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Ohio Supreme Court's Ruling on Penalties Ups the Ante for Contractors Subject to Ohio's Prevailing Wage Law

By Heidi D. Alten and Neil Grindstaff

The Ohio Supreme Court in *Bergman v. Monarch Construction Co.*, No. 2010-Ohio 622 (Mar. 2, 2010) has held that in an employee-initiated action the penalties set forth in the Prevailing Wage Law¹ are mandatory and must be imposed against a party found to have violated the prevailing wage law, in all but exceptional cases.

Ohio's Prevailing Wage Law requires contractors and subcontractors on public improvement projects to pay workers locally prevailing (union-scale) wages and fringe benefits for all construction and renovation work for the State of Ohio or any public authority, except for certain school districts.² The Director of the Ohio Department of Commerce (ODC) administers and enforces the Prevailing Wage Law. Workers may file a complaint with the ODC, which will conduct an investigation and issue a determination. Workers may also file private lawsuits against their employers or lawsuits may be brought by "interested parties," (e.g., unsuccessful bidders or labor unions representing employees of the contractor).

Background

In *Monarch*, several masonry workers who were employed on a project to build student housing at Miami University brought a lawsuit against Monarch Construction Company, the general contractor for the building project, the University and their employer Don Salyers Masonry. Monarch had subcontracted the masonry work to the plaintiffs' employer, Don Salyers Masonry. The workers claimed that Salyers failed to pay them prevailing wages and benefits for their work on the project. They sought to recover back pay from Miami University, Salyers and Monarch. Prior to the trial, the court granted Miami University's motion to be dismissed as a co-defendant in the case and entered a default judgment against Salyers, which had gone out of business.

Following a bench trial to decide the remaining claims against Monarch, the judge determined that Monarch, as the general contractor, was liable for the workers' back wages, because as the general contractor it has the responsibility to ensure that the

requirements of the Prevailing Wage Law were satisfied. However, the trial court declined to require Monarch to pay the workers a 25% penalty or to order payment of a 75% penalty to the ODC, as required by statute. The court reasoned that Ohio's Prevailing Wage Law gives the trial court discretion to impose civil penalties against the employer.

The trial court ultimately decided that the imposition of civil penalties against Monarch was not warranted, given the circumstance of the case, because Monarch had cooperated as soon as it received notice of Salyers's violation from ODC. The plaintiffs appealed the trial court's decision to the Twelfth District Court of Appeals, which affirmed, holding that the statutory penalties provided in Ohio's Prevailing Wage Law were discretionary, and not mandatory.

Ohio Supreme Court's Decision

In the majority opinion, written by Justice Cupp, the court rejected the appellate court's reasoning that the statutory penalties set forth in the Prevailing Wage Law were discretionary, finding that the appellate court had misconstrued the statute. The Supreme Court observed that within Ohio Revised Code section 4115.10(A), the phrase "may recover" refers to the choice the underpaid employee has to enforce his or her right to recover the underpayment, not the penalty. If the employee chooses to enforce his or her statutory right to recover the unpaid wages, and successfully proves the case, then the statutory penalties set forth in Ohio's Prevailing Wage Law are mandatory.

Implication of the Court's Holding

Before the court's decision in *Monarch*, the ODC and trial courts often exercised their discretion to waive the penalties. However, based on this holding, Ohio courts will strictly enforce the statutory penalty provisions upon finding a prevailing wage violation. As the number of public construction projects increase due to the influx of stimulus funds, contractors should be careful to determine up front whether or not a particular project is subject to Ohio's Prevailing Wage Law. The issue of whether a public project is subject to this law, while seemingly simple, can be quite complicated when funds for a project come from a variety of sources including public, private, state and/ or federal funds.

General contractors subject to the Prevailing Wage Law also have additional cause for concern given that the court's decision clearly establishes that general contractors will be held liable for subcontractors' violations of the Prevailing Wage Law, including liability for the 100% penalty. General contractors subject to the Prevailing Wage Law therefore must take the necessary steps to ensure that their subcontractors also are complying with this law.

Of further concern to Ohio employers is the increased enforcement effort by the State of Ohio. Since January 2009, the Ohio Attorney General's office has filed enforcement actions seeking recovery of more than \$1.39 million for prevailing wage violations, and publicly hailed the court's decision as a victory for Ohio employees.

Given the Attorney General's enforcement initiative, contractors and subcontractors on public improvement projects in Ohio must closely monitor their compliance with Ohio's Prevailing Wage Law, and should contact legal counsel for assistance before a problem arises.

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¹ OHIO REV. CODE ANN. § 4115.10(A).

² Coverage threshold for "new" construction is \$78,258, adjusted biennially; and coverage threshold for "Reconstruction, enlargement, alteration, repair, remodeling, renovation, or painting" is \$23,447, adjusted biennially.