

Penalties For Non Compliance With Prevailing Wage Laws Are Mandatory



By: Luke J. Busam

Recently, in *Bergman v. Monarch Construction Company*, 2010 Ohio 622, the Supreme Court of Ohio established that, in an employee-initiated action to enforce the prevailing wage law, the certain statutory penalties are mandatory and not left to the discretion of the trial court. This decision has the dual effect of: (1) removing a trial court's discretion in enforcing the statutory penalties, and (2) effectively doubling the cost of non-compliance for an employer.

Monarch Construction was the general contractor for a Miami University (Oxford, Ohio) student housing construction project. The project was a public improvement, thus subject to the prevailing wage laws of R.C. 4115. Notably, Monarch Construction was "repeatedly assured" by its subcontractor that the subcontractor had paid its employees, supported by Monarch's review of the subcontractor's payroll records, the prevailing wage rate. However, despite these efforts, an investigation by the Director of Commerce revealed underpayment by the subcontractor, for which Monarch was liable.

After the investigation, 36 employees filed suit against Monarch and the subcontractor for the underpaid wages. At a bench trial, the Butler County Court of Common Pleas found the Monarch liable for \$368,266.34 in back pay. However, the trial court denied the Plaintiffs' request for Monarch to pay an additional 25% penalty to the Plaintiffs, and also denied the Plaintiffs' request for Monarch to pay an additional 75% penalty to the Ohio Director of Commerce. The trial court believed that the additional penalties were discretionary in nature and that, given Monarch's efforts to ensure compliance, the case did not warrant the imposition of the additional penalties.

The Twelfth District Court of Appeals agreed and concluded that the penalty provisions were discretionary based upon statutory language which states that an employee "may recover" the difference between the prevailing wage and the amount paid to the employee and "in addition thereto a sum equal to twenty-five per cent of that difference."

However, the Supreme Court found otherwise and held that the phrase "may recover" merely pertains to an employee's options in bringing about the legal action to recover the unpaid wages. More specifically, an underpaid employee can (1) bring an action on her own behalf; (2) assign that right to the Director of Commerce; or (3) if no action is brought and no assignment is made, the Director of Commerce is then obligated to bring an action to recover the unpaid wages. Thus, the "may recover" language refers to this choice of options, and does not grant the court discretion with regard to the penalty provisions.

The Supreme Court also explained that prior to 1994, the underpaid employer was awarded the 100% penalty. In 1994 the penalty provisions were altered and apportioned between the underpaid employee and the Director of Commerce. For those reasons, the Supreme Court held that the penalty provisions are mandatory.

The Supreme Court left open only few exceptions to this mandatory penalty rule. Indeed, only when the Director of Commerce finds that the underpayment is the result of a misinterpretation of the prevailing wage statute or an error in preparing payroll documents and restitution is made, no penalties are assessed. Thus, given that the penalty provisions are mandatory and effectively double the judgment against a non-complying employer, it is important for all contractors to ensure full compliance with prevailing wage laws. This is especially true in situations where a general contractor is furnished payroll records from one of its subcontractors since, as the Court did in *Monarch*, a general contractor can be liable for its subcontractor's failure to pay prevailing wages.

If you would like a full copy of the opinion or if you have any other questions related to prevailing wage matters in connection with Construction Liability, feel free to call upon one of our practice area lawyers.

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