By:  Peter M. Follenweider

Fringe & Overtime

It’s That Time of Year Again

Prevailing Wage Act

As another bleak, cold and snowy Chicago winter melts into an all too brief Spring, it is time to get outside and start those “Public Works Projects” again. Therefore, a brief refresher regarding the applications of the Illinois Prevailing Wage Act (“Act”) seems particularly appropriate. This article will focus on paying of wages, fringe and overtime.

Before discussing the wages, fringe benefits and overtime required by the Act, it is important to understand which projects are covered under the Act. The Act applies only to “Public Works Projects” that improve, build, demolish or alter property or equipment owned or operated by the government. In other words, any contract for public works that involves work for the State of Illinois or any governmental subdivision such as the Illinois Department of Transportation, municipalities or school districts is covered under the Act. The Act does not cover employers who are engaged in private sector work or even that work performed for the federal government.

WAGES and FRINGE

After determining whether your current project is a Public Works job, the next step is to determine what wages the Act requires. The current Prevailing Wage Act rates can be found at [http://www.illinois.gov/idol/Laws-Rules/CONMED/Rates](http://www.illinois.gov/idol/Laws-Rules/CONMED/Rates). It is important to note that each county has a separate wage scale. The Act requires employers to pay all covered employees the statutorily required wages and the associated fringe benefits regardless whether the company is a private or public sector employer.

The Act requires employers to pay all covered employees the statutorily required wages and the associated fringe benefits regardless whether the company is a private or public sector employer.

Turned Down For What? Settlement Offer Rejected By Plaintiff Leads To Poor Trial Result

By:  Ryan Van Osdol

As a case gets closer to a scheduled trial date, the parties frequently engage in eleventh hour settlement discussions. The uncertainty of a trial result often influences all parties to settle a pending dispute with a certain result via settlement. The party who had more success during the discovery phase of the litigation may have more leverage in the settlement negotiations. However, more often than not, the terms of a settlement agreement leave both sides with a feeling of discontent. The plaintiff often feels as though he or she should have received more and the defendant often feels as though he or she should have paid less. The settlement negotiation process requires the parties to exercise reason over emotion. When a plaintiff turns down a substantial cash offer during settlement negotiations, he or she to be prepared for a result at trial that could be worse. I recently experienced such an occasion while defending a general construction client.

This case involved the build out of a commercial space. The owner had a cost-plus agreement with the general contractor, which required our client to pass through his actual costs for materials and labor to receive an agreed upon percentage mark-up for overhead and profit. At the conclusion of the project, the owner accused our client of intentionally inflating the invoices from his laborers and material suppliers to receive a much larger profit than our client was entitled to. Our client disputed these allegations, but had discarded much of the documentation regarding the project. Accordingly, the owner filed a lawsuit against the general contractor in his individual and corporate capacities alleging claims for both breach of contract and fraud.

After five painstaking years of discovery and pretrial motion practice, the case was finally set for trial. After the trial date was set, the parties focused on settlement negotiations. At first, it appeared as though the parties were too far apart. Initially, the plaintiff demanded in excess of $1,000,000, which was quickly reduced to a mid-six figure demand. The defendant’s offer slowly crept up from $0 to $50,000 to $100,000. At the final pretrial conference, the judge persuaded both parties to move even further. The plaintiff’s final settlement demand was $160,000. At that point, the defendant would not agree to come up with more than $120,000 paid over several years. The general construction company had stopped doing business and our client was going to have to make these payments personally. Therefore, the defendant was hesitant to commit to more than he thought he could pay.

In the week before trial, the parties agreed that the financial amount for the settlement would be $160,000 with monthly payment over several years. However, the plaintiff then demanded that the defendant must stipulate to specific facts concerning fraudulent conduct. The defendant absolutely refused to stipulate to fraudulent conduct, because he had not inflated the invoices he passed through to the owner. Rather, he was agreeing to settle the dispute to avoid the uncertain result of the trial and the expense of attorney’s fees associated with the trial. On the first day of trial, the judge cautioned the plaintiff of two things: 1.) Be careful when pointing fingers, because three fingers may be pointed back at you; and 2.) Reconsider the proposed settlement offer, because not all breaches of contract amount to fraud. However, based on the defendant’s refusal to stipulate to fraudulent conduct, the plaintiff rejected the settlement offer and the case proceeded to trial with the plaintiff claiming that it was entitled to approximately $1,300,000 in damages.

continued on page 2 ➤

continued on page 3 ➤
employees are members of a particular union. Perhaps the most common mistake non-union contractors make is that they pay the base rate but do not add the fringe to the hourly rate normally paid by union contractors to union trust funds as required by the respective CBAs. The Act requires that both union and non-union contractors make contributions to Health and Welfare, Insurance, Pension, Vacation and Training that are either paid to employees through employer-offered benefits, or paid directly to the employees as hourly wages. For example, if Employee A is a Laborer working in Cook County and not covered under a CBA and does not receive benefits from his or her employer, Employee A is to be paid $62.40 per hour for all straight time hours worked covered under the Act ($38.00 for straight time wages plus $24.40 for fringe).

OVERTIME
Another common mistake employers make relates to the payment of overtime. The Act requires the payment of overtime, time-and-a-half or double time under three distinct circumstances:

A. When an employee works more than 8 hours on a given day. The mistake many employers make is that they believe overtime is based on the number of hours an employee works during a week. That is incorrect. Overtime is applied on a daily basis. [http://www.illinois.gov](http://www.illinois.gov). For example, if Employee A works 9 hours on Monday, 8 hours on Tuesday, does not work Wednesday or Thursday and works 10 hours on Friday, Employee A is owed 3 hours of overtime. One for Monday and two for Friday even though s/he did not work on Wednesday or Thursday.

***Please note that while the majority of the labor classifications defined by the Act require time and a half for daily overtime, a significant number require double time for daily overtime. Please consult the prevailing wage scale for your county to determine the proper overtime scale.

B. When the employee works on a Saturday. If an employee works on a Saturday, even if s/he has not worked a full 40 hour week, overtime must be paid, either time-and-a-half or double time (depending on the labor classification). Taking the example from Paragraph A, if Employee A also worked 8 hours on Saturday, Employee A’s employer is required to pay for 8 hours of overtime (time-and-a-half) even though Employee A worked only 27 hours Monday through Friday.

C. When an employee works on a Sunday or Holiday (or the Monday following a Sunday holiday). All labor classifications, except for painters and painters of signs, require double time for Holiday or Sunday work. Once again, how many hours an employee worked in the days leading up to the Holiday or Sunday has no impact on whether overtime is paid. Using our example from Paragraph A, Employee A works the same hours as detailed above plus 8 hours on Saturday and 5 hours on Sunday, that employee is to be paid 11 hours of time-and-a-half (3 hours of daily overtime and 8 Saturday hours) plus 5 hours of double time for Sunday.

Note: If Employee A works on the Monday following a recognized Holiday that falls on a Sunday, such as Christmas, Employee A would be entitled to double time for the hours worked.

PENALTIES
It is extremely important that employers do their absolute best to ensure compliance with the Act because the penalties for a violation are severe. First, employers who violate the Act are required to pay back wages to affected employees for the difference between the wages paid and the wages earned under the Act plus the applicable fringe benefits. Second, the Act allows for a 20% penalty to be paid by the employer to the Illinois Department of Labor of all wages, including fringe and overtime, owed to employees, plus an additional 2% payment of that 20% penalty is paid to the employees in addition to the back wages owed. Third, and perhaps of greater importance, contractors who incur two violations within a five-year period can be barred from performing any Public Works Projects in Illinois for a period of four years. For employers who rely on work in the public sector, this ban could sound a death knell for their businesses.

If you receive a notice of investigation from the Illinois Department of Labor, feel free to contact Paul A. Greco (pgreco@dimontelaw.com) or Peter M. Follenweider (pfollenweider@dimontelaw.com) of Di Monte & Lizak (847-698-9600).

A second, and much less obvious, potential violation occurs during the hauling of material and debris, including rocks, concrete and blacktop, either to or from a jobsite. It is important to note that not all drivers who deliver materials to a job site are covered under the Act. The Act carves out an exemption for material sellers and suppliers. If a contractor or subcontractor has its own employees deliver materials to a jobsite and engage in actual construction, those employees are covered under the Act and deliver for the Act ($38.00 for straight time wages plus $24.40 for fringe).

The important factor in determining if the Act applies to hauling debris from a jobsite is not whether the debris will be recycled or who now owns the debris. The important factor is who is doing the hauling and with whom the hauler contracted to haul the debris. If you have any questions as to whether the Act applies, please contact Paul Greco or Peter Follenweider at DiMonte and Lizak, LLC before creating a potential Act violation. This is truly a case in which an ounce of prevention is not worth the pound of cure which will most definitely be dispensed by the Illinois Department of Labor.
DiMonte & Lizak - Highlights

Attorneys Ryan Van Osdol & Jordan Finfer Receive Recognition from Illinois Super Lawyers
DiMonte & Lizak, LLC is proud to announce that Ryan Van Osdol and Jordan Finfer have been named to the 2015 Illinois Super Lawyers’ Rising Stars list as top attorneys in Illinois in the field of business litigation. Ryan received this honor in 2012, 2013, and 2014 making this the fourth year in a row that he was nominated and recognized by other Illinois attorneys and judges for this prestigious award. Jordan received this honor in 2015, making this the second year in a row that he was nominated and recognized by other Illinois attorneys and judges for this prestigious award.

No more than 2.5% of Illinois attorneys are selected as Rising Stars. Super Lawyers is a rating service of outstanding attorneys from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Attorneys cannot pay to be listed as a Super Lawyers’ Rising Star. The annual selections are made using a rigorous multi-phased process that includes a statewide survey, independent research, and peer reviews by practice area.

Attorney Paul Greco Assists a DiMonte & Lizak Commercial Real Estate Client Close on the Purchase of 340,000 Square Feet of Office Space
In May of 2015, Paul A. Greco and other D&L attorneys assisted a client in acquiring over 340,000 square feet of commercial real estate. The assets acquired consist primarily of rental office space located at five separate locations along the I-94 corridor. The transaction included local real estate professionals, a West Coast venture partner and a prominent local lender.

Attorney Margherita Albarello Speaks About Employment Law at Recent Park Ridge Chamber’s Women in Business Event
Margherita Albarello spoke at the Park Ridge Chamber of Commerce Women in Business Networking Breakfast on May 22, 2015 regarding “recent employment laws and decisions affecting you as either the employer or employee.” More specifically, she touched upon new trends in employment law including medical marijuana use among employees, age discrimination and restrictive covenants.

Turned Down For What? Settlement Offer Rejected By Plaintiff Leads To Poor Trial Result
At the beginning of trial, the plaintiff was very confident. The plaintiff believed that most of the evidence produced in discovery supported his position. However, the evidence did not come in at trial in plaintiff’s favor. Rather, the plaintiff was impeached multiple times during cross-examination and one of his witnesses was nearly found in contempt for refusing to directly answer questions that were asked on cross-examination.

After calling six fact witnesses and an expert witness over nearly two full weeks of trial, the plaintiff rested its case. At the conclusion of the plaintiff’s case, the defendant moved for a directed finding. When moving for a directed finding in a bench (non-jury) trial, the defendant asks the court to weigh the evidence and rule in defendant’s favor on the plaintiff’s claims without requiring the defendants to put on a defense at trial. After a lengthy oral argument, the judge ruled in favor of the defendants on the fraud and breach of contract claims against the general contractor in his individual capacity and on the fraud claim against the general contractor in its corporate capacity. This ruling left the plaintiff in a very poor position. The only claim that survived the motion for a directed finding was the breach of contract claim against the corporate defendant, and the corporate defendant had no assets because it had stopped doing business several years prior.

Since all of the fraud claims were denied and there was no longer the potential for personal liability, the defendants did not put on a defense case. After closing arguments, the judge entered a small judgment against the corporate defendant, which was less than 10% of the damages initially sought by the plaintiff. Regardless, the judgment resulted in little comfort to the plaintiff, because the corporate defendant had no assets to satisfy the judgment. Accordingly, instead of accepting the $160,000 settlement offer, the plaintiff incurred the substantial expense of having two attorneys prepare for and conduct trial for nearly two weeks and the additional expense of its expert witness preparing and testifying at trial.

While our client received a very successful result at trial, this story should serve as a cautionary tale to those who are currently involved in litigation and those who may experience litigation in the future. Always give careful consideration to settlement offers in the days before trial and even settlement offers that may arise during or after trial. There is an inherent value to a certain result, plus you save the cost of trial. Always be aware that the result at trial could be less than the amount offered in settlement; it could even result in no recovery at all. Even the strongest cases have potential flaws, and it is impossible to predict with 100% accuracy how a judge or jury will interpret the evidence presented at trial. It has been said that there are only two certainties in life: death and taxes. Well there is only one certainty in trial: additional litigation expense. Accordingly, the prudent litigant should always assign value to the certainty of settlement; because the uncertainty of trial may prove to be the greatest expense of all.
An experienced, multi-practice law firm working as a team to provide practical counsel and quality services.

What’s Inside...

Turned Down for What? Settlement Offer Rejected by Plaintiff Leads to Poor Trial Result  See front page & page 3

Prevailing Wage Act. It’s That Time of Year Again. Fringe & Overtime  See front page & page 2

DiMonte & Lizak - Highlights  Page 3

PRACTICE AREAS

- Litigation and Appeals
- Real Estate Development and Land Use
- Construction and Mechanic’s Liens
- Corporate and Business Governance
- Estate Planning and Probate
- Creditors’ Rights and Bankruptcy
- Employment and Human Resources
- Banking and Finance
- Tax

To order additional copies of this publication, please contact MaryLeslie Naker at (847) 698-9600 or mnaker@dimontelaw.com.

While the Newsletter is intended only to provide information of general interest to our clients and their advisors, under the Rules of the Supreme Court of Illinois, or the rules of other jurisdictions, this publication may be regarded as advertising. Information contained herein should not be considered as individual legal advice or legal opinion. You are urged to consult your D&L attorney regarding your own legal situation and any specific legal questions you may have.