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ATTORNEYS AT LAW

CLIENT ALERT

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**OHIO'S PREVAILING WAGE LAW PENALTIES ARE MANDATORY
AND WILL BE IMPOSED UPON GENERAL CONTRACTORS**

Ohio Revised Code Chapter 4115 requires contractors on public projects to pay "Prevailing Wages" to their employees performing work on the public project. The Prevailing Wage is determined by reference to the union agreements and job classifications for the locality of the project. In essence, contractors are required to pay their employees union scale together with all fringe benefits and comply with the applicable journeyman to apprentice ratios.

General Contractors in Ohio have long been aware that Ohio's Prevailing Wage Law imposes strict liability upon the General Contractor for the Prevailing Wage Violations of Subcontractors. However, it has never been clear whether statutory penalties contained within Ohio's Prevailing Wage Law were mandatory and would be imposed upon a General Contractor when the Subcontractor failed to pay Prevailing Wages. In a 4-2 decision issued on March 2, 2010, the Ohio Supreme Court clarified the issue and held that in an employee initiated action to enforce Ohio's Prevailing Wage Law, the penalties set forth in Ohio Revised Code 4115.10(A) are mandatory penalties that must be imposed upon a party found to have violated Ohio's Prevailing Wage Law if the violation did not result from the exceptions specified in the statute. These penalties will be imposed even if the injured

party was not directly employed by the violating contractor.

Ohio Revised Code 4115.10(A) provides: "No person, firm, corporation, or public authority that constructs a public improvement * * * shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code * * *. Any employee upon any public improvement, except an employee to whom or on behalf of whom restitution is made pursuant to division (C) of section 4115.13 of the Revised Code, who is paid less than the fixed rate of wages applicable thereto may recover from such person, firm, corporation, or public authority * * * the difference between the fixed rate of wages and the amount paid to the employee and in addition thereto a sum equal to twenty-five per cent of that difference. The person, firm, corporation, or public authority who fails to pay the rate of wages so fixed also shall pay a penalty to the director of seventy-five per cent of the difference between the fixed rate of wages and the amount paid to the employees on the public improvement."

In *Bergman, et al. v. Monarch Construction Company* (March 2, 2010), Slip Opinion No. 2010-Ohio-622, thirty-six (36), Plaintiffs were employed by a Subcontractor to Monarch Construction, the General Contractor, on a Miami University Project.

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Both Monarch and the Subcontractor were required to pay their employees Ohio Prevailing Wage on the project. Throughout the lifetime of the project, the Subcontractor repeatedly assured Monarch that it was paying Prevailing Wages to its employees. Monarch reviewed Certified Payroll Reports and payroll records submitted to it by its Subcontractor and confirmed that the appropriate wages were being paid.

A complaint was filed with Ohio's Department of Commerce alleging that the Subcontractor had failed to pay its employees the applicable Prevailing Wage Rates. The Department of Commerce issued a Determination to Monarch and its Subcontractor that they were both jointly and severally liable for \$368,266.34 in back wages and \$368,266.34 in penalties. This Determination was the first notice that Monarch had ever received of the alleged violations or of the investigation that had been ongoing for months. Monarch immediately cooperated with the Department of Commerce.

The employee plaintiffs in *Bergman* did not assign their claims to the Department of Commerce. Instead, they personally filed suit on their behalves against Monarch and the Subcontractor under Ohio Revised Code 4115.10(A). A judgment by default was entered against the Subcontractor. The case proceeded to trial against Monarch. The Trial Court found Monarch Construction liable for the back wages, but did not impose penalties upon Monarch. The Court found that the 25% penalty provided for in Ohio Revised Code 4115.10(A) was discretionary and that the remaining 75% penalty was payable only to the Department of Commerce. Because Monarch had cooperated in the investigation immediately upon learning that its Subcontractor had failed to pay appropriate wage rates, the

Court reasoned that it was inappropriate to impose either penalty on the General Contractor. The Appellate Court affirmed. Five (5) of the original thirty-six (36) Plaintiffs appealed.

The Supreme Court of Ohio reversed. The issue for the Supreme Court was one of straight forward statutory interpretation without regard to the status of Monarch Construction as the General Contractor. The primary purpose of Ohio's Prevailing Wage Law is to support the integrity of the collective bargaining process by preventing the undercutting of wages in the private construction sector. To achieve this end, Ohio Revised Code Chapter 4115 provides employees with a comprehensive procedure to ensure an employer's compliance. Supporting the administrative and civil proceedings are statutory deterrents in the form of civil and criminal penalties. Ohio Revised Code 4115.10(A) allows an injured employee to bring a legal action and clearly sets forth the damages that an employee is entitled to: "the difference between the fixed rate of wages and the amount paid to the employee and in addition thereto a sum equal to twenty-five per cent of that difference" and "pay a penalty to the director of seventy-five per cent of the difference between the fixed rate of wages and the amount paid to the employees on the public improvement." According to Ohio Revised Code 4115.13(C), when the Director of Commerce finds that a wage underpayment was the result of a misinterpretation of the prevailing-wage statutes or an erroneous preparation of the payroll documents, provided restitution of the underpayment is made, no further proceedings will occur and no penalties are assessed. Because this provision did not apply to Monarch in this case, there was no authority for the mandatory penalty to be waived. Monarch's Subcontractor failed to

pay the applicable wage rates to its employees. Monarch Construction was the General Contractor on the project. Therefore, the Court reasoned that it was strictly liable for its Subcontractor's violations and the penalties required to be imposed by statute.

It is now clear that in a Court action brought by a Subcontractor's employees to enforce Ohio's Prevailing Wage Law, a General Contractor may be subject to liability for all unpaid back wages together with a 100% penalty. This liability can arise at anytime during the lifetime of the project or well after the project has closed and the Subcontractor has received final payment.

General Contractors must now be more vigilant than ever. General Contractors must now, on all public projects in Ohio, or any project which requires the payment of Prevailing Wages, institute a system of checks to ensure that Subcontractors are complying with the Prevailing Wage Statutes. Relying on Certified Payroll Reports alone is not sufficient according to the Ohio Supreme Court. General Contractors must now take additional steps including random interviews of Subcontractor employees as well as monthly audits of payroll and cancelled checks to ensure Subcontractor compliance. Contractual provisions requiring compliance, indemnification, audits, immediate termination, and the imposition of penalties should be added to subcontracts. Specially crafted Subcontractor Surety Bonds providing for the payment of back wages and penalties may also need to be considered.

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