of Contract Wages becoming final and not subject to further review under these Rules.

(b) A Request for Review shall be transmitted to the office of the Enforcing Agency designated on the Assessment or Notice of Withholding of Contract Payments from which review is sought.

(c) A Request for Review shall be deemed filed on the date of mailing, as determined by the U.S. Postal Service postmark date on the envelope or the overnight carrier's receipt in accordance with Rule 03(b) [Section 17203(b)] above, or on the date of receipt by the designated office of the Enforcing Agency, whichever is earlier.

(d) An additional courtesy copy of the Request for Review may be served on the Department by mailing to the address specified in Rule 23 [Section 17223] below at any time on or after the filing of the Request for Review with the Enforcing Agency. The service of a courtesy copy on the Department shall *not* be effective for invoking the Director's review authority under Labor Code section 1742; however, it may determine the time within which the hearing shall be commenced under Rule 41(a) [Section 17241(a)] below.

(e) A Request for Review either shall clearly identify the Assessment or Notice from which review is sought, including the date of the Assessment or Notice, or it shall include a copy of the Assessment or Notice as an attachment. A Request for Review shall also set forth the basis upon which the Assessment or Notice is being contested. A Request for Review shall be liberally construed in favor of its sufficiency; however, the Hearing Officer may require the Party seeking review to provide a further specification of the issues or claims being contested and a specification of the basis for contesting those matters.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742 and 1771.6(a), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17223. Transmittal of Request for Review to Department.

Within ten (10) days followings its receipt of a Request for Review, the Enforcing Agency shall transmit to the Office of the Director – Legal Unit, the Request for Review and copies of the Assessment or Notice of Withholding of Contract Wages, any Audit Summary that accompanied the Assessment or Notice, and a Proof of Service or other document showing the name and address of any bonding company or Surety entitled to notice under Rule 20(a) [Section 17220(a)] above. The Enforcing Agency shall transmit these items to the following address.

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR – LEGAL UNIT
ATTENTION: LEAD HEARING OFFICER
P.O. BOX 420603
SAN FRANCISCO, CA 94142–0603

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(a) and 1771.6(a), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17224. Disclosure of Evidence.

(a) Within ten (10) days following its receipt of a Request for Review, the Enforcing Agency shall also notify the Affected Contractor or Subcontractor of its opportunity and the procedures for reviewing evidence to be utilized by the Enforcing Agency at the hearing on the Request for Review.

(b) An Enforcing Agency shall be deemed to have provided the opportunity to review evidence required by this Rule if it (1) gives the Affected Contractor or Subcontractor the option, at the Affected Contractor's or Subcontractor's own expense, to either (A) obtain copies of all such evidence through a commercial copying service or (B) inspect and copy such evidence at the office of the Enforcing Agency during normal business hours; or if (2) the Enforcing Agency at its own expense forwards copies of all such evidence to the Affected Contractor or Subcontractor.

(c) The evidence required to be provided under this Rule shall include the identity of witnesses whose testimony the Enforcing Agency intends to present, either in person at the hearing or by declaration or affidavit. This provision shall not be construed as requiring the Enforcing Agency to prepare or provide any separate listing of witnesses whose identities are disclosed within the written materials made available under subpart (a).

(d) The Enforcing Agency shall make evidence available for review as specified in subparts (a) through (c) within 20 days of its receipt of the Request for Review; *provided that*, this deadline may be extended by written request or agreement of the Affected Contractor or Subcontractor. The Enforcing Agency's failure to make evidence available for review as required by Labor Code section 1742(b) and this Rule, shall preclude the Enforcing Agency from introducing such evidence in proceedings before the Hearing Officer or the Director.

(e) This Rule shall not preclude the Enforcing Agency from relying upon or presenting any evidence first obtained after the initial disclosure of evidence under subparts (a) through (d), *provided that*, such evidence is promptly disclosed to the Affected Contractor or Subcontractor. This Rule also shall not preclude the Enforcing Agency from presenting previously undisclosed evidence to rebut new or collateral claims raised by another Party in the proceeding.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(b) and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17229. Finality of Notice of Withholding of Contract Payments; Authority of Awarding Body to Recover Additional Funds.

Where a Notice of Withholding of Contract Payments seeks to recover wages, penalties, or damages in excess of the amounts withheld from available contract payments (*see* Rule 20(b)(2) [Section 17220(b)(2)] above), an Awarding Body may recover any excess amounts that become or remain due when the Notice of Withholding of Contract Payments has become final under Labor Code section 1771.6. To recover the excess amounts, the Awarding Body shall transmit to the Labor Commissioner the Notice together with any decision of the Director or court that has become final and not subject to further review. The Labor Commissioner in turn shall certify and file the final order with the superior court in accordance with Labor Code section 1742(d).

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(d) and 1771.6, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

Article 3. Prehearing Procedures

§ 17230. Scheduling of Hearing; Continuances and Tolling.

(a) The appointed Hearing Officer shall establish the place and time of the hearing on the merits, giving due consideration to the needs of all Parties and the statutory time limits for hearing and deciding the matter. Parties are encouraged to communicate scheduling needs to the Hearing Officer and all other Parties at the earliest opportunity. It shall not be a violation of Rule 07 [Section 17207]'s prohibition on ex parte communications for the Hearing Officer or his or her designee to communicate with Parties individually for purposes of clearing dates and times and proposing locations for the hearing. The Hearing Officer may also conduct a prehearing conference by telephone or any other expeditious means for purposes of establishing the time and place of the hearing.

(b) Once a hearing date is set, a request for a continuance that is not joined in by all other Parties or that is for more than 30 days will not be granted absent a showing of extraordinary circumstances, giving due regard to the potential prejudice to other Parties in the case and other Persons affected by the matter under review. Absent an enforceable waiver (*see* subpart (d) below), no continuance will be granted nor any proceeding otherwise delayed if doing so is likely to prevent the Hearing Officer from commencing the hearing on the matter within the statutory time limit.

(c) A request for a continuance that is for 30 days or less and is joined by all Parties shall be granted upon a showing of good cause. Notwithstanding subpart (b) above, a unilateral request for a continuance made by the Party who filed the Request for Review shall be granted upon a showing of good cause if the new date for commencing the hearing is no more than 150 days after the date of service of the Assessment or Notice of Withholding of Contract Payments.

(d) If a Party makes or joins in any request that would delay or otherwise extend the time for hearing or deciding a review proceeding beyond any prescribed time limit, such request shall also be deemed a waiver by that Party of that time limit.

(e) The time limits for hearing and deciding a review proceeding shall also be deemed tolled (1) when proceedings are suspended to seek judicial enforcement of a subpoena or other order to compel the attendance, testimony, or production of evidence by a necessary witness; (2) when the proceedings are stayed or enjoined by any court order; (3) between the time that a proceeding is dismissed and then ordered reinstated under Rule 25 [Section 17225] above; (4) upon the order of a court reinstating or requiring rehearing of the merits of a proceeding; or (5) during the pendency of any other cause beyond the Director's direct control (including but not limited to natural disasters, temporary unavailability of a suitable hearing facility, or absence of budget authority) that prevents the Director or any appointed Hearing Officer from carrying out his or her responsibilities under these Rules.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New article 3 (sections 17230–17237) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17231. Prehearing Conference.

(a) Upon the application of any Party or upon his or her own motion, the appointed Hearing Officer may conduct a prehearing conference for any purpose that may expedite or assist the preparation of the matter for hearing or the disposition of the Request for Review. The prehearing conference may be conducted by telephone or other means that is convenient to the Hearing Officer and the Parties.

(b) The Hearing Officer shall provide reasonable advance notice of any prehearing conference conducted pursuant to this Rule. The Notice shall advise the Parties of the matters which the Hearing Officer intends to cover in the prehearing conference, but the failure of the Notice to enumerate some matter shall not preclude its discussion or consideration at the conference.

(c) With or without a prehearing conference, the Hearing Officer may issue such procedural Orders as are appropriate for the submission of evidence or briefs and conduct of the hearing, consistent with the substantial rights of the affected Parties.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11511.5, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17232. Consolidation and Severance.

(a) The Hearing Officer may consolidate for hearing and decision any number of proceedings where the facts and circumstances are similar and consolidation will result in conservation of time and expense. Where the Hearing Officer proposes to consolidate proceedings on his or her own motion, the Parties shall be given reasonable notice and an opportunity to object before consolidation is ordered.

(b) The Hearing Officer may sever consolidated proceedings for good cause.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11507.3, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17233. Prehearing Motions; Cut Off Date.

(a) Any motion made in advance of the hearing on the merits, any opposition thereto, and any further reply shall be in writing and directed to the appointed Hearing Officer. No particular format shall be required; however, the following information shall appear prominently on the first page: (1) the case name (*i.e.*, names of the Parties); (2) any assigned case number; (3) the name of the Hearing Officer to whom the paper is being submitted; (4) the identity of the Party submitting the paper; (5) the nature of the relief sought; and (6) the scheduled date, if any, for the hearing on the merits of the Request for Review. The motion shall also include a Proof of Service, as defined in Rule 10 [Section 17210] above, showing that copies have been served on all other Parties to the proceeding.

(b) Prehearing motions shall be served and filed no later than 20 days prior to the hearing on the merits of the Request for Review. Any opposition shall be served and filed no later than 10 days after service of the motion or at least 7 days prior to the hearing on the merits, whichever is earlier. The Hearing Officer may in his or her discretion decide the motion in writing in advance of the hearing on the merits or reserve the matter for further consideration and determination at the hearing on the merits.

(c) There shall be no right to a separate oral hearing on any prehearing motion, except in those instances in which an oral hearing has been specially requested by a Party or the Hearing Officer *and* in which the enforcement or forfeiture of a fundamental right is at stake. When the Hear-

tial communications, or has engaged in conduct which, in the judgment of the Hearing Officer, creates an appearance of bias, prejudice, or partiality.

(h) Nothing in this section limits any further rights extended by Evidence Code section 754 to a Party or witness who is deaf or hard of hearing.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 754, Evidence Code; Sections 11435.05–11435.65 and 68560–68566, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17249. Hearing Record; Recording of Testimony and Other Proceedings.

(a) The Hearing Officer and the Director shall maintain an official record of all proceedings conducted under these Rules. In the absence of a determination under subpart (b) below, all testimony and other proceedings at any hearing shall be recorded by audiotape. Recorded testimony or other proceedings need not be transcribed unless requested for purposes of further court review of a decision or order in the same case.

(b) Upon the application of any Party or upon his or her own motion, the Hearing Officer may authorize the use of a certified court reporter, videotape, or other appropriate means to record the testimony and other proceedings. Any application by a Party under this subpart shall be made at a prehearing conference or by prehearing motion filed no later than 10 days prior to the scheduled date of hearing. Upon the granting of any such application, it shall be the responsibility of the Party or Parties who made the application to procure and pay for the services of a qualified person and any additional equipment needed to record the testimony and proceedings by the requested means. Ordinarily the granting of such application will be conditioned on the applicant's paying for certified copies of the transcript for the official record and for the other Parties. The failure of a requesting Party to comply with this requirement shall not be cause for delaying the hearing on the merits, but instead shall result in the proceedings being tape recorded in accordance with subpart (a).

(c) The Parties may, at their own expense, arrange for the recording of testimony and other proceedings through a different means other than the one authorized by the Hearing Officer, *provided that* it does not in any way interfere with the Hearing Officer's control and conduct of the proceedings, and *further provided that*, it shall not be regarded as an official record for any purpose absent a stipulation by all of the Parties or order of the Hearing Officer.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17250. Burdens of Proof on Wages and Penalties.

(a) The Enforcing Agency has the burden of coming forward with evidence that the Affected Contractor or Subcontractor (1) was served with an Assessment or Notice of Withholding of Contract Payments in accordance with Rule 20 [Section 17220]; (2) was provided a reasonable opportunity to review evidence to be utilized at the hearing in accordance with Rule 24 [Section 17224]; and (3) that such evidence provides prima facie support for the Assessment or Withholding of Contract Payments.

(b) If the Enforcing Agency meets its initial burden under (a), the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment or for the Withholding of Contract Payments is incorrect.

(c) With respect to any civil penalty established under Labor Code section 1775, the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty.

(d) All burdens of proof and burdens of producing evidence shall be construed in a manner consistent with relevant sections of the Evidence Code, and the quantum of proof required to establish the existence or non–existence of any fact shall be by a preponderance of the evidence, unless a higher standard is prescribed by law.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 500, 502 and 550, Evidence Code; and Sections 1742(b) and [illegible] Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17251. Liquidated Damages.

(a) With respect to any liquidated damages for which an Affected Contractor, Subcontractor, or Surety on a bond becomes liable under Labor Code section 1742.1, the Enforcing Agency shall have a further burden of coming forward with evidence to show the amount of wages that remained unpaid as of 60 days following the service of the Assessment or Notice of Withholding of Contract Payments. The Affected Contractor or Subcontractor shall have the burden of demonstrating that he or she had substantial grounds for believing the Assessment or Notice to be in error.

(b) To demonstrate "substantial grounds for believing the Assessment or Notice to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment or Notice was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment or Notice.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 1742(b), 1742.1 and 1773.5, Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17252. Oral Argument and Briefs.

(a) Parties may submit prehearing briefs of reasonable length un[illegible] such conditions as the appointed Hearing Officer shall prescribe. Pa[illegible] shall also be permitted to present a closing oral argument of reasonable length at or following the conclusion of the hearing.

(b) There shall be no automatic right to file a post–hearing brief. However, the Hearing Officer may permit the Parties to submit written post–hearing briefs, under such terms as are just. The Hearing Officer shall have discretion to determine, among other things, the length and format of such briefs and whether they will be filed simultaneously or on a staggered (opening, response, and reply) basis.

(c) In addition to or as an alternative to post–hearing briefs, the Hearing Officer may also prepare proposed findings or a tentative decision or may designate a Party to prepare proposed findings and thereafter give the Parties a reasonable opportunity to present arguments in support of or opposition to any proposed findings or tentative decision prior to the issuance of a decision by the Director under Rule 60 [Section 17260] below.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17253. Conclusion of Hearing; Time for Decision.

(a) The hearing shall be deemed concluded and the matter submitted either upon the completion of all testimony and post–hearing arguments or upon the expiration of the last day for filing any post–hearing brief or other authorized submission, whichever is later. Thereafter, the Director shall have 45 days within which to issue a written decision affirming, modifying, or dismissing the Assessment or the Withholding of Contract Wages.

(b) For good cause, the Hearing Officer may vacate the submis[illegible] and reopen the hearing for the purpose of receiving additional evide[illegible] or argument, in which case the time for the Director to issue a written decision shall run from the date of resubmission.

cable and no later than when the matter is noticed for a prehearing conference or hearing.

(b) The Director may appoint a different Hearing Officer to conduct and hear the review or to conduct and dispose of any preliminary or procedural matter in a given case.

(c) A Party wishing to object to the appointment of a particular Hearing Officer, including for any one or more of the grounds specified in sections 11425.30 and 11425.40 of the Government Code or section 1742(b) of the Labor Code, shall within 10 days after receiving notice of the appointment and no later than the start of any hearing on the merits, *whichever is earlier*, file a motion to disqualify the appointed Hearing Officer together with a supporting affidavit or declaration. The motion shall be filed with the Chief Counsel of the Office of the Director at the address indicated in Rule 23 [Section 17223] above. Notwithstanding the foregoing time limits, if a Party subsequently discovers facts constituting grounds for the disqualification of the appointed Hearing Officer, including but not limited to that the Hearing Officer has received a prohibited ex parte communication in the pending case, the motion shall be filed as soon as practicable after the facts constituting grounds for disqualification are discovered.

(d) Upon receipt of a motion to disqualify the appointed Hearing Officer, the Director may: (1) consider and decide the motion or appoint another Hearing Officer to consider and decide the motion, in which case the challenged Hearing Officer shall first be given an opportunity to respond to the motion, but no proceedings shall be conducted by the challenged Hearing Officer until the motion is determined; or (2) appoint another Hearing Officer to hear the Request for Review, in which case the motion shall be deemed moot.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Sections 170.3(c)(1), Code of Civil Procedure; Sections 11425.30 and 11425.40, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New article 4 (sections 17240–17249) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17241. Time and Place of Hearing.

(a) A hearing on the merits of a timely Request for Review shall be commenced within 90 days after the date it is received by the Office of the Director. The hearing shall be conducted at a suitable location within the county where the appointed Hearing Officer maintains his or her regular office, unless the hearing is moved to a different county in accordance with subpart (b) below.

(b) Upon the agreement of the Parties or upon a showing of good cause by either the Party who filed the Request for Review or the Enforcing Agency, the hearing shall be conducted at a suitable location within either (1) the county where a majority of the subject public works employment was performed, or (2) any other county that is proximate to or convenient for the Parties and necessary witnesses.

(c) A suitable location under this section means one that is open and accessible to members of the public and which includes appropriate facilities for the recording of testimony. Any facility that is regularly used by any state agency or by the Awarding Body for public hearings and that will reasonably accommodate the anticipated number of Parties and witnesses involved in the proceeding, is presumed suitable in the absence of a contrary showing. Parties seeking to change the location of a hearing under subpart (b) shall make reasonable efforts to identify, agree upon, and arrange for the availability of a suitable location within a county specified in subpart (b)(1) or (b)(2).

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11425.20, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17242. Open Hearing; Confidential Evidence and Proceedings; and Exclusion of Witnesses.

(a) Subject to the qualifications set forth below, the hearing shall be open to the public. If all or part of the hearing is conducted by telephone, television, or other electronic means, the Hearing Officer shall conduct the hearing from a location where members of the public may be physically present, and members of the public shall also have a reasonable right of access to the hearing record and any transcript of the proceedings.

(b) Notwithstanding the provisions of subpart (a), the Hearing Officer may order closure of a hearing or make other protective orders to the extent necessary to: (1) preserve the confidentiality of information that is privileged, confidential, or otherwise protected by law; (2) ensure a fair hearing in the circumstances of the particular case; or (3) protect a minor witness or a witness with a developmental disability from intimidation or other harm, taking into account the rights of all persons.

(c) Upon motion of any Party or upon his or her own motion, the Hearing Officer may exclude from the hearing room any witnesses not at the time under examination. However, a Party to the proceeding and the Party's Representative shall not be excluded.

(d) This section does not apply to any prehearing or settlement conference.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 777, Evidence Code, Section 11425.20, Government Code, and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17243. Conduct of Hearing.

(a) Testimony shall be taken only on oath or affirmation under penalty of perjury.

(b) Every Party shall have the right to call and examine witnesses; to introduce exhibits; to question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which Party first called the witness to testify; and to rebut any opposing evidence. A Party may be called by an opposing Party and examined as if under cross–examination, whether or not the Party called has testified or intends to testify on his or her own behalf.

(c) The Hearing Officer may call and examine any Party or witness and may on his or her own motion introduce exhibits.

(d) The Hearing Officer shall control the taking of evidence and other course of proceedings in a hearing and shall exercise that control in a manner best suited to ascertain the facts and safeguard the rights of the Parties. Prior to taking evidence, the Hearing Officer shall define the issues and explain the order in which evidence will be presented; *provided that*, for good cause the Hearing Officer later may vary the order of presentation as circumstances warrant.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 11513, Government Code; and Section 1742(b), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

§ 17244. Evidence Rules; Hearsay.

(a) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

(b) The rules of privilege shall be recognized to the same extent and applied in the same manner as in the courts of this state.

(c) The Hearing Officer may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

(d) Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it either would be admissible over objection in a civil action or no Party raises an objection to such use. Unless previously waived, an objection or argument that evidence is insufficient in itself to support a finding because of its hearsay character shall be timely if presented at any time before submission of the case for decision.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1094.5, Code of Civil Procedure; and Section 1742(c), Labor Code.

HISTORY

1. New section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

Article 7. Transitional Rule

§ 17270. Applicability of These Rules to Notices Issued Between April 1, 2001 and June 30, 2001.

(a) These Rules shall apply to any notice issued by the Labor Commissioner or an Awarding Body with respect to the withholding or forfeiture of contract payments for unpaid wages or penalties under the prevailing wage laws in effect prior to July 1, 2001; *provided that,* the party seeking review has not commenced a civil action with respect to such notice under the provisions of Labor Code sections 1731–1733 [repealed effective July 1, 2001].

(b) An Affected Contractor or Subcontractor may appeal any such notice served between April 1, 2001 and June 30, 2001 by filing a Request for Review with the Enforcing Agency that issued the notice, in the manner and form specified in Rule 22 [Section 17222] above. Any such Request for Review shall be in writing and shall include a statement indicating the date upon which the contractor or subcontractor was served with the notice of withholding or forfeiture.

(c) This Rule shall *not* extend the time available to appeal the notice under the former law. A Request for Review of a notice issued prior to July 1, 2001 must be filed with the Enforcing Agency within ninety (90) days after service of the notice.

(d) A contractor or subcontractor who has sought review of a notice issued prior to July 1, 2001 by filing a court action under the repealed provisions of Labor Code sections 1731–1733 on or after July 1, 2001, shall, if said action would have been timely under those sections, be afforded the opportunity to dismiss the action without prejudice, after entering into a stipulation that the proceeding be transferred to the Director for hearing in accordance with these Rules. The stipulation shall also provide that the time for commencing a hearing under Rule 41 [Section 17241] shall not begin to run until the case has been formally transferred to and received by the Office of the Director.

(e) Any hearing request made pursuant to Labor Code section 1771.7 [repealed effective July 1, 2001] that has not been heard and decided by a Hearing Officer prior to July 1, 2001 shall be handled in accordance with these Rules.

NOTE: Authority cited: Sections 55, 59, 1742(b) and 1773.5, Labor Code. Reference: Section 1742(b), Labor Code.

HISTORY

1. New article 7 (section 17270) and section filed 1–15–2002; operative 1–15–2002 pursuant to Government Code section 11343.4 (Register 2002, No. 3).

* * *

STATE OF CALIFORNIA GRAY DAVIS, GOVERNOR

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

October 21, 2002

John W. Francis, Esq.
2600 East Nutwood Avenue, Suite 260
Fullerton, CA 92831-3106

Re: Public Works Case No. 2002-012
California State University, San Marcos
Student Housing Project

Dear Mr. Francis:

This constitutes the determination of the Director of the Department of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based upon my review of the facts of this case and an analysis of the applicable law, it is my determination that construction of Student Housing at California State University, San Marcos ("Project") is a public work subject to the payment of prevailing wages.

Factual Background

The Project involves construction of apartment-style residential units, which will serve approximately 475 students of California State University, San Marcos ("University"). The Project also includes construction of a Community Building, within which will be a classroom, a student government meeting room and other related amenities. The building configurations and exterior elevations specifically are designed to conform to the University's architecture. The Project is sited on campus in a geographical area encompassing approximately 6.11 acres of University property within the City of San Marcos, County of San Diego ("Site").

The Project was formalized in a series of three contracts entered into on March 1, 2002. First, a Ground Lease was entered into between the Board of Trustees of the California State University ("Board") and the San Marcos University Corporation ("Corporation"), a California non-profit public benefit corporation. In that Ground Lease, the Corporation agreed to design, finance, construct and manage the Project, and the Board agreed to lease the Site to the Corporation for $10. The term of the Ground Lease commenced on the earlier of the date of recordation of a memorandum of the Ground Lease with the County

Recorder of San Diego County, or March 1, 2002, and will terminate on July 1, 2037, unless extended or sooner terminated as provided under the terms of the lease.

The Corporation in turn entered into a Development Agreement with Allen & O'Hara Education Services, LLC ("Developer") to undertake the design, construction, furnishing and equipping of the Project consistent with the Ground Lease. The Developer then hired the Ellias Construction Company, Inc. to act as the general contractor. Construction began on April 1, 2002. The anticipated completion date is July 1, 2003.

The Corporation also entered into an Indenture with First Union National Bank for the issuance of bonds, designated the San Marcos University Corporation Auxiliary Organization Student Housing Revenue Bonds ("Bonds"), in an aggregate principal amount not exceeding $27,990,000.

The Project cost is anticipated to be $27,990,000, which is to be funded by the Bonds. The Bonds will be retired using net revenue from the student housing.

Analysis

What is now Labor Code[1] section 1720(b)(as amended by statutes of 2001, chapter 938, section 2) is the applicable law. On projects such as this, the amended statute applies where the project formation documents were entered into on or after the effective date of the amendment. This amendment took effect on January 1, 2002. The relevant project formation documents - the Ground Lease, the Development Agreement and the Indenture - were entered into on March 1, 2002.

Section 1720(a)(1) defines public works to mean: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds...." The Project is construction done under contract. The issue presented here is whether the Project is being paid for in whole or in part out of public funds.

Labor Code section 1720(b) specifies that, "'paid for in whole or in part out of public funds' means ... fees, costs, rents, ... or other obligations that would normally be required in the execution of the contract, which are paid, reduced, charged at less than fair market value, waived or forgiven."

[1] Unless otherwise indicated, all statutory references are to the Labor Code.

Under the Ground Lease, the Board has leased to the Corporation, for 35 years, for $10, an area of approximately 6.11 acres of property within the City of San Marcos, County of San Diego. A lease for $10 for 6.11 acres of land within San Diego County constitutes rent that is paid for at patently less than fair market value and consequently, a payment of public funds for construction under Labor Code section 1720(b).[2]

Conclusion

Based on the above analysis, I find that the Project is a public work for which prevailing wages must be paid.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Chuck Cake

Chuck Cake
Acting Director

[2] As discussed above, I find the Project to be a public work based on the below-market value rent constituting a payment of public funds for construction. I therefore need not address whether the Project would also be covered on the alternative grounds that the Corporation is the alter ego and/or agent of the Board for public works purposes. Similarly, I need not address whether Education Code section 89911, under which any obligation of the Corporation authorized by the Board is an obligation of the State of California, creates prevailing wage liability for this Project.

STATE OF CALIFORNIA
GRAY DAVIS, GOVERNOR

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

December 4, 2002

Arthur S. Lujan
Labor Commissioner
Department of Industrial Relations
Division of Labor Standards Enforcement
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102

Re: Public Works Case No. 2002-024
John O'Banion Community Learning Center
Housing Authority of the County of Merced

Dear Mr. Lujan:

This constitutes the determination of the Director of the Department of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, ("CCR") section 16000(a). Based upon my review of the facts of this case and an analysis of the applicable law, it is my determination that the John O'Banion Community Learning Center Project ("Project") is a public work subject to the payment of prevailing wages.

The Project includes demolition, site preparation and construction of a new 17,000 square-foot, one-story multi-purpose building in Merced. The owner and general contractor for the Project is the Housing Authority of the County of Merced ("Housing Authority"), which entered into sub-contracts with the successful bidders on the Project. Funding for the Project consists of a $150,000 Community Development Block Grant ("CDBG") from the U.S. Department of Housing and Urban Development ("HUD"), and a $1 million loan from the County Bank of Merced to the Housing Authority. The preliminary work for the Project, including surveying and architectural design, was funded by the CDBG funds, which are administered by the Housing Authority. The bank loan is a standard commercial loan from a private source that will be repaid from lease payments made by the tenants of the Center. Lockwood General Engineering, a subcontractor, will receive approximately $505,535 for performing demolition, site preparation, all grading work, site utilities installation and specified concrete work on the Project.

What is now Labor Code section 1720(a)(1)[1] (as amended by Statutes of 2001, Chapter 938, section 2 (Senate Bill 975)) defines "public works" in relevant part as: "Construction, alteration, demolition, installation or repair work done under contract and paid for in whole or part out of public funds." "Construction" includes work performed during the design and pre-construction phases of construction including, but not limited to, inspection and land survey work. 8 CCR section 16000 defines "public funds" as state, local and/or federal monies.

This Project involves construction and demolition done under contract at both the pre-construction and construction stages. Although there is also a private bank loan funding the Project, under the applicable regulation the federal CDBG funds constitute public funds. The question appears to be whether the Project is subject to the payment of California prevailing wages.

In a letter dated February 4, 2002, HUD states that the CDBG funds will not trigger the Davis-Bacon requirements, and therefore the Project is not subject to the payment of federal prevailing wages. That federal prevailing wages are not required has no bearing in this case on whether state prevailing wages are required. Applicable to this issue is 8 CCR section 16001(b), which states:

> Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort.

Because the Project in this case is federally funded and assisted and is being administered by the Housing Authority, a California awarding body, California prevailing wages would apply.

In summary, pursuant to section 1720(a)(1) and 8 CCR section 16001(b), the work being done by Lockwood on this Project is a public work for which California prevailing wages must be paid.

[1] All statutory code section references are to the Labor Code.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Chuck Cake

Chuck Cake
Acting Director

22 PACLJ 1333
(Cite as: 22 Pac. L.J. 1333)
«KeyCite Citations»

Pacific Law Journal
July, 1991

Comment

*1333 FINANCING LOCAL GOVERNMENT IN THE POST-PROPOSITION 13 ERA: THE USE AND EFFECTIVENESS OF NONTAXING REVENUE SOURCES

Julie K. Koyama

INTRODUCTION

In 1978, California voters approved initiative Proposition 13, amending the California Constitution. [FN1] Prior to Proposition 13, property taxes were the main source of revenue for local governments, [FN2] including cities, counties, and special districts. [FN3] *1334 Proposition 13, however, severely curbed the ability of state and local taxing jurisdictions to raise money by limiting annual levies on real property to one percent of the 1975-76 assessed value [FN4] and by restricting the passage of state tax increases. [FN5] Although Proposition 13 permits local taxing authorities to collect revenues through the use of "special taxes" under section 4 of the proposition, such taxes require a two-thirds vote of the local electorate. [FN6] As a result, revenues flowing to local governments from general property taxes have abruptly diminished. [FN7] Cities, counties, and special districts which had been dependent on property taxes to finance municipal improvements, services, and facilities were thus faced with the prospect of drastically reducing expenditures or finding new sources of revenue. [FN8]

Increasingly, municipalities have responded to the harsh fiscal effect caused by the taxing restrictions of Proposition 13 by turning to nontaxing revenue sources not subject to the provisions of the amendment. [FN9] Specifically, local governments have employed *1335 special benefit assessments [FN10] and governmental regulatory and service fees [FN11] to ease their financial burdens. [FN12] However, the use of these nontaxing alternatives has been challenged in recent years as circumventing the purposes of Proposition 13. [FN13]

Part I of this Comment surveys the background, relevant provisions, and fiscal impact of Proposition 13. [FN14] Part II examines court decisions interpreting Proposition 13 which have impacted the ability of local governments to raise revenues for municipal improvements, services, and facilities. [FN15] Part III analyzes the use and effectiveness of special benefit assessments and governmental regulatory and service fees to avoid the taxing restrictions of Proposition 13 and recoup lost revenues. [FN16] Part IV considers the current status and future of Proposition 13 and summarizes the role of California courts in shaping the amendment. [FN17] This Comment concludes that California courts have tempered the effect of Proposition 13's taxing restrictions by allowing local governments to develop nontaxing sources of revenue. [FN18]

*1336 I. PROPOSITION 13

A. Historical Background and Purposes

Prior to the enactment of Proposition 13, local property taxes in California were among the highest in the nation. [FN19] The adoption of Proposition 13 was the culmination of a long-standing protest by California landowners against burdensome property taxes, [FN20] and the event was widely characterized as a "taxpayer's revolt." [FN21] The "Jarvis-Gann Initiative" [FN22] was intended by its authors to provide effective property tax relief and, as a

corollary, reduce governmental waste and spending. [FN23] Moreover, since California had a tax surplus which the legislature refused to spend or rebate to taxpayers, high property taxes seemed unnecessary. [FN24] By *1337 approving Proposition 13, California voters greatly checked the taxing powers of their state and local governments. [FN25]

B. Summary of Relevant Constitutional Provisions

Proposition 13 provides a new scheme [FN26] for taxing real property and applies to all residential and commercial land uses. [FN27] Prior to the amendment, local governments generally had the power to impose any taxes and fees, within constitutional or legislative limits, [FN28] by a vote of their governing bodies. [FN29] However, Proposition 13 significantly curtailed the independent taxing authority of local jurisdictions. [FN30] The provisions that have restricted the ability of local governments to raise revenues are outlined briefly below.

Section 1 of Proposition 13 limits ad valorem taxes [FN31] on real property to one percent of the assessed value of such property. [FN32] Section 2 restricts inflationary increases in the assessed value of real property, or "full cash value base," [FN33] to two percent per year. [FN34] This section further rolled back the full cash value base of real property to the 1975-76 county assessor's valuation, subject to *1338 various adjustments. [FN35] While these two sections maintain proportion between property taxes and property values, [FN36] their effect was to severely reduce the traditional primary source of discretionary tax revenue available to local governments. [FN37]

Section 3 of Proposition 13 provides that "any changes in State taxes enacted for the purpose of increasing revenues" require a two-thirds vote of all members of both the assembly and the senate. [FN38] Local governments are directly affected by this restraint on the state legislature since many local governing bodies derive their taxing authority from enabling statutes. [FN39] Section 3 also expressly prohibits the legislature from imposing any new ad valorem taxes on real property or new taxes on the sales of real property. [FN40] This provision is significant since even a nonproperty tax which receives the requisite supermajority legislative approval may be struck down if it too closely resembles an ad valorem tax. [FN41]

Section 4 is a key provision in Proposition 13 since it compounds the fiscal crisis caused by the amendment's one percent *1339 ad valorem limitation [FN42] and prohibition of the enactment of new ad valorem and sales or transaction taxes on real property. [FN43] This section requires a two- thirds vote of the qualified local electorate for any new or increased "special tax." [FN44] A "special tax," as distinguished from taxes which flow to the local government's general fund, is one which is earmarked for a specific purpose. [FN45] Prior to the enactment of section 4, California law generally permitted any new or increased local taxes without voter approval. [FN46] The purpose of section 4 is to prevent local taxing jurisdictions from recouping their losses from decreased property taxes by imposing or increasing other taxes. [FN47]

C. Fiscal Impact

Proposition 13 has been characterized as "the most significant fiscal act of the people of California in modern times." [FN48] Only one year following approval of the initiative, property tax revenues dropped fifty-one percent, a $5.9 billion decrease from property tax revenues in the prior fiscal year. [FN49] The effect of Proposition 13 upon local governments was debilitating, since property taxes are the largest single source of tax revenue for cities, counties, and *1340 special districts, [FN50] and because all property tax revenues are devoted to support of local government activities. [FN51]

The California Legislature softened the impact of Proposition 13 by granting financial assistance to local governments. [FN52] Commonly referred to as a "bail-out," [FN53] the state aid program replaced some of the lost revenues caused by Proposition 13 through block grants and loans, [FN54] and implemented a method of distributing the proceeds of the one percent property tax to local governments. [FN55] However, in the early 1980's the legislature was forced to reduce financial assistance to local governments because of the severe recession. [FN56] Federal cutbacks and inflation compounded the cities' and counties' financial problems. [FN57] As a *1341 result, the long-term impact of Proposition 13 is now being felt by many municipalities. [FN58]

Because Proposition 13 is not susceptible to legislative repeal, [FN59] and since legislative efforts to assist local

governments have been insufficient, [FN60] cities, counties, and special districts have been forced to counter property tax revenue losses resulting from Proposition 13 by developing other sources of revenue, especially nontaxing levies, for the longer term since the alternative of cutting expenditures is politically unpalatable. [FN61] Expectedly, these efforts to generate revenues through alternative sources have been resisted as contrary to the provisions of Proposition 13. [FN62] However, California courts have responded favorably toward local taxing jurisdictions by restricting the application of Proposition 13. [FN63] It has been the courts, rather than the legislature, which have taken an active role in moderating the harsh fiscal impact of Proposition 13, as demonstrated by the decisions discussed below.

II. RELEVANT PROPOSITION 13 COURT DECISIONS

Since the enactment of Proposition 13, California courts have examined almost every aspect of the amendment. [FN64] The California *1342 Supreme Court promptly reviewed the constitutionality of Proposition 13 in Amador Valley Joint Union High School District v. State Board of Equalization [FN65] and upheld the amendment. [FN66] The court noted that it was only addressing "those principal, fundamental challenges to the validity of Proposition 13 as a whole." [FN67] Thus, the interpretation and application of particular provisions was expressly left for later litigation. [FN68] Since the Amador decision, most of the litigation surrounding Proposition 13 *1343 has focused on the amendment's one percent ad valorem tax and special tax- limitations, [FN69] which are discussed below.

A. The One Percent Ad Valorem Tax Limit

The scope of the one percent limit on ad valorem real property taxes in section 1 of Proposition 13 [FN70] was addressed by the California Supreme Court in Heckendorn v. City of San Marino. [FN71] San Marino drafted an ordinance authorizing a special tax which went into effect after approval by approximately eighty percent of the city's voters. [FN72] The plaintiff, a city property owner, filed a complaint alleging that the ordinance, which imposed a graduated tax based on the size of a real property parcel, [FN73] was an unconstitutional ad valorem tax. [FN74] However, the court upheld the ordinance, defining "ad valorem tax" in section 1 of Proposition 13 narrowly as "any source of revenue derived from applying a property tax rate to the assessed value of property." [FN75] Under this definition, the ordinance did not constitute an ad valorem tax since the ordinance involved no appraisal of property value and taxed parcels within a zone at the same rate, even if the actual value of the parcels differed. [FN76] The Heckendorn decision established that Proposition 13 only prohibits applying a tax rate directly to the *1344 assessed value of property. [FN77] Thus, the supreme court seemingly opened the door to the use of taxes which are closely correlated to parcel values but not imposed on assessed property values. [FN78]

B. The Special Tax Two-Thirds Vote Requirement

Application of the two-thirds voter majority requirement for enactment of special taxes under section 4 of Proposition 13 [FN79] was first considered in Los Angeles County Transportation Commission v. Richmond. [FN80] Two years before the adoption of Proposition 13, the California Legislature created the Los Angeles County Transportation Committee (LACTC). [FN81] After the initiative was approved, the LACTC attempted to levy a sales tax for public transit purposes with only simple majority voter approval. [FN82] The defendant, LACTC's executive director, refused to implement the tax, and the LACTC filed a petition for writ of mandate. [FN83] The California Supreme Court issued an alternative writ, [FN84] holding that the LACTC was not a special district within the meaning of section 4, [FN85] and thus was not subject to the two-thirds voter majority requirement imposed by that section. [FN86]

*1345 In Richmond, the court concluded that the term "special district" as used in section 4 of Proposition 13 applies only to districts authorized to impose ad valorem property taxes. [FN87] The majority reasoned that section 4 should apply only to districts which lost property tax revenues as a result of Proposition 13, since section 4 was intended to limit the power of local governments to replace property tax revenue losses. [FN88] Thus, because the LACTC did not have the power to levy ad valorem taxes, the LACTC was exempted from the provisions of the amendment. [FN89]

The Richmond decision invited local taxing jurisdictions to circumvent the restrictions of Proposition 13 by replacing lost property tax revenues with the use of nonproperty tax special districts such as the LACTC. [FN90]

Justice Richardson's dissent characterized the majority's ruling as "a hole in the financial fence which the people in their Constitution have erected around their government" which would lead to wholesale avoidance of the purpose of Proposition 13. [FN91] The majority of the court, however, *1346 rejected the argument that its decision in Richmond would result in such legislative evasion of the restrictions of Proposition 13. [FN92] Indeed, the myriad of nonproperty tax special districts has not materialized as predicted by the dissent. [FN93]

However, Richmond was a harbinger of further erosion of Proposition 13 in a case decided later the same year, City and County of San Francisco v. Farrell, [FN94] which interpreted the term "special tax" in section 4 of the amendment. [FN95] Although the Richmond court declined to reach the issue of the meaning of "special taxes" as used in section 4 and decided the case on the "special districts" definition issue, [FN96] the supreme court did establish a "framework" for resolving future ambiguities in section 4 of Proposition 13. [FN97] In Richmond, the court could have interpreted the term "special districts" broadly [FN98] but declined to *1347 do so, stating that the language must be strictly construed and the ambiguities resolved in favor of permitting special districts to enact special taxes because of the "fundamentally undemocratic nature" of the supermajority vote requirement contained in section 4. [FN99] Thus, for policy reasons, the supreme court departed from the rules of construction applicable to constitutional initiatives set forth in Amador, [FN100] and adopted a rule of strict construction for interpreting section 4 of Proposition 13. [FN101]

The California Supreme Court followed the Richmond rule of strict construction and defined the term "special taxes" as used in section 4 narrowly in Farrell. [FN102] In Farrell, San Francisco had increased its payroll and gross receipts tax without the approval of two-thirds of the voters. [FN103] When the mayor approved a request for funding of municipal improvements to be appropriated from the gross receipts tax proceeds, Farrell, the city's controller, refused to allow the appropriation. [FN104] The defendant asserted that the increased gross receipts tax was an unconstitutional special tax under section 4 of Proposition 13. [FN105] However, the majority rejected Farrell's argument that section 4 required two-thirds voter approval for all new and increased nonproperty taxes. [FN106] The supreme court defined "special tax" as used in section 4 as a tax "levied for a specific purpose rather than . . . a levy placed in the general fund to be utilized for general governmental *1348 purposes." [FN107] Thus, San Francisco's tax, the proceeds of which were to be paid in the city's general fund, was not a special tax as contemplated by Proposition 13 because the tax was not levied for a specific purpose. [FN108]

While the supreme court in Farrell could have construed section 4 to include all nonproperty taxes, [FN109] the court chose the narrowest application of the section's supermajority vote requirement. [FN110] Farrell, at least in theory, permits a city to recoup its lost property tax revenues simply by adopting some other replacement tax with simple majority vote approval. [FN111] Farrell requires only that the proceeds from the new tax be deposited into the local government's general fund since proceeds collected for a specific purpose constitute a special tax requiring supermajority voter approval. [FN112] Although the Farrell result was partially nullified by the enactment of initiative Proposition 62 in 1986, [FN113] *1349 the decision illustrates the supreme court's desire to limit the application of Proposition 13.

C. Summary

As Heckendorn, Richmond, and Farrell indicate, the California Supreme Court has construed the provisions of Proposition 13 narrowly and the consequences of these decisions can be summed briefly. First, Proposition 13 is aimed primarily at controlling ad valorem property taxes. [FN114] However, the one percent limit on ad valorem taxes [FN115] is limited in application, since the California Supreme Court has narrowly defined "ad valorem" as a tax rate based solely on the assessed value of property. [FN116]

Second, city and county general revenue taxing powers remain unaffected by Proposition 13 except that new or increased nonproperty tax revenues levied for a specific purpose require approval by two-thirds of the local voters. [FN117] Of course, a new or increased nonproperty tax which too closely resembles an ad valorem tax is precluded by Proposition 13 even if approved by a supermajority local electorate vote, since Proposition 13 strictly prohibits such action. [FN118]

Thus, although the California Supreme Court initially approved the constitutionality of all sections of Proposition 13 [FN119] the court has since been unwilling to read the amendment expansively. This result is encouraging to

local governments. However, local taxing *1350 jurisdictions have received the biggest boost from the courts' tolerance of bold municipal moves to finance local government through nontaxing alternatives.

III. THE USE AND EFFECTIVENESS OF NONTAXING ALTERNATIVES TO AVOID PROPOSITION 13

On its face, Proposition 13 applies only to tax revenues, as opposed to nontax revenues. [FN120] Thus, an avenue is open to local taxing jurisdictions to offset the fiscal impact of Proposition 13 on ad valorem property taxes and special purpose nonproperty taxes by generating revenues through nontaxing levies. [FN121] Two specific types of nontax revenue devices are special benefit assessments and governmental fees, discussed below.

A. Special Benefit Assessments

A special assessment is "a charge imposed on particular real property for a local public improvement of direct benefit to that property." [FN122] An "assessment district" consists of the property or properties specially assessed to bear the expense of such improvement. [FN123] The theory underlying special assessments is that the assessed property receives a direct benefit as it increases in value due to the property's proximity to the local improvement. [FN124] This benefit to the property or properties within the district is greater than that received by the general public. [FN125] *1351 Therefore, a special assessment is fairly imposed on those benefitted, since the general public should not have to bear the expense when the public does not receive a corresponding benefit. [FN126]

An assessment district is formed by local legislative resolution; [FN127] no electorate approval is required. [FN128] The creation of special assessment districts takes place "as the result of a peculiarly legislative process," [FN129] and the authority of local governing bodies to impose special assessments is grounded in the taxing power of the sovereign. [FN130] Although a special assessment is imposed through the same mechanism used to finance the cost of a local government, special assessments are distinct from taxes, which are levied for general revenues and for general public *1352 improvements. [FN131] Hence, as the California Supreme Court has observed, a special assessment is not a tax at all, but simply a charge imposed to recoup the cost of a public improvement made for the special benefit of particular property. [FN132]

Prior to the enactment of Proposition 13, special assessment legislative acts [FN133] had been the most widely used procedure to finance construction of a variety of public improvements. [FN134] The use of special assessments became even more extensive after Proposition 13 as local governments sought to offset lost property tax revenues. [FN135] The effect of Proposition 13 upon special assessments was first examined in County of Fresno v. Malmstrom. [FN136] Fresno County attempted to collect assessments within a subdivision for the construction of streets. [FN137] However, the defendant, the Fresno County Treasurer and Tax Collector, refused to serve notice of assessment on the property owners, contending that the assessment in question contravened Proposition 13. [FN138] The Court of Appeal for the Fifth District granted the *1353 county's request for a writ of mandate to compel the county tax collector to serve the notice of assessment, ruling that the provisions of Proposition 13 did not apply to the assessment. [FN139]

The decision in Malmstrom resolved two questions regarding the continuing viability of special assessments after Proposition 13. [FN140] First, the court held that the one percent limit on ad valorem taxes did not apply to special assessments because the purposes of Proposition 13 would not be thereby furthered. [FN141] The court reasoned that it would be "illogical" to include special assessments within section 1, since that section was intended to control ad valorem taxes and limit wasteful governmental spending of general tax funds. [FN142] Second, the court held that special assessments did not require approval by a supermajority of voters because special assessments were not a tax per se, and thus not included in the definition of "special taxes" in section 4. [FN143] The court stated that while both special assessments and taxes may specially benefit particular property, a special assessment may not exceed the benefit conferred, whereas a special tax need not so specifically benefit the taxed property. [FN144] Malmstrom represents a significant rein on the effect of Proposition 13, since many public *1354 improvement projects financed previously with general taxes may now be financed with special assessments. [FN145]

Proposition 13 was further limited by the Second District Court of Appeal in Solvang Municipal Improvement District v. Board of Supervisors of the County of Santa Barbara. [FN146] In Solvang, the plaintiff, a special district,

created a parking district prior to Proposition 13 which was financed by non- voted special assessments against the benefitted property. [FN147] The Santa Barbara Board of Supervisors refused to collect the assessments after Proposition 13, contending that the assessments were unconstitutional under the amendment's one percent limit on ad valorem taxes. [FN148] The court upheld the validity of special assessments, despite the fact that the assessments were measured by the assessed value of benefitted parcels. [FN149] Following the rationale of the Malmstrom decision, the Solvang court held that the one percent limit of section 1 did not apply to any special assessment, even if assessed on an ad valorem basis. [FN150] Hence, special assessments may be levied according to the assessed value of property, but they do not constitute an ad valorem property tax. [FN151]

Despite mild language to the contrary, [FN152] the favorable decisions in Malmstrom and Solvang seemingly invited a switch by local governments from property taxes to special assessments for projects traditionally financed with general revenues, and California *1355 courts have allowed municipalities to make this switch. [FN153] For example, in J.W. Jones Cos. v. City of San Diego, [FN154] the city created a system of "facility benefit assessments" (FBA) which were exacted from developers who applied for building permits to develop land in one of the city's new communities. [FN155] Under this scheme, proceeds of the FBA were collected in a special fund for exclusive use in constructing "a broad spectrum of public works" including parks, transit and transportation, libraries, fire stations, school buildings, and police stations for the benefit of the assessed parcels. [FN156] The plaintiff, a landowner and developer, challenged the assessment system, arguing that the FBA did not directly benefit the assessed property and were thus special taxes under section 4 of Proposition 13, [FN157] and that undeveloped and developed parcels were treated differently. [FN158] The Court of Appeal for the Fourth District upheld the city's financing scheme, stating that the FBA did not constitute special taxes and thus were not subject to the supermajority vote requirement of section 4 of Proposition 13, and that the system of assessing and placing liens on undeveloped properties only did not violate equal protection of the law. [FN159]

The J.W. Jones court acknowledged that San Diego's assessments did not fit within the traditional definition of special *1356 assessments because the facility benefit assessments imposed a lien on parcels to pay for future improvements and because they were assessed on a unique basis. [FN160] However, the court stated that these anomalies did not prevent the city's levies from being valid special assessments rather than special taxes. [FN161] The court also determined that the lien provision of the city's ordinance did not create a discriminatory classification between undeveloped and developed properties because the benefits to the developed properties were only incidental. [FN162] As further justification for its holdings, the court indicated that the facility benefit assessments system was "necessary for the health and welfare of future residents of" the city. [FN163] A companion case to J.W. Jones, City of San Diego v. Holodnak, [FN164] upheld a similar FBA system for a wide variety of facilities and services [FN165] under the same rationale. [FN166] The court in J.W. Jones predicted the outcome of *1357 Holodnak and future cases by strongly hinting that it desired to actively assist local governments to finance municipal growth. [FN167] Other cases have also extended the use of special assessments to finance operating expenses of local government, such as maintenance of flood control facilities [FN168] and road maintenance. [FN169]

The impact of these decisions has been to broaden the authority of the California Legislature to enact several bills authorizing local agencies to use special benefit assessments to augment their other revenue sources. [FN170] General law cities requiring enabling statutes in order to impose special assessments [FN171] have especially benefitted from the courts' tolerance of the use of special assessments since the California Legislature has interpreted relevant decisions as validating legislative action. [FN172] Specifically, the state legislature has authorized the use of special benefit assessments to *1358 finance fire and police protection services, [FN173] flood control, [FN174] drainage and water management services, [FN175] and street lighting services. [FN176]

While the expanded use of special benefit assessments can be attributed to a willingness on the part of California courts to limit the application of Proposition 13, that is only a partial explanation. Another factor which accounts for the favorable judicial response is that the formation of special assessment districts is not subject to broad judicial review. [FN177] Although a special assessment must particulary benefit the assessed property, [FN178] courts give great deference to a local governing body's finding of benefit because the creation of an assessment district is an exercise of a municipality's sovereign taxing power. [FN179] Thus, so long as some special benefit to the assessed property can be demonstrated, the courts will probably uphold a local government's formation of a special assessment district. [FN180]

*1359 B. Governmental Regulatory and Service Fees

Local governments collect a multitude of fees for everything from building permits to garbage services to dog licenses. [FN181] The authority to collect such fees is derived from the state constitution or a specific legislative enactment. [FN182] Technically, governmental fees are not taxes, so long as they do not exceed the value of the benefit conferred or the service rendered. [FN183] These fees also are not assessed upon the value of property. [FN184] Thus, Proposition 13 seemingly does not affect the power of municipalities to raise revenues through use of such fees. [FN185] However, because of the increased interest in nontaxing alternatives after Proposition 13 was enacted, [FN186] California courts have considered the application of the amendment's provisions to a variety of governmental fees. [FN187]

*1360 There are two typical legal issues involved in challenges to the imposition of governmental fees. [FN188] The first is whether the fee is authorized by state law. [FN189] Without specific enabling or constitutional authority, the fee will be struck down. [FN190] The second issue is whether the fee is really a tax. [FN191] A local government's authority to impose fees derives from the its police power to regulate municipal activities for the public's health, safety, or general welfare, [FN192] while the taxing authority of local governments is restricted to the express purpose of raising general revenue. [FN193] Legislation implementing Proposition 13 expressly excludes from the definition of "special tax" any fee which does not exceed the reasonable cost of providing the regulatory activity or service for which the fee is charged and which is not levied for general revenue purposes. [FN194] Thus, a fee which is not reasonably equivalent to the cost of the regulatory activity or service, or which is deposited into the general treasury rather than a special fund may be deemed a tax and therefore prohibited by Proposition 13. [FN195]

California courts have reached varying conclusions regarding the use of governmental fees to generate nontaxing alternative sources of revenue. [FN196] The Third District Court of Appeal expressed the generally accepted rule regarding the validity of regulatory fees under Proposition 13 in Mills v. County of Trinity. [FN197] In Mills, the plaintiff challenged a county resolution *1361 providing both increased and new fees for processing land use applications [FN198] as prohibited by the special tax provision of Proposition 13. [FN199] The court upheld the resolution, concluding that land use regulatory fees do not constitute special taxes under section 4, when the fees charged to particular applicants do not exceed the reasonable cost of the regulatory activities. [FN200] The court refused to give an expansive reading of the term "tax" as used in Proposition 13's special tax provision, [FN201] indicating that state voters did not intend to put local governments in a "fiscal straitjacket." [FN202]

A different analysis was utilized by the Court of Appeal for the Second District in Trent Meredith, Inc. v. City of Oxnard. [FN203] The court upheld an ordinance requiring developers to either pay fees or dedicate land to local school districts as a precondition to issuance of a building permit. [FN204] The plaintiff, a subdivider, claimed the ordinance was unconstitutional because the development requirements constituted special taxes under section *1362 4 of Proposition 13. [FN205] The court held that the restrictions of Proposition 13 did not apply to the development fee and dedication requirements. [FN206] First, the court stated that the development requirements did not constitute ad valorem taxes because they were not assessed according to property values. [FN207] Second, because the court determined that the ordinance was an appropriate exercise of police power, to relieve conditions of overcrowding of local school facilities caused by new development, [FN208] the court stated that it was unnecessary to decide whether the ordinance requirements constituted a special tax. [FN209]

The Second District Court of Appeal, however, later decided a case on the "special tax" definition issue in California Building Industry Association v. Government Board of the Newhall School District of Los Angeles County. [FN210] In this case, defendant school districts levied taxes under the special tax provision of Proposition 13, after the resolution authorizing the taxes received the requisite two-thirds voter majority approval. [FN211] Plaintiff builders challenged the taxes, contending that the levies were actually "development fees" subject to statutory monetary limits. [FN212] The court adopted the definition of "special taxes" expressed in City and County of San Francisco v. Farrell. [FN213] and held that the school district's levies did not fall within the Farrell meaning. [FN214] The court concluded that the levies were more like development fees and *1363 should be considered as such. [FN215] Thus, the court invalidated the fees because they exceeded statutory monetary limits. [FN216]

In Beaumont Investors v. Beaumont-Cherry Valley Water District, [FN217] the Fourth District Court of Appeal considered whether a facilities fee enacted by a water district constituted a special tax under Proposition 13. [FN218] The court held that the fee fell under the ambit of section 4 since the fee exceeded the reasonable cost of constructing the water system. [FN219] The fee was therefore invalid since it had not been approved by a two-thirds vote of the district's qualified voters. [FN220] In support of its conclusion. the court stated that the purpose of Proposition 13 was to impose a "broad constitutional restriction" on the power of local agencies to impose special taxes. [FN221] Thus, any agency which sought to avoid the special tax limitations of section 4 through use *1364 of "facilities fees" must bear the burden of proving that the assessment does not amount to a "special tax," a task the water district could not accomplish. [FN222]

The Fourth District Court of Appeal elaborated on the showing necessary to prove that a regulatory fee was not a special tax in San Diego Gas & Electric Co. v. San Diego City Air Pollution Control District. [FN223] The court stated that the local taxing agency should prove the estimated costs of the regulatory activity or service and the basis for determining the manner in which the costs are apportioned, so that the charges bear a reasonable relationship to the benefits from the regulatory activity. [FN224] Once the requisite showing is made, a regulatory fee may be upheld. [FN225] The court further noted that the imposition of fees was a reasonable way to achieve Proposition 13's goals of effective property tax relief, since the fees shifted the burden of costs from the taxpaying public to those who directly benefit from conducting the regulatory activity. [FN226]

The courts have been fairly strict in requiring a documented showing that a regulatory fee is not a special tax. For example, in Bixel Associates v. City of Los Angeles, [FN227] the Court of Appeal for the Second District struck down Los Angeles' development fee because the city had not met its burden of showing that a valid *1365 method had been used for determining that the fees charged reasonably reflected the burden posed by the development. [FN228] The Bixel court refused to hear policy arguments supporting the city's decision to impose a fire hydrant fee, pointedly stating that the case was not about "the obvious need for the funding by the City of sophisticated fire protection in the post-Proposition 13 era" but only about determining the constitutionality of the fee. [FN229]

Thus far, the California Supreme Court has not clarified the scope of Proposition 13 with regard to governmental regulatory and service fees. [FN230] The existing cases indicate that the courts have been somewhat less tolerant of the use of governmental fees than of special benefit assessments. [FN231] One reason for the courts' stricter approach may be the fact that the wide range of governmental fees requires closer scrutiny than the narrow class of levies constituting special assessments. However, the cases also indicate that the courts have been less consistent in their analysis of such fees under Proposition 13. [FN232] These differing decisions are to be expected in the absence of firm guidance by the supreme court, but the cases also reflect the court's differing views of Proposition 13. [FN233] The courts' uncertainty can best be explained *1366 by a brief consideration of the current status and future of Proposition 13 and a summary of the California courts' role in shaping the amendment, discussed below.

IV. PROPOSITION 13 TODAY AND IN THE FUTURE

After surviving an initial challenge to its constitutionality [FN234] and several severe tests thereafter, [FN235] Proposition 13 is still not safe from attack. [FN236] In 1989, the Supreme Court of the United States in Allegheny Pittsburgh Coal Co. v. County Commission [FN237] struck down a West Virginia taxing scheme similar to Proposition 13 as violative of the equal protection clause of the fourteenth amendment. [FN238] In Allegheny, the plaintiffs, various coal companies, challenged the Webster County assessor's method of property value appraisal, [FN239] contending that the method of appraisal resulted in recently sold properties having higher appraised value than properties that had not recently been sold. [FN240] The Supreme Court of the United States accepted the coal companies' argument that the method of appraisal created an unconstitutional discriminatory classification between new purchasers and existing landowners. [FN241] The Court reasoned that using the selling price of property to fix assessments was not rationally related to the county's objective of establishing accurate, current property values, since this method resulted in dramatic and *1367 unequal differences in valuation of comparable properties. [FN242] While the Court did not state that all assessment schemes which use more than one method of assessing property in the same class are invalid, the Court indicated that such schemes must ensure that general adjustments of comparable property are "accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders." [FN243] Because the Webster County assessor's adjustments were neither prompt nor substantial enough to eliminate the disparity in appraisals of comparable

properties, the county's assessment scheme was struck down. [FN244]

The Allegheny decision left open the question of the constitutionality of Proposition 13, since the Court declined to decide whether the Webster County assessment scheme might be constitutional if it were the law of a state rather than a single county. [FN245] Whether the Court was indicating its approval of Proposition 13 or inviting a challenge to the amendment is arguable. [FN246] Numerous renewed challenges to the constitutionality of Proposition 13 have been filed since Allegheny, [FN247] however, several California courts of appeal have affirmed the validity of the amendment. [FN248]

*1368 While the ultimate validity of Proposition 13 is unclear after the Supreme Court of the United States' decision in Allegheny, local taxing jurisdictions in the meantime will have to continue finding adequate financing for local government activities. California courts have taken an active role in moderating the harsh fiscal impact of Proposition 13 by limiting the application of the amendment's key provisions. [FN249] Because Proposition 13 was ambiguous in a number of particulars, [FN250] the courts have had ample opportunity to give an expansive reading to the amendment, yet for the most part cases have been decided in favor of greater freedom by local governments to impose assessments. [FN251] This response by the courts cannot be unintended. The Proposition 13 court decisions reflect a conscious desire on the part of California courts to make Proposition 13 an effective scheme of property tax relief, but without crippling the ability of local governments to carry out municipal functions. [FN252] As a result of the courts' actions in shaping Proposition 13, some local governments' budgets have not suffered as dramatically as the authors of the amendment might have anticipated. [FN253]

*1369 CONCLUSION

California courts have tempered the effect of the taxing restrictions of Proposition 13 by allowing local governments to develop nontaxing sources of revenue. [FN254] The most effective source of nontaxing revenue is special benefit assessments. The courts have shown great tolerance for allowing special assessments to finance an expanded variety of municipal improvements and services. [FN255] To a lesser extent, the courts have also allowed the use of governmental regulatory and service fees. [FN256] While the validity of the use of these fees is not as predictable as the use of special assessments, governmental fees remain a viable source of nontaxing revenues, as evidence by the sheer number of these fees. [FN257]

While most local governments still regard Proposition 13 as a "dirty word," [FN258] California courts have kept the amendment from becoming a "fiscal straitjacket" [FN259] to local governments. [FN260] By taking an active role in shaping the provisions and application of Proposition 13, the courts have ensured that local taxing jurisdictions can find alternative sources of revenue despite the severe loss of property tax funds.

[FN1]. CAL. CONST. art. XIIIA §§ 1-6 (West Supp. 1991). Proposition 13 was placed on the June 1978 primary ballot through the initiative process. See CAL. CONST. art. II §§ 8, 10 (West 1983) (constitutional provisions for the state initiative process); CAL. ELEC. CODE §§ 3500-3524, 3530- 3579 (West 1977 & Supp. 1991) (statutes governing initiatives, excluding initiatives proposed by the legislature). Proposition 13 has been amended several times since 1978. References in this Comment are to the current amended text unless otherwise indicated. See infra notes 26-47 and accompanying text (discussing the relevant provisions of Proposition 13).

[FN2]. In 1977, one year before Proposition 13 was adopted, property taxes in California contributed 22.4% of city revenues, 36.3% of county revenues, and 67.4% of nonenterprise special district revenues. See CALIFORNIA LEGISLATIVE ANALYST, AN ANALYSIS OF THE EFFECT OF PROPOSITION 13 ON LOCAL GOVERNMENTS 6-10 (Oct. 1979) (prepared by the California Legislative Analyst pursuant to Cal. S.B. No. 154, 1979 Cal. Stat. ch. 292 (1978) and Cal. S.B. 2212, 1978 Cal. Stat. ch. 332 (1978)) [hereinafter LEGISLATIVE ANALYSIS]. Other significant sources of state and local government revenues are, in order of decreasing percentage of contribution: Sales and use taxes, personal income taxes, and corporate franchise and income taxes. 11 N. LANE, CALIFORNIA PRACTICE STATE AND LOCAL TAXATION § 1 (2d ed. 1987).

[FN3]. The following is an overview of the legal structure of local government in California. Cities and Counties: Cities and counties in California are either general law or chartered. CALIFORNIA ASSEMBLY, OFFICE OF RESEARCH, CALIFORNIA STATE AND LOCAL TAX SYSTEMS: A REVIEW OF MAJOR REVENUE

SOURCES 245 (July 1985) [hereinafter ASSEMBLY RESEARCH REPORT]. General law cities and counties are organized under the general laws of the state and must derive their authority to act from a constitutional grant of authority or from an act of the legislature. Id. In contrast, chartered cities and counties may act without specific statutory authority, subject to constitutional constraints. Id. Cities have constitutional authority to adopt a charter while counties may do so only with approval of the legislature. Id. Special Districts: Special districts are autonomous units of local government which provide governmental services, generally within unincorporated areas. Id. at 246. Examples of special districts include the following: Water districts, transit districts, waste disposal districts, and lighting and lighting maintenance districts. Id. Each special district's authority is restricted to those powers and activities specifically provided for in the special district's enabling statute. Id. at 247. The term "special district" as used in this Comment refers loosely to all local taxing districts, including school and police and fire protection districts, as well as those districts created by statute.

[FN4]. CAL. CONST. art. XIIIA §§ 1(a), 2(a) (West Supp. 1991).

[FN5]. Id. § 3. Proposition 13 provides for a maximum 2% annual increase of the assessed value of real property after the 1975-76 base year. Id. § 2(b). Further, any changes in the state taxing scheme must be approved by two-thirds of each of the two houses of the legislature, except that no new ad valorem taxes on real property may be imposed. Id. § 3.

[FN6]. Id. § 4. No definition of the term "special tax" appears in section 4. However, the California Supreme Court has construed this term to mean taxes "levied for a specific purpose rather than . . . a levy placed in the general fund to be utilized for general governmental purposes." City and County of San Francisco v. Farrell, 32 Cal. 3d 47, 57, 648 P.2d 935, 940, 184 Cal. Rptr. 713, 718 (1982). See infra notes 102-113 and accompanying text (discussing the Farrell decision).

[FN7]. See LEGISLATIVE ANALYSIS, supra note 2, at 3 (discussing the loss of property tax revenues effected by Proposition 13). Property tax revenues dropped 51% one year after the enactment of Proposition 13, a $5.9 billion decrease from revenues in the previous fiscal year. Id.

[FN8]. T. SCHWADRON & P. RICHTER, CALIFORNIA AND THE AMERICAN TAX REVOLT 70- 79 (1984). Examples of how local governments have reacted to Proposition 13 include curtailed local services, deferred facility maintenance, layoffs, and increased user fees. ASSEMBLY RESEARCH REPORT, supra note 3, at 239.

[FN9]. Henke, The Effect of Proposition 13 Court Decisions on California Local Government Revenue Sources, 22 U.S.F. L. REV. 251, 281-90 (1988); Lefcoe & Allison, The Legal Aspects of Proposition 13: The Amador Valley Case, 53 S. CAL. L. REV. 173, 190-91 (1979). See Kroll, California Cities v. Prop. 13, 3 CAL. LAW., Jun. 1983, at 28, 30 (stating that "cities and counties are beating the bushes for new taxes, fees and assessments" and "are developing creative ways of financing local government").

[FN10]. A special assessment is a charge imposed on particular real property for a local public improvement of direct benefit to that property. Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 29, 148 P. 217, 219 (1915). See infra notes 122-180 and accompanying text (discussing special assessments).

[FN11]. Governmental fees are charges exacted by local taxing authorities for regulatory activities or municipal services. Mills v. County of Trinity, 108 Cal. App. 3d 656, 660-61, 166 Cal. Rptr. 674, 676-77 (1980). See infra notes 181-233 and accompanying text (discussing governmental fees).

[FN12]. Kroll, supra note 9, at 30. See CALIFORNIA COMM'N ON GOV'T REFORM, FINAL REPORT 118 (Jan. 1979) (listing numerous new or increased county permit, service, and license fees in the year following the enactment of Proposition 13). See generally ANNUAL REPORTS OF THE STATE CONTROLLER, FINANCIAL TRANSACTIONS CONCERNING SPECIAL DISTRICTS (1980) (documenting 175% increase in special assessments levied between 1978 and 1980).

[FN13]. Kroll, supra note 9, at 31. See, e.g., City of Sacramento v. Drew, 207 Cal. App. 3d 1287, 1294, 255 Cal. Rptr. 704, 708 (1989) (school construction special assessment struck down); Bixel Assoc. v. City of Los Angeles,

216 Cal. App. 3d 1208, 1220, 265 Cal. Rptr. 347, 355 (1989) (fire hydrant fee struck down); Beaumont Investors v. Beaumont-Cherry Valley Water Dist., 165 Cal. App. 3d 227, 238, 211 Cal. Rptr. 567, 573 (1985) (water facilities fee struck down).

[FN14]. See infra notes 19-63 and accompanying text.

[FN15]. See infra notes 64-119 and accompanying text.

[FN16]. See infra notes 120-233 and accompanying text.

[FN17]. See infra notes 234-53 and accompanying text.

[FN18]. See infra notes 254-260 and accompanying text.

[FN19]. See U.S. BUREAU OF THE CENSUS, GOVERNMENT FINANCES IN 1976-77, at 64, table25 (1978) (documenting amount of per capita property taxes collected according to state). In the year preceding Proposition 13, only Alaska, Massachusetts, and New Jersey had higher per capita property taxes than California. Id.

[FN20]. Proposition 13 was the third attempt in 10 years to limit state and local government taxing power. CALIFORNIA ASSEMBLY REVENUE & TAXATION COMM., FACTS ABOUT PROPOSITION 13, THE JARVIS/GANN INITIATIVE 7 (1978). In 1968, Proposition 9, which proposed a 1% limit on the property tax rate, was defeated. Id. In 1972, Proposition 14, which would have limited the tax rate from 1.75% to 2%, was also defeated. Id. Proposition 13 received 4,280,689 "yes" votes (64.8%) to 2,326,167 "no" votes (35.2%). CAL. SECRETARY OF STATE, STATEMENT OF VOTE 39 (1978).

[FN21]. Henke, supra note 9, at 251.

[FN22]. Proposition 13 is often called the "Jarvis-Gann Initiative" after the names of its outspoken authors: Howard Jarvis and Paul Gann.

[FN23]. Henke, supra note 9, at 260. Proponents of Proposition 13 argued in the voters pamphlet, "More than 15% of all government spending is wasted! Wasted on huge pensions for politicians which sometimes approach $80,000 per year! Wasted on limousines for elected officials or taxpayer-paid junkets. Now we have the opportunity to trade waste for property tax relief." CALIFORNIA VOTERS PAMPHLET, 56-58, Jun. 6, 1978 (compiled by Cal. Secretary of State) (comments by H. Jarvis, Chairman, United Organization of Taxpayers and P. Gann, President, Peoples Advocate). A later Gann initiative, Proposition 4, which passed in 1979, directly addressed governmental spending. See CAL. CONST. art. XIIIB §§ 1-12 (West Supp. 1991), for full text of Proposition 4. Proposition 4 limits the amount of revenue which state and local governments may spend by imposing a ceiling on most appropriations. Id. § 1. The proposition provides that such appropriations may only increase consistently with increases in population and the consumer price index. Id.

[FN24]. Comment, Police and Fire Service Special Assessments Under Proposition 13, 16 U.S.F. L. REV. 781, 784 (1982). In the years preceding Proposition 13, huge state income tax surpluses accumulated as economic growth and inflation generated revenues far in excess of budget estimates. Lefcoe & Allison, supra note 9, at 176. The State Legislature failed to spend or refund the excess income tax dollars collected and, only after Proposition 13 was enacted, did the Legislature finally pass a form of inflation indexing designed to reduce the surplus. Id.

[FN25]. In 1977-78, the year prior to Proposition 13, California local property taxes were 51% above the national norm (norm is the average per $1000 of personal income for residents). SECURITY PACIFIC NAT'L BANK, TAXES AND OTHER REVENUE OF STATES AND LOCAL GOVERNMENT IN CALIFORNIA A4-A6 (1982) [hereinafter SECURITY PACIFIC STUDY]. One year after Proposition 13, local property taxes in California were 27% below the national norm. Id.

[FN26]. See CAL. REV. AND TAX. CODE §§ 50-100.5 (West 1987 & Supp. 1991) (statutes implementing Proposition 13).

[FN27]. CAL. CONST. art. XIIIA § 1(a) (West Supp. 1991).

[FN28]. See CAL. CONST. art. XI § 7 (West Supp. 1991) (homerule taxing authority provision for counties and cities); CAL. CONST. art. XIII § 37 (repealed provision authorizing state legislature to vest taxing authority in local governments); CAL. GOV'T CODE § 25202 (West 1988) (statute authorizing counties to levy property taxes); id. § 37100-37101 (West 1988 & Supp. 1991) (statutes authorizing cities to pass ordinances and levy license, sales, and use taxes).

[FN29]. LANE, supra note 2, § 4 (2d. ed. Supp. 1990) (citing CAL. CONST. art. XI § 5).

[FN30]. Id.

[FN31]. BLACK'S LAW DICTIONARY 51 (6th ed. 1991). An ad valorem tax is one based on the value of property.

[FN32]. CAL. CONST. art. XIIIA § 1(a) (West Supp. 1991).

[FN33]. The "full cash value base" of real property is the assessed value of such property. Id. § 2(a).

[FN34]. Id. § 2(b).

[FN35]. Id. § 2(a).

[FN36]. One of the concerns leading to the enactment of Proposition 13 was the rapid increase of property values in California. County of Fresno v. Malmstrom, 94 Cal. App. 3d 974, 980, 156 Cal. Rptr. 777, 780 (1979). However, the increased income of the property owners did not offset the increased property taxes. Id. Sections 1 and 2 prevent property taxes from rising so high that owners are forced to sell their property in order to pay the higher assessments. Comment, supra note 24, at 781, 784 n.22 (1982).

[FN37]. Henke, supra note 9, at 263. See infra notes 48-63 and accompanying text (discussing the fiscal impact of Proposition 13).

[FN38]. CAL. CONST. art. XIIIA § 3 (West Supp. 1991).

[FN39]. LANE, supra note 2, § 2. General law cities and counties must derive their authority to tax from a constitutional grant of authority or from an act of the legislature. ASSEMBLY RESEARCH REPORT, supra note 3, at 245. Under the California Constitution, counties and cities are authorized to impose taxes in the exercise of their police power. See CAL. CONST. art. XI § 7 (West Supp. 1991) (provision authorizing enactment of local ordinances and regulations for the general public welfare). All other taxing authority is derived from the state legislature. Nauman, Local Government Taxing Authority Under Proposition 13, 10 SW.L.J. 795, 804 (1978). See generally supra note 3 (discussing the legal structure of local government in California). The legislature may not impose taxes for local purposes but may authorize local governments to impose them. CAL. CONST. art. XIII § 24 (West Supp. 1991).

[FN40]. CAL. CONST. art. XIIIA § 3.

[FN41]. See Henke, supra note 9, at 263.

[FN42]. See CAL. CONST. art. XIIIA § 1(a)(West Supp. 1991)("The maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property.").

[FN43]. See id. § 3 ("[N]o new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.").

[FN44]. Id. § 4.

[FN45]. City and County of San Francisco v. Farrell, 32 Cal. 3d 47, 57, 648 P.2d 935, 940, 184 Cal. Rptr. 713, 718 (1982). See infra notes 102-113 and accompanying text (discussing the California Supreme Court's interpretation of "special taxes" as used in Proposition 13).

[FN46]. See, e.g., CAL. CONST. art. XI § 7 (West Supp. 1991)(homerule taxing authority provision for counties and cities).

[FN47]. Los Angeles County Transp. Comm'n v. Richmond, 31 Cal. 3d 197, 205-08, 643 P.2d 941, 945-47, 182 Cal. Rptr. 324, 328-30 (1982).

[FN48]. CALIFORNIA COMM'N ON GOV'T REFORM, FINAL REPORT 1 (Jan. 1979).

[FN49]. LEGISLATIVE ANALYSIS, supra note 2, at 3.

[FN50]. LANE, supra note 2, § 4.

[FN51]. Id. According to the Assembly Office of Research, "the quality of the functions performed by local jurisdictions has deteriorated." ASSEMBLY RESEARCH REPORT, supra note 3, at 239.

[FN52]. See CALIFORNIA ASSEMBLY REVENUE & TAXATION COMM., SUMMARY OF LEGISLATION IMPLEMENTING PROPOSITION 13 FOR FISCAL YEAR 1978-79, S.B. 154 at ii-iii (1978)(discussing the legislative financial aid plan provided in Senate Bill 154, the short-term program for implementing Proposition 13).

[FN53]. See, e.g., Henke, supra note 9, at 252; Comment, supra note 24, at 788 n.38.

[FN54]. For fiscal year 1978-79, the California Legislature allocated $4.2 billion to local governments and established a $900 million loan fund. CALIFORNIA COMM'N ON GOV'T REFORM, FINAL REPORT 17-19 (Jan. 1979). In fiscal year 1979-80, the "bail-out" was $4.9 billion, and in fiscal year 1980-81, the "bail-out" was $5.5 billion. Comment, supra note 24, at 788 n.39. State financial assistance was based on the surplus generated by the increase in other state taxes. Id. at 787-88. Although Proposition 13 reduced property tax revenues during 1978-79, the high rate of inflation that resulted increased other state taxes, including death and gift taxes, state property taxes on motor vehicles and mobile homes, taxes on corporation net income, and individual income taxes. See SECURITY PACIFIC STUDY, supra note 25, at A4-A12.

[FN55]. ASSEMBLY RESEARCH REPORT, supra note 3, at 232. Senate Bill 154, the local government bail-out bill, provided that the countywide proceeds of the 1% property tax collected by local assessors were to be distributed pro rata to local jurisdictions, based on the average percentage of annual property taxes revenues collected by the city, county, or district. Id. See generally Doerr, The California Legislature's Response to Proposition 13, 53 S. CAL. L. REV. 77, 77-79 (1979)(discussing the legislation implementing Proposition 13 and providing for the bail-out program); CALIFORNIA ASSEMBLY REVENUE & TAXATION COMM., OVERVIEW OF CURRENT COURT CHALLENGES TO PROPOSITION 13 AND ITS IMPLEMENTATION LAWS: ASSESSMENT OF SIMILAR PROPERTIES AND REVENUE ALLOCATION TO LOCAL AGENCIES 20-25 (Dec. 1989) (discussing the provisions and underlying policy of legislation implementing Proposition 13).

[FN56]. ASSEMBLY RESEARCH REPORT, supra note 3, at 235-39.

[FN57]. Id. at 249-50.

[FN58]. See, e.g., City of Oakland v. Digre, 205 Cal. App. 3d 99, 102, 252 Cal. Rptr. 99, 99 (1988) (Oakland faced anticipated $14.5 million deficit for fiscal year 1989 because of reduced federal funding and the long-term impact of reduced property tax revenues); Northgate Partnership v. City of Sacramento, 202 Cal. Rptr. 15, 17 (1984)(Sacramento faced revenue loss of approximately $16.6 million in fiscal year 1978-79 as a result of Proposition 13).

[FN59]. CAL. CONST. art. II § 10(c) (West Supp. 1991)("[T]he Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.").

[FN60]. According to the Assembly Office of Research, state fiscal relief since fiscal year 1978-79, while essential, "helped save a drowning person, but it did not help that person reach shore." ASSEMBLY RESEARCH REPORT, supra note 3, at 241.

[FN61]. See SCHWADRON & RICHTER, supra note 8, at 70-79 (discussing aftermath of Proposition 13 revolt).

[FN62]. See infra note 64 (describing cases interpreting the main provisions of Proposition 13).

[FN63]. See infra notes 64-119 and accompanying text (discussing relevant Proposition 13 court decisions).

[FN64]. See, e.g., Heckendorn v. City of San Marino, 42 Cal. 3d 481, 486- 89, 723 P.2d 64, 67-69, 229 Cal. Rptr. 324, 327-29 (1986)(defining scope of 1% ad valorem tax limit); City and County of San Francisco v. Farrell, 32 Cal. 3d 47, 57, 648 P.2d 935, 940, 184 Cal. Rptr. 713, 718 (1982) (defining special tax provision); Carman v. Alvord, 31 Cal. 3d 318, 326-33, 644 P.2d 192, 197- 201, 182 Cal. Rptr. 506, 511-15 (1982) (interpreting bond indebtedness exception to 1% limitation provision); Los Angeles County Transp. Comm'n v. Richmond, 31 Cal. 3d 197, 205-07, 643 P.2d 941, 945-47, 182 Cal. Rptr. 324, 328-30 (1982) (interpreting application of two-thirds majority vote requirement); Amador Valley Joint Union High School Dist. v. State Board of Equalization, 22 Cal. 3d 208, 219, 248, 583 P.2d 1281, 1283, 1302, 149 Cal. Rptr. 239, 241, 259 (1978) (deciding constitutionality of Proposition 13).

[FN65]. 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal.Rptr. 239 (1978) (decided Sept. 22, 1978, only 3 months after Proposition 13 was adopted).

[FN66]. Id. at 219, 248, 583 P.2d at 1283, 1302, 149 Cal. Rptr. at 241, 259. The Amador case consolidated multiple constitutional challenges to Proposition 13, and the supreme court reached several holdings. First, the court held that Proposition 13 was a constitutional amendment rather than an impermissible "revision," and, therefore, an appropriate subject of the initiative process for amending the California Constitution. Id. at 229, 583 P.2d at 1289, 149 Cal. Rptr. at 247. Second, the court held that Proposition 13 did not violate the single subject requirement of the initiative process. Id. at 232, 583 P.2d at 1292, 149 Cal. Rptr. at 250. Third, the court held that Proposition 13 did not deny equal protection of the laws required by the fourteenth amendment of the United States Constitution. Id. at 237, 583 P.2d at 1294-95, 149 Cal. Rptr. at 252-53. Fourth, the court held that Proposition 13 did not impermissibly infringe upon the right to travel. Id. at 238, 583 P.2d at 1295, 149 Cal. Rptr. at 253. Fifth, the court held that Proposition 13 did not unconstitutionally impair contractual rights. Id. at 242, 583 P.2d at 1298, 149 Cal. Rptr. at 256. Sixth, the court held that Proposition 13 did not violate the title and ballot summary requirements for initiatives required by the California Constitution. Id. at 243, 583 P.2d at 1298, 149 Cal. Rptr. at 256. Lastly, the court held that Proposition 13 was not void for vagueness. Id. at 246, 583 P.2d at 1301, 149 Cal. Rptr. at 259.

[FN67]. Id. at 219, 583 P.2d at 1283, 149 Cal. Rptr. at 241.

[FN68]. Id. at 247-48, 583 P.2d at 1301, 149 Cal. Rptr. at 259. Specifically, the supreme court stated:

> [W]e decline to reach the question whether the various interpretations put forth by the Legislature and State Board of Equalization are correct . . . . [W]e recently affirmed that "it seems apparent that we cannot, and should not, attempt to pass upon the meaning or validity of each contested provision in every hypothetical context--adjudication of these matters must await an actual controversy, and should proceed on a case-by-case basis as the need arises."

Id. at 247, 583 P.2d at 1301, 149 Cal. Rptr. at 259 (citing County of Nevada v. MacMillen, 11 Cal. 3d 662, 674, 522 P.2d 1345, 1352, 114 Cal. Rptr. 345, 352 (1974)).

[FN69]. While the courts have examined many other aspects of Proposition 13, this Comment only discusses decisions which have affected local government revenue sources. See generally CALIFORNIA TAX FOUND., PROPOSITION 13 REPORTER (1985), for a comprehensive compilation of Proposition 13 litigation.

[FN70]. CAL. CONST. art. XIIIA § 1(a) (West Supp. 1991).

[FN71]. 42 Cal.3d 481, 723 P.2d 64, 229 Cal. Rptr. 324 (1986).

[FN72]. Id. at 484, 723 P.2d at 65, 229 Cal. Rptr. at 325.

[FN73]. The challenged tax was graduated according to the city's zoning classifications, which were determined by real property parcel size. Id. at 484, 484-85 n.2, 723 P.2d at 65, 65-66 n.2, 229 Cal. Rptr. at 325, 325-26 n.2. However, within each zone, the ordinances imposed a flat tax rate on all parcels, despite any variations in size, improvements, and ultimate value. Id. at 484-85, 723 P.2d at 65-66, 229 Cal. Rptr. at 325-26.

[FN74]. Id. at 485, 723 P.2d at 66, 229 Cal. Rptr. at 326. New ad valorem taxes on real property are strictly prohibited under Proposition 13. CAL. CONST. art. XIIIA § 4 (West Supp. 1991).

[FN75]. Heckendorn, 42 Cal. 3d at 487, 723 P.2d at 67, 229 Cal. Rptr. at 327 (quoting CAL. REV. & TAX. CODE § 2202 (West 1987)).

[FN76]. Id.

[FN77]. Henke, supra note 9, at 275.

[FN78]. Id. For example, using floor area of buildings as well as lot area to define the steps in a graduated parcel tax presumably would not be precluded by Heckendorn, since no appraisal of property value is made. Id.

[FN79]. CAL. CONST. art. XIIIA § 4.

[FN80]. 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982).

[FN81]. Id. at 199-200, 643 P.2d at 941-42, 182 Cal. Rptr. at 324-25.

[FN82]. Id. at 200, 643 P.2d at 942, 182 Cal. Rptr. at 325. LACTC's measure authorizing imposition of the sales tax was approved by 54% of the county voters. Id.

[FN83]. Id. Richmond, the executive director of the LACTC, refused to pay the State Board of Equalization the administrative costs of collecting the sales tax required by sections 7270 and 7272 of the Revenue & Taxation Code. Id. at 200 n.3, 643 P.2d at 942 n.3, 182 Cal. Rptr. at 325 n.3. Richmond's refusal to implement the tax was prompted by the California Attorney General's opinion that the tax ordinance was unconstitutional under section 4 of Proposition 13 because the ordinance had not received the approval of two- thirds of the voters. Id. at 200, 643 P.2d at 942, 182 Cal. Rptr. at 325 (citing 64 Op. Att'y Gen. 156 (1981)).

[FN84]. Id. at 200, 643 P.2d at 942-43, 182 Cal. Rptr. at 325-36. The supreme court invoked the exercise of its original jurisdiction in Richmond "[b]ecause of the importance of the issues involved and the need for their prompt resolution." Id.

[FN85]. Section 4 is applicable specifically to "[c]ities, counties and special districts." CAL. CONST. art. XIIIA § 4 (West Supp. 1991) (emphasis added).

[FN86]. Richmond, 31 Cal. 3d at 207-08, 643 P.2d at 947, 182 Cal. Rptr. at 330.

[FN87]. Id. at 205, 643 P.2d at 945, 182 Cal. Rptr. at 328. In Arvin Union School Dist. v. Ross, 176 Cal. App. 3d 189, 221 Cal. Rptr. 720 (1985), the Second District Court of Appeal addressed an issue remaining after Richmond regarding whether the special tax restrictions of section 4 applied to special districts which were specifically authorized by statute to assess additional property taxes as needed. Id. at 193, 221 Cal. Rptr. at 722. The court held that Proposition 13 preempted the enactment authorizing collection of additional property taxes and affirmed the rule in Richmond that section 4's "special districts" language includes all entities empowered to levy on real property. Id. at 199, 221 Cal. Rptr. at 726.

[FN88]. Richmond, 31 Cal. 3d at 205-06, 643 P.2d at 945-46, 182 Cal. Rptr. at 329 (citing language in the June 1978 California Voters Pamphlet to support the court's conclusion). See supra note 23 (quoting comments made by the authors of Proposition 13 and printed in the California Voters Pamphlet).

[FN89]. Richmond, 31 Cal. 3d at 205-08, 643 P.2d at 945-47, 182 Cal. Rptr. at 328-30. Cf. Huntington Park Redevelopment Agency v. Martin, 38 Cal. 3d 100, 695 P.2d 220, 211 Cal. Rptr. 133 (1985). In Huntington Park, the supreme court clarified the Richmond rule, stating that the term "special districts" as used in section 4 of Proposition 13 encompasses only those agencies which are empowered to impose and collect property taxes. Id. at 105, 695 P.2d at 224, 211 Cal. Rptr. at 137. Thus, the court held that the plaintiff, a community redevelopment agency which did not have authority to impose and collect property taxes, was not a special district, even though the agency received a substantial share of property tax revenues collected by other governmental entities. Id. at 105-07, 695 P.2d at 222-24, 211 Cal. Rptr. at 135-37.

[FN90]. Henke, supra note 9, at 265-66 n.78.

[FN91]. Richmond, 31 Cal. 3d at 213, 643 P.2d at 950, 182 Cal. Rptr. at 333 (Richardson, J., dissenting). Specifically, Justice Richardson wrote:

The majority has cut a hole in the financial fence which the people in their Constitution have erected around their government. Governmental entities may be expected, instinctively, to pour through the opening seeking the creation of similar revenue-generating entities in myriad forms which will be limited only by their ingenuity.

Id.

[FN92]. Id. at 208, 643 P.2d at 947, 182 Cal. Rptr. at 330. The Richmond majority stated, "We cannot assume that the Legislature will attempt to avoid the goals of article XIIIA by [reorganizing special districts to remove their property-taxing power or creating new ones without such power]. In any event, that problem can be dealt with if and when the issue arises." Id.

[FN93]. Henke, supra note 9, at 267. Henke suggests that nonproperty tax special districts have not proliferated, partly because of the supreme court's liberal response to the "special tax" issue in City and County of San Francisco v. Farrell, 32 Cal. 3d 47, 648 P.2d 935, 184 Cal. Rptr. 713 (1982). Id.

[FN94]. 32 Cal. 3d 47, 648 P.2d 935, 184 Cal. Rptr. 713 (1982).

[FN95]. See id. at 53-54, 648 P.2d at 937-38, 184 Cal. Rptr. at 716-17 (discussing the Richmond decision as a precedent for the court's decision in Farrell).

[FN96]. Richmond, 31 Cal. 3d at 201-02, 643 P.2d at 943, 182 Cal. Rptr. at 326. While acknowledging that an ambiguity existed in the meaning of "special taxes" under section 4, the Richmond court indicated that it was only considering the meaning of the term "special districts." Id. Because the court determined that the LACTC was not a "special district" within the meaning of section 4, further analysis of section 4 was neither necessary nor appropriate.

[FN97]. Id. at 205, 643 P.2d at 945, 182 Cal. Rptr. at 328. The Richmond court stated, "The purpose of our discussion [of the substance and effect of an extraordinary vote requirement] is not to throw doubt on the constitutionality of the two-thirds vote requirement in section 4, but rather to establish the framework in which the ambiguity in the language of the provision should be resolved." Id.

[FN98]. Id. at 202, 643 P.2d at 943-44, 182 Cal. Rptr. at 327. The Richmond court noted that the term "special district" is generally defined as "a legally constituted governmental entity established for the purpose of carrying on specific activities within definitely defined boundaries." Id. at 202, 643 P.2d at 943, 182 Cal. Rptr. at 326 (citing SENATE FACT FINDING COMM. REPORT ON REVENUE AND TAXATION, INTERGOVERNMENTAL FISCAL RELATIONS IN CALIFORNIA 177 (Jun. 1965). The defendant urged the court to interpret "special districts" to mean "any unit of local government other than a city or county that is empowered to levy a 'special tax.'" Id. at 202, 643 P.2d at 943, 182 Cal. Rptr. at 327.

[FN99]. Id. at 205, 643 P.2d at 945, 182 Cal. Rptr. at 328.

[FN100]. 22 Cal. 3d 208, 219, 245-246, 583 P.2d 1281, 1283, 1300-01, 149 Cal. Rptr. 239, 241 257-58 (1978). The Amador court stated that constitutional initiatives must be "liberally construed" and that constitutional provisions and enactment must receive a "practical common-sense construction" which will meet "changed conditions and the growing needs of the people." Id.

[FN101]. Richmond, 31 Cal. 3d at 205, 643 P.2d at 945, 182 Cal. Rptr. at 328.

[FN102]. City and County of San Francisco v. Farrell, 32 Cal.3d 47, 56- 57, 648 P.2d 935, 940, 184 Cal. Rptr. 713, 718 (1982).

[FN103]. Id. at 51, 648 P.2d at 936, 184 Cal. Rptr. at 714. The measure in Farrell, which extended the operation of an ordinance providing for a 0.4% increase in the tax rate, was passed by 55% of city and county voters. Id. at 51, 648 P.2d at 936-37, 184 Cal. Rptr. at 714-15.

[FN104]. Id. at 51, 648 P.2d at 937, 184 Cal. Rptr. at 715.

[FN105]. Id.

[FN106]. Id. at 57, 648 P.2d at 940, 184 Cal. Rptr. at 718.

[FN107]. Id.

[FN108]. Id.

[FN109]. Henke, supra note 9, at 267-68. The Farrell court, like the court in Richmond, also had an opportunity to choose a broad interpretation of the ambiguous provision of Proposition 13 at issue. 32 Cal. 3d at 53-54, 648 P.2d at 938, 184 Cal. Rptr. at 716. If one regards the ad valorem property tax as the "regular" local tax, then the term "special" in section 4 can be understood to include all additional nonproperty taxes. Id. at 59, 648 P.2d at 941, 184 Cal. Rptr. at 719 (Kaus; J., dissenting). The defendant had argued that a "special tax" is an "extra, additional, or supplemental charge imposed . . . to raise money for public purposes." Id. at 53-54, 648 P.2d at 938, 184 Cal. Rptr. at 716.

[FN110]. Farrell, 32 Cal. 3d at 57, 648 P.2d at 940, 184 Cal. Rptr. at 718. The supreme court's interpretation of the meaning of "special taxes" in Farrell is especially significant in light of an earlier decision, Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981). In Trent Meredith, although the Court of Appeal for the Second District did not attempt to define the meaning of "special taxes" in section 4, the court did express concern that if the term were defined as taxes collected and earmarked for a special purpose, local governments could easily avoid Proposition 13 by depositing their nonproperty tax proceeds in the general fund. Id. at 323, 170 Cal. Rptr. at 688. The Farrell majority did not address the court of appeal's concern, which was echoed in the dissenting opinions to Farrell. Farrell, 32 Cal. 3d at 58, 648 P.2d at 941, 184 Cal. Rptr. at 719 (Richardson and Kaus, JJ., dissenting).

[FN111]. Henke, supra note 9, at 276.

[FN112]. Farrell, 32 Cal. 3d at 57, 648 P.2d at 940, 184 Cal. Rptr. at 718.

[FN113]. See 1986 Cal. Stat. prop. 62, codified at CAL. GOV'T CODE §§ 53720-53730 (West Supp. 1991) (codifying Initiative 62). Proposition 62 requires that a local governmental or district governing body approve by two- thirds vote the imposition of a general fund tax. Id. § 53722. Although the proposition also requires electorate approval to levy a general fund tax, only a simple majority is necessary. Id. § 53723.

[FN114]. See supra notes 19-25 and accompanying text (discussing the historical background and purposes of Proposition 13).

[FN115]. CAL. CONST. art. XIIIA § 1(a).

[FN116]. See supra notes 70-78 and accompanying text (discussing the Heckendorn decision, defining "ad valorem tax").

[FN117]. See supra notes 79-101 and accompanying text (discussing the Richmond decision, interpreting the application of the two-thirds voter majority requirement).

[FN118]. See supra notes 42-47 and accompanying text (discussing the restrictions of section 4). The California Constitution does permit increases in ad valorem taxes on real property above the 1% limit to pay interest and redemption charges on indebtedness for the acquisition or improvement of real property. CAL. CONST. art. XIIIA § 1(b).

[FN119]. See Amador Valley Joint Union High School Dist. v. State Board of Equalization, 22 Cal. 208, 219, 248, 583 P.2d 1281, 1283, 1302, 149 Cal. Rptr. 239, 241, 259 (1978) (holding Proposition 13 to be a valid constitutional amendment).

[FN120]. See CAL. CONST. art. XIIIA §§ 1-6 (West Supp. 1991) (using term "tax" rather than another descriptive term such as "levy" or "assessment").

[FN121]. See generally Henke, supra note 9 (discussing the effect of Proposition 13 on existing local government revenue sources).

[FN122]. Solvang Mun. Improvement Dist. v. Board of Supervisors, 112 Cal. App. 3d 545, 552, 169 Cal. Rptr. 391, 395 (1980).

[FN123]. Russ Bldg. Partnership v. City and County of San Francisco, 44 Cal. 3d 839, 848, 750 P.2d 324, 329, 244 Cal. Rptr. 682, 687 (1988) (citing Dawson v. Town of Los Altos Hills, 16 Cal. 3d 676, 683, 547 P.2d 1377, 1381, 129 Cal. Rptr. 97, 101 (1976). See generally CAL. STS. & HIGH. CODE §§ 5000- 6794 (West 1969 & Supp. 1991) (Improvement Act of 1911); id. §§ 10000-10706 (West 1969 & Supp. 1991) (Municipal Improvements Act of 1913).

[FN124]. Solvang, 112 Cal. App. 3d at 553, 169 Cal. Rptr. at 395.

[FN125]. Id. at 552, 169 Cal. Rptr. 395.

[FN126]. Id. The Solvang court stated that "[t]he general public should not be required to pay for special benefits for the few, and the few specially benefitted should not be subsidized by the general public." Id.

[FN127]. Russ Bldg., 44 Cal. 3d at 849, 750 P.2d at 329, 244 Cal. Rptr. at 687.

[FN128]. Southern Cal. Rapid Transit Dist. v. Bolen, 219 Cal. App. 3d 1446, 1466, 269 Cal. Rptr. 147, 159 (1990). In Bolen, the court stated that neither property owners nor nonproperty owners in a proposed district had a constitutional right to vote on the formation of an assessment district. Id. at 1463, 269 Cal. Rptr. at 157-58. However, the court noted that if the right to vote is conferred, the election must comply with equal protection requirements. Id. at 1464, 269 Cal. Rptr. at 158. Despite the lack of a constitutional right to vote on the imposition of an improvement assessment, interested parties are not completely foreclosed from challenging the proposed assessment. Dawson v. Town of Los Altos Hills, 16 Cal. 3d 676, 683 n.4, 547 P.2d 1377, 1381 n.4, 129 Cal. Rptr. 97, 101 n.4 (1976). The local rulemaking body must afford such parties a hearing at which the parties may question any aspect of the proposed improvement, assessment, or district. Id. A majority of affected property owners protesting the proposed improvement can generally block the formation of a district, subject to a four-fifths majority override by the local rulemaking body. Id. Failure to follow proper procedure for asserting a challenges to a proposed assessment may preclude later litigation of the matter. See City of Larkspur v. Marin County Flood Control & Water Conservation Dist., 168 Cal. App. 3d 947, 956-58, 214 Cal. Rptr. 689, 695-97 (1985) (town did not object

at special hearing, which was exclusive procedure for asserting lack of benefit).

[FN129]. Dawson v. Town of Los Altos Hills, 16 Cal. 3d, 676, 683, 547 P.2d 1377, 1381, 129 Cal. Rptr. 97, 101 (1976).

[FN130]. Id. See Bryant v. Comm'r of Internal Revenue, 111 F.2d 9, 14 (9th Cir. 1940) (stating that a city derives its power to levy and collect special assessments from its power of taxation). See also CAL. CONST. art. XI § 7 (homerule taxing authority provision for counties and cities). A distinction should be made between general law cities and counties and charter cities. See supra note 3 (discussing the legal structure of local government in California). Local general law governments may impose special assessments only if specifically authorized by the state legislature. ASSEMBLY RESEARCH REPORT, supra note 3, at 247. However, charter cities are authorized to impose special assessments without legislative approval pursuant to the California Constitution. Id.

[FN131]. Solvang Mun. Improvement Dist. v. Board of Supervisors, 112 Cal. App. 3d 545, 553, 169 Cal. Rptr. 381, 396 (1980). See Northwestern Mut. Life Ins. Co. v. State Board of Equalization, 73 Cal. App. 2d 548, 552, 166 P.2d 917, 920 (1946) (enumerating the significant differences between a special assessment and a tax).

[FN132]. Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 29, 148 P. 217, 219 (1915). See Solvang, 112 Cal. App. 3d at 553, 169 Cal. Rptr. at 396 ("a special assessment is not a tax at all, but a benefit to specific real property financed through the use of public credit"). Property owners may pay for the special assessments either in cash or, at their option, by installments over a period of time. County of Fresno v. Malmstrom, 94 Cal. App. 3d 974, 978, 156 Cal. Rptr. 777, 779 (1979).

[FN133]. See, e.g., CAL. STS. & HIGH. CODE §§ 5000-6794 (West 1969 & Supp. 1991) (Improvement Act of 1911); id. §§ 8500-8851 (West 1969 & Supp. 1991) (Municipal Bond Act of 1915); id. §§ 10000-10706 (West 1969 & Supp. 1991) (Municipal Improvement Act of 1913).

[FN134]. Malmstrom, 94 Cal. App. 3d at 978, 156 Cal. Rptr. 779. Examples of public improvements are, streets, sidewalks, sewers, water systems, and lighting and public utility lines. Id.

[FN135]. Comment, supra note 24, at 797. In 1978-79, special assessments amounted to $36 million. Id. at 797, n.88. In 1979-80, that amount jumped to $98 million, an increase of almost 175%. Id.

[FN136]. 94 Cal. App. 3d 974, 156 Cal. Rptr. 777 (1979).

[FN137]. Id. at 977, 156 Cal. Rptr. at 778-79. Assessment proceedings were initiated by the Fresno County Board of Supervisors pursuant to Streets and Highways Code sections 10000 through 10600, the Municipal Improvement Act of 1913. Id.

[FN138]. Id. at 977-78, 156 Cal. Rptr. at 779. The defendant's argument that the assessment was unconstitutional was two-fold. First, the defendant contended that the assessment would result in a levy which exceeded the 1% limit of section 1 of Proposition 13. Id. Second, the defendant contended that the assessment constituted a "special tax" which had not been approved by a two-thirds vote of qualified electors under section 4 of the amendment. Id.

[FN139]. Id. at 986, 156 Cal. Rptr. at 784.

[FN140]. A later case, County of Placer v. Corin, resolved the related issue of whether Proposition 4, the enactment limiting state and local government appropriations and spending, applied to special assessments. 113 Cal. App. 3d 443, 170 Cal. Rptr. 232 (1980). See CAL. CONST. art. XIIIB §§ 1-12 (West Supp. 1991), for full text of Proposition 4. The Court of Appeal for the Third District held that the spending limitation of Article XIIIB did not apply to proceeds derived from special assessments. Corin, 113 Cal. App. at 449, 170 Cal. Rptr. at 236.

[FN141]. Malmstrom, 94 Cal. App. 3d at 981-82, 156 Cal. Rptr. at 781-82.

[FN142]. Id. at 980-81, 156 Cal. Rptr. at 780-81.

[FN143]. Id. at 983-85, 156 Cal. Rptr. at 782-83. Accord, Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981). In Trent, the Second District Court of Appeal agreed with the Fifth District's conclusion in Malmstrom that Proposition 13 did not affect special assessments because they were not taxes, special or otherwise. Id. at 323, 170 Cal. Rptr. at 688. Because Proposition 13 was inapplicable to special assessments, the Second District rejected the plaintiff's argument that Malmstrom defined the term "special tax" as used in section 4 of the amendment and refused to render any definition of "special taxes" in the case. Id. at 323, 328, 170 Cal. Rptr. at 688, 691.

[FN144]. Malmstrom, 94 Cal. App. 3d at 984, 156 Cal. Rptr. at 783.

[FN145]. See, e.g., CAL. GOV'T CODE §§ 50078-50078.20 (West 1983 & Supp. 1991) (statutes authorizing local governments to impose police and fire special assessments); id. §§ 53970-53979 (West 1983 & Supp. 1991) (statutes authorizing local governments to impose police and fire protection special taxes). See generally Benefit Assessments: A Born Again Revenue Raiser, CAL- TAX RESEARCH BULL. 1-8 (1981) (reporting on new enabling legislation for special assessments and increased use of special assessments after Malmstrom).

[FN146]. 112 Cal. App. 3d 545, 169 Cal. Rptr. 391 (1980).

[FN147]. Id. at 548, 169 Cal. Rptr. at 393.

[FN148]. Id.

[FN149]. Id. at 548, 557, 169 Cal. Rptr. at 393, 398.

[FN150]. Id. at 557, 169 Cal. Rptr. at 398. Special assessments may be levied on a variety of bases, including fixed and variable, as well as ad valorem. Id.

[FN151]. Id.

[FN152]. See, e.g., id. at 557, 169 Cal. Rptr. at 398 ("levies to meet general expenses of the taxing entity and to construct facilities to serve the general public . . . may not be transformed from general ad valorem taxes to special assessments by a mere change in the name of the levy").

[FN153]. Henke, supra note 9, at 283-85.

[FN154]. 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (1984).

[FN155]. Id. at 749-50, 203 Cal. Rptr. at 582-83. In the early 1960's, San Diego had created a general plan to develop land in "planned urbanizing areas," which included developing and new communities. Id. at 749-50, 203 Cal. Rptr. at 582. The J.W. Jones decision concerned the planned urbanizing area of North University City. Id. at 749, 203 Cal. Rptr. at 582. To finance the construction of public facilities within North University City, San Diego enacted an ordinance which authorized the city council to designate lands to be benefitted by public improvements and apportion the costs of the improvements among the parcels. Id. The ordinance conditioned the issuance of building permits upon the payment of "facility benefit assessments," and gave the city a lien on the benefitted parcels until the FBA were paid. Id.

[FN156]. Id. at 749, 203 Cal. Rptr. at 583.

[FN157]. Id. at 756, 203 Cal. Rptr. at 588. Jones contented that some of the public facilities financed by the assessments were remote and therefore only indirectly benefitted the assessed parcels. Id.

[FN158]. Id. at 756-57, 203 Cal. Rptr. at 588-89. Jones argued that only owners of undeveloped property were required to bear the burden of paying for public facilities while owners of both undeveloped and developed properties derived benefit from the new facilities. Id.

[FN159]. Id. at 758, 203 Cal. Rptr. at 589.

[FN160]. Id. at 755, 203 Cal. Rptr. at 587. The J.W. Jones court stated that San Diego's ordinance and assessments were "distant cousins" to traditional public work financing arrangements, since the times for commencing and completing the public facilities were not fixed but rather were subject to adjustment depending on growth needs and economic conditions. Id. The court noted that San Diego's assessments were also unique in that they were apportioned amongst the parcels according to the number of "net equivalent dwelling units" attributable to each parcel at its highest potential development under current zoning, rather than on a front or square footage or ad valorem basis, as are traditional assessments. Id.

[FN161]. Id.

[FN162]. Id. at 757, 203 Cal. Rptr. at 588. The court in J.W. Jones stated, "The levy on undeveloped properties only has a reasonable basis. The incidental fallout of benefit to developed parcels does not result in such equality as to offend equal protection concepts." Id.

[FN163]. Id. at 757-58, 203 Cal. Rptr. at 588-89. The court found that the assessment system was the key to implementing San Diego's controlled growth plan, without which future growth would be jeopardized. Id. The court also noted that the assessment scheme was reasonable and valid, stating that "narrow strictures of general law concepts of financing public utilities . . . do not accommodate the dynamics of explosive growth in sunbelt cities." Id. at 756, 203 Cal. Rptr. at 589.

[FN164]. 157 Cal. App. 3d 759, 203 Cal. Rptr. 797 (1984).

[FN165]. The FBA system in Holodnak authorized San Diego to designate areas of benefit in the city's new North City West community to be assessed for public improvements and to apportion costs among according to benefit received. Id. at 761, 203 Cal. Rptr. at 798. The public facilities to be financed by the assessment system included water lines, community parks, a library, a park and ride facility, a fire station, and widening of a bridge. Id.

[FN166]. Id. at 762, 203 Cal. Rptr. at 799. The court adopted portions of the J.W. Jones opinion as it addressed the contentions raised in Holodnak. Id. The court also made its own findings of special benefit to North City West conferred by special facilities financed by the FBA, and stated that San Diego's determination of special benefit was both supported by the record and conclusive. Id. at 762-63, 203 Cal. Rptr. at 799.

[FN167]. J.W. Jones, 157 Cal. App. 3d at 758, 203 Cal. Rptr. at 589. Specifically, the J.W. Jones court stated: "The vision of San Diego's future as sketched in the general plan is attainable only through the comprehensive financing scheme contemplated by the FBA. We view the precedents of yesterday's case law, not as barriers to growth, but as the guidelines to accomplish the needs of tomorrow." Id. The most questionable improvements financed by the FBA in Holodnak, the park and ride facility and bridge widening, were easily approved by the court. Holodnak, 157 Cal. App. at 763, 203 Cal. Rptr. at 799. The court found benefit to the assessed properties conferred by the park and ride facility, stating that the properties would benefit from a decrease in traffic and pollution, even though the facility was open to everyone. Id. Likewise, the court found that the assessed properties would be benefitted by widening of a bridge spanning the city's major interstate highway since ingress and egress to the new development would be expanded. Id.

[FN168]. See American River Flood Control Dist. v. Sayre, 136 Cal. App. 3d 342, 356, 186 Cal. Rptr. 202, 207 (1982) (special assessment for operating and maintenance costs of flood control district held valid).

[FN169]. See City Council of the City of San Jose v. South, 146 Cal. App. 3d 320, 332 335, 194 Cal. Rptr. 110, 118, 120 (1983) (special assessment for maintenance of landscaped median islands and their appurtenant areas held valid).

[FN170]. ASSEMBLY RESEARCH REPORT, supra note 3, at 251.

[FN171]. Local general law governments may impose special assessments only if specifically authorized by the state legislature. ASSEMBLY RESEARCH REPORT, supra note 3, at 247. See supra note 3 (discussing the legal structure of local government in California).

[FN172]. ASSEMBLY RESEARCH REPORT, supra note 3, at 251; Benefit Assessments: A Born Again Revenue Raiser, CAL-TAX RESEARCH BULL. 1-8 (1981).

[FN173]. See CAL. GOVT CODE §§ 50078-50078.20 (West 1983 & Supp. 1991) (statutes authorizing local governments to impose police and fire special assessments).

[FN174]. See CAL. GOVT CODE § 54710.5 (West Supp. 1991) (statute authorizing local governments to impose assessments for flood control services).

[FN175]. See id. (statute authorizing local governments to impose assessments for drainage and water management services).

[FN176]. See CAL. STS. & HIGH. CODE § 18165 (West Supp. 1991) (statute authorizing cities to impose assessments for street lighting).

[FN177]. See Dawson v. Town of Los Altos Hills, 16 Cal. 3d 676, 684, 547 P.2d 1377, 1382, 129 Cal. Rptr. 97, 102 (1976) (stating that "the scope of judicial review of such actions is quite narrow . . ."). In Dawson, the supreme court indicated that the local rulemaking body "is the ultimate authority which is empowered to finally determine what lands are benefitted and what amount of benefits shall be assessed against the several parcels benefitted. . . . [Special assessments are] of a particularly legislative character, and the appropriate scope of review is firmly rooted in that consideration." Id. at 684-85, 547 P.2d at 1382, 129 Cal. Rptr. at 102.

[FN178]. See supra notes 122-132 and accompanying text (defining "special assessment").

[FN179]. See, e.g., White v. County of San Diego, 26 Cal. 3d 897, 904, 608 P.2d 728, 731, 163 Cal. Rptr. 640, 644 (1980). In White, the supreme court stated that a special assessment will not be set aside unless the "absence of benefit clearly appears from the record," and that the local government's "determination of benefit is conclusive." Id. See supra notes 127- 130 and accompanying text (discussing homerule taxing authority of counties and cities and legislative enactments authorizing the imposition of special assessments and the formation of assessments districts).

[FN180]. But see Harrison v. Board of Supervisors, 44 Cal. App. 3d 852, 858, 118 Cal. Rptr. 828, 831-32 (1975) (property not benefitted from storm sewers). Cf. City of Sacramento v. Drew, 207 Cal. App. 3d 1287, 1294, 255 Cal. Rptr. 704, 708 (1989) (public schools were not "of a local nature" within the meaning of the Municipal Improvement Act of 1913).

[FN181]. See, e.g., CALIFORNIA COMM'N ON GOV'T REFORM, FINAL REPORT 118 (Jan. 1979) (listing numerous new or increased county license, permit, and service fees in the year following the approval of Proposition 13).

[FN182]. ASSEMBLY RESEARCH REPORT, supra note 3, at 250.

[FN183]. See Mills v. County of Trinity, 108 Cal. App. 3d 656, 660, 166 Cal. Rptr. 674, 678 (1980) ("In narrower contexts, the word [tax] has been construed to exclude charges to particular individuals which do not exceed the value of the governmental benefit conferred upon or the services rendered to the individuals . . .").

[FN184]. Ordinarily, governmental fees are levied upon individuals and business entities. See generally, Bauman & Ethier, Development Exactions and Impact Fees: A Survey of American Practices, 50 L. CONTEMP. PROB. 51 (1987), for a thorough discussion of governmental fees and the issues raised by use of such fees.

[FN185]. CAL. CONST. art. XIIIA §§ 1-6 (West Supp. 1991) (using the term "tax" rather than another descriptive term, such as "levy," "charge," or "fee").

[FN186]. User fees have increased from $2,817 million in fiscal year 1971-72 to $11,135 million in fiscal year 1982-83, an increase of 295 percent. ASSEMBLY RESEARCH REPORT, supra note 3, at 252. In fiscal year 1982-83, user fees accounted for almost 41% of all city revenues and 19% of all county revenues. Id. at 256.

[FN187]. See, e.g., Alamo Rent-A-Car, Inc. v. Board of Supervisors, 221 Cal.App.3d 198, 205-06, 272 Cal. Rptr. 19, 24 (1990) (airport access fee upheld); Bixel Assoc. v. City of Los Angeles, 216 Cal. App. 3d 1208, 1220, 265 Cal. Rptr. 347, 355 (1989) (fire hydrant fee struck down); San Diego Gas & Elec. Co. v. San Diego County Air Pollution Control Dist., 203 Cal. App. 3d 1132, 1135, 250 Cal. Rptr. 420, 421 (1988) (pollution permit fee upheld); Beaumont Investors V. Beaumont-Cherry Valley Water Dist., 165 Cal. App. 3d 227, 238, 211 Cal. Rptr. 567, 573 (1985) (water connection fee struck down); Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317, 325, 170 Cal. Rptr. 685, 689 (1981) (school impact fee upheld); Mills v. County of Trinity, 108 Cal. App. 3d 656, 663, 166 Cal. Rptr. 674, 678 (1980) (new and increased fees for county services upheld).

[FN188]. Bauman & Ethier, supra note 184, at 54.

[FN189]. Id.

[FN190]. Id.

[FN191]. Id.

[FN192]. See CAL. CONST. art. XI § 7 (West Supp. 1991) (homerule taxing authority provision for counties and cities).

[FN193]. Bauman & Ethier, supra note 184, at 54.

[FN194]. CAL. GOV'T CODE §§ 50075-50076 (West Supp. 1991). See Beaumont Investors v. Beaumont-Cherry Valley Water Dist., 165 Cal. App. 227, 234, 211 Cal. Rptr. 567, 570 (1985) (discussing sections 50075 and 50076 of the Government Code).

[FN195]. Bauman & Ethier, supra note 184, at 54.

[FN196]. See supra note 187, for a list of cases involving the use of governmental regulatory and service fees.

[FN197]. 108 Cal. App. 3d 656, 166 Cal. Rptr. 674 (1980). The issue of whether Proposition 4, the enactment limiting government appropriations and spending, applied to governmental fees was discussed in Trend Homes, Inc. v. Central Unified School District, 220 Cal. App. 3d 102, 269 Cal. Rptr. 349 (1990). See CAL. CONST. art. XIIIB §§ 1-12 (West Supp. 1991), for the full text of Proposition 13. In Trend Homes, the Fifth District Court of Appeal held that if a fee is not a special tax within the meaning of Article XIIIA, Proposition 4 is not applicable. Id. at 115, 269 Cal. Rptr. at 356.

[FN198]. Mills, 108 Cal. App. 3d at 658, 166 Cal. Rptr. at 675.

[FN199]. Id. at 658-59, 166 Cal. Rptr. at 675. See CAL. CONST. art. XIIIA § 4 (West Supp. 1991) (provision restricting the imposition of special taxes).

[FN200]. Id. at 663, 166 Cal. Rptr. at 678. See Alamo Rent-A-Car, Inc. v. Board of Supervisors, 221 Cal. App. 3d 198, 208, 272 Cal. Rptr. 19, 25 (1990) (stating that governmental regulatory fees should be comprised of a "fair and reasonable" approximation of the overall benefit derived from the activity being regulated).

[FN201]. The Mills court utilized the rules of construction used to interpret constitutional provisions expressed in Amador Valley Joint Union High School Dist. v. State Board of Equalization, 22 Cal. 3d 208, 244-45, 583 P.2d 1281, 1300, 149 Cal. Rptr. 239, 258 (1978), which requires the court to interpret enactments so as to give full effect to the framers' objectives. Mills, 108 Cal. App. 3d at 659, 166 Cal. Rptr. at 676.

[FN202]. Id. at 660, 166 Cal. Rptr. at 676. The trial court in Mills had construed the term "tax" broadly to include "all charges, however labeled, which are to exact money for the support of government or for public purposes." Id. The court of appeal rejected this construction since such an interpretation would render a county powerless to raise charges for proprietary functions. Id. The court reasoned that such a "draconian result" was probably never intended by the electorate. Id.

[FN203]. 114 Cal. App. 3d 317, 170 Cal. Rptr, 685 (1981).

[FN204]. Id. at 321, 170 Cal. Rptr. at 687.

[FN205]. Id. at 321, 170 Cal. Rptr. at 687. The ordinance had been enacted by the City of Oxnard without voter approval, and the plaintiff claimed that it thus violated the two-thirds voter majority approval requirement of section 4.

[FN206]. Id. at 328, 170 Cal. Rptr. at 691.

[FN207]. Id. at 325, 170 Cal. Rptr. at 689. The Trent court reasoned that the development requirements imposed by the city were not ad valorem taxes because the requirements were "not imposed upon the land in the subdivision as such but [are] imposed on the privilege of subdividing land." Id.

[FN208]. Id. at 325-28, 170 Cal. Rptr. at 698-91.

[FN209]. Id. at 325-28, 170 Cal. Rptr. at 689-91.

[FN210]. 206 Cal. App. 3d 212, 253 Cal. Rptr. 497 (1988).

[FN211]. Id. at 220, 253 Cal. Rptr. at 500.

[FN212]. Id. at 226, 253 Cal. Rptr. at 504.

[FN213]. City and County of San Francisco v. Farrell, 32 Cal. 3d 47, 57, 648 P.2d 935, 940, 184 Cal. Rptr. 713, 718 (1982). See supra notes 102-113 and accompanying text (discussing the Farrell decision).

[FN214]. California Bldg., 206 Cal. App. 3d at 235, 253 Cal. Rptr. at 510-11.

[FN215]. Id. at 237, 253 Cal. Rptr. at 511. To support its conclusion that the school district's levies constituted development fees rather than special taxes, the court in California Bldg. stated that development fees are distinguishable from taxes because fees are voluntary, whereas taxes are compulsory. Id. at 236, 253 Cal. Rptr. at 510. The court also noted that development fees, unlike "special taxes" under section 4, are not intended to replace lost property tax revenues. Id. at 236, 253 Cal. Rptr. at 511.

[FN216]. Id. at 233, 253 Cal. Rptr. at 509. The defendants were required to comply with the financial limitations of California Government Code sections 53080 and 65995 because school districts have no independent taxing authority under the California Constitution. Id. The school districts' authority to impose development fees derived solely from legislative enactments since, as the court held, section 4 of Proposition 13 was not a self- executing grant of taxing authority. Id. at 226-33, 253 Cal. Rptr. at 504- 08.

[FN217]. 165 Cal. App. 3d 227, 211 Cal. Rptr. 567 (1985).

[FN218]. Id. at 230, 211 Cal. Rptr. at 568. In Beaumont, defendant water district charged the plaintiff developer a $750 per unit facilities fee to help pay for the construction of new water systems facilities necessitated by development. Id. at 231, 211 Cal. Rptr. at 568. The developer then brought suit, contending that the fee fell within the purview of section 4 of Proposition 13, which requires a two-thirds majority vote approval before a new special tax may be imposed. Id. at 232, 211 Cal. Rptr. at 569.

[FN219]. Id. at 238, 211 Cal. Rptr. at 573. The court in Beaumont explained that in order for a governmental fee to be exempt from Proposition 13, the fee must reasonably relate to the cost of the service for which it is imposed. Id. at 234, 211 Cal. Rptr. at 570. See CAL. GOVT CODE §§ 50075- 50076 (West Supp. 1991) (authorizing cities, counties, and special districts to impose special taxes and specifically excluding from the definition of "special tax" any fee "which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes").

[FN220]. Beaumont, 165 Cal. App. 3d at 238, 211 Cal. Rptr. at 573.

[FN221]. Id. at 235, 211 Cal. Rptr. at 571 (quoting Amador Valley Joint Union High School Dist. v. State Board of Equalization, 22 Cal. 3d 208, 248, 583 P.2d 1281, 1301, 149 Cal. Rptr. 239, 259 (1978)).

[FN222]. Beaumont, 165 Cal. App. 3d at 235-38, 211 Cal. Rptr. at 571-73. The court distinguished a factually similar special assessment case, J.W. Jones Cos. v. Holodnak, 157 Cal. App. 3d 745, 403 Cal. Rptr. 580 (1984), stating that in J.W. Jones the City of San Diego had worked up a detailed and sophisticated study and plan before imposing development charges, whereas the Beaumont Water District had not made an informed decision. Id. at 236-38, 211 Cal. Rptr. at 271-73.

[FN223]. 203 Cal. App. 3d 1132, 250 Cal. Rptr. 420 (1988). SDG & E involved a challenge to a county air pollution control district's method of apportioning costs of permit programs among agencies required to obtain operating permits. Id. at 1135, 250 Cal. Rptr. at 421. The court held that the district could properly recover actual costs of operation by apportioning them among all monitored polluting agencies based on an emissions fee schedule. Id. at 1148-49, 250 Cal. Rptr. at 430-31.

[FN224]. Id. at 1146, 250 Cal. Rptr. at 429.

[FN225]. Id. at 1147-48, 250 Cal. Rptr. at 430.

[FN226]. Id. at 1148-49, 250 Cal. Rptr. at 430.

[FN227]. 216 Cal. App. 3d 1208, 265 Cal. Rptr. 347 (1989). Bixel involved an ordinance which specified that fees collected from developers were to be deposited into a "Fire Hydrant Installation and Main Replacement Fund" to finance the cost of initial installation and upgrades of fire hydrants and the improvements or replacements of existing water mains. Id. at 1214, 265 Cal. Rptr. at 350.

[FN228]. Id. at 1219-20, 265 Cal. Rptr. at 354-55.

[FN229]. Id. at 1220, 265 Cal. Rptr. at 358.

[FN230]. In Russ Bldg. Partnership v. City and County of San Francisco, 44 Cal. 3d 839, 750 P.2d 324, 244 Cal. Rptr. 682 (1988), the supreme court did address a related issue. In Russ Bldg., plaintiff developers challenged the retroactive application of a transit fee ordinance to new office buildings. Id. at 845, 750 P.2d at 326, 244 Cal. Rptr. at 685. The court held that the fee did not impair the developers' vested rights, even though the developers had been issued building permits, had begun construction, and had made a substantial financial commitment to their projects almost two years before the ordinance was enacted. Id. at 846, 750 P.2d at 327, 244 Cal. Rptr. at 685.

[FN231]. See supra notes 196-233 and accompanying text (discussing court decisions reaching differing conclusions as to the validity of certain governmental fees after Proposition 13).

[FN232]. See supra notes 196-233 and accompanying text (discussing court decisions reaching differing conclusions based on differing rationales).

[FN233]. Compare Mills v. County of Trinity, 108 Cal. App. 3d 656, 660, 166 Cal. Rptr. 674, 676 (3d Dist. 1980) (court chose to interpret special tax provision of Proposition 13 narrowly and upheld regulatory fees, stating that

Proposition 13 was not intended to put local governments in a "fiscal straitjacket") with Bixel Assoc. v. City of Los Angeles, 261 Cal. App. 3d 1208, 1220, 265 Cal. Rptr. 347, 355 (2d Dist. 1988) (court struck down development fees and refused to hear policy arguments in support thereof, stating that the case was not about the "obvious need for funding by [Los Angeles] of sophisticated fire protection in the post-Proposition 13 era").

[FN234]. See Amador Valley Joint Union High School Dist. v. State Board of Equalization, 22 Cal. 3d 208, 219, 249, 583 P.2d 1281, 1283, 1302, 149 Cal. Rptr. 239, 241, 259 (1978) (upholding the validity of Proposition 13).

[FN235]. See supra notes 64-119 and accompanying text (discussing relevant Proposition 13 court decisions).

[FN236]. See generally Glennon, Taxation and Equal Protection, 58 GEO. WASH. L. REV. 261, 293 (1989) (discussing the constitutionality of Proposition 13 after the Supreme Court of the United States' decision in Allegheny Pittsburgh Coal Co. v. County Comm'n, 109 S.Ct. 633 (1989)).

[FN237]. 109 S.Ct. 633 (1989).

[FN238]. Id. at 637.

[FN239]. In Webster County, an appraisal of value was made each time property ownership changed. Id. at 635. The appraisal value was the sales price of property, determined by the declared consideration in the deed of the property. Id.

[FN240]. Id. at 635-37.

[FN241]. Id. at 637.

[FN242]. Id. at 637-39.

[FN243]. Id. at 638.

[FN244]. Id. at 638-39.

[FN245]. Id. at 638 n.4. Specifically, the Court stated:

> We need not and do not decide today whether the Webster County assessment method would stand on a different footing if it were the law of a State, generally applied, instead of the aberrational enforcement policy it appears to be. [Proposition 13] is grounded on the belief that taxes should be based on the original cost of property and should not tax unrealized paper gains in the value of the property.

Id. See Glennon, supra note 236, at 301 (discussing the probability of success of an equal protection challenge to Proposition 13 and stating that a court could distinguish Allegheny if California government authorities came forward with a legitimate state interest justifying its policy of appraisal).

[FN246]. Glennon, supra note 236, at 294.

[FN247]. See ASSEMBLY RESEARCH REPORT, supra note 3, at 26-33 (discussing challenges to Proposition 13 filed after the decision in Allegheny).

[FN248]. See, e.g., City of Rancho Cucamonga v. Mackzum, 279 Cal. Rptr. 220 (Ct. App. 4th Dist. Mar. 20, 1991) (No. E007876) (claim that legislation implementing Proposition 13 violates equal protection of the laws struck down); R.H. Macy Co. v. Contra Costa County, 226 Cal. App. 3d 352, 357, 370, 276 Cal. Rptr. 530, 533, 541 (1991) (claim that change in ownership provision of Proposition 13 violates the equal protection, right to travel, and interstate commerce clauses of the United States Constitution struck down); Nordlinger v. Lynch, 225 Cal. App. 3d 1259, 1265, 1282, 275 Cal. Rptr. 684, 686, 698 (1991) (claim that acquisition value assessment method of Proposition 13 is unconstitutional after the Allegheny decision struck down).

[FN249]. See supra notes 64-119 and accompanying text (discussing relevant Proposition 13 court decisions).

[FN250]. Amador Valley Joint Union High School Dist. v. State Board of Equalization, 22 Cal. 3d 208, 245, 583 P.2d 1281, 1301, 149 Cal. Rptr. 239, 257 (1978).

[FN251]. See Kroll, supra note 9, at 29.

[FN252]. See id. at 29-31 (describing the loopholes of Proposition 13 and the ability of local governments to find ways around the amendment's tax limitations).

[FN253]. Id. at 29. Because the courts have narrowly interpreted all disputed sections of the measure, the impact of Proposition 13 on local governments is much less severe than expected. Id. The response of the courts led Proposition 13 co-author Howard Jarvis to state, "The court doesn't know what a tax is." Id.

[FN254]. See supra notes 120-233 and accompanying text (discussing court decisions impacting the use and effectiveness of nontaxing sources of revenue).

[FN255]. See supra notes 120-180 and accompanying text (discussing the effect of court decisions broadening the use of special assessments).

[FN256]. See supra notes 181-233 and accompanying text (discussing the use and effectiveness of governmental fees to generate revenues).

[FN257]. See generally Bauman & Ethier, supra note 184, for a complete analysis of the use of governmental fees on geographical and purpose bases.

[FN258]. Kroll, supra note 9, at 28.

[FN259]. Mills v. County of Trinity, 108 Cal. App. 3d 656, 660, 166 Cal. Rptr. 674, 676 (1980).

[FN260]. See supra notes 250-253 and accompanying text (describing the role of California courts in shaping Proposition 13).

END OF DOCUMENT

PROOF OF SERVICE

(Code Civ. Proc. §§ 1013a, 2015.5)

Re: Prevailing Wage Rate, 03-TC-13
City of Newport Beach, Claimant
Labor Code Section 1720, et al.
Public Contract Code Section 22022
Title 8, CCR, Section 16000 et al.
Statutes 2001, Chapter 938 et al.
And Affected Parties and State Agencies

I am employed in the City and County of Sacramento, California. I am over the age of eighteen years and not a party to the within action; my business address is 320 W. Fourth Street, Suite 600, Los Angeles, CA 90013.

On March 2, 2004, I served the enclosed **Department of Industrial Relations 's Response to Commission On State Mandates Concerning Petition On Prevailing Wages,** on the parties listed below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit, for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepared, to be deposited in a recognized place of deposit of the U.S. Mail in Loa Angeles, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee by a member of the staff of the Department of Industrial Relations, Office of the Director Legal Unit, on the date last written below.

(C) By Messenger Service: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit for messenger delivery, and I caused each such envelope to be delivered to a courier employed by Golden State Overnight, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address at the place and on the date last written below.

(D) By Facsimile Transmission: I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action, pursuant to oral and/or written agreement between such parties regarding service by facsimile by transmitting a true copy to the following fax numbers:

TYPE OF SERVICE	ADDRESSEE & FAX NUMBER (IF APPLICABLE)	PARTY REPRESENTED
A	Mr. Glen Everroad Revenue Manager City of Newport Beach 3300 Newport Blvd. P.O. Box 1768 Newport Beach, CA 92659	Claimant
A	Mr. Allan Burdick MAXIMUS 4320 Auburn Blvd., Suite 2000 Sacramento, CA 95841	Claimant Representative
A	Mr. Paul Minney Spector, Middleton, Young & Minney, LLP 7 Park Center Drive Sacramento, CA 95825	Interested Party
A	David Wellhouse David Wellhouse & Associates, Inc. 9175 Kiefer Blvd., Suite 121 Sacramento, CA 95826	Interested Party
A	Ms. Harmeet Barkschat Mandate Resource Service 5325 Elkhorn Blvd., Suite 307 Sacramento, CA 95842	Interested Party
A	Ms. Annette Chinn Cost Recovery Systems 705-2 East Bidwell Street, Suite 294 Folsom, CA 95630	Interested Party
A	Mr. Steve Smith, CEO Mandated Cost Systems, Inc. 11130 Sun Center Drive, Suite 100 Rancho Cordova, CA 95670	Interested Party
A	Mr. Leonard Kaye County of Los Angeles Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	State Agency

A	Ms. Cindy Sconce Centration, Inc. 12150 Tributary Point Drive, Suite 140 Gold River, CA 95670	Interested Party
A	Mr. Keith Gmeinder Mr. James E. Tilton Department of Finance 915 L Street, 8th Floor Sacramento, CA 95814	Interested Party
A	Mr. Michael Havey State Controller's Office Division of Accounting and Reporting 3301 C. Street, Suite 500 Sacramento, CA 95816	State Agency

Executed on March 2, 2004, at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Maria Salazar, Declarant

Exhibit F

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

July 11, 2007

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

RE: **Request for Specific Citations to Regulations**
Prevailing Wages, 03-TC-13
City of Newport Beach, Claimant
Labor Code, Sections 1720, 1720.3, 1720.4, 1726, 1727, 1735, 1742, 1770, 1771, 1771.5, 1771.6, 1773.5;
Statutes 1976, Ch. 1084; Statutes 1976, Ch. 1174; Statutes 1980, Ch. 992; Statutes 1983, Ch. 142; Statutes 1983, Ch. 143; Statutes 1989, Ch. 278; Statutes 1989, Ch. 1224; Statutes 1992, Ch. 913; Statutes 1992, Ch. 1342; Statutes 1999, Ch. 83; Statutes 1999, Ch. 220; Statutes 2000, Ch. 881; Statutes 2000, Ch. 954; Statutes 2001, Ch. 938; Statutes 2002, Ch. 1048;
Title 8, CCR, Sections 16000-16802

Dear Mr. Burdick:

Commission staff is currently preparing a draft staff analysis on the *Prevailing Wages* test claim, tentatively scheduled for the December 6, 2007 Commission hearing. The test claim asserts that several regulatory provisions impose reimbursable state-mandated activities. Under Part B of the test claim, which identifies the specific statutory or regulatory sections that contain the mandate, the claim broadly cites "Title 8, California Code of Regulations, Sections 16000-16802" and Exhibit 16 provides a copy of the regulations as they existed on September 20, 2003.

The regulations that existed on September 20, 2003, however, show that sections were added or amended at various times since 1976. Thus, it is unclear from the test claim what version of the regulations, as identified by the effective date and register number of the change to the regulations, the claimant is pleading. Without this information, staff is unable to determine the activities in the regulations that the claimant is alleging to be reimbursable under
article XIII B, section 6.

So that staff may complete the analysis, we are requesting that no later than August 1, 2007, the Commission be provided with the effective date and register number of the change to or addition of each specific regulatory provision which is alleged to create a newly mandated activity, as well as a copy of the regulation identifying that regulatory change or addition.

Please note that a similar claim, *Prevailing Wage Rate* (01-TC-28), was filed by Clovis Unified School District and is also tentatively scheduled for the December 6, 2007 Commission hearing. The mailing list has been updated to reflect interested parties and persons for both test claims.

Please contact Deborah Borzelleri at (916) 322-4230 if you have questions.

Sincerely,

Paula Higashi

Paula Higashi
Executive Director

Original List Date: 10/3/2003
Last Updated: 7/19/2006
List Print Date: 07/11/2007
Claim Number: 03-TC-13
Issue: Prevailing Wages

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Tel: (916) 323-5849
Fax: (916) 327-0832

Mr. Ramon M. De La Guardia
Department of Justice
1300 I Street, 17th Floor
P.O. Box 944255
Sacramento, CA 95814

Tel: (916) 324-5467
Fax: (916) 323-2137

Mr. Keith B. Petersen
SixTen & Associates
5252 Balboa Avenue, Suite 900
San Diego, CA 92117

Claimant Representative
Tel: (858) 514-8605
Fax: (858) 514-8645

Mr. Scott A. Kronland
Altshuler, Berzon, Nussbaum, Rubin & Demain
177 Post Street, Suite 300
San Francisco, CA 94108

Tel: (415) 421-7151
Fax: (415) 362-8064

Ms. Luisa M. Park
Office of Public School Contruction
Department of General Services
1130 K Street, Suite 400
Sacramento, CA 95814

Tel: (916) 445-3160
Fax:

Mr. Glen Everroad
City of Newport Beach
3300 Newport Blvd.
P. O. Box 1768
Newport Beach, CA 92659-1768

Claimant
Tel: (949) 644-3127
Fax: (949) 644-3339

Mr. Allan Burdick MAXIMUS 4320 Auburn Blvd., Suite 2000 Sacramento, CA 95841	**Claimant Representative** Tel: (916) 485-8102 Fax: (916) 485-0111
Mr. David Wellhouse David Wellhouse & Associates, Inc. 9175 Kiefer Blvd, Suite 121 Sacramento, CA 95826	Tel: (916) 368-9244 Fax: (916) 368-5723
Mr. Leonard Kaye, Esq. County of Los Angeles Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: (213) 974-8564 Fax: (213) 617-8106
Mr. Anthony Mischel Department of Industrial Relations Division of Administration 320 W. Fourth St., Suite 600 Los Angeles, CA 90013	Tel: (213) 576-7725 Fax: (213) 576-7735
Ms. Annette Chinn Cost Recovery Systems, Inc. 705-2 East Bidwell Street, #294 Folsom, CA 95630	Tel: (916) 939-7901 Fax: (916) 939-7801
Ms. Carla Castaneda Department of Finance (A-15) 915 L Street, 11th Floor Sacramento, CA 95814	Tel: (916) 445-3274 Fax: (916) 323-9584
Ms. Ginny Brummels State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 500 Sacramento, CA 95816	Tel: (916) 324-0256 Fax: (916) 323-6527
Ms. Susan Geanacou Department of Finance (A-15) 915 L Street, Suite 1190 Sacramento, CA 95814	Tel: (916) 445-3274 Fax: (916) 324-4888
Ms. Bonnie Ter Keurst County of San Bernardino Office of the Auditor/Controller-Recorder 222 West Hospitality Lane San Bernardino, CA 92415-0018	Tel: (909) 386-8850 Fax: (909) 386-8830

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Boulevard, Suite #106
Roseville, CA 95661

Tel: (916) 677-4233

Fax: (916) 677-2283

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF ADMINISTRATION
Office of the Director-Legal Unit
320 W. Fourth Street, Suite 600
Los Angeles, CA 90013

Arnold Schwa

Telephone No.: (213) 576-7725
Facsimile No.: (213) 576-7735

EXHIBIT G

July 23, 2007

Paula Higashi, Executive Director
Commission on State Mandates
980-Ninth Street, Suite 300
Sacramento, CA 95814

RE: City of Newport Beach
Test Claim No.: 03-TC-13
Prevailing Wage Rates

Dear Ms. Higashi:

I am the principal attorney for the Department of Industrial Relations in this matter. I am in receipt of your 11 July 2007 letter in which you stated that these claims may be scheduled for the Commission's 7 December 2007 meeting. I am writing to request that these matters not be scheduled until at least January due to my preexisting plans to be out of the country (from 8 September 2007 to 20 October 2007) during crucial periods prior to the December meeting.

Assuming the staff's draft report is served approximately eight weeks prior to the December meeting; the report would be received several weeks prior to my return. With only three weeks in which to respond to the draft report, this creates an undue burden on the Department.

Since no date has been formally set, I am requesting this brief accommodation.

Thank you in advance for your anticipated cooperation.

Yours truly,

Anthony Mischel
Attorney at Law

ASM/sp

cc: See Attached Mailing List

SERVICE LIST

Mr. Jim Spano
State Conroller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Mr. Ramon De La Guardia
Deputy Attorney General
Department of Justice
1300 I. Street, Suite 125
Sacramento, CA 95814

Mr. Keith B. Petersen
President
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Mr. Scott Kronland
Altshuler, Berzon, Nassbaum, Rubin & Demain
177 Post Street, Suite 300
San Francisco, CA 94108

Ms. Luisa M. Park
Office of Public School Construction
Department of General Services
1130 K Street, suite 400
Sacramento, CA 95814

Mr. Glen Everroad
City of Newport Beach
3300 Newport Blvd.
Newport Beach, CA 92659-1768

Mr. Allan Burdick
MAXIMUS
4320 Auburn, Blvd., Suite 2000
Sacramento, CA 95841

Mr. David Wellhouse
David Wellhouse & Associates, Inc
9175 Kiefer Blvd., Suite 121
Sacramento, CA 95826

Mr. Leonard Kaye, Esq
County of Los Angeles
Auditor- Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Ms. Annette Chinn
Coast Recovery Systems, Inc.
705-2 East Bidwell Street, #294
Folsom, CA 95630

Ms. Carla Castaneda
Department of Finance (A-15)
915 L. Street, 11th Floor
Sacramento, CA 95816

Ms. Ginny Brummels
State Controllers Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Ms. Susan Geanacou
Department of Finance (A-15)
915 L. Street, suite 1190
Sacramento, CA 95814

Ms. Bonnie Ter Keurst
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 W. Hospitality Lane
San Bernardino, CA 92415-0018

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

ARNOLD SC

EXHIBIT H

July 26, 2007

Mr. Anthony Mischel, Attorney at Law
Department of Industrial Relations
320 W. Fourth Street, Suite 600
Los Angeles, CA 90013

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

RE: **Denial of Request to Postpone Hearing**
Prevailing Wages, 03-TC-13
City of Newport Beach, Claimant
Labor Code, Sections 1720, 1720.3, 1720.4, 1726, 1727, 1735, 1742, 1770, 1771, 1771.5, 1771.6, 1773.5;
Statutes 1976, Ch. 1084; Statutes 1976, Ch. 1174; Statutes 1980, Ch. 992; Statutes 1983, Ch. 142; Statutes 1983, Ch. 143; Statutes 1989, Ch. 278; Statutes 1989, Ch. 1224; Statutes 1992, Ch. 913; Statutes 1992, Ch. 1342; Statutes 1999, Ch. 83; Statutes 1999, Ch. 220; Statutes 2000, Ch. 881; Statutes 2000, Ch. 954; Statutes 2001, Ch. 938; Statutes 2002, Ch. 1048;
Title 8, CCR, Sections 16000-16802

Dear Mr. Mischel:

At this time, your request to postpone hearing the *Prevailing Wages* test claim on December 6, 2007 is denied for failure to show good cause. Although section 1181.1, subdivision (h)(7), of the Commission's regulations defines good cause as a planned vacation that cannot reasonably be rearranged, it is speculative at this point whether the timing of your vacation would interfere with the Department's ability to comment on the draft staff analysis and/or appear at the December hearing.

If, after the draft staff analysis is issued, it becomes clear that the Department will be unable to provide timely comments or appear at the hearing, another request for an extension of time to file comments or postpone the hearing may be filed.

Please contact Deborah Borzelleri at (916) 322-4230 if you have questions.

Sincerely,

Paula Higashi
Executive Director

EXHIBIT I

Paula Higashi

From: Juliana F Gmur/MAXIMUS [julianagmur@maximus.com]
Sent: Friday, October 05, 2007 12:45 PM
To: Paula Higashi
Cc: Allan P Burdick/MAXIMUS; everroad@city.newport-beach.ca.us; kbpsixten@aol.com
Subject: Re: Commission on State Mandates, Prevailing Wages Test Claim, 03-TC-13
Attachments: Prevailing wage reg chart.doc

Dear Paula,

It is with great pleasure that I present to you our regulatory review. I hope you enjoy using it far more than I enjoyed putting it together. I will follow up with a hard copy and cover letter for filing purposes but due to the delay in responding, I thought it best to get this to you quickly. If I can be of further service, please do not hesitate to call upon me. Thanks!!!!!!!

Juliana F. Gmur, Esq.
MAXIMUS
Cell: (559) 960-4507

"Paula Higashi" <paula.higashi@csm.ca.gov>

09/07/2007 05:22 PM

To "Allan P Burdick/MAXIMUS" <allanburdick@maximus.com>, <julianagmur@maximus.com>, <everroad@city.newport-beach.ca.us>
cc
Subject Commission on State Mandates, Prevailing Wages Test Claim, 03-TC-13

Allan,

On July 11, 2007, the Commission requested that by August 1, 2007, the City of Newport Beach provide the Commission with the "effective date and register number of the change to or addition or each specific regulatory provision which is alleged to create a newly mandated activity, as well as a copy of the regulation identifying that regulatory change or addition."

To date, the Commission has not received the City's response to this request. Without this information, the Commission staff is unable to prepare a draft staff analysis of the *Prevailing Wages* Test Claim, tentatively scheduled for the December 6, 2007 Commission hearing.

Please advise when the City's response will be filed so that this test claim can be set for hearing.

Paula Higashi, Executive Director
Commission on State Mandates
(916) 323-8210

Register No.	Effective Date	History	Effect of Changes
Register 56, No. 8	Filed 4-27-56; effective 30 days thereafter	Added: §§16000-16004, 16100-16101 and 16200-16205 (Group 3)	§§16000-16004: defines person, filing, Nearest Labor Market Area, Prevailing Rate and wages. §16100: In the absence of a daily rate of wages for a given craft, a general prevailing wages shall be ascertained by the body awarding the contract. §16101: Body awarding the contract shall list, identify and separately state the prevailing wages in the call for bids. §16200: Authorizes representative for Department of Industrial Relations on petitions under Labor Code §1773.4. §16201: States manner of filing petitions. §16202: States form of petition. §16203: States components of petitions. §16204: Dismissal for failure to attach calls for bids. §16205: Filing with awarding body.
Register 72, No. 13	Filed 3-24-72; effective upon filing	New Group 4 (§§16209, 16209.1-16209.6) filed as emergency	§16209: Defined alien entitled to lawful residence. §16209.1: Employer shall make inquiry as to citizen or alien of applicant for employment. §16209.2: Shall also inquire of employee. §16209.3: Employee or applicant may be employed upon signed declaration. §16209.4: If alien applicant, shall be requested to show proof of lawful residence. §16209.5: If alien employee, same. §16209.6: Defines adverse effect.
Register 72, No. 23	Filed 6-2-72	Certificate of Compliance filed for §§16209, 16209.1-16209.6	
Register 77, No. 02	Filed 1-3-77; effective upon filing	Repealer of Group 3 (Articles 1-3, §§16000-16004, 16100-16101 and 16200-16205) and new Group 3 (Articles 1-4, §§16000-16013, 16100-16109, 16200-16206 and 16300-16305).	§16000 - 16013: Define director, division, chief, person (similar to prior §16000 but includes awarding bodies and their agents and officers), public works, political subdivision, awarding body, filing (more specific than prior §16001), Nearest Labor Market Area (non-substantive changes to prior §16002), locality, employer payments, prevailing rate (expanded version of prior §16003 includes other employer payments, overtime and holiday work), general prevailing rate of per diem wages, and interested party. §16100: limited determinations of prevailing wage to recognized crafts, classifications or types of workers (See Labor Code §§1720,

Register No.	Effective Date	History	Effect of Changes
			1720.2 and 1720.3. §16101: Lists components of determinations. §16102: Labor Code procedures to be followed in determinations. §16103: Procedures for filing collective bargaining agreements §16104: Permits Director to obtain data from other interested parties in making determinations. §16105: Permits adoption of collective bargaining agreements as prevailing wage; process of adoption. §16106: Permits Director to correct errors in determinations. §16107: Director's issuance of an area determination and process to request such determination by awarding body. §16108: Determinations to have effective dates. §16109: Awarding bodies shall use determined rates when required to publish; may refer to determinations rather than publish. §16200: Authorizes representative for Director (similar to prior §16200 with more specific language and different designee). §16201: States specific parties and timing for filing petition to review. §16202: States manner of filing petition (similar to prior §16201 with non-substantive changes). §16203: States form of petition (similar to prior §16202 with non-substantive changes). §16204: States content of petition (similar to prior §16203 with greater specificity of pleading needed for petitions where prevailing rate in the contract is different from that ascertained by the awarding body.) §16205: Dismissal for failure to attach calls for bids (identical to prior §16204). §16206: Filing with awarding body (identical to prior §16205). §16300: States Director's discretion to act. §16301: Director shall take actions he deems necessary. §16302: Hearing procedures. §16303: Process for issuance of decision. §16304: Hearing to conform to Government Code §11371 *et seq.* - public hearing.

Register No.	Effective Date	History	Effect of Changes
			§16305: Severance of invalid code sections.
Register 78, No. 06	Filed 2-8-78; effective 30 days thereafter	Added: New Group 3; §§16000-16014, 16100-16109, 16200-16207.9.	§16000- 16014: Define director (no change), division (non-substantive change), chief (non substantive change), person (no change), public works (no change), political subdivision (no change), awarding body (no change), filing (no change), Nearest Labor Market Area (no change), locality (no change), employer payments (expanded to make more specific but non-substantive), prevailing rate (added if conflict, labor code prevails), general prevailing rate of per diem wages (no change), interested party (no change) and issue date (new section). §16100: limited determinations of prevailing wage (no change) §16101: Lists components of determinations (added dates and listing of holidays and travel and subsistence payments taken from the collective bargaining agreement). §16102: Director to follow procedures in Labor Code (no change). §16103: Procedures for filing collective bargaining agreements (added copies of non-bona fide bargaining agreements are not deemed filed). §16104: Permits Director to obtain data from other interested parties (no change). §16105: Permits adoption of collective bargaining agreements (no change). §16106: Permits correction of errors (no change). §16107: Director's issuance of an area determination (non-substantive change). §16108: Determinations to have effective dates (added awarding body responsible for use of correct determination). §16109: Awarding bodies shall use determined rates (removed ability to refer to determinations rather than publish and added copies of determination to be on file at body's principal office and copies posted on job site or location readily available to workers). §16200: Authorizes representative for Director (non-substantive change). §16201: States specific parties and timing for filing petition to review (non-substantive change). §16202: States manner of filing petition (no

Register No.	Effective Date	History	Effect of Changes
			change). §16203: States form of petition (removed some technical requirements). §16204: States content of petition (no change). §16205: Dismissal for failure to attach calls for bids (no change). §16206: Filing with awarding body (added additional time limits and other non-substantive changes). §16207: States Director's discretion to act (identical to prior §16300). §16207.1: Director shall take necessary actions (identical to prior §16301). §16207.2: Hearing procedures (similar to prior §16302 but added notice procedures for interested parties and time allocations for those parties to present evidence). §16207.3: Process for issuance of decision (identical to prior §16303). §16207.4: Public hearing (identical to prior §16304). §16207.5: Director shall establish and coordinate administration of prevailing wage law. §16207.6: Director shall issue guidelines. §16207.7: Prevailing wage issues shall be referred to Director. §16207.8: Appeals of determinations referred to Director. §16207.9: Severance of invalid code (identical to prior §16305).
Register 79, No. 19	Filed 5-11-79; effective 30 days thereafter	Added: §16015.	§16015: Defines types of maintenance work that are public works for prevailing wage - Labor Code §1771.
Register 80, No. 06	Filed 2-8-80; effective 30 days thereafter	Added: §§16016-16019, 16207.10-16207.19. Repealed §16207.9.	§16016: Defines payroll records. §16017: Defines certified. §16018: Defines public entity §16019: Defines contractor and subcontractor. §16207.10: States manner for requesting payroll records. §16207.11: States content of request for records under Labor Code §1776. §16207.12: Public entity receiving request shall acknowledge receipt. §16207.13: States content for request for records by public entity to contractor. §16207.14: Inspection of contractor payroll

Register No.	Effective Date	History	Effect of Changes
			records limited to public entities with notice. §16207.15: states format for reporting of payroll records and address to obtain forms. §16207.16: Sets forth certification. §16207.17: States fees allowed for copies of payroll records. §16207.18: Payroll records requested shall be kept on file by public entity for 6 months and redacted of personal information. Public entity may confirm or deny person's employment but not disclose further identifying information. §16207.19: Severance of invalid code (identical to prior §16207.9).
Register 82, No. 51	Filed 12-15-82	Repealer of Group 4 (Article I, §§16209, 16209.1-16209.6) by OAL pursuant to Government Code §11349.7(j).	
Register 86, No. 07	Filed 2-11-86; effective 30 days thereafter	Renumbering and amending of former sections to current sections: §§16000-16006 and 16008-16019 to §16000; §16100 to §16002; §16101 to §16203; §§16102-16105 to §16200; §16106 to §16206; §16107 (a), (b) and (c) to §§16201, 16202 and 16205; §16108 to §16204; §16200 to §16300; §§16007, 16201, 16202, 16204 and 16206 to §16302; §§16207 to §16303; §§16207.2 and 16207.3 to §16304; §16207.5 to §16100; §16207.7 to §16301; §16207.10-16207.14 to §16400; §§16207.15 and 16207.16 to §16401; §16207.17 to §16402; §16207.18 to §16403; §16207.19 to §16500. Repealer of former	§16000: Defines area of determination, awarding body (similar to prior §16006 expanded to include letting a contract or purchase order), bid, certified (similar to prior §16017 with no substantive change), chief of DAS (similar to prior §16002 with no substantive change), chief of DLSE (similar to prior §16002 with no substantive change), chief of DLSR (similar to prior §16002 with no substantive change), date of notice, DAS (similar to prior §16001 with no substantive change), DLSE (similar to prior §16001 with no substantive change), DLSR (similar to prior §16001 with no substantive change), director (no change from prior §16000), duly authorized representative, employer payments (similar to prior §16010 but includes apprentices), general prevailing rate of per diem wages (similar to prior §16012 with non-substantive changes), interested party (similar to prior §16013 expanded to include associations and representatives of awarding bodies), issue date (similar to prior §16014 with non-substantive changes), locality (unlike prior §16009, now cites back to Labor Code §1724), maintenance (similar to prior §16015 but no longer cites to Labor Code, removes "includes but not limited to" language and cites to Public Contract Code

Register No.	Effective Date	History	Effect of Changes
		sections: §§16100.1, 16109, 16203, 16205, 16207.1, 16207.4, 16207.6 and 16207.8. Added sections: §§16001, 16101 and 16102.	§21002 for landscape maintenance), Nearest Labor Market Area (similar to prior §16008 with non-substantive changes), payroll records (similar to prior §16016 with non-substantive changes), person (similar to prior §16003 with non-substantive changes), political subdivision (unlike prior §16005, now cites back to Labor Code §1721), prevailing rate (similar to prior §16011 expanded to include alternative rate, other employer payments and holiday or overtime work), public entity (similar to prior §16018 with no substantive change), public funds, public works (unlike prior §16004, now cites back to Labor Code §§1720, 1720.2, 1720.3, and 1771), sheltered workshop and worker. §16001: States public works subject to the prevailing wage law. §16002: States determinations shall cover workers under Labor Code §§1720, 1720.2, 1720.3, and 1771. §16100: States duties, responsibilities and rights of Department (similar to §§ 16207.5 and 16207.6), awarding bodies (added duties not stated before) and contractors/subcontractors (includes posting requirements similar to prior section §16106). §16101: Cites to Labor Code §§ 1735, 1777.5, 1777.6, and 3077.5 on discrimination. §16102: States interested party may be source of wage data information (similar to prior §16104 which permitted Director to obtain such). §16200: States process by which determination made in collective bargaining agreements (similar to prior §§16103, 16104, and 16105 but added criteria for determination, including factors for consideration, addressed holidays, overtime, wage rates, rates for helpers, and payment in lieu of cash) with regard to federal rates. §16201: States process for making general area determinations (similar to §16107 with non-substantive change). §16202: States process for making special determinations. §16203: Lists components of determinations (similar to prior §§16101 and 16108 but includes apprentices, ability to use formula,

Register No.	Effective Date	History	Effect of Changes
			and supplement to determination upon request; excludes formula for holiday and overtime work). §16204: Determinations to have effective dates (similar to prior §16108 but added indication of modification through use of asterisks). §16205: Procedure to get on mailing list (similar to §16107(c) with non-substantive changes). §16206: Permits correction of errors (identical to prior §16106). §16300: Authorizes representative for Director (similar to prior §16200 with non-substantive change). §16301: Prevailing wage issues shall be referred to Director (similar to prior §16207.7 with non-substantive change). §16302: States parties, timing, manner and form for filing petition to review (similar to prior §§16201, 16202, 16203, 16204 and 16206 with requirement that if petitioner is a bidder then must state parent corporations or associations). §16303: States authority of Director is quasi-legislative. §16304: Hearing procedures (similar to prior §§16207.2 and 16207.3 with non-substantive changes). §16400: States process for requesting payroll records (similar to prior §§16207.10, 16207.11, 16207.12, 16207.13, and 16207.14 with non-substantive changes). §16401: States format for reporting of payroll records (similar to prior §§16207.15 and §16207.16 with non-substantive changes). §16402: States fees allowed for copies of payroll records (similar to prior §16207.17 except added handling fee, monies paid in advance and defines form of payment). §16403: Payroll records requested shall be kept on file by public entity for 6 months and redacted of personal information. Public entity may confirm or deny person's employment but not disclose further identifying information (identical to prior §16207.18). §16500: Severance of invalid code (similar to prior §16207.19 with non-substantive

Register No.	Effective Date	History	Effect of Changes
			changes.)
Register 88, No. 35	Filed 8-24-88	Amended: §16200: Order of Repeal of subsection (a)(3)(E) by OAL pursuant to Government Code section 11340.15.	§16200: States process by which determination made in collective bargaining agreements (removed statement that only federal and state recognized holidays specifically named in the agreement can be part of the determination).
Register 90, No. 14	Filed 4-5-90; effective 4-5-90	§16800-16802: New section filed as an emergency. A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed by 8-3-90.	§16800: Defines substantial interest, fraud, person (similar to existing §16000 with minor changes to include firms, limited partnerships and trusts; also uses including but not limited to language), firm, intent to defraud, deliberately, and respondent. §16801: States duties, rights and responsibilities of parties in investigations and hearings on violations. §16802: States factors to be considered if hearing officer recommends a penalty as a result of hearing on violations.
Register 90, No. 42	Filed 9-4-90	§16800-16802: New section filed as an emergency re-adoption effective 9-4-90. A Certificate of Compliance must be transmitted to OAL by 1-2-91 or emergency language will be repealed on the following day.	No change.
Register 91, No. 12	Repealed 1-3-91	§16800-16802: Repealed emergency regulations §§16800-16802. Added new §§16800-16802.	§16800: States definitions (no change). §16801: States duties, rights and responsibilities of parties in investigations and hearings on violations (similar to prior §16801 but added that mileage and witness fees are set pursuant to Government Code §68093 and clarified that debarment records are available to the public) . §16802: States factors to be considered if hearing officer recommends a penalty as a result of hearing on violations (no change).
Register 92, No. 13	Filed 2-20-92; effective 3-23-92 Filed 2-20-92; effective 3-23-92	Amended: §16000: Various amendments. §16001: Subsection (a) and Note and adopted subsections (a) (1) – (3) and (e) and relettering	§16000: States definitions (added coverage; days; effective date; expiration date; helper; interim determination; LCP; mistake, inadvertence or neglect; predetermined changes; service upon a contractor or subcontractor; serve upon the labor commissioner; wage survey; willful and expanded date of notice to include publishing in a legally sufficient manner)

Register No.	Effective Date	History	Effect of Changes
	Filed 2-20-92; effective 3-23-92 Filed 2-20-92; effective 3-23-92 Filed 2-20-92; effective 3-23-92 Filed 2-20-92; effective 3-23-92 Filed 2-20-92; effective 3-23-92 Filed 2-20-92; effective 3-23-92 Filed 2-20-92; effective 3-23-92	subsection (e) and (f). Added §§16002.5, 16003 and 16425-16439. §16100: Subsection (b)(2)(B). §16200: Subsections (a)(1), (a)(3) and (b). §16204: Subsections (a)(3) and (b). §16205 §16302: Amended subsection (a). §16425-16435, §16435.5, §16436-16439, §16500: New section filed.	§16001: States public works subject to the prevailing wage law (added process by which interested party may request determination of coverage and added commercial projects to list). §16002.5: States process for appeal of coverage determinations. §16003: States process to get approval for use of volunteer labor. §16100: States duties, responsibilities and rights of Department (non-substantial changes). §16200: States process by which determination made in collective bargaining agreements (added time limit to filing collective bargaining agreements and such shall be basis for calls for bids, that all wage classifications may be considered in a determination, that contractor may take credit for fringe benefits and other non-substantive changes). §16204: Determinations to have effective dates (added that double asterisk rates include basic, overtime and holiday rates and other non-substantive changes). §16205: Procedure to get on mailing list (non-substantive changes). §16302: States parties, timing, manner and form for filing petition to review (non-substantive change). §16425: States dates for enforcement of awarding bodies' labor compliance programs. §16426: States process for and factors to be considered in initial approval of labor compliance program. §16427: States process for final approval of labor compliance program. §16428: States process to revoke final approval of labor compliance program. §16429: States content and method for notice of an initial or final approval. §16430: Lists components of labor compliance program including pre-job conference. §16431: States awarding body shall submit annual reports to Director and lists components. §16432: States audits may be conducted upon request of awarding body and shall be

Register No.	Effective Date	History	Effect of Changes
			conducted upon request of labor commissioner and lists audit parameters. Includes appendix B: audit record form. §16433: States an exemption for awarding bodies with an approved labor compliance program and under certain monetary limits. §16434: States awarding body shall have duty of enforcement of Labor Code, div. 2, part 7, chapter 1. §16435: Defines withhold, contracts, delinquent payroll records, and inadequate payroll records. §16435.5: Defines withhold (cites to §16435), contracts (cites to §16435), and amount equal to the underpayment. §16436: Defines forfeitures, and failing to pay the correct prevailing wages. §16437: States process for and content of request for determination of forfeiture. Includes appendix C: notice of deadlines. §16438: States how penalties and forfeitures are deposited after issues resolved. §16439: States process and notice for appeal of labor compliance program enforcement action. §16500: Severance of invalid code (limits language to regulations in group 3 and group 4.)
Register 96, No. 52	Filed 12-27-96; effective 1-26-97	Amended: §16000: . . . §16001: Amendment of subsection (b) and (d) §16200: Repealer of subsection (a)(3)(B), subsection relettering, and amendment of newly designated subsections (a)(3)(B), (a)(3)(D), and (a)(3)(F)(3). Amendment of subsection (b). §16204: Subsection (a)(3), repealer and new subsection (b).	§16000: States definitions (repealed "predetermined changes"; amended "prevailing rate" to create a different method to determine rate for other payments than method used to determine basic hourly rate.) §16001: States public works subject to the prevailing wage law (added federal law limitation for federally funded or assisted projects and residential projects). §16200: States process by which determination made in collective bargaining agreements (added that interested parties may request new determinations upon contract change and content of request and other non-substantive changes). §16204: Determinations to have effective dates (added that new determinations are not applicable to contract if published bid unless determination pursuant to Labor Code §1773.4, deleted use of predetermined changes and clarified that no predetermined

Register No.	Effective Date	History	Effect of Changes
			changes can be used).
Register 99, No. 08	Filed 1-27-97; effective 1-27-97 Filed 2-19-99 Filed 2-19-99 Filed 2-19-99 Filed 2-16-99, effective 2-16-99 Filed 2-16-99; effective 2-16-99	Pursuant to Sacramento Superior Court Order Issued 6-4-97 in Case 97CS00471 - amendments invalidated and prior regulations reinstated. §16000: Restore definition of "predetermined changes" and repeal amendments to definition of "prevailing rate". §16001: Repeal amendments to subsections (b) and (d) §16200: Repeal amendments to definitions of "prevailing rate." §16204: Repeal 12-27-96 amendments to section. §16410-16414: New article 7 (§§16410-16414) filed as emergency regulations. Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language repealed by operation of law on following day.	§16000: States definitions (reverts back to prior version). §16001: States public works subject to the prevailing wage law (reverts back to prior version). §16200: States process by which determination made in collective bargaining agreements (reverts back to prior version). §16204: Determinations to have effective dates (reverts back to prior version). §16410: Defines affected subcontractor. §16411: States notice provisions to contractors and affected subcontractors for decision to withhold, retain or forfeit monies from payments due. §16412: States after notice, awarding body mat withhold and such is subject to hearing and suit. §16413: States process to request a hearing on withholding. §16414: States parameters of hearing.
Register 99, No. 25	Refiled 6-14-99; effective 6-14-99	§16410: New article 7 (§§16410-16414) refiled as emergency regulations. Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language repealed by operation of law on the following day. §§16411-16414: New section refiled. Certificate of Compliance must be transmitted to OAL by 10-	§16410: Defines affected subcontractor (no change). §16411: States notice provisions to contractors and affected subcontractors for decision to withhold, retain or forfeit monies from payments due (no change). §16412: States after notice, awarding body mat withhold and such is subject to hearing and suit (no change). §16413: States process to request a hearing on withholding (no change). §16414: States parameters of hearing (no change).

Register No.	Effective Date	History	Effect of Changes
		12-99 or emergency language repealed by operation of law on the following day.	
Register 99, No. 41	Refiled 10-4-99; effective 10-4-99	§16410: New article 7 (§§16410-16414) refiled as emergency regulations. Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language repealed by operation of law on the following day. §§16411-16412: New section refiled. Certificate of Compliance must be transmitted to OAL by 2-1-00 or emergency language repealed by operation of law on the following day.	§16410: Defines affected subcontractor (no change). §16411: States notice provisions to contractors and affected subcontractors for decision to withhold, retain or forfeit monies from payments due (no change). §16412: States after notice, awarding body mat withhold and such is subject to hearing and suit (no change). §16413: States process to request a hearing on withholding (no change). §16414: States parameters of hearing (no change).
Register 00, No. 03	Refiled 1-20-00; effective 2-2-00	§16410: New article 7 (§§16410-16414) refiled as emergency regulations. Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language repealed by operation of law on the following day. §16411: New section refiled. Certificate of Compliance must be transmitted to OAL by 6-1-00 or emergency language repealed by operation of law on the following day. §§16412-16414: New section refiled. Certificate of Compliance must be transmitted to OAL by 6-1-00 or emergency language repealed by operation of law on the following day.	§16410: Defines affected subcontractor (no change). §16411: States notice provisions to contractors and affected subcontractors for decision to withhold, retain or forfeit monies from payments due (no change). §16412: States after notice, awarding body mat withhold and such is subject to hearing and suit (no change). §16413: States process to request a hearing on withholding (no change). §16414: States parameters of hearing (no change).
Register 00, No. 18	Transmitted order 3-29-00; filed 5-	§§16410-16414: Certificate of Compliance	

Register No.	Effective Date	History	Effect of Changes
	4-00	as to 1-20-00 order transmitted to OAL.	

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

EXHIBIT J

October 11, 2007

Mr. Glen Everroad
Revenue Manager
City of Newport Beach
3300 Newport Blvd.
P. O. Box 1768
Newport Beach, CA 92659-1768

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Draft Staff Analysis and Hearing Date
Prevailing Wages, 03-TC-13
Labor Code Sections 1720 and Title 8, California Code of Regulations, Sections1600, et al;
Statutes 1976, Chapter 1084, et al.
City of Newport Beach, Claimant

Dear Mr. Everroad:

The draft staff analysis of this test claim is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by Thursday, **November 1, 2007**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing on **Thursday, December 6, 2007**, at 9:30 a.m. in Room 126, State Capitol, Sacramento, CA. The final staff analysis will be issued on or about November 21, 2007. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Deborah Borzelleri at (916) 323-4230 with any questions regarding the above.

Sincerely,

PAULA HIGASHI
Executive Director

Enclosures

ITEM ____

TEST CLAIM
DRAFT STAFF ANALYSIS

Labor Code
Sections 1720, 1720.3, 1720.4, 1726, 1727, 1735, 1742, 1770, 1771, 1771.5, 1771.6, 1773.5

Statutes 1976, Ch. 1084 (SB 2010)
Statutes 1976, Ch. 1174 (AB 3365)
Statutes 1980, Ch. 992 (AB 3165)
Statutes 1983, Ch. 142 (AB 1390)
Statutes 1983, Ch. 143 (AB 1949)
Statutes 1989, Ch. 278 (AB 2483)
Statutes 1989, Ch. 1224 (AB 114)
Statutes 1992, Ch. 913 (AB 1077)
Statutes 1992, Ch. 1342 (SB 222)
Statutes 1999, Ch. 83 (SB 966)
Statutes 1999, Ch. 220 (AB 302)
Statutes 2000, Ch. 881 (SB 1999)
Statutes 2000, Ch. 954 (AB 1646)
Statutes 2001, Ch. 938 (SB 975)
Statutes 2002, Ch. 1048 (SB 972)

Title 8, California Code of Regulations,
Sections 16000-16802
(Register 56, No. 8; Register 72, No. 13; Register 72, No. 23; Register 77, No. 02; Register 78, No. 06; Register 79, No. 19; Register 80, No. 06; Register 82, No. 51; Register 86, No. 07; Register 88, No. 35; Register 90, No. 14; Register 90, No. 42; Register 91, No. 12; Register 92, No. 13; Register 96, No. 52; Register 99, No. 08; Register 99, No. 25; Register 99, No. 41; Register 00, No. 03; Register 00, No. 18)

Prevailing Wages

03-TC-13

City of Newport Beach, Claimant

EXECUTIVE SUMMARY

This test claim addresses changes to the California Prevailing Wage Law (CPWL). The CPWL is a comprehensive statutory scheme that requires prevailing wages in the local area to be paid to construction workers on public works projects exceeding $1,000, when such work is performed under contract by private contractors, and *not for work carried out by a public agency with its own forces.*

The Test Claim Statutes and Executive Orders Do Not Impose a Reimbursable State-Mandated Program Within the Meaning of Article XIII B, Section 6 of the California Constitution

The provisions of the CPWL are only applicable when a local agency contracts with a private entity to carry out a public works project. The test claim statutes and executive orders modified several provisions of the CPWL, and local agencies that contract out for their public works projects are affected by these changes. However, the cases have consistently held that when a local agency makes an underlying discretionary decision that triggers mandated costs, no state mandate is imposed. Here, a local agency's decision to contract with a private entity to carry out a public works project triggers the CPWL requirements. However, there is no evidence in the record or in law that a decision to contract out for public works is either legally or practically compelled. Moreover, local agencies have other options to carry out such projects, such as using their own employees, hiring additional employees for the project, or contracting with another public entity, none of which triggers the requirements of the CPWL. Therefore, the test claim statutes and executive orders do not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Conclusion

Staff finds that the state has not ordered or commanded local agencies to engage in an activity or task, since the provisions of the CPWL are only applicable when a local agency makes the initial discretionary decision to contract with a private entity to undertake a public works project. There is no evidence in the record or in law to show that a local agency is required to carry out such public works projects by *contracting with a private entity*. Staff therefore finds that the test claim statutes and executive orders do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Recommendation

Staff recommends the Commission adopt this analysis to deny this test claim.

STAFF ANALYSIS

Claimant

City of Newport Beach

Chronology

09/26/03	The City of Newport Beach filed test claim with the Commission
10/16/03	The Department of Industrial Relations requested a 90-day extension to file comments on the test claim, to February 2, 2004
10/22/03	Commission staff approved 90-day extension
02/02/04	The Department of Finance filed comments on the test claim with the Commission
03/03/04	The Department of Industrial Relations filed comments on the test claim with the Commission
07/11/07	Commission staff requested additional information regarding claimed regulations, due on August 1, 2007
07/23/07	The Department of Industrial Relations requested postponement of the hearing on the test claim to January 2008
07/26/07	Commission staff denied the request to postpone the hearing on the test claim
10/05/07	The City of Newport Beach filed additional information regarding claimed regulations
10/11/07	Commission staff issued draft staff analysis

Background

This test claim addresses changes to the California Prevailing Wage Law (CPWL),[1] which is "a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds."[2]

The CPWL requires prevailing wages in the local area to be paid to construction workers on public works projects exceeding $1,000, *when such work is performed under contract by private contractors, and not for work carried out by a public agency with its own forces.*[3] The agency or authority awarding the private contract for public work is known as the "awarding body."[4]

The overall purpose of the CPWL is to benefit and protect employees on public works projects.[5] Its specific goals are to: 1) protect employees from substandard wages that might be paid if

---

[1] Labor Code sections 1720 et seq.

[2] *Road Sprinkler Fitters, Local Union 669 v. G & G Fire Sprinkler, Inc.* (2002) 102 Cal.App.4th 765, 776.

[3] Labor Code section 1771.

[4] Labor Code section 1720.

[5] *Lusardi Construction Co. v. Aubry* (1992) 1 Cal 4th 976, 987.

contractors could recruit from cheap-labor areas; 2) permit union contractors to compete with nonunion contractors; 3) benefit the public through the superior efficiency of well-paid employees; and 4) compensate nonpublic employees with higher wages for the absence of job security and benefits enjoyed by public employees.[6]

The CPWL does not cover federal projects. Those projects are addressed in the federal Davis-Bacon Act (40 USC § 276a(a)), which was enacted for a similar purpose, i.e., to protect local wage standards by preventing federal contractors from basing their bids on wages lower than those prevailing in the area.[7]

Public Works Defined

The Labor Code generally defines "public works" as construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds,[8] and includes: 1) design and preconstruction work;[9] 2) work done for irrigation, utility, reclamation and improvement districts;[10] 3) street, sewer, or other improvement work for public agencies;[11] 4) laying of carpet;[12] 5) certain public transportation demonstration projects;[13] and 6) hauling of refuse from a public works site to an outside disposal location.[14]

The Labor Code also defines "paid for in whole or in part out of public funds" as payment of funds directly to or on behalf of a public works contractor, subcontractor or developer,[15] including various other types of payments,[16] and provides several types of projects that are excluded from that definition.[17]

---

[6] *Ibid.*

[7] *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 Cal.App.4th 873, 882-883.

[8] Labor Code section 1720, subdivision (a)(1).

[9] *Ibid.*

[10] Labor Code section 1720, subdivision (a)(2).

[11] Labor Code section 1720, subdivision (a)(3).

[12] Labor Code section 1720, subdivisions (a)(4) and (a)(5).

[13] Labor Code section 1720, subdivision (a)(6).

[14] Labor Code section 1720.3.

[15] Labor Code section 1720, subdivision (b)(1).

[16] Labor Code section 1720, subdivisions (b)(2) through (b)(6).

[17] Labor Code section 1720, subdivision (c).

Prevailing Wage Rates

Prevailing wage rates are set by the Director of the Department of Industrial Relations (DIR),[18] in accordance with standards set forth including ascertaining and considering the applicable local wage rates established by collective bargaining agreements and rates that may have been predetermined for federal public works.[19] The awarding body for any contract for public works is required to specify in the call for bids, the bid specifications and the contract itself, what the prevailing wage rate is for each craft, classification or type of worker needed to execute the contract.[20] In lieu of specifying the wage rates in the call for bids, bid specifications and the contract itself, the awarding body may include a statement in those documents that copies of the prevailing wage rates are on file at its principal office, which shall be made available to any interested party on request.[21] The awarding body is required to post at each job site a copy of the determination by the DIR Director of the prevailing wage rates.[22]

Prospective bidders, representatives of any craft classification or type of worker involved, or the awarding body may challenge the declared prevailing wage rates with DIR within 20 days after commencement of advertising of the bids.[23] The Director of DIR begins an investigation and within 20 days, or longer if agreed upon by all the parties, makes a determination and transmits it in writing to the awarding body and the interested parties, which delays the closing date for submitting bids or starting of work until five days after the determination.[24] The Director's determination is final, and shall be considered the determination of the awarding body.[25]

Payroll Records

Contractors and subcontractors subject to the CPWL are required to keep accurate payroll records showing name, address, social security number, work classification, straight time and overtime hours worked each day and week and actual wages paid to each worker in connection with the public work,[26] and provide certified copies or make such records available for inspection, upon request of the employee, the awarding body, Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards.[27] Requests by the public are required to be made through the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement,[28] and shall be redacted to prevent disclosure of an

---

[18] Labor Code section 1770.

[19] Labor Code section 1773.

[20] Labor Code section 1773.2.

[21] *Ibid.*

[22] *Ibid.*

[23] Labor Code section 1773.4.

[24] *Ibid.*

[25] *Ibid.*

[26] Labor Code section 1776, subdivision (a).

[27] Labor Code section 1776, subdivision (b).

[28] Labor Code section 1776, subdivision (b)(3).

individual's name, address and social security number.[29] The requesting party is required to reimburse the costs of preparing the records by the contractor, subcontractors, and the entity through which the request was made.[30] The awarding body is required to insert stipulations in the contract to effectuate these provisions.[31]

Discrimination on Public Works Employment Prohibited

Labor Code section 1735 prohibits contractors from discriminating on public works employment for particular categories of persons, and every contractor violating the section is subject to all the penalties imposed for a violation of the CPWL.

Enforcement of CPWL

The awarding body is required to "take cognizance" of violations of the CPWL committed in the course of the public works contract, and shall promptly report any suspected violations to the Labor Commissioner.[32]

The Labor Commissioner is charged with enforcing the CPWL.[33] If the Labor Commissioner determines after an investigation that there has been a violation of the CPWL, the Labor Commissioner issues a civil wage and penalty assessment to the contractor or subcontractor or both.[34] Prior to July 1, 2001, the only way to challenge such an assessment was in court. On and after July 1, 2001, contractors or subcontractors may obtain review of a civil wage and penalty assessment through an informal settlement meeting with the Labor Commissioner,[35] or via an administrative hearing.[36] Until January 1, 2009, hearings are conducted before the DIR Director with an impartial hearing officer; thereafter the hearing will be conducted by an administrative law judge.[37] An affected contractor or subcontractor may appeal the administrative decision within 45 days of service of the decision by filing a petition for writ of mandate under Code of Civil Procedure section 1094.5.[38] This process provides the exclusive remedy for review of a civil wage and penalty assessment by the Labor Commissioner.[39]

When the Labor Commissioner issues a civil wage and penalty assessment, the awarding body is required to withhold and retain such moneys from contractor payments sufficient to satisfy the

---

[29] Labor Code section 1776, subdivision (e).

[30] Labor Code section 1776, subdivision (b)(3).

[31] Labor Code section 1776, subdivision (h).

[32] Labor Code section 1726.

[33] Labor Code section 1741.

[34] *Ibid.*

[35] Labor Code section 1742.1, subdivision (b).

[36] Labor Code section 1742, subdivisions (a) and (b).

[37] Labor Code section 1742, as amended by Statutes 2004, chapter 685.

[38] Labor Code section 1742, subdivision (c).

[39] Labor Code section 1742, subdivision (g).

assessment.[40] The amounts withheld cannot be disbursed until receipt of a final order that is no longer subject to judicial review.[41] The awarding body that has withheld funds in response to a civil wage and penalty assessment, upon receipt of the final order, shall remit withheld funds to the Labor Commissioner.[42]

Labor Compliance Program

The awarding body can avoid paying prevailing wages for public works projects of $25,000 or less when the project is for construction, and $15,000 or less when the project is for alteration, demolition, repair or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program (LCP) for all of its public works projects.[43] As part of its duties as an LCP, the awarding body is required to do the following: 1) place appropriate language concerning CPWL in all bid invitations and public works contracts; 2) conduct a prejob conference with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract; 3) review and audit payroll records (that the contractor is required to keep) to verify compliance with CPWL; 4) withhold contract payments when payroll records are delinquent or inadequate; and 5) withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.[44]

If the awarding body enforces the CPWL as an LCP, the awarding body is entitled to keep any penalties assessed. Before taking any action, the awarding body is required to provide notice of the withholding of any contract payments to the contractor and any subcontractor.[45] The same process for review of a civil wage and penalty assessment made by the Labor Commissioner, as set forth in Labor Code sections 1742 and 1742.1, is invoked.[46] Any amount recovered from the contractor shall first satisfy the wage claim, before being applied to penalties, and if insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.[47] Wages for workers who cannot be located are placed in the Industrial Relations Unpaid Wage Fund and held in trust.[48] Penalties of not more than $50 per day for each worker paid less than the prevailing wage rates[49] are paid into the general fund of the awarding body that enforced the CPWL.[50]

---

[40] Labor Code section 1727, subdivision (a).

[41] Labor Code section 1727, subdivision (b).

[42] Labor Code section 1742, subdivision (f).

[43] Labor Code section 1771.5, subdivision (a).

[44] Labor Code section 1771.5, subdivision (b).

[45] Labor Code section 1771.6, subdivision (a).

[46] Labor Code section 1771.6, subdivisions (b) and (c).

[47] Labor Code section 1771.6, subdivision (d).

[48] Labor Code section 1771.6, subdivision (e).

[49] Labor Code section 1775.

[50] Labor Code section 1771.6, subdivision (e).

Awarding bodies that choose to use funds derived from the Kindergarten-University Public Education Facilities Bond Acts of 2002[51] or 2004[52] for public works projects, or awarding bodies for any contract for a public works project financed in any part with funds from the Water Security, Clean Drinking Water, Coastal Beach Protection Act of 2002,[53] are required to adopt and enforce an LCP or contract with a third party to adopt and enforce an LCP.[54]

Employment of Apprentices on Public Works Projects

Properly registered apprentices are allowed to work on public works projects and must be paid prevailing wages for apprentices in the trade.[55] Apprenticeship standards are established by the DIR Division of Apprenticeship Standards,[56] and ratios of apprentices to journey level workers in a particular craft or trade on the public work are established by the particular apprenticeship program.[57] Contractors must meet various requirements with regard to employing apprentices, and the awarding body is required to include stipulations to that effect in the contract.[58]

Test Claim Statutes and Executive Orders

The test claim statutes encompass changes to the CPWL in the Labor Code, starting in 1976, wherein new types of projects have been added to the definition of public works and certain new activities are imposed on awarding bodies. The relevant provisions of these statutes are summarized below.

Statutes 1976, Chapter 1084: Added Labor Code section 1720.3 which makes hauling refuse from a public works site for state contracts (including California State Universities and Colleges and University of California) a public works project for purposes of CPWL. This statute did not affect local agencies.

Statutes 1976, Chapter 1174: Amended Labor Code section 1735 to prohibit discrimination on public works employment for particular categories of persons, and every contractor violating the section is subject to all the penalties imposed for violations of the chapter.

Statutes 1980, Chapter 142: Amended Labor Code section 1735 to modify the categories and names for categories of those persons for whom discrimination is prohibited.

Statutes 1983, Chapter 142: As statutory cleanup, amended Labor Code section 1720.3 to update California State Universities and Colleges to California State University. This statute did not affect local agencies.

---

[51] Approved by the voters at the November 5, 2002 statewide general election.

[52] Approved by the voters at the March 2004 statewide direct primary election.

[53] Approved by the voters at the November 5, 2002 statewide general election.

[54] Labor Code sections 1771.7 and 1771.8.

[55] Labor Code section 1777.5, subdivisions (a) and (b).

[56] Labor Code section 1777.5, subdivision (c).

[57] Labor Code section 1777.5, subdivision (g).

[58] Labor Code section 1777.5, subdivision (n).

Statutes 1983, Chapter 143: This bill is an alternate version of Chapter 142, and the language for Labor Code section 1720.3 is identical.

Statutes 1989, Chapter 278: Amended Labor Code section 1720 to add public transportation demonstration projects authorized pursuant to Streets and Highways Code section 143 to the definition of public works. The statute thus added a new type of public works project that became subject to the CPWL.

Statutes 1989, Chapter 1224: Added Labor Code sections 1720.4, 1771.5 and 1771.6; amended Labor Code section 1773.5.

New *Labor Code section 1720.4* excluded from the CPWL public works performed entirely by volunteer labor for private non-profit community facilities upon approval by the Director of DIR.

New *Labor Code sections 1771.5 and 1771.6* established the ability of an awarding body to elect to initiate and enforce a Labor Compliance Program (LCP). In exchange, payment of prevailing wages is not required for any public works project of $25,000 or less when the project is for construction, or for any public works project of $15,000 or less when the project is for alteration, demolition, repair or maintenance work. An awarding body that establishes an LCP is also allowed to keep any fines or penalties assessed when it takes enforcement action. As part of its duties as an LCP, the awarding body is required to do the following:
1) place appropriate language concerning CPWL in all bid invitations and public works contracts; 2) conduct a prejob conference with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract; 3) review and audit payroll records (that the contractor is required to keep) to verify compliance with CPWL; 4) withhold contract payments when payroll records are delinquent or inadequate; and 5) withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

Labor Code section 1773.5, which previously gave the Director of DIR authority to establish rules and regulations, was amended to add "including, but not limited to, the responsibilities and duties of awarding bodies under this chapter."

Statutes 1992, Chapter 913: Amended Labor Code section 1735 to modify the categories of individuals for whom discrimination is prohibited. The statute affected many state programs; the bill's stated legislative intent was to strengthen California law in areas where it is weaker than the federal Americans with Disabilities Act ("ADA") and retain California law when it provides more protection than the ADA.

Statutes 1992, Chapter 1342: Amended Labor Code section 1727 to change the word "amounts" to "wages and penalties," and to change the name "Division of Labor Law Enforcement" to "Division of Labor Standards Enforcement."

Statutes 1999, Chapter 83: As code maintenance, no relevant changes were made.

Statutes 1999, Chapter 220: Amended Labor Code section 1720.3 to add the requirement to pay prevailing wages on public works projects for the removal of refuse from the public works construction site, which was previously only applicable to state agencies. The statute added a new category of public works projects subject to the CPWL for local agencies.

Statutes 1999, Chapter 881: Amended Labor Code section 1720 to include design and preconstruction, including inspection and land surveying, within the definition of public works. The Senate Rules Committee Analysis[59] stated that the bill codified current DIR practice and regulation by including construction inspectors and land surveyors among those workers deemed to be employed upon public works and by insuring that workers entitled to prevailing wage during the construction phase of a public works project will get prevailing wage on the design and pre-construction phases of a project.

On June 9, 2000, the DIR issued a decision (Public Works Case No. 99-046) finding that construction inspectors hired to do inspection for compliance with applicable building codes and other standards for a public works project were deemed to be employed upon public works and therefore entitled to prevailing wage. This DIR decision was the subject of a lawsuit, *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, which held that even though the DIR had interpreted preexisting statute to include the preconstruction activities as public works and argued that the new statute merely clarified existing law, the Supreme Court found the change in the statute operated prospectively only. Therefore, pursuant to the Supreme Court's interpretation, this statute added a new category of public works projects subject to the CPWL.

Statutes 2000, Chapter 954: Amended Labor Code sections 1726 and 1727, and added section 1742.

In *Labor Code section 1726* a requirement was added for the awarding body (which was already required to "take cognizance" of violations) to promptly report suspected violations to the Labor Commissioner; if the awarding body determines as a result of its *own* investigation, i.e., if it has an LCP, that there has been a violation and withholds its own contract payments, the LCP procedures in section 1771.6 shall be followed.

Labor Code section 1727 was changed to state that if the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a *subcontractor's* violations, the *contractor* is required to withhold money upon request of the Labor Commissioner and transfer that money to the awarding body. In either case, the awarding body is limited to disbursing such withheld assessments until after receipt of a final order that is no longer subject to judicial review.

Pre-existing law allowed for challenges to wage and penalty assessments in court only; new *Labor Code section 1742* provides for an administrative process. Specifically, the new section provides that contractors or subcontractors may obtain review of a civil wage and penalty assessment by the Labor Commissioner, and establishes procedures and additional appeal provisions. Based on this statute pled, the hearing is conducted before the DIR Director with an

---

[59] Senate Rules Committee, Office of Senate Floor Analyses, SB 1999, August 29, 2000, page 2.

impartial hearing officer until January 1, 2005, thereafter the hearing is conducted by an administrative law judge. This provision was amended in 2004 to extend the first scenario until January 1, 2007, and again in 2007 to extend the first scenario to January 1, 2009. Subdivision (f) provides that the awarding body that has withheld funds in response to a civil wage and penalty assessment, upon receipt of the final order, shall remit withheld funds to the Labor Commissioner. Subdivision (g) provides that the section is the exclusive remedy for review of a civil wage and penalty assessment by the Labor Commissioner or the awarding body pursuant to section 1771.5.

The bill's declared legislative intent is to provide contractors and subcontractors with prompt administrative hearing if they disagree with alleged violations of the CPWL. The Senate Rules Committee analysis stated that its supporters intended the bill to cure a defect in current law which a federal court found to be an unconstitutional violation of a subcontractor's due process rights (*G & G Fire Sprinklers v. Bradshaw* (1998) 156 Fed.3d 893 (now vacated)).[60] Even though the Labor Commissioner, as a result of that case, already adopted regulations to allow for such an administrative hearing, the sponsor still wanted to go forward.[61] The bill provides that the exclusive remedy for challenging an administrative decision is a Code of Civil Procedure section 1094.5 writ. The bill was intended to streamline the procedures for review of a decision to withhold funds, reduce existing layers of litigation by providing for an administrative hearing and mandamus action but no right to a de novo trial in court, thus providing a more streamlined and efficient process while protecting due process rights of all parties.

Statutes 2001, Chapter 938: Amended Labor Code section 1720 to add "installation" to the definition of public works, to add a definition for "paid for in whole or in part out of public funds" and provided for exemptions. The bill was intended to close a loophole that exempted from CPWL projects financed through Industrial Development Bonds issued by the California Infrastructure and Economic Development Bank (I-Bank, a state agency).[62] It also establishes a definition for "public funds" that conforms to several precedential coverage decisions made by DIR, and seeks to remove ambiguity regarding the definition of public subsidy of development projects.[63]

Executive Orders: California Code of Regulations, Title 8, sections 16000 through 16802, as pled in the attached chart, implement and make specific the statutory provisions cited above.

Claimant's Position

The claimant states that the test claim statutes and executive orders impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Claimant asserts that the following activities and costs are reimbursable:

---

[60] Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis, AB 1646, September 19, 2000, page 5.

[61] *Id.* page 6.

[62] Senate Rules Committee, Office of Senate Floor Analyses, SB 975, September 5, 2001, page 4.

[63] *Ibid.*

1. Increased labor and administrative costs to pay prevailing wage rates to all workers on a project, if the project cost is greater than $1,000, for new types of projects now classified as public works. (Lab. Code, §§ 1771 and 1774, and Cal. Code Regs., tit. 8, § 16000.)
2. Post at each job site prevailing wage rates for the project. (Lab. Code, § 1773.2.)
3. Maintain and make available for inspection certified payroll records containing detailed information for each worker. (Lab. Code, § 1776 and Cal. Code Regs., tit. 8, § 16400, subdivision (e).)
4. Comply with statutory apprenticeship requirements. (Lab. Code, § 1777.5.)
5. Training of public agency's administrative and legal staff.
6. Increased cost for disposal of refuse at a public works site. (Lab. Code, § 1720.3.)
7. Increased cost of dealing with certain nonprofit volunteer projects. (Lab. Code, § 1720.4.)
8. Notify Labor Commissioner of any suspected violations of the CPWL. (Lab. Code, § 1726.)
9. Tracking more carefully the amounts under contract and progress payments, increased administrative costs and expenses, and training, to address changes in procedures for withholding moneys from contract payments for violations. (Lab. Code, § 1727.)
10. Additional administrative and contract monitoring efforts to address changes in anti-discrimination provisions of the CPWL. (Lab. Code, § 1735.)
11. Additional administrative expense in tracking contracts and progress payments for purposes of civil wage and penalty assessments, serving notice of those assessments, withholding of contract payments, and training on contract and payment management for staff of awarding body. (Lab. Code, § 1742.)
12. Establish a Labor Compliance Program (LCP) with the following requirements:
    - Include appropriate language in all bid invitations and contracts for public works concerning the CPWL.
    - Conduct a prejob conference with the contractor and all subcontractors to discuss federal and state labor law requirements applicable to the contract.
    - All contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.
    - Review and, if appropriate, audit payroll records to verify compliance with the CPWL.
    - Withhold contract payments when payroll records are delinquent or inadequate.
    - Withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

    (Lab. Code, § 1771.5.)

13. Enforce CPWL by withholding penalties or forfeitures from contract payments. (Lab. Code, § 1771.6.)

14. As a result of the Director of Industrial Relations' new authority to establish rules and regulations for the purpose of carrying out the chapter, "*including, but not limited to, the responsibilities and duties of awarding bodies under this chapter*,"[64] the following new responsibilities imposed by regulation:

    - File with DIR and/or receive service of request to DIR to determine whether or not a particular work is covered by the CPWL. (Cal. Code Regs., tit. 8, §§ 16000 and 16100.)
    - Appeal DIR determination of coverage, with notice including all factual and legal grounds upon which the determination is sought and whether a hearing is requested. (Cal. Code Regs., tit. 8, § 16002.5.)
    - As responding party for any request for determination or appeal of such determination, submit all documentation and legal arguments pertaining to the issue.
    - If volunteer labor is to be used, serve a written request to use such labor 45 days prior to the commencement of work, setting forth the basis for belief that use of volunteer labor is authorized pursuant to Labor Code sections 1720.4, and name all unions in the locality where the work is to be performed. (Cal. Code Regs., tit. 8, § 16003.)
    - Pursuant to California Code of Regulations, Title 8, section 16100, subdivision (b):
        - Obtain prevailing wage rate from DIR.
        - Specify the appropriate prevailing wage rates in bids and contracts.
        - Ensure that requirement for posting prevailing wage rates is applied to each job.
        - Make request for special determination by the DIR Division of Labor Statistics and Research at least 45 days prior to project bid advertisement date, if the wage for a particular craft, classification, or type of worker is not already available from DIR (See also Cal. Code Regs., tit. 8, § 16202).
        - Notify the Division of Apprenticeship Standards.
        - Notify the prime contractors of the relevant public work requirements, which include:
            - Appropriate number of apprentices.
            - Workers' compensation coverage.
            - Requirement to keep accurate work records.
            - Inspection of payroll records.

[64] Statutes 1989, chapter 1224, added the italicized text; previously, Labor Code section 1773.5 stated: "The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out the prevailing wage provisions of this article."

- Other requirements imposed by law, including a plethora of requirements that are imposed upon local agencies when awarding a contract.

- Pursuant to California Code of Regulations, Title 8, section 16100:
  - Withhold monies.
  - Ensure that public works are not split into smaller projects to evade prevailing wages.
  - Deny the right to bid on public contracts to those who have violated public works laws.
  - Prohibit workers from working more than 8 hours per day or more than 40 hours per week, unless paid not less than time and one half pay.
  - Refrain from taking any portion of the workers' wages or fee.
  - Comply with requirements set forth in Labor Code sections 1776, subdivision (g), 1777.5, 1810, 1813 and 1860.
- When the awarding body believes that the Director of DIR has not adopted appropriate prevailing wage rates for its area or for the classifications in question, file a petition to DIR for the review of the prevailing wage rate determination pursuant to Labor Code section 1773.4 and California Code of Regulations, Title 8, section 16302. Such petition must include:
  - The name, address, telephone number and job title of the person filing the petition and the person verifying the petition, as well as his or her attorney.
  - Whether the petitioning party is the local agency, prospective bidder, or a representative of one or more of the crafts.
  - The nature of the petitioner's business.
  - The name of the awarding body.
  - The date on which the call for bids was first published.
  - The name and location of the newspaper in which the publication was made and a copy thereof.
  - If the petitioner is an awarding body other than a county, city and county, city, township, or regional district, it shall describe the parent or principal organization and the statutory authority for the award of the work.
  - The manner in which the wage determination failed to comply with Labor Code section 1773.
  - The prevailing wage rate that petitioner believes to be accurate.
  - If there are facts relating to a particular employer, the facts must identify the employer by name and address and give the number of workers involved.
  - If the facts relate to rates actually paid on public or private projects in the area, the facts surrounding that payment must be included.

- If the DIR has failed to consider rates, those rates must be alleged in detail.

- Receive service of the petition, if petitioner is not the awarding body. (Lab. Code, § 1773.4.)
- Respond to the petition, if petitioner is not the awarding body.
- If a hearing on the petition is conducted by the Director pursuant to California Code of Regulations, title 8, section 16304, receive service of notice of the hearing, introduce evidence, and cross-examine witnesses.
- Costs of handling a request for detailed payroll records including acknowledging receipt of the request and estimating the costs of providing the records. (Lab. Code, § 1776, Cal. Code Regs., tit. 8, § 16400.)
- If the Labor Commissioner issues a civil wage and penalty assessment as permitted by Labor Code section 1727, receive written notice of the decision and withhold, retain or forfeit the amount stated in the notice. (Lab. Code, § 1727, Cal. Code Regs., tit. 8, §§ 16411 and 16412.)
- If the contractor or subcontractor challenges the Labor Commissioner's decision and a hearing is held, receive a copy of the decision. (Cal. Code Regs., tit. 8, § 16414.)
- To get initial approval of a Labor Compliance Program (LCP), pursuant to California Code of Regulations, title 8, section 16426, provide information to the Director of DIR regarding the following factors:
    - The experience of the awarding body's personnel on public works labor compliance issues.
    - The average number of public works contracts annually administered.
    - Whether the proposed LCP is a joint or cooperative venture among awarding bodies, and how the resources and responsibilities of the proposed LCP compare to the awarding bodies involved.
    - The awarding body's record of taking cognizance of Labor Code violations and of withholding in the preceding five years.
    - The availability of legal support for the proposed LCP.
    - The availability and quality of a manual outlining the responsibilities of an LCP.
    - The methods by which the awarding body will transmit notice to the Labor Commissioner of willful violations.
- To get final approval of LCP, pursuant to California Code of Regulations, title 8, section 16427, provide evidence to the Director of DIR that the awarding body has satisfactorily demonstrated its ability to monitor compliance with the requirements of the Labor Code and the regulations, and has filed timely, complete and accurate reports as required.

- If an interested party requests the Director of DIR to revoke an awarding body's LCP, provide a supplemental report as required by the Director. (Cal. Code Regs., tit. 8, §§ 16428, subdivision (b)(2), and 16431.)
- If LCP is approved, comply with the requirements of California Code of Regulations, title 8, section 16430, including:
    - Specify in the call for bids and the contract or purchase order the appropriate language concerning Labor Code requirements.
    - Conduct a prejob conference with contractors and subcontractors in the bid, at which time federal and state labor law requirements applicable to the contract are discussed, and copies of applicable forms are provided, including 14 points suggested in Appendix A.
    - Create a form, as necessary, meeting the minimum requirements of a certified weekly payroll, or use the DIR "Public Works Payroll Reporting Form."
    - Establish a program for orderly review of payroll records and, if necessary, audit the payroll records.
    - Establish a prescribed routine for withholding penalties, forfeitures and underpayment of wages for violations of the Labor Code.
    - Include a provision in all contracts to which prevailing wage requirements apply a provision that contract payments will not be made if payroll records are delinquent or inadequate.
- If LCP is approved, submit an annual report to the Director of DIR within 60 days after the close of the awarding body's fiscal year, pursuant to California Code of Regulations, title 8, section 16431, to include the following:
    - Number of contracts awarded and their total value.
    - Number, description and total value of contracts which were exempt from prevailing wages.
    - Summary of penalties and forfeitures imposed or withheld from any money due contractors as well as the amount recovered by court action.
    - Summary of wages due to employees resulting from contractors failing to pay prevailing wage rates, the amount withheld from money due the contractors, and the amount recovered through court action.
- If LCP is approved, pursuant to California Code of Regulations, title 8, section 16432 and Appendix B, conduct audits at discretion of awarding body or when ordered to do so by the Labor Commissioner, to consist of the following:
    - A comparison of payroll records to the best available information concerning the hours worked and the classification of employees.
    - Sufficient detail for the Labor Commissioner and the LCP to draw reasonable conclusions as to whether there has been compliance with prevailing wage laws and to ensure accurate computation of underpayment of wages to workers as well as applicable penalties and forfeitures.

- If LCP is approved, enforce the CPWL in a manner consistent with the practice of the DIR Division of Labor Standards Enforcement, pursuant to California Code of Regulations, title 8, section 16434.
- If LCP is approved, and LCP wishes the Labor Commissioner to determine the appropriate amount of a forfeiture, the LCP shall file a request, pursuant to California Code of Regulations, title 8, section 16437, which includes deadlines, evidence of violation, evidence of audit or investigation, evidence that contractor was given opportunity to respond, previous record of contractor in meeting prevailing wage obligations, whether the LCP has been granted initial, extended initial or final approval, and notice procedures.
- If LCP is approved, awarding body takes enforcement action, and contractor appeals such enforcement action to DIR Director, provide to DIR Director within 30 days a full copy of the record of the enforcement proceedings and any further documents, arguments, or authorities it wishes the Director to consider, and, as requested by the Director, a supplemental report on the activities of the LCP. (Cal. Code Regs., tit. 8, § 16439.)
- If the DIR Division of Labor Standards Enforcement investigates violations, the awarding body is required to inform prime contractors of the requirements of Labor Code section 1776 and any other requirements imposed by law in order to assist the Division of Labor Standards Enforcement with its investigation.

With regard to cost estimates for complying with the program, claimant states: "[N]ot only is the cost of each contract increased by 15-30% for the increase in wages, but the administrative cost of monitoring as required by these laws runs many thousands of dollars on an annual basis."

Position of Department of Finance

The Department of Finance states that the claimant did not establish a clear or concise argument that the claimant is mandated to pay prevailing wages for public works projects, since the prevailing wage laws only apply to private contractors bidding for, and working on, public works contracts paid for by local agencies or school districts. Although the definition of what constitutes a public works project has substantially increased by statute since 1975, under existing state law, local agencies and school districts are not limited to private contractors to build, repair or maintain public works projects. Since local agencies are free to use their own employees for projects, and are also allowed to purchase, rather than construct, structures for government purposes mandated under state law, the payment of prevailing wages cannot be considered mandatory for local agencies.

Citing *City of Merced v. State of California* (1984) 153 Cal.App.3d 777 and *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, the Department concludes the courts have held that costs to a local entity resulting from an action undertaken at the option of the local entity are not reimbursable as costs mandated by the state. The Department believes that the provisions of California Code of Regulations, Title 8, sections 16000-16802, last amended January 26, 1997, simply make an optional program available to local agencies, the costs of which are not reimbursable because they are not costs mandated by the state.

The Department further claims that all penalties and enforcement duties imposed for non-compliance with prevailing wage laws cannot be considered state-reimbursable mandates

because article XIII B, section 6 does not apply to the creation of new crimes or costs related to the enforcement of crimes. Federally-mandated labor laws also do not apply to article XIII B, section 6.

Position of Department of Industrial Relations (DIR)

DIR asserts that the claim should be denied because no new state mandate has been created, concluding the following:

> The very decision to perform construction using private contractors and private workers is a voluntary act, and the results that flow from this voluntary act are not subject to subvention. Further, local and state governments share the responsibility to comply with the CPWL with private employers. When viewed as a whole, the inevitable changes over almost 30 years in the CPWL have reduced the burdens on local governments by shifting more responsibility to the state for determining public works, setting prevailing wages, and enforcing the obligation to pay prevailing wages. For this reason, the claim should be denied.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[65] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[66] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[67]

A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[68] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[69]

---

[65] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[66] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 735.

[67] *County of San Diego v. State of California* (*County of San Diego*) (1997) 15 Cal.4th 68, 81.

[68] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[69] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988)

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[70] To determine if the program is new or imposes a higher level of service, the test claim requirements must be compared with the legal requirements in effect immediately before the enactment of the test claim statutes.[71] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[72]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[73]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[74] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[75]

The analysis addresses the following issue:

- Do the test claim statutes and executive orders mandate a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?

Issue 1: Do the test claim statutes and executive orders mandate a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?

For the test claim statutes and executive orders to impose a reimbursable state-mandated program under article XIII B, section 6, the language must order or command a local agency to engage in an activity or task. If the language does not do so, then article XIII B, section 6 is not

---

44 Cal.3d 830, 835-836 (*Lucia Mar*).

[70] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*County of Los Angeles*); *Lucia Mar, supra,* 44 Cal.3d 830, 835).

[71] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[72] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 877.

[73] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[74] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[75] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817 (*City of San Jose*).

triggered. Moreover, where program requirements are only invoked after the local agency has made an *underlying discretionary decision* causing the requirements to apply, or where participation in the *underlying program is voluntary*, courts have held that resulting new requirements do not constitute a reimbursable state mandate.[76]

The plain language of the test claim statutes and executive orders do require certain activities of the awarding body to comply with the CPWL. However, the question here is whether the state has ordered or commanded local agencies to engage in an activity or task, since the provisions of the CPWL are only applicable when a local agency makes the *initial discretionary decision* to contract with a private entity to undertake a public works project.[77] Staff finds that, whether or not a local agency's act to initiate a public works project is discretionary, there is no evidence in the record to show that a local agency is *required* to carry out such public works projects by *contracting with a private entity.* Staff therefore finds that the test claim statutes and executive orders do not mandate a new program or higher level of service within the meaning of article XIII B, section 6.

As noted above, there are two decision points at the local level which engage the CPWL: 1) the local agency undertakes a public works project, and 2) the local agency contracts with a private entity to carry out the project.

Labor Code section 1720 sets forth the types of public works projects that are subject to the CPWL:

- construction, including design and preconstruction phases such as inspection and land surveying;
- alteration;
- demolition;
- installation;
- repair;
- work done for irrigation, utility, reclamation and improvement districts (but not operation of irrigation or drainage system of any irrigation or reclamation district);
- street, sewer or other improvement work;
- laying of carpet;
- public transportation or demonstration projects authorized pursuant to Streets and Highways Code section 143; and
- hauling of refuse from a public works site to outside disposal location.

Thus, the statute covers a broad range of projects. The undertaking of such projects could arise in a myriad of ways, from a local administrative decision to an initiative enacted by the voters. Claimant states on page 11 of the test claim:

> [I]t is critical to keep in mind the fact that not all projects are discretionary to the local government entity. First of all, this law applies to maintenance of all buildings as well as infrastructure. Additionally, it applies to repairs as

---

[76] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783; *Kern High School Dist., supra,* 30 Cal.4th 727, 727.

[77] Labor Code section 1771.

well as replacements. Thus, if a street needs to be fixed, a water main breaks, or a building because it has been used for years is in need of repair lest it become a hazard, these works are all subject to prevailing wages.

There is no evidence in the test claim statutes, executive orders or the record, however, that the *state* has required local agencies to undertake such public works projects. Here, claimant has alleged that there could be negative consequences if the local agency fails to undertake a public works project in certain instances. But any such consequences would be project-specific so it is not possible to find compulsion generally exists for public works projects. For the reasons stated below, such a finding would be moot anyway since the second local decision – to carry out a public works project by *contracting with a private entity* – is not compelled.

First, there is no evidence in the record to demonstrate that the decision to contract with a private entity to carry out the public works project is legally compelled by the plain language of the test claim statutes or executive orders, or any other provision of law.

Absent legal compulsion, the courts have ruled that at times, based on the particular circumstance, "practical" compulsion might be found. The Supreme Court in *Kern High School Dist.* addressed the issue of "practical" compulsion in the context of a school district that had participated in optional funded programs in which new requirements were imposed. In *Kern*, the court determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe ... penalties" such as "double ... taxation" or other "draconian" consequences.[78]

In the case of *San Diego Unified School Dist.*, the test claim statutes required school districts to afford to a student specified hearing procedures whenever an expulsion recommendation was made and before a student could be expelled.[79] The Supreme Court held that hearing costs incurred as a result of statutorily required expulsion recommendations, e.g., where the student allegedly possessed a firearm, constituted a reimbursable state-mandated program.[80] Regarding expulsion recommendations that were discretionary on the part of the district, the court acknowledged the school district's arguments, stating that in the absence of legal compulsion, compulsion *might* nevertheless be found when a school district exercised its discretion in deciding to expel a student for a serious offense to other students or property, in light of the state constitutional requirement to provide safe schools.[81] Ultimately, however, the Supreme Court decided the discretionary expulsion issue on an alternative basis.[82]

There is no evidence in the record to indicate that failure to contract out for a public works project would result in certain and severe penalties such as double taxation or other draconian consequences as set out in the *Kern* case. Nor does the record contain any information to demonstrate that such a decision could create a situation similar to that faced by the *San Diego*

---

[78] *Kern High School Dist., supra,* 30 Cal.4th 727, 754.

[79] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 866.

[80] *Id.* at pages 881-882.

[81] *Id.* at page 887, footnote 22.

[82] *Id.* at page 888.

court, that is, the potential for unsafe schools resulting from failure to expel a student for a serious offense, leaving the district with no reasonable alternative but to expel.

Instead, staff finds that the local decision to contract with a private entity to carry out a public works project is analogous to the situation in *City of Merced*. There, the issue before the California Supreme Court was whether reimbursement was required for new statutory costs imposed on the local agency to pay a property owner for loss of goodwill, when a local agency exercised the power of eminent domain.[83] The court stated:

> "Whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost."[84]

The Supreme Court in *Kern High School District* reaffirmed the *City of Merced* rule in applying it to voluntary education-related funded programs:

> "The truer analogy between [*Merced*] and the present case is this: In *City of Merced*, the city was under no legal compulsion to resort to eminent domain – but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate."[85]

Here, as in *City of Merced*, there is no evidence that a local agency is legally or practically compelled to contract with a private entity to carry out its public works projects. In fact, local agencies have other options to carry out such projects, such as using their own employees, hiring additional employees for the project, or contracting with another public entity, none of which triggers the requirements of the CPWL. When local agencies have such options, the program is *not* state-mandated.[86]

Conclusion

Staff finds that the state has not ordered or commanded local agencies to engage in an activity or task, since the provisions of the CPWL are only applicable when a local agency makes the initial discretionary decision to contract with a private entity to undertake a public works project. There is no evidence in the record or in law to show that a local agency is *required* to carry out such public works projects by *contracting with a private entity*. Staff therefore finds that the test

---

[83] *City of Merced, supra,* (1984) 153 Cal.App.3d 777, 777.

[84] *Id.* at 783.

[85] *Kern High School District, supra,* 30 Cal.4th 727, 743.

[86] *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 818.

claim statutes and executive orders do not mandate a new program or higher level of service within the meaning of article XIII B, section 6.

Recommendation

Staff recommends the Commission adopt this analysis to deny the test claim.

Register No.	Effective Date	History	Effect of Changes
Register 56, No. 8	Filed 4-27-56; effective 30 days thereafter	Added: §§16000-16004, 16100-16101 and 16200-16205 (Group 3)	§§16000-16004: defines person, filing, Nearest Labor Market Area, Prevailing Rate and wages. §16100: In the absence of a daily rate of wages for a given craft, a general prevailing wages shall be ascertained by the body awarding the contract. §16101: Body awarding the contract shall list, identify and separately state the prevailing wages in the call for bids. §16200: Authorizes representative for Department of Industrial Relations on petitions under Labor Code §1773.4. §16201: States manner of filing petitions. §16202: States form of petition. §16203: States components of petitions. §16204: Dismissal for failure to attach calls for bids. §16205: Filing with awarding body.
Register 72, No. 13	Filed 3-24-72; effective upon filing	New Group 4 (§§16209, 16209.1-16209.6) filed as emergency	§16209: Defined alien entitled to lawful residence. §16209.1: Employer shall make inquiry as to citizen or alien of applicant for employment. §16209.2: Shall also inquire of employee. §16209.3: Employee or applicant may be employed upon signed declaration. §16209.4: If alien applicant, shall be requested to show proof of lawful residence. §16209.5: If alien employee, same. §16209.6: Defines adverse effect.
Register 72, No. 23	Filed 6-2-72	Certificate of Compliance filed for §§16209, 16209.1-16209.6	
Register 77, No. 02	Filed 1-3-77; effective upon filing	Repealer of Group 3 (Articles 1-3, §§16000-16004, 16100-16101 and 16200-16205) and new Group 3 (Articles 1-4, §§16000-16013, 16100-16109, 16200-16206 and 16300-16305).	§16000 - 16013: Define director, division, chief, person (similar to prior §16000 but includes awarding bodies and their agents and officers), public works, political subdivision, awarding body, filing (more specific than prior §16001), Nearest Labor Market Area (non-substantive changes to prior §16002), locality, employer payments, prevailing rate (expanded version of prior §16003 includes other employer payments, overtime and holiday work), general prevailing rate of per diem wages, and interested party. §16100: limited determinations of prevailing wage to recognized crafts, classifications or types of workers (See Labor Code §§1720,

Register No.	Effective Date	History	Effect of Changes
			1720.2 and 1720.3. §16101: Lists components of determinations. §16102: Labor Code procedures to be followed in determinations. §16103: Procedures for filing collective bargaining agreements §16104: Permits Director to obtain data from other interested parties in making determinations. §16105: Permits adoption of collective bargaining agreements as prevailing wage; process of adoption. §16106: Permits Director to correct errors in determinations. §16107: Director's issuance of an area determination and process to request such determination by awarding body. §16108: Determinations to have effective dates. §16109: Awarding bodies shall use determined rates when required to publish; may refer to determinations rather than publish. §16200: Authorizes representative for Director (similar to prior §16200 with more specific language and different designee). §16201: States specific parties and timing for filing petition to review. §16202: States manner of filing petition (similar to prior §16201 with non-substantive changes). §16203: States form of petition (similar to prior §16202 with non-substantive changes). §16204: States content of petition (similar to prior §16203 with greater specificity of pleading needed for petitions where prevailing rate in the contract is different from that ascertained by the awarding body.) §16205: Dismissal for failure to attach calls for bids (identical to prior §16204). §16206: Filing with awarding body (identical to prior §16205). §16300: States Director's discretion to act. §16301: Director shall take actions he deems necessary. §16302: Hearing procedures. §16303: Process for issuance of decision. §16304: Hearing to conform to Government Code §11371 *et seq.* - public hearing.

Register No.	Effective Date	History	Effect of Changes
			§16305: Severance of invalid code sections.
Register 78, No. 06	Filed 2-8-78; effective 30 days thereafter	Added: New Group 3; §§16000-16014, 16100-16109, 16200-16207.9.	§16000- 16014: Define director (no change), division (non-substantive change), chief (non substantive change), person (no change), public works (no change), political subdivision (no change), awarding body (no change), filing (no change), Nearest Labor Market Area (no change), locality (no change), employer payments (expanded to make more specific but non-substantive), prevailing rate (added if conflict, labor code prevails), general prevailing rate of per diem wages (no change), interested party (no change) and issue date (new section). §16100: limited determinations of prevailing wage (no change) §16101: Lists components of determinations (added dates and listing of holidays and travel and subsistence payments taken from the collective bargaining agreement). §16102: Director to follow procedures in Labor Code (no change). §16103: Procedures for filing collective bargaining agreements (added copies of non-bona fide bargaining agreements are not deemed filed). §16104: Permits Director to obtain data from other interested parties (no change). §16105: Permits adoption of collective bargaining agreements (no change). §16106: Permits correction of errors (no change). §16107: Director's issuance of an area determination (non-substantive change). §16108: Determinations to have effective dates (added awarding body responsible for use of correct determination). §16109: Awarding bodies shall use determined rates (removed ability to refer to determinations rather than publish and added copies of determination to be on file at body's principal office and copies posted on job site or location readily available to workers). §16200: Authorizes representative for Director (non-substantive change). §16201: States specific parties and timing for filing petition to review (non-substantive change). §16202: States manner of filing petition (no

Register No.	Effective Date	History	Effect of Changes
			change). §16203: States form of petition (removed some technical requirements). §16204: States content of petition (no change). §16205: Dismissal for failure to attach calls for bids (no change). §16206: Filing with awarding body (added additional time limits and other non-substantive changes). §16207: States Director's discretion to act (identical to prior §16300). §16207.1: Director shall take necessary actions (identical to prior §16301). §16207.2: Hearing procedures (similar to prior §16302 but added notice procedures for interested parties and time allocations for those parties to present evidence). §16207.3: Process for issuance of decision (identical to prior §16303). §16207.4: Public hearing (identical to prior §16304). §16207.5: Director shall establish and coordinate administration of prevailing wage law. §16207.6: Director shall issue guidelines. §16207.7: Prevailing wage issues shall be referred to Director. §16207.8: Appeals of determinations referred to Director. §16207.9: Severance of invalid code (identical to prior §16305).
Register 79, No. 19	Filed 5-11-79; effective 30 days thereafter	Added: §16015.	§16015: Defines types of maintenance work that are public works for prevailing wage - Labor Code §1771.
Register 80, No. 06	Filed 2-8-80; effective 30 days thereafter	Added: §§16016-16019, 16207.10-16207.19. Repealed §16207.9.	§16016: Defines payroll records. §16017: Defines certified. §16018: Defines public entity §16019: Defines contractor and subcontractor. §16207.10: States manner for requesting payroll records. §16207.11: States content of request for records under Labor Code §1776. §16207.12: Public entity receiving request shall acknowledge receipt. §16207.13: States content for request for records by public entity to contractor. §16207.14: Inspection of contractor payroll

Register No.	Effective Date	History	Effect of Changes
			records limited to public entities with notice. §16207.15: states format for reporting of payroll records and address to obtain forms. §16207.16: Sets forth certification. §16207.17: States fees allowed for copies of payroll records. §16207.18: Payroll records requested shall be kept on file by public entity for 6 months and redacted of personal information. Public entity may confirm or deny person's employment but not disclose further identifying information. §16207.19: Severance of invalid code (identical to prior §16207.9).
Register 82, No. 51	Filed 12-15-82	Repealer of Group 4 (Article I, §§16209, 16209.1-16209.6) by OAL pursuant to Government Code §11349.7(j).	
Register 86, No. 07	Filed 2-11-86; effective 30 days thereafter	Renumbering and amending of former sections to current sections: §§16000-16006 and 16008-16019 to §16000; §16100 to §16002; §16101 to §16203; §§16102-16105 to §16200; §16106 to §16206; §16107 (a), (b) and (c) to §§16201, 16202 and 16205; §16108 to §16204; §16200 to §16300; §§16007, 16201, 16202, 16204 and 16206 to §16302; §§16207 to §16303; §§16207.2 and 16207.3 to §16304; §16207.5 to §16100; §16207.7 to §16301; §16207.10-16207.14 to §16400; §§16207.15 and 16207.16 to §16401; §16207.17 to §16402; §16207.18 to §16403; §16207.19 to §16500. Repealer of former	§16000: Defines area of determination, awarding body (similar to prior §16006 expanded to include letting a contract or purchase order), bid, certified (similar to prior §16017 with no substantive change), chief of DAS (similar to prior §16002 with no substantive change), chief of DLSE (similar to prior §16002 with no substantive change), chief of DLSR (similar to prior §16002 with no substantive change), date of notice, DAS (similar to prior §16001 with no substantive change), DLSE (similar to prior §16001 with no substantive change), DLSR (similar to prior §16001 with no substantive change), director (no change from prior §16000), duly authorized representative, employer payments (similar to prior §16010 but includes apprentices), general prevailing rate of per diem wages (similar to prior §16012 with non-substantive changes), interested party (similar to prior §16013 expanded to include associations and representatives of awarding bodies), issue date (similar to prior §16014 with non-substantive changes), locality (unlike prior §16009, now cites back to Labor Code §1724), maintenance (similar to prior §16015 but no longer cites to Labor Code, removes "includes but not limited to" language and cites to Public Contract Code

Register No.	Effective Date	History	Effect of Changes
		sections: §§16100.1, 16109, 16203, 16205, 16207.1, 16207.4, 16207.6 and 16207.8. Added sections: §§16001, 16101 and 16102.	§21002 for landscape maintenance), Nearest Labor Market Area (similar to prior §16008 with non-substantive changes), payroll records (similar to prior §16016 with non-substantive changes), person (similar to prior §16003 with non-substantive changes), political subdivision (unlike prior §16005, now cites back to Labor Code §1721), prevailing rate (similar to prior §16011 expanded to include alternative rate, other employer payments and holiday or overtime work), public entity (similar to prior §16018 with no substantive change), public funds, public works (unlike prior §16004, now cites back to Labor Code §§1720, 1720.2, 1720.3, and 1771), sheltered workshop and worker. §16001: States public works subject to the prevailing wage law. §16002: States determinations shall cover workers under Labor Code §§1720, 1720.2, 1720.3, and 1771. §16100: States duties, responsibilities and rights of Department (similar to §§ 16207.5 and 16207.6), awarding bodies (added duties not stated before) and contractors/subcontractors (includes posting requirements similar to prior section §16106). §16101: Cites to Labor Code §§ 1735, 1777.5, 1777.6, and 3077.5 on discrimination. §16102: States interested party may be source of wage data information (similar to prior §16104 which permitted Director to obtain such). §16200: States process by which determination made in collective bargaining agreements (similar to prior §§16103, 16104, and 16105 but added criteria for determination, including factors for consideration, addressed holidays, overtime, wage rates, rates for helpers, and payment in lieu of cash) with regard to federal rates. §16201: States process for making general area determinations (similar to §16107 with non-substantive change). §16202: States process for making special determinations. §16203: Lists components of determinations (similar to prior §§16101 and 16108 but includes apprentices, ability to use formula,

Register No.	Effective Date	History	Effect of Changes
			and supplement to determination upon request; excludes formula for holiday and overtime work). §16204: Determinations to have effective dates (similar to prior §16108 but added indication of modification through use of asterisks). §16205: Procedure to get on mailing list (similar to §16107(c) with non-substantive changes). §16206: Permits correction of errors (identical to prior §16106). §16300: Authorizes representative for Director (similar to prior §16200 with non-substantive change). §16301: Prevailing wage issues shall be referred to Director (similar to prior §16207.7 with non-substantive change). §16302: States parties, timing, manner and form for filing petition to review (similar to prior §§16201, 16202, 16203, 16204 and 16206 with requirement that if petitioner is a bidder then must state parent corporations or associations). §16303: States authority of Director is quasi-legislative. §16304: Hearing procedures (similar to prior §§16207.2 and 16207.3 with non-substantive changes). §16400: States process for requesting payroll records (similar to prior §§16207.10, 16207.11, 16207.12, 16207.13, and 16207.14 with non-substantive changes). §16401: States format for reporting of payroll records (similar to prior §§16207.15 and §16207.16 with non-substantive changes). §16402: States fees allowed for copies of payroll records (similar to prior §16207.17 except added handling fee, monies paid in advance and defines form of payment). §16403: Payroll records requested shall be kept on file by public entity for 6 months and redacted of personal information. Public entity may confirm or deny person's employment but not disclose further identifying information (identical to prior §16207.18). §16500: Severance of invalid code (similar to prior §16207.19 with non-substantive

Register No.	Effective Date	History	Effect of Changes
			changes.)
Register 88, No. 35	Filed 8-24-88	Amended: §16200: Order of Repeal of subsection (a)(3)(E) by OAL pursuant to Government Code section 11340.15.	§16200: States process by which determination made in collective bargaining agreements (removed statement that only federal and state recognized holidays specifically named in the agreement can be part of the determination).
Register 90, No. 14	Filed 4-5-90; effective 4-5-90	§16800-16802: New section filed as an emergency. A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed by 8-3-90.	§16800: Defines substantial interest, fraud, person (similar to existing §16000 with minor changes to include firms, limited partnerships and trusts; also uses including but not limited to language), firm, intent to defraud, deliberately, and respondent. §16801: States duties, rights and responsibilities of parties in investigations and hearings on violations. §16802: States factors to be considered if hearing officer recommends a penalty as a result of hearing on violations.
Register 90, No. 42	Filed 9-4-90	§16800-16802: New section filed as an emergency re-adoption effective 9-4-90. A Certificate of Compliance must be transmitted to OAL by 1-2-91 or emergency language will be repealed on the following day.	No change.
Register 91, No. 12	Repealed 1-3-91	§16800-16802: Repealed emergency regulations §§16800-16802. Added new §§16800-16802.	§16800: States definitions (no change). §16801: States duties, rights and responsibilities of parties in investigations and hearings on violations (similar to prior §16801 but added that mileage and witness fees are set pursuant to Government Code §68093 and clarified that debarment records are available to the public). §16802: States factors to be considered if hearing officer recommends a penalty as a result of hearing on violations (no change).
Register 92, No. 13	Filed 2-20-92; effective 3-23-92 Filed 2-20-92; effective 3-23-92	Amended: §16000: Various amendments. §16001: Subsection (a) and Note and adopted subsections (a) (1) – (3) and (e) and relettering	§16000: States definitions (added coverage; days; effective date; expiration date; helper; interim determination; LCP; mistake, inadvertence or neglect; predetermined changes; service upon a contractor or subcontractor; serve upon the labor commissioner; wage survey; willful and expanded date of notice to include publishing in a legally sufficient manner)

Register No.	Effective Date	History	Effect of Changes
	Filed 2-20-92; effective 3-23-92 Filed 2-20-92; effective 3-23-92 Filed 2-20-92; effective 3-23-92 Filed 2-20-92; effective 3-23-92 Filed 2-20-92; effective 3-23-92 Filed 2-20-92; effective 3-23-92 Filed 2-20-92; effective 3-23-92	subsection (e) and (f). Added §§16002.5, 16003 and 16425-16439. §16100: Subsection (b)(2)(B). §16200: Subsections (a)(1), (a)(3) and (b). §16204: Subsections (a)(3) and (b). §16205 §16302: Amended subsection (a). §16425-16435, §16435.5, §16436-16439, §16500: New section filed.	§16001: States public works subject to the prevailing wage law (added process by which interested party may request determination of coverage and added commercial projects to list). §16002.5: States process for appeal of coverage determinations. §16003: States process to get approval for use of volunteer labor. §16100: States duties, responsibilities and rights of Department (non-substantial changes). §16200: States process by which determination made in collective bargaining agreements (added time limit to filing collective bargaining agreements and such shall be basis for calls for bids, that all wage classifications may be considered in a determination, that contractor may take credit for fringe benefits and other non-substantive changes). §16204: Determinations to have effective dates (added that double asterisk rates include basic, overtime and holiday rates and other non-substantive changes). §16205: Procedure to get on mailing list (non-substantive changes). §16302: States parties, timing, manner and form for filing petition to review (non-substantive change). §16425: States dates for enforcement of awarding bodies' labor compliance programs. §16426: States process for and factors to be considered in initial approval of labor compliance program. §16427: States process for final approval of labor compliance program. §16428: States process to revoke final approval of labor compliance program. §16429: States content and method for notice of an initial or final approval. §16430: Lists components of labor compliance program including pre-job conference. §16431: States awarding body shall submit annual reports to Director and lists components. §16432: States audits may be conducted upon request of awarding body and shall be

Register No.	Effective Date	History	Effect of Changes
			conducted upon request of labor commissioner and lists audit parameters. Includes appendix B: audit record form. §16433: States an exemption for awarding bodies with an approved labor compliance program and under certain monetary limits. §16434: States awarding body shall have duty of enforcement of Labor Code, div. 2, part 7, chapter 1. §16435: Defines withhold, contracts, delinquent payroll records, and inadequate payroll records. §16435.5: Defines withhold (cites to §16435), contracts (cites to §16435), and amount equal to the underpayment. §16436: Defines forfeitures, and failing to pay the correct prevailing wages. §16437: States process for and content of request for determination of forfeiture. Includes appendix C: notice of deadlines. §16438: States how penalties and forfeitures are deposited after issues resolved. §16439: States process and notice for appeal of labor compliance program enforcement action. §16500: Severance of invalid code (limits language to regulations in group 3 and group 4.)
Register 96, No. 52	Filed 12-27-96; effective 1-26-97	Amended: §16000: §16001: Amendment of subsection (b) and (d) §16200: Repealer of subsection (a)(3)(B), subsection relettering, and amendment of newly designated subsections (a)(3)(B), (a)(3)(D), and (a)(3)(F)(3). Amendment of subsection (b). §16204: Subsection (a)(3), repealer and new subsection (b).	§16000: States definitions (repealed "predetermined changes"; amended "prevailing rate" to create a different method to determine rate for other payments than method used to determine basic hourly rate.) §16001: States public works subject to the prevailing wage law (added federal law limitation for federally funded or assisted projects and residential projects). §16200: States process by which determination made in collective bargaining agreements (added that interested parties may request new determinations upon contract change and content of request and other non-substantive changes). §16204: Determinations to have effective dates (added that new determinations are not applicable to contract if published bid unless determination pursuant to Labor Code §1773.4, deleted use of predetermined changes and clarified that no predetermined

Register No.	Effective Date	History	Effect of Changes
			changes can be used).
Register 99, No. 08	Filed 1-27-97; effective 1-27-97 Filed 2-19-99 Filed 2-19-99 Filed 2-19-99 Filed 2-16-99, effective 2-16-99 Filed 2-16-99; effective 2-16-99	Pursuant to Sacramento Superior Court Order Issued 6-4-97 in Case 97CS00471 - amendments invalidated and prior regulations reinstated. §16000: Restore definition of "predetermined changes" and repeal amendments to definition of "prevailing rate". §16001: Repeal amendments to subsections (b) and (d) §16200: Repeal amendments to definitions of "prevailing rate." §16204: Repeal 12-27-96 amendments to section. §16410-16414: New article 7 (§§16410-16414) filed as emergency regulations. Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language repealed by operation of law on following day.	§16000: States definitions (reverts back to prior version). §16001: States public works subject to the prevailing wage law (reverts back to prior version). §16200: States process by which determination made in collective bargaining agreements (reverts back to prior version). §16204: Determinations to have effective dates (reverts back to prior version). §16410: Defines affected subcontractor. §16411: States notice provisions to contractors and affected subcontractors for decision to withhold, retain or forfeit monies from payments due. §16412: States after notice, awarding body mat withhold and such is subject to hearing and suit. §16413: States process to request a hearing on withholding. §16414: States parameters of hearing.
Register 99, No. 25	Refiled 6-14-99; effective 6-14-99	§16410: New article 7 (§§16410-16414) refiled as emergency regulations. Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language repealed by operation of law on the following day. §§16411-16414: New section refiled. Certificate of Compliance must be transmitted to OAL by 10-	§16410: Defines affected subcontractor (no change). §16411: States notice provisions to contractors and affected subcontractors for decision to withhold, retain or forfeit monies from payments due (no change). §16412: States after notice, awarding body mat withhold and such is subject to hearing and suit (no change). §16413: States process to request a hearing on withholding (no change). §16414: States parameters of hearing (no change).

Register No.	Effective Date	History	Effect of Changes
		12-99 or emergency language repealed by operation of law on the following day.	
Register 99, No. 41	Refiled 10-4-99; effective 10-4-99	§16410: New article 7 (§§16410-16414) refiled as emergency regulations. Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language repealed by operation of law on the following day. §§16411-16412: New section refiled. Certificate of Compliance must be transmitted to OAL by 2-1-00 or emergency language repealed by operation of law on the following day.	§16410: Defines affected subcontractor (no change). §16411: States notice provisions to contractors and affected subcontractors for decision to withhold, retain or forfeit monies from payments due (no change). §16412: States after notice, awarding body mat withhold and such is subject to hearing and suit (no change). §16413: States process to request a hearing on withholding (no change). §16414: States parameters of hearing (no change).
Register 00, No. 03	Refiled 1-20-00; effective 2-2-00	§16410: New article 7 (§§16410-16414) refiled as emergency regulations. Certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language repealed by operation of law on the following day. §16411: New section refiled. Certificate of Compliance must be transmitted to OAL by 6-1-00 or emergency language repealed by operation of law on the following day. §§16412-16414: New section refiled. Certificate of Compliance must be transmitted to OAL by 6-1-00 or emergency language repealed by operation of law on the following day.	§16410: Defines affected subcontractor (no change). §16411: States notice provisions to contractors and affected subcontractors for decision to withhold, retain or forfeit monies from payments due (no change). §16412: States after notice, awarding body mat withhold and such is subject to hearing and suit (no change). §16413: States process to request a hearing on withholding (no change). §16414: States parameters of hearing (no change).
Register 00, No. 18	Transmitted order 3-29-00; filed 5-	§§16410-16414: Certificate of Compliance	

Register No.	Effective Date	History	Effect of Changes
	4-00	as to 1-20-00 order transmitted to OAL.	

HSouthern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry
Cal.App.1.Dist.

SOUTHERN CALIFORNIA LABOR MANAGEMENT OPERATING ENGINEERS CONTRACT COMPLIANCE COMMITTEE, Plaintiff and Appellant,
v.
LLOYD W. AUBRY, JR., as Director, etc., Defendant and Respondent.
No. A074161.

Court of Appeal, First District, Division 4, California.
Mar. 31, 1997.

SUMMARY

The trial court denied plaintiff's petition for a peremptory writ of mandate seeking to direct the Director of the Department of Industrial Relations of the State of California to find that a dam project was subject to the state's prevailing wage law (Lab. Code, § 1720 et seq.), rather than the federal Davis-Bacon Act (40 U.S.C., § 276a(a)). (Superior Court of the City and County of San Francisco, No. 974794, William J. Cahill, Judge.)

The Court of Appeal affirmed the judgment, holding that the trial court properly denied the writ petition. Lab. Code, § 1773.5, provides that the Director of the Department of Industrial Relations "may establish rules and regulations for the purpose of carrying out this chapter, including ... the responsibilities and duties of awarding bodies under this chapter." Under Cal. Code Regs., tit. 8, §§ 16000, 16001, subd. (a), and 16001, subd. (b), federally funded projects controlled by, carried out by, and awarded by the federal government are not subject to the prevailing wage law, even if it requires a higher wage than the Davis-Bacon Act. In this case, the awarding body was an agency of the federal government. Under the "Local Cooperation Agreement," the federal agency was given ultimate authority over construction, financial audits, paying construction companies, and determining that the project was complete. Since the project was controlled by a federal awarding body, the prevailing wage law did not apply under the regulations, which were valid inasmuch as they were consistent with case law and the prevailing wage law statutes. The court further held that the director did not violate the California Constitution (Cal. Const., art. III, § 3.5) by refusing to enforce a statute on constitutional or preemption grounds. (Opinion by Hanlon, J., with Anderson, P. J., and Reardon, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Public Works and Contracts § 6--Contracts-- Contractors' Rights and Liabilities--State Prevailing Wage Law--As Preempted by Federal Davis-Bacon Act.
The trial court properly denied a writ petition that would have directed the Director of the Department of Industrial Relations of the State of California to find that a dam project was subject to the state's prevailing wage law (Lab. Code, § 1720 et seq.), rather than the federal Davis-Bacon Act (40 U.S.C., § 276a(a)). Lab. Code, § 1773.5, provides that the director "may establish rules and regulations for the purpose of carrying out this chapter, including ... the responsibilities and duties of awarding bodies under this chapter." Under Cal. Code Regs., tit. 8, §§ 16000, 16001, subd. (a), and 16001, subd. (b), federally funded projects controlled by, carried out by, and awarded by the federal government are not subject to the prevailing wage law, even if it requires a higher wage than the Davis-Bacon Act. In this case, the awarding body was an agency of the federal government. Under the "Local Cooperation Agreement," the federal agency was given ultimate authority over construction, financial audits, paying construction companies, and determining that the project was complete. Since the project was controlled by a federal awarding body, the prevailing wage law did not apply under the regulations, which were valid inasmuch as they were consistent with case law and the prevailing wage law statutes.
[See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency, § 331.]
(2) Statutes § 29--Construction--Language--Legislative Intent.
A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. In construing a statute, the court's first task is to look to the

language of the statute itself. When the language is clear and there is no uncertainty as to the legislative intent, the court looks no further and simply enforces the statute according to its terms. The court is required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. If possible, significance should be given to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose. When used in a statute, words must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear. Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. An overriding principle in this area is that the individual portions of a statute should be harmonized with the body of law of which it forms a part. The object that a statute seeks to achieve is of primary importance in statutory interpretation.

(3a, 3b) Public Works and Contracts § 6--Contracts--Contractors' Rights and Liabilities--State Prevailing Wage Law and Federal Davis-Bacon Act--Purpose.
The overall purpose and object of California's prevailing wage law (Lab. Code, § 1720 et seq.) is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees. The overall purpose and object of the federal Davis-Bacon Act (40 U.S.C. § 276a(a)) is to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area. The state's prevailing wage law and the Davis-Bacon Act each carry out a similar purpose. Read as a unit, they set out two separate, but parallel, systems regulating wages on public contracts. The prevailing wage law covers state contracts and the Davis-Bacon Act covers federal contracts.

(4) Administrative Law § 117--Judicial Review and Relief--Scope and Extent of Review--Arbitrary, Capricious, or Unreasonable Action.
An agency's regulation will not be set aside unless it is inconsistent with a statute, arbitrary, capricious, unlawful, or contrary to public policy. An agency's construction of statutes will generally be followed unless it is clearly erroneous.

(5) Constitutional Law § 34--Distribution of Governmental Powers--Conflicts Between Federal and State Powers--Preemption.
The supremacy clause (U.S. Const., art. VI) may entail preemption of state law either by express provision, by implication, or by a conflict between federal and state law. Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility. Further, there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the supremacy clause. However, despite the variety of opportunities for federal preeminence, courts have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law.

(6) Labor § 10--Regulation of Working Conditions--Minimum Wage and Prevailing Wage Law.
Minimum wage laws fall under the same classification as valid regulation of the employment relationship under state police powers. The prevailing wage law (Lab. Code, § 1720 et seq.) is not a minimum wage law.

(7) Administrative Law § 10--Administrative Construction and Interpretation of Laws--Department of Industrial Relations' Authority to Determine Project Not Subject to Prevailing Wage Law.
In a mandamus proceeding to determine whether the Director of the Department of Industrial Relations of the State of California properly determined that a dam project was not subject to the state's prevailing wage law (Lab. Code, § 1720 et seq.), the director did not violate the California Constitution by refusing to find a public works to exist based on a perceived fear of unconstitutionality or conflict with federal law. Under Cal. Const., art. III, § 3.5, an administrative agency has no power to refuse to enforce a statute on the grounds it is unconstitutional or conflicts with federal law, until an appellate court has so held. However, the California Supreme Court has held that the purpose of Cal. Const., art. III, § 3.5, was to prevent agencies from using their own interpretation

of the Constitution or federal law to thwart the mandates of the Legislature, and cannot reasonably be construed to place a restriction on the authority of the Legislature to limit the scope of its own enactments. By limiting the implementation of a statute as directed by the Legislature, an agency neither declares it unenforceable, nor refuses to enforce it. Far from thwarting the Legislature's mandate, such action fulfills it. The director's administrative decisions in the present case were proper interpretations of the prevailing wage law within the scope of the Supreme Court's opinion.

COUNSEL
Carroll & Scully, Donald C. Carroll and Charles P. Scully II for Plaintiff and Appellant.
John M. Rea and Gary J. O'Mara for Defendant and Respondent. *877

HANLON, J.

Plaintiff and appellant Southern California Labor Management Operating Engineers Contract Compliance Committee (appellant) appeals from a judgment denying its petition for a peremptory writ of mandate directing defendant and respondent Lloyd W. Aubry, Jr. as Director of the Department of Industrial Relations of the State of California (respondent) to set aside his outstanding decision and issue a new determination that the Seven Oaks Dam project is a public works subject to the California prevailing wage law (Lab. Code, §§ 1771, 1720-1781) (hereinafter referred to as PWL) rather than Davis-Bacon Act, 40 United States Code section 276a(a), which is the federal prevailing wage law (hereinafter referred to as DBA).

Appellant contends: (1) the PWL applies even though the construction contract for the dam project was "awarded" by an agency of the federal government, and (2) respondent acted beyond its power by refusing to enforce a statute on constitutional or preemption grounds. We affirm.

I. *Statement of Facts*

Seven Oaks Dam project is a part of the Santa Ana River Mainstem, including Santiago Creek, California Flood Control Project. Construction of the complete flood control project is governed by a local cooperation agreement among the Department of the Army, Orange County Flood Control District, San Bernardino County Flood Control District and Riverside County Flood Control and Water Conservation District, which was executed in 1989. As a group the involved counties are denominated as "sponsors."

Relevant provisions of the local cooperation agreement are as follows:

The maximum allowable cost of the flood control project is set at $1,536,000,000. At the time of the execution of the agreement, total costs were estimated at $1,293,000,000 and the sponsors' cash contribution at $63,700,000. In addition, "sponsors shall provide all lands, easments [*sic*], rights-of-way, excavated material disposal areas, and perform relocations (excluding railroad bridges and approaches thereto) required for construction of the [flood control] project." The total contribution of the sponsors cannot exceed 50 percent or be less than 25 percent. During construction the sponsors shall provide a cash contribution of 5 percent of the total cost. No federal funds may be used to meet the sponsors' share, unless expressly authorized by statute. The federal government shall audit the sponsors' records and issue a final accounting which is binding on the sponsors. All funds contributed by the federal government and sponsors shall be placed in *878 an escrow account. The federal government shall pay the costs of construction from funds in such account.

Basic contractual "obligations of the parties" include the following: A. "The [Federal] Government, subject to and using funds provided by the Sponsors and funds appropriated by the Congress, shall expeditiously construct the [Flood Control] Project (including alterations or relocations of railroad bridges and approaches thereto) applying those procedures usually followed or applied in Federal projects, pursuant to Federal laws, regulations, and policies. The sponsors shall be afforded the opportunity to review and comment on all contracts, including relevant plans, specifications and special provisions prior to the issuance of invitations for bids. The Sponsors also shall be afforded the opportunity to review and comment on all modifications and change orders prior to the issuance to the Contractor of a Notice to Proceed for such modification or change order unless an emergency exists or immediate action is required, in which case the [Federal] Government will direct the change without review by the Sponsors. The [Federal] Government will consider the views of the Sponsors, but award of the contracts including change orders and performance of the work thereunder shall be

exclusively within the control of the [Federal] Government."

The term "contracting officer" is defined in the agreement as "the Commander of the U.S. Army Engineer District, Los Angeles, or his designee." Regarding "construction, phasing and management," "[t]he contracting officer shall consider the recommendations of the [sponsors] in all matters relating to the [Flood Control] Project, but the Contracting Officer, having ultimate responsibility for construction of the Project, has complete discretion to accept, reject, or modify the recommendations."

Sponsoring counties shall hold and save the federal government free from all damages "except for damages due to the fault or negligence of the [Federal] Government or its contractors." If hazardous substances are found in the area of the flood control project, the federal government "shall, after consultation with the Local Sponsors, but in its sole discretion, determine" what action to take. The sponsors agree to comply with all applicable federal and state laws and regulations. Some laws are specifically listed, but no mention is made of the California PWL or the federal DBA.

The final relevant provision of the local cooperation agreement is: "When the [Federal] Government determines that a feature or phase of the [Flood Control] Project is complete and appropriate for operation and maintenance by a Sponsor or Sponsors, the [Federal] Government shall turn the completed feature or phase over to the responsible Sponsor or Sponsors ...." *879

Pursuant to the local cooperation agreement, on March 29, 1994, the United States Army Engineer District-Los Angeles entered into a contract with CBPO of America, Inc., for construction of the Seven Oaks Dam and Appurtenances. Total estimated cost for the project was $167,777,000. The contract for the Seven Oaks Dam specifically provides that "laborers and mechanics employed or working upon the site of the work" will be paid in accordance with the DBA.

II. *Applicability of PWL*

(1a) Appellant contends that the PWL applies even though the construction contract for the Seven Oaks Dam project was "awarded" by an agency of the federal government. This contention lacks merit.

The core of the PWL is Labor Code section 1771[FN1], which provides in pertinent part: "Except for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers on public works." Under PWL respondent determines the general prevailing rate. (§§ 1770, 1773, 1773.6.)

FN1 Unless otherwise stated all citations to California statutes are to the Labor Code.

DBA provides in pertinent part: "The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction ... of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed ...." (40 U.S.C. § 276a(a).)

Other California code sections which define when PWL applies are the following.

Section 1720 provides in pertinent part: "As used in this chapter, 'public works' means: *880

"(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

"(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. 'Public work' shall not include the operation of

the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

"(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not."

Section 1720.2 provides in pertinent part: "For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, 'public works' also means any construction work done under private contract when all of the following conditions exist: [¶] (a) The construction contract is between private persons. [¶] ... [¶] (c) Either of the following conditions exist: [¶] (1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract. [¶] (2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work."

Section 1720.3 provides: "For the limited purposes of Article 2 (commencing with Section 1770), 'public works' also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California." Section 1720.4 covers work on nonprofit installations performed by volunteer labor.

Section 1721 provides: " 'Political subdivision' includes any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts."

Section 1722 provides: " 'Awarding body' or 'body awarding the contract' means department, board, authority, officer or agent awarding a contract for public work."

Section 1724 provides: " 'Locality in which public work is performed' means the county in which the public work is done in cases in which the *881 contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases."

Section 1740 provides: "Notwithstanding any other provision of this chapter or any other law of this State, except limitations imposed by the Constitution, the legislative body of a political subdivision which has received or is to receive a loan or grant of funds from the Federal Government or a federal department or agency for public works of that political subdivision, may provide in its call for bids in connection with such public works that all bid specifications and contracts and other procedures in connection with bids or contracts shall be subject to modification to comply with revisions in federal minimum wage schedules without the necessity of republication or duplication of other formal statutory requirements."

Section 1775 provides in pertinent part: "The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her."

Section 1777 provides: "Any officer, agent, or representative of the State or of any political subdivision who wilfully violates any provision of this article, and any contractor, or subcontractor, or agent or representative thereof, doing public work who neglects to comply with any provision of section 1776 is guilty of a misdemeanor."

Section 1777.7 provides in pertinent part: "(d) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state."

Sections 1779 and 1780 make it a misdemeanor to charge or collect fees with respect to the employment of persons on public works. The state, political subdivisions and contractors are mentioned in the sections; the federal government is not.

(2) "A fundamental rule of statutory construction is

that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law .... In construing a statute, our first task is to look to the language of the statute itself.... When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute *882 according to its terms.... [¶] ... 'We are required to give effect to statutes "according to the usual, ordinary import of the language employed in framing them." ...' ... ' "If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." ... "When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear." .... Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole ....' " (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388 [20 Cal.Rptr.2d 523, 853 P.2d 978], citations omitted.)

"[A]n overriding principle in this area is that the individual portions of a statute should be harmonized ... with the body of law of which it forms a part. [Citations.]" (*United Public Employees v. Public Employment Relations Bd.* (1989) 213 Cal.App.3d 1119, 1127 [262 Cal.Rptr. 158].) "The object that a statute seeks to achieve is of primary importance in statutory interpretation. [Citations.]" (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [4 Cal.Rptr.2d 837, 824 P.2d 643].)

(3a) The overall purpose and object of California's PWL "is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees. [Citations.]" (*Lusardi Construction Co. v. Aubry, supra*, 1 Cal.4th at p. 987; *Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345, 356 [28 Cal.Rptr.2d 550].)

The overall purpose and object of DBA is " 'to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.' [Citation.] ... [T]he Act was intended to combat the practice of 'certain itinerant, irresponsible contractors, with itinerant, cheap, bootleg labor, [who] have been going around throughout the country " picking" off a contract here and a contract there.' The purpose of the bill was 'simply to give local labor and the local contractor a fair opportunity to participate in this building program.' [Citation.]" (*Universities Research Assn. v. Coutu* (1981) 450 U.S. 754, 773-774 [101 S.Ct. 1451, 1463, 67 L.Ed.2d 662].)

(1b),(3b) The PWL and DBA each carry out a similar purpose. DBA specifically provides that it only applies to contracts "to which the United *883 States or the District of Columbia is a party." The PWL does not contain a specific clause limiting it to contracts to which the state of California or a political subdivision thereof is a party. However, the overall effect of the various code sections which constitute the PWL is to exclude contracts of the federal government. Thus, sections 1720, subdivision (c), 1720.2, 1720.3 and 1724 refer to construction jobs under the supervision of state entities while the sections assessing penalties for violating the PWL only mention state entities (§§ 1775, 1777, 1779). No sections, either individually or collectively, mandate that contracts awarded by, or construction jobs under the supervision of, federal authorities are subject to the PWL. In fact, the only mention of the federal government refers to a federal wage law (§ 1740). Read as a unit PWA and DBA set out two separate, but parallel, systems regulating wages on public contracts. The PWL covers state contracts and DBA covers federal contracts.

Respondent has long agreed with this interpretation of the statutes. Section 1773.5 provides: "The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter."

One such regulation is California Code of Regulations, title 8, section 16001, entitled "Public Works Subject to Prevailing Wage Law," which provides: "Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by

California awarding bodies of any sort." (Cal. Code Regs., tit. 8, § 16001, subd. (b).)

Other pertinent regulations are as follows: "Awarding body" is defined as: "Any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works." (Cal. Code Regs., tit. 8, § 16000.)"Public Funds. Includes state, local and/or federal monies." (Cal. Code Regs., tit. 8, § 16000.)"General Coverage. State prevailing wage rates apply to all public works contracts as set forth in Labor Code Sections 1720, 1720.2, 1720.3, 1720.4, and 1771." (Cal. Code Regs., tit. 8, § 16001, subd. (a).)

Thus under the regulations, federally funded projects controlled by, carried out by, and awarded by the federal government are not subject to PWL, even if it requires a higher wage than DBA. Nothing in the two administrative cases of respondent, cited by appellant, contradicts the regulations because neither case involved the federal government. (Public Works ***884** Coverage Case No. 91-056, Southern Cal. Regional Rail Authority Lease of Union Pacific Right-of-Way, Decision on Appeal, Nov. 30, 1993 and Public Works Case No. 96-006, Department of Corrections, Community Correctional Facilities, June 11, 1996.)

(4) An agency's regulation "will not be set aside unless it is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy. [Citation.]" (*Ripe Trades Dist. Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1466 [49 Cal.Rptr.2d 208].) An agency's "construction of statutes will generally be followed unless it is clearly erroneous. [Citation.]" (*United Public Employees v. Public Employment Relations Bd., supra,* 213 Cal.App.3d at p. 1125.)

(1c) To determine if respondent's regulations are valid interpretations of the statutes, we look to cases construing the PWL, DBA and related statutes, particularly those which involve the question of preemption by federallaw. (5) "[T]he Supremacy Clause, U.S. Const., Art. VI, may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law. [Citations.] And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. [Citation.]" (*New York Blue Cross v. Travelers Ins.* (1995) 514 U.S. 645, ___ [115 S.Ct. 1671, 1676, 131 L.Ed.2d 695, 704]; see also *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 93-94 [160 Cal.Rptr. 733, 603 P.2d 1329].)

"Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' [citation] ...." (*Hillsborough County v. Automated Medical Labs.*(1985) 471 U.S. 707, 713 [105 S.Ct. 2371, 2375, 85 L.Ed.2d 714].) Further, "... there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the Supremacy Clause." (*De Canas v. Bica* (1976) 424 U.S. 351, 356 [96 S.Ct. 933, 937, 47 L.Ed.2d 43].)

In *Commissioner of Labor and Ind. v. Boston Housing Auth.* (1963) 345 Mass. 406 [188 N.E.2d 150, 157-158], the highest court in Massachusetts held that under the rules of preemption a federal agency operating a housing project in Boston pursuant to federal regulations was not subject to a state prevailing wage law. Thus, in order to avoid a serious constitutional problem it interpreted the state law as not intended by the Legislature to require ***885** action by the federal agency in conflict with proper explicit budgetary requirements of a federal law. The court reasoned, "The intention to coerce such a head on conflict with Federal authority is not lightly to be attributed to the Legislature, which must be taken to have known the existing law relating to housing projects receiving [federal] contributions."

Gartrell Const. Inc. v. Aubry (9th Cir. 1991) 940 F.2d 437, 438-439 [131 A.L.R.Fed. 773] held that a private contractor performing work for the federal government on federal property was not required to obtain a California contractor's license, because he complied with the parallel federal "responsibility" regulations for contractors. The state law was preempted by the "similar" federal requirements. To same effect see *Airport Const. and Materials, Inc. v. Bivens* (1983) 279 Ark. 161 [649 S.W.2d 830, 832].

California Comm'n v. United States (1958) 355 U.S. 534, 540, 545-546 [78 S.Ct. 446, 450-451, 453-454, 2

L.Ed.2d 470], held that California statutes and regulations regarding rates for shipping freight could not be applied to federal procurement officials because "Congress has provided a comprehensive policy governing procurement." (*Id.* at p. 540.)In reaching its holding the nation's highest court quickly distinguished certain types of state laws. "We lay to one side these cases which sustain nondiscriminatory state taxes on activities of contractors and others who do business for the United States, as their impact at most is to increase the costs of the operation. [Citations.] We also need do no more than mention cases where, absent a conflicting federal regulation, a State seeks to impose safety or other requirements on a contractor who does business for the United States." (*Id.* at p. 543 [78 S.Ct. at p. 452].) (6) Minimum wage laws fall under the same classification as valid regulation of the employment relationship under state police powers.(*De Canas v. Bica, supra*, 424 U.S. at pp. 356-357 [96 S.Ct. at pp. 936-937].) The PWL is not a minimum wage law, however. (*San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 790 [163 Cal.Rptr. 460, 608 P.2d 277]).

(1d) *Hull v. Dutton* (11th Cir. 1991) 935 F.2d 1194, 1196-1198, held that a state agency which ran a switching railroad as a private carrier was subject to the Railway Labor Act and such federal law preempted a state law establishing bonus payments for certain state employees.

Chamber of Commerce of U.S. v. Bragdon (9th Cir. 1995) 64 F.3d 497, 504 held that the National Labor Relations Act preempted a Contra Costa County ordinance which established a prevailing wage law for "wholly private construction projects." In contrast, *People v. Hwang* (1994) 25 Cal.App.4th 1168, 1172, 1181-1182 [31 Cal.Rptr.2d 61], held that PWL was not preempted by the National Labor Relations Act as to a public works contract between a private contractor and county school district. ***886**

Drake v. Molvik & Olsen Elec., Inc. (1986) 107 Wn.2d 26 [726 P.2d 1238], held that the Washington prevailing wage law governed a "federally-funded construction project by the Seattle Housing Authority" and was not preempted by DBA. (To same effect see *Siuslaw Concrete Const. v. Wash., Dept. of Transp.* (9th Cir. 1986) 784 F.2d 952, 953-954, 959 [involving a state-run training program which might be exempt under the provision of DBA].)

Metropolitan Water Dist. v. Whitsett (1932) 215 Cal. 400, 408, 417 [10 P.2d 751] upheld the constitutionality of PWL, in part "on the theory that the state as the employer having full control of the terms and conditions under which it will contract may, through its legislatures, and within constitutional limits, provide the wage which shall be paid to its employees and that the payment of a less sum shall be unlawful." Overall, the state has greater power to legislate in areas covered by federal law as "proprietor" than as "regulator." (*Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.* (1993) 507 U.S. 218, 226-227, 232-233 [113 S.Ct. 1190, 1195-1196, 1198-1199, 122 L.Ed.2d 565].)

The basic distinction uniformly maintained in the cases is that stateenacted prevailing wage regulations are valid and not preempted by federal law when applied to contracts of the state or its political subdivisions. However, those laws cannot be applied to a project which is under the complete control of the federal government. This is also the distinction made by respondent's regulations, which provide that the PWL rather than DBA is applied to federally funded or assisted construction projects in California when wages under PWL would be higher and the projects "are controlled or carried out by California awarding bodies of any sort." Accordingly, because the regulations are consistent with California cases, federal cases, cases from other states, and the PWL statutes, we will follow them.

In the present case, the awarding body is an agency of the federal government. The local cooperation agreement governs the overall project containing the Seven Oaks Dam project at issue herein. Under the local cooperation agreement, the federal agency is given the ultimate authority over the actual construction, financial audits, paying the construction companies, determination of what to do if hazardous substances are discovered and determination that a project is complete. Thus, the Seven Oaks Dam project is controlled and carried out by a federal awarding body and under respondent's regulations, the PWL does not apply.

Appellant expresses the fear that a decision for respondent "would positively invite California public bodies in the future to give California public ***887** monies to the Corps of Engineers (or to any private party if the trial court is correct) and to let it award all

contracts, thereby allowing such public bodies and employers to evade the PWL." We wish to calm appellant's fears. This court shares the Legislature's interest in protecting working people in the state. Our decision is based on a careful scrutiny of the record to discover the actual relationship between federal, state and private parties. We do nothing more than uphold the regulations and apply the facts to the regulations and statute. As in other areas of the law, each case involving public contracts and PWL will be decided on its own facts and merits.

III. *Respondent's Administrative Decision*

(7) Appellant contends that respondent director violated the California Constitution by "refusing to find a public works to exist simply because of a perceived fear of unconstitutionality or conflict with federal law." This contention lacks merit.

California Constitution, article III, section 3.5 provides that an administrative agency has no power to refuse to enforce a statute on the grounds it is unconstitutional or conflicts with federal law, until an appellate court has so held. In *Reese v. Kizer* (1988) 46 Cal.3d 996, 1002 [251 Cal.Rptr. 299, 760 P.2d 495], the Supreme Court held: "The purpose of the amendment was to prevent agencies from using their own interpretation of the Constitution or federal law to thwart the mandates of the Legislature. Its language, however, cannot reasonably be construed to place a restriction on the authority of the Legislature to limit the scope of its own enactments. By limiting the implementation of a statute as directed by the Legislature, an agency neither 'declares it unenforceable' nor 'refuses to enforce it.' Indeed, far from thwarting the Legislature's mandate, such action precisely fulfills it." (Fns. omitted.)

Respondent's administrative decisions in the instant case were proper interpretations of the PWL within the scope of *Reese*.

IV. *Disposition*

The judgment is affirmed. Costs are awarded to respondent.

Anderson, P. J., and Reardon, J., concurred.
A petition for a rehearing was denied April 29, 1997, and appellant's petition for review by the Supreme Court was denied July 9, 1997.

Cal.App.1.Dist.
Southern Cal. Lab. Management etc. Committee v. Aubry
54 Cal.App.4th 873, 63 Cal.Rptr.2d 106, 3 Wage & Hour Cas.2d (BNA) 1680, 97 Cal. Daily Op. Serv. 3259, 97 Daily Journal D.A.R. 5688

END OF DOCUMENT

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916) 327-4478

SB 975

UNFINISHED BUSINESS

Bill No: SB 975
Author: Alarcon (D)
Amended: 8/30/01
Vote: 21

SENATE GOVERNMENTAL ORG. COMMITTEE : 8-4, 4/24/01
AYES: Vincent, Chesbro, Dunn, Karnette, Machado, O'Connell, Perata, Soto
NOES: Johnson, Brulte, Johannessen, Knight

SENATE FLOOR : 24-12, 4/26/01
AYES: Alarcon, Alpert, Bowen, Burton, Costa, Dunn, Escutia, Figueroa, Karnette, Kuehl, Machado, Murray, O'Connell, Ortiz, Perata, Polanco, Romero, Scott, Sher, Soto, Speier, Torlakson, Vasconcellos, Vincent
NOES: Ackerman, Battin, Brulte, Johannessen, Johnson, Knight, Margett, McClintock, Monteith, Morrow, Oller, Poochigian

ASSEMBLY FLOOR : 51-29, 9/4/01 - See last page for vote

SUBJECT : California Infrastructure and Economic Development Bank

SOURCE : State Building and Construction Trades Council

DIGEST : This bill defines "public funds" used in "public projects" and states legislative intent that projects financed through Industrial Development Bonds issued by the California Infrastructure and Economic Development Bank must comply with existing laws pertaining to prevailing

CONTINUED

wages.

Assembly amendments :

1. Exempt specified types of affordable housing, private residential housing, private development projects, and state manufacturing tax credits from the definition of "paid for in whole or in part out of public funds."

2. Exempt qualified residential projects, low income housing projects, and single family residential projects financed before December 31, 2003, unless another statute, ordinance or regulation applies this chapter to those specific projects.

3. Exempt de minimus subsidies, or reimbursements for costs that would normally be paid by the public, by a state or political subdivision to a private developer.

ANALYSIS : Existing law, the Bergeson-Peace Infrastructure and Economic Development Bank Act, establishes an Infrastructure Bank for the purpose of funding specified types of infrastructure projects by qualified public/private entities. (The Governor and Legislature provided an initial 450 million capitalization to the Bank in 1998 and increased the bank's funding by an additional $425 million in the 1999-00 budget year.) Pursuant to the act's provisions, the legislative body of a local agency sponsor is required to make specified findings by resolution, prior to submitting a project to the Infrastructure Bank for consideration. The Infrastructure Bank may do the following, in addition to other enumerated duties: (a) issue bonds; (b) make loans; (c) make guarantees, credit enhancements, grants, contributions, or other financial enhancements; and, (d) issue both taxable and tax-exempt revenue bonds. The act requires public works financed by the Infrastructure Bank to comply with certain laws applicable to payment of "prevailing wages" on public works.

Existing law establishes, within the State Treasurer's Office, the California Industrial Development Financing Advisory Commission (CIDFAC) to provide technical assistance to city and county authorities that issue

Industrial Development Bonds (IDBs). CIDFAC independently reviews IDB applications for compliance with federal and state requirements and approves the sale of IDBs by local authorities. The program is intended to benefit economically distressed areas and to provide an alternative method of financing capital outlay that will increase employment or otherwise contribute to economic development.

This bill:

1. Declares the intent of the Legislature that projects financed through CIEDB, including projects financed through IDBs, comply with existing labor law pertaining to prevailing wages.

2. Includes "installation" in the existing definition of "public works."

3. Defines "public funds" used in public works as the following:

   A. Payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor,

or developer.

B. Construction work performed by a state or political subdivision in execution of a project.

C. Transfer of an asset of value for less than fair market price.

D. Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations normally required in the execution of a contract that are paid, reduced, charged at less than fair market value, waived or forgiven.

E. Repayment of money and credits applied on a contingent basis.

1. States that if the state or political subdivision provides a direct or indirect subsidy to a private developer or reimburses a private developer for costs

that would normally be paid by the state or political subdivision, then the project is not subject to the requirements of this chapter if the costs or subsidy are de minimus in the context of the overall project.

2. Exempts the following from the definition of "paid for in whole or in part out of public funds" as proposed in this bill:

A. Affordable housing for low- or moderate-income persons either financed solely through the Low- and Moderate-Income Housing Fund established pursuant to current law or financed through a combination of the Fund and private funds.

B. Qualified residential projects financed on or before December 31, 2003, that are in whole or in part financed through bonds issued by the California Debt Limit Allocation Committee in the Office of the State Treasurer, unless another statute, ordinance, or regulation, applies this chapter to the qualified residential project.

C. Single family residential projects financed on or before December 31, 2003, that are financed in whole or in part through qualified mortgage revenue bonds, qualified veterans' mortgage bonds, and mortgage revenue certificates issued under the Qualified Mortgage Credit Certificate Program in the Office of the State Treasurer, unless another statute, ordinance, or regulation, applies this chapter to the single family residential project.

D. Low income housing projects that are allocated federal and state low income housing tax credits on or before December 31, 2003 by the Office of the State Treasurer, unless another statute, ordinance, or regulation, applies this chapter to the low income housing project.

E. Private residential housing on private land that is not built pursuant an agreement with a state agency, a redevelopment agency, or a local public housing authority.

F. Private development projects built on private property that are required by a state or political subdivision to construct improvements, if the following two conditions are met:

I. The state or political subdivision contributes no more money, or the equivalent of money, to the overall project than that which is required to perform the public work of improvement.

II. The state or political subdivision maintains no proprietary interest in the overall project.

1. State manufacturers' investment tax credits as allowed under current law for electronic, semiconductor, equipment, commercial space satellite, computer software, specified pharmaceutical, and other manufacturing.

Comments

According to the Assembly Third Reading analysis, this bill closes a loophole in law that exempts projects financed through IDBs issued by CIEDB from prevailing wage provisions of current law. The California Industrial Development Financing Act requires all other state and local agencies that issue IDBs to comply with prevailing wage provisions.

This bill establishes a definition of "public funds" that conforms to several precedential coverage decisions made by the Department of Industrial Relations. These coverage decisions define payment by land, reimbursement plans, installation, grants, waiver of fees, and other types of public subsidy as public funds. The definition of public funds in this bill seeks to remove ambiguity regarding the definition of public subsidy of development projects.

FISCAL EFFECT : Appropriation: No Fiscal Com.: No
Local: No

SUPPORT : (Verified 9/5/01)

State Building and Construction Trades Council (source)
State Council of Carpenters
State Treasurer
International Brotherhood of Electrical Workers Local Union 340
Laborers' International Union of North America
Napa-Solano Counties Building and Construction Trades Council
Santa Clara and San Benito Counties Building and Construction Trades Council
Southern California Pipe Trades District Council 16
United Association of Plumbers and Pipefitters Local #230

OPPOSITION : (Verified 9/5/01)

GioSoils Consultants, Inc.
The Lee Group, Inc.
California Association of Enterprise Zones
California Association for Local Economic Development
California Association of Sanitation Agencies
California Chamber of Commerce
California Coalition for Rural Housing
California Housing Partnership Corporation
California Municipal Utilities Association
California State Association of Counties
California Taxpayers' Association
Cities of Bakersfield, Barstow, Blythe, Burbank, Chula Vista, Concord, Emeryville, Eureka, Fountain Valley, Fremont, Fullerton - Office of the City Council, Grover Beach, Hemet, Hesperia, Huntington Beach, Lakewood, La Quinta, Lawndale, Loma Linda, Lompoc, Moreno Valley, Norwalk, Rancho Mirage, Redding, Rosemead, San Clemente, Signal Hill, Thousand Oaks, Tulare, Visalia
County of San Bernardino
Coachella Valley Housing Coalition
Del Webb's Sun City Palm Desert
Economic Development Corporation
Innovative Resort Communities
League of California Cities
Longs Drug Stores
Non-Profit Housing Association of Northern California
Rural Communities Housing Development Corporation
San Diego Housing Federation

San Joaquin Housing Authority
Self-Help Enterprises
71 private Businesses
21 individuals

ARGUMENTS IN SUPPORT : Supporters of this bill note, for example, the discrepancy under existing law between a monetary transfer of funds to a developer that would trigger prevailing wage requirements and tax forgiveness or a fee waiver for an equivalent amount of funds that would not trigger prevailing wage requirements.

ARGUMENTS IN OPPOSITION : Opposition to this bill cites potential increased costs to public works projects financed with public funds as defined by this bill.

ASSEMBLY FLOOR :

AYES: Alquist, Aroner, Calderon, Canciamilla, Cardenas, Cardoza, Cedillo, Chan, Chavez, Chu, Cohn, Corbett, Correa, Diaz, Dutra, Firebaugh, Florez, Frommer, Goldberg, Havice, Horton, Jackson, Keeley, Kehoe, Koretz, Liu, Longville, Lowenthal, Maddox, Matthews, Migden, Nakano, Nation, Negrete McLeod, Oropeza, Papan, Pavley, Reyes, Salinas, Shelley, Simitian, Steinberg, Strom-Martin, Thomson, Vargas, Washington, Wayne, Wesson, Wiggins, Wright, Hertzberg
NOES: Aanestad, Ashburn, Bates, Bogh, Briggs, Bill Campbell, John Campbell, Cogdill, Cox, Daucher, Dickerson, Harman, Hollingsworth, Kelley, La Suer, Leach, Leonard, Leslie, Maldonado, Mountjoy, Robert Pacheco, Rod Pacheco, Pescetti, Richman, Runner, Strickland, Wyland, Wyman, Zettel

TSM:sl 9/5/01 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

SENATE RULES COMMITTEE Office of Senate Floor Analyses 1020 N Street, Suite 524 (916) 445-6614 Fax: (916) 327-4478	AB 1646

THIRD READING

Bill No: AB 1646
Author: Steinberg (D)
Amended: 8/29/00 in Senate
Vote: 21

SENATE INDUSTRIAL RELATIONS COMMITTEE : 4-2, 7/14/99
AYES: Alarcon, Figueroa, Karnette, Solis
NOES: Haynes, Mountjoy

SENATE JUDICIARY COMMITTEE : 6-3, 8/24/99
AYES: Burton, Escutia, O'Connell, Peace, Sher, Schiff
NOES: Haynes, Morrow, Wright

SENATE APPROPRIATIONS COMMITTEE : Senate Rule 28.8

SENATE FLOOR : 23-15, 8/30/00
AYES: Alarcon, Alpert, Bowen, Burton, Costa, Dunn, Escutia, Figueroa, Hayden, Hughes, Johnston, Karnette, Murray, O'Connell, Ortiz, Perata, Polanco, Schiff, Sher, Solis, Soto, Speier, Vasconcellos
NOES: Brulte, Haynes, Johannessen, Johnson, Kelley, Knight, Leslie, Lewis, McPherson, Monteith, Morrow, Mountjoy, Poochigian, Rainey, Wright

ASSEMBLY FLOOR : 42-31, 8/31/00 - See last page for vote

SUBJECT : Public works: payments

SOURCE : State Building and Construction Trades Council of California

CONTINUED

D

DIGEST : This bill streamlines the procedures for review of a decision to withhold funds from a contractor due to failure to pay prevailing wages on a public works project.

This bill would revise the procedures for challenging a decision to withhold funds from a contractor due to the contractor's failure to pay a prevailing wage on a public works contract. Instead of providing a right to a court

challenge by the contractor, this bill would provide any affected contractor or subcontractor the right to a hearing before an administrative law judge on the validity of the order and a limited court review of that administrative decision.

This bill would also make a contractor and subcontractor expressly jointly and severally liable for all amounts due (including underpaid wages and penalties) pursuant to a final order of the Labor Commissioner for a violation of the prevailing wage law.

This bill is intended to reduce the current layers of litigation by providing for an administrative hearing and a mandamus action, but no right to a de novo trial. The sponsor asserts that the revision makes the process more streamlined and efficient while protecting the due process rights of all parties.

Senate Floor Amendments of 8/29/00 technically correct a Legislative Counsel drafting error.

Senate Floor Amendments of 8/25/00 change the author from the Assembly Labor Committee to Assemblyman Steinberg and provide further due process procedures of an administrative decision to impose penalty assessments for a failure to pay prevailing wages, to establish an informal settlement procedure, to impose liquidated damages, and to provide notice to bonding companies.

ANALYSIS :

1. Existing law provides for the prevailing wage law and sets forth procedures for withholding funds from a contractor in cases of a violation. Existing law provides 90 days for a contractor, or a subcontractor to

whom the rights have been assigned, to file suit for recovery of any money withheld. If suit is not brought within 90 days, the withheld funds are disbursed by the commissioner to the underpaid workers.

Existing law, Section 1771.7, also allows a contractor to appeal an enforcement action by a local public entity to the Director of Industrial Relations. Any such appeal, however, would waive the contractor's right to bring a court action on the same issue. By regulation, a subcontractor may also request an administrative hearing on the withholding.

This bill would repeal Section 1771.7 and redraft and revise the procedures for contesting a withholding action. It would provide that:

A. An affected contractor or subcontractor may request a review of a civil wage and penalty assessment by filing a written request for a hearing within 30 days of being served with the assessment. The assessment would become final and shall constitute a verified claim for wages found due and payable if a hearing request is not filed within that 30-day period.

B. Until January 1, 2005, authorize the Director of Industrial Relations to initiate an administrative appellate hearing by a qualified hearing officer. The director would issue the decision and possible reconsideration actions. After these provisions sunset, an administrative law judge under the jurisdiction of the director shall have such authority to conduct hearings and issue decisions and reconsideration actions.

C. The cited party would have the opportunity to review the commissioner's evidence within 20 days of the receipt of the request for hearing. Similar to existing law, it would be the contractor's or subcontractor's burden to show the per diem wages paid to its employees and the hours worked by its employees.

D. Impose liquidated damages on a contractor in an amount

equal to all unpaid wages due if the wages are not paid within 60 days after the issuance of an assessment decision. The damages would be distributed to affected employees.

E. The affected contractor or subcontractor may seek judicial review of this administrative decision by filing a petition for a writ of mandamus under Code of Civil Procedure Section 1094.5 within 45 days of the service of the decision. Under that provision, the ALJ's decision will be upheld unless there was a prejudicial abuse of discretion established by a showing that the ALJ did not proceed in the manner required by law, or that his or her order is not supported by the findings, or that the findings are not supported by substantial evidence in light of the whole record.

F. This administrative hearing and mandamus action would be the exclusive methods for review of a commissioner's assessment or the decision of an awarding body to withhold contract payment; there would not be a right to a de novo trial.

2. Existing law, Labor Code Section 1775(d), provides that "the contractor and subcontractor shall be jointly and severally liable in the enforcement action for any wages due," and specifies that the contractor is liable for collection only after enforcement of all reasonable remedies against the subcontractor has been exhausted. Section 1775(b) makes a prime contractor liable for penalties for a subcontractor's violation of the law when the contractor either knows of the subcontractor's violation or fails to follow specified procedures to require the subcontractor to comply with the prevailing wage law and to monitor compliance.

This bill would expressly hold a contractor and a subcontractor jointly and severally liable for all amounts due (including penalties) pursuant to a final

assessment of the commissioner or a judgment thereon. Like existing law, collection against the contractor could ensue only upon the exhaustion of all reasonable remedies against the violating subcontractor. Similarly,

a prime contractor would not be liable for the subcontractor's penalties unless the prime contractor knew of its subcontractor's failure to pay prevailing wages or failed to comply with the procedures to require and monitor the subcontractor's compliance.

3. Other provisions would provide that:

A. An awarding body, that knows of any suspected prevailing wage violation must report the violation to the Labor Commissioner. The DLSE would in turn be required to notify the contractor within 15 days of the DLSE receiving a complaint that a subcontractor on the project is violating the law.

B. A violation may be enforced by the awarding body or by the Labor Commissioner after investigation by issuance of a civil wage and penalty assessment to the violating contractor or subcontractor, or both, setting forth the nature of the violation and the wages and penalties due. The assessment shall also advise the cited party of the procedure for obtaining review of the assessment. (As in existing law, a civil penalty of up to $50 per employee per day may be assessed.)

C. Any assessment must be served no later than 180 days after the filing of a valid notice of completion for the public works project in the county in which the project is located, or no later than 180 days after acceptance of the public work, whichever is later.

D. Establish an informal settlement conference (e.g., telephone conference) process without formal proceedings before the expiration of a 60 day period within which a contractor can appeal an assessment.

E. Require the Labor Commissioner to try to ascertain the identities of wage bonding companies and to serve a copy of the assessment at the same time service is made to the contractor, subcontractor, or awarding body. No bonding company would be relieved of its responsibilities due to failure to receive such notice.

F. An awarding body shall not disburse the withheld funds until receipt of a final decision by the Labor Commissioner that is no longer subject to judicial review. If amounts are due, funds shall be transmitted to the commissioner for disbursal.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: Yes

SUPPORT : (Verified 8/15/00)

State Building and Construction Trades Council of California (source)
California Chapters of the National Electrical Contractors Association
Sheet Metal and Air Conditioning Contractors, National Association
California Legislative Conference of the Plumbing, Heating, and Piping Industry
Western Wall and Ceiling Contractors Association
Air Conditioning and Refrigeration Contractors Association
California District Council of Iron Workers
California Labor Federation, AFL-CIO
California-Nevada Conference of Operating Engineers
California Professional Firefighters
California State Association of Electrical Workers
California State Pipe Trades Council
Western States Council of Sheet Metal Workers

ARGUMENTS IN SUPPORT : Proponents argue that this bill will make the administrative process easier for both workers and contractors: more efficient and less litigious. Under the current statutory scheme, cases can drag out for four years or more, thus depriving the underpaid worker of her or her fair wages for that extended time.

Supporters state this bill will cure a defect in current law which a federal court found to be an unconstitutional violation of subcontractors' due process rights. The Federal 9th Circuit Court of Appeals, in the case of G&G Fire Sprinklers, Inc., v. Bradshaw [156 Fed 3d 893 (1998)] determined that the Due Process clause requires a hearing

prior to the withholding of funds, or promptly thereafter. The existing statutory scheme allows the commissioner to compel the withholding of funds from a contractor based on a violation of prevailing wages without an administrative hearing either before or after the withholding occurs. Instead, existing statutes require the contractor to file suit to reclaim funds which they believe have been wrongfully withheld. The court held that the remedy of a lawsuit does not satisfy the Due Process requirements for a prompt hearing.

In response to the G&G case, the Labor Commissioner has adopted regulations to allow for an administrative hearing of a claim by a contractor that funds have been wrongfully withheld. Under the existing statute, a contractor who lost before the commissioner could file a suit and receive a new trial before a court.

The bill was originally introduced to address the G&G decision. However, even though that decision has been vacated, the sponsor of this bill wishes to proceed with the proposed revisions in order to reduce the current layers of litigation.

ASSEMBLY FLOOR :
AYES: Alquist, Aroner, Bock, Calderon, Cardenas, Cardoza, Cedillo, Corbett, Davis, Ducheny, Dutra, Firebaugh, Florez, Gallegos, Havice, Honda, Jackson, Keeley, Knox, Kuehl, Lempert, Longville, Lowenthal, Migden, Nakano, Papan, Reyes, Romero, Scott, Shelley, Steinberg, Strom-Martin, Thomson, Torlakson, Villaraigosa, Vincent, Washington, Wayne, Wesson, Wiggins, Wildman, Hertzberg
NOES: Aanestad, Ackerman, Ashburn, Baldwin, Bates, Battin, Baugh, Brewer, Briggs, Campbell, Cox, Cunneen, Dickerson, Granlund, House, Kaloogian, Leach, Leonard, Maddox, Maldonado, Margett, McClintock, Olberg, Oller, Robert Pacheco, Rod Pacheco, Pescetti, Runner, Strickland, Thompson, Zettel

NC:sl 9/19/00 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916)
327-4478

SB 1999

UNFINISHED BUSINESS

Bill No: SB 1999
Author: Burton (D)
Amended: 8/23/00
Vote: 21

SENATE VOTES NOT RELEVANT

SENATE FLOOR : 23-13, 5/25/00
AYES: Alarcon, Alpert, Bowen, Burton, Chesbro, Costa, Dunn, Escutia, Figueroa, Hughes, Johnston, Karnette, Murray, O'Connell, Ortiz, Peace, Perata, Schiff, Sher, Solis, Soto, Speier, Vasconcellos
NOES: Brulte, Johannessen, Johnson, Kelley, Knight, Leslie, Lewis, McPherson, Monteith, Mountjoy, Poochigian, Rainey, Wright

ASSEMBLY FLOOR : 47-29, 8/28/00 - See last page for vote

SUBJECT : Public work

SOURCE : Author

DIGEST : This bill provides that for purposes of public works laws, "construction" includes work performed during the design and pre-construction phases of construction including, but not limited to, inspection and land surveying work.

Assembly Amendments delete the prior version. As it left the Senate, the bill was authored by Senator Karnette and related to crane operators and occupational safety orders.

CONTINUED

ANALYSIS : Existing law:

1. Provides that "public works" includes construction, demolition, or repair work done under contract and paid for in whole or in part out of public funds. (Labor Code Section 1720)

2. Defines "public works contract" as "an agreement for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind." (Public Contract Code Section 1101)

3. Provides that workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work. (Labor Code Section 1772)

4. Provides that "workman" includes "laborer, workman, or mechanic." (Labor Code Section 1723)

5. Provides that "contractor" and "subcontractor" include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works projects, as defined. (Labor Code Section 1722.1)

6. Provides that all workers employed on public works shall be paid prevailing wage. (Labor Code Section 1771) Requires that public works contractors employ workers in any apprenticeable trade or craft to employ apprentices at a ratio, as defined.

7. Provides that the Department of Industrial Relations has the authority to determine whether a project is a "public works" and shall determine the prevailing wage for workers employed on public works.

This bill provides that for purposes of public works laws, "construction" includes work performed during the design and pre-construction phases of construction including, but not limited to, inspection and land surveying work.

This bill:

1. Clarifies that workers entitled to prevailing wage on construction jobs, are entitled to prevailing wage rates during the design and pre-construction phases of a public works construction projects.

2. Clarifies that workers providing construction inspection and land surveying work on public works projects are entitled to prevailing wage.

Comments

This bill codifies current Department of Industrial Relations practice by including construction inspectors and land surveyors among those workers deemed to be employed upon public works and by insuring that workers entitled to prevailing wage during the construction phase of a public works project will get prevailing wage on the design and pre-construction phases of a project.

On June 9, 2000, the department issued a decision in Public Works Case No. 99-046 finding that construction inspectors hired to do inspection for compliance with applicable

building codes and other standards for a public works project were deemed to be employed upon public works and therefore entitled to prevailing wage. In the case, part of the public works contract provided for "construction inspection for compliance with applicable building codes" and other standards. The inspectors argued that they should be paid prevailing wage pursuant to the state's public works laws because their work was part of a public works contract. The general contractor and the subcontractor that hired the inspectors argued that because the inspectors were not involved in actual construction, demolition, or repair work, as specified in Section 1720 of the Labor Code, they were not covered by the prevailing wage laws.

The department declined to interpret Section 1720 so narrowly, finding that the inspectors were covered under prevailing wage law because "workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon

public work." (Labor Code Section 1772.) The department rejected an argument that Section 1723 of the Labor Code (which states that "workmen" entitled to prevailing wage includes laborers, workmen and mechanics) precluded a finding that inspectors were also covered by the prevailing wage laws, noting that Section 1723 does not state that "inspectors" are not "workmen" that can be covered by the prevailing wage laws. The department also found that the subcontractor employing the inspectors fit squarely under the definition of subcontractor in the prevailing wage laws despite the fact that the subcontract involved construction management duties.

This bill codifies much of the department's June 9, 2000, decision by including "inspectors" in the definition of "construction" for purposes of public works. This bill also insures that workers earning the prevailing wage in the construction phase of a project will also be entitled to that wage for the same type of work done during the design and pre-construction phases of a project, even if that work is done pursuant to a services contract or otherwise, as the department found.

This bill also codifies department regulation and practice of covering land surveyors under prevailing wage law.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: Yes

According to the Assembly Appropriations Committee analysis, this bill has no direct state fiscal impact, but merely codifies current administrative decisions of the department interpreting prevailing wage law.

ASSEMBLY FLOOR :
AYES: Alquist, Aroner, Bock, Calderon, Cardenas, Cardoza, Cedillo, Corbett, Correa, Davis, Ducheny, Dutra, Firebaugh, Florez, Gallegos, Havice, Honda, Jackson, Keeley, Knox, Kuehl, Lempert, Longville, Lowenthal, Machado, Mazzoni, Migden, Nakano, Papan, Pescetti, Reyes,

Romero, Scott, Shelley, Steinberg, Strom-Martin, Thomson, Torlakson, Villaraigosa, Vincent, Washington, Wayne, Wesson, Wiggins, Wildman, Wright, Hertzberg
NOES: Aanestad, Ackerman, Ashburn, Baldwin, Bates, Battin,

□

Baugh, Brewer, Briggs, Campbell, Cox, Cunneen, Dickerson, Granlund, House, Leach, Leonard, Maddox, Maldonado, Margett, McClintock, Olberg, Oller, Robert Pacheco, Rod Pacheco, Runner, Strickland, Thompson, Zettel

NC:sl 8/29/00 Senate Floor Analyses

SUPPORT/OPPOSITION: NONE RECEIVED

**** END ****

Original List Date: 10/3/2003
Last Updated: 7/19/2006
List Print Date: 10/11/2007
Claim Number: 03-TC-13
Issue: Prevailing Wages

Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Tel: (916) 323-5849
Fax: (916) 327-0832

Mr. Scott A. Kronland
Altshuler, Berzon, Nussbaum, Rubin & Demain
177 Post Street, Suite 300
San Francisco, CA 94108

Tel: (415) 421-7151
Fax: (415) 362-8064

Mr. Rob Cook
Office of Public School Contruction
Department of General Services
1130 K Street, Suite 400
Sacramento, CA 95814

Tel: (916) 445-3160
Fax:

Mr. Glen Everroad
City of Newport Beach
3300 Newport Blvd.
P. O. Box 1768
Newport Beach, CA 92659-1768

Claimant
Tel: (949) 644-3127
Fax: (949) 644-3339

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Claimant Representative
Tel: (916) 485-8102
Fax: (916) 485-0111

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Tel: (916) 368-9244
Fax: (916) 368-5723

Mr. Leonard Kaye, Esq. County of Los Angeles Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: Fax:	(213) 974-8564 (213) 617-8106
Mr. Anthony Mischel Department of Industrial Relations Division of Administration 320 W. Fourth St., Suite 600 Los Angeles, CA 90013	Tel: Fax:	(213) 576-7725 (213) 576-7735
Ms. Annette Chinn Cost Recovery Systems, Inc. 705-2 East Bidwell Street, #294 Folsom, CA 95630	Tel: Fax:	(916) 939-7901 (916) 939-7801
Ms. Carla Castaneda Department of Finance (A-15) 915 L Street, 11th Floor Sacramento, CA 95814	Tel: Fax:	(916) 445-3274 (916) 323-9584
Ms. Ginny Brummels State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 500 Sacramento, CA 95816	Tel: Fax:	(916) 324-0256 (916) 323-6527
Ms. Susan Geanacou Department of Finance (A-15) 915 L Street, Suite 1190 Sacramento, CA 95814	Tel: Fax:	(916) 445-3274 (916) 324-4888
Ms. Bonnie Ter Keurst County of San Bernardino Office of the Auditor/Controller-Recorder 222 West Hospitality Lane San Bernardino, CA 92415-0018	Tel: Fax:	(909) 386-8850 (909) 386-8830
Mr. J. Bradley Burgess Public Resource Management Group 1380 Lead Hill Boulevard, Suite #106 Roseville, CA 95661	Tel: Fax:	(916) 677-4233 (916) 677-2283
Ms. Juliana F. Gmur MAXIMUS 2380 Houston Ave Clovis, CA 93611	Tel: Fax:	(916) 485-8102 (916) 485-0111

Mr. Keith B. Petersen
SixTen & Associates
3841 North Freeway Blvd., Suite 170
Sacramento, CA 95834

Tel: (916) 565-6104

Fax: (916) 564-6103

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF ADMINISTRATION
Office of the Director – Legal Unit
320 W. Fourth Street, Suite 600
Los Angeles, CA 90013

Arnold Schwar

Tel. No.: (213) 576-7725
Fax: (213) 576-7735

EXHIBIT K

31 October 2007

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth St., Suite 300
Sacramento, CA 95814

Re: Test Claim by City of Newport Beach (Prevailing Wages)
No: 03-TC-13

Dear Ms. Higashi:

The Department of Industrial Relations ("DIR") supports the Commission Draft Staff Analysis ("Draft Analysis"), which determined that new mandates were not created by changes in the California Prevailing Wage Law ("CPWL") because Test Claimants has not demonstrated the decision to engage in construction using private contractors is a voluntary act.[1] DIR will not repeat the Draft Analysis's basis for this conclusion. Instead, these comments reiterate DIR's position that even if Test Claimants can prove that local governments have to engage in construction and have to contract out for construction activities, changes in the Labor Code have not increased the burden on local governments so as to create a mandate.

The Obligation To Pay Prevailing Wages And Comply With The Reporting Requirements Of The Labor Code Is On The Private Sector And Does Not Uniquely Affect Local Governments.

As the Draft Analysis notes, the prevailing wage statute is an attempt to bring the employees of private contractors into parity with public employees:

> The overall purpose of the prevailing wage law ... is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion

[1] DIR argued this in its response and challenged Test Claimants to show some compulsion to use private contractors as well as for more specifics on its claimed mandates. Test Claimants chose not to respond, and DIR has no way to know what Test Claimant may now claim. DIR therefore requests the ability to file a response on this point should Test Claimants now show some requirement that they engage in construction and use private contractors for that construction.

> contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(*Lusardi Construction Co v. Aubry* (1992) 1 Cal.4th 976, 987 (citations omitted).)

If a local government contracts out construction work to the private sector, the Labor Code prevents private contractors from undercutting local private labor standards with public dollars. As Labor Code section 1771 makes clear, the obligation to pay prevailing wages or comply with the CPWL, does not apply to construction "carried out by a public agency with its own forces." (See also, *Bishop v. City of San Jose* (1969) 1 Cal.3d 56.)

The obligation to pay prevailing wages, however, is with the private sector, as is the requirement to hire apprentices, prepare Certified Payroll Records, and other obligations described in Labor Code sections 1770 et seq. No changes to these sections of the Labor Code affect local governments other than, possibly than in an enforcement capacity.

Subvention only applies to "programs that carry out the governmental function of providing service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56. As seen in DIR's prior submissions, changes to the CPWL do not meet this requirement of uniquely affecting local governments.

<u>The Changes In Labor Code Have Been A Series Of Changes That, Taken As A Whole, Reduced Local Governments' Responsibility In Favor Of Increased Responsibility By The State. Therefore, The State Has Not Increased The Demands On Local Governments.</u>

Even if the Commission were to determine that some changes to the CPWL affect only local governments, DIR's prior submissions demonstrated that the changes to the Labor Code have in fact reduced the responsibility on local governments and increased the responsibilities on the state. The Legislature or a state agency must mandate "a new program or higher level of service" on local government in order for the State to provide a subvention. (Cal. Const., art. XIII B, § 6, subd. (a); *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.) A minor addition in responsibility accompanied by a simultaneous reduction in work does not result in subvention. (Gov. Code, § 17556, subd. (e).)[2]

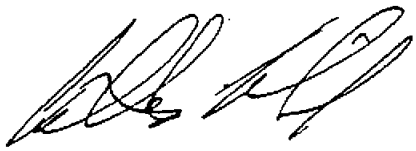
[1] Since DIR's submissions, there have been further developments in the CPWL. For example, Test Claimant argues that Newport Beach is now required by the Department to comply with the CPWL in spite of its status as a chartered city. This contention was based on a determination by the Director that was challenged in *City of Long Beach v.*

To summarize DIR's prior submissions, before 1975, local governments determined the prevailing wage and enforced it against contractors and their subcontractors through civil litigation. (Lab. Code, § 1773 [1975 version], *Lusardi*, *supra*, 1 Cal.4th 976.) Coverage determinations, previously made by local governments at the time of signing a construction contract, are now made by DIR, upon the request of an interested party. (Lab. Code, § 1773.4, 8 Cal. Code Regs., tit 8, § 16001-16002.5.) DIR now is responsible for defending these decisions in litigation. (Compare, for example, *Metropolitan Water District v. Whitsett* (1932) 215 Cal. 400 with *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976.) The determination of prevailing wage rates, previously the responsibility of local governments, are now calculated, published, and defended in court by the Director of Industrial Relations. (See, *California Slurry Seal Association v. Dept. of Industrial Relations* (2002) 98 Cal.App.4th 651.) The only obligation of local governments is to make these rates available to private contractors. (Lab. Code, § 1773.) Previously, local governments had the primary responsibility for enforcement of the obligation to pay prevailing wages. Enforcement is now primarily the carried out by the Labor Commissioner, while local governments retain only the duty to "take cognizance" of violations and report them to the Labor Commissioner. This is another clear reduction of responsibilities away from the city and to the state.[3]

Conclusion

The Draft Analysis correctly and fairly determines that Test Claimants have not shown a mandate as a result of changes to the CPWL. Therefore, the Claim should be denied.

Yours Truly,



Anthony Mischel
Attorney At Law

cc: See attached list

Department of Industrial Relations (2004) 34 Cal.4th 942. As a result of this decision, the Department removed its determination from its listing of precedent determinations. There is, therefore, no Department position that requires chartered cities always to comply with the CPWL.

[3] The only actual enforcement responsibility for local governments occurs when they **voluntarily** apply to enforce the prevailing wage as a labor compliance program under Labor Code section 1771.5. There is, however, no legal compulsion for a local government to apply for such status although there are economic benefits if one chooses to do so.

SERVICE LIST

Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Mr. Scott A Kronland
Altshuler, Berzon, Nussabaum, Rubin & Demain
177 Post Street, Suite 300
San Francisco, CA 94108

Mr. Glen Everroad
Revenue Manager
City of Newport Beach
330 Newport Blvd.
P.O. Box 1768
Newport Beach, CA 92659-1768

Mr. Rob Cook
Office of Public School Construction
Department of General Services
1130 K. Street, Suite 400
Sacramento, CA 95814

Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Mr. Glen Everroad
City of Newport Blvd.
P.O. Box 1768
Newport Beach, CA 92659-1768

Mr. David Wellhouse
David Wellhouse & Associates, Inc
9175 Kiefer Blvd., suite 121
Sacramento, CA 95826

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Blvd., Suite 106
Roseville, CA 95661

Ms. Annette Chinn
Coast Recovery Systems, Inc
705-2 East Bidwell Street, #294
Folsom, CA 95630

Ms. Juliana F. Gmur
Maximus
2380 Houston Ave
Clovis, CA 93611

Ms. Ginny Brummels
State Controllers Office (B-08)
Division of Accounting & Reporting
3301 C. Street, suite 500
Sacramento, CA 95816

Mr. Keith B. Petersen
Six Ten and Associates
3841 Borth Freeway Blvd., Suite 170
Sacramento, CA 95834

Mr. Susan Geanacou
Department of Finace (A-15)
915 L. Street, suite 1190
Sacramento, CA 95814

Ms. Carla Castaneda
Department of Finance (A-15)
915 L. Street, 11th Floor
Sacramento, CA 95814

Ms. Bonnie Ter Keurst
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 West Hospitality Lane
San Bernardino, Ca 92415-0018

Exhibit L

COMMENTS ON DRAFT STAFF ANALYSIS

Prevailing Wages

Chapter 1084, Statutes of 1976; Chapter 1174, Statutes of 1976; Chapter 992, Statutes of 1980; Chapter 142, Statutes of 1983; Chapter 143, Statutes of 1983; Chapter 278, Statutes of 1989; Chapter 1224, Statutes of 1989; Chapter 913, Statutes of 1992; Chapter 1342, Statutes of 1992; Chapter 83, Statutes of 1999; Chapter 220, Statutes of 1999; Chapter 881, Statutes of 2000; Chapter 954, Statutes of 2000; Chapter 938, Statutes of 2001; Chapter 1048, Statutes of 2002; and 8 California Code of Regulations, sections 16000-16802

Labor Code Sections 1720, 1720.3, 1720.4, 1726, 1727, 1735, 1742, 1770, 1771, 1771.5, 1771.6, 1773.5

Claim no. CSM-03-TC-13

City of Newport Beach, Test Claimant

INTRODUCTION:

Test claimant City of Newport Beach (hereinafter "City") submits the following in response to the Draft Staff Analysis issued by Commission staff on October 11, 2007. In its analysis of the one issue raised in the Draft Staff Analysis, Staff's conclusion is in error. Test claimant wishes to set the record straight.

ISSUE 1: Do the test claim statutes and executive orders mandate a "new program or higher level of service" within the meaning of Article XIII B, section 6, of the California Constitution?

Staff answers the above question in the negative concluding that *City of Merced*[1] and its progeny are applicable to this matter and that they stand as the controlling cases on the issue of how voluntary acts on behalf of local government serve to sever the program from being a reimbursable state mandate. Staff bases this conclusion on two alleged

[1] (1984) 153 Cal.App.3d 777.

voluntary decisions entertained by local government: the decision to undertake a project and the decision to bid that project out to a privet entity. In the first instance, the argument of practical compulsion lies as the purpose of local government is the protection of and service to the public. In the second, the decision to contract with a private contractor for public works projects is anything other than a voluntary choice on behalf of the local governmental entity. Indeed, there is a complex body of law on this matter that defines under what conditions a local government must seek out private contracts for public works and watchdog organizations to ensure compliance with the law.

A. Local Governmental Entities Are Required By Law to Competitively Bid Public Works Projects.

Public Contract Code[2] sections 20100 *et seq.* set forth the Local Agency Public Construction Act. The Act sets project cost limits on those projects can be done by local governmental entities[3] themselves without using outside contractors.[4] Any project that exceeds the cost limits cannot be performed by the local governmental entity an must be bid out. Examples of such limits include, but are not limited to:

School districts and Community College Districts:

- $50,000 for equipment, materials, services[5] and repairs including maintenance;[6] and
- 350 to 750 hours[7] for repairs, alterations, additions, painting, maintenance[8] and improvements of school buildings, apparatus, equipment or school grounds.[9]

---

[2] All further statutory references shall be to the Public Contract Code unless stated otherwise.

[3] This body of law is applicable to school districts, community college districts, counties, cities, utility districts, transit districts, highway districts, irrigation districts, water storage districts, county waterworks districts, county drainage districts, levee districts, municipal water districts, sanitation and sewer districts, harbor and river districts, community service districts, and fire protection districts, among others.

[4] For school districts, emergency repairs can be made and personal property and educational materials may purchased without bid or use of private contractors. Sections 20113, 20118, 20118.3. For counties, emergency repairs, emergency court room construction, and solutions to jail overcrowding when the county is under court order to relieve the situation can be made without bid or use of private contractors. Section 20134. For cities, emergency repairs and transfer of prisoners can be made without bid or use of private contractors. Sections 20168 and 20168.5. For Community College Districts, emergency repairs can be made without bid or use of private contractors. Section 20654.

[5] Section 20111, subdivision (c) excludes professional, advice and insurance services.

[6] Section 20111, subdivision (a) (schools) and Section 20651, subdivision (a) (colleges).

[7] Depending on average daily attendance for school districts. Section 20114.

[8] As defined in Sections 20115 (schools) and 20656 (colleges).

Counties:

- $4,000, $6,500 or $50,000[10] for construction of public buildings, painting and repairs;[11]
- $3 million annually for repair, remodeling or other repetitive work;[12] and
- $3,500 to $6,500 for the purchase of materials, furnishings and supplies[13] used in construction or repair of public works.[14]

Public projects are generally[15] defined in Public Contract Code section 22002, subdivision (c) which states, in pertinent part:

> "Public project" means any of the following:
> (1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publicly owned, leased, or operated facility.
> (2) Painting or repainting of any publicly owned, leased, or operated facility.
> (3) In the case of a publicly owned utility system, "public project" shall include only the construction, erection, improvement, or repair

---

[9] Sections 20114 (schools) and 20655 (colleges).
[10] Depending on whether the population is below 500,000, greater that 500,000 or greater than 2 million. Sections 20122 and 20123.
[11] Section 20121.
[12] Section 20128.5.
[13] Section 20131, subdivision (c) excludes medical or surgical supplies or equipment or professional services for county hospitals.
[14] Depending on whether the population is greater than 500,000. Section 20131.
[15] Other case-specific definitions can be found within the code.
Section 20150.2 (counties with a population of less than 500,000):
(a) A project for the erection, improvement, and repair of public buildings and works.
(b) Work in or about streams, bays, waterfronts, embankments, or other work for protection against overflow, except maintenance, repair, or reconstruction work.
(c) Supplies and materials used in maintenance, repair, or reconstruction work in or about streams, bays, waterfronts, embankments; or other maintenance, repair, or reconstruction work for protection against overflow.
Section 20161 (cities):
(a) A project for the erection, improvement, painting, or repair of public buildings and works.
(b) Work in or about streams, bays, waterfronts, embankments, or other work for protection against overflow.
(c) Street or sewer work except maintenance or repair.
(d) Furnishing supplies or materials for any such project, including maintenance or repair of streets or sewers.

of dams, reservoirs, power plants, and electrical transmission lines of 230,000 volts and higher.[16]

For Public Projects, school districts and community college districts must bid out projects exceeding $15,000;[17] counties with a population under 500,000 have a $4,000 limit to informally bid and $10,000 for formal bids;[18] and cities have a $5,000 limit.[19] Projects exceeding these amount must be competitively bid. Charter cities are subject to the limitations of their charter.[20]

Moreover, local governmental entities cannot split the project up into smaller component parts to avoid application of the law and the requirement to seek outside competitive bids.[21]

The above stated amounts for the various local governmental entities can be increased under the application of Uniform Public Construction Cost Accounting Act[22] thus allowing greater flexibility for keeping projects in-house rather than bidding them out. Such application is elective on the part of the local governmental entity.[23]

Finally, organizations like the Construction Industry Force Account Council (CIFAC) act as watchdogs over the competitive bidding process. CIFAC has monitored local governmental entities for almost thirty years to ensure compliance with the Public Contracting Code for new construction providing investigations that have resulted, over the past four years, in $2 billion in competitive bidding contracts going out to the construction community and has influenced an additional $662 million of bids to ensure their availability to private contractors.[24]

---

[16] Section 22002, subdivision (d) sets forth those items excluded form the definition of public work: " 'Public project' does not include maintenance work. For purposes of this section, "maintenance work" includes all of the following:

(1) Routine, recurring, and usual work for the preservation or protection of any publicly owned or publicly operated facility for its intended purposes.

(2) Minor repainting.

(3) Resurfacing of streets and highways at less than one inch.

(4) Landscape maintenance, including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems.

(5) Work performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems, including, but not limited to, dams, reservoirs, power plants, and electrical transmission lines of 230,000 volts and higher."

[17] Sections 20111, subdivision (b) and 20651, subdivision (b).

[18] Section 20150.4.

[19] Section 20162.

[20] Section 1100.7.

[21] Section 20116 (school districts); section 20123.5 (counties); and section 20163 (cities).

[22] Section 22000 et seq.

[23] Section 22003.

[24] See www.cifac.org.

B. Local Governmental Entities Are Compelled to Undertake Public Works Projects.

Staff relies on recent Supreme Court decisions in *Kern High School District*[25] and *San Diego Unified School District*[26] for the proposition that the initial decision by a local governmental entity is discretionary and this voluntariness severs the program from being a reimbursable state mandate. But, the analysis begins with the first case on the issue: *City of Merced*.[27]

At issue in *City of Merced,* was the change in Code of Civil Procedure §1263.510, in 1975, which provided that when the power of eminent domain was exercised, the local government was responsible for reimbursing a business owner for loss of goodwill. The city filed a test claim to obtain reimbursement for the loss of goodwill it had paid out in a 1980 eminent domain action alleging that the statutory change had created a state-mandated program.[28] On appeal, the court applied "the basic rules of statutory construction" finding that the discretionary nature of the exercise of the power of eminent domain was set forth in the code itself.[29] The court pointed to Code of Civil Procedure §1230.030 which was part of the same 1975 legislation that provided for the payment for loss of goodwill. The statute stated that the exercise of eminent domain was a discretionary act, as there are other methods of acquiring property.[30] Thus the city had, at its own option, embarked on a course that resulted in it having to pay for loss of goodwill.

And yet, even the *City of Merced* court recognized that underlying decisions within the purview of governmental function are not outside the scope of reimbursable state mandate. Indeed, the fact that there were two decisions by the city is often overlooked. Just as in the instant case, where Staff states that there is an initial decision to undertake a public works project, there was an initial decision by the city of Merced to acquire property. The court did not find that this was the voluntary decision that would prevent recovery of costs by the city. Although it could have so found. On the contrary, this decision was taken in stride. It was the second decision to acquire the property by eminent domain rather than any other process that resulted in the court's now, well-known holding.

So, too, was the treatment by the Court of the two school district cases, *supra*. There is no analysis by the Court as to the initial decision to create the district, to educate pupils. Clearly, there is a line to be drawn between those decisions that are functions of government and those that truly voluntary.

---

[25] (2003) 30 Cal.4th 727.
[26] (2004) 33 Cal.4th 859.
[27] (1984) 153 Cal.App.3d 777.
[28] *Id.* at p. 780.
[29] *Id.* at p. 783.
[30] *Ibid.*

Finally, the decision to undertake a public works project is hardly voluntary in the case of repairs; necessary improvements; replacement of existing structures; and when new construction is required for fire stations, police stations and the provision of other emergency services. Indeed, under the Local Agency Public Construction Act, small repairs and maintenance are not held to the competitive bidding standards and can be performed by the local government's employees. That which is compelled are those projects that are vital to the function of government and are of such cost as to require they be performed by private contractors.

CONCLUSION:

Based on the preceding arguments, City urges the Commission to find that the Prevailing Wage statutes create a reimbursable state mandate under Article XIIIB, section 6 of the California Constitution.

CERTIFICATION

I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and correct, except as to those matters stated upon information and belief and as to those matters, I believe them to be true.

Executed this 16 day of November, 2007, at Newport Beach, California, by:

Glen Everroad
City of Newport Beach

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento, and I am over the age of 18 years and not a party to the within action. My place of employment is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841.

On November 7, 2007, I served:

COMMENTS ON DRAFT STAFF ANALYSIS

Prevailing Wages

Chapter 1084, Statutes of 1976; Chapter 1174, Statutes of 1976; Chapter 992, Statutes of 1980; Chapter 142, Statutes of 1983; Chapter 143, Statutes of 1983; Chapter 278, Statutes of 1989; Chapter 1224, Statutes of 1989; Chapter 913, Statutes of 1992; Chapter 1342, Statutes of 1992; Chapter 83, Statutes of 1999; Chapter 220, Statutes of 1999; Chapter 881, Statutes of 2000; Chapter 954, Statutes of 2000; Chapter 938, Statutes of 2001; Chapter 1048, Statutes of 2002; and 8 California Code of Regulations, sections 16000-16802

Labor Code Sections 1720, 1720.3, 1720.4, 1726, 1727, 1735, 1742, 1770, 1771, 1771.5, 1771.6, 1773.5

Claim no. CSM-03-TC-13

City of Newport Beach, Test Claimant

by placing a true copy thereof in an envelope addressed to each of the persons listed on the mailing list attached hereto, and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 7th day of November, 2007, at Sacramento, California.

Declarant

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Mr. Scott A. Kronland
Attshuler, Berzon, Nussbaum, Rubin & Demain
177 Post Street, Suite 300
San Francisco, CA 94108

Mr. Rob Cook
Office of Public School Construction
Department of General Services
1130 K Street, Suite 400
Sacramento, CA 95814

Mr. Anthony Mischel
Department of Industrial Relations
Division of Administration
320 West Fourth Street, Suite 600
Los Angeles, CA 90013

Ms. Annette Chinn
Cost Recovery Systems, Inc.
705-2 East Bidwell Street, #294
Folsom, CA 95630

Mr. Keith B. Peterson
SixTen & Associates
3841 North Freeway Blvd., Suite 170
Sacramento, CA 95834

Ms. Carla Castaneda
Department of Finance (A-15)
915 L Street, 12th Floor
Sacramento, CA 95814

Ms. Susan Geanacou
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814

Mr. David Wellhouse
Wellhouse & Associates
9175 Kiefer Blvd., Suite 121
Sacramento, CA 95826

Ms. Ginny Brummels
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Blvd., Suite 106
Roseville, CA 95661

Ms. Bonnie Ter Keurst
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 West Hospitality Lane
San Bernardino, CA 92415-0018

Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Exhibit M

DEPARTMENT OF FINANCE
OFFICE OF THE DIRECTOR

ARNOLD SCHWARZENEGGER, GOVERNOR
STATE CAPITOL ■ ROOM 1145 ■ SACRAMENTO CA ■ 95814-4998 ■ WWW.DOF.CA.GOV

November 1, 2007

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of October 11, 2007, the Department of Finance (Finance) has reviewed the draft staff analysis of Claim No. 03-TC-13 "Prevailing Wages."

Finance agrees with the Commission staff's recommendation to deny the test claim. The test claim statutes do not mandate a new program or higher level of service on local agencies within the meaning of Article XIIIB, Section 6 of the California Constitution. The test claim statutes refer to the California Prevailing Wage Law (CPWL), which is triggered by the discretionary decision of a local agency to use a private entity as a contractor for employment on a public works project.

Finance agrees with Commission staff that the decision to undertake a public works project is not required by the state, but rather prioritized by local agencies based upon project specific circumstances. Finance also agrees with Commission staff that the local agency decision to contract with a private entity to carry out a public works project is not compelled by statute, as local agencies have other options to carry out public works projects, such as using their own employees, hiring additional employees or contracting with another public entity. These options are not subject to the CPWL. The courts have consistently held that when a local agency makes an underlying discretionary decision, the resulting new requirements do not constitute a reimbursable state mandate.

As required by the Commission's regulations, a "Proof of Service" is enclosed indicating that the parties included on the mailing list which accompanied your October 11, 2007 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Carla Castañeda, Principal Program Budget Analyst at (916) 445-3274.

Sincerely,

Diana L. Ducay
Program Budget Manager

Enclosure

Attachment A

DECLARATION OF CARLA CASTAÑEDA
DEPARTMENT OF FINANCE
CLAIM NO. 03-TC-13

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

November 1, 2007
at Sacramento, CA

Carla Castañeda
Carla Castañeda

PROOF OF SERVICE

Test Claim Name: Prevailing Wages
Test Claim Number: 03-TC-13

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 12th Floor, Sacramento, CA 95814.

On November 1, 2007, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 12th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-08
Ms. Ginny Brummels
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Ms. Annette Chinn
Coast Recovery Systems Inc.
705-2 East Bidwell Street, #294
Folsom, CA 95630

A-15
Ms. Carla Castañeda
Department of Finance
915 L Street, Suite 1280
Sacramento, CA 95816

D-08
Mr. Ramon De La Guardia
Deputy Attorney General
Department of Justice
1300 I Street, Suite 125
Sacramento, CA 95814

Mr. Glen Everroad
City of Newport Beach
3300 Newport Boulevard
Newport Beach, CA 92659-1768

A-15
Ms. Susan Geanacou
Department of Finance
915 L Street, Suite 1280
Sacramento, CA 95814

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor – Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Mr. Scott Kronland
Altshuler, Berzon, Nassbaum, Rubin & Demain
177 Post Street, Suite 300
San Francisco, CA 94108

Mr. Ernie Silva
League of California Cities
1400 K Street
Sacramento, CA 95815

B-08
Mr. Jim Spano
State Controller's Office
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

A-17
Ms. Luisa M. Park
Office of Public School Construction
Department of General Services
1130 K Street, Suite 400
Sacramento, CA 95814

Ms. Bonnie Ter Keurst
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 W. Hospitality Lane
San Bernardino, CA 92415-0018

Mr. Keith B. Petersen
President
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd., Suite 121
Sacramento, CA 95826

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 1, 2007, at Sacramento, California.

Kelly Montelongo

Kelly Montelongo

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, Plaintiff and Respondent, v. G & G FIRE SPRINKLERS, INC., Defendant and Appellant.
Cal.App.3.Dist.

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, Plaintiff and Respondent,
v.
G & G FIRE SPRINKLERS, INC., Defendant and Appellant.
No. C035386.

Court of Appeal, Third District, California.
Oct. 1, 2002.

[Opinion certified for partial publication.[FN*]]

FN* See footnote 2, *post*, at page 770.

SUMMARY

A union brought an action against a fire suppression sprinkler subcontractor for a construction project, alleging defendant's failure to pay certain workers the prevailing wage rate and benefits applicable to their classification as fire sprinkler fitters. They were paid instead under the lesser classification of pipe tradesman. The trial court entered a judgment awarding the union deficiency wages, unpaid benefits, waiting time penalty wages, interest, attorney fees, and costs. (Superior Court of San Joaquin County, No. 294737, William J. Murray, Jr., Judge.)

The Court of Appeal affirmed. The court held that the union, as assignee of the statutory rights of the workers, had standing to maintain the action. The court further held that a worker on a public works project has a private statutory cause of action against a contractor to recover unpaid prevailing wages and waiting time wages. The court also held that the trial court properly imposed penalty wages for defendant's willful failure to pay the prevailing wage for the workers' job classification. (Opinion by Blease, Acting P. J., with Davis and Raye, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Judgments § 67--Res Judicata--Nature and Purpose.
The doctrine of res judicata, or claim preclusion, gives preclusive effect to former judgments on the merits and bars relitigation of the same cause of action in a subsequent suit between the same parties or parties in privity with them. The doctrine promotes judicial economy by limiting multiple litigation.
[See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 280.]

(2) Judgments § 73--Res Judicata--Merger or Bar--Declaratory Relief Action.
A final judgment in an action for declaratory relief and specific performance is a bar to a separate subsequent action for damages on the same underlying claim.

(3) Judgments § 70--Res Judicata--Merger or Bar--Pleading.
The defense of res judicata must be pleaded and proven. Failure to properly raise it in the trial court waives it.
[See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, §§ 281, 291.]

(4) Judgments § 68--Res Judicata--Identity of Parties--Privity.
Under the doctrine of res judicata, privity involves a person so identified in interest with another that he or she represents the same legal right.
[See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 392.]

(5a, 5b, 5c) Labor § 12--Regulation of Working Conditions--Wages-- Actions to Recover Prevailing Wage--Standing of Union.
In an action by a union against a subcontractor alleging the subcontractor failed to pay its workers the prevailing wage rate for their classification as fire sprinkler fitters, the trial court properly determined that the union had standing to assert the workers' wage and penalty claims, pursuant to the workers' assignment to the union of their statutory wage rights (Lab. Code, §§ 1194, 1774, 203).

(6) Assignments § 8--Actions--Review.
Because an assignment is a written instrument, in the absence of parol evidence an appellate court reviews it independently, looking to the language of the assignment to determine its meaning.

(7) Mechanics' Liens § 1--Nature and Purpose.
A mechanic's lien is a procedural device for obtaining payment of a debt owned by a property owner for the performance of labor or the furnishing of materials used in construction. However, mechanics' liens are not applicable to the performance of a public work.

(8) Mechanics' Liens § 10--Payment Bonds.
A payment bond is the practical substitute for a mechanic's lien in the public works context when a stop notice is inadequate because insufficient funds remain to be paid by the awarding body. A payment bond is required by statute and affords an additional or cumulative remedy.

(9) Labor § 12--Regulation of Working Conditions--Wages--Actions to Recover Prevailing Wage--Under Statute or Contract.
The right of a worker on a public project to recover prevailing wages under the statutory scheme is separate from the right to recover under a public works contract. The right to recover under the statute arises from the statutory scheme (Lab. Code, §§ 1771, 1774, 1775), while the right to recover on a contract theory arises from the common law right to sue for breach of the express terms of the contract as a third party beneficiary of the public works contract.

(10) Labor § 12--Regulation of Working Conditions--Wages--Actions to Recover Prevailing Wage--Under Public Works Contract.
When seeking recovery for deficiency wages for breach of a public works contract, the plaintiff must plead a common law cause of action for breach of contract and must allege that the public works contract, by its terms, requires the payment of prevailing wages.

(11a, 11b) Labor § 12--Regulation of Working Conditions--Wages--Actions to Recover Prevailing Wage--Statutory Action by Workers Against Employer.
In an action by a union against a subcontractor alleging the subcontractor failed to pay its workers the prevailing wage rate for their classification as fire sprinkler fitters, the trial court properly determined that the workers, who assigned their statutory rights to the union, had a statutory right under Lab. Code, § 1194, to recover in a civil action unpaid minimum wages and waiting time wages (Lab. Code, § 203) from the subcontractor. The California Prevailing Wage Law (Lab. Code, §§ 1720-1861) is a minimum wage law.

[See Witkin, 2 Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 331; West's Key Number Digest, Labor Relations ⇨ 1471.]

(12) Labor § 10--Regulation of Working Conditions--Wages--Prevailing Wage Law.
The California Prevailing Wage Law (Lab. Code, §§ 1720-1861) is a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds. Under the law, all workers employed on public works costing more than $1,000 must be paid not less than the general prevailing rate of per diem wages as determined by the Director of the Department of Industrial Relations for work of a similar character and not less than the general prevailing per diem wage for holiday and overtime work. Per diem wages include employer payments for health and welfare, pension, vacation, travel time, and subsistence pay as provided for in the applicable collective bargaining agreement. The duty to pay the prevailing wage to employees on a public works project extends to both the prime contractor and all subcontractors. The central purpose of the prevailing wage law, which is a minimum wage law, is to protect and benefit employees on public works projects.

(13a, 13b, 13c, 13d) Labor § 12--Regulation of Working Conditions--Wages--Actions to Recover Prevailing Wage--Penalty Wages.
In an action by a union against a subcontractor alleging the subcontractor failed to pay its workers the prevailing wage rate for their classification as fire sprinkler fitters, the trial court properly imposed penalty wages under Lab. Code, § 203, for the willful failure to pay the prevailing wage. The evidence was clear that the workers were sprinkler fitters entitled to the prevailing wage for that classification, but were instead paid at the lower rate for pipe tradesmen, and were not paid for that wage upon their termination of employment.

(14a, 14b) Labor § 12--Regulation of Working Conditions--Wages--Actions to Recover Prevailing Wage--Willful Failure to Pay--Penalty Wages.
Under Lab. Code, § 203, which requires the payment of an additional penalty if an employer willfully fails to pay waiting time wages (Lab. Code, § 202), the term "willful" means the employer intentionally failed or refused to perform an act that was required to be done. It does not mean that the employer's refusal to pay wages must necessarily be based on a deliberate evil purpose to defraud workers of wages

which the employer knows to be due. An employer's good faith mistaken belief that wages are not owed may negate a finding of willfulness.

(15a, 15b) Appellate Review § 149--Scope of Review--Sufficiency of Evidence.
The power of an appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted that will support the finding of fact. The court will not reweigh the evidence. A reviewing court begins with the presumption that the record contains evidence to sustain every finding of fact. To overcome the trial court's factual findings, the appellant must demonstrate that there is no substantial evidence to support the challenged findings. A recitation of only the appellant's evidence is not sufficient. Accordingly, if some particular issue of fact is not sustained, the appellant is required to set forth in its brief all the material evidence on the point and not merely its own evidence. Unless this is done the error is deemed to be waived.

COUNSEL
Horvitz & Levy, David M. Axelrad, Sandra J. Smith, Stephanie Rae Williams, Jon B. Eisenberg; and Robert G. Klein for Defendant and Appellant.
Roger Frommer & Associates and Roger Frommer for Plaintiff and Respondent.
Robert N. Villalovos and Michelle Yu for Division of Labor Standards Enforcement as Amicus Curiae on behalf of Plaintiff and Respondent.
BLEASE, Acting P. J.
This case is the result of a dispute arising from the construction of a new wing of the San Joaquin General Hospital, in which the subcontractor, G & G Fire Sprinklers, Inc. (G & G), failed to pay its workers the prevailing wage rate for their labor classification.

Road Sprinkler Fitters Local Union No. 669 (the Union), acting on the assignment of the statutory rights of four workers, sued G & G to recover their unpaid, prevailing wages under Labor Code section 1774[FN1] and for waiting time penalty wages under section 203.

FN1 All further section references are to the Labor Code unless otherwise specified.

G & G appeals from the judgment in favor of the Union, raising several contentions. It claims this matter is preempted by the National Labor Relations Act and that the National Labor Relations Board has exclusive jurisdiction over this case, the Union has no standing to sue because its standing is limited to recovery of the workers' statutory rights and the workers have no private statutory right to recover unpaid prevailing wages, G & G's reasonable good faith choice of job classification defeats the Union's claim, the trial court's erroneous rulings on the burden of proof and the admission of evidence require a new trial, and G & G is not liable for waiting time penalty wages. *770

In the published portion of the opinion we conclude the Union, as assignee of the workers' statutory rights, has standing to assert G & G's statutory duty to pay prevailing wages under section 1774, because a prevailing wage is a minimum wage, and therefore the workers may assert their express rights to recover their unpaid prevailing wages under the minimum wage provisions of section 1194. [FN2]

FN2 Under California Rules of Court, rules 976(b) and 976.1, the Reporter of Decisions is directed to publish the opinion except for parts I, and III through V of the Discussion.

We find no error and affirm the judgment and award of damages.

Factual and Procedural Background [FN3]

On September 28, 1993, the County of San Joaquin awarded Perini Building Company, Inc. (Perini), a public works construction contract to build a new wing of the San Joaquin County General Hospital. On November 23, 1993, Perini selected G & G as the subcontractor to install the fire suppression sprinkler system for the hospital. Pursuant to a written subcontract, G & G agreed to perform this work for $398,000.

FN3 The statement of facts is taken primarily from the trial court's statement of intended decision.

A fire suppression sprinkler system may be installed only by workers classified as fire sprinkler fitters, a skilled classification of the plumbers craft responsible for installing and maintaining several types of fire suppression systems.

In its call for bids and in the public works contract, San Joaquin County published the prevailing wages for the work classifications necessary to execute the contract. Included in the publication was the basic prevailing hourly wage rate for fire sprinkler fitters. Including benefits, the rate was $33.73 per hour in 1994 when the work was performed.

G & G hired a number of workers to install the fire suppression system it had agreed to provide under its subcontract with Perini. Four of these workers were Thomas Browning, Dennis Marlowe, Kenneth Ahoff, and Stephen Ledford. They are fire sprinkler fitters by trade with years of experience in the trade and belong to the Union. G & G hired Browning as the foreman and paid him the basic rate for the classification of fire sprinkler fitter, but failed to provide him with the required benefits. G & G paid Marlowe, Ahoff, and Ledford as pipe tradesmen, a classification that carries a lower per diem prevailing wage rate than a fire sprinkler fitter. G & G also failed to provide these men with benefits. *771

Browning, Marlowe, Ahoff and Ledford filed complaints with the Division of Labor Standards Enforcement (DLSE) protesting their rate of pay and lack of benefits, triggering an investigation by DLSE. After an initial review of the matter, a DLSE investigator advised G & G it was using the wrong classification to pay its men and advised it to cease that practice. G & G did not heed the advice. DLSE subsequently filed a notice to withhold payment against G & G in the amount of $93,867.08 for wages and penalties. DLSE determined the total amount of underpaid wages and penalties owed by G & G was $219,929.25.

G & G called only one witness, Mr. Itai Ben-Artzi, to testify concerning its claim it paid Browning, Marlowe, Ahoff, and Ledford their required benefits and that it had reasonably and in good faith relied on information provided by government officials in making its determination that Marlowe, Ahoff, and Ledford should be classified as pipe tradesmen and paid the prevailing wage for that classification.

Browning, Marlowe, Ahoff, and Ledford signed a document assigning the Union their "statutory" rights to collect underpaid wages and benefits.

The DLSE filed a complaint against Perini and its sureties to recover the underpaid wages and benefits for 17 workers, and penalties. The Union, as assignee of Browning, Marlowe, Ahoff, and Ledford, filed a complaint against the County of San Joaquin, Perini, G & G, and the sureties for their underpaid wages and waiting time penalty wages. Pursuant to a stipulation and order, the Union agreed to abate its action against the County, Perini, and the sureties, and these defendants were dismissed from the action without prejudice. The two matters were consolidated and tried before the court.

The trial court found in favor of DLSE [FN4] and the Union. The court awarded the Union $230,630.60 against G & G for deficiency wages, unpaid benefits, waiting time penalty wages, interest, attorneys' fees, and costs. [FN5] The amount awarded for deficiency wages, $93,633.41, was included in the total awards to both the Union and DLSE and was made joint and several. The award to the Union for waiting time wages, interest, attorneys' fees, and costs was made several.

FN4 DLSE was awarded a total of $343,839.26 against Perini and $215,820 against the sureties.

FN5 The total award of $230,630.60 is calculated as the sum of the following items of damages: deficiency wages: $93,633.41; interest: $41,257.19; waiting time wages (§ 203): $32,380.00; interest: $40,860; and attorneys' fees: $22,500.

G & G filed a timely notice of appeal from the judgment in favor of the Union. *772

Discussion [FN6]

(1-4)(See fn. 6.)

FN6 At oral argument, G & G raised the defense of res judicata for the first time, citing to footnote 12 in *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888 907-908[123 Cal.Rptr.2d 432, 51 P.3d 297](*Mycogen*), arguing that the final judgment in DLSE's case against Perini and its sureties bars recovery by the Union against G & G under principles of res judicata.

(1) This claim has no merit. The doctrine of res judicata, or "claim preclusion," gives preclusive

effect to former judgments on the merits and bars relitigation of the same cause of action in a subsequent suit between the same parties or parties in privity with them. (*Mycogen, supra*, 28 Cal.4th at pp. 896-897.)The doctrine promotes judicial economy by limiting multiple litigation. (*Id.*, at p. 897; 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 280, p. 820.) (2) In *Mycogen*, the Supreme Court held that a final judgment in an action for declaratory relief and specific performance is a bar to a separate subsequent action for damages on the same underlying claim. (3) The defense of res judicata must be pleaded and proven. Failure to properly raise it in the trial court waives it. (7 Witkin, Cal. Procedure, *supra*, Judgment, §§ 281, 291, pp. 821, 836-837.) G & G waived this claim by failing to raise it in the trial court. Moreover, among the many hurdles that G & G would have to overcome to successfully assert this defense would be to establish privity of interest between the DLSE and the Union. (4) " '[P]rivity involves a person so identified in interest with another that he represents the same legal right.' " (*Zaragosa v. Craven* (1949) 33 Cal.2d 315, 318[202 P.2d 73, 6 A.L.R.2d 461]; 7 Witkin, *supra*, Judgment, § 392, p. 961.) G & G must also establish identity of claim. (*Mycogen, supra*, 28 Cal.4th 888.)As we discuss, *post*, the legal claims and factual issues raised and litigated in the suit by DLSE against Perini and its sureties were significantly different from those claims and issues raised by the Union as the workers' assignee against G & G. (See fn. 14, *post*.)

I. [FN*] *Preemption*

FN* See footnote 2, *ante*, page 770.

. . . . . .

II. *Standing*

(5a) G & G contends the Union lacks standing to assert the workers' claims for unpaid prevailing wages and benefits. G & G claims the Union was assigned only the right to recover for the workers' statutory rights and the workers have no private, statutory rights to sue a subcontractor for unpaid prevailing wages and benefits.

The Union argues the employees transferred to the Union "any and all statutory rights," which include the power to collect the unpaid prevailing *773 wages under section 1774, as well as under a third party beneficiary theory. We agree with the Union although we differ in our analysis of the statutory basis for standing. We agree with G & G that the rights conveyed by the assignments are limited, for purposes of our discussion, to the workers' statutory rights, but conclude the workers have private statutory rights to recover unpaid prevailing wages under sections 1194 and 1774 and waiting time wages under section 203.

A. *The Assignment*

The assignments state as follows: "The undersigned does hereby authorize the filing of Mechanics Liens or Stop Notices, on my behalf with respect to the job site at San Joaquin General Hospital, French Camp, whereon my Employer G & G FIRE SPRINKLER CO., INC. ('G & G') was engaged, and whereon the undersigned worked, for which work I failed to receive payment of state prevailing wages; and further transfers and assigns for purposes of collection, all of my rights and causes of action under the Mechanics Lien Law to Road Sprinkler Fitters Local Union, 669 ('Union'), and does further transfer and assign all interest in and to, any and all parties named therein (owners, awarding bodies, etc.) to said Union. *This Assignment includes any and all statutory and private bond rights.*" (Italics added, fn. omitted.)

The trial court found that while the assignment is "less than artfully drafted," it included the workers' statutory rights under section 1774 and any third party beneficiary theory based on the prevailing wage contract.

(6) Because the assignment is a written instrument, in the absence of parol evidence we review the assignment independently, looking to the language of the assignment. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866[44 Cal.Rptr. 767, 402 P.2d 839]; *Gifford v. City of Los Angeles* (2001) 88 Cal.App.4th 801, 806[106 Cal.Rptr.2d 164].) (5b) By its own terms, the assignment is limited to the filing of mechanics' liens and stop notices, and for purposes of collection, "all ... causes of action under the Mechanics Lien Law," and "any and all *statutory* and private bond rights." (Italics added.) Because these rights are expressed in the conjunctive, we understand the causes of action under the "Mechanic's Lien Law" to be separate from and not a limitation on "all statutory and private bond *774

rights." (7), (8) **(See fn. 11)** For reasons we footnote, the workers have no mechanic's lien rights regarding the performance of public work. [FN11]

> FN11 (7) A mechanic's lien is a procedural device for obtaining payment of a debt owned by a property owner for the performance of labor or the furnishing of materials used in construction. (-3154.) However, mechanics' liens are not applicable to the performance of a public work. (Civ. Code, § 3109; *Department of Industrial Relations v. Fidelity Roof Co.* (1997) 60 Cal.App.4th 411, 418[70 Cal.Rptr.2d 465].) (8) A payment bond is the practical substitute for a mechanic's lien in the public works context when a stop notice is inadequate because insufficient funds remain to be paid by the awarding body. (*Id.* at p. 423.)A payment bond is required by statute and affords an additional or cumulative remedy. (*Ibid.*) The assignment therefore assigns to the Union the right to sue the surety on the payment bond. Because the language regarding the mechanic's lien law is without legal effect, it adds nothing to the Union's argument.

For these reasons, no doubt, the Union bases its standing to sue G & G on the assignment of "statutory" rights under section 1774 and on a third party beneficiary theory. [FN12] (9) As discussed more fully in part II.B, the right to recover prevailing wages under the statutory scheme is separate from the right to recover under the public works contract. (10)**(See fn. 13)** At the risk of stating the obvious, the right to recover under the statute arises from the statutory scheme (§§ 1771, 1774, 1775; see *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 986-988[4 Cal.Rptr.2d 837, 824 P.2d 643]), while the right to recover on a contract theory arises from the common law right to sue for breach of the express terms of the contract as a third party beneficiary of the public works contract. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 971[9 Cal.Rptr.2d 92, 831 P.2d 317](*Aubry*);*Tippett v. Terich* (1995) 37 Cal.App.4th 1517, 1532-1534[44 Cal.Rptr.2d 862],overruled on other grounds in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 171[96 Cal.Rptr.2d 518, 999 P.2d 706]; *Department of Industrial Relations v. Fidelity Roof Co., supra*, 60 Cal.App.4th at pp. 425-426 [a worker has a private common law right of action to recover unpaid wages against a contractor as a third party beneficiary of the public works contract].) [FN13]

> FN12 At oral argument, G & G agreed that "private" modifies "bond rights," to the effect that the assignment is of statutory rights and private bond rights.

> FN13 When seeking recovery for deficiency wages for breach of a public works contract, the plaintiff must plead a common law cause of action for breach of contract and must allege the public works contract, by its terms, requires the payment of prevailing wages. (*Aubry, supra*, 2 Cal.4th at p. 971.)It has not done so.

(5c) The limited language of the assignments purports to transfer only the right to recover unpaid wages under a statute, not under the contract. No personal or contractual rights are included within the assignment.

The Union argues that because the cases were consolidated by defendants and the issues and facts are identical for the consolidated plaintiffs, "it *775 makes little difference under whose assignment the claimants are cloaked, for the Labor Commissioner may take wage claims without assignment." Aside from the inaccuracy of this claim, [FN14] we fail to see its relevancy in determining the scope of the assignment, which turns on its terms.

> FN14 The legal and factual issues in a suit by the assignee of a worker against the subcontractor are not identical to the legal and factual issues raised in a suit by the DLSE against a contractor. In a suit to recover deficiency wages by the Union as an assignee of an aggrieved worker who is a third party beneficiary of the public works contract, the Union has the burden of proof (Evid. Code, § 500 ["a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"]; *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205[52 Cal.Rptr.2d 518]), and must establish the factual elements of its standing as a third party beneficiary (*Tippett v. Terich, supra*, 37

Cal.App.4th at pp. 1531-1532), the breach of the terms of the contract (*ibid.*), and the assignment.

In a suit by the DLSE against a contractor under former section 1775, the only issue to be determined is the contractor's liability for the penalties and deficiency payments, and the contractor has the burden of proving that the penalties and amounts demanded in the action are not due. Additionally, the contractor's liability for penalties is subject to statutory defenses, including his willful failure to pay the correct rates of pay and his knowledge of his or her obligations under the statutory scheme. (Former § 1775; as amended by Stats. 1992, ch. 1342, § 9, pp. 6602-6603.)

Unlike the Union, the DLSE need not obtain an assignment from an aggrieved worker before bringing suit against the contractor on behalf of the worker for recovery of deficiency wages. (§ 96.7; *Department of Industrial Relations v. Fidelity Roof Co., supra,* 60 Cal.App.4th at pp. 426-427.)In sum, the burden of proof and the legal and factual issues in suits brought by DLSE against a contractor and by the assignee of a worker against a subcontractor are significantly different.

For these reasons, we conclude the assignment is limited to the workers' statutory rights to sue G & G for recovery of unpaid prevailing wages.

B. *The Private Statutory Right to Recover Unpaid Prevailing Wages Against the Subcontractor*

G & G contends that sections 1774 and 1775 do not create a private right of action to recover unpaid prevailing wages from a subcontractor. It argues the statutory scheme gives DLSE the exclusive statutory right to sue a contractor for unpaid prevailing wages and penalties, that section 1775 details the procedures for suits to recover such wages and penalties, and the statutory scheme makes no mention of suits by individuals.

As discussed above in part II.A, Browning, Marlowe, Ahoff, and Ledford assigned the Union their statutory rights to recover unpaid wages. The assignee "stands in the shoes" of the assignor and his rights are no greater than those of the assignor. (Civ. Code, § 1459; Code Civ. Proc., § 368; Rest.2d Contracts, § 336; 4 Corbin on Contracts (1981) § 892 et seq.) *776 (11a) We therefore determine whether the workers have a private statutory right to recover unpaid wages from G & G.

(12) The California Prevailing Wage Law is a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds. (§§ 1720-1861; see *Lusardi Construction Co. v. Aubry, supra,* 1 Cal.4th at p. 985(*Lusardi*);*Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345, 351[28 Cal.Rptr.2d 550].)

Under the prevailing wage law, all workers employed on public works costing more than $1,000 must be paid not less than the general prevailing rate of per diem wages as determined by the Director of the Department of Industrial Relations for work of a similar character and not less than the general prevailing per diem wage for holiday and overtime work. (§§ 1770, 1771, 1772 & 1774; *Lusardi, supra,* 1 Cal.4th at p. 987;*O.G. Sansone Co. v. Department of Transp.* (1976) 55 Cal.App.3d 434, 441[127 Cal.Rptr. 799].) Per diem wages include employer payments for health and welfare, pension, vacation, travel time, and subsistence pay as provided for in the applicable collective bargaining agreement. (§ 1773.1, and former § 1773.8, repealed by Stats. 1999, ch. 1224, § 5.) The duty to pay the prevailing wage to employees on a public works project extends to both the prime contractor and all subcontractors. (§ 1774.)

The central purpose of the prevailing wage law is to protect and benefit employees on public works projects. (*Lusardi, supra,* 1 Cal.4th at p. 985;*O.G. Sansone Co. v. Department of Transportation, supra, 55 Cal.App.3d at p. 458.)It also includes several goals which serve "to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees." (Lusardi, supra, 1 Cal.4th at p. 987.)*

Former section 1775 authorizes the Division of Labor Standards Enforcement to maintain a civil action to recover deficiency wages and penalties from a contractor on a public works project who fails to pay the prevailing rate to his workers. (Former § 1775, as amended by Stats. 1992, ch. 1342, § 9, pp. 6602-6603.) However, the remedies specified in section

1775 are not exclusive. (*Tippett v. Terich, supra*, 37 Cal.App.4th at pp. 1531-1532.)The DLSE also may file suit on behalf of the workers against the awarding body *777 on a third party beneficiary theory (*Aubry, supra*, 2 Cal.4th at p. 971) and against a surety on the payment bond. (*Department of Industrial Relations v. Fidelity Roof Co., supra*, 60 Cal.App.4th at p. 425.)

Additionally, a worker on a public works project may maintain a private suit against the contractor to recover deficiency wages as a third party beneficiary of the public contract if the contract provides for the payment of prevailing wages. (*Tippett v. Terich, supra*, 37 Cal.App.4th at pp. 1531-1532;*Department of Industrial Relations v. Fidelity Roof Co., supra*, 60 Cal.App.4th at pp. 425-426;*Aubry, supra*, 2 Cal.4th at p. 971.)

(11b) With this background in mind, we turn to the question whether a worker has a private *statutory* cause of action against a contractor to recover the prevailing wage. While the question has not been decided, it has been discussed. (*Aubry, supra*, 2 Cal.4th at p. 969, fn. 5,*id.* at p. 972 (dis. opn. of Kennard, J.).)

In *Aubry*, a contractor (Lusardi) brought suit for injunctive and declaratory relief against the DLSE seeking a determination the prevailing wage law did not apply to a hospital facility constructed by the contractor for a third party who would sell it to the public hospital district on completion. After the trial court granted summary judgment for the contractor, the DLSE cross-complained against the public hospital district under tort claims provisions of Government Code section 815.6, seeking damages for violation of the prevailing wage law. The district's demurrer to that claim was sustained and the DLSE appealed.

The Supreme Court held that Government Code section 815.6 does not provide a cause of action against a public entity that fails to comply with its obligation under the prevailing wage law. The court reasoned that section 815.6 is part of the Tort Claims Act which does not protect the type of injury arising from the failure to pay prevailing wages, i.e., injuries that " 'would be actionable if inflicted by a private person.' " (*Aubry, supra*, 2 Cal.4th at p. 968, italics omitted.)

Justice Kennard, writing in dissent, was of the view the interest injured was one protected in an action between private persons. "The worker can proceed [under Labor Code section 1194] against the contractor in an action to which no public entity need be a party-an 'action between private persons.' " (*Aubry*, supra, 2 Cal.4th at pp. 972, 976 (dis. opn. of Kennard, J.).) Responding to the dissent, Justice Panelli writing for the majority, pointed out the court had not yet decided this issue and dismissed the dissent's view on the grounds that "even if such an action is available, it *778 does not bring the present action within the scope of the Tort Claims Act. Any action by a worker against a contractor for wages must necessarily be based on the worker's contractual relationship with the contractor .... Thus, a worker's action against an employer for unpaid statutorily required wages sounds in contract." (*Id.* at p. 969, fn. 5.)

This case tenders the issue not reached by the majority in *Aubry* and we therefore consider the applicability of the provisions of section 1194, which provides as follows: "(a) Notwithstanding any agreement to work for a lesser wage, *any employee* receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee *is entitled to recover in a civil action* the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." (Italics added.)

Section 1194 grants to an employee the statutory right to recover in a civil action for unpaid minimum wages and overtime compensation. (See *Ghory v. Al-Lahham* (1989) 209 Cal.App.3d 1487, 1492[257 Cal.Rptr. 924] [overtime compensation].) In the context of overtime compensation, the court in *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1430[95 Cal.Rptr.2d 57], explained, "[a]n employee's right to wages and overtime compensation clearly have different sources. Straight-time wages (above the minimum wage) are a matter of private contract between the employer and employee. Entitlement to overtime compensation, on the other hand, is mandated by statute and is based on an important public policy.... 'The duty to pay overtime wages is a duty imposed by the state; it is not a matter left to the private discretion of the employer. [Citations.] California courts have long recognized [that] wage and hours laws "concern not only the health and welfare of the workers themselves, but also the public health and general

welfare." [Citation.]' " (Italics omitted.)

It is well established that California's prevailing wage law is a minimum wage law (*Metropolitan Water Dist. v. Whitsett* (1932) 215 Cal. 400, 417-418[10 P.2d 751]; *O.G. Sansone Co. v. Department of Transportation, supra*, 55 Cal.App.3d at p. 448; see also *People v. Hwang* (1994) 25 Cal.App.4th 1168, 1181[31 Cal.Rptr.2d 61]), which guarantees a minimum cash wage for employees hired to work on public works contracts. (*Department ofIndustrial Relations v. Nielsen Construction Co.* (1996) 51 Cal.App.4th 1016, 1026[59 Cal.Rptr.2d 785].) Like overtime compensation (*Earley v. Superior Court, supra*, 79 Cal.App.4th at p. 1430), the prevailing wage law serves the important public policy goals of protecting employees on public works projects, competing union contractors and the public. (*779*Lusardi, supra*, 1 Cal.4th at pp. 985, 987.)The duty to pay prevailing wages is mandated by statute and is enforceable independent of an express contractual agreement. (§§ 1771, 1774-1775; *Lusardi, supra*, 1 Cal.4th at pp. 986-987.)Thus, while the obligation to pay prevailing wages arises from an employment relationship which gives rise to contractual obligations and claims (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 22-23[157 Cal.Rptr. 706, 598 P.2d 866], the duty to pay the prevailing wage is statutory. (§§ 1771, 1774.)

For these reasons we conclude that, because the prevailing wage law is a minimum wage law mandated by statute and serves important public policy goals, section 1194 provides an employee with a private statutory right to recover unpaid prevailing wages from an employer who fails to pay that minimum wage.

C. *The Private Statutory Right to Recover Waiting Time Wages*

The Union also sought and was awarded waiting time wages under section 203. [FN15] It compels the prompt payment of earned wages (*Triad Data Services, Inc. v. Jackson* (1984) 153 Cal.App.3d Supp. 1, 9[200 Cal.Rptr. 418]), and provides an employee who is discharged or quits with a statutory cause of action against his or her employer if the employer fails to pay earned wages immediately upon the employee's termination. (§ 203; *Division of Labor Law Enforcement v. El Camino Hosp. Dist.* (1970) 8 Cal.App.3d Supp. 30, 35[87 Cal.Rptr. 476].)

FN15 The version of section 203 governing the instant proceedings, provides as follows: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days. No employee who secretes or absents himself to avoid payment to him, or who refuses to receive the payment when fully tendered to him, including any penalty then accrued under this section, shall be entitled to any benefit under this section for the time during which he so avoids payment.
"*Suit may be filed for such penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise.*" (Stats. 1975, ch. 43, § 1, pp. 75-76, italics added.)

Thus, under section 203, if G & G owed the workers wages at the time their employment terminated and failed to pay them, it is liable to the employee for penalties which the employee has a statutory cause of action to recover.

For these reasons we hold that workers on public works projects have a private statutory right to sue their employer for failure to pay the prevailing *780 wage (§§ 1194, 1771, 1774) and for waiting time wages. (§ 203.)Because workers have private statutory remedies against their employer, the assignment of their "statutory rights" was sufficient to give the Union standing to sue G & G for recovery of unpaid prevailing wages and waiting times wages.

III. -V. [FN*]

FN* See footnote 2, *ante*, page 770.

. . . . . .

VI. *Section 203 Waiting Time Wages*

G & G contends it is not liable for section 203 waiting time penalties because it paid all of the wages due, its failure to pay the prevailing wage for sprinkler fitters was not willful, and it acted in good faith after requesting guidance from the State. (13a)

The Union contends section 203 penalty wages were properly imposed. We agree with the Union.

The trial court awarded the Union $32,380 in waiting time penalties under section 203. The purpose of section 203 is to "compel the prompt payment of earned wages ...." (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7[177 Cal.Rptr. 803](*Barnhill*);*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492[80 Cal.Rptr.2d 175].) Former section 203 mandates the payment of penalties under the following circumstances: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days." (§ 203, as amended by Stats. 1975, ch. 43, § 1, p. 75.)

Section 202 provides that when an employee who does not have a written contract for a definite period quits his employment, his wages become "due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting."

Wages are defined to include "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of *781 calculation." (§ 200, subd. (a).) "Wages" include health benefits (*People v. Alves* (1957) 155 Cal.App.2d Supp. 870, 872[320 P.2d 623]) and other fringe benefits. (*Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1972) 24 Cal.App.3d 35, 44[100 Cal.Rptr. 791]; *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 780[183 Cal.Rptr. 846, 647 P.2d 122, 33 A.L.R.4th 254].)

(14a) Thus, section 203 requires the payment of an additional penalty if the employer willfully fails to comply with section 202. The term "willful" within the meaning of section 203, means the employer "intentionally failed or refused to perform an act which was required to be done." (*Barnhill, supra*, 125 Cal.App.3d at p. 7, italics omitted; *Ghory v. Al-Lahham, supra*, 209 Cal.App.3d 1487, 1492[257 Cal.Rptr. 924].) It does not mean that the employer's refusal to pay wages must necessarily be based on a deliberate evil purpose to defraud workers of wages which the employer knows to be due. (*Barnhill, supra*, 125 Cal.App.3d at p. 7;*Davis v. Morris* (1940) 37 Cal.App.2d 269, 274[99 P.2d 345].)

(13b) The evidence was clear. G & G's workers were sprinkler fitters entitled to the prevailing wage for that classification. Because G & G failed to promptly pay these workers their due upon their termination of employment, G & G also owed them penalty wages under section 203.

G & G argues that because it paid its workers more than the prevailing wage as pipe tradesmen, and paid full benefits in cash, it could not be held liable for failure to pay wages or waiting time penalties under section 203. G & G also argues that it paid Browning the full wage and benefits for a fire sprinkler fitter and that a contrary conclusion is not supported by substantial evidence.

In considering G & G's contention, the crucial determination is whether there is substantial evidence in support of the trial court's findings of fact. (15a) " '[T]he power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' " (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881[92 Cal.Rptr. 162, 479 P.2d 362].) It will not reweigh the evidence. (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465[46 Cal.Rptr.2d 427, 904 P.2d 834].)

(13c) The first of G & G's claims is premised on the factual claim it did not owe the workers the prevailing wage for sprinkler fitters. It ignores the trial court's contrary findings of fact that G & G had erroneously classified its workers as pipe tradesmen, that they should have been classified as fire *782 sprinkler fitters and paid the prevailing wage for that classification. The second claim is also contrary to the trial court's finding that G & G failed to enroll Browning in any of its benefit plans.

(15b) A reviewing court begins with the " 'presumption that the record contains evidence to sustain every finding of fact.' " (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.)To overcome the trial court's factual findings, G & G must " 'demonstrate that there is *no* substantial evidence to support the challenged findings.' ... A

recitation of only defendants' evidence is not the 'demonstration' contemplated under the above rule. [Citation.] Accordingly, if ... 'some particular issue of fact is not sustained, [defendants] are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived.' " (*Foreman Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881, italics added by *Foreman*.)G & G sets forth only its own evidence, ignoring the trial court's findings and the evidence in support of those findings. It has therefore waived its substantial evidence claim.

Second, G & G claims it did not act willfully in failing to pay the prevailing wage, arguing that "[m]ore than a simple mistake is required to impose the statutory penalties." G & G applies the wrong legal standard and again ignores the factual findings.

(14b) An employer's good faith mistaken belief that wages are not owed may negate a finding of willfulness. In *Barnhill, supra*, 125 Cal.App.3d 1, the employee was owed wages upon her discharge but she owed the employer on a debt she incurred. The employer exercised its right of setoff against the employee's wages, bringing the amount due to the employee to zero. The court held the employer did not have a right of setoff and was therefore liable to the employee for wages due at the time of her discharge. Nevertheless, because the question of setoff was one of law and the law was not clear at the time of the employee's discharge, the employer's good faith belief he had a right of setoff negated a finding his nonpayment of wages was willful within the meaning of section 203. (*Barnhill*, at pp. 8-9.)

(13d) By contrast, in the instant case, the trial court found that "G & G's error in classification is clear. Marlowe, Ahoff, and Ledford should have been classified as Fire Sprinkler Fitters and paid the prevailing wage for that classification." The trial court also found that G & G did not act in good faith in determining the workers' classification and failing to pay the proper prevailing wage and benefits. Thus, unlike the employer in *Barnhill*, G & G did not make a reasonable good faith legal mistake in failing to pay its *783 workers their full wages upon termination of their employment. Moreover, because G & G does not set forth all the material substantial evidence in support of these findings, its substantial evidence claim is waived. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.)

Third, relying on *Lusardi, supra*, 1 Cal.4th at pages 996-997, *Division of Labor Standards Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 129[270 Cal.Rptr. 75], and *Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal.App.3d 635, 639-642[237 Cal.Rptr. 546], G & G contends that equity precludes imposition of waiting time penalties because it acted reasonably and in good faith after requesting guidance from the state.

G & G failed to raise this claim in the trial court and has waived it on appeal. (*Forman v. Chicago Title Co.* (1995) 32 Cal.App.4th 998, 1015-1016[38 Cal.Rptr.2d 790].) Moreover, for the same reasons discussed above, because it is not supported by the trial court's findings and the substantial evidence in support of those findings, G & G has waived its claim. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.)Accordingly, we hold that the trial court's imposition of waiting time wages was proper.

Disposition

The judgment and award of damages is affirmed. Plaintiff is awarded its costs on appeal. (Cal. Rules of Court, rule 26(a).)

Davis, J., and Raye, J., concurred. *784
Cal.App.3.Dist.
Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.
102 Cal.App.4th 765, 125 Cal.Rptr.2d 804, 02 Cal. Daily Op. Serv. 10,082, 2002 Daily Journal D.A.R. 11,513

END OF DOCUMENT

Lusardi Const. Co. v. Aubry
Cal. 1992.
LUSARDI CONSTRUCTION COMPANY, Plaintiff and Respondent,
v.
LLOYD W. AUBRY, JR., as Labor Commissioner, etc., et al., Defendants and Appellants.
No. S011121.

Supreme Court of California
Feb 24, 1992.

SUMMARY

A public hospital district desired to expand its facilities and, in an attempt to control costs, entered into an agreement with a third party corporation for construction of the facilities. The corporation in turn appointed the public entity as its agent for all purposes on the construction project. The public entity, purportedly acting as agent for the third party corporation, then hired a private contractor to construct the project, without entering into the statutorily required stipulations that the contractor pay its employees the prevailing wage rates (Lab. Code, § 1720 et seq.). The public entity advised the contractor that the prevailing wage laws did not apply to the project. When the Director of the Department of Industrial Relations sought to require the contractor to pay prevailing wages, the contractor brought an action for a determination that the prevailing wage statutes could not be applied to it. The trial court granted the contractor injunctive and declaratory relief. (Superior Court of San Diego County, No. 579903, Vincent P. Di Figlia, Judge.) The Court of Appeal, No. D007559, Fourth Dist., Div. One, affirmed, concluding on constitutional and equitable grounds that the director could not enforce the prevailing wage law against the contractor.

The Supreme Court reversed the judgment of the Court of Appeal. It held that the statutory obligation to pay the prevailing wage did not depend on the contractor's assent, that the director could validly and constitutionally determine that the project was for a public work, and that the doctrine of equitable estoppel did not prevent the director from proceeding against the contractor. However, it held that the contractor might be entitled to indemnity from the public entity if it reasonably relied on the public entity's representations that the project was not subject to the prevailing wage law. It further held that when a contractor relies in good faith on such representations, equity prohibits the imposition of statutory penalties against the contractor for failing to pay the prevailing wage. (Opinion by Kennard, J., with Lucas, C. J., Mosk and George, JJ., concurring. Separate concurring and dissenting opinions by Panelli, J., with Baxter, J., concurring, by Arabian, J., and by Baxter, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Public Works and Contracts § 6--Contracts--Contractors' Rights and Liabilities--Payment of Prevailing Wage--Purpose of Statutory Requirement.
The overall purpose of the prevailing wage law (Lab. Code, §§ 1720-1861) is to protect and benefit employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant, cheap-labor areas; to permit union contractors to compete with non-union contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(2a, 2b) Public Works and Contracts § 6--Contracts--Contractor's Obligation to Pay Employees Prevailing Wage--Statutory Source of Obligation.
The statutory obligation of a contractor on a public works project to pay its employees the prevailing wage (Lab. Code, § 1720 et seq.) may be imposed on the contractor independent of any contractual provisions. To construe the prevailing wage laws as applicable only when the contractor and the public entity have included in the contract language requiring compliance with the prevailing wage law would encourage awarding bodies and contractors to legally circumvent the laws, resulting in payment of less than the prevailing wage to workers on construction projects that would otherwise be deemed public works. This would reduce the prevailing wage

laws to merely an advisory expression of the Legislature's view. That the contracting parties are required to assure that the prevailing wage laws are observed does not demonstrate a legislative intent that the laws be optional.
[See Cal.Jur.3d, Public Works and Contracts, § 7; 2 **Witkin,** Summary of Cal. Law (9th ed. 1987) Agency, § 331.]
(3)Statutes § 21--Construction--Legislative Intent.
The object that a statute seeks to achieve is of primary importance in statutory interpretation.

(4) Public Works and Contracts § 6--Contracts--Contractor's Obligation to Pay Employees Prevailing Wage--Authority of Director of Department of Industrial Relations to Promulgate Governing Rules.
The Director of the Department of Industrial Relations has authority to determine whether a construction project is a "public work" within the meaning of statutory provisions requiring contractors engaged in public works to pay their employees prevailing wages (Lab. Code, § 1720 et seq.). Lab. Code, § 50 et seq. (Department of Industrial Relations), establishes a legislative intent to give the director plenary authority to promulgate rules to enforce the Labor Code. Although no statute expressly gives the director the authority to make regulations governing coverage, this authority is implied. The authority of an administrative board or officer to adopt reasonable rules and regulations which are deemed necessary to the due and efficient exercise of the powers expressly granted cannot be questioned. This authority is implied from the power granted. Thus, interpreting the statutes as authorizing the making of regulations governing coverage of the prevailing wage laws is well within the broad scope of the director's authority.

(5a, 5b) Public Works and Contracts § 6--Contracts--Determination of Contractor's Obligation to Pay Employees Prevailing Wage--Due Process Implications.
On appeal of a judgment granting a contractor injunctive and declaratory relief in its action challenging the determination by the Director of the Department of Industrial Relations that the contractor's project was a public work for purposes of the prevailing wage laws (Lab. Code, § 1720 et seq.), the Court of Appeal erred in assuming that the director's determination was an adjudication resulting in a deprivation of property requiring procedural due process. Under the statutory scheme, the director has no power to adjudicate whether a project is a public work or to independently deprive a contractor of any property interest. Instead, when the contract does not provide for a money payment from the awarding body to the contractor, the director is authorized only to bring charges in court against a contractor for failing to pay the prevailing wage. The court has the sole power to determine whether the contractor is liable for my underpayment, and to make a binding order that payments be made. The director did not order the contractor to pay the prevailing wage, but merely warned the contractor that if it did not comply, the director would initiate proceedings against the contractor. Thus, since no formal proceedings were initiated, the contractor's due process rights were not implicated.

(6) Constitutional Law § 107--Due Process--Procedural--Prior to Filing of Charges.
A person against whom criminal or civil charges may be filed has no procedural due process right to notice and a hearing until and unless an executive branch official actually files formal civil or criminal charges.

(7) Public Works and Contracts § 6--Contracts--Determination of Contractor's Obligation to Pay Employees Prevailing Wage--Intrusion on Judicial Power.
The determination by the Director of the Department of Industrial Relations that a contractor's project was a public work for purposes of the prevailing wage laws (Lab. Code, § 1720 et seq.) did not impermissibly intrude on judicial powers. The director's determination is not judicial, since it does not encompass the conduct of a hearing or a binding order for any type of relief.

(8a, 8b, 8c) Estoppel and Waiver § 13.4--Estoppel--Against Public Entity--Enforcement of Prevailing Wage Laws.
On appeal of a judgment granting a contractor injunctive and declaratory relief in its action challenging the determination by the Director of the Department of Industrial Relations that the contractor's project was a public work for purposes of the prevailing wage laws (Lab. Code, § 1720 et seq.), the Court of Appeal erred in determining that equitable estoppel barred the director from making its determination. Although the public entity with whom the contractor negotiated advised the contractor that the prevailing wage laws would not apply, the elements of equitable estoppel were not present. The contractor did not rely on any act or omission of the director. Also, there was no privity or identity of

interest between the contracting public entity and the director, since their interests were in direct conflict: the contracting entity desired a low cost for the project, and the director desired to enforce the prevailing wage laws. However, although estoppel did not operate to relieve the contractor from paying the difference between the wages actually paid and prevailing wages, equitable principles did operate to relieve the contractor of paying statutory penalties for its failure to pay prevailing wages, since it acted in good faith reliance on the express representations of a public entity.

(9) Estoppel and Waiver § 7--Equitable Estoppel--Elements.
Generally, four elements must be present for the doctrine of equitable estoppel to apply. First, the party to be estopped must have been aware of the facts. Second, that party must either intend that its act or omission be acted upon, or must so act that the party asserting estoppel has a right to believe it was intended. Third, the party asserting estoppel must be unaware of the true facts. Fourth, the party asserting estoppel must rely on the other party's conduct, to its detriment.

(10) Estoppel and Waiver § 13--Estoppel--Against Public Entities.
Even when the elements of estoppel are present, estoppel will not be applied against the government if to do so would nullify a strong rule of policy adopted for the benefit of the public.

(11) Estoppel and Waiver § 13--Estoppel--Against Public Entities--Binding Effect of One Public Agency's Acts on Another.
For purposes of estoppel, the acts of one public agency will bind another public agency only when there is privity, or an identity of interests between the agencies.

COUNSEL
H. Thomas Cadell, Jr., for Defendants and Appellants.
Donald C. Carroll, Charles P. Scully II and Frances C. Schreiberg as Amici Curiae on behalf of Defendants and Appellants.
Corona & Prager, Thierman, Cook, Brown & Prager, John W. Prager, Jr., and Berta Peterson-Smith for Plaintiff and Respondent. *981
Tonsing & Tonsing, Jon P. Tonsing, Crosby, Heafey, Roach & May, Stephen A. McFeely and Gideon Kanner as Amici Curiae.

KENNARD, J.
The prevailing wage law governs wages and other conditions of employment on public works, which include "[c]onstruction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds ...." (Lab. Code, § 1720, subd. (a); all further unlabeled statutory references are to the Labor Code.) "Public works" contracts awarded to private contractors must include stipulations requiring the contractors and subcontractors to pay their employees no less than the applicable prevailing wage rates, as determined by the Director of the Department of Industrial Relations (the Director). (§§ 1773.2, 1775.)

This case involves an $18 million expansion of a public hospital. To keep the construction costs as low as possible, the public entity entered into a written agreement with a third party corporation, which appointed the public entity as its agent for all purposes on the construction project. The public entity, purportedly acting as agent for the third party corporation, then hired a private contractor to construct the project, without entering into the statutorily required stipulations that the contractor pay its employees the prevailing wage rates.

The Director sought to require the contractor to pay its employees prevailing wages; the contractor then brought this action challenging enforcement of the law against it. The trial court granted injunctive and declaratory relief, and the Court of Appeal affirmed, concluding on constitutional and equitable grounds that the Director could not enforce the prevailing wage law against the contractor.

This case involves the following issues:

First, does the prevailing wage law apply only when the contractor agrees to comply with it as part of the contract, or does the obligation to pay prevailing wages have an independent statutory basis? *982

Second, is the Director statutorily authorized to make the administrative determination that a contract for the construction of a public improvement is one for a public work? If so, does the making of such a determination constitute an adjudication, so that procedural due process protections are required?

Third, does the doctrine of equitable estoppel preclude any determination that in this case the

contractor is bound by the prevailing wage law?

Fourth, is a civil penalty sought to be imposed on the contractor by the state invalid?

We hold that the statutory obligation to pay the prevailing wage does not depend on the contractor's assent, that the Director may validly and constitutionally determine that a given project is for a public work, and that the doctrine of equitable estoppel does not prevent the Director from proceeding against the contractor. We emphasize, however, that the contractor may be entitled to indemnity from the public entity if it reasonably relied on the public entity's representations that the project was not subject to the prevailing wage law, and that when, as here, a contractor does rely in good faith on such representations, equity prohibits the imposition of statutory penalties against the contractor for failing to pay the prevailing wage.

We conclude that the judgment of the Court of Appeal should be reversed.

Facts

The parties stipulated to these facts: Tri-City Hospital District (the District) is a public hospital district and an independent political subdivision of the State of California. In 1983, the District wanted to expand its hospital facilities. On June 28, 1983, the District entered into a written agreement with Imperial Municipal Services Group, Inc. (Imperial), a private corporation, for the construction of new facilities at Tri-City Hospital (the Expansion Project). The contract with Imperial specified that the sole role of Imperial was that of the seller of the property, and that the District was *983 appointed as Imperial's "agent and attorney-in-fact for all purposes respecting construction of the Expansion Project, including, without limitation, the engagement of contractors ... and the management and supervision of the construction of the Expansion Project." The contract further provided that "Purchaser [the District], as agent, shall cause contractors under such contracts to ... pay prevailing wages in accordance with the California Labor Code ...."

Although Lusardi Construction Company (Lusardi) had served as a contractor on many public works, it made a business decision not to perform any public works contracts after 1980. During its negotiations with the District, Lusardi told the District that it did not enter into contracts for the construction of public works. The District represented to Lusardi that: (1) the Expansion Project was a private work and not a public work under the prevailing wage law, and therefore the payment of prevailing wages and keeping of payroll records was not required; (2) the District had received legal opinions determining that the Expansion Project was not a public work; and (3) Lusardi should compute its construction costs on the basis that the project was not a public work. Lusardi relied on the District's representations in calculating its construction costs.

With the District purportedly acting as Imperial's "agent," Imperial and Lusardi then entered into a contract for the construction of the Expansion Project. Lusardi agreed to construct a "four-phase," 108,000-square-foot addition to Tri-City Hospital at a maximum cost of $18,350,000. The contract between Imperial and Lusardi did not refer to prevailing wages.

In July 1983, Lusardi began work on the project. Lusardi and its subcontractors did not pay the prevailing wage, and did not comply with prevailing wage law requirements governing the hiring of apprentices and the maintenance of certified payroll records. After two and one-half years, Lusardi had completed significant portions of the project.

In January 1986, the Director informed the District in writing of his tentative determination that the Expansion Project was a public work. In *984 May, the Division of Labor Standards Enforcement (the DLSE), a part of the Department of Industrial Relations (the Department), requested Lusardi to submit payroll records, and warned that failure to comply would subject Lusardi to statutory penalties. In August, the Director notified Lusardi and the District that he had made a final determination that the Expansion Project was a public work. In September, the Division of Apprenticeship Standards (the DAS), another arm of the Department, requested evidence of compliance with the statutory apprenticeship requirements from Lusardi.

When Lusardi did not submit the certified payroll records, the DLSE sent a "penalty assessment letter" to the District in November 1986, with a copy to Lusardi. The DLSE purported to assess a statutory penalty of $25 per day per employee, calculated on the basis of a minimum of 200 employees, retroactive

to August 1986. Although the construction contract provided that Lusardi was paid by Imperial and not by the District, the DLSE directed the District to withhold future payments due Lusardi, and to increase the amount withheld by $5,000 a day for each day of noncompliance beyond November 13, 1986.

The DAS wrote to Lusardi on November 13, 1986, that if it did not receive satisfactory proof of compliance with the statutory apprenticeship requirements within five days of the letter's receipt, it would initiate "proceedings for determination of willful noncompliance ... pursuant to Labor Code section 1777.7. ..." The DLSE and the DAS warned Lusardi that it could be subject to back-wage payments, civil penalties, public work debarment, and civil and administrative litigation.

In November 1986, Lusardi filed this lawsuit and ceased all work on the Expansion Project. Lusardi's complaint sought declaratory and injunctive relief, alleging that the prevailing wage provisions of the Labor Code could not lawfully be applied to it consistent with due process. [FN1]

> FN1 The DLSE filed a cross-complaint against the District alleging that the District had engaged in an unlawful scheme to circumvent the prevailing wage law in an effort to reduce its construction costs. The trial court sustained the District's demurrer without leave to amend, and dismissed the cross- complaint. The Court of Appeal affirmed, and we granted review. *Aubry v. Tri-City Hospital Dist.* (1989) 234 Cal.App.3d 510 [265 Cal.Rptr. 451], review granted March 15, 1990 (S011123), is now pending in this court.

The trial court issued a temporary restraining order and a preliminary injunction restraining defendants from enforcing or attempting to enforce the prevailing wage law against Lusardi. It subsequently granted Lusardi's motion for summary judgment. Based on the stipulated facts, the trial court ruled that the prevailing wage law could not be applied to Lusardi because of *985 the absence of the requisite contractual provisions and because Lusardi's due process rights had been violated.

The trial court determined that under the prevailing wage law the responsibility for ensuring that the prevailing wage provisions were in a public work contract was on the agency awarding the contract. Because the contract contained no provisions requiring the prevailing wage to be paid, the trial court ruled that Lusardi had acted reasonably as a matter of law in concluding that the prevailing wage law did not apply to it. The trial court also concluded that the Department's application of the public works standards to Lusardi violated Lusardi's right to reasonable notice and an opportunity to respond.

The Court of Appeal affirmed, holding that the Director's determination that the project was a public work without giving Lusardi notice and an opportunity to be heard violated procedural due process, and that the Director was barred under the doctrine of equitable estoppel from proceeding against Lusardi.

Discussion

1. *Overview of the Prevailing Wage Law*

The Legislature has declared that it is the public policy of California "to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a).) The conditions of employment on construction projects financed in whole or in part by public funds are governed by the prevailing wage law. (§§ 1720- 1861.)

(1a) The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects. (*O. G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 458 [127 Cal.Rptr. 799].) Subject to an exception not relevant here, under section 1720, subdivision (a), "public works" include "[c]onstruction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds ...." Section 1771 provides that not less than the general prevailing rate of wages must be paid to all workers employed on public works projects costing more than $1,000. Section 1770 requires the Director to make the prevailing wage rate determination, based on a method defined in section 1773. *986

Section 1773 requires the public entity "awarding any contract for public work, or otherwise undertaking any public work," to obtain from the Director the general prevailing rate for each craft, classification or type of worker needed to execute the contract. The public entity must specify those rates in its call for bids, in bid specifications, and in the contract or, alternatively, must specify in those documents that the prevailing wage rates are on file in its principal office. (§ 1773.2.)

A contractor for a public works project that fails to pay the prevailing rate to its workers is liable for the deficiency and is subject to a statutory penalty. (§ 1775.) Deficiencies and penalties are to be withheld by the awarding body from sums due under the contract. (§ 1727.) If the money due a contractor from an awarding body is insufficient to pay all of the imposed penalties and deficiencies, or if the public works contract does not provide for payments by the awarding body to the contractor, the DLSE is authorized to bring an action to recover the deficiencies due and penalties assessed. (§ 1775.) [FN2]

> FN2 Each contractor and subcontractor must maintain complete and accurate records showing the names, occupations, addresses and Social Security numbers of all workers employed on public works projects, and detailing the actual hours worked and wages paid. (§ 1776, subd. (a).) The awarding body must insert stipulations in the construction contract requiring compliance with the recordkeeping provisions. (§ 1776, subd. (g).) Certified copies of these records must be made available for inspection or furnished upon request to representatives of the awarding body or the Department. (§ 1776, subd. (b).) Failure to do so within 10 days after receipt of the request subjects the contractor or subcontractor to forfeiture of $25 "for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated." (§ 1776, subd. (f).) Additionally, noncompliance may lead to prosecution on a misdemeanor charge. (§ 1777.)

This statutory scheme also governs the employment of apprentices. Section 1777.5 requires the employment of apprentices on public works projects under the terms of a statutory formula, and mandates that the awarding body insert stipulations in the construction contract requiring compliance with the apprenticeship provisions of the prevailing wage law. Section 1777.7 specifies sanctions for failure to comply with the apprenticeship requirements, including debarment from public works contracting and monetary penalties.

Any public agent who wilfully fails to comply with any provision of the prevailing wage law is guilty of a misdemeanor. (§ 1777.)

2. *Statutory Obligation by Contractor on Public Work to Pay Prevailing Wages*

(2a) The threshold issue here is whether the obligation of a contractor on a public works project to pay the prevailing wage is based exclusively on contractual provisions, or whether such an obligation flows from a statutory duty to pay the prevailing wage imposed on the contractor independent of any contractual requirement. The Court of Appeal implicitly assumed, without deciding, that the contractor's duty to pay prevailing wages arose from statute. ***987**

As noted above, sections 1773.2, 1775, 1776, subdivision (g), and 1777.5 generally require the contracting public entity, either through specifications in the notice for bids or by stipulations in any resulting contract, to notify the contractor of the applicability of the prevailing wage law and the possibility of penalties and forfeitures in the event of noncompliance. Lusardi contends that these statutes reflect a legislative intent that the prevailing wage laws are enforceable only when a provision requiring their observance is contained in the contract between the public agency and the contractor. We disagree.

Lusardi's proposed interpretation violates section 1771, which provides that "[e]xcept for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages ... *shall be paid* to all workers employed on public works." (Italics added.) By its express language, this statutory requirement is not limited to those workers whose employers have contractually agreed to pay the prevailing wage; it applies to "*all* workers employed on public works." (Italics added.)

(3) Moreover, Lusardi's proposed interpretation would defeat the legislative objective. The object that a statute seeks to achieve is of primary importance in statutory interpretation. (*People v. Jeffers* (1987) 43

Cal.3d 984, 997 [239 Cal.Rptr. 886, 741 P.2d 1127]; *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 669 [150 Cal.Rptr. 250, 586 P.2d 564].) (1b) The overall purpose of the prevailing wage law, as noted earlier, is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees. (*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 123 [270 Cal.Rptr. 75]; *O. G. Sansone Co. v. Department of Transportation, supra,* 55 Cal.App.3d at pp. 458-460.) (2b) These objectives would be defeated if we were to accept Lusardi's interpretation.

As the facts of this case show, both the awarding body and the contractor may have strong financial incentives not to comply with the prevailing wage law. To construe the prevailing wage law as applicable only when the contractor and the public entity have included in the contract language requiring compliance with the prevailing wage law would encourage awarding bodies and contractors to legally circumvent the law, resulting in payment of less than the prevailing wage to workers on construction projects *988 that would otherwise be deemed public works. To allow this would reduce the prevailing wage law to merely an advisory expression of the Legislature's view.

Lusardi argues that the legislative history of the prevailing wage law supports its position that the law applies only when the contractor agrees to it in writing. Yet there is nothing in the legislative history that establishes an intent by the Legislature that contractors on public works projects who failed to execute such agreements are not bound by the prevailing wage laws. [FN3]The awarding body and contractor are required to take steps to assure that the prevailing wage law is observed. It does not follow, however, that the law is intended to be optional with the contracting parties.

> FN3 At least one feature in the legislative history of the statutory scheme strongly favors the conclusion that the Legislature intended the contractor's obligation to pay prevailing wages to be both statutory and contractual. Section 1781, before its repeal in 1957 (Stats. 1957, ch. 396, § 1, p. 1240), read: "The penalties and remedies provided for in sections 1775 and 1777 shall be the exclusive penalties and remedies against any contractor or subcontractor for any violation of sections 1770 to 1777 *or* of the provisions inserted in any call for bids, specifications or contracts pursuant thereto." (Italics added.)
> The Legislature's use of the disjunctive "or" in this provision indicates that it viewed contractors and subcontractors as liable *either* for violation of their statutory obligation to pay prevailing wages, *or* for violation of their contractual stipulations to do so. The repeal of the statute does not change this, but merely clarifies that the Legislature no longer intends the statutory remedies to be exclusive. (See Comment, *Employee Rights: Enforcement of the Public Works Prevailing Wage Obligation* (1981) 14 Loyola L.A. L.Rev. 311, 328, fn. 110.)

For these reasons, Lusardi's argument that the prevailing wage law applies only when the contractor assents to it in writing is rejected.

3. *Director's Authority to Determine Coverage*

(4) The Court of Appeal assumed for the purpose of analysis that the Director could make the determination that a project was a public work. Lusardi contends that the Director has no statutory authority to determine that a construction project is a "public work" within the meaning of the Labor Code, and thus subject to the statutory requirement that "prevailing wages" be paid. We disagree.

The Director is the chief officer of the Department. (§ 51.) The stated function of the Department is to "foster, promote and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment." (§ 50.5.) The Director's statutory authority is broad: "The director shall perform all duties, exercise all powers and jurisdiction, assume and discharge all responsibilities, and carry out and effect all purposes vested by law in the department, *989 except as otherwise expressly provided by this code." (§ 54.) The Director possesses explicit authority to make rules. Section 55 provides in pertinent part: "[T]he director may, in

accordance with the provisions of [the Administrative Procedure Act], make such rules and regulations as are necessary to carry out the provisions of this chapter and to effectuate its purposes." [FN4]

> FN4 Section 59, part of the same chapter as sections 54 and 55, provides: "The department through its appropriate officers shall administer and enforce all laws imposing any duty, power, or function upon the offices or officers of the department."

These statutes establish a legislative intent to give the Director plenary authority to promulgate rules to enforce the Labor Code. Although no statute expressly gives the Director the authority to make regulations governing coverage, such authority is implied. " '[T]he authority of an administrative board or officer, ... to adopt reasonable rules and regulations which are deemed necessary to the due and efficient exercise of the powers expressly granted cannot be questioned. This authority is implied from the power granted.' " (*California Drive-in Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 303 [140 P.2d 657].) Thus, this court has previously upheld labor regulations under the same general statutory scheme "for which there is no express statutory or constitutional authority." (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 330 [19 Cal.Rptr. 492, 369 P.2d 20].)

Under these standards, the Director's interpretation of the statutes as authorizing the making of regulations governing coverage of the prevailing wage laws is well within the broad scope of his authority. Exercising that authority, the Director has made regulations governing coverage of the prevailing wage law. [FN5] Under the regulations, issues of coverage of the prevailing wage law are determined by the Director or the DLSE as the Director's designee. Lusardi does not contend that the regulations themselves are invalid. For the reasons discussed earlier, we hold that the Director's interpretation of his statutory authority is reasonable, and that the Director has the power to determine that a construction project is a "public work." ***990**

> FN5 At the time of the coverage determination in this case, former California Administrative Code, title 8, section 16207.5 provided in relevant part: "The Director shall establish and coordinate the administration of the State's prevailing wage law, including the determination of coverage issues." (This regulation has since been recodified at California Code of Regulations, title 8, section 16100.) Former California Administrative Code, title 8, section 16207.7 specified: "Any issue as to coverage of or amount of the prevailing wage raised by an awarding body or other interested party shall be referred to the Director, except that if it involves an issue raised after a contract is let, DLSE shall exercise discretion in the enforcement of the law .... DLSE shall refer ... any issue as to coverage which is not routine to the Director's office as soon as possible to coordinate with Departmental policy." (This regulation appears now in somewhat different language in California Code of Regulations, title 8, section 16301.)

4. *Due Process Implications of Director's Coverage Determinations*

(5a) Lusardi contends that the Director's determination in August 1986 that the Expansion Project was a public work without affording Lusardi notice and an opportunity to be heard violated its right to procedural due process under the state and federal Constitutions. This argument mirrors the reasoning of the Court of Appeal, which held that because the administrative finding that a project was a public work was of great importance to the contractor, procedural due process attached. We disagree.

The Court of Appeal correctly observed that procedural due process "does not require any particular form of notice or type of hearing." Thereafter, the Court of Appeal focused exclusively on the importance of the interests involved. The court stated that whether the project was a public work was "a matter of great importance to the contractor." The court found it significant that the Director had promulgated regulations allowing for hearings to determine prevailing wage rates; this was, in the court's view, another "important determination" to be made in connection with the prevailing wage law, though not directly relevant to this case. The court observed that it could "conceive of no adjudication under the prevailing wage law more important to a contractor than the foundational adjudication of the very nature of the job-whether it is 'public' or 'private' works." The court then concluded that Lusardi's due

process rights had been violated by this adjudication.

The Court of Appeal erred in assuming that the Director's determination that the project was a public work is an "adjudication" resulting in a deprivation requiring procedural due process.

Careful review of the statutory scheme, however, makes clear that the Director has no power to adjudicate whether a project is a public work, or to independently deprive a contractor such as Lusardi of any property interest. Instead, when the contract does not provide for a money payment from the awarding body to the contractor, the Director is authorized under the statute only to bring charges in court against a contractor for failing to pay the prevailing wage. The court has the sole power to determine whether the contractor is liable for any underpayment, and to make a binding order that the payments be made. The Director's role in this process is purely prosecutorial.

The statute governing this case is section 1775. It provides, in pertinent part: "[I]n all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall ***991** notify the [DLSE] of the violation and the [DLSE], if necessary with the assistance of the awarding body, *may maintain an action in any court of competent jurisdiction* to recover the penalties and the amounts due provided in this section." (Italics added.)

Here, the contract did not provide for a money payment from the District to Lusardi. Accordingly, the Director, through the DLSE, was authorized to bring an action in court for recovery of the underpayment. Contrary to the Court of Appeal's assumption, the Director was not authorized to, and did not, "adjudicate" anything. The Director's role in deciding that the prevailing wage law had been violated was no more "adjudicatory" than a district attorney's decision that a criminal statute has been violated.

It is true that after the Director made his determination that the project was a public work, he caused the DLSE to direct the District to withhold purported future payments to Lusardi. This did not result in a deprivation of property. Because "the contract does not provide for a money payment by the awarding body to the contractor" (§ 1775), this purported direction to withhold payments was meaningless. [FN6]The DLSE ordered the District to perform an impossible act.

> FN6 In this case the District, though it did not directly award the contract to Lusardi, is the awarding body within the meaning of the statutory scheme. As explained earlier, the District entered into a contract under which Imperial, a private corporation, would build the Expansion Project and sell the completed Expansion Project to the District; the contract provided that the District was appointed as Imperial's "agent ... for all purposes ... including, the engagement of contractors ... and the management and supervision of the Expansion Project." As Imperial's "agent," the District negotiated with Lusardi for the award of the construction contract. Under section 1722, "awarding body" means "department, board, authority, officer or *agent* awarding a contract for public work." (Italics added.)

The Director did not order Lusardi to begin paying the prevailing wage, nor did the Director have any power to do so. The DAS did warn Lusardi that if it did not comply with the statutory apprenticeship requirements, the DAS would initiate "proceedings for determination of willful noncompliance ... pursuant to ... section 1777.7 ...." The DAS has not, however, initiated such proceedings.

Thus, what the Director and his designees did in this case was to notify the District and Lusardi that, in the view of the authorities, the project was a public work and the prevailing wage law applied. There is no statute requiring the Director to so notify an awarding body or contractor; apparently the Director did so in the hope that voluntary compliance could avoid the necessity to bring an action under section 1775. But before the Director could bring a court action to recover the amounts due under section 1775, Lusardi sued the Director, claiming its due process rights were violated. ***992**

There is apparently no case that is precisely on point. But there is a substantial body of case law that is wholly supportive of the conclusion that a party in Lusardi's situation has no procedural due process rights to notice or a hearing until an executive branch official files formal civil or criminal charges against it.

Thus, in *SEC v. Jerry T. O'Brien, Inc.* (1984) 467 U.S. 735, 742 [81 L.Ed.2d 615, 621, 104 S.Ct. 2720], the high court stated that "because an administrative investigation adjudicates no legal rights," the due process clause of the federal Constitution is "not implicated ...." In the context of administrative process that, unlike the main procedure at issue here, does include an administrative hearing, the courts have consistently held that "due process do[es] not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." (*Opp Cotton Mills v. Administrator* (1941) 312 U.S. 126, 152-153 [85 L.Ed. 624, 640, 61 S.Ct. 524]; see *Hodel v. Virginia Surface Mining & Recl. Assn.* (1981) 452 U.S. 264, 303 [69 L.Ed.2d 1, 33, 101 S.Ct. 2352].)

In the more closely related context of official action that, like a criminal prosecution and the procedure under section 1775, contemplates not an administrative hearing but a court trial after an executive official has filed charges, the courts have also refused to hold that procedural due process requires notice and a hearing prior to the filing of charges.

A representative analysis is found in *Baltimore Gas & Elec. Co. v. Heintz* (4th Cir. 1985) 760 F.2d 1408, 1419,certiorari denied474 U.S. 847 [88 L.Ed.2d 116, 106 S.Ct. 141]: "The mere determination to enforce the statute or regulation in some cases and not to enforce [it] in others, without more, may entitle one to an explanation from the agency designed to facilitate judicial review of the decision, but such an action does not constitute a deprivation of due process. That standard has 'generated an almost unbroken line of cases upholding prosecutors' powers to decide who and how to charge.' [Citations.]" (Accord, e.g., *United States v. Patterson* (9th Cir. 1972) 465 F.2d 360, 361,cert. den.409 U.S. 1038 [34 L.Ed.2d 487, 93 S.Ct. 516] ["It is sufficient if a hearing is had prior to the final order which deprives the person of his liberty."].)

(6) Thus, the case law establishes that a person against whom criminal or civil charges may be filed has no procedural due process right to notice and a hearing until and unless an executive branch official actually files formal civil or criminal charges. A contrary conclusion would result in serious mischief. For example, a place of prostitution that learned that the district attorney planned to file a ***993** civil "red light" action against it to abate a nuisance could demand that, before charges were filed, a hearing be held on the prosecutor's decision to file. (But see Pen. Code, § 11225 et seq.) Or the Attorney General, having decided to seek an injunction under the unfair competition statute to halt a campaign of false advertising targeting senior citizens, would be required to subject the decision to proceed to a hearing. (But see Bus. & Prof. Code, § 17200 et seq.) Or the Division of Medical Quality of the Medical Board of California, having determined as a result of an investigation that charges should be brought against a physician for unprofessional conduct, would be required to provide the physician, under Lusardi's theory, with notice and an opportunity to be heard before an accusation could be brought. (But see Gov. Code, § 11500 et seq.; Bus. & Prof. Code, § 2220 et seq.) The examples could easily be multiplied.

(5b) The Director's decision that a project is a public work may lead to further action that triggers due process rights. Should the DLSE seek to recover underpayments of the prevailing wage from Lusardi in a court action under section 1775, Lusardi will be entitled to fully litigate the issue of its liability in the trial court. But at the time the Director's preliminary determination is made, no process is due.

5. *Coverage Determinations and Judicial Powers*

(7) Lusardi argues that the Director's determination that a contract is a public work impermissibly intrudes on judicial powers under the standards set forth in *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348 [261 Cal.Rptr. 318, 777 P.2d 91]. We do not agree.

In *McHugh v. Santa Monica Rent Control Bd., supra,* 49 Cal.3d 348, this court held that administrative agencies that are legislatively authorized to hold hearings and order relief may constitutionally do so when the exercise of such power is reasonably necessary to effectuate the agency's legitimate regulatory purposes, and "the 'essential' judicial power (i.e., the power to make enforceable, binding judgments) remains ultimately in the courts, through review of agency determinations." (*Id.,* at p. 372,

italics omitted.)

Here, the Director's determination that a project is a public work does not violate the principles set forth in *McHugh v. Santa Monica Rent Control Bd., supra,* 49 Cal.3d 348. The Director's determination cannot be accurately characterized as "judicial," because it does not encompass the conduct of a hearing or a binding order for any type of relief.

6. Lusardi Has Not Demonstrated Impermissible "Retroactive Enforcement" of the Prevailing Wage Law

Lusardi argues that *any* application of the prevailing wage laws against it requiring the payment of higher wages to its employees on the ***994** Expansion Project, or subjecting it to penalties for failing to comply with the prevailing wage laws, violates state and federal due process guarantees and amounts to impermissible "retroactive enforcement." Lusardi's theory, which the Court of Appeal found unnecessary to address, is that because the contract contained no provision requiring it to pay the prevailing wage, it had no notice of such a requirement. In support of this theory Lusardi relies on *Lambert v. California* (1957) 355 U.S. 225 [2 L.Ed.2d 228, 78 S.Ct. 240].

Lusardi's retroactive enforcement argument is premised on its contention that the obligation to pay prevailing wages arises solely from the contract. As shown above, however, this is incorrect; the obligation of a contractor to pay prevailing wages on a public work is statutory in nature.

In *Lambert v. California, supra,* 355 U.S. 225, the United States Supreme Court held that an ordinance making it a criminal offense for a person convicted of a felony to fail to register with a city if the person remained for more than five days in the city was unconstitutional as applied to a person who had no actual knowledge of the ordinance, when no showing was made of the probability of such knowledge. *Lambert* solely concerns the state of mind requisite to an individual's criminal liability. (*Texaco, Inc. v. Short* (1982) 454 U.S. 516, 537 fn. 33 [70 L.Ed.2d 738, 756, 102 S.Ct. 781]; see *United States v. Freed* (1971) 401 U.S. 601, 608-609 [28 L.Ed.2d 356, 362-363, 91 S.Ct. 1112].) Thus, it has no application here.

7. Equitable Issues

(8a) The Court of Appeal was persuaded that the doctrine of equitable estoppel bars the Director from determining that the Expansion Project was a public work. Lusardi renews that contention here, arguing that it relied on the District's representations that the project was not subject to the prevailing wage law, and that to now allow the Director to enforce the prevailing wage law against it would violate equitable principles. Not so.

(9) Generally, four elements must be present for the doctrine of equitable estoppel to apply. First, the party to be estopped must have been aware of the facts. Second, that party must either intend that its act or omission be acted upon, or must so act that the party asserting estoppel has a right to believe it was intended. Third, the party asserting estoppel must be unaware of the true facts. Fourth, the party asserting estoppel must rely on the other party's conduct, to its detriment. (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 398-399 [261 Cal.Rptr. 310, 777 P.2d 83].) (10) Even when these elements are present, estoppel will not be applied against the government if to do so would nullify a strong rule of policy adopted for the benefit of the ***995** public.(*Ibid.*; accord, e.g., *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488 [91 Cal.Rptr. 23, 476 P.2d 423].)

(8b) Lusardi's attempt to invoke the doctrine against the Director must fail because the elements of equitable estoppel are entirely lacking against the Director. Lusardi does not and cannot claim that it justifiably relied on acts or omissions of the Director. Rather, Lusardi argues that the actions of the District led to Lusardi's reliance, and that the acts of the District should be attributed to the Director.

(11) The acts of one public agency will bind another public agency only when there is privity, or an identity of interests between the agencies. (*City and County of San Francisco v. Grant Co.* (1986) 181 Cal.App.3d 1085, 1092 [227 Cal.Rptr. 154]; *California Tahoe Regional Planning Agency v. Day & Night Electric, Inc.* (1985) 163 Cal.App.3d 898, 904-905 [210 Cal.Rptr. 48]; see *Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 397-399 [29 Cal.Rptr. 657, 380 P.2d 97].)

(8c) In this case, there is no privity or identity of interest between the District and the Director. Instead, there is a direct and palpable conflict. As its actions clearly evidence, the District had an interest in obtaining the lowest possible cost for construction

of the hospital expansion project. The interest of the Director is in enforcing the prevailing wage laws. Contractors that do not pay the prevailing wage to their workers enjoy a competitive advantage over contractors that do, and may be preferred by local government agencies for public works projects, because the construction dollar will purchase more when a contractor paying less than the prevailing wage is selected. The facts of this case illustrate this conflict of interest: the District seeks to avoid the prevailing wage law, while the Director seeks to enforce it.

Lusardi argues that *Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal.App.3d 635 [237 Cal.Rptr. 546] (hereafter *Waters*) supports a finding that the Director is estopped from determining that the project is subject to the prevailing wage law. We disagree.

In *Waters, supra,* 192 Cal.App.3d 635, a city published a notice for bids on a construction project stating that, under section 1773, prevailing wages were to be paid by the contractor, but failing to set forth the prevailing wage rates or to include a statement that the rates were on file with the city, as required by section 1773.2. The contractor consulted with a city architect, who mistakenly indicated that the prevailing rates for carpentry were considerably lower than the applicable rate established by the Director. Based on ***996** this incorrect information, the contractor concluded that the rates paid by his carpentry subcontractor were greater than the prevailing wage. Thereafter, the DLSE determined that the carpenters had been underpaid; it levied a penalty for the underpayment, and ordered the city to withhold the amount of the underpayment plus the penalty from payments due the contractor. The contractor sued the DLSE. On appeal from a judgment in favor of the contractor, the appellate court held that although the contractor was liable for the underpayment, the DLSE was estopped by the actions of the city from collecting the penalty. (192 Cal.App.3d at pp. 639-642.)

The *Waters* court declined to apply estoppel to preclude enforcement of the prevailing wage law against the contractor, and held that the contractor was liable for the difference between the amount paid and the prevailing wage rate. (*Waters, supra,* 192 Cal.App.3d at p. 639.) Thus, *Waters* does not support an application of the doctrine of estoppel to preclude a determination that a project is a public work. Moreover, the *Waters* court never considered the question whether the city and the DLSE shared the requisite privity or identity of interests.

Waters does, however, contain an insight of considerable value to this case. The *Waters* court concluded that there was no "strong rule of policy" that would require the imposition of a penalty on the contractor, who had reasonably and in good faith attempted to comply with the requirements of the prevailing wage law. (*Waters, supra,* 192 Cal.App.3d at pp. 641-642.) We agree that in a proper case equitable considerations may preclude the imposition of statutory penalties against a public work contractor for failing to pay the prevailing wage. This is such a case. Here, Lusardi acted in good faith in entering into the contract on the basis of the District's representations, assertedly on the advice of its attorneys, that the project was not subject to the prevailing wage law. Under the circumstances of this case it would be inequitable for Lusardi to be held liable for penalties for failure to pay the prevailing wage. Lusardi's exposure to liability must be limited to the amount of underpayment.

This conclusion comports with this state's policy, reflected in Civil Code section 3275, that when a party incurs a loss in the nature of a forfeiture or penalty, but makes full compensation to the injured party, he or she may be relieved from the forfeiture or penalty except when there has been a grossly negligent, willful or fraudulent breach of a duty. California courts have applied this principle when necessary to accomplish substantial justice. (See *Valley View Home of Beaumont, Inc. v. Department of Health Services* (1983) 146 Cal.App.3d 161, 168 [194 Cal.Rptr. 56].) Similarly, courts refuse to impose civil penalties against a party who acted with a good ***997** faith and reasonable belief in the legality of his or her actions. (*Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d 240, 263 [220 Cal.Rptr. 2]; *No Oil, Inc. v. Occidental Petroleum Corp.* (1975) 50 Cal.App.3d 8, 30 [123 Cal.Rptr. 589].) In this case substantial justice would not be achieved by a resolution that left Lusardi liable for statutory penalties under section 1775 for failing to pay the prevailing wage when it acted in good faith and on the express representations of a governmental entity. Based on these equitable principles, Lusardi should also not be liable for penalties under either section 1777.7 (relating to failure to comply with the apprenticeship provisions of the prevailing wage law) or section 1813 (involving noncompliance with

overtime provisions of the prevailing wage law) based on violations allegedly occurring before Lusardi ceased work on the project in this case.

We also note in connection with the equitable issues raised in this case that although the contract between Imperial and the District specified that the prevailing wage was to be paid, the stipulation of the parties makes clear that the District expressly represented to Lusardi that the construction project was not a public work and therefore the prevailing wage law did not apply, and that Lusardi relied in good faith on these representations. These facts strongly suggest that Lusardi has remedies against the District, Imperial, and perhaps others for indemnification of any sums it may be required to pay as a result of application of the prevailing wage law. (See generally, *Rozay's Transfer v. Local Freight Drivers L.* (9th Cir. 1988) 850 F.2d 1321; *Southwest Administrators, Inc. v. Rozay's Transfer* (9th Cir. 1986) 791 F.2d 769.)Moreover, if the District made material misrepresentations to Lusardi, as the stipulated facts suggest, Lusardi may be entitled to recover for all other consequential damages it suffered as a result of such wrongful conduct, in addition to indemnification for amounts due under the prevailing wage law. (Civ. Code, § 3333.)

8. *Section 1776 Penalties*

Lusardi separately challenges numerous specific provisions of the prevailing wage law relating to penalties. The Court of Appeal did not reach Lusardi's specific challenges.

As described above, in May 1986 the DLSE directed Lusardi to submit certified payroll records and warned that failure to do so would subject Lusardi to statutory penalties. Lusardi did not comply with the request. In November 1986, the DLSE sent a "penalty assessment letter" to the District, with a copy to Lusardi. The letter purported to assess a statutory penalty of $25 per day per employee, under section 1776, subdivision (f), calculated on *998 the basis that there were a minimum of 200 employees, and made retroactive to August 30, 1986. The DLSE directed the District to withhold $380,000 from future progress payments due Lusardi, and to increase the amount withheld by $5,000 per day for each day of noncompliance beyond November 13, 1986.

Lusardi contends that the penalties imposed against it violate procedural due process guarantees because they constitute a deprivation of its property without a hearing. Lusardi also argues that section 1776, subdivision (f), violates the prohibition of unreasonable searches and seizures under the Fourth Amendment to the United States Constitution. We do not reach the merits of these arguments because, as we shall explain, the DLSE's letter purporting to impose the penalty was ineffective.

Under subdivision (f) of section 1776, a contractor has 10 days in which to comply with a request to submit certified payroll records. If the contractor fails to do so, the statute provides: "[T]he contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon request of the [DAS] or the [DLSE], these penalties shall be withheld from progress payments then due."

In this case, there was no contract between Lusardi and the District. The only contract to which Lusardi was a party was the construction contract between it and Imperial. The District itself had no funds to withhold from Lusardi; thus, the DLSE's letter directing the District to withhold funds had no legal force.

Because the DLSE has taken no effective steps to impose a penalty on Lusardi under section 1776, subdivision (f), Lusardi is in the same position as if the DLSE had never asserted the applicability of that subdivision. In this context, a ruling on the constitutionality of section 1776, subdivision (f), would be purely advisory. We have no assurance that Lusardi would refuse to comply with a renewed request for records. Nor is there any reason to believe that the DLSE would necessarily seek penalties before affording Lusardi an opportunity to contest the matter in court. We decline to reach the questions regarding the constitutionality of section 1776 in this hypothetical context. (See *Hodel v. Virginia Surface Mining & Recl. Assn., supra,* 452 U.S. 264, 304 [69 L.Ed.2d 1, 33-34]; *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 173-174 [188 Cal.Rptr. 104, 655 P.2d 306].)*999

9. *Additional Issues*

Lusardi argues that sections 1727 through 1733 are unconstitutional because they authorize the seizure of property without a hearing, and that sections 1775, 1777.7, and 1813 are unconstitutional because they provide for excessive penalties that are imposed without a hearing. As we have explained earlier, Lusardi is not liable for penalties under the latter three sections based on any violation allegedly occurring before it ceased work on the Expansion Project. Accordingly, we do not address Lusardi's contentions regarding these sections.

Sections 1727 through 1733 generally govern the circumstances under which awarding bodies may withhold sums from contractors, and provide for recovery of withheld sums. As noted above, here there was no contract between the contractor and the awarding body, and no sums were or could have been withheld from Lusardi by the District. The Director has not sought to apply any of these statutes against Lusardi. Under the circumstances, sections 1727 through 1733 are inapplicable. We decline to address the merits of legal questions not posed by the facts of this case.

Disposition

The judgment of the Court of Appeal is reversed.

Lucas, C. J., Mosk, J., and George, J., concurred.
PANELLI, J.,
Concurring and Dissenting.

I dissent from the majority's holding that the obligation of a contractor on a public works project to pay the prevailing wages arises from a statutory duty independent of any contractual agreement or notice to the contractor. (Maj. opn., *ante*, at pp. 986-988.) The majority bases its conclusion on the language of one of the public works law's provisions that the prevailing wage " 'shall be paid to all workers employed on public works.' " (*Id.* at p. 987, italics omitted, quoting Lab. Code, § 1771.) [FN1] The majority also asserts that requiring contractors to comply with the public works laws only when their contracts require it would defeat the legislative objective of ensuring that workers on public works be paid the prevailing wages. (Maj. opn., *ante*, at p. 987.) I disagree with the majority's interpretation of the prevailing wage laws. In my view, the statutory scheme as a whole does not disclose a legislative intent to hold contractors liable for paying the prevailing wages when the contract does not require those wages to be paid; rather, it reflects a view that the Legislature intended contractors to be aware of their obligations under the prevailing ***1000** wage laws before entering into a contract for public works. As a consequence, the result that the majority in this case reaches is patently unfair and, in my view, unconstitutional as a violation of due process; there is no evidence that the Legislature intended such a result.

FN1 All further statutory references are to the Labor Code unless otherwise noted.

In interpreting the prevailing wage laws, we must look at the statutory scheme as a whole in order to harmonize the various elements. (*Mattice Investments, Inc. v. Division of Labor Standards Enforcement* (1987) 190 Cal.App.3d 918, 923 [235 Cal.Rptr. 502]; *Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 489 [134 Cal.Rptr. 630, 556 P.2d 1081].) While it is true, as the majority states, that section 1771 provides that the prevailing wage "shall be paid to all workers employed on public works," it is also evident that the statutory scheme establishes detailed procedures designed to ensure that contractors are aware of their responsibilities under the public works laws before entering into a public works contract. (See §§ 1773.2, 1775, 1776, subd. (g), 1777.5.) In particular, the public body awarding the contract is required either to specify the prevailing wage in the call for bids, the bid specifications, and the contract itself, or to include a statement in those documents that copies of the prevailing rate of wages are on file and available for inspection. (§ 1773.2.)In addition, the awarding public body is required to have the contract include a stipulation that the contractor will comply with the forfeiture and penalty provisions if any workers employed by the contractor or any subcontractor are underpaid. (§ 1775.)

These provisions for precontract notice indicate that the Legislature intended contractors to be fully aware of their responsibility to pay the prevailing wages and of the consequences of failure to pay those wages before entering into a contract for the construction of public works. The Legislature also intended contractors to agree to those obligations in the contract. The statutory scheme can most reasonably be read to allow the prevailing wage laws to be enforced against the contractor only when the contract specifies that the project is a public work.

The *stipulated* facts in this case indicate that Lusardi Construction Company's (Lusardi's) contract did not state that the prevailing wage laws were applicable; in fact, Lusardi's representative made clear that the company would not enter the contract if it was for a public works project. I do not believe that the Legislature intended contractors to be held liable for the prevailing wages under these factual circumstances.

This interpretation is consistent with that of the Courts of Appeal that have considered the question of when a contractor can be required to pay prevailing wages on a public works project. As will be discussed, those courts have held without exception, that the contractor could be held liable because, *in *1001 each case, the contractor had agreed in the contract to be subject to the prevailing wage laws.*

In *Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114 [270 Cal.Rptr. 75], the Court of Appeal held that a contractor could be required to pay the prevailing wage to workers who fell into a job classification for which the public entity awarding the contract had not specified the prevailing wage. The court reasoned that this deficiency did not relieve the contractor of its obligation to pay all its workers prevailing wages, because *the contractor had expressly agreed in the contract to pay prevailing wages.*(*Id.* at pp. 125-126 & fn. 21.)

Two cases in which payments were withheld from contractors after the contractors failed to ensure that prevailing wages were paid also conclude that the duty to pay prevailing wages arises from the contract. In *O. G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434 [127 Cal.Rptr. 799] the court held that contractor could be required to pay penalties and the difference between actual wages and the prevailing wage rate when a subcontractor failed to pay the prevailing wages. The court reasoned that the public works provisions of the Labor Code did not place an involuntary burden on the contractor, since "[the contractors'] execution of the contract with knowledge of the penalties to be imposed if they or their subcontractors failed to pay the prevailing wages required under the contract was voluntary, and constituted consent to the [prevailing wage provisions]. [Citation.]" (*Id.* at p. 455.)Therefore the court held that "[w]hen the contractor submits his bid *based on the prevailing wage determination* and freely enters into a contract for the public work involved, *in which contract he stipulates to be subject to the penalty provisions of the prevailing wage law,* he cannot be heard to say that he was denied due process of law with respect to the enforcement of the penalty provisions." (*Ibid.*, italics added.)

The court in *Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal.App.3d 635 [237 Cal.Rptr. 546] (*Waters*), applied a similar analysis. There, the contracting public entity withheld payments from a contractor to cover penalties and extra wages when a subcontractor failed to pay the prevailing rate. The city contracting for the project had not specified what the prevailing rates were, nor that those rates were on file in the city's office. However, the contract between the city and Waters, the contractor, did provide that the prevailing wage rates were to be paid to the workers. The court held that Waters could be required to pay the difference between the prevailing rates and the wages actually paid, *because "[t]he contract documents ... did alert Waters, as he so testified, that the wages must not be less *1002 than the prevailing general rate."* (*Id.* at p. 640, italics added.) [FN2]The court stated, "[w]hen a contractor freely enters into an agreement for a public work in which he stipulates to pay the prevailing wage rate ..., he will be required to comply with the terms of his contract." (*Id.* at p. 639.)

> FN2 It also held that, under the doctrine of equitable estoppel, Waters could not be required to pay the statutory penalties because he had made a reasonable attempt to find out what the prevailing wages were. (*Waters, supra*, 192 Cal.App.3d at pp. 640-641.)

Thus, the courts that have considered the applicability of the requirement to pay prevailing wages in circumstances in which the public entity did not fully comply with its obligations agree that "*the duty to pay the prevailing wage [is] triggered once the contractor so agree[s] in the contract.*" (*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc., supra*, 221 Cal.App.3d at p. 126, fn. 21, italics added.) Under this analysis, a contractor is not liable for paying prevailing wages or for any penalties for underpayment unless the contractor was on notice of the requirements at the time that the contractor entered into the contract for the public work and agreed to pay the prevailing wages in the contract. I believe that this conclusion is correct.

Under the majority's interpretation, a contractor may be held liable for extra wages although the contractor had no notice that the prevailing wage requirements would be applicable and, like Lusardi, the contractor would not have entered into the contract if the contractor had had that notice. In that case, if a contractor enters into a contract in a good faith belief that it is for a private work, *as the stipulated facts state that Lusardi did,* and the project is later determined to be a public work, the contractor would effectively have been forced against its will into accepting a public works contract. To say that the contractor will only be liable for the extra wages and not for any penalties does not mitigate the fundamental unfairness of this outcome. I see no reason to conclude that the Legislature intended such an unfair result. (See *County of Madera v. Gendron* (1963) 59 Cal.2d 798, 803 [31 Cal.Rptr. 302, 382 P.2d 342, 6 A.L.R.3d 555] [court reluctant to construe statute in a way that would cause "harsh and unjust result" in the absence of "clear indication" of legislative intent]; see also *Johnson v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 235, 242 [207 Cal.Rptr. 857, 689 P.2d 1127].)

The majority attempts to soften the harshness of its holding by saying that Lusardi may be entitled to indemnity from the Tri-City Hospital District (the District). In my view, the fundamental unfairness remains. The majority's conclusion would place on Lusardi the primary responsibility for paying the excess wages, as well as the additional burden of showing that it was entitled to indemnity. This is a considerable burden to place on a contractor that, as the stipulated facts state, relied in good faith on the District's assurances that the expansion project was a private work. ***1003**

I am also troubled by the due process implications of the majority's conclusion imposing liability on Lusardi. In this case, the Director of the Department of Industrial Relations (the Director), after the contract was entered into, made a determination that the project was a public work and directed the District to withhold payments due Lusardi. The majority concludes that this action did not result in a deprivation of property without due process of law, since there was no money due from the District to Lusardi, but rather, all money due Lusardi was owed by Imperial Municipal Services Group, Inc. (Imperial). Accordingly, under the majority's view, the Director would have had to institute a court action, giving Lusardi notice and an opportunity to be heard before any deprivation of its property occurred. (Maj. opn., *ante,* at pp. 990-993; see § 1775.)

This reasoning, in my view, is unsound. The contract between the District and Imperial stated that "[Imperial] hereby appoints and constitutes [the District] as its agent and attorney-in-fact for all purposes respecting construction of the [expansion project], including, without limitation, the engagement of contractors ... and the management and supervision of the construction of the [expansion project] .... [The District], as agent, shall ... supervise and provide for, or cause to be supervised and provided for, as agent for [Imperial], the complete acquisition and construction of the [expansion project]." Thus, the District had complete responsibility for managing the construction of the project. Moreover, the majority concludes that as the agent of Imperial, the District is the "awarding body."

If the District is the "awarding body," it elevates form over substance to say that there was no money owing from the District to the contractor. If the District did owe money to Lusardi, then the Director would not have ordered an "impossible act" when he ordered the District to withhold funds from Lusardi. (See maj. opn., *ante,* at p. 991.) This withholding of funds would clearly violate Lusardi's due process rights, since the contractor would have been deprived of its property without notice or an opportunity to be heard. (See *O. G. Sansone Co. v. Department of Transportation, supra,* 55 Cal.App.3d at p. 455.)

The majority has expressed concern that if contractors cannot be bound by the public works laws in the absence of agreement in the contract, the policy of ensuring that workers are paid the prevailing wage will be defeated. However, I do not see any state policy that can only be served by holding contractors liable in these circumstances. The Legislature has seen fit to place on the contracting *public entities* the obligation to require public works contractors to pay the prevailing wages. "By the express terms of the statutes, the Legislature has imposed upon the awarding body ... the responsibility for providing advance notice to the contractor that wages must ***1004** be paid in accordance with the general prevailing rate .... [Citation.]" (*Waters, supra,* 192 Cal.App.3d at p. 640.) The statutory objective of guaranteeing that workers on public works are paid prevailing wages can be served by requiring public

entities to carry out their obligations under the public works law.

Enforcing the public works laws against awarding bodies only and not against the contractors in these circumstances would be both reasonable and fair. The public works law imposes a duty *on the public agency* to put bidders on notice of the potential liability that a successful bidder will incur. Nowhere does the public works law suggest that bidders not notified of the implications of a successful bid will nonetheless be subject to an obligation imposed upon them after the fact, resulting from the failure of a public agency to follow the dictates of the law. Nor would it be unreasonable to place upon the public agency itself the financial burden of its failure to comply with the public works law. By not adhering to its obligation under the law, the public agency is, presumptively, the beneficiary of a less costly project; had the public agency advised bidders of their obligations under the public works law to pay prevailing wages the project would have been more costly to the public agency. Hence it would not be unfair to require the public agency to bear any obligation to pay the extra wages.

The majority has also raised the possibility that, if contractors are not held liable in these circumstances, public entities and contractors might collude to evade the prevailing wage laws. However, the statutory scheme provides criminal sanctions that will serve to discourage collusion. Section 1777 makes it a misdemeanor for any officer, agent, or representative of the state or any political subdivision to wilfully violate any provision of the prevailing wage law statutory scheme. I presume that collusion with a contractor to evade the laws would fall under this section.

Therefore, I dissent from the majority's conclusion that contractors' obligation to pay the prevailing wages arises purely from the statutory scheme. In my view, Lusardi cannot be required to pay the difference between the prevailing wages and the wages actually paid because it did not have notice that the prevailing wage laws applied before entering into the contract to construct the expansion project and did not agree in the contract to pay those wages. Like the majority, I also conclude that Lusardi cannot be required to pay the statutory penalties.

Baxter, J., concurred.

ARABIAN, J.,

Concurring and Dissenting.

Although I agree that the obligation to pay prevailing wage derives from statute as well as contract ***1005** and that the Director of the Department of Industrial Relations (the Director) retains the inherent and necessary authority ultimately to determine a project's public work status, I cannot support the majority's refusal to accord Lusardi Construction Company (Lusardi) a modicum of fairness under this scenario. In my view, the circumstances "clearly establish that a grave injustice would be done if an equitable estoppel were not applied." (*Cal. Cigarette Concessions v. City of L. A.* (1960) 53 Cal.2d 865, 869 [3 Cal.Rptr. 675, 350 P.2d 715].) I would, therefore, affirm the judgment of the Court of Appeal.

The stipulated facts establish that the contract between Lusardi and Imperial Municipal Services Group, Inc. (Imperial) did not contain any reference to the status of the expansion project as a public work or to any obligation to pay prevailing wages; that Lusardi inquired as to the nature of the project, expressly declining to enter into a public works contract; that in response the Tri-City Hospital District (the District) gave assurances, based on representations of its legal counsel, that the construction was private and no prevailing wage or payroll record obligations obtained; that Lusardi premised its agreement with Imperial upon those assurances and representations; and that in so doing Lusardi acted in good faith. Lusardi did all a business could do.

A simple recitation of these facts should thus suffice to confirm the right to invoke equitable estoppel: Lusardi acted to its detriment in justifiable reliance upon the inaccurate representations of a governmental agency charged with implementation and enforcement of the law. Nevertheless, the majority demur based upon an asserted lack of privity between the Director and the District and the potential nullification of "a strong rule of policy adopted for the benefit of the public." (Maj. opn., *ante*, pp. 994-995.)

To reach its conclusion, the majority analysis hews to the "elements" of equitable estoppel. (See *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489 [91 Cal.Rptr. 23, 476 P.2d 423].) Dispensing equitable relief, however, depends upon a measure of flexibility as well as fairness and must accommodate

compelling circumstances that may not precisely conform to "the rigid rules of law." (*Bechtel v. Wier* (1907) 152 Cal. 443, 446 [93 P. 75].) "Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention." (*Times- Mirror Co. v. Superior Court* (1935) 3 Cal.2d 309, 331 [44 P.2d 547]; *Bisno v. Sax* (1959) 175 Cal.App.2d 714, 729 [346 P.2d 814] [" 'no inflexible rule has been permitted to circumscribe the power of equity to do justice' "]; cf. *Farina v. Bevilacqua* (1961) 192 Cal.App.2d 681, 685 [13 Cal.Rptr. 791] [inability to restore precise status quo not invariable bar to rescission]; ***1006***Nadell & Co. v. Grasso* (1959) 175 Cal.App.2d 420, 431 [346 P.2d 505] ["peculiar, and perhaps unique, facts" justified enforcement of restrictive covenant as to services; equitable servitudes not limited to chattels].)

Moreover, I am unpersuaded under the facts that equity should not charge the Director with the consequences of the District's conduct. As head of the Department of Industrial Relations, the Director assumes primary responsibility for determining, monitoring, and enforcing prevailing wage laws on public works. (See generally Lab. Code, § 1770 et seq.) The awarding body has interrelated notification and implementation obligations pursuant to which it works in conjunction with the Director to ensure compliance. (See, e.g., Lab. Code, §§ 1773.2, 1773.3, 1773.4, 1775, 1776; cf. *City and County of San Francisco v. Grant Co.* (1986) 181 Cal.App.3d 1085, 1092 [227 Cal.Rptr. 154] [city not acting as arm or agent of state in failing to enforce building code regulations since city had initial and independent enforcement responsibility within its territory].) The statutory scheme thus contemplates a confluence of governmental interests and duties sufficient in my estimation to establish privity. (See *Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 397- 399 [29 Cal.Rptr. 657, 380 P.2d 97], and cases cited at fn. 10.) In finding to the contrary, the majority rely on the fact that the District in actuality assumed a position antagonistic to the Director. Lusardi, however, had no reason to anticipate such an eventuality, whereas the Director could well have taken measures to forestall the possibility. (See Lab. Code, § 1773.5 [Director may "establish rules and regulations for the purpose of carrying out this chapter, including, ... the responsibilities and duties of awarding bodies"].) Lusardi should not bear the burden of the Director's default in failing to maintain adequate administrative controls over awarding bodies that share responsibility for implementing and enforcing prevailing wage laws. [FN1]

> FN1 Whether based on equity or otherwise, this court does not lack precedent for holding one governmental agency accountable for the actions of another. (See, e.g., *People v. Sims* (1982) 32 Cal.3d 468, 481-482 [186 Cal.Rptr. 77, 651 P.2d 321] [criminal charges of welfare fraud dismissed on collateral estoppel after evidence found insufficient in administrative hearing; "The People cannot now take advantage of the fact that the County avoided its litigation responsibilities and chose not to present evidence at the prior proceeding."]; *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827-829 [48 Cal.Rptr. 366, 409 P.2d 206] [under Pen. Code, § 654, misdemeanor conviction will generally bar felony prosecution based on same act or course of conduct even when crimes are prosecuted by different public law offices]; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 351-352 [272 Cal.Rptr. 767, 795 P.2d 1223, 2 A.L.R.5th 995] [for reasons of public policy collateral estoppel does not preclude criminal prosecution after People fail to establish violation of probation based on same underlying conduct].)

Furthermore, the Director retains the inherent authority to characterize a given project as a public work thereby invoking the obligation to pay ***1007** prevailing wages. (Maj. opn., *ante*, pp. 988-989.) Accordingly, at any and all times the Director could have intervened, notified Lusardi that the project constituted a public work, and mandated wage and reporting compliance. Cynically, I note such intervention did not occur until Lusardi had substantially completed the project in reliance upon contractual provisions and express representations by a governmental agency to the contrary. "[N]egligence or silence in the face of a duty to speak may suffice [to invoke estoppel]. [Citation.]" (*City and County of San Francisco v. Grant Co., supra*, 181 Cal.App.3d at p. 1091; see also *Dettamanti v. Lompoc Union School Dist.* (1956) 143 Cal.App.2d 715, 721 [300 P.2d 78]; cf. *People v. Department of Housing & Community Dev.* (1975) 45 Cal.App.3d 185, 195-196 [119 Cal.Rptr. 266] [comparing estoppel and laches]; 11 Witkin, Summary of Cal. Law (9th ed. 1990)

Equity, § 14, pp. 690-692 [defense of laches].) While the District's misfeasance may have instigated this predicament, the Director's nonfeasance perpetuated it to Lusardi's detriment.

As to the majority's policy argument, I cannot agree that the Legislature enacted the prevailing wage laws "for the benefit of the public." (See *County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 826-828 [186 P.2d 124, 175 A.L.R. 747].) Whatever incidental salutary effect the general public may derive, in the words of the majority, "[t]he overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." (Maj. opn., *ante*, p. 985; see Lab. Code, § 90.5, subd. (a); *O. G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 458 [127 Cal.Rptr. 799]; cf. 11 Witkin, Summary of Cal. Law, *supra*, Equity, § 183, at pp. 864-866, and cases cited therein ["no estoppel where it would defeat operation of a policy protecting the public"].) As between the two, the District, not Lusardi, had the primary statutory obligation to safeguard the interests of employees with respect to minimum labor standards. (See Lab. Code, § 1720 et seq.) Indemnification notwithstanding, I see no public policy fostered by requiring a nondefaulting party to assume that responsibility. [FN2](*Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal.App.3d 635, 641-642 [237 Cal.Rptr. 546].)

> FN2 In no respect do the facts imply a case of unjust enrichment or an unfair profit by Lusardi at the expense of employees who may otherwise have been entitled to a higher wage. Lusardi and the District premised their negotiations and the final terms of the contract on the absence of any prevailing wage obligations.

As the Court of Appeal below summarized, "We have here a fact situation which shouts estoppel." If no equitable mechanism exists by which Lusardi can extricate itself from the very litigation it attempted in good faith to avoid, then rectitude and fair dealing have ceased to function within our judicial framework. Regrettably, the chancellor's conscience has fallen victim to the very rigidity of the rule of law it should seek to ameliorate. (See ***1008***Bechtel v. Wier, supra*, 152 Cal. 443, 446; *City of Los Angeles v. Cohn* (1894) 101 Cal. 373, 376-378 [35 P. 1002].)

BAXTER, J.,

Concurring and Dissenting.

I agree with the majority that Lusardi Construction Company (Lusardi) cannot be held liable for statutory penalties. I respectfully dissent, however, from the remainder of the judgment and the majority's reasoning. I have concurred in Justice Panelli's explanation of why Lusardi should not be required to pay the difference between the prevailing wages and the wages that Lusardi contracted to pay. (Conc. and dis. opn. of Panelli, J., at pp. 999-1004, *ante*.)I write separately only to state that I also agree with Justice Arabian's conclusion that the majority opinion results in a miscarriage of justice. (Conc. and dis. opn. of Arabian, J., at pp. 1004- 1008, *ante*.)As he explains and as the Court of Appeal observed, this case cries out for application of equitable estoppel.

In an apparent attempt to render its harsh result more palatable, the majority suggests that Lusardi "has remedies against the District, Imperial, and perhaps others for indemnification ...." (Maj. opn., at p. 997, *ante*.)This result not only delays justice to Lusardi, it unnecessarily consumes court resources. ***1009**

Cal. 1992.
Lusardi Construction Co. v. Aubry
1 Cal.4th 976, 824 P.2d 643, 4 Cal.Rptr.2d 837, 30 Wage & Hour Cas. (BNA) 1281, 121 Lab.Cas. P 56,852, 123 Lab.Cas. P 57,112

END OF DOCUMENT

HSouthern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry
Cal.App.1.Dist.

SOUTHERN CALIFORNIA LABOR MANAGEMENT OPERATING ENGINEERS CONTRACT COMPLIANCE COMMITTEE,
Plaintiff and Appellant,
v.
LLOYD W. AUBRY, JR., as Director, etc.,
Defendant and Respondent.
No. A074161.

Court of Appeal, First District, Division 4, California.
Mar. 31, 1997.

SUMMARY

The trial court denied plaintiff's petition for a peremptory writ of mandate seeking to direct the Director of the Department of Industrial Relations of the State of California to find that a dam project was subject to the state's prevailing wage law (Lab. Code, § 1720 et seq.), rather than the federal Davis-Bacon Act (40 U.S.C., § 276a(a)). (Superior Court of the City and County of San Francisco, No. 974794, William J. Cahill, Judge.)

The Court of Appeal affirmed the judgment, holding that the trial court properly denied the writ petition. Lab. Code, § 1773.5, provides that the Director of the Department of Industrial Relations "may establish rules and regulations for the purpose of carrying out this chapter, including ... the responsibilities and duties of awarding bodies under this chapter." Under Cal. Code Regs., tit. 8, §§ 16000, 16001, subd. (a), and 16001, subd. (b), federally funded projects controlled by, carried out by, and awarded by the federal government are not subject to the prevailing wage law, even if it requires a higher wage than the Davis-Bacon Act. In this case, the awarding body was an agency of the federal government. Under the "Local Cooperation Agreement," the federal agency was given ultimate authority over construction, financial audits, paying construction companies, and determining that the project was complete. Since the project was controlled by a federal awarding body, the prevailing wage law did not apply under the regulations, which were valid inasmuch as they were consistent with case law and the prevailing wage law statutes. The court further held that the director did not violate the California Constitution (Cal. Const., art. III, § 3.5) by refusing to enforce a statute on constitutional or preemption grounds. (Opinion by Hanlon, J., with Anderson, P. J., and Reardon, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Public Works and Contracts § 6--Contracts-- Contractors' Rights and Liabilities--State Prevailing Wage Law--As Preempted by Federal Davis-Bacon Act.
The trial court properly denied a writ petition that would have directed the Director of the Department of Industrial Relations of the State of California to find that a dam project was subject to the state's prevailing wage law (Lab. Code, § 1720 et seq.), rather than the federal Davis-Bacon Act (40 U.S.C., § 276a(a)). Lab. Code, § 1773.5, provides that the director "may establish rules and regulations for the purpose of carrying out this chapter, including ... the responsibilities and duties of awarding bodies under this chapter." Under Cal. Code Regs., tit. 8, §§ 16000, 16001, subd. (a), and 16001, subd. (b), federally funded projects controlled by, carried out by, and awarded by the federal government are not subject to the prevailing wage law, even if it requires a higher wage than the Davis-Bacon Act. In this case, the awarding body was an agency of the federal government. Under the "Local Cooperation Agreement," the federal agency was given ultimate authority over construction, financial audits, paying construction companies, and determining that the project was complete. Since the project was controlled by a federal awarding body, the prevailing wage law did not apply under the regulations, which were valid inasmuch as they were consistent with case law and the prevailing wage law statutes.
[See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency, § 331.]
(2) Statutes § 29--Construction--Language--Legislative Intent.
A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. In construing a statute, the court's first task is to look to the

language of the statute itself. When the language is clear and there is no uncertainty as to the legislative intent, the court looks no further and simply enforces the statute according to its terms. The court is required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. If possible, significance should be given to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose. When used in a statute, words must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear. Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. An overriding principle in this area is that the individual portions of a statute should be harmonized with the body of law of which it forms a part. The object that a statute seeks to achieve is of primary importance in statutory interpretation.

(3a, 3b) Public Works and Contracts § 6--Contracts--Contractors' Rights and Liabilities--State Prevailing Wage Law and Federal Davis-Bacon Act-- Purpose.
The overall purpose and object of California's prevailing wage law (Lab. Code, § 1720 et seq.) is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees. The overall purpose and object of the federal Davis-Bacon Act (40 U.S.C. § 276a(a)) is to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area. The state's prevailing wage law and the Davis-Bacon Act each carry out a similar purpose. Read as a unit, they set out two separate, but parallel, systems regulating wages on public contracts. The prevailing wage law covers state contracts and the Davis-Bacon Act covers federal contracts.

(4) Administrative Law § 117--Judicial Review and Relief--Scope and Extent of Review--Arbitrary, Capricious, or Unreasonable Action.
An agency's regulation will not be set aside unless it is inconsistent with a statute, arbitrary, capricious, unlawful, or contrary to public policy. An agency's construction of statutes will generally be followed unless it is clearly erroneous.

(5) Constitutional Law § 34--Distribution of Governmental Powers--Conflicts Between Federal and State Powers--Preemption.
The supremacy clause (U.S. Const., art. VI) may entail preemption of state law either by express provision, by implication, or by a conflict between federal and state law. Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility. Further, there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the supremacy clause. However, despite the variety of opportunities for federal preeminence, courts have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law.

(6) Labor § 10--Regulation of Working Conditions--Minimum Wage and Prevailing Wage Law.
Minimum wage laws fall under the same classification as valid regulation of the employment relationship under state police powers. The prevailing wage law (Lab. Code, § 1720 et seq.) is not a minimum wage law.

(7) Administrative Law § 10--Administrative Construction and Interpretation of Laws--Department of Industrial Relations' Authority to Determine Project Not Subject to Prevailing Wage Law.
In a mandamus proceeding to determine whether the Director of the Department of Industrial Relations of the State of California properly determined that a dam project was not subject to the state's prevailing wage law (Lab. Code, § 1720 et seq.), the director did not violate the California Constitution by refusing to find a public works to exist based on a perceived fear of unconstitutionality or conflict with federal law. Under Cal. Const., art. III, § 3.5, an administrative agency has no power to refuse to enforce a statute on the grounds it is unconstitutional or conflicts with federal law, until an appellate court has so held. However, the California Supreme Court has held that the purpose of Cal. Const., art. III, § 3.5, was to prevent agencies from using their own interpretation

of the Constitution or federal law to thwart the mandates of the Legislature, and cannot reasonably be construed to place a restriction on the authority of the Legislature to limit the scope of its own enactments. By limiting the implementation of a statute as directed by the Legislature, an agency neither declares it unenforceable, nor refuses to enforce it. Far from thwarting the Legislature's mandate, such action fulfills it. The director's administrative decisions in the present case were proper interpretations of the prevailing wage law within the scope of the Supreme Court's opinion.

COUNSEL

Carroll & Scully, Donald C. Carroll and Charles P. Scully II for Plaintiff and Appellant.

John M. Rea and Gary J. O'Mara for Defendant and Respondent. *877

HANLON, J.

Plaintiff and appellant Southern California Labor Management Operating Engineers Contract Compliance Committee (appellant) appeals from a judgment denying its petition for a peremptory writ of mandate directing defendant and respondent Lloyd W. Aubry, Jr. as Director of the Department of Industrial Relations of the State of California (respondent) to set aside his outstanding decision and issue a new determination that the Seven Oaks Dam project is a public works subject to the California prevailing wage law (Lab. Code, §§ 1771, 1720-1781) (hereinafter referred to as PWL) rather than Davis-Bacon Act, 40 United States Code section 276a(a), which is the federal prevailing wage law (hereinafter referred to as DBA).

Appellant contends: (1) the PWL applies even though the construction contract for the dam project was "awarded" by an agency of the federal government, and (2) respondent acted beyond its power by refusing to enforce a statute on constitutional or preemption grounds. We affirm.

I. *Statement of Facts*

Seven Oaks Dam project is a part of the Santa Ana River Mainstem, including Santiago Creek, California Flood Control Project. Construction of the complete flood control project is governed by a local cooperation agreement among the Department of the Army, Orange County Flood Control District, San Bernardino County Flood Control District and Riverside County Flood Control and Water Conservation District, which was executed in 1989. As a group the involved counties are denominated as "sponsors."

Relevant provisions of the local cooperation agreement are as follows:

The maximum allowable cost of the flood control project is set at $1,536,000,000. At the time of the execution of the agreement, total costs were estimated at $1,293,000,000 and the sponsors' cash contribution at $63,700,000. In addition, "sponsors shall provide all lands, easments [*sic*], rights-of-way, excavated material disposal areas, and perform relocations (excluding railroad bridges and approaches thereto) required for construction of the [flood control] project." The total contribution of the sponsors cannot exceed 50 percent or be less than 25 percent. During construction the sponsors shall provide a cash contribution of 5 percent of the total cost. No federal funds may be used to meet the sponsors' share, unless expressly authorized by statute. The federal government shall audit the sponsors' records and issue a final accounting which is binding on the sponsors. All funds contributed by the federal government and sponsors shall be placed in *878 an escrow account. The federal government shall pay the costs of construction from funds in such account.

Basic contractual "obligations of the parties" include the following: A. "The [Federal] Government, subject to and using funds provided by the Sponsors and funds appropriated by the Congress, shall expeditiously construct the [Flood Control] Project (including alterations or relocations of railroad bridges and approaches thereto) applying those procedures usually followed or applied in Federal projects, pursuant to Federal laws, regulations, and policies. The sponsors shall be afforded the opportunity to review and comment on all contracts, including relevant plans, specifications and special provisions prior to the issuance of invitations for bids. The Sponsors also shall be afforded the opportunity to review and comment on all modifications and change orders prior to the issuance to the Contractor of a Notice to Proceed for such modification or change order unless an emergency exists or immediate action is required, in which case the [Federal] Government will direct the change without review by the Sponsors. The [Federal] Government will consider the views of the Sponsors, but award of the contracts including change orders and performance of the work thereunder shall be

exclusively within the control of the [Federal] Government."

The term "contracting officer" is defined in the agreement as "the Commander of the U.S. Army Engineer District, Los Angeles, or his designee." Regarding "construction, phasing and management," "[t]he contracting officer shall consider the recommendations of the [sponsors] in all matters relating to the [Flood Control] Project, but the Contracting Officer, having ultimate responsibility for construction of the Project, has complete discretion to accept, reject, or modify the recommendations."

Sponsoring counties shall hold and save the federal government free from all damages "except for damages due to the fault or negligence of the [Federal] Government or its contractors." If hazardous substances are found in the area of the flood control project, the federal government "shall, after consultation with the Local Sponsors, but in its sole discretion, determine" what action to take. The sponsors agree to comply with all applicable federal and state laws and regulations. Some laws are specifically listed, but no mention is made of the California PWL or the federal DBA.

The final relevant provision of the local cooperation agreement is: "When the [Federal] Government determines that a feature or phase of the [Flood Control] Project is complete and appropriate for operation and maintenance by a Sponsor or Sponsors, the [Federal] Government shall turn the completed feature or phase over to the responsible Sponsor or Sponsors ...." *879

Pursuant to the local cooperation agreement, on March 29, 1994, the United States Army Engineer District-Los Angeles entered into a contract with CBPO of America, Inc., for construction of the Seven Oaks Dam and Appurtenances. Total estimated cost for the project was $167,777,000. The contract for the Seven Oaks Dam specifically provides that "laborers and mechanics employed or working upon the site of the work" will be paid in accordance with the DBA.

II. *Applicability of PWL*

(1a) Appellant contends that the PWL applies even though the construction contract for the Seven Oaks Dam project was "awarded" by an agency of the federal government. This contention lacks merit.

The core of the PWL is Labor Code section 1771[FN1], which provides in pertinent part: "Except for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers on public works." Under PWL respondent determines the general prevailing rate. (§§ 1770, 1773, 1773.6.)

FN1 Unless otherwise stated all citations to California statutes are to the Labor Code.

DBA provides in pertinent part: "The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction ... of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed ...." (40 U.S.C. § 276a(a).)

Other California code sections which define when PWL applies are the following.

Section 1720 provides in pertinent part: "As used in this chapter, 'public works' means: *880

"(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

"(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. 'Public work' shall not include the operation of

the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

"(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not."

Section 1720.2 provides in pertinent part: "For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, 'public works' also means any construction work done under private contract when all of the following conditions exist: [¶] (a) The construction contract is between private persons. [¶] ... [¶] (c) Either of the following conditions exist: [¶] (1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract. [¶] (2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work."

Section 1720.3 provides: "For the limited purposes of Article 2 (commencing with Section 1770), 'public works' also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California." Section 1720.4 covers work on nonprofit installations performed by volunteer labor.

Section 1721 provides: " 'Political subdivision' includes any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts."

Section 1722 provides: " 'Awarding body' or 'body awarding the contract' means department, board, authority, officer or agent awarding a contract for public work."

Section 1724 provides: " 'Locality in which public work is performed' means the county in which the public work is done in cases in which the *881 contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases."

Section 1740 provides: "Notwithstanding any other provision of this chapter or any other law of this State, except limitations imposed by the Constitution, the legislative body of a political subdivision which has received or is to receive a loan or grant of funds from the Federal Government or a federal department or agency for public works of that political subdivision, may provide in its call for bids in connection with such public works that all bid specifications and contracts and other procedures in connection with bids or contracts shall be subject to modification to comply with revisions in federal minimum wage schedules without the necessity of republication or duplication of other formal statutory requirements."

Section 1775 provides in pertinent part: "The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her."

Section 1777 provides: "Any officer, agent, or representative of the State or of any political subdivision who wilfully violates any provision of this article, and any contractor, or subcontractor, or agent or representative thereof, doing public work who neglects to comply with any provision of section 1776 is guilty of a misdemeanor."

Section 1777.7 provides in pertinent part: "(d) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state."

Sections 1779 and 1780 make it a misdemeanor to charge or collect fees with respect to the employment of persons on public works. The state, political subdivisions and contractors are mentioned in the sections; the federal government is not.

(2) "A fundamental rule of statutory construction is

that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law .... In construing a statute, our first task is to look to the language of the statute itself.... When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute ***882** according to its terms.... [¶] ... 'We are required to give effect to statutes "according to the usual, ordinary import of the language employed in framing them." ...' ... ' "If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." ... "When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear." ... Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole ....' " (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388 [20 Cal.Rptr.2d 523, 853 P.2d 978], citations omitted.)

"[A]n overriding principle in this area is that the individual portions of a statute should be harmonized ... with the body of law of which it forms a part. [Citations.]" (*United Public Employees v. Public Employment Relations Bd.* (1989) 213 Cal.App.3d 1119, 1127 [262 Cal.Rptr. 158].) "The object that a statute seeks to achieve is of primary importance in statutory interpretation. [Citations.]" (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [4 Cal.Rptr.2d 837, 824 P.2d 643].)

(3a) The overall purpose and object of California's PWL "is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees. [Citations.]" (*Lusardi Construction Co. v. Aubry, supra,* 1 Cal.4th at p. 987; *Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345, 356 [28 Cal.Rptr.2d 550].)

The overall purpose and object of DBA is " 'to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.' [Citation.] ... [T]he Act was intended to combat the practice of 'certain itinerant, irresponsible contractors, with itinerant, cheap, bootleg labor, [who] have been going around throughout the country " picking" off a contract here and a contract there.' The purpose of the bill was 'simply to give local labor and the local contractor a fair opportunity to participate in this building program.' [Citation.]" (*Universities Research Assn. v. Coutu* (1981) 450 U.S. 754, 773-774 [101 S.Ct. 1451, 1463, 67 L.Ed.2d 662].)

(1b),(3b) The PWL and DBA each carry out a similar purpose. DBA specifically provides that it only applies to contracts "to which the United ***883** States or the District of Columbia is a party." The PWL does not contain a specific clause limiting it to contracts to which the state of California or a political subdivision thereof is a party. However, the overall effect of the various code sections which constitute the PWL is to exclude contracts of the federal government. Thus, sections 1720, subdivision (c), 1720.2, 1720.3 and 1724 refer to construction jobs under the supervision of state entities while the sections assessing penalties for violating the PWL only mention state entities (§§ 1775, 1777, 1779). No sections, either individually or collectively, mandate that contracts awarded by, or construction jobs under the supervision of, federal authorities are subject to the PWL. In fact, the only mention of the federal government refers to a federal wage law (§ 1740). Read as a unit PWA and DBA set out two separate, but parallel, systems regulating wages on public contracts. The PWL covers state contracts and DBA covers federal contracts.

Respondent has long agreed with this interpretation of the statutes. Section 1773.5 provides: "The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter."

One such regulation is California Code of Regulations, title 8, section 16001, entitled "Public Works Subject to Prevailing Wage Law," which provides: "Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by

California awarding bodies of any sort." (Cal. Code Regs., tit. 8, § 16001, subd. (b).)

Other pertinent regulations are as follows: "Awarding body" is defined as: "Any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works." (Cal. Code Regs., tit. 8, § 16000.)"Public Funds. Includes state, local and/or federal monies." (Cal. Code Regs., tit. 8, § 16000.)"General Coverage. State prevailing wage rates apply to all public works contracts as set forth in Labor Code Sections 1720, 1720.2, 1720.3, 1720.4, and 1771." (Cal. Code Regs., tit. 8, § 16001, subd. (a).)

Thus under the regulations, federally funded projects controlled by, carried out by, and awarded by the federal government are not subject to PWL, even if it requires a higher wage than DBA. Nothing in the two administrative cases of respondent, cited by appellant, contradicts the regulations because neither case involved the federal government. (Public Works *884 Coverage Case No. 91-056, Southern Cal. Regional Rail Authority Lease of Union Pacific Right-of-Way, Decision on Appeal, Nov. 30, 1993 and Public Works Case No. 96-006, Department of Corrections, Community Correctional Facilities, June 11, 1996.)

(4) An agency's regulation "will not be set aside unless it is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy. [Citation.]" (*Pipe Trades Dist. Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1466 [49 Cal.Rptr.2d 208].) An agency's "construction of statutes will generally be followed unless it is clearly erroneous. [Citation.]" (*United Public Employees v. Public Employment Relations Bd., supra*, 213 Cal.App.3d at p. 1125.)

(1c) To determine if respondent's regulations are valid interpretations of the statutes, we look to cases construing the PWL, DBA and related statutes, particularly those which involve the question of preemption by federallaw. (5) "[T]he Supremacy Clause, U.S. Const., Art. VI, may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law. [Citations.] And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. [Citation.]" (*New York Blue Cross v. Travelers Ins.* (1995) 514 U.S. 645, ___ [115 S.Ct. 1671, 1676, 131 L.Ed.2d 695, 704]; see also *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 93-94 [160 Cal.Rptr. 733, 603 P.2d 1329].)

"Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' [citation] ...." (*Hillsborough County v. Automated Medical Labs.*(1985) 471 U.S. 707, 713 [105 S.Ct. 2371, 2375, 85 L.Ed.2d 714].) Further, "... there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the Supremacy Clause." (*De Canas v. Bica* (1976) 424 U.S. 351, 356 [96 S.Ct. 933, 937, 47 L.Ed.2d 43].)

In *Commissioner of Labor and Ind. v. Boston Housing Auth.* (1963) 345 Mass. 406 [188 N.E.2d 150, 157-158], the highest court in Massachusetts held that under the rules of preemption a federal agency operating a housing project in Boston pursuant to federal regulations was not subject to a state prevailing wage law. Thus, in order to avoid a serious constitutional problem it interpreted the state law as not intended by the Legislature to require *885 action by the federal agency in conflict with proper explicit budgetary requirements of a federal law. The court reasoned, "The intention to coerce such a head on conflict with Federal authority is not lightly to be attributed to the Legislature, which must be taken to have known the existing law relating to housing projects receiving [federal] contributions."

Gartrell Const. Inc. v. Aubry (9th Cir. 1991) 940 F.2d 437, 438-439 [131 A.L.R.Fed. 773] held that a private contractor performing work for the federal government on federal property was not required to obtain a California contractor's license, because he complied with the parallel federal "responsibility" regulations for contractors. The state law was preempted by the "similar" federal requirements. To same effect see *Airport Const. and Materials, Inc. v. Bivens* (1983) 279 Ark. 161 [649 S.W.2d 830, 832].

California Comm'n v. United States (1958) 355 U.S. 534, 540, 545-546 [78 S.Ct. 446, 450-451, 453-454, 2

L.Ed.2d 470], held that California statutes and regulations regarding rates for shipping freight could not be applied to federal procurement officials because "Congress has provided a comprehensive policy governing procurement." (*Id.* at p. 540.)In reaching its holding the nation's highest court quickly distinguished certain types of state laws. "We lay to one side these cases which sustain nondiscriminatory state taxes on activities of contractors and others who do business for the United States, as their impact at most is to increase the costs of the operation. [Citations.] We also need do no more than mention cases where, absent a conflicting federal regulation, a State seeks to impose safety or other requirements on a contractor who does business for the United States." (*Id.* at p. 543 [78 S.Ct. at p. 452].) (6) Minimum wage laws fall under the same classification as valid regulation of the employment relationship under state police powers.(*De Canas v. Bica, supra*, 424 U.S. at pp. 356-357 [96 S.Ct. at pp. 936-937].) The PWL is not a minimum wage law, however. (*San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 790 [163 Cal.Rptr. 460, 608 P.2d 277]).

(1d) *Hull v. Dutton* (11th Cir. 1991) 935 F.2d 1194, 1196-1198, held that a state agency which ran a switching railroad as a private carrier was subject to the Railway Labor Act and such federal law preempted a state law establishing bonus payments for certain state employees.

Chamber of Commerce of U.S. v. Bragdon (9th Cir. 1995) 64 F.3d 497, 504 held that the National Labor Relations Act preempted a Contra Costa County ordinance which established a prevailing wage law for "wholly private construction projects." In contrast, *People v. Hwang* (1994) 25 Cal.App.4th 1168, 1172, 1181-1182 [31 Cal.Rptr.2d 61], held that PWL was not preempted by the National Labor Relations Act as to a public works contract between a private contractor and county school district. *886

Drake v. Molvik & Olsen Elec., Inc. (1986) 107 Wn.2d 26 [726 P.2d 1238], held that the Washington prevailing wage law governed a "federally-funded construction project by the Seattle Housing Authority" and was not preempted by DBA. (To same effect see *Siuslaw Concrete Const. v. Wash., Dept. of Transp.* (9th Cir. 1986) 784 F.2d 952, 953-954, 959 [involving a state-run training program which might be exempt under the provision of DBA].)

Metropolitan Water Dist. v. Whitsett (1932) 215 Cal. 400, 408, 417 [10 P.2d 751] upheld the constitutionality of PWL, in part "on the theory that the state as the employer having full control of the terms and conditions under which it will contract may, through its legislatures, and within constitutional limits, provide the wage which shall be paid to its employees and that the payment of a less sum shall be unlawful." Overall, the state has greater power to legislate in areas covered by federal law as "proprietor" than as "regulator." (*Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.* (1993) 507 U.S. 218, 226-227, 232-233 [113 S.Ct. 1190, 1195-1196, 1198-1199, 122 L.Ed.2d 565].)

The basic distinction uniformly maintained in the cases is that stateenacted prevailing wage regulations are valid and not preempted by federal law when applied to contracts of the state or its political subdivisions. However, those laws cannot be applied to a project which is under the complete control of the federal government. This is also the distinction made by respondent's regulations, which provide that the PWL rather than DBA is applied to federally funded or assisted construction projects in California when wages under PWL would be higher and the projects "are controlled or carried out by California awarding bodies of any sort." Accordingly, because the regulations are consistent with California cases, federal cases, cases from other states, and the PWL statutes, we will follow them.

In the present case, the awarding body is an agency of the federal government. The local cooperation agreement governs the overall project containing the Seven Oaks Dam project at issue herein. Under the local cooperation agreement, the federal agency is given the ultimate authority over the actual construction, financial audits, paying the construction companies, determination of what to do if hazardous substances are discovered and determination that a project is complete. Thus, the Seven Oaks Dam project is controlled and carried out by a federal awarding body and under respondent's regulations, the PWL does not apply.

Appellant expresses the fear that a decision for respondent "would positively invite California public bodies in the future to give California public *887 monies to the Corps of Engineers (or to any private party if the trial court is correct) and to let it award all

contracts, thereby allowing such public bodies and employers to evade the PWL." We wish to calm appellant's fears. This court shares the Legislature's interest in protecting working people in the state. Our decision is based on a careful scrutiny of the record to discover the actual relationship between federal, state and private parties. We do nothing more than uphold the regulations and apply the facts to the regulations and statute. As in other areas of the law, each case involving public contracts and PWL will be decided on its own facts and merits.

III. *Respondent's Administrative Decision*

(7) Appellant contends that respondent director violated the California Constitution by "refusing to find a public works to exist simply because of a perceived fear of unconstitutionality or conflict with federal law." This contention lacks merit.

California Constitution, article III, section 3.5 provides that an administrative agency has no power to refuse to enforce a statute on the grounds it is unconstitutional or conflicts with federal law, until an appellate court has so held. In *Reese v. Kizer* (1988) 46 Cal.3d 996, 1002 [251 Cal.Rptr. 299, 760 P.2d 495], the Supreme Court held: "The purpose of the amendment was to prevent agencies from using their own interpretation of the Constitution or federal law to thwart the mandates of the Legislature. Its language, however, cannot reasonably be construed to place a restriction on the authority of the Legislature to limit the scope of its own enactments. By limiting the implementation of a statute as directed by the Legislature, an agency neither 'declares it unenforceable' nor 'refuses to enforce it.' Indeed, far from thwarting the Legislature's mandate, such action precisely fulfills it." (Fns. omitted.)

Respondent's administrative decisions in the instant case were proper interpretations of the PWL within the scope of *Reese*.

IV. *Disposition*

The judgment is affirmed. Costs are awarded to respondent.

Anderson, P. J., and Reardon, J., concurred.
A petition for a rehearing was denied April 29, 1997, and appellant's petition for review by the Supreme Court was denied July 9, 1997.

Cal.App.1.Dist.
Southern Cal. Lab. Management etc. Committee v. Aubry
54 Cal.App.4th 873, 63 Cal.Rptr.2d 106, 3 Wage & Hour Cas.2d (BNA) 1680, 97 Cal. Daily Op. Serv. 3259, 97 Daily Journal D.A.R. 5688

END OF DOCUMENT

Piledrivers' Local Union No. 2375 v. City of Santa Monica
Cal.App.2.Dist.
PILEDRIVERS' LOCAL UNION NO. 2375, Plaintiff and Appellant,
v.
CITY OF SANTA MONICA, Defendant and Respondent; CONSTRUCTION INDUSTRY FORCE ACCOUNT COUNCIL, Intervener and Appellant.
Civ. No. 69027.

Court of Appeal, Second District, Division 4, California.
Jan 31, 1984.

SUMMARY

A labor union sought to enjoin work being done by city employees on a city owned pier, on the ground state law required the city to put the work to competitive bidding, and the city's charter required competitive bidding. The trial court found that the work was a matter of municipal concern and was not shown to be new construction so as to require the city's public bidding procedure, and accordingly denied the union's application for a preliminary injunction. (Superior Court of Los Angeles County, No. WECO76122, Raymond Choate, Judge.)

The Court of Appeal affirmed, holding that the mode of contracting work by a charter city is a municipal rather than a statewide concern and state bidding procedures do not apply. The court further held that the removal and replacement work being done on the pier constituted repairs and maintenance and thus came within the maintenance and repair exclusion of the public bidding provision of the city charter. (Opinion by Saeta, J., [FN*] with Kingsley, Acting P. J., and Amerian, J., concurring.)

FN* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Municipalities § 19--Legislative Control--What Are 'Municipal Affairs'--Planning and Improvements--Work on Pier.
Pub. Contact Code, §§ 20161 and 20162, providing for bidding on work to repair public works, were not applicable to a charter city's repair of a municipal pier. The mode of contracting work by a charter city is municipal rather than a statewide concern, and the fact that certain tideland legislation showed a state interest in the operation of piers did not arise to a state preemption of nonconflicting local regulation of contract letting.
[See **Cal.Jur.3d**, Municipalities, § 104; Am.Jur.2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 138.]
(2a, 2b) Municipalities § 87--Contracts--Letting of Contracts--Bidding-- Exclusion of Repairs and Maintenance.
Under a city charter provision requiring bidding on contracts for public works over $5,000, but excluding maintenance and repair, work on a municipal pier consisting of the removal and replacement of certain beams, joists and surface decking was repair and maintenance not requiring competitive bidding.

(3) Words, Phrases, and Maxims--Repair.
The word repair in its ordinary sense relates to the preservation of property in its original condition, and does not carry the connotation that a new thing should be made or a distinct entity created. To repair means to mend an old thing, not to make a new thing, to restore to a sound state something which has become partially dilapidated, not to create something which has no existence.

COUNSEL
Patrick T. Connor and De Carlo & Connor for Plaintiff and Appellant.
Donald D. Harmata for Intervener and Appellant.
Robert M. Myers, City Attorney, and Martin T. Tachiki, Deputy City Attorney, for Defendant and Respondent.
SAETA, J. [FN*]

FN* Assigned by the Chairperson of the Judicial Council.

Appellants appeal from denial of their application for a preliminary injunction. They sought to enjoin the work being done by employees *511 of the City of

Santa Monica (City) on the City-owned Newcomb Pier. Appellants advance two arguments in support of their position: (1) state law required the City to put the work to competitive bidding; and (2) the City's charter requires competitive bidding. The trial court found that the work was a matter of municipal concern and the work was not shown to be new construction so as to require the public bidding procedure. The trial court was correct and we affirm.

Appellants rely on Public Contract Code sections 20161 and 20162. These provisions were formerly found in Government Code sections 37901 and 37902. They provide for work done in 'erection, improvement, painting, or repair of public buildings and works' of over $5,000 expenditure to 'be contracted for and let to the lowest responsible bidder after notice.' It is conceded that work on the pier required an expenditure of well over $5,000. The City counters with the argument that sections 20161 and 20162 do not apply because it is a charter city.

California Constitution, article XI, section 5, subdivision (a), reads as follows: 'It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.'

This constitutional provision has been construed several times by the Supreme Court. In the leading case of *Bishop v. City of San Jose* (1969) 1 Cal.3d 56 [81 Cal.Rptr. 465, 460 P.2d 137], the court explains that home rule charter cities initially have full power to legislate but are subject to state legislation where there is both a conflict in the laws and the state legislation discloses an intent to preempt the field. (*Id.*, at pp. 61-62.) Whether or not the state has preempted the field under inquiry is a matter for the courts to decide. (*Id.*, at p. 62.)Even where the state legislation purports to supersede inconsistent provisions in local charters, that legislative declaration is not controlling on the courts. (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 316 [152 Cal.Rptr. 903, 591 P.2d 1].)

(1)The issue of whether these state bidding provisions bind charter cities has been addressed and decided in *Smith v. City of Riverside* (1973) 34 Cal.App.3d 529 [110 Cal.Rptr. 67]. The appellate court held that the mode of contracting work in the city was a municipal rather than a statewide ***512** concern and the state bidding procedures did not apply. Appellants have advanced no persuasive reasons for us to depart from the reasoning or holding of *Smith*.No developments in this area of the law in the 10 years since *Smith* are cited to vitiate that ruling. Indeed, the recodification without change of the relevant sections of the Government Code into the Public Contract Code in 1982 (Stats. 1982, ch. 465, § 11) reinforces the *Smith* interpretation. Further, Public Contract Code section 20160 provides that the state bidding procedures apply to noncharter cities.

Appellants argue that 'statewide concern' over the City's pier is reflected in tidelands legislation (Stats. 1970, ch. 1077, pp. 1913-1919); coastal conservancy legislation (Pub. Resources Code, § 30000 et seq.); and the California Parklands Act of 1980 (Pub. Resources Code § 5096.141 et seq.). While it may be true that these enactments show an interest in the operation of piers, this interest does not arise to a preemption of nonconflicting local regulation of contract letting. Appellants point to no conflict between the City's work plans and the other cited enactments. The only conflict is between the City's having its employees do the work and Public Contract Code sections 20161 and 20162. It has already been pointed out that *Smith* resolves that conflict in favor of the City. A comparison of the majority and dissenting opinions in *Bishop v. City of San Jose, supra.*, 1 Cal.3d 56, shows that state interest in the project is not the same thing as state interest in competitive bidding. The *Bishop* dissent says that inquiry ends once a statewide concern is found. (*Id.*, at p. 66.)The majority rejects this reasoning in speaking of conflicts between state and local regulations and whether the 'subject matter under discussion is of municipal or statewide concern.' (*Id.*, at p. 62;*Alioto's Fish Co. v. Human Rights Com. of San Francisco* (1981) 120 Cal.App.3d 594, 603-604 [174 Cal.Rptr. 763].)

(2a)Appellants' second line of attack is that the City violated its own charter requirement of obtaining competitive bids. City charter section 608 states in part: 'Every contract involving an expenditure of more than ... $5,000.00 ... for the construction or

improvement (*excluding maintenance and repair*) of public buildings, works, streets ... parks and playgrounds, and each separate purchase of materials or supplies for the same, ... shall be let to the lowest responsible bidder ....' (Italics added.)

City relies on the italicized portion of the section, i.e., its work on the pier was maintenance and repair. Appellants dispute the application of the quoted exception, claiming that the work done was more extensive. Factually, the work was best described by the City engineer as 'removing and replacing approximately 20 percent of the 12 inch by 12 inch beams, 90 percent of the 3 inch by 12 inch and 3 inch and 16 inch joists and 100 ***513** percent of the 2 inch by 12 inch surface decking of an area representing approximately 15 percent of the total area of the Pier.'

Appellants rely on two 'paving' cases for a definition of 'repairs': *Santa Cruz R.P. Co. v. Broderick* (1896) 113 Cal.628, 633[45 P.8633]; and *Holland v. Braun* (1956) 139 Cal.App.2d 626 [294 P.2d 51]. In both cases the courts held that paving a previously unpaved street was more than a 'repair.' More analogous than roads to our facts are bridge cases cited by the City. In *Whalen v. Ruiz* (1953) 40 Cal.2d 294, 300-301 [253 P.2d 457], the issue was the duty of a railroad company concerning a bridge. The railroad had the contractual duty to repair the bridge but not to make structural changes to meet changing traffic conditions. (3)In defining the word 'repair,' the court states: 'The word 'repair' in its ordinary sense relates to the preservation of property in its original condition, and does not carry the connotation that a new thing should be made or a distinct entity created. (76 C.J.S. p. 1169.) As was said in *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565, at page 576 [194 P. 1024]: 'To repair means to mend an old thing, not to make a new thing; to restore to a sound state something which has become partially dilapidated, not to create something which has no existence.'' (*Id.*, at p. 300.)*Whalen* cites *Bosqui v. City of San Bernardino* (1935) 2 Cal.2d 747, 758 [43 P.2d 547], where the Supreme Court includes in 'repair' the duty to maintain weakened parts of an overhead viaduct including the framework, roadway and curbing. Taken together, these two Supreme Court pronouncements show that work on underlying supporting members as well as paving of an existing roadway constitute 'repair' in a suitable factual context. Our pier is similar to the structures in *Bosqui* and *Whalen*.

In addition, City cites *People ex rel. Dept. Pub. Wks. v. Ryan Outdoor Advertising, Inc.* (1974) 39 Cal.App.3d 804, 810 [114 Cal.Rptr. 499], where the court held 'maintenance' does not include the moving of a billboard a few feet to accomodate a change in the state's right of way. The court quotes Webster's New World Dictionary of the American Language (2d college ed.) definition of 'maintenance' as follows: ''a maintaining or being maintained; upkeep, support, defense, etc.; [specifically], the work of keeping a building, machinery, etc. in a state of good repair ....' The word 'maintain' is defined as 'to keep or keep up; continue in or with; carry on ... [and] to keep in a certain condition or position, [especially] of efficiency, good repair, etc.; preserve (to maintain roads) ....''

(2b)On the facts presented to the trial court and on our interpretation of the law as applied to those facts (Evid. Code, § 310, subd. (a)), the City ***514** was engaged in repair and maintenance work within the meaning of section 608.

The judgment is affirmed.

Kingsley, Acting P. J., and Amerian, J., concurred.
A petition for a rehearing was denied February 15, 1984, and the petition of intervener and appellant for a hearing by the Supreme Court was denied April 25, 1984. ***515**

Cal.App.2.Dist.
Piledrivers' Local Union v. City of Santa Monica
151 Cal.App.3d 509, 198 Cal.Rptr. 731

END OF DOCUMENT

R & A Vending Services, Inc. v. City of Los Angeles
Cal.App.2.Dist.
R & A VENDING SERVICES, INC., Plaintiff and Appellant,
v.
CITY OF LOS ANGELES, Defendant and Respondent.
No. B007979.

Court of Appeal, Second District, Division 5, California.
Oct 7, 1985.

SUMMARY

A bidder on a city contract for operation of refreshment stands in a city park brought an action against the city for writ of mandate and declaratory and injunctive relief, alleging that as highest responsible bidder plaintiff should have been awarded the contract. The trial court denied plaintiff's petition for writ of mandate. (Superior Court of Los Angeles County, No. C 492484, Lawrence C. Waddington, Judge.)

The Court of Appeal affirmed, holding that under city ordinances, which were applicable rather than general state law, defendant had discretion to determine who the highest responsible bidder was. The court held further that the judgment was not void for denying plaintiff a hearing on its causes of action for declaratory and injunctive relief, since plaintiff had alleged the invasion of only one primary right, and the judgment constituted a determination that plaintiff had no cause of action against defendant. (Opinion by Ashby, J., with Feinerman, P. J., and Eagleson, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Municipalities § 15--Legislative Control--Control of Municipal Affairs--Home Rule Cities.
Defendant city, which had rejected plaintiff's bid on a city contract, was not bound by Pub. Con. Code, § 20162, requiring certain public projects to be contracted for and let to the lowest responsible bidder, where defendant was a chartered city and the matter at issue was a municipal affair.

(2) Municipalities § 15--Legislative Control--Control of Municipal Affairs--Home Rule Cities.
State general law bidding procedures do not bind chartered cities where the subject matter of the bid constitutes a municipal affair.

(3a, 3b) Municipalities § 16--Legislative Control--What Are "Municipal Affairs"--Refreshment Stands in Public Park.
Gov. Code, § 50514, requiring a legislative body to award a lease to the highest responsible bidder, and Gov. Code, § 50515, requiring a legislative body to enter into a lease with the highest bidder, were not applicable to defendant chartered city, which had awarded a city contract to a bidder other than plaintiff, despite plaintiff's contention that it was the highest responsible bidder, since subject contract for refreshment stands in a city park was unquestionably a matter of municipal concern to which state general law, in the case of chartered cities, is inapplicable.

(4) Municipalities § 15--Legislative Control--Control of Municipal Affairs--Home Rule Cities.
If a chartered city legislates with regard to municipal affairs, the charter prevails over general state law.
[See **Cal.Jur.3d**, Municipalities, § 95; **Am.Jur.2d**, Municipal Corporations, Counties, and Other Political Subdivisions, § 128.]

(5) Municipalities § 55--Ordinances, Bylaws, and Resolutions--Validity-- Conflict With Statutes or Charter.
In matters of statewide concern, a city is bound by general laws if it is the intent and purpose of the general laws to occupy the field to the exclusion of municipal regulation.

(6a, 6b) Municipalities § 87--Contracts--Letting of Contracts-- Discretion in Accepting Bids.
A bidder on a contract offered for public bid by defendant city was properly denied a writ of mandate, notwithstanding its allegation that it was the highest responsible bidder and should have been awarded the contract, since a city has discretion to decide who the highest responsible bidder is, and since defendant's statement in its summary of proposals that plaintiff's

"pro forma was unrealistic and contained admitted inaccuracies" indicated that defendant was dissatisfied with plaintiff's bid and had exercised its discretion in rejecting it, and plaintiff had not shown that the city had acted fraudulently or corruptly.

(7) Municipalities § 87--Contracts--Letting of Contracts--Discretion in Accepting Bids--Review.
The term "lowest responsible bidder" in city charters means the lowest bidder whose offer best responds in quality, fitness, and capacity to the particular requirements of the proposed work. Where, by use of these terms the council has been invested with discretionary power as to which is the lowest responsible bidder, such discretion will not be interfered with by the courts, in the absence of direct averments and proof of fraud.

(8a, 8b, 8c) Mandamus and Prohibition § 67--Mandamus--Judgment-- Effect on Other Remedies.
In proceedings for writ of mandate, declaratory relief, and injunctive relief by a bidder on a city contract for operation of refreshment stands in a city park, alleging that as the highest responsible bidder plaintiff should have been awarded the contract by defendant city, the judgment entered by the trial court denying plaintiff's petition for the writ was not void, despite plaintiff's contention that the judgment denied plaintiff a hearing on its causes of action for declaratory and injunctive relief, since plaintiff alleged a violation of only one primary right, its right to be chosen as highest responsible bidder, and by determining that defendant had discretion in choosing from among the bidders for the contract, the trial court ruled that plaintiff had no cause of action against defendant.

(9) Courts § 6--Powers and Organization--Calendar.
A court calendar is a list of causes awaiting hearing on motion or trial. The court for good cause has discretion in the control and regulation of its calendar or docket, and it is permissible for good cause to delay a trial or hearing to a later date or to draw up or strike a case from the calendar, to be restored on motion of one or more of the litigants or on the court's own motion. "Off calendar" is not synonymous with "dismissal"; "off" merely means a postponement whereas a "dismissal" in judicial procedure has reference to a cessation of consideration. Courts have control of pleadings in a case until a valid final judgment is rendered.

(10) Actions and Special Proceedings § 6--Existence of Right of Action-- Primary Rights.
In determining the existence of a cause of action, California subscribes to the primary rights theory, under which the invasion of one primary right gives rise to a single cause of action. It is the right sought to be established, not the remedy or relief, which determines the nature and substance of the cause of action.

COUNSEL
Joseph W. Fairfield for Plaintiff and Appellant.
Gary R. Netzer and James K. Hahn, City Attorneys, Thomas C. Bonaventura, Pedro B. Echeverria and John F. Haggerty, Assistant City Attorneys, and Marcia Haber Kamine, Deputy City Attorney, for Defendant and Respondent. *1191
ASHBY, J.
R & A Vending Services, Inc. (R & A) appeals from the denial of a petition for a writ of mandate, and an order to place off calendar a demurrer to R & A's request for injunctive and declaratory relief against the City of Los Angeles (City). We affirm the judgment of the trial court as to the writ petition. As will be seen below, the off-calendar order is not appealable.

R & A was one of six bidders responding to City's call for proposals for the operation of five refreshment stands in Griffith Park. The proposals were studied. City's board of recreation and parks commission (Board) recommended the acceptance of a proposal by T. Irwin. The other bidders contested the decision. Board interviewed the bidders and reconsidered. The lease was finally awarded to Jim Pontillo. R & A sued on the ground that it was the highest responsible bidder, promising more rent to City than Mr. Pontillo. R & A relied on sections of the Public Contract Code and the Government Code for its argument that City must award the lease to R & A because City had no discretion in making its decision to award the lease under the pertinent section of the city charter, section 386. Following a hearing on the petition for a writ of mandate, the trial court ruled that the award of the lease was a discretionary act governed by the city charter. A motion for a new trial was denied. This appeal followed.

(1a)We begin with R & A's contention that City is bound by Public Contract Code section 20162. [FN1]The City of Los Angeles is a charter city, not a general law city. (2)The law is settled: these state general law bidding procedures do not bind chartered

cities where the subject matter of the bid constitutes a municipal affair. [FN2] (*Smith v. City of Riverside* (1973) 34 Cal.App.3d 529, 534 [110 Cal.Rptr. 67]; see *Piledrivers' Local Union v. City of Santa Monica* (1984) 151 Cal.App.3d 509, 511-512 [198 Cal.Rptr. 731].)[FN3] (1b)Because the matter at issue here is a municipal affair, as will be seen below, City is not bound by section 20162. ***1192**

FN1 "When the expenditure required for a public project exceeds five thousand dollars $5,000), it shall be contracted for and let to the lowest responsible bidder after notice." (Pub. Con. Code, § 20162.)

FN2 Cities organized under a charter shall be "'chartered cities.'" (Gov. Code, § 34101.)Los Angeles is organized under a charter.

FN3 We agree with R & A's argument that *Piledrivers* is distinguishable. The distinction is that in *Piledrivers*, and in *Smith*, the application of Public Contract Code section 20162 was at least arguable. The type of work contested in both cases could have been considered a "public project" under the state code. It is more difficult to see how a concession lease in Griffith Park could be a public project for purposes of section 20162 in light of the meanings that term is given in section 20161. Given the holdings of *Smith* and *Piledrivers* we need not discuss the issue further.

(3a) R & A also relies on Government Code sections 50514[FN4] and 50515. [FN5]The parties cite and our research reveals no case discussing the application of sections 50514 and 50515 to chartered cities. Many cases discuss and apply the general analysis used to determine the issue of whether a state code or municipal law applies. (4)It is long settled that if a chartered city legislates with regard to municipal affairs the charter prevails over general state law. (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 315 [152 Cal.Rptr. 903, 591 P.2d 1].) (5)In matters of statewide concern the city is bound by general laws if it is the intent and purpose of the general laws to occupy the field to the exclusion of municipal regulation. (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61-62 [81 Cal.Rptr. 465, 460 P.2d 137].)

(3b)The question of whether the matter at issue is of municipal or statewide concern must be judicially determined, but the courts have developed no precise definition of the term "municipal affair." (*Id.*, at p. 62;*Smith v. City of Riverside, supra.*, 34 Cal.App.3d 529.) A review of the case law dealing with the issue of whether a chartered city is bound by state law, or by municipal ordinances or city charters, shows the following have been deemed matters of municipal concern: charter city employee compensation (*Sonoma County Organization of Public Employees v. County of Sonoma, supra.*, 23 Cal.3d 296, 317, and see *Bishop v. City of San Jose, supra.*, 1 Cal.3d 56); licensing fees and occupation taxes (*Weekes v. Oakland* (1978) 21 Cal.3d 386 [146 Cal.Rptr. 558, 579 P.2d 449]; *Marsh & McLennan of Cal., Inc. v. Los Angeles* (1976) 62 Cal.App.3d 108, 124 [132 Cal.Rptr. 796]); city planning (*Duran v. Cassidy* (1972) 28 Cal.App.3d 574, 583 [104 Cal.Rptr. 793]); city-operated public utilities (*Smith v. Riverside, supra.*, 34 Cal.App.3d 529); and city sewage (*City of Santa Clara v. Von Raesfeld* (1970) 3 Cal.3d 239, 246 [90 Cal.Rptr. 8, 474 P.2d 976]). Deciding who will be awarded the contract for refreshment stands in a city park is unquestionably a matter of municipal concern. The determination of how bids on such a contract will be accepted must be controlled by local rather than state legislation. We find that the Los Angeles City Charter provisions control, and that Government Code sections 50514 and 50515 have no application. [FN6]***1193**

FN4 "The legislative body shall award the lease to the highest responsible bidder." (Gov. Code, § 50514.)

FN5 "After the bid has been accepted by the legislative body, it shall enter into a lease with the highest bidder ...." (Gov. Code, § 50515.)

FN6 The city charter section at issue, section 386, provides a more complete procedure for competitive bidding than the Government Code sections relied upon by appellant. For example, city charter section 386(c) requires that notice of the invitation for proposals be published in a daily newspaper and that the notice specify the amount of the bond that must be posted. The section permits the City to require detailed specifications, and guarantees of performance and other appropriate factors.

(6a) R & A's main argument appears to be that even under the charter provisions for competitive bidding City was duty bound to accept the "lowest [or highest] and best regular responsible bidder furnishing satisfactory security for its performance" (L. A. City Charter, § 386(f)), and that City has no discretion in making that determination. R & A maintains that because it was the highest responsible bidder City was bound to grant the lease to it. The case law does not support R & A. (7)The term "lowest responsible bidder" in city charters has been held to mean "the lowest bidder whose offer best responds in quality, fitness, and capacity to the particular requirements of the proposed work; and that where by the use of these terms the council has been invested with discretionary power as to which is the lowest responsible bidder ... such discretion will not be interfered with by the courts in the absence of direct averments and proof of fraud." [FN7](*West v. Oakland* (1916) 30 Cal.App. 556, 560-561 [159 P. 202], reaffd. in *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court* (1972) 7 Cal.3d 861, 867 [103 Cal.Rptr. 689, 500 P.2d 601].)

FN7 R & A makes no allegation of fraud by City.

(6b)R & A argues that City made no finding that it was not a qualified bidder. (See *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court, supra.*.) On the contrary, City specifically stated in its summary of proposals that R & A's "pro-forma was unrealistic and contained admitted inaccuracies." This language shows a dissatisfaction with R & A's proposal and explains why City exercised its discretion by awarding the contract to a lower bidder, i.e., one who proposed a lower annual revenue for City. City had the right and the obligation to consider the practicability of each bid before awarding the contract. R & A has not shown that City acted fraudulently or corruptly in performing its duty. Thus there is no basis for awarding the writ of mandate requested by R & A.

(8a)R & A contends that the judgment entered by the trial court is void. R & A reasons that it received a hearing on the petition for a writ of mandate, but no hearing on the second cause of action for declaratory relief or on the third cause of action for injunctive relief. In fact the trial court did not deny hearing on the other causes of action, but placed them off calendar. (9)"A court calendar is a list of causes awaiting hearing on motion or trial. [Citation.] ... The court for good cause has discretion in the control and regulation of its calendar or docket. [Citation.] It is permissible for good cause to delay a trial or hearing to a later date or to drop or strike a case from the calendar, to be restored on motion of one or more of the litigants or on the court's own motion. 'Off Calendar' is not synonymous with 'dismissal.' 'Off' merely means a postponement whereas a 'dismissal' ***1194** in judicial procedure has reference to a cessation of consideration. Courts have control of pleadings in a case until a valid final judgment is rendered. [Citation.]" (*Guardianship of Lyle* (1946) 77 Cal.App.2d 153, 155-156 [174 P.2d 906].) (8b)Thus, R & A's contention that the judgment on the writ petition is void is without merit. R & A's error is in its belief that the judgment in this matter includes all three causes of action. It does not. Nevertheless, the single issue underlying all three causes of action, i.e., whether City had discretion in awarding the lease, was resolved against R & A. The trial court had before it one lawsuit seeking three different remedies. It did not have three separate causes of actions or potentially three separate lawsuits. (10)In determining the existence of a cause of action, California subscribes to the primary rights theory. (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795 [126 Cal.Rptr. 225, 543 P.2d 593].) Under the theory, the invasion of one primary right gives rise to a single cause of action.(*Ibid.*;*Wulfjen v. Dolton* (1944) 24 Cal.2d 891, 895-896 [151 P.2d 846].) It is the right sought to be established, not the remedy or relief, which determines the nature and substance of the cause of action. (*Ideal Hardware etc. Co. v. Dept. of Emp.* (1952) 114 Cal.App.2d 443, 448 [250 P.2d 353].) (8c) R & A alleged a violation of what it deems its primary right to be chosen as the highest responsible bidder, a right found created by certain statutes and case law. The trial court determined that City had discretion in choosing from among the bidders for the concession lease. By this determination the trial court ruled that R & A had no cause of action against City and therefore no remedy for mandatory injunction. When this judgment becomes final, it will be a bar to the remainder of the lawsuit. R & A's authority, *Spector v. Superior Court* (1961) 55 Cal.2d 839 [13 Cal.Rptr. 189, 361 P.2d 909] and *Moore v. California Minerals etc. Corp.* (1953) 115 Cal.App.2d 834 [252 P.2d 1005], in which parties were denied a hearing in the trial court have no application. R & A had a full hearing on the pertinent issues: which legislation controlled and whether City had discretion in choosing the lessee.

The judgment is affirmed.

Feinerman, P. J., and Eagleson, J., concurred.
A petition for a rehearing was denied October 3, 1985, and appellant's petition for review by the Supreme Court was denied December 30, 1985. *1195

Cal.App.2.Dist.
R & A Vending Services, Inc. v. City of Los Angeles
172 Cal.App.3d 1188, 218 Cal.Rptr. 667

END OF DOCUMENT

Opinion No. CV 75-283—April 2, 1976

SUBJECT: PUBLIC WORKS AND ECONOMIC DEVELOPMENT ACT FUNDS —PROJECTS—COMPETITIVE BIDS—A general law city receiving federal funds under title X, Public Works and Economic Development Act of 1965, may not utilize persons employed with such funds for construction, erection, repair, remodeling, improvement or alteration of public facilities, if total costs of a particular project exceed the limit of $5,000 as set forth in Government Code section 37902 except as permitted by sections 37905 and 53707 and by applicable judicially created exceptions. Unless a county charter or ordinance provides otherwise, a charter or general law county receiving similar federal funds may not utilize persons employed with such funds for work on public facilities, if total costs of a particular project exceed the limit of $4,000 as set forth in Government Code section 25450, except for those counties covered by sections 25450.4 and 25450.41 and except as permitted by statute or by applicable judicially created exceptions. Districts with similar projects to be funded through title X are subject to any competitive bid requirements imposed by statute unless there are applicable statutory or judicially created exceptions.

Requested by: ASSEMBLYMAN, 26th DISTRICT

Opinion by: EVELLE J. YOUNGER, Attorney General

Geoffrey L. Graybill, Deputy

The Honorable Carmen Perino, Assemblyman for the Twenty-Sixth District, has requested an opinion of this office on the following questions:

1. When a city is receiving federal funds under a grant made pursuant to section 301 of the Emergency Jobs and Unemployment Assistance Act of 1974 (also known as title X of the Public Works and Economic Development Act of 1965), may the city in employing persons under this federal program use such persons for the construction, erection, repair, remodeling, improvement or alteration of public buildings, parks and other facilities, even though the total labor costs (the combined total of wages paid to the persons on the same project) would exceed the limit of $5,000 as set forth in Government Code section 37902?

2. When a county is receiving federal funds under a grant made pursuant to section 301 of the Emergency Jobs and Unemployment Assistance Act of 1974 (also known as title X of the Public Works and Economic Development Act of 1965), may the county in employing persons under this federal program use such persons for the construction, erection, repair, remodeling, improvement or alteration of public buildings, parks and other facilities, even though the total labor costs (the combined total of wages paid to the persons on the same project) would exceed the limit of $4,000 as set forth in Government Code section 25450 except as expressly modified by sections 25450.4 and 25450.41?

3. Are districts which have similar projects to be funded through title X subject to competitive bid requirements or may they use "force account" to accomplish the project?

The conclusions are summarized as follows:

1. A general law city receiving federal funds granted pursuant to title X of the Public Works and Economic Development Act of 1965 may not use persons employed with such funds for the construction, erection, repair, remodeling, improvement or alteration of public buildings, parks and other facilities, if the total costs of a particular project exceed the limit of $5,000 as set forth in Government Code section 37902 except as permitted by Government Code sections 37905 and 53707 and by such judicially created exceptions as may be applicable to a particular project. A charter city's ability to use such persons for the aforementioned purposes will depend on the provisions of its charter.

2. Unless the charter of a county or an ordinance enacted pursuant to the charter provides otherwise, a charter or general law county receiving federal funds granted pursuant to title X of the Public Works and Economic Development Act of 1965 may not use persons employed with such funds for the construction, erection, repair, remodeling, improvement or alteration of public buildings, parks and other facilities, if the total costs of a particular project exceed the limit of $4,000 as set forth in Government Code section 25450, except for those counties covered by sections 25450.4 and 25450.41 and except as permitted by statute or by such judicially created exceptions as may be applicable to a particular project.

3. Districts which have similar projects to be funded through title X are subject to any competitive bid requirements imposed by statute unless statutory or judicially created exceptions are applicable to a particular project.

ANALYSIS

THE FEDERAL JOB OPPORTUNITIES PROGRAM

The Public Works and Economic Development Act of 1965[1] (hereinafter referred to as "the Act") was amended by the Emergency Jobs and Unemployment Assistance Act of 1974 to add thereto a title X entitled "Job Opportunities Program" (hereinafter referred to as "title X.")[2] As stated in section 1001 of the Act, the purpose of title X is:

> ". . . to provide emergency financial assistance to stimulate, maintain or expand job creating activities in areas, both urban and rural, which are suffering from unusually high levels of unemployment."

Section 1003 of the Act provides in part:

". . .

[1] Public Law 89-136, § 2, August 26, 1965, 79 Stat. 552, 42 U.S.C.A. § 3121.

[2] Public Law 93-567, title III, § 301, December 31, 1974, 88 Stat. 1853, 42 U.S.C.A. § 3246.

"(d) In allocating funds under this title, the Secretary of Commerce shall give priority consideration to—

"(1) the severity of unemployment in the area; and

"(2) the appropriateness of the proposed activity in relating to the number and needs of unemployed persons in eligible areas.

"(e) Notwithstanding any other provision of this title, funds allocated by the Secretary of Commerce shall be available only for programs or projects which the Secretary of Commerce and the Secretary of Labor jointly determine are programs or projects—

"(1) which will contribute significantly to the reduction of unemployment in the eligible area;

"(2) which can be initiated or strengthened promptly;

"(3) a substantial portion of which can be completed within 12 months after such allocation is made;

"(4) which are not inconsistent with locally approved comprehensive plans for the jurisdiction affected, whenever such plans exist; and

"(5) which will be approved giving first priority to programs and projects which are most labor intensive."

In addition to the "labor intensive" priority set forth in subdivision (e)(5) of section 1003, section 1005 of the Act provides:

"Fifty per centum of the funds appropriated pursuant to section 1007 of this title shall be available only for programs and projects in which not more than 25 percent of such funds will be expended for necessary non-labor costs."

It has been suggested that work performed by temporary employees hired by a public entity and paid on a daily basis would be more labor intensive, and thus more likely to qualify for title X money, than work performed under contracts awarded pursuant to competitive bids. Given this assumption, the basic issue raised by this opinion request is whether counties, cities and districts may ignore competitive bidding requirements when performing work to be paid for by title X moneys. The conclusion is that generally they may not.

SCOPE OF STATUTORY COMPETITIVE BID REQUIREMENTS

There is no constitutional requirement that public works projects be performed by contract let by means of competitive bidding. In the absence of any statutory requirement any reasonable means can be used to accomplish a public works project. However, where a mode of contracting is specified it must be followed unless an exception applies. *Zottman* v. *San Francisco*, 20 Cal. 96 (1862); *Reams* v. *Cooley*, 171 Cal. 150, 153-154 (1915); *Miller* v. *McKinnon*, 20 Cal. 2d 83 (1942); *Santa Monica Unified Sch. Dist.* v. *Persh*, 5 Cal. App. 3d 945, 952 (1970).

In California, cities, counties and some districts must contract for public construction projects exceeding a specified sum through competitive bids. If particular cities or counties are charter cities or counties, the applicability of competitive bid requirements would be determined by reference to the particular charter.

1. Procedures of Charter Cities and Counties

Section 5 of article XI of the California Constitution provides in pertinent part:

> "(a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith."

The means by which public works projects of a charter city must be accomplished is a municipal affair. Thus, where procedures for accomplishing public works projects are established pursuant to a charter, such prevail over general law. *Smith* v. *City of Riverside,* 34 Cal. App. 3d 529, 536-538 (1973). If the charter contains the "home rule" provision allowed by the first sentence of subdivision (a) of section 5 of article XI, provisions of state law regarding competitive bidding for public works projects have no effect on such a city's procedure for accomplishing public work unless the city adopts them. Concerning this "home rule" provision, the California Supreme Court has stated in *Bellus* v. *City of Eureka,* 69 Cal. 2d 336, 347 (1968), that:

> "The purpose of the 1914 constitutional amendment was to free cities which availed themselves of 'home rule' of the control of general laws in the area of municipal affairs and to give them complete control over such matters whether or not their charter expressly enumerated a power over the municipal affair in question. (See *West Coast Advertising Co.* v. *City & County of San Francisco, supra,* 14 Cal. 2d at p. 521; *City of Pasadena* v. *Charleville* (1932) 215 Cal. 384, 388-389 [10 P.2d 745].)"

See generally Sato, "*Municipal Affairs*" in California, 60 Cal. L. Rev. 1055 (1972).

Similarly, the provisions of county charters regarding accomplishment of public works supersede general laws, as provided in article XI, section 3, subdivision (a) of the California Constitution.[8] Cf. *Harman* v. *City and County of San Francisco,*

[8] Article XI, section 3, subdivision (a) provides in pertinent part:

"County charters adopted pursuant to this section shall supersede any existing charter and all laws inconsistent therewith. The provisions of a charter are the law of the State and have the force and effect of legislative enactments."

The adoption of Proposition 2 by the voters on June 2, 1970, revised article XI, including the foregoing provision, to strengthen local government and to make most provisions applicable equally to cities and counties. See Arguments in favor of Prop. 2, Proposed Amendments to Constitution, June 2, 1970 (Ballot Pamphler).

7 Cal. 3d 150, 161 (1972). There being an absence of a preemptive state statutory policy regarding what contracts must be let by competitive bidding, *Smith* v. *City of Riverside*, *supra*, provisions of the charter, or regulations enacted pursuant thereto, relating to accomplishment of public works supersede general law on the subject. *Pearson* v. *County of Los Angeles*, 49 Cal. 2d 523, 535 (1957). However, where the charter is silent on the subject, general law will control on the issue of whether a project must be put up to competitive bid. Thus, California Constitution article XI, section 4, subdivision (g) provides:

> "(g) Whenever any county has framed and adopted a charter, and the same shall have been approved by the Legislature as herein provided, the general laws adopted by the Legislature in pursuance of Section 1(b) of this article, shall, as to such county, be superseded by said charter as to matters for which, under this section it is competent to make provision in such charter, *and for which provision is made therein*, except as herein otherwise expressly provided." (Emphasis added.)

2. Government Code Section 37901 *et seq.*

Government Code section 37901[4] defines public projects and section 37902 provides that when undertaken by cities at a cost in excess of $5,000 such projects must be contracted for and let to the lowest responsible bidder after notice.[5] However, sections 37904, 37905 and 37906 recognize circumstances in which the contract-bid requirements are not applicable. If no bids are received the city may have the project done without further compliance with bidding requirements. § 37904.

Section 37905 provides:

> "After rejecting bids, the legislative body may pass a resolution by a four-fifths vote of its members declaring that the project can be performed more economically by day labor, or the materials or supplies furnished at a lower price in the open market. Upon adoption of the resolution, it may have the project done in the manner stated without further complying with this chapter."

[4] All section references hereafter are to the Government Code unless otherwise indicated.

[5] Section 37901 provides:

"As used in this chapter, 'public project' means:

"(a) A project for the erection, improvement and repair of public buildings and works.

"(b) Work in or about streams, bays, water fronts, embankments, or other work for protection against overflow.

"(c) Street or sewer work except maintenance or repair.

"(d) Furnishing supplies or materials for any such project, including maintenance or repair of streets or sewers."

Section 37902, as amended by Statutes of 1975, chapter 916, provides:

"When the expenditure required for a public project exceeds five thousand dollars ($5,000), it shall be contracted for and let to the lowest responsible bidder after notice."

Section 37906 provides:

"If there is a great public calamity, as an extraordinary fire, flood, storm, epidemic, or other disaster, or if it is necessary to do emergency work to prepare for national or local defense, the legislative body may pass a resolution by a four-fifths vote of its members declaring that the public interest and necessity demand the immediate expenditure of public money to safeguard life, health, or property. Upon adoption of the resolution, it may expend any sum required in the emergency without complying with this chapter."

Economic problems generally would not be within the classes of exceptions to the contract-bidding requirement, including natural disaster and defense situations recognized in section 37906. The term "great public calamity" is given definition by specified examples of particular classes of situations. An economic recession is not a disaster or calamity of the types exempted by section 37906, to wit, an extraordinary flood, fire, storm or epidemic, which are commonly referred to as "natural disasters," or a defense problem. Therefore, it is unlikely that it would be held that the effects of an economic recession are a basis for exemption from the competitive bidding requirements which are permitted by section 37906.

However, if bids are received and rejected and if by a resolution adopted by four-fifths vote of the city legislative body it is determined that a project can be performed using day labor at a cost lower than the lowest responsible bid, section 37905 permits performance of a project by day labor.

3. Government Code Section 25450 *et seq.*

General law counties are required to contract with the lowest responsible bidder for the construction or repair of a building[6] where the cost thereof exceeds four thousand dollars ($4,000). Section 25450 provides:

"Whenever the estimated cost of construction of any wharf, chute, or other shipping facility, or of any hospital, almshouse, courthouse, jail, historical museum, aquarium, county free library building, branch library building, art gallery, art institute, exposition building, stadium, coliseum, sports arena or sports pavilion or other building for holding sports events, athletic contests, contests of skill, exhibitions, spectacles and other public meetings, or other public building or the cost of any repairs thereto exceeds the sum of four thousand dollars ($4,000), inclusive of the estimated cost of materials or supplies to be furnished pursuant to Section 25457, the work shall be done by contract. Any such contract not let pursuant to this article is void."

[6] See 13 Ops. Cal. Atty. Gen. 129 (1949), which includes construction of runways, erection of fences and excavation work within the meaning of the phrase "construction or repair of buildings."

Section 25454 provides:

> "The board shall award the contract to the lowest responsible bidder, and the person to whom the contract is awarded shall perform the work in accordance with the plans, specifications, strain sheets, and working details, unless the contract is modified by a four-fifths vote of the board."

However, there are higher cost limits for the larger counties.[7]

Moreover, if after receipt of bids a board of supervisors is advised that shipping facilities may be constructed at a cost less than by contract, it may reject all bids and order the work done by day labor. Thus, section 25456 provides:

> "If the board of supervisors is advised by the county surveyor or engineer that any wharf, chute, or other shipping facility can be constructed or repaired for a sum less than the lowest responsible bid, it may reject all bids and order the work done by day's work under the supervision and direction of the surveyor or engineer."

Furthermore, in cases of great emergency when repair or replacement is necessary to permit the continued conduct of county operations or services or to avoid danger to life or property, section 25458 permits avoidance of the contract bid requirements of sections 25450 and 25454. There is a further exception for the construction of public juvenile residential facilities if a major portion of the work is performed by wards of the juvenile courts assigned to such facilities. § 25465.

Generally, counties may repair or construct county highways using day labor and force account if such work is done under the supervision and direction of the county road commissioner. Streets and Highways Code section 1075 provides:

> "The board may have any work upon county highways done under the supervision and direction of the county road commissioner. Such work may be done:
>
> "(a) By letting a contract covering both work and material. In such event the contract shall be let to the lowest responsible bidder as provided in this article.
>
> "(b) By purchasing the material and letting a contract for the doing of the work. In such event the material shall be bought from and the contract let to the lowest responsible bidder as provided in this article.

---

[7] Section 25450.4 provides:

> "In counties containing a population of 500,000 or over, the work referred to in Section 25450 need not be done by contract if the estimated cost thereof is less than six thousand five hundred dollars ($6,500), exclusive of the estimated cost of materials or supplies to be furnished pursuant to Section 25457.4."

Section 25450.41 provides:

> "In counties containing a population of 2,000,000 or over, the provisions of Sections 25450 and 25450.4 do not apply to alteration or repair work upon county-owned buildings, if the cost of such work is under fifty thousand dollars ($50,000), and if before the work is authorized the board of supervisors determines that detailed plans for the existing building are obsolete or do not exist and that because of the age or condition of the building it is impracticable to have detailed plans and specifications prepared for the proposed work."

"(c) By purchasing the material and having the work done by day labor, in which case advertising for bids is not required."

If the work is not done under the supervision of the road commissioner, contracts for the work must be let to the lowest responsible bidder unless the work can be done more cheaply by day labor, Sts. & Hy. Code § 1073, or the work is expected to cost less than ten thousand dollars ($10,000). Sts. & Hy. Code § 1074.

4. Districts

The limitations on use of force account by general law or special law districts to accomplish projects depend upon the statutes applicable to the particular district. For example, all work within the authority of harbor districts in excess of three thousand five hundred dollars ($3,500) must be awarded upon competitive bidding. Harb. & Nav. Code § 6080. However, a port district is authorized to do work and make improvements without letting contracts therefor if the work is done under the direction of its officers or employees. Harb. & Nav. Code § 6273.

GENERAL EXCEPTIONS TO STATUTORY BID REQUIREMENTS

1. Judicially Recognized Exceptions

In addition to the specific statutory exceptions to the competitive bidding requirements, the courts have recognized that:

"... [W]here the nature of the improvements to be constructed or services to be provided are such that competitive proposals would be unavailing or not produce an advantage, statutes requiring competitive bidding do not apply." *County of Riverside* v. *Whitlock*, 22 Cal. App. 3d 863, 878 (1972).

The foregoing doctrine has generally been applied to find a transaction to be out of the scope of a competitive bidding requirement in four types of circumstances: (1) The service to be purchased is best provided by a uniquely qualified professional person,[8] *Kennedy* v. *Ross*, 28 Cal. 2d 569, 581-582 (1946); *San Francisco* v. *Boyd*, 17 Cal. 2d 606, 620 (1941); *Miller* v. *Boyle*, 43 Cal. App. 39 (1919); (2) there is only one source for the commodity or service purchased, *Los Angeles Dredging Co.* v. *Long Beach*, 210 Cal. 348, 354 (1930); *Los Angeles G. & E. Corp.* v. *Los Angeles*, 188 Cal. 307, 319 (1922); *Orange County Water Dist.* v. *Bennett*, 156 Cal. App. 2d 745, 753 (1958); *Hodgeman* v. *City of San Diego*, 53 Cal. App. 2d 610, 617 (1942); (3) where the price is controlled by law, *County of Riverside* v. *Whitlock*, *supra*; *California Motor Express, Ltd.* v. *Chowchilla Union High Sch. Dist.*, 202 Cal. App. 2d 314, 318 (1962); (4) there is no cost to the public entity. *Hiller* v. *City of Los Angeles*, 197 Cal. App. 2d 685, 694 (1961).

Of all the foregoing categories of judicially created exceptions to statutory bid

[8] The cases cited for this proposition involve contracts for the services of architects and engineers to design a project. However, if the contract involves actual construction, that part at least must be put up for competitive bid as required by a particular statute. *City of Inglewood-Los Angeles County Civic Center Auth.* v. *Superior Court*, 7 Cal. 3d 861, 866 (1972).

requirements, the only one which might conceivably be applied as a general rule to projects financed with federal funds is the exception when there is no cost to the public entity. However, as indicated in *Hiller* v. *City of Los Angeles, supra,* 197 Cal. App. 2d at 688, that exception applies where there is no expenditure at all on the project which is the subject of the contract by the public entity authorizing the project. While a local government project may be funded entirely with federal title X money, the local government still authorizes the local project and expends public money. Cf. *Martin* v. *City of Corning,* 25 Cal. App. 3d 165, 172 (1972). Therefore, it is concluded that none of the judicially created exceptions exempts projects funded through title X from the statutory bid requirements.

2. Government Code Section 53701 *et seq.*

The exceptions to the competitive bidding requirement particularly applicable to the issues raised by this opinion request are those provided in sections 53701 to 53703.

Section 53701 provides:

> "Notwithstanding any other law, except limitations imposed by the Constitution, the legislative body of a county, city, district, political subdivision, or a public or municipal corporation, may accept grants or loans of funds made available by the Federal Government or a federal department or agency to aid in financing plans for, or construction of, public works."

Section 53702 provides:

> "A county, city, district, political subdivision, or a public or municipal corporation, may comply with all applicable requirements of federal laws and regulations and orders issued pursuant to the law relating to the awarding of contracts for public work, the hours of labor, employment preferences, and other matters covered by the law, regulation, or order, if such compliance is a prerequisite to the loan or grant of federal funds."

Section 53703 provides in pertinent part:

> "A county or city may do all acts necessary to participate in all programs authorized by a federal housing act, including the Demonstration Cities and Metropolitan Development Act of 1966 or any other federal program whereby federal funds are granted to the county or city or any of its residents for purposes of health, education, welfare, public safety, law enforcement activities which have not been preempted by state law, prevention or reduction of crime, rehabilitation of persons convicted of crime or juvenile offenders, public works or community improvement, including, without limitation thereto, contracting and cooperating with the federal government, the state and its agencies, other local public agencies and private persons and corporations, and may make any expenditure of county or city funds required for such participation."

There is nothing in the language of title X, or any regulation issued thereunder, which limits the grant of title X funds to projects performed by temporary help hired directly by a public entity without competitive bidding.[9] Under these circumstances the statutory basis for avoidance of competitive bidding is not present. If title X programs are being administered in a manner that excludes projects that must be built through competitive bid, such a practice would not authorize public entities to avoid the competitive bidding requirements because such practice is neither required by title X or any regulation issued thereunder.

However, effective January 1, 1976, a section 53707 was added to the Government Code (Stats. 1975, ch. 933) which enables *cities* to utilize funds made available by federal law relating to employment for public works projects without compliance with Government Code section 37901 *et seq.* in certain circumstances. Section 53707 provides:

> "Whenever funds are made available to any city, under the Comprehensive Employment and Training Act of 1973 (Pub.L. 93-203), under such act as amended, or under any similar federal laws relating to employment, job training, or manpower programs, for the employment of any person by such city for the erection, improvement, repair, remodeling, or alteration of any public building or works, or any street or highway, or sewer, the city may authorize such projects without complying with the provisions of Chapter 6 (commencing with Section 37901) of Division 3 of Title 4 of the Government Code, provided that substantially all of the employees hired by the city to perform such projects are compensated pursuant to, and are otherwise subject to, the provisions of the Comprehensive Employment and Training Act of 1973.
>
> "However, all such employees shall be compensated at least at the same prevailing wage rate and with the same benefits determined by the city pursuant to Article 2 (commencing with Section 1770) of Chapter 1 of Part 7 of Division 2 of the Labor Code, and no such project as defined in Section 37901 shall exceed twenty-five thousand dollars ($25,000).
>
> "This section shall remain in effect only until January 1, 1977, and as of such date is repealed, unless a later enacted statute, which is chaptered before January 1, 1977, deletes or extends such date."

SUMMARY

California law provides no basis for exempting local public works projects financed with title X funds from statutory competitive bidding requirements which are otherwise applicable. However, effective January 1, 1976, cities which are sub-

[9] It is the opinion of the Chief Counsel of the Economic Development Administration, which has responsibility for administering title X of the Public Works and Economic Development Act of 1965, that title X permits the funding of eligible projects constructed either on a force account basis or on a competitive bid basis. Letter from William F. Clinger, Jr., Chief Counsel, Economic Development Administration of the United States Department of Commerce, to Congressman John J. McFall, dated June 13, 1975.

ject to general law were exempted, within specified constraints, from statutory bidding requirements for projects financed through certain federal programs.

Opinion No. CV 75-357—April 14, 1976

SUBJECT: TERMINATION OF CONTINUING FINANCE CHARGES APPLICABLE TO RETAIL INSTALLMENT CONTRACTS—With the addition of one important proviso related to Civil Code section 1806.3, the conclusions made in 58 Ops. Cal. Atty. Gen. 166 (1975) regarding limitations on the collectability of finance charges relative to retail installment accounts also apply to finance charges assessed in connection with retail installment contracts. Thus, continuing finance charges applicable to retail installment contracts must be terminated if (1) the underlying debt is discharged, (2) the seller or holder of the contract violates an Unruh Act provision wilfully, (3) the seller or holder of the contract violates an Unruh Act provision not wilfully and fails to correct the violation within 30 days, (4) a court awards final money judgment on amount owing, (5) the buyer commits a breach and the seller or holder elects to terminate buyer's opportunity to pay his obligation over time or, (6) the indebtedness created by any retail installment contract is satisfied prior to its maturity through either surrender of collateral, repossession of collateral, redemption of collateral after repossession, assignment of obligation for collection, or any judgment. Also, the limitations as contained in 58 Ops. Cal. Atty. Gen. 166 (1975) regarding collectability of finance charges made in connection with retail installment accounts as well as limitations relative to retail installment contracts apply not only to collection agencies but also to any seller or subsequent holder of a retail installment account or contract.

Requested by: CHIEF, BUREAU OF COLLECTION AND INVESTIGATIVE SERVICES, DEPARTMENT OF CONSUMER AFFAIRS

Opinion by: EVELLE J. YOUNGER, Attorney General

Robert McKim Bell, Deputy

The Honorable Douglas Faigin, Chief of the Bureau of Collection and Investigative Services of the Department of Consumer Affairs, has requested the opinion of this office in response to the following questions:

1. Do the comments contained in 58 Ops. Cal. Atty. Gen. 166 (1975), relative to the collectability of retail installment account finance charges apply with equal force to finance charges assessed in connection with retail installment contracts?

2. Do the limitations on the collectability of finance charges expressed in the aforementioned opinion apply only to collection agencies?

SENATE RULES COMMITTEE Office of Senate Floor Analyses 1020 N Street, Suite 524 (916) 445-6614 Fax: (916) 327-4478	SB 1999

UNFINISHED BUSINESS

Bill No: SB 1999
Author: Burton (D)
Amended: 8/23/00
Vote: 21

SENATE VOTES NOT RELEVANT

SENATE FLOOR : 23-13, 5/25/00
AYES: Alarcon, Alpert, Bowen, Burton, Chesbro, Costa, Dunn, Escutia, Figueroa, Hughes, Johnston, Karnette, Murray, O'Connell, Ortiz, Peace, Perata, Schiff, Sher, Solis, Soto, Speier, Vasconcellos
NOES: Brulte, Johannessen, Johnson, Kelley, Knight, Leslie, Lewis, McPherson, Monteith, Mountjoy, Poochigian, Rainey, Wright

ASSEMBLY FLOOR : 47-29, 8/28/00 - See last page for vote

SUBJECT : Public work

SOURCE : Author

DIGEST : This bill provides that for purposes of public works laws, "construction" includes work performed during the design and pre-construction phases of construction including, but not limited to, inspection and land surveying work.

Assembly Amendments delete the prior version. As it left the Senate, the bill was authored by Senator Karnette and related to crane operators and occupational safety orders.

CONTINUED

ANALYSIS : Existing law:

1. Provides that "public works" includes construction, demolition, or repair work done under contract and paid for in whole or in part out of public funds. (Labor Code Section 1720)

2. Defines "public works contract" as "an agreement for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind." (Public Contract Code Section 1101)

3. Provides that workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work. (Labor Code Section 1772)

4. Provides that "workman" includes "laborer, workman, or mechanic." (Labor Code Section 1723)

5. Provides that "contractor" and "subcontractor" include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works projects, as defined. (Labor Code Section 1722.1)

6. Provides that all workers employed on public works shall be paid prevailing wage. (Labor Code Section 1771) Requires that public works contractors employ workers in any apprenticeable trade or craft to employ apprentices at a ratio, as defined.

7. Provides that the Department of Industrial Relations has the authority to determine whether a project is a "public works" and shall determine the prevailing wage for workers employed on public works.

This bill provides that for purposes of public works laws, "construction" includes work performed during the design and pre-construction phases of construction including, but not limited to, inspection and land surveying work.

This bill:

1. Clarifies that workers entitled to prevailing wage on construction jobs, are entitled to prevailing wage rates during the design and pre-construction phases of a public works construction projects.

2. Clarifies that workers providing construction inspection and land surveying work on public works projects are entitled to prevailing wage.

Comments

This bill codifies current Department of Industrial Relations practice by including construction inspectors and land surveyors among those workers deemed to be employed upon public works and by insuring that workers entitled to prevailing wage during the construction phase of a public works project will get prevailing wage on the design and pre-construction phases of a project.

On June 9, 2000, the department issued a decision in Public Works Case No. 99-046 finding that construction inspectors hired to do inspection for compliance with applicable building codes and other standards for a public works project were deemed to be employed upon public works and therefore entitled to prevailing wage. In the case, part of the public works contract provided for "construction inspection for compliance with applicable building codes" and other standards. The inspectors argued that they should be paid prevailing wage pursuant to the state's public works laws because their work was part of a public works contract. The general contractor and the subcontractor that hired the inspectors argued that because the inspectors were not involved in actual construction, demolition, or repair work, as specified in Section 1720 of the Labor Code, they were not covered by the prevailing wage laws.

The department declined to interpret Section 1720 so narrowly, finding that the inspectors were covered under prevailing wage law because "workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon

public work." (Labor Code Section 1772.) The department rejected an argument that Section 1723 of the Labor Code (which states that "workmen" entitled to prevailing wage includes laborers, workmen and mechanics) precluded a finding that inspectors were also covered by the prevailing wage laws, noting that Section 1723 does not state that "inspectors" are not "workmen" that can be covered by the

prevailing wage laws. The department also found that the subcontractor employing the inspectors fit squarely under the definition of subcontractor in the prevailing wage laws despite the fact that the subcontract involved construction management duties.

This bill codifies much of the department's June 9, 2000, decision by including "inspectors" in the definition of "construction" for purposes of public works. This bill also insures that workers earning the prevailing wage in the construction phase of a project will also be entitled to that wage for the same type of work done during the design and pre-construction phases of a project, even if that work is done pursuant to a services contract or otherwise, as the department found.

This bill also codifies department regulation and practice of covering land surveyors under prevailing wage law.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: Yes

According to the Assembly Appropriations Committee analysis, this bill has no direct state fiscal impact, but merely codifies current administrative decisions of the department interpreting prevailing wage law.

ASSEMBLY FLOOR :
AYES: Alquist, Aroner, Bock, Calderon, Cardenas, Cardoza, Cedillo, Corbett, Correa, Davis, Ducheny, Dutra, Firebaugh, Florez, Gallegos, Havice, Honda, Jackson, Keeley, Knox, Kuehl, Lempert, Longville, Lowenthal, Machado, Mazzoni, Migden, Nakano, Papan, Pescetti, Reyes, Romero, Scott, Shelley, Steinberg, Strom-Martin, Thomson, Torlakson, Villaraigosa, Vincent, Washington, Wayne, Wesson, Wiggins, Wildman, Wright, Hertzberg
NOES: Aanestad, Ackerman, Ashburn, Baldwin, Bates, Battin,

Baugh, Brewer, Briggs, Campbell, Cox, Cunneen, Dickerson, Granlund, House, Leach, Leonard, Maddox, Maldonado, Margett, McClintock, Olberg, Oller, Robert Pacheco, Rod Pacheco, Runner, Strickland, Thompson, Zettel

NC:sl 8/29/00 Senate Floor Analyses

SUPPORT/OPPOSITION: NONE RECEIVED

**** END ****

HCity of Long Beach v. Department of Industrial Relations
Cal.,2004.

Supreme Court of California
CITY OF LONG BEACH, Plaintiff and Respondent,
v.
DEPARTMENT OF INDUSTRIAL RELATIONS, Defendant and Appellant.
No. S118450.

Dec. 20, 2004.

Background: City filed petition for writ of mandate challenging the decision of Department of Industrial Relations that state's prevailing wage law (PWL) applied to animal shelter project financed in part with city funds. The Superior Court, Los Angeles County, No. BS072516,David P. Yaffe, J., granted writ. Department appealed. The Court of Appeal reversed. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Chin, J., held that:

(1) animal shelter project was not "public work" as defined by former statute, and thus was not subject to PWL, and

(2) amended statute redefining "public work" applied prospectively only.

Court of Appeal judgment reversed.

Opinion, 1 Cal.Rptr.3d 837, superseded.

Kennard, J., filed dissenting opinion.
West Headnotes
[1] Labor and Employment 231H ⚿2217(1)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)1 In General
231Hk2215 Constitutional and Statutory Provisions
231Hk2217 Purpose
231Hk2217(1) k. In General. Most Cited Cases
The overall purpose of the prevailing wage law (PWL) is to protect and benefit employees on public works projects. West's Ann.Cal.Labor Code § 1770 et seq.

[2] Mandamus 250 ⚿187.9(1)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k187 Appeal and Error
250k187.9 Review
250k187.9(1) k. Scope and Extent in General. Most Cited Cases
On review of grant of writ of mandate, Supreme Court exercises its independent judgment in resolving whether a project at issue constitutes a "public work" within the meaning of the prevailing wage law (PWL). West's Ann.Cal.Labor Code §§ 1720(a)(1), 1771.

[3] Labor and Employment 231H ⚿2217(1)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)1 In General
231Hk2215 Constitutional and Statutory Provisions
231Hk2217 Purpose
231Hk2217(1) k. In General. Most Cited Cases

Labor and Employment 231H ⚿2220(2)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)1 In General
231Hk2215 Constitutional and Statutory Provisions
231Hk2220 Construction
231Hk2220(2) k. Strict or Liberal Construction. Most Cited Cases
The prevailing wage law (PWL) was enacted to protect and benefit workers and the public and is to

be liberally construed. West's Ann.Cal.Labor Code § 1770 et seq.

[4] Labor and Employment 231H ⚿2220(2)

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)1 In General
231Hk2215 Constitutional and Statutory Provisions
231Hk2220 Construction
231Hk2220(2) k. Strict or Liberal Construction. Most Cited Cases
Courts will liberally construe prevailing wage statutes, but they cannot interfere where the Legislature has demonstrated the ability to make its intent clear and chosen not to act. West's Ann.Cal.Labor Code § 1770 et seq.

[5] Labor and Employment 231H ⚿2304

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)4 Operation and Effect of Regulations
231Hk2304 k. Prevailing Wages. Most Cited Cases
Private animal shelter project was not "public work" as defined by former statute, and thus was not subject to prevailing wage law (PWL), although city contributed funds to project, where grant of city funds was expressly limited to preconstruction expenses, including funding of legal fees, insurance premiums, architectural design costs, and project management and surveying fees. West's Ann.Cal.Labor Code § 1771; § 1720 (a)(1) (1999).
See Cal. Civil Practice (Thomson/West 2004) Business Litigation, § 39:5.1; Annot., What Entities or Projects Are "Public" for Purposes of State Statutes Requiring Payment of Prevailing Wages on Public Works Projects (1993) 5 A.L.R.5th 470.

[6] Statutes 361 ⚿219(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases
When an administrative agency construes a statute in adopting a regulation or formulating a policy, a reviewing court will respect the agency interpretation as one of several interpretive tools that may be helpful, but the court must independently judge the text of the statute.

[7] Courts 106 ⚿89

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k89 k. In General. Most Cited Cases
Attorney General's opinions are entitled to considerable weight, but are not binding on the courts.

[8] Municipal Corporations 268 ⚿266

268 Municipal Corporations
268IX Public Improvements
268IX(A) Power to Make Improvements or Grant Aid Therefor
268k266 k. Constitutional and Statutory Provisions. Most Cited Cases
Amended statute redefining "construction" on public work project to include work performed during project's design and preconstruction phases changed existing law, and was intended to apply prospectively only. West's Ann.Cal.Labor Code § 1720(a)(1).

[9] Statutes 361 ⚿278.5

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.4 Prospective Construction
361k278.5 k. In General. Most Cited Cases
(Formerly 361k263)
Legislation is deemed to operate prospectively only, unless a clear contrary intent.

[10] Labor and Employment 231H ⚿2304

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime

Pay

231HXIII(B)4 Operation and Effect of Regulations

231Hk2304 k. Prevailing Wages. Most Cited Cases

State prevailing wage law (PWL) is similar to the federal prevailing wage act and shares its purposes. 40 U.S.C.A. § 3141 et seq.; West's Ann.Cal.Labor Code § 1770 et seq.

***519John M. Rea, Chief Counsel, Vanessa L. Holton, Acting Chief Counsel, Steven A. McGinty, Assistant Chief Counsel, Sarah L. Cohen, Acting Assistant Chief Counsel, and Anthony Mischel, Staff Counsel, for Defendant and Appellant.

Altshuler, Berzon, Nussbaum, Rubin & Demain, Stephen P. Berzon, Scott A. Kronland, San Francisco, Dorothea K. Langsam and Victor M. Ortiz-de-Montellano for The State Building and Construction Trades Council of California, AFL-CIO as Amicus Curiae on behalf of Defendant and Appellant.

Cox, Castle & Nicholson, John S. Miller, Jr., Los Angeles, and Dwayne P. McKenzie for Center for Contract Compliance as Amicus Curiae on behalf of Defendant and Appellant.

Weinberg, Roger & Rosenfeld, Sandra Rae Benson, Los Angeles, Ellyn Moscowitz, Oakland, and M. Suzanne Murphy for California Apprenticeship Coordinators Association, et al., as Amici Curiae on behalf of Defendant and Appellant.

Bill Lockyer, Attorney General, Manuel M. Medeiros, State Solicitor General, Andrea Lynn Hoch, Chief Assistant Attorney General, Louis R. Mauro, Assistant Attorney General, and Douglas J. Woods, Deputy Attorney General, as Amici Curiae on behalf of Defendant and Appellant.

Simpson, Garrity & Innes, Paul V. Simpson and Ronald A. Johnstone, South San Francisco, for Engineering & Utility Contractors Association as Amicus Curiae on behalf of Defendant and Appellant.

Robert E. Shannon, City Attorney, Daniel S. Murphy, Principal Deputy City Attorney, and Michelle Gardner, Deputy City Attorney, for Plaintiff and Respondent.

Rutan & Tucker, M. Katherine Jenson and Mark J. Austin, Costa Mesa, for 44 California Cities and The League of California Cities as Amici Curiae on behalf of Plaintiff and Respondent.

Nick Cammarota for California Building Industry Association as Amicus Curiae on behalf of Plaintiff and Respondent.

Atkinson, Andelson, Loya, Ruud & Romo, Robert Fried, Pleasanton, Thomas A. Lenz, Cerritos, and Alice K. Conway, Pleasanton, for Associated Builders & Contractors of Southern California, Inc., as Amicus Curiae on behalf of Plaintiff and Respondent.

Case, Knowlson, Jordan & Wright, Michael F. Wright, Los Angeles, and Armen Tamzarian for M & H Realty Partners IV L.P. as Amicus Curiae on behalf of Plaintiff and Respondent.

***520 Stanton, Kay & Watson and James P. Watson, San Francisco, for Foundation for Fair Contracting as Amicus Curiae.

Davis, Cowell & Bowe, John J. Davis, Jr., and Andrew J. Kahn, San Francisco, for Northern California Mechanical Contractors Association, Los Angeles Chapter National Electrical Contractors Association, Air Conditioning, Refrigeration and Mechanical Contractors Association of Southern California, California Plumbing and Mechanical Contractors Association, California Sheet Metal Contractors National Association and Associated Plumbing and Mechanical Contractors Association as Amici Curiae.

CHIN, J.

***946**906** In this case, we address the application of the state's prevailing wage law (PWL; see Lab.Code, § 1770 et seq.) [FN1] to private construction of a $10 million animal control facility in Long Beach (the City). The Society for the Prevention of Cruelty to Animals of Los Angeles (SPCA-LA) built the facility, but it was partly funded by a $1.5 million grant from the City that was expressly limited to project development and other *preconstruction* expenses. Section 1771 requires that "workers employed on public works" be paid "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed...."

> FN1. Further statutory references are to this code unless otherwise indicated.

When the present contract was executed in 1998, "public works" was defined as including "*construction,* alteration, demolition, or repair work done under contract and *paid for in whole or in part out of public funds...* ."(§ 1720, subd. (a), italics added.) As we observe, *after* the agreement was executed, and *after* the City's grant money was used for preconstruction expenses, a 2000 amendment to section 1720, subdivision (a)(1), was adopted to include within the word "construction" such activities

as "the design and preconstruction phases of construction," including "inspection and land surveying work," items the City partly funded in this case.

We first consider whether the project here is indeed a "public work" within the meaning of section 1771 and former section 1720. We will conclude, contrary to the Court of Appeal, that under the law in effect when the contract at issue was executed, a project that *private* developers build solely with *private* funds on land leased from a public agency remains private. It does not become a *public* work subject to the PWL merely because the City had earlier contributed funds to the owner/lessee to assist in *947 defraying such "preconstruction" costs or expenses as legal fees, insurance premiums, architectural design costs, and project management and surveying fees.

This conclusion completely disposes of this case. We leave open for consideration at **907 another time important questions raised by the parties, including (1) whether, assuming the project indeed was a "public work" under section 1771, it should be deemed a "municipal affair" of a charter city and therefore exempt from PWL requirements, and (2) whether the PWL is a matter of such "statewide concern" that it would override a charter city's interests in conducting its municipal affairs. Resolution of these important issues is unnecessary and inappropriate here because the present project was not a public work subject to the PWL.

FACTS

The following uncontested facts are largely taken from the Court of Appeal ***521 opinion in this case. The Department of Industrial Relations (Department) appeals from a judgment granting a petition for writ of mandate filed by the City. The City had sought to overturn the Department's determination that an animal shelter project financed in part with City funds and built on City lands was subject to the PWL.

In 1998, the City entered into an agreement with SPCA-LA, under which the City agreed to contribute $1.5 million to assist in the development and preconstruction phases of a facility within City limits that would serve as an animal shelter and SPCA-LA's administrative headquarters. It would also provide kennels and office space for the City's animal control department. The agreement required the City's funds to be placed in a segregated account and used only for expenses related to project development, such as SPCA-LA's "investigation and analysis" of the property on which the shelter was to be built, "permit, application, filing and other fees and charges," and "design and related preconstruction costs." SPCA-LA was specifically precluded from using any of the City's funds "to pay overhead, supervision, administrative or other such costs" of the organization.

The City owned the land on which the facility was to be built, but leased it to SPCA-LA for $120 per year. The City in turn agreed to pay SPCA-LA $60 a year as rent for the space occupied by its animal control department. The agreement further provided it was "interdependent," with lease and lease-back agreements between the parties with respect to the City land on which the project would be built. The agreement further stated that "[i]f either the lease or lease-back is terminated then this agreement shall automatically terminate, without notice." Finally, the agreement provided "[i]f there is a *948 claim relating to the payment of wages arising from the construction described herein," the City shall pay 95 percent of "all costs, expenses, penalties, payments of wages, interest, and other charges related to the claim, including attorneys' fees and court or administrative costs and expenses[.]"

The record shows a portion of the City's financial contribution was spent on such preconstruction expenses as architecture and design ($318,333), project management ($440,524), legal fees ($16,645), surveying ($14,500), and insurance ($23,478). The City estimated that an additional $152,000 in architectural, legal, development and insurance expenses would be required for completion. The dissent observes that some of these additional funds may have been spent after actual construction began. The dissent cites a letter from the City indicating that by the time construction began, some additional funds "had yet to be spent." (Dis. opn. 22 Cal.Rptr.3d at pp. 529-530, 102 P.3d at pp. 914-915.)The record is unclear, however, if or when such funds were actually paid. But as we previously noted, the City's agreement with SPCA-LA required the City's funds to be used only for project development, design and related preconstruction costs, and the issue before us is whether the term "construction" includes such activities. Assuming some limited City funds were

spent *during* construction, the record fails to demonstrate they were used *for* construction.

The project itself was completed in 2001 at a cost of approximately $10 million. Evidence obtained from the SPCA-LA showed the project was intended to serve all of Los Angeles County and parts of Orange County. Animals from all these areas, not just from Long Beach, would be housed at the shelter. In addition, the facility would also house the SPCA-LA's headquarters.

***522**908Section 1771 states in relevant part: "[N]ot less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed ... shall be paid to all workers employed on public works." In 1998, when the present contract was executed, "public works" was defined as "[*c*]*onstruction,* alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds ...." (§ 1720, subd. (a), italics added.) The term "construction" was undefined. As discussed below, a 2000 amendment to section 1720, subdivision (a), adopted several years after the City executed its contract with SPCA-LA and made its limited contribution, now includes within "construction" such activities as "the design and preconstruction phases of construction," including inspection and surveying.

Acting on an inquiry by a labor organization, the Department began an investigation to determine whether the project was a "public work" under former section 1720 and was therefore subject to the prevailing wage rates *949 that section 1771 mandated. The City argued that the project was not a public work, but even if it was, the prevailing wage law did not apply because it was strictly a charter city's "municipal affair." The Department concluded the project was a public work and the city's status as a charter city did not exempt it from the PWL. This determination was affirmed on an administrative appeal. The City filed a petition for a writ of mandate under Code of Civil Procedure section 1085, challenging the Department's decision that the PWL applied to the shelter project. The trial court granted the writ, and the Department filed a timely appeal. The Court of Appeal reversed, concluding that (1) the project was a public work under former section 1720 and section 1771, (2) the project was not a municipal affair exempt from the PWL, and (3) even if the project was a municipal affair, the PWL was a matter of statewide concern, precluding exemption under the municipal affairs doctrine. Concluding the shelter project was not a public work as then defined, we will reverse the judgment of the Court of Appeal.

DISCUSSION

[1] Before proceeding with our analysis, we set out some established principles that will help guide our decision. In *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 4 Cal.Rptr.2d 837, 824 P.2d 643(*Lusardi*), we spoke regarding the PWL's general intent and scope. We observed that "[t]he Legislature has declared that it is the public policy of California 'to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.' [Citation.] [¶] The overall purpose of the prevailing wage law is to protect and benefit employees *on public works projects.* [Citation.]" (*Lusardi, supra,* 1 Cal.4th at p. 985, 4 Cal.Rptr.2d 837, 824 P.2d 643, italics added.)

Lusardi continued by observing that "[t]his general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees. [Citations.]"***523(*Lusardi, supra,* 1 Cal.4th at p. 987, 4 Cal.Rptr.2d 837, 824 P.2d 643.)

[2][3] In conducting our review, we must exercise our independent judgment in resolving whether the project at issue constituted a "public work" within the meaning of the PWL. (*McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1583-1584, 18 Cal.Rptr.2d 680(*McIntosh*).) We have acknowledged *950 that the PWL was enacted to protect and benefit workers and the public and is to be liberally construed. (See *Lusardi, supra,* 1 Cal.4th at p. 985, 4 Cal.Rptr.2d 837, 824 P.2d 643.) The law does, however, permit public agencies to form alliances with the private sector and **909 allows them to enter into leases of public lands and to give financial incentives to

encourage private, nonprofit construction projects that provide public services at low cost (see Gov.Code, § 26227; *McIntosh, supra,* 14 Cal.App.4th at p. 1587, 18 Cal.Rptr.2d 680;*International Brotherhood of Electrical Workers v. Board of Harbor Commissioners* (1977) 68 Cal.App.3d 556, 562, 137 Cal.Rptr. 372 [lease to private developer to construct oil and gas facilities and pay city-lessor royalties not "public work" under former section 1720]).

[4] "Courts will liberally construe prevailing wage statutes [citations], but they cannot interfere where the Legislature has demonstrated the ability to make its intent clear and chosen not to act [citation]." (*McIntosh, supra,* 14 Cal.App.4th at p. 1589, 18 Cal.Rptr.2d 680.) Here, we must determine whether the City's contract with SPCA-LA truly involved "construction" that was paid for in part with public funds.

[5] The City observes that its $1.5 million donation to SPCA-LA was neither earmarked nor used for actual construction of the facility. The City's agreement with SPCA-LA specifically designated the contributed funds for preconstruction costs. Those funds were in fact spent on architectural design, project management, legal fees, surveying fees, and insurance coverage. The City contends that, when the agreement was executed in 1998, "construction" meant only the actual physical act of building the structure.

The City notes that only in 2000, several years *after* the agreement was signed and *after* the City had contributed its funds to the project, did the Legislature amend section 1720, subdivision (a), by adding a sentence stating: "For purposes of this paragraph, 'construction' includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work." (Stats.2000, ch. 881, § 1.) The City views the foregoing amendment as a prospective *change* in the law, not a simple restatement of existing law.

The Department, on the other hand, argues that the term "construction" would encompass the planning, design, and "pre-building" phases of a project, which would include architectural design, project management, and surveying. The City's financial contribution to the project paid for all these items. In the Department's view, the 2000 amendment to section 1720, subdivision (a), merely clarified existing law. As will appear, we think the City's argument makes more sense.

***951** The Court of Appeal observed that the "[Department's] position is supported by the common meaning of the word 'construction' ...," citing a dictionary that defines construction as "[t]he act or *process* of constructing." (American Heritage Dict. (2d college ed.1982) p. 315, italics added; see also *Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 756, 80 Cal.Rptr. 145 [construction ordinarily includes "the entire process" required in order to erect a structure, including basements, foundations, and utility connections].) But ****524** that definition begs the question whether the construction "process" includes the preconstruction activities involved here. Other dictionaries give the word a more literal interpretation.

For example, Webster's Third New International Dictionary (2002), page 489, gives a primary definition of "construction" as "[t]he act of putting parts together to form a complete integrated object." 3 Oxford English Dictionary (2d ed.1989), page 794, defines the word as "the action of framing, devising, or forming, by the putting together of parts; erection, building." Thus, contrary to the Court of Appeal's statement, dictionary definitions do not strongly support the Department's position.

The Court of Appeal also relied on the Department's own regulations and rulings interpreting and implementing the PWL. It noted that the Department has defined "construction" as including "field survey work traditionally covered by collective bargaining agreements," when such surveying is "integral to the specific public works project in the design, preconstruction, or construction phase." (Cal.Code Regs., tit. 8, § 16001, subd. (c).) The total project cost was approximately $10 million. The record does ***910** not clearly show whether the minimal ($14,500) surveying work paid for out of the City's donation met the "collective bargaining" and "integral work" elements of the Department regulation. Neither the Court of Appeal nor the briefs explore these aspects of the regulation.

[6] In any event, assuming that regulation applies here, although we give the Department's interpretation great weight (e.g., *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 309, 58 Cal.Rptr.2d 855, 926 P.2d 1042), this court

bears the ultimate responsibility for construing the statute. "When an administrative agency construes a statute in adopting a regulation or formulating a policy, the court will respect the agency interpretation as one of several interpretive tools that may be helpful. In the end, however, '[the court] must ... independently judge the text of the statute.'"(*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 322, 87 Cal.Rptr.2d 423, 981 P.2d 52, quoting *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 7-8, 78 Cal.Rptr.2d 1, 960 P.2d 1031.)

[7]**952 The Court of Appeal also relied on the Attorney General's opinion citing the Department regulation with apparent approval. (70 Ops.Cal.Atty.Gen. 92, 93-94 (1987).) But the question whether that regulation comported with the PWL was not before the Attorney General, who was asked only whether the PWL applied to engineering firm employees whom the city hired to perform services that the city engineer ordinarily performed. That issue involved determining whether the work was "performed under contract" or "carried out by a public agency with its own forces."(§ 1771.) As the opinion recites, "The inquiry assumes that the work in question is a 'public work' within the meaning" of former section 1720 and section 1771. (70 Ops.Cal.Atty.Gen., *supra,* at p. 93.) Indeed, the Attorney General's conclusion was that the PWL applied to the engineering firm's employees "*except with respect to such duties which do not qualify as a public work.*" (*Id.* at p. 98, italics added.) Thus, the opinion seems inconclusive for our purposes. In any event, as with the Department's own regulations, the Attorney General's opinions are entitled to "considerable weight," but are not binding on us. (E.g., *State of Cal. ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 71, 44 Cal.Rptr.2d 399, 900 P.2d 648.)

***525[8] As noted, the City relies in part on the 2000 post-agreement amendment to section 1720, subdivision (a), defining "construction" to include work performed during the project's design and preconstruction phases. The City views the amendment as a change in existing law. It relies on an August 30, 2000, letter from the amendment's author, Senator John Burton, seeking to respond to interested parties' "concerns" regarding its operation. The letter recites that the amendment was "intended only to operate prospectively and therefore will only apply to contracts for public works entered into on and after the effective date of the legislation which will be January 1, 2001." (4 Sen. J. (1999-2000 Reg. Sess.) p. 6371.) The present contract was executed in 1998.

Although letters from individual legislators are usually given little weight unless they reflect the Legislature's *collective* intent (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 45-46, fn. 9, 77 Cal.Rptr.2d 709, 960 P.2d 513;*Metropolitan Water Dist. v. Imperial Irrigation Dist.* (2000) 80 Cal.App.4th 1403, 1425-1426, 96 Cal.Rptr.2d 314), the Burton letter was presented, *prior* to the bill's enactment, to the full Senate, which carried his motion to print it in the Senate Daily Journal. Indeed, the letter is printed and included under the notes to section 1720 in West's Annotated Labor Code. (Historical and Statutory Notes, 44A West's' Ann. Lab.Code (2003 ed.) foll. § 1720, p. 7.) Under these circumstances, we think the letter carries more weight as indicative of probable legislative intent. (See *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 377-378, 20 Cal.Rptr.2d 330, 853 P.2d 496;*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 590-591, 128 Cal.Rptr. 427, 546 P.2d 1371.)

[9]**953 Moreover, Senator Burton's remarks conform to the well-established rule that legislation is deemed to operate prospectively only, unless a clear contrary intent appears **911 (e.g., *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840-841, 123 Cal.Rptr.2d 40, 50 P.3d 751;*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207-1209, 246 Cal.Rptr. 629, 753 P.2d 585, and cases cited). We find in the available legislative history no indication of an intent to apply the amendment retroactively.

The Department, on the other hand, relies on an Assembly Committee on Labor and Employment report indicating, "The bill [amending section 1720] codifies current Department practice by including inspectors and surveyors among those workers deemed to be employed upon public works and by insuring that workers entitled to prevailing wage during the construction phase of a public works project will get prevailing wage on the design and pre-construction phases of a project." (Assem. Com. on Labor and Employment, Rep. on Sen. Bill No.1999 (1999-2000 Reg. Sess.) as amended Aug. 18, 2000, p. 3.) This language is inconclusive. Although it indicates the proposed legislation will now adopt the Department *practice* as to inspectors

and surveyors, it fails to state that such adoption reflects *existing law* or should be applied retroactively to preexisting contracts. Moreover, the same Assembly Committee report notes that "in its current form, this bill also *expands* the definition of 'public works' to include architects, engineers, general contractors and others in their employ *who have not previously been subject to the prevailing wage laws.*" (*Ibid.*, italics added.) This language strongly indicates that the 2000 amendment was more than a simple restatement of existing law.

***526 We also note that the Legislative Counsel's digest to the bill explains that it would "*revise* the definition of public works by providing that 'construction' includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work." (Legis. Counsel's Dig., Sen. Bill No.1999 (1999-2000 Reg. Sess.), Stats.2000, ch. 881, italics added.) The Legislative Counsel also evidently believed that the revision might impose new costs on local government. (*Ibid.*)

The City observes that the United States Secretary of Labor has defined "construction," for purposes of the *federal* prevailing wage law (40 U.S.C. §§ 3141-3148) as: "All types of work done on a particular building or work at the site thereof ... by laborers and mechanics employed by a construction contractor or construction subcontractor...." (29 C.F.R. § 5.2(j)(1) (2004).) "Laborers and mechanics" generally include "those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished **954 from mental or managerial." (29 C.F.R. § 5.2(m) (2004).) This definition seemingly would not cover work done by surveyors, lawyers, project managers, or insurance underwriters, who function before actual construction activities commence.

[10] We have found no case deciding whether surveyors' work constitutes "construction" under federal regulations. California's prevailing wage law is similar to the federal act and shares its purposes. (*Southern Cal. Lab. Management etc. Committee v. Aubry* (1997) 54 Cal.App.4th 873, 882, 63 Cal.Rptr.2d 106.) Although the Legislature was free to adopt a broader definition of "construction" for projects that state law covers, certainly the fact that federal law generally confines its prevailing wage law to situations involving actual construction activity is entitled to some weight in construing the pre-2000 version of the statute.

The Court of Appeal concluded that the broader interpretation of "construction" in former section 1720, subdivision (a), is "most consistent" with the PWL's purpose, to protect employees and the public. But, of course, no one suggests that had SPCA-LA, a private charitable foundation, funded the entire project, the PWL, which applies only to projects constructed in whole or in part with *public funds*, would nonetheless cover it. Does it make a difference that SPCA-LA received City funds for designing, surveying and insuring, and otherwise managing the project at the preconstruction phase? For all the reasons discussed above, we conclude the project falls outside the PWL's scope. Our conclusion makes it unnecessary to **912 reach the City's alternative contention that the present project was not "done under contract" within the PWL's meaning. (See § 1720, subd. (a).)

CONCLUSION

The PWL does not apply in this case because no publicly funded construction was involved. The judgment of the Court of Appeal is reversed.

WE CONCUR: GEORGE, C.J., BAXTER, WERDEGAR, BROWN, J., and MORENO, JJ.
Dissenting Opinion by KENNARD, J.
When a construction project is funded in whole or in part by a public entity, California law requires that the workers be paid the local prevailing wage. Here, a city and a charity entered into a contract for construction of a building, and agreed that the city would pay for certain expenses essential to the overall project but would not pay for erection of the building itself. ***527 The majority concludes the project was not a public work and therefore not subject to the prevailing wage. I disagree.

**955I

In 1998, the City of Long Beach (City) contracted with the Society for the Prevention of Cruelty to Animals, Los Angeles (SPCA-LA) for the latter to construct a building that was to contain an animal shelter as well as the SPCA-LA's headquarters and the City's animal control department. The City agreed to contribute $1.5 million to the project (which ultimately cost approximately $10 million) and to

lease to the SPCA-LA, at a nominal fee, the six and one-half acres of land on which the facility was to be built.

In December 1999, just after ground was broken and the actual building had begun, a local newspaper reported on the project. This prompted a labor organization to ask the state Department of Industrial Relations (DIR) to investigate whether the project was a public work and therefore subject to the prevailing wage law. In response to the DIR's inquiry, the City explained in a letter written in September 2000 that the SPCA-LA had placed the City's $1.5 million contribution in a segregated account; that roughly $1 million was being used to pay the architects, project managers, lawyers, and surveyors, as well as the insurance costs; the rest would be used for advertising, fundraising, and "startup costs" such as furniture and equipment; and that none of the City's money would be used to pay for the building itself. The City asserted that because its financial contribution would not be used to pay for the building itself, the project was not a public work. The DIR, however, determined that the project was a public work and therefore subject to the prevailing wage law; that ruling was affirmed on administrative appeal. The City challenged that decision in a petition for writ of mandate in the superior court. The court granted the writ, and the DIR appealed. The Court of Appeal reversed the superior court, concluding that the project was a public work.

II

Labor Code section 1771[FN1] provides that "all workers employed on public works" costing more than $1,000 must be paid "the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed...." When the City and the SPCA-LA contracted to build the animal control facility in question, the version of section 1720, subdivision (a) (former section 1720(a)) then in effect defined "public works" in these words: "*Construction,* alteration, demolition, or repair work done under contract and *paid for in whole or in part out of public funds....*" (Stats.1989, ch. 278, p. 1359, italics added.) At issue here is what the Legislature meant by the term "construction." That term, which has been in section 1720 since its enactment in 1937, is ambiguous. In a narrow sense it **956 could mean-as the majority concludes-erection of the actual building only. In a broader sense it could mean-as the Court of Appeal concluded-the entire construction project, including the architectural,**913 project management, insurance, surveying, and legal costs paid for by the City here. The parties furnish no legislative history bearing on the intent of the Legislature in 1937, when it used the word "construction" in former section 1720(a). But two principles of statutory interpretation provide guidance, as discussed below.

FN1. All further statutory citations are to the Labor Code.

***528 In construing an ambiguous statute, courts generally defer to the views of an agency charged with administering the statute. "While taking ultimate responsibility for the construction of a statute, we accord 'great weight and respect to the administrative construction' thereof.... [¶] Deference to administrative interpretations always is 'situational' and depends on 'a complex of factors' ..., but where the agency has special expertise and its decision is carefully considered by senior agency officials, that decision is entitled to correspondingly greater weight...."(*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 436, 2 Cal.Rptr.3d 699, 73 P.3d 554, citations & fn. omitted (*Sharon S.*); see also *Styne v. Stevens* (2001) 26 Cal.4th 42, 53, 109 Cal.Rptr.2d 14, 26 P.3d 343;*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11-15, 78 Cal.Rptr.2d 1, 960 P.2d 1031.)

The Legislature has given the Director of the DIR "plenary authority to promulgate rules to enforce the Labor Code," including "the authority to make regulations governing coverage" under the prevailing wage law. (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 989, 4 Cal.Rptr.2d 837, 824 P.2d 643.) When, as here, the meaning of a statutory term is ambiguous and there is no indication of the Legislature's intent regarding its meaning, this court should defer to the DIR's determination based on its "special expertise" (*Sharon S., supra,* 31 Cal.4th at p. 436, 2 Cal.Rptr.3d 699, 73 P.3d 554), so long as that determination was "carefully considered by senior agency officials"(*ibid.*) and is consistent with the DIR's previous decisions (*Yamaha Corp. of America v. State Bd. of Equalization, supra,* 19 Cal.4th at p. 13, 78 Cal.Rptr.2d 1, 960 P.2d 1031 [courts should not defer to an administrative agency that has taken a "vacillating position" as to the meaning of the statute in question]).

Here, in a 13-page decision signed by DIR Director

Stephen Smith, the DIR concluded that this project was a public work. The DIR's regulations have long stated that surveying work, which the City paid for here, comes within the definition of the term "construction" under former section 1720(a), whether or not it occurs before the actual building process begins, so long as it is "integral to" the project. (Cal.Code Regs., tit. 8, § 16001, subd.(c).) The City does not deny that the work performed by the architect and the project manager-also paid for by the City-was integral to the construction project here. Thus, the DIR's determination that the construction project in question ***957** is a public work was carefully considered by a senior agency official and is consistent with the agency's regulations. Therefore, that decision commands great deference.

Also lending support to my conclusion is California's long-standing policy that prevailing wage laws are to be liberally construed in favor of the worker. (*Walker v. County of Los Angeles* (1961) 55 Cal.2d 626, 634-635, 12 Cal.Rptr. 671, 361 P.2d 247;*McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1589, 18 Cal.Rptr.2d 680;*Union of American Physicians v. Civil Service Com.* (1982) 129 Cal.App.3d 392, 395, 181 Cal.Rptr. 93;*Melendres v. City of Los Angeles* (1974) 40 Cal.App.3d 718, 728, 115 Cal.Rptr. 409;*Alameda County Employees' Assn. v. County of Alameda* (1973) 30 Cal.App.3d 518, 531, 106 Cal.Rptr. 441.) When, as here, a term in the prevailing wage law can plausibly be construed in two ways, one broad and one narrow, and there is no evidence that the Legislature intended the term's narrow meaning, this court should adopt the term's broader meaning. The Legislature's objectives in enacting the prevailing wage law were these: "to protect employees from substandard wages that might be paid if contractors could recruit labor from *****529** distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees." ****914**(*Lusardi Construction Co. v. Aubry, supra,* 1 Cal.4th at p. 987, 4 Cal.Rptr.2d 837, 824 P.2d 643.) These purposes will be implemented by applying the prevailing wage law to the project here.

For the reasons given above, the word "construction" in former section 1720(a) refers to work that, in the Court of Appeal's words, is "integrally connected to the actual building and without which the structure could not be built." That includes the costs of surveying, architectural design and supervision, and project management paid for by the City here.

III

The majority acknowledges the two rules of statutory interpretation I just discussed. As applied here, those rules require a broad reading of the word "construction" in former section 1720(a). Yet the majority construes the term narrowly, holding that it does not encompass the expenses paid for by the City here. The majority's reasons are unpersuasive.

The majority repeatedly characterizes as "preconstruction" costs the expenses the City paid for architectural design and supervision, project management, insurance, surveying, and legal services. (Maj. opn., *ante,* 22 Cal.Rptr.3d at pp. 520, 521, 523, 524, 526, 102 P.3d at pp. 906, 907, 908-909, 911-912.) To label these expenses as "preconstruction" is ***958** misleading. The term implies that all these expenses were incurred *before* the building of the facility began. But, as explained below, that view finds no support in the record.

True, the *surveying* expenses were most likely incurred at the outset of the project, as is customarily the case. But that is not true of the project's management and architectural costs. The SPCA-LA's contract with project manager Pacific Development Services said the latter's duties included "Construction Management of *all phases of construction of the Project.*" (Italics added.) And the SPCA-LA's contract with the architectural firm of Warren Freedenfeld & Associates provided that the firm would "be a representative of and shall advise and consult with the owner *during construction,*" would "visit the site at intervals appropriate to the stage of construction," would "keep the Owner informed of the progress and quality of the Work," and would attempt to "guard the Owner against defects and deficiencies in the Work" as it progressed. (Italics added.) Indeed, the City's September 2000 letter to the DIR (see 22 Cal.Rptr.3d p. 520, 102 P.3d pp. 906-907,*ante*) when the building phase of the project was well under way, said that of the approximately $540,000 of the City's contribution that was budgeted for project management, $100,000 had yet to be spent; and that of the $360,000 of the City's contribution that was budgeted for architectural fees, $40,000 had yet to be

spent. The City's letter also mentioned that smaller portions of the legal and insurance costs had yet to be paid. Thus, the contracts with the project manager and the architect, as well as the City's letter, demonstrate that the City did not pay merely for "preconstruction" costs but also for expenses incurred while the facility was being constructed.

The majority talks at length about an amendment to section 1720(a) that the Legislature enacted in 2000, stating that the term "construction," as used in that section, includes "the design and preconstruction phases of construction." After a ***530** thorough review of the legislative history pertaining to the 2000 amendment, the majority concludes that the Legislature did not intend the amendment to apply retroactively. Right. So what? Retroactivity of the 2000 amendment is not at issue here; therefore, the intent of the 2000 Legislature has no bearing here. What is at issue is the intent of the Legislature back in 1937, when it first used the word "construction" to define public works in former section 1720(a). It is the duty of this court, not the 2000 Legislature, to determine the 1937 Legislature's intent, and the views of the 2000 Legislature on the subject are not controlling. As this court said less than two months ago: "[T]he 'Legislature has no authority to interpret a statute. That is a judicial task. The Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive. But it has no legislative *959 authority simply to say what it *did* mean.'"**915(*McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 473, 20 Cal.Rptr.3d 428, 99 P.3d 1015.)

IV

I would uphold the Court of Appeal's decision that the project here was a public work and thus subject to the prevailing wage law. The majority concludes to the contrary and sees no need to resolve the remaining two issues on which this court granted review: (1) whether the project is a "municipal affair" exempt from the prevailing wage law, and (2) whether the prevailing wage law is a matter of statewide concern that overrides the municipal affair exemption. These are difficult and important questions. I would retain the case to decide them.

Cal.,2004.
City of Long Beach v. Department of Industrial Relations

34 Cal.4th 942, 102 P.3d 904, 22 Cal.Rptr.3d 518, 10 Wage & Hour Cas.2d (BNA) 405, 04 Cal. Daily Op. Serv. 11,142, 2004 Daily Journal D.A.R. 15,029

END OF DOCUMENT

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916)
327-4478

AB 1646

THIRD READING

Bill No: AB 1646
Author: Steinberg (D)
Amended: 8/29/00 in Senate
Vote: 21

SENATE INDUSTRIAL RELATIONS COMMITTEE : 4-2, 7/14/99
AYES: Alarcon, Figueroa, Karnette, Solis
NOES: Haynes, Mountjoy

SENATE JUDICIARY COMMITTEE : 6-3, 8/24/99
AYES: Burton, Escutia, O'Connell, Peace, Sher, Schiff
NOES: Haynes, Morrow, Wright

SENATE APPROPRIATIONS COMMITTEE : Senate Rule 28.8

SENATE FLOOR : 23-15, 8/30/00
AYES: Alarcon, Alpert, Bowen, Burton, Costa, Dunn, Escutia, Figueroa, Hayden, Hughes, Johnston, Karnette, Murray, O'Connell, Ortiz, Perata, Polanco, Schiff, Sher, Solis, Soto, Speier, Vasconcellos
NOES: Brulte, Haynes, Johannessen, Johnson, Kelley, Knight, Leslie, Lewis, McPherson, Monteith, Morrow, Mountjoy, Poochigian, Rainey, Wright

ASSEMBLY FLOOR : 42-31, 8/31/00 - See last page for vote

SUBJECT : Public works: payments

SOURCE : State Building and Construction Trades Council of California

CONTINUED

Page

2

DIGEST : This bill streamlines the procedures for review of a decision to withhold funds from a contractor due to failure to pay prevailing wages on a public works project.

This bill would revise the procedures for challenging a decision to withhold funds from a contractor due to the contractor's failure to pay a prevailing wage on a public works contract. Instead of providing a right to a court challenge by the contractor, this bill would provide any affected contractor or subcontractor the right to a hearing before an administrative law judge on the validity of the order and a limited court review of that administrative decision.

This bill would also make a contractor and subcontractor expressly jointly and severally liable for all amounts due (including underpaid wages and penalties) pursuant to a final order of the Labor Commissioner for a violation of the prevailing wage law.

This bill is intended to reduce the current layers of litigation by providing for an administrative hearing and a mandamus action, but no right to a de novo trial. The sponsor asserts that the revision makes the process more streamlined and efficient while protecting the due process rights of all parties.

Senate Floor Amendments of 8/29/00 technically correct a Legislative Counsel drafting error.

Senate Floor Amendments of 8/25/00 change the author from the Assembly Labor Committee to Assemblyman Steinberg and provide further due process procedures of an administrative decision to impose penalty assessments for a failure to pay prevailing wages, to establish an informal settlement procedure, to impose liquidated damages, and to provide notice to bonding companies.

ANALYSIS :

1. Existing law provides for the prevailing wage law and sets forth procedures for withholding funds from a contractor in cases of a violation. Existing law provides 90 days for a contractor, or a subcontractor to

AB 1646
Page

3

whom the rights have been assigned, to file suit for recovery of any money withheld. If suit is not brought

within 90 days, the withheld funds are disbursed by the commissioner to the underpaid workers.

Existing law, Section 1771.7, also allows a contractor to appeal an enforcement action by a local public entity to the Director of Industrial Relations. Any such appeal, however, would waive the contractor's right to bring a court action on the same issue. By regulation, a subcontractor may also request an administrative hearing on the withholding.

This bill would repeal Section 1771.7 and redraft and revise the procedures for contesting a withholding action. It would provide that:

A. An affected contractor or subcontractor may request a review of a civil wage and penalty assessment by filing a written request for a hearing within 30 days of being served with the assessment. The assessment would become final and shall constitute a verified claim for wages found due and payable if a hearing request is not filed within that 30-day period.

B. Until January 1, 2005, authorize the Director of Industrial Relations to initiate an administrative appellate hearing by a qualified hearing officer. The director would issue the decision and possible reconsideration actions. After these provisions sunset, an administrative law judge under the jurisdiction of the director shall have such authority to conduct hearings and issue decisions and reconsideration actions.

C. The cited party would have the opportunity to review the commissioner's evidence within 20 days of the receipt of the request for hearing. Similar to existing law, it would be the contractor's or subcontractor's burden to show the per diem wages paid to its employees and the hours worked by its employees.

D. Impose liquidated damages on a contractor in an amount

equal to all unpaid wages due if the wages are not paid within 60 days after the issuance of an assessment decision. The damages would be distributed to affected employees.

E. The affected contractor or subcontractor may seek judicial review of this administrative decision by

filing a petition for a writ of mandamus under Code of Civil Procedure Section 1094.5 within 45 days of the service of the decision. Under that provision, the ALJ's decision will be upheld unless there was a prejudicial abuse of discretion established by a showing that the ALJ did not proceed in the manner required by law, or that his or her order is not supported by the findings, or that the findings are not supported by substantial evidence in light of the whole record.

F. This administrative hearing and mandamus action would be the exclusive methods for review of a commissioner's assessment or the decision of an awarding body to withhold contract payment; there would not be a right to a de novo trial.

2. Existing law, Labor Code Section 1775(d), provides that "the contractor and subcontractor shall be jointly and severally liable in the enforcement action for any wages due," and specifies that the contractor is liable for collection only after enforcement of all reasonable remedies against the subcontractor has been exhausted. Section 1775(b) makes a prime contractor liable for penalties for a subcontractor's violation of the law when the contractor either knows of the subcontractor's violation or fails to follow specified procedures to require the subcontractor to comply with the prevailing wage law and to monitor compliance.

This bill would expressly hold a contractor and a subcontractor jointly and severally liable for all amounts due (including penalties) pursuant to a final assessment of the commissioner or a judgment thereon. Like existing law, collection against the contractor could ensue only upon the exhaustion of all reasonable remedies against the violating subcontractor. Similarly,

a prime contractor would not be liable for the subcontractor's penalties unless the prime contractor knew of its subcontractor's failure to pay prevailing wages or failed to comply with the procedures to require and monitor the subcontractor's compliance.

3. Other provisions would provide that:

A. An awarding body, that knows of any suspected prevailing wage violation must report the violation to the Labor Commissioner. The DLSE would in turn be required to notify the contractor within 15 days of

the DLSE receiving a complaint that a subcontractor on the project is violating the law.

B. A violation may be enforced by the awarding body or by the Labor Commissioner after investigation by issuance of a civil wage and penalty assessment to the violating contractor or subcontractor, or both, setting forth the nature of the violation and the wages and penalties due. The assessment shall also advise the cited party of the procedure for obtaining review of the assessment. (As in existing law, a civil penalty of up to $50 per employee per day may be assessed.)

C. Any assessment must be served no later than 180 days after the filing of a valid notice of completion for the public works project in the county in which the project is located, or no later than 180 days after acceptance of the public work, whichever is later.

D. Establish an informal settlement conference (e.g., telephone conference) process without formal proceedings before the expiration of a 60 day period within which a contractor can appeal an assessment.

E. Require the Labor Commissioner to try to ascertain the identities of wage bonding companies and to serve a copy of the assessment at the same time service is made to the contractor, subcontractor, or awarding body. No bonding company would be relieved of its responsibilities due to failure to receive such notice.

F. An awarding body shall not disburse the withheld funds until receipt of a final decision by the Labor Commissioner that is no longer subject to judicial review. If amounts are due, funds shall be transmitted to the commissioner for disbursal.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: Yes

SUPPORT : (Verified 8/15/00)

State Building and Construction Trades Council of California (source)
California Chapters of the National Electrical Contractors Association

Sheet Metal and Air Conditioning Contractors, National Association
California Legislative Conference of the Plumbing, Heating, and Piping Industry
Western Wall and Ceiling Contractors Association
Air Conditioning and Refrigeration Contractors Association
California District Council of Iron Workers
California Labor Federation, AFL-CIO
California-Nevada Conference of Operating Engineers
California Professional Firefighters
California State Association of Electrical Workers
California State Pipe Trades Council
Western States Council of Sheet Metal Workers

ARGUMENTS IN SUPPORT : Proponents argue that this bill will make the administrative process easier for both workers and contractors: more efficient and less litigious. Under the current statutory scheme, cases can drag out for four years or more, thus depriving the underpaid worker of her or her fair wages for that extended time.

Supporters state this bill will cure a defect in current law which a federal court found to be an unconstitutional violation of subcontractors' due process rights. The Federal 9th Circuit Court of Appeals, in the case of G&G Fire Sprinklers, Inc., v. Bradshaw [156 Fed 3d 893 (1998)] determined that the Due Process clause requires a hearing

prior to the withholding of funds, or promptly thereafter. The existing statutory scheme allows the commissioner to compel the withholding of funds from a contractor based on a violation of prevailing wages without an administrative hearing either before or after the withholding occurs. Instead, existing statutes require the contractor to file suit to reclaim funds which they believe have been wrongfully withheld. The court held that the remedy of a lawsuit does not satisfy the Due Process requirements for a prompt hearing.

In response to the G&G case, the Labor Commissioner has adopted regulations to allow for an administrative hearing of a claim by a contractor that funds have been wrongfully withheld. Under the existing statute, a contractor who lost before the commissioner could file a suit and receive a new trial before a court.

The bill was originally introduced to address the G&G decision. However, even though that decision has been vacated, the sponsor of this bill wishes to proceed with the proposed revisions in order to reduce the current

layers of litigation.

ASSEMBLY FLOOR :
AYES: Alquist, Aroner, Bock, Calderon, Cardenas, Cardoza, Cedillo, Corbett, Davis, Ducheny, Dutra, Firebaugh, Florez, Gallegos, Havice, Honda, Jackson, Keeley, Knox, Kuehl, Lempert, Longville, Lowenthal, Migden, Nakano, Papan, Reyes, Romero, Scott, Shelley, Steinberg, Strom-Martin, Thomson, Torlakson, Villaraigosa, Vincent, Washington, Wayne, Wesson, Wiggins, Wildman, Hertzberg
NOES: Aanestad, Ackerman, Ashburn, Baldwin, Bates, Battin, Baugh, Brewer, Briggs, Campbell, Cox, Cunneen, Dickerson, Granlund, House, Kaloogian, Leach, Leonard, Maddox, Maldonado, Margett, McClintock, Olberg, Oller, Robert Pacheco, Rod Pacheco, Pescetti, Runner, Strickland, Thompson, Zettel

NC:sl 9/19/00 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

□

**** END ****

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916) 327-4478

SB 975

UNFINISHED BUSINESS

Bill No: SB 975
Author: Alarcon (D)
Amended: 8/30/01
Vote: 21

SENATE GOVERNMENTAL ORG. COMMITTEE : 8-4, 4/24/01
AYES: Vincent, Chesbro, Dunn, Karnette, Machado, O'Connell, Perata, Soto
NOES: Johnson, Brulte, Johannessen, Knight

SENATE FLOOR : 24-12, 4/26/01
AYES: Alarcon, Alpert, Bowen, Burton, Costa, Dunn, Escutia, Figueroa, Karnette, Kuehl, Machado, Murray, O'Connell, Ortiz, Perata, Polanco, Romero, Scott, Sher, Soto, Speier, Torlakson, Vasconcellos, Vincent
NOES: Ackerman, Battin, Brulte, Johannessen, Johnson, Knight, Margett, McClintock, Monteith, Morrow, Oller, Poochigian

ASSEMBLY FLOOR : 51-29, 9/4/01 - See last page for vote

SUBJECT : California Infrastructure and Economic Development Bank

SOURCE : State Building and Construction Trades Council

DIGEST : This bill defines "public funds" used in "public projects" and states legislative intent that projects financed through Industrial Development Bonds issued by the California Infrastructure and Economic Development Bank must comply with existing laws pertaining to prevailing

CONTINUED

wages.

Assembly amendments :

1. Exempt specified types of affordable housing, private residential housing, private development projects, and state manufacturing tax credits from the definition of "paid for in whole or in part out of public funds."

2. Exempt qualified residential projects, low income housing projects, and single family residential projects financed before December 31, 2003, unless another statute, ordinance or regulation applies this chapter to those specific projects.

3. Exempt de minimus subsidies, or reimbursements for costs that would normally be paid by the public, by a state or political subdivision to a private developer.

ANALYSIS : Existing law, the Bergeson-Peace Infrastructure and Economic Development Bank Act, establishes an Infrastructure Bank for the purpose of funding specified types of infrastructure projects by qualified public/private entities. (The Governor and Legislature provided an initial 450 million capitalization to the Bank in 1998 and increased the bank's funding by an additional $425 million in the 1999-00 budget year.) Pursuant to the act's provisions, the legislative body of a local agency sponsor is required to make specified findings by resolution, prior to submitting a project to the Infrastructure Bank for consideration. The Infrastructure Bank may do the following, in addition to other enumerated duties: (a) issue bonds; (b) make loans; (c) make guarantees, credit enhancements, grants, contributions, or other financial enhancements; and, (d) issue both taxable and tax-exempt revenue bonds. The act requires public works financed by the Infrastructure Bank to comply with certain laws applicable to payment of "prevailing wages" on public works.

Existing law establishes, within the State Treasurer's Office, the California Industrial Development Financing Advisory Commission (CIDFAC) to provide technical assistance to city and county authorities that issue

Industrial Development Bonds (IDBs). CIDFAC independently reviews IDB applications for compliance with federal and

state requirements and approves the sale of IDBs by local authorities. The program is intended to benefit economically distressed areas and to provide an alternative method of financing capital outlay that will increase employment or otherwise contribute to economic development.

This bill:

1. Declares the intent of the Legislature that projects financed through CIEDB, including projects financed through IDBs, comply with existing labor law pertaining to prevailing wages.

2. Includes "installation" in the existing definition of "public works."

3. Defines "public funds" used in public works as the following:

   A. Payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.

   B. Construction work performed by a state or political subdivision in execution of a project.

   C. Transfer of an asset of value for less than fair market price.

   D. Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations normally required in the execution of a contract that are paid, reduced, charged at less than fair market value, waived or forgiven.

   E. Repayment of money and credits applied on a contingent basis.

1. States that if the state or political subdivision provides a direct or indirect subsidy to a private developer or reimburses a private developer for costs

that would normally be paid by the state or political subdivision, then the project is not subject to the requirements of this chapter if the costs or subsidy are de minimus in the context of the overall project.

2. Exempts the following from the definition of "paid for in whole or in part out of public funds" as proposed in

this bill:

A. Affordable housing for low- or moderate-income persons either financed solely through the Low- and Moderate-Income Housing Fund established pursuant to current law or financed through a combination of the Fund and private funds.

B. Qualified residential projects financed on or before December 31, 2003, that are in whole or in part financed through bonds issued by the California Debt Limit Allocation Committee in the Office of the State Treasurer, unless another statute, ordinance, or regulation, applies this chapter to the qualified residential project.

C. Single family residential projects financed on or before December 31, 2003, that are financed in whole or in part through qualified mortgage revenue bonds, qualified veterans' mortgage bonds, and mortgage revenue certificates issued under the Qualified Mortgage Credit Certificate Program in the Office of the State Treasurer, unless another statute, ordinance, or regulation, applies this chapter to the single family residential project.

D. Low income housing projects that are allocated federal and state low income housing tax credits on or before December 31, 2003 by the Office of the State Treasurer, unless another statute, ordinance, or regulation, applies this chapter to the low income housing project.

E. Private residential housing on private land that is not built pursuant an agreement with a state agency, a redevelopment agency, or a local public housing authority.

F. Private development projects built on private property that are required by a state or political subdivision to construct improvements, if the following two conditions are met:

I. The state or political subdivision contributes no more money, or the equivalent of money, to the overall project than that which is required to perform the public work of improvement.

II. The state or political subdivision maintains no proprietary interest in the overall project.

1. State manufacturers' investment tax credits as allowed under current law for electronic, semiconductor, equipment, commercial space satellite, computer software, specified pharmaceutical, and other manufacturing.

Comments

According to the Assembly Third Reading analysis, this bill closes a loophole in law that exempts projects financed through IDBs issued by CIEDB from prevailing wage provisions of current law. The California Industrial Development Financing Act requires all other state and local agencies that issue IDBs to comply with prevailing wage provisions.

This bill establishes a definition of "public funds" that conforms to several precedential coverage decisions made by the Department of Industrial Relations. These coverage decisions define payment by land, reimbursement plans, installation, grants, waiver of fees, and other types of public subsidy as public funds. The definition of public funds in this bill seeks to remove ambiguity regarding the definition of public subsidy of development projects.

FISCAL EFFECT : Appropriation: No Fiscal Com.: No Local: No

SUPPORT : (Verified 9/5/01)

State Building and Construction Trades Council (source)
State Council of Carpenters
State Treasurer
International Brotherhood of Electrical Workers Local Union 340
Laborers' International Union of North America
Napa-Solano Counties Building and Construction Trades Council
Santa Clara and San Benito Counties Building and Construction Trades Council
Southern California Pipe Trades District Council 16
United Association of Plumbers and Pipefitters Local #230

OPPOSITION : (Verified 9/5/01)

GioSoils Consultants, Inc.

The Lee Group, Inc.
California Association of Enterprise Zones
California Association for Local Economic Development
California Association of Sanitation Agencies
California Chamber of Commerce
California Coalition for Rural Housing
California Housing Partnership Corporation
California Municipal Utilities Association
California State Association of Counties
California Taxpayers' Association
Cities of Bakersfield, Barstow, Blythe, Burbank, Chula Vista, Concord, Emeryville, Eureka, Fountain Valley, Fremont, Fullerton - Office of the City Council, Grover Beach, Hemet, Hesperia, Huntington Beach, Lakewood, La Quinta, Lawndale, Loma Linda, Lompoc, Moreno Valley, Norwalk, Rancho Mirage, Redding, Rosemead, San Clemente, Signal Hill, Thousand Oaks, Tulare, Visalia
County of San Bernardino
Coachella Valley Housing Coalition
Del Webb's Sun City Palm Desert
Economic Development Corporation
Innovative Resort Communities
League of California Cities
Longs Drug Stores
Non-Profit Housing Association of Northern California
Rural Communities Housing Development Corporation
San Diego Housing Federation

San Joaquin Housing Authority
Self-Help Enterprises
71 private Businesses
21 individuals

ARGUMENTS IN SUPPORT : Supporters of this bill note, for example, the discrepancy under existing law between a monetary transfer of funds to a developer that would trigger prevailing wage requirements and tax forgiveness or a fee waiver for an equivalent amount of funds that would not trigger prevailing wage requirements.

ARGUMENTS IN OPPOSITION : Opposition to this bill cites potential increased costs to public works projects financed with public funds as defined by this bill.

ASSEMBLY FLOOR :
AYES: Alquist, Aroner, Calderon, Canciamilla, Cardenas, Cardoza, Cedillo, Chan, Chavez, Chu, Cohn, Corbett, Correa, Diaz, Dutra, Firebaugh, Florez, Frommer, Goldberg, Havice, Horton, Jackson, Keeley, Kehoe, Koretz, Liu, Longville, Lowenthal, Maddox, Matthews, Migden,

Nakano, Nation, Negrete McLeod, Oropeza, Papan, Pavley, Reyes, Salinas, Shelley, Simitian, Steinberg, Strom-Martin, Thomson, Vargas, Washington, Wayne, Wesson, Wiggins, Wright, Hertzberg
NOES: Aanestad, Ashburn, Bates, Bogh, Briggs, Bill Campbell, John Campbell, Cogdill, Cox, Daucher, Dickerson, Harman, Hollingsworth, Kelley, La Suer, Leach, Leonard, Leslie, Maldonado, Mountjoy, Robert Pacheco, Rod Pacheco, Pescetti, Richman, Runner, Strickland, Wyland, Wyman, Zettel

TSM:sl 9/5/01 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

A. E. NICKERSON, Appellant, v. THE COUNTY OF SAN BERNARDINO et al., Respondents.
Cal. 1918.

A. E. NICKERSON, Appellant,
v.
THE COUNTY OF SAN BERNARDINO et al., Respondents.

Supreme Court of California.
L. A. No. 4610.

December 31, 1918.

COUNTIES-PURCHASE OF LAND FOR HOSPITAL SITE-ACTION BY TAXPAYER FOR RECOVERY-EVIDENCE-EXCESSIVE ACREAGE AND PRICE- PROOF PROPERLY EXCLUDED.
In an action by a taxpayer against a county, certain of its officers, and certain land owners to recover from the defendants other than the county, but for the county's benefit, money expended and paid for the purchase of lands for a hospital site, an offer on the part of the plaintiff to prove by one of the supervisors who had voted for the purchase that the greater portion of the land was purchased for a county farm, that the amount of land purchased greatly exceeded in acreage the amount of land necessary for hospital grounds, and that the money paid therefor was grossly in excess of its value, was properly excluded.

ID.-MUNICIPAL BODY-LEGISLATIVE ACTION-REVIEW BY COURTS.
When the legislature has committed to a municipal body the power to legislate on given subjects, or has committed to it judgment or discretion as to matters upon which it is authorized to act, courts of equity have no power to interfere with such a body in the exercise of its legislative or discretionary functions.

ID.-PURCHASE OF HOSPITAL SITE-LEGISLATIVE POWER.
The power conferred on the board of supervisors by law relative to the purchase of land for a hospital site, the erection of hospital buildings and their equipment, is both legislative and discretionary.

ID.-NOTICE OF INTENTION TO PURCHASE-PUBLICATION-JURISDICTIONAL PREREQUISITE.
The publication of a proper notice of intention to purchase land for a hospital site by the board of supervisors is a jurisdictional prerequisite to the power of the board to act in the matter.

ID.-NAME OF PERSON FROM WHOM PROPERTY TO BE PURCHASED-TENANTS IN COMMON- SUFFICIENCY OF NOTICE.
Under subdivision 6 of section 4041 of the Political Code, which requires a notice of intention to state among other things the name of the person from whom the purchase is to be made, a notice is not fatally defective because of the omission to mention the name of the wife, where the land was owned by the husband and wife as tenants in common, since the code section does not require a statement of the names of the owners of the property.

ID.-NAME OF DECEASED PERSON-PENDENCY OF ADMINISTRATION PROCEEDINGS-VALID NOTICE.
The statement in such notice that the name of the person from whom the property was to be purchased was a deceased person, is not fatal, where the property was in course of administration.

ID.-STATEMENT OF PRICE.
Under the provision of the code requiring the published notice to state the price to be paid for the property, the use of the term "more or less" in stating the acreage is not fatal.

APPEAL from a judgment of the Superior Court of San Bernardino County. J. W. Curtis, Judge. Affirmed.

The facts are stated in the opinion of the court.

*519 Goodcell & Goodcell and Cecil H. Phillips, for Appellant.
T. W. Duckworth, John L. Campbell, and Ralph E. Swing, for Respondents.
LORIGAN, J.
The plaintiff as a taxpayer of San Bernardino County, brought this action against said county and the other defendants, consisting of three members of its board of supervisors, its county treasurer and county auditor, together with the owners of certain lands, the purchase of which is involved in this suit.

It appears that on September 10, 1914, the board of supervisors of San Bernardino County authorized and called a special election and submitted to the voters of the county the question of incurring a bonded indebtedness in the sum of one hundred and fifty thousand dollars, the money raised thereby to be expended "for purchasing necessary county hospital grounds, to construct thereon necessary county hospital buildings, and equip and furnish the same with necessary appliances, furniture and hospital equipment." The bonded indebtedness was favorably voted, bonds were issued and sold by the board of supervisors, the proceeds placed in the hospital improvement fund, and thereupon the said board called for the submission to it of sealed proposals for furnishing tracts of land for a hospital site. In response to said call C. J. Anderson, one of the defendants, submitted a proposal for the sale to the county of a tract of land containing 93 1/2 acres, the offer stating that the entire tract consisted of several tracts of land owned by said Anderson and several others named in the proposal and in whose behalf the offer was made. The price was stated as $645 per acre.

*520 On June 2, 1915, the board of supervisors, by resolution, declared its intention to purchase the said land and thereupon published a notice of intention to do so. Thereafter, and in due course, it passed a resolution purporting to consummate the purchase of the land at the price stated, which price was to be paid when a favorable report on the title to the property was made by the district attorney. At the same time it ordered the money to be placed in escrow to pay for the land.

It is then alleged in the complaint that the land so purchased contains more than 60 acres that are not necessary for necessary hospital grounds and that the board purchased this tract of land of 93 1/2 acres for the purpose of using all of the portion thereof not necessary for hospital grounds for a county farm; that it was the intention of the members of the board of supervisors and those who voted for the purchase of said tract to purchase it for necessary hospital grounds and for use by said county as a county farm; that 30 acres is all the land necessary for necessary county hospital grounds, and that the amount of money which would be left in the treasury after the purchase of said tract of land exceeding 30 acres will be wholly inadequate and insufficient to carry out and fulfill the purpose for which said bonds were issued and sold. It was further alleged by plaintiff that notice was served on the defendants, the treasurer and auditor of the county, that the purchase of said land was illegal and that neither of them should authorize or pay any money on account thereof and that each, notwithstanding said notice, paid the sum of $46,968.90 on account of the purchase of said land; that no claim was ever filed with the board of supervisors in the manner required by law for the payment of said money, nor was its payment authorized or allowed by the board of supervisors after the presentation to them of a claim therefor; that unless restrained from so doing said auditor and treasurer intend to pay over the balance of $13,338.60 for the purchase of said property. It is also alleged that $645 an acre, agreed to be paid as the purchase price of said land, is greatly in excess of its value, and that at the time this action was commenced deeds to the land in favor of the county had been made and delivered to it by the various owners of the tracts of land purchased except one. This one consisted of the property of the *521 J. A. Anderson estate. A deed to the county of that land had been executed by all the heirs of said estate except one, whose whereabouts was unknown, and proceedings were then being taken in the estate of said J. A. Anderson to have a probate sale of said Anderson tract made to the county, thus vesting the title in the county against the absent heir; that it was this Anderson tract for which the $13,338.60 was still to be paid from the hospital fund. The prayer of the complaint was that plaintiff recover from the defendants other than the county of San Bernardino, but for its benefit, the moneys expended and paid for the purchase of the various tracts of land of which conveyances were made to the county; for a decree restraining the payment of any money for the Anderson tract, and for general relief.

The defendants, in their answer, denied all the material allegations of the complaint upon which plaintiff asserted a right of action against any of them, and denied that the land purchased was not necessary for necessary hospital grounds; they averred that a tract of land of 28.5 acres, theretofore used by the county for hospital grounds, was inadequate, and that at the time of the purchase of the land in question the board of supervisors found and determined that the amount of land purchased was necessary for necessary county hospital grounds, and denied that the land purchased, or any part of it, was purchased to provide the county with a county farm, or for any other purpose than as specified in the proceedings authorizing its purchase.

On the issues joined the cause went to trial, which resulted in a motion of defendants for a nonsuit being granted and a judgment of nonsuit accordingly entered, from which plaintiff appeals.

Appellant makes several points for a reversal which, however, may be considered under two general heads which are, first, that the court erred in refusing to allow him to introduce certain testimony; and, secondly, in refusing to sustain appellant in his attacks upon the validity of certain proceedings of the board of supervisors and the action of the other county officers defendant.

As to the claim of error in rejecting certain testimony. Appellant called as a witness one of the members of the board of supervisors, who had voted for the purchase of the land in question, and sought to prove by him that the greater *522 portion of said land was purchased for a county farm; that the amount of land purchased greatly exceeded in acreage the amount of land necessary for necessary county hospital grounds, and that the money paid for the land was grossly in excess of its value. The court sustained objections to this line of testimony.

It is not necessary to enter into any extended discussion of this assigned error. The ruling of the court was clearly within a well-recognized principle of law controlling the power of courts with respect to the review of proceedings of municipal bodies acting in their legislative or discretionary capacities. When the legislature has committed to a municipal body the power to legislate on given subjects or has committed to it judgment or discretion as to matters upon which it is authorized to act, courts of equity have no power to interfere with such a body in the exercise of its legislative or discretionary functions. That the power conferred on the board of supervisors by law relative to the purchase of land for a hospital site, the erection of hospital buildings and their equipment, was both legislative and discretionary in character is not open to dispute. The law cast upon the board the duty of determining whether in its judgment the public necessity required that the county should acquire a new county hospital and conferred upon it the power necessary to accomplish this if it should so determine. The money to do so was, it is true, to be furnished through the action of the voters of the county, but it was left to the board to determine how much money would be needed to acquire a site and construct the hospital buildings and to determine the quantity of land necessary for such site; to call for proposals of land from which to make a selection; to make the selection and determine the price which should he paid for it, and to adopt and approve the style and extent of the buildings to be erected upon the proposed site. All these matters were committed by the statute solely to the board, and their determination involved both legislative action and the exercise of discretion, neither of which was subject to review or control of any court. Whether, in the exercise of legislative powers, a board acts wisely or unwisely is no concern of the courts. They cannot enter the board room and substitute their judgment for that of the board nor interfere at all with its action unless the board is exceeding its legislative powers, or its judgment or discretion is being fraudulently*523 or corruptly exercised. This whole subject is considered in the case of *Hopping v. City of Richmond*, 170 Cal. 605, [150 Pac. 977], and reference is made to this authority for further discussion of the subject.

There is no fraudulent or corrupt conduct asserted against the board of supervisors in making the purchase of the hospital site. All the allegation respecting it is that the quantity of land purchased is more than is necessary for necessary hospital grounds; that the purchase of the entire tract was made to provide both necessary hospital grounds and land to be used as a county farm; and that it was the intention of the board of supervisors and its purpose, that all that portion of the entire tract not necessary for county hospital grounds was to be used as a county farm or for other purposes. This is not an allegation of fraud or corruption in legislative action or abuse of discretion respecting the purchase. What is in effect alleged is that all the land purchased was purchased with an intention of using that portion of it that was not necessary for a hospital site for a county farm and that 60 acres was all that was necessary for a hospital site; in short, that the board purchased more land than was necessary for a hospital site with the intention of devoting the surplus to a county farm. Now, it appears from the complaint itself that as to this land purchased the board, by its resolution, declared that this purchase of the entire tract was necessary for county hospital grounds. The truth of this resolution plaintiff sought to attack by the testimony of a member of the board of supervisors which passed it, and his complaint is that he was not permitted to do so. We think, however, the court properly refused to permit the witness to do so. The resolution passed was binding on the board and

represented its official action on the subject embraced within it, and the simple secret intention of a member of the board or his extraneous expression concerning the use to which, in the future, some part of the land purchased might be devoted will not be permitted to impeach the integrity of the official intention and purpose of the board disclosed by its records. There is nothing in the acreage of the tract purchased itself to warrant the slightest inference that it was in excess of the quantity necessary for a hospital site. As such public institutions are to be used by a county indefinitely, the board in providing for them must consider not only the present, *524 but the future needs of the county, arising from the certainty of always having the sick and afflicted to care for with the added certainty that as the population of the county increases this public duty will increase with it. No restriction is placed on the board by the statute as to the quantity of land it shall purchase or the character of the buildings it shall erect for county hospital purposes. That matter is committed entirely to the judgment and discretion of the board, and when, in the exercise of such judgment and discretion, it determines that a certain quantity of land is necessary for a site its conclusion must prevail and is not subject to review or control of the courts.

As to the points made by appellant concerning the validity of certain proceedings on the part of the board of supervisors and the action of the treasurer and auditor of the county. Starting with the proposition which is, of course, true, that the publication of a proper notice of intention to purchase land for a hospital site by the board of supervisors was a jurisdictional prerequisite to the power of the board to act in the matter (*Winn v. Shaw*, 87 Cal. 631, [25 Pac. 968]), it is contended by appellant that the public notice of intention to purchase given in this matter was defective in some essential particulars. Subdivision 6 of section 4041 of the Political Code requires such notice of intention to state among other things the price to be paid for the property and the name of the person from whom the purchase is to be made, and, it is claimed by appellant, that as to these matters they were not contained in the notice. While counsel makes this broad claim, it is evident on examination of the record that what he really claims is not that these matters were entirely omitted from the notice, but only that they were defectively stated. But in this we do not agree with him. The purpose of the law in requiring these matters and others to be stated in the notice is to give the taxpayers, upon whose property the burden of taxation for the future payment of the debt entailed for the purchase of the property would fall, full information of what was intended to be done in order that they might determine whether they would or would not attend the meeting of the board when the time for the consummation of the purchase was set and protest or object to the purchase.

Now, as to the points of appellant. As a matter of fact the notice contained the names of the persons from whom the *525 board of supervisors declared its intention to purchase as contained in the proposal to sell made by C. J. Anderson to the board in his own and on behalf of the others agreeing to the terms of that proposal earlier referred to in this opinion. It appears, however, that as to one of said tracts offered it was owned as tenants in common by Frank Parmenter and his wife, and the name of the husband was alone mentioned as the party from whom the tract was to be purchased as it was alone mentioned in the proposal to sell. Appellant insists that a failure to mention the name of the wife rendered the notice fatally defective. But this amounted only to a failure to state in the notice the name of one of the owners of this particular tract, and the section does not require a statement of the names of the *owners* of the property proposed to be purchased to be stated in the notice, but only the names of parties from whom it is its intention to purchase. *Non constat* but that the husband who had offered the common property for sale had arranged to give good title before making the offer to sell. Anyhow, he was the party who offered the property for sale, and was the party properly to be mentioned from whom the board intended to purchase this particular tract. If, when it came to consummating the sale, Parmenter could not give a good title, that was another matter, but it could not affect the validity of the published notice. Considering, too, the nature of the title of the Parmenters, the mention of him as the person from whom the purchase of that tract was to be made would, in any event, fulfill the purpose of the statute. The notice contained a description of all the property intended to be purchased, including the tract owned by the Parmenters in common. No fraud or imposition could under such circumstances possibly be practiced on the taxpayers of the county by the omission of the name of one cotenant in the tenancy. It does not approach a case where there is the omission to at all mention the name of a person from whom a particular tract is to be purchased. It may be that in such a case a description of the property by governmental subdivisions or courses and distances,

without giving the name of the owner or person from whom its purchase was to be made, would not give information to the taxpayer of the exact location of the property as readily or accurately as if in connection with the description the name of the party from whom the purchase is to be made, who is *526 generally the owner, was mentioned in connection with the description. Here, however, the notice subserved just this purpose. It gave a description of the property and the name of the party from whom it was to be purchased, and who was in fact one of the owners. It gave the taxpayer all the information necessary for his guidance in determining what action he should take on the contemplated purchase of the Parmenter tract with the others, and, hence, constituted a fair and substantial compliance with the statute.

The notice of intention to purchase also contained the name of R. J. Anderson as one of the parties from whom a tract, alleged to be owned by him and which was offered to the board with the other tracts, was to be purchased. It appears that R. J. Anderson was dead at the time and that his estate was unsettled. The property stood on the records as belonging to R. J. Anderson when he died, and was property of his estate when it was offered by his representatives through C. J. Anderson, who offered all the tracts. The only omission there was in the notice as to this property was an omission to say that the property contemplated to be purchased was property of the estate of R. J. Anderson. No taxpayer could be misled by this omission. He had sufficient information from its being designated as property of R. J. Anderson to find out all about the particular owners of it if he thought that matter important. In this, as with respect to the Parmenters, we think there was a substantial compliance with the statute, and that the omissions complained of were not in any respect fatal to the validity of the notice.

It is further insisted that the notice contained no statement of the price to be paid for the property to be purchased. This is based on the fact that the term "more or less" is used in stating the aggregate acreage of the tract to be purchased. This contention is extremely critical. It is universally held that the use of the term "more or less" in notices of a statement of acreage of real property does not render the description uncertain. This being true, add the amount to be purchased being stated at 93 1/2 acres "more or less," and the price stated at $645 per acre, mere computation on the part of the taxpayer would give him reasonable and satisfactory information as to the price to be paid for the property.

Lastly, it is claimed by appellant that the conduct of the auditor and treasurer, the one in auditing, the other in paying,*527 the several warrants on the hospital improvement fund in the county treasury, was illegal, subjecting each to liability for restoration of the money to the fund. In this regard it is insisted that sections 4074, 4075 and 4076 of the Political Code, which require all claims against the county to be presented to the board of supervisors for allowance and payment applied to the purchase price to be paid to the several owners of the land purchased. In the proceedings for the purchase of the land the board of supervisors had made an order directing payment of the price of the land to be made to the owners out of the hospital improvement fund as soon as deeds thereto were ready for delivery to the county, and when the deeds were delivered the auditor and treasurer paid over the purchase price thereof without the presentation of any claims to the board of supervisors, or further order for their payment, other than the general one above referred to. Without discussing the relevancy of the sections quoted to claims of this character it is sufficient for present purposes to say that appellant is not in a position to raise the point he makes. No possible injury to him or to any taxpayer arose or could arise from the payments being made as they were. The county got the land it purchased, and it paid the owners the prices it had agreed to pay for it, and it is immaterial now whether there was a strict compliance with the statute in the method of payment or not. Any deviation from a prescribed method under the circumstances was merely an irregularity and harmless.

The judgment appealed from is affirmed.

Wilbur, J., and Melvin, J., concurred.
Cal. 1918.
Nickerson v. San Bernardino County
179 Cal. 518, 177 P. 465

END OF DOCUMENT

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF ADMINISTRATION
Office of the Director – Legal Unit
320 W. Fourth Street, Suite 600
Los Angeles, CA 90013

Arnold Schw

Tel. No.: (213) 576-7725
Fax: (213) 576-7735

19 November 2007

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth St., Suite 300
Sacramento, CA 95814

Re: Test Claim by City of Newport Beach (Prevailing Wages)
No: 03-TC-13

Dear Ms. Higashi:

Test Claimant's response to the Draft Analysis determination that unspecific changes of the California Prevailing Wage Law ("CPWL") do not constitute a state mandate because there is no evidence of a requirement to engage in construction or to contract out for the construction work was simply to claim that the PCC ("PCC") requires local governments to contract projects under certain circumstance. Test Claimant would have the Commission believe the PCC applies so broadly as to cover its general and unspecific Test Claim in its entirety. However, the PCC does not apply as extensively as Test Claimant would like. The requirements in the PCC do not apply to chartered cities, such as Test Claimant, unless the city chooses to be covered; the PCC does not apply to all expenditures of public funds for construction; the PCC does not necessarily apply to any project since a city can opt out on a project by project basis. Once all of the clearly inapplicable aspects of this Test Claim are shorn away, there is very little this Test Claim actually covers and that small amount, for the reasons described below, does not fall into the classification of a mandate.

First, Test Claimant overstates the reach of the PCC as it applies to cities. Test Claimant cites sections throughout the PCC that apply to community college districts, local school districts, and counties among a menagerie of other local entities with different rules for each. (Newport Beach Comments on Draft Staff Analysis, dated November 7, 2006 at pgs.2, 3 and F3.) The rules for Community College Districts are different from the rules for the various sizes of counties, to use an example noted in the Test Claimant's response to the Draft. (Pub. Contract Code §§ 20650, 20120 *et seq.*, § 20150 *et seq.* See, Comments on Draft Staff Analysis at pg 3.) Here the Test Claimant is a city, and has standing to bring test claims only on the limited issues facing cities.[1] Therefore the only

[1] The Commission lacks jurisdiction and thus should not consider these additional types of entities. Gov. Code, § 175221 and 17522 (a); Cal. Code Regs., tit. 2, § 1183 (h) and (i).

portions of the PCC relevant in this claim are those dictating contracting by cities, specifically Article 4. (Pub. Contract Code §§ 20160 – 20175.2.)

As Test Claimant seems to acknowledge, chartered cities are able to elect not to be bound by the PCC in their charter. (Pub. Contract Code § 1100.7 see Comments on Draft Staff Analysis at p 4.) Thus, a chartered city's decision to be bound by the PCC is voluntary; and the draft analysis's conclusion would apply. For cities such as Newport Beach, therefore, no changes in the CPWL would constitute a mandate because there is no obligation to contract out to the private sector for the construction. This means the Test Claim's scope is limited to general law cities only.

The PCC does not require all projects using city funds to be performed under contract. Any project contracted for by a city that is not a public building or work falls outside the definition of a public project provided in section 20161. (Pub. Contract Code § 20161["public project" defined].)[2] Only contracts directly awarded by cities are subject to the requirement to contract out to the private sector; it therefore does not apply in the situation where a private developer merely receives public funds for a project. (Pub. Contract Code, § 20160.) This means any project undertaken by a private developer is not covered simply because it involves state funds. Therefore, the Draft Staff Analysis applies where the actual contracting party is not a city or where the project is "the erection, improvement, paining, or repair" of a non-public building or a non-public work. (Pub. Contract Code, § 20161.) For example, cities contracting for the construction of low income housing would not be a "public project" because the contract is for private residences, not a public building.

If a general city is going to construct a public building, the PCC does not necessarily require that a city contract out with private contractors for construction. A city's "legislative body may reject any bids presented" and, after rejecting bids, choose to avoid the requirement to contract out if four-fifths of its members affirm a resolution that it would be more economical for the supplies and labor to be acquired directly by the city rather than through a contractor. (Pub. Contract Code, §§ 20166, 20167.) This option is available at the discretion of the city. Pub. Contract Code §§ 20166, 20167; 59 Ops.Cal.Atty.Gen. 242 (1976) [interpreting Gov. Code, §§ 37905 and 5307, which are now contained in Pub. Contracts Code, §§ 20166, 20167.]) Thus, all cities have the choice to undertake projects using a workforce hired directly by the city, that otherwise would require contracts under the PCC. This choice makes the provisions of the PCC voluntary for the purposes of determining if changes in the CPWL are mandate.

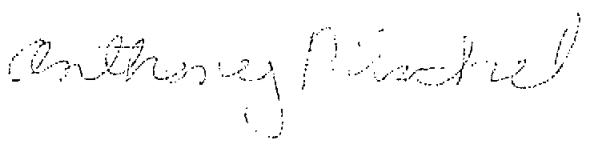
Additionally, the arguments previous presented by the Department of Industrial Relations still apply. To even begin this analysis, the city must first choose to engage in construction and it must do so in a way that fits within the very narrow realm of this test

[2] For a review of the definition of a "public project" as defined by this statute when it appeared in California's Gov. Code, see *Davis v. City of Santa Ana* (1952) 108 Cal. App.2d 669, 675 – 679.

claim, as described above. This is a voluntary choice and thus there is no mandate. Additionally, most enforcement and rate setting was taken over by the state. Local government's only remaining obligation, the requirement to take cognizance of the obligation to pay prevailing wages, continues from the previous statutory scheme. Therefore, there has been no increase in obligation on general law cities and there can be no mandate.

The Test Claim is left with only very limited situations when the Draft Analysis might not apply, assuming Test Claimants first can prove that cities must engage in construction (something completely ignored in the Test Claimant's response). That is, for any mandate to be subject to subvention, Test Claimants would have to show a) there is requirement to build a building or structure; b) there is a requirement under the PCC to contract with the private sector; c) there is no ability to avoid the requirements of the Public Contracts Code; and d) changes to the CPWL have increased the requirements for cities on those particular projects.

Yours Truly,



Anthony Mischel
Attorney At Law

cc: See attached list

SERVICE LIST

Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Mr. Scott A Kronland
Altshuler, Berzon, Nussabaum, Rubin & Demain
177 Post Street, Suite 300
San Francisco, CA 94108

Mr. Glen Everroad
Revenue Manager
City of Newport Beach
330 Newport Blvd.
P.O. Box 1768
Newport Beach, CA 92659-1768

Mr. Rob Cook
Office of Public School Construction
Department of General Services
1130 K. Street, Suite 400
Sacramento, CA 95814

Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Mr. Glen Everroad
City of Newport Blvd.
P.O. Box 1768
Newport Beach, CA 92659-1768

Mr. David Wellhouse
David Wellhouse & Associates, Inc
9175 Kiefer Blvd., suite 121
Sacramento, CA 95826

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Blvd., Suite 106
Roseville, CA 95661

Ms. Annette Chinn
Coast Recovery Systems, Inc
705-2 East Bidwell Street, #294
Folsom, CA 95630

Ms. Juliana F. Gmur
Maximus
2380 Houston Ave
Clovis, CA 93611

Ms. Ginny Brummels
State Controllers Office (B-08)
Division of Accounting & Reporting
3301 C. Street, suite 500
Sacramento, CA 95816

Mr. Keith B. Petersen
Six Ten and Associates
3841 Borth Freeway Blvd., Suite 170
Sacramento, CA 95834

Mr. Susan Geanacou
Department of Finace (A-15)
915 L. Street, suite 1190
Sacramento, CA 95814

Ms. Carla Castaneda
Department of Finance (A-15)
915 L. Street, 11th Floor
Sacramento, CA 95814

Ms. Bonnie Ter Keurst
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 West Hospitality Lane
San Bernardino, Ca 92415-0018