

LCB File No. T017-02

ADOPTED TEMPORARY REGULATION OF THE
OFFICE OF THE LABOR COMMISSIONER

Filed with the Secretary of State on 11/15/2002

EXPLANATION- Matter that is *italicized* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: §§1-5, NRS 338.012, NRS 233B.040-050; §2, NRS 338.020; §§3-5, NRS 338.015, 338.060, 338.070, 338.090

Section 1. Chapter 338 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 through and 5 of this regulation.

Section 2. NAC 338.0095 is hereby amended to read as follows:

NAC 338.0095 Workmen and apprentices: Payment based on type of work actually performed and in accordance with recognized class of workmen; identification of employer. (NRS 338.012, 338.020, 338.050)

1. For the purposes of NRS 338.010 to 338.090, inclusive, and NAC 338.005 to 338.125, inclusive:

(a) A workman employed on a public work must be paid *the applicable prevailing wage rate* based on the type of work that the workman actually performs on the public work and in accordance with the recognized class of the workman; and

(b) Each contractor and subcontractor shall be deemed to be the employer of each workman and apprentice who performs work directly for that contractor or subcontractor in the execution of a contract for a public work, whether the workman or apprentice is employed directly by the contractor or subcontractor or is furnished to the contractor or subcontractor by or through another person or entity such as an employee leasing company or equipment rental business.

2. Any person employed on a public work as an apprentice or listed on a certified payroll report as an apprentice who is not registered with the Bureau of Apprenticeship and Training of the Office of Apprenticeship, Training, Employer and Labor Services of the Employment and Training Administration of the United States Department of Labor or its successor and the state apprenticeship council must be paid not less than the applicable wage rate for the type of work actually performed by the person and in accordance with the applicable recognized class of workmen. Any person designated as an apprentice performing work at the site of a public work who exceeds the ratio of apprentices to journeymen authorized under the registered program of apprenticeship must be paid not less than the applicable wage rate for the type of work actually performed by the person and in accordance with the applicable recognized class of workmen.

Sec. 3. NAC 338.110 is hereby amended to read as follows:

NAC 338.110 Determination by awarding body: Procedure; factors for consideration; objections; action by labor commissioner. (NRS 338.012, 338.070)

1. Upon its own initiative or upon notice of a possible violation, an awarding body shall cause such an investigation to be made as may be necessary to determine whether a violation of NRS 338.010 to 338.090, inclusive, or NAC 338.005 to 338.125, inclusive, was committed in the course of the execution of a contract for a public work that was awarded by the awarding body. *Upon commencing an investigation upon its own initiative, the awarding body shall notify the labor commissioner in writing as soon as is practicable.* Such an investigation must commence and conclude within a reasonable time, except that the investigation must not exceed 30 days unless an additional period of time is approved by the labor commissioner.

2. An awarding body may request the labor commissioner to issue subpoenas on behalf of the awarding body to assist the awarding body in its investigation.

3. In making a determination of whether a contractor or subcontractor violated NRS 338.010 to 338.090, inclusive, or NAC 338.005 to 338.125, inclusive, an awarding body shall consider:

(a) Information contained in any claim or complaint against the contractor or subcontractor that was received by the labor commissioner;

(b) Oral or written statements made by employees of the contractor or subcontractor or witnesses during interviews conducted by the awarding body;

(c) Information contained in certified payroll reports applicable to the public work; and

(d) Any other information that could reasonably assist the awarding body in determining whether a violation was committed.

4. Upon the conclusion of its investigation, an awarding body shall issue, in writing, its determination of whether a contractor or subcontractor violated NRS 338.010 to 338.090, inclusive, or NAC 338.005 to 338.125, inclusive, and shall transmit a copy of the determination to the labor commissioner~~;~~ *the contractor and, if the contractor is a subcontractor, then to the prime contractor and any intermediate subcontractors, and any person who filed a claim or complaint with the labor commissioner relating to the investigation* ~~[in writing of its determination and resulting actions].~~

5. If, after an investigation, an awarding body determines that a contractor or subcontractor has failed to pay the correct wages to workmen employed by the contractor or subcontractor in connection with a public work, the awarding body shall withhold and retain the wages due and owing to the workmen and any applicable penalties, and shall immediately ~~notify~~ *transmit a copy of the determination to* the labor commissioner, *the contractor and, if the contractor is a subcontractor, then to the prime contractor and any intermediate subcontractors, and any person who filed a claim or complaint with the labor commissioner relating to the investigation* ~~[in writing of its determination and resulting actions].~~

6. In addition to transmitting a copy of its determination to the labor commissioner pursuant to subsections *4 and 5*, an awarding body shall transmit to the labor commissioner the following information pertaining to the determination:

(a) A detailed narrative of the findings of the investigation;

(b) The name and address of the contractor or subcontractor and its responsible officers *and, if the contractor is a subcontractor, then the prime contractor and any intermediate subcontractors*;

(c) A copy of the contract for the public work, or an excerpt of the portion of the contract that the labor commissioner determines is relevant, which must include, without limitation, information identifying the deadline by which bids on the contract were accepted, the date on which the contract was awarded and the scope of work performed by the contractor or subcontractor;

(d) Copies of any claims or complaints received by the awarding body from the labor commissioner relating to the investigation;

(e) Copies of the applicable certified payroll reports and nonperformance payroll reports submitted by the contractor or subcontractor;

(f) If applicable, signed interview statements of employees of the contractor or subcontractor;
~~[and]~~

(g) If applicable, computations of penalties and back wages for each workman, including, without limitation, the name, address and social security number of the workman~~[.]~~ *and*

(h) The awarding body shall make the information set forth in subsections (a) through (g) available on request to the other parties to the proceeding.

7. A person who has been served a copy of a determination pursuant to subsection 5 and who is aggrieved by the determination may file a written objection with the labor commissioner within 15 days after the date of service of the determination. Such an objection must be accompanied by a short statement of the grounds for the objection and evidence substantiating the objection. The awarding body shall insert language to this effect in the determination.

~~[7]~~8. Within ~~[20]~~ 30 days after receipt of a determination issued by an awarding body pursuant to subsections 4 *and* 5, the labor commissioner will:

(a) Return the determination to the awarding body with a directive for further investigation;
~~[or]~~

(b) Affirm or modify the determination and, if any wages or penalties were withheld by the awarding body, direct the awarding body to forward to the labor commissioner the sums withheld for disbursement to the workmen~~[.]~~;

(c) Set the matter for an administrative hearing; or

(d) Decline to assert any further jurisdiction over the matter.

Sec. 4. NAC 338.112 is hereby amended to read as follows:

NAC 338.112 Determination by awarding body: Service by labor commissioner; filing of objection; hearing; disposition. (NRS 338.012, 338.015)

1. If, pursuant to paragraph (b) of subsection ~~[7]~~8 of NAC 338.110, the labor commissioner affirms or modifies a determination issued by an awarding body, the labor commissioner will serve a copy of the affirmed or modified determination by ~~[certified]~~ mail on the contractor or subcontractor who was the subject of the investigation and any person who filed a claim or complaint with the labor commissioner relating to the investigation.

2. A person who has been served a copy of a determination pursuant to subsection 1 and who is aggrieved by the determination may file a written objection with the labor commissioner within 15 days after the date of service of the determination. Such an objection must be accompanied by a short statement of the grounds for the objection and evidence substantiating the objection.

3. Except as otherwise provided in subsection 4, if an objection to a determination issued by an awarding body is filed with the labor commissioner within the period for objection prescribed in subsection 2, the labor commissioner will, within 15 days after that period for objection has expired, schedule a hearing on the determination if:

(a) The determination issued by the awarding body included an assessment of back wages owed to workmen, an administrative penalty or fine, or a recommendation of the imposition of a

period of disqualification from public works against a contractor or subcontractor pursuant to NRS 338.017; or

(b) The determination issued by the awarding body did not include an assessment of back wages owed to workmen, an administrative penalty or fine, or a recommendation of the imposition of a period of disqualification from public works against a contractor or subcontractor pursuant to NRS 338.017, but the labor commissioner determines that the objection has merit on other grounds after reviewing the determination and the information transmitted to him by the awarding body pursuant to subsection 6 of NAC 338.110.

4. If:

(a) An objection is filed with the labor commissioner within the period for objection prescribed in subsection 2 and the determination does not meet the requirements of paragraph (a) or (b) of subsection 3; or

(b) An objection was not filed with the labor commissioner within the period for objection prescribed in subsection 2, the determination of the awarding body is deemed to be the final order of the labor commissioner on the matter.

5. If, after holding a hearing scheduled pursuant to subsection 3 on a determination issued by an awarding body, the labor commissioner finds that a contractor or subcontractor violated NRS 338.010 to 338.090, inclusive, or NAC 338.005 to 338.125, inclusive, the labor commissioner will issue a written ~~[determination]~~ *decision*, which will include, without limitation, the relevant facts and applicable laws on which the ~~[determination]~~ *decision* was based. The labor commissioner will serve a copy of the ~~[determination]~~ *decision* by ~~[certified]~~ mail on the contractor or subcontractor who was the subject of the investigation and any person who filed a claim or complaint with the labor commissioner relating to the investigation. A ~~[determination]~~ *decision* issued by the labor commissioner pursuant to this subsection is deemed to be the final order of the labor commissioner on the matter.

Sec. 5. NAC 338.114 is hereby amended to read as follows:

NAC 338.114 Determination by labor commissioner: Issuance and service; filing of objection; hearing; disposition. (NRS 338.012, 338.015)

1. If, after an investigation conducted or caused to be conducted by the labor commissioner, the labor commissioner finds that a person, including, without limitation, the officers, agents or employees of a public body, has violated NRS 338.010 to 338.090, inclusive, or NAC 338.005 to 338.125, inclusive, the labor commissioner will issue a written determination, which will include, without limitation, the relevant facts and applicable laws on which the determination was based. The labor commissioner will serve a copy of the determination by certified mail on the person who is found to have committed the violation and any other person who filed a claim or complaint with the labor commissioner relating to the investigation.

2. A person who has been served a copy of a determination issued by the labor commissioner pursuant to subsection 1 and who is aggrieved by the determination may file a written objection with the labor commissioner within 15 days after the date of service of the determination. Such an objection must be accompanied by a short statement of the grounds for the objection and evidence substantiating the objection. *The labor commissioner shall insert language to this effect in the determination.*

3. Except as otherwise provided in subsection 4, if an objection to a determination issued by the labor commissioner pursuant to subsection 1 is filed with the labor commissioner within the

period for objection prescribed in subsection 2, the labor commissioner will, within 15 days after that period for objection has expired, schedule a hearing on the determination if:

(a) The determination issued by the labor commissioner included an assessment of back wages owed to workmen, an administrative penalty or fine, or an imposition of a period of disqualification from public works against a contractor or subcontractor pursuant to NRS 338.017; or

(b) The determination issued by the labor commissioner did not include an assessment of back wages owed to workmen, an administrative penalty or fine, or an imposition of a period of disqualification from public works against a contractor or subcontractor pursuant to NRS 338.017, but the labor commissioner determines that the objection has merit on other grounds.

4. If:

(a) An objection is filed with the labor commissioner within the period for objection prescribed in subsection 2 and the determination does not meet the requirements of paragraph (a) or (b) of subsection 3; or

(b) An objection was not filed with the labor commissioner within the period for objection prescribed in subsection 2,

the determination issued by the labor commissioner pursuant to this section is deemed to be the final order of the labor commissioner on the matter.

5. If, after holding a hearing scheduled pursuant to subsection 3 on a determination issued by labor commissioner pursuant to subsection 1, the labor commissioner finds that a person, including, without limitation, the officers, agents or employees of a public body, has violated NRS 338.010 to 338.090, inclusive, or NAC 338.005 to 338.125, inclusive, the labor commissioner will issue a written ~~[determination]~~ **decision**, which will include, without limitation, the relevant facts and applicable laws on which the ~~[determination]~~ **decision** was based. The labor commissioner will serve a copy of the ~~[determination]~~ **decision** by certified mail on the person who is found to have committed the violation and any other person who filed a claim or complaint with the labor commissioner relating to the investigation. A ~~[determination]~~ **decision** issued by the labor commissioner pursuant to this subsection is deemed to be the final order of the labor commissioner on the matter.

**NOTICE OF ADOPTION OF TEMPORARY REGULATION
LCB File No. T017-02**

INFORMATIONAL STATEMENT

- (a) A description of how public comment was solicited, a summary of the public response, and explanation how other interested persons may obtain a copy of the summary.
Public comment on the proposed rule was solicited on the agency website, posted notices including copies to the main library in each county and direct mail to persons on the agency 233B mailing list. Copies are available through the agency website or upon request from the agency.
- (b) The number of persons who:
- (1) Attended each hearing:
A representative of the Nevada Department of Transportation attended the workshop in Carson City. He stated that the changes in the regulation comported with their established practice, so he had no comment as to the substance. A representative of the laborer's union inquired as to the time and place, asked to be kept informed, but did not attend the workshop. Three members of the Labor Commissioner's staff attended the hearing. Four individuals representing the carpenter and operating engineers unions attended the hearing.
- (2) Testified at each hearing:
Two representatives of the carpenters testified at the hearing.
- (3) Submitted to the agency written statements:
A letter was received from Attorney Dennis Kist representing the bricklayers union.
- (c) A description of how comment was solicited from affected businesses, a summary of their response and an explanation how other interested persons may obtain a copy of the summary:
Comments were solicited through published and posted notices and by direct mail to organizations and individuals on the agency mailing list.
- (d) If the regulation was adopted without changing any part of the proposed regulation, a summary of the reasons for adopting the regulation without change:
Two changes were suggested at the hearing. Both related to Section 4, subsection 8. One suggestion was to add the word "or" to each of the subsections of subsection 8. Each of the four options available to the Labor Commissioner is mutually exclusive of the other three. The use of "or" after the second to the last clause accomplishes that purpose. The second proposed change was to delete Section 8(d) allowing the Labor Commissioner to decline to assert further jurisdiction over the matter. The agency position is that the provision merely clarifies the Labor Commissioner's existing discretionary authority and was left in for that reason.

The written comments from Dennis Kist sought to expand the scope of the proposed regulation. Because the agency intends to reopen the rule after the 2003 legislative session, the comments were accepted for consideration during the next round of rulemaking.

- (e) The estimated economic effect of the regulation on the businesses which it is to regulate and on the public.

Impact on businesses that are regulated:

- (1) Both adverse and beneficial effects:
The regulation should result in a more timely resolution of prevailing wage claims and complaints by reducing the time needed to investigate and process the claims by three to six weeks thereby reducing the amount of time businesses against whom claims and complaints will have to invest in the process.
- (2) Both immediate and long-term effects:
The agency's effectiveness should increase and claims and complaints can be brought to a final resolution in a more timely manner over both the short-and long-term.

Impact on the public:

- (1) Both adverse and beneficial effects:
Increased agency efficiency should result in better service to the contractors, workers and awarding bodies by reducing the time it takes to move through the process.
 - (2) Both immediate and long-term effects:
Increased agency efficiency should result in better service to the contractors, workers and awarding bodies by reducing the time it takes to move through the process.
- (f) The estimated cost to the agency for enforcement of the proposed regulation:
There is no anticipated cost to the agency for enforcement. Cost savings realized through a more efficient operation will be absorbed by increased activity.
 - (g) A description of any regulations of other state or government agencies which the proposed regulation overlaps or duplicates and a statement explaining why the duplication or overlapping is necessary. If the regulation overlaps or duplicates a federal regulation, the name of the regulating federal agency:
The regulation does not overlap the regulations of any other state or federal agency.
 - (h) If the regulation includes provisions which are more stringent than a federal regulation which regulates the same activity, a summary of such provisions.
Not applicable.
 - (i) If the regulation provides a new fee or increases an existing fee, the total annual amount the agency expects to collect and the manner in which the money will be used.
No new fees are involved.