

**PROPOSED REGULATION OF  
THE LABOR COMMISSIONER**

**LCB File No. R047-22**

August 8, 2022

EXPLANATION – Matter in *italics* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: § 1, NRS 338.012; § 2, NRS 338.012 and 338.040; §§ 3 and 4, NRS 338.012, 338.035 and 338.070.

A REGULATION relating to public works; interpreting certain terms related to exemptions for certain contracts awarded by the public body; revising the interpretation of the circumstances under which a worker is deemed to be employed on a public work; establishing requirements relating to bona fide fringe benefits reported on a certified payroll report; and providing other matters properly relating thereto.

**Legislative Counsel’s Digest:**

Existing law establishes requirements for the solicitation, award and administration of contracts for public works which are entered into between a contractor and a public body. (Chapter 338 of NRS) Existing law exempts certain contracts from these statutory requirements, including, without limitation, contracts directly related to the normal operation of the public body or the normal maintenance of its property, and requires the Labor Commissioner to enforce the requirements and exemptions. (NRS 338.011, 338.015) Existing law authorizes the Labor Commissioner to adopt regulations which are necessary to carry out these duties. (NRS 338.012) **Section 1** of this regulation interprets the term “normal operation of the public body or the normal maintenance of its property” to mean routine activities, including, without limitation, janitorial, cleaning and basic repair work, which do not require a building permit, the employment of skilled or semiskilled mechanics or workers, or the hiring of a licensed contractor, and which may be performed by the staff of the awarding body, or by an independent contractor who costs less than \$100,000 and is awarded a contract in compliance with existing local and state government purchasing requirements.

Existing law requires workers employed on a public work to be paid prevailing wages and deems workers to be employed on a public work if they are: (1) employed at the site of a public work; and (2) necessary in the execution of the contract for the public work. Existing law requires the Labor Commissioner to adopt regulations defining the circumstances under which a worker satisfies those terms. (NRS 338.020, 338.040) Existing regulations interpret the term “employed at the site of a public work.” (NAC 338.009, as amended by section 6 of LCB File No. R018-18) **Section 2** of this regulation revises the interpretation of the term “site of a public work” to specifically include both permanent and temporary sites where certain work is performed and certain sites either established or used to execute the contract for the public work.

Existing law authorizes a contractor engaged on a public work to discharge, in part, the obligation to pay prevailing wages to a worker employed on the public work if any bona fide fringe benefits are provided in the name of the worker. (NRS 338.035) Existing law defines a “bona fide fringe benefit” as a benefit in the form of a contribution that is made not less frequently than monthly to an independent third party pursuant to a fund, plan or program which meets certain requirements. (NRS 338.010) Existing law also requires a contractor engaged on a public work to maintain certain records related to workers and payroll, including records of the actual per diem, wages and benefits paid to workers, and to submit copies of such records on a monthly basis to the public body awarding the contract. (NRS 338.070) Existing regulations define the required submission of such records as a “certified payroll report” and require certain information, including information about bona fide fringe benefits, to be included in each certified payroll report. (NAC 338.0056, 338.094, as amended by section 16 of LCB File No. R018-18) **Section 3** of this regulation: (1) revises the existing requirement for itemization of all bona fide fringe benefits provided in the name of a worker by requiring hourly itemization of any such benefits; (2) adds a requirement to submit a statement that any such bona fide fringe benefits are made on an annualized basis, if the benefits are not made pursuant to the terms of a collective bargaining agreement or other agreement providing for annualized bona fide fringe benefits; and (3) adds requirements that a certified payroll report must include the worker’s name and address, information on the shift worked by the worker, shift differential paid to the worker, if applicable, and the area of work by the worker, if applicable.

Existing law requires any public body awarding a contract for a public work to investigate possible violations of certain laws governing the performance of the public work and to inform the Labor Commissioner of any such violations if the public body determines a violation has been committed. (NRS 338.070) Existing regulations require an awarding body or the Labor Commissioner to cause examination of certified payroll reports to be made at reasonable times to ensure compliance with existing law and regulations. Existing regulations also establish the information that must be verified and reviewed during such an examination and require an awarding body to document and report any potential violations to the Labor Commissioner. (NAC 338.096, as amended by section 17 of LCB File No. R018-18) **Section 4** of this regulation adds a requirement that such an examination of a certified payroll report must include, if there is any evidence of payments of bona fide fringe benefits, an examination of whether such payments were made on an annualized basis.

**Section 1.** Chapter 338 of NAC is hereby amended by adding thereto a new section to read as follows:

*As used in NRS 338.011, the Labor Commissioner will interpret “normal operation of the public body or the normal maintenance of its property” to mean routine activities, including, without limitation, janitorial, cleaning and basic repair work, which:*

- 1. Do not require a building permit;*

- 2. Do not require the employment of skilled or semiskilled mechanics;*
- 3. Do not require the employment of skilled or semiskilled workers;*
- 4. Do not require the hiring of a contractor who is licensed pursuant to chapter 624 of NRS; and*
- 5. May be performed by the staff of the awarding body, or by an independent contractor who has entered into a contract with the public body. For purposes of this subsection, if an activity is performed by an independent contractor who has entered into a contract with the public body:*
  - (a) The cost of the activity must be less than \$100,000, including labor, equipment and supplies; and*
  - (b) The public body must comply with the applicable provisions of chapters 332 and 333 of NRS.*

**Sec. 2.** NAC 338.009 is hereby amended to read as follows:

338.009 1. As used in NRS 338.040, the Labor Commissioner will interpret:

(a) “Employed at the site of a public work” to mean the performance of work in the execution of a contract for a public work at the physical place or places at which the work is performed or at which a significant portion of the public work is constructed, altered or repaired if such place is established specifically for the execution of the contract for the public work or dedicated exclusively, or nearly so, to the execution of the contract for the public work.

(b) “Necessary in the execution of the contract for the public work” to mean the performance of duties required to construct, alter or repair the public work and without which the public work could not be completed.

(c) The terms interpreted in paragraphs (a) and (b) to not include an instance in which a person provides services to the prime contractor or a subcontractor at the site of a public work for a limited period of time if the services provided:

(1) Do not include work typically performed by a recognized class of workers; and

(2) Are incidental or ancillary to the construction, repair or reconstruction of the public work.

2. As used in this section, “site of a public work” includes *any site, whether permanent or temporary, including, without limitation,* job headquarters, a tool yard, batch plant, borrow pit or any other location , that is established *or used* for the purpose of executing the contract for the public work or that is dedicated exclusively, or nearly so, to executing the contract for the public work. The term does not include a permanent home office, branch plant establishment, fabrication plant, tool yard or any other operation of a contractor, subcontractor or supplier if the location or the continued existence of the operation is determined without regard to a particular public work.

**Sec. 3.** NAC 338.094 is hereby amended to read as follows:

338.094 1. Each certified payroll report:

(a) May be submitted electronically on a form prescribed by the Labor Commissioner or in a format selected by the contractor or subcontractor that provides the information required pursuant to subsection ~~5~~ 6 of NRS 338.070 . ~~6~~

(b) Must be accompanied by a statement of compliance, on a form prescribed by the Labor Commissioner, which is executed by the contractor or subcontractor and which certifies the truthfulness and accuracy of the payroll report . ~~6~~ ~~and~~

(c) Must include an *hourly* itemization of all bona fide fringe benefits provided in the name of a worker as authorized by NRS 338.035, if any such contributions were made as part of the wages of that worker. *If the bona fide fringe benefits are not made pursuant to the terms of a collective bargaining agreement or other agreement providing for annualized bona fide fringe benefits, a statement that the bona fide fringe benefits are made on an annualized basis must be submitted.*

*(d) Must include the name and address of the worker, information on the shift worked by the worker, shift differential paid to the worker, if applicable, and the area of work by the worker, if applicable.*

2. A contractor or subcontractor shall report workers on a certified payroll report for a public work:

- (a) Based on the type of work actually performed by the workers;
- (b) Based on the number of hours worked per worker per day; and
- (c) In accordance with the recognized classes of workers.

↳ Such a report must not include any hours of work performed by the workers on another public work or private project.

3. When a contractor or subcontractor first lists an apprentice on a certified payroll report, the contractor or subcontractor must submit with that certified payroll report documentation, on such forms as the Labor Commission may prescribe, to substantiate that the apprentice meets the definition of apprentice as provided in NAC 338.0052 and that the hours and wages of any such apprentice have been accurately reported in the certified payroll report.

4. Upon the request of the awarding body or the Labor Commissioner, a contractor or subcontractor engaged on a public work shall provide to the requesting entity payroll records and

any other records deemed necessary by the requesting entity to verify the accuracy of information contained in any certified payroll report submitted by the contractor or subcontractor.

**Sec. 4.** NAC 338.096 is hereby amended to read as follows:

338.096 1. An awarding body shall cause, or the Labor Commissioner will cause, such an examination of the certified payroll reports of a contractor or subcontractor to be made at reasonable times to assure compliance with the provisions of NRS 338.010 to 338.090, inclusive, and NAC 338.005 to 338.125, inclusive, and sections 2 and 3 of LCB File No. R018-18. Such an examination must include, or, if conducted by the Labor Commissioner will include, without limitation:

(a) Verification of the wages entered into the payroll system, wages that were actually paid, validation settings in the payroll system and self-audit and preventative measures established by the contractor or subcontractor to ensure the correct wages are paid for the type of work actually performed by those employees;

(b) Review of records and other data concerning the payroll of the contractor or subcontractor;

(c) Verification of the registration of apprentices or documentation demonstrating that the use of apprentices was not required for the project or was waived by the Labor Commissioner; and

(d) ~~Evidence~~ *Examination of evidence* of payments of bona fide fringe benefits, if any, and, if so, a description of any such benefits, the amount of any such benefits, the frequency with which such benefits were paid *and whether such benefits were provided on an annualized basis* and, if applicable, the plan or group name.

2. In conducting an examination pursuant to this section, an awarding body shall verify and report to the Labor Commissioner upon request:

- (a) The accuracy of the reporting of workers in the recognized classes of the workers; and
- (b) The ratio of apprentices to journeymen authorized under the registered program of apprenticeship and the percentage of apprentices under the registered program that were used.

3. Except for the late submittal of a certified payroll report pursuant to subsection 6 of NRS 338.070, an awarding body shall report to the Labor Commissioner any potential violation of NRS 338.010 to 338.090, inclusive, or NAC 338.005 to 338.125, inclusive, and sections 2 and 3 of LCB File No. R018-18 discovered during the examination of the certified payroll reports. Such a report to the Labor Commissioner must include, if applicable, documentation identifying any error in payroll reporting and a description of any subsequent corrective action or audit taken by the contractor, subcontractor or awarding body.