

# HOT TOPICS

## Public Works Legal 2022

# Disclaimer

The following presentation is intended to summarize relevant portions of existing law in the Labor Code and California Code of Regulations, but those code sections, as interpreted by the courts, will govern actual enforcement. The information contained in this presentation is a general overview of existing law or regulation. Any opinions expressed are solely those of the author/speaker and are not necessarily the official position of the Department of Industrial Relations (DIR), its Director, or any related public entity. The information in this presentation is not intended as legal advice, and does not guarantee any outcome in specific enforcement or coverage proceedings within the jurisdiction of DIR.

# California's "Affordable Housing" Crisis.

“California has a housing supply and affordability crisis of historic proportions. The consequences of failing to effectively and aggressively confront this crisis are hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives.”

Gov. Code §65589.5 (a)(2)(A).

The “Streamlined Ministerial Approval Process” of Gov. C. §65913.4 imposes a non-public work prevailing wage & “skilled & trained workforce” obligation.



See: California Dept. of Housing & Community Development’s “Streamlined Ministerial Approval Guidelines,” dated March 30, 2021, at <https://www.hcd.ca.gov/policy-research/docs/sb-35-guidelines-update-final.pdf>

Gov. Code §65913.4 (k) (6) makes this law applicable to cities and counties, *including a charter city, a charter county, and a “charter city and county”*.

Imposes a *non-public works* “prevailing wage” obligation and an obligation to employ a “skilled and trained workforce”, to specified multi-family housing projects. See: “Streamlined Ministerial Approval Guidelines,” dated March 30, 2021, at <https://www.hcd.ca.gov/policy-research/docs/sb-35-guidelines-update-final.pdf>

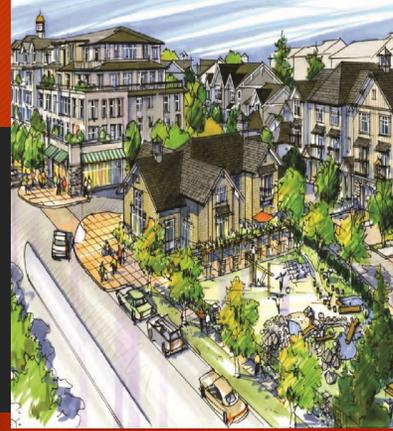
- This presentation *does not* cover the process for determining eligibility of development projects, nor the elements requiring differing percentages of “skilled & trained workforce” obligations depending on the craft, but will familiarize you with:
  - The scope of “*Prevailing Wage*” obligation under Gov. Code §65913.4;
  - Potential confusion with established housing exemptions/exclusions; and
  - Potential conflict with alternative workweek schedules.

DLSE enforcement of Gov. C. § Gov. C. §65913.4 (a) (8) (i).



If the developer certified that the *entirety* of the project is a public work for purposes of Labor Code §1720 et seq., then the "usual" public works laws apply, including the obligation to pay prevailing wages and to employ apprentices.

If developer certified that “all construction workers employed in the execution of the development” will be paid prevailing wages:



*All of the following apply to the portions of the development that are not a public work:*

1. Developer shall ensure that the PW requirement is in all contracts for the performance of the work;
2. All contractors and subcontractors shall pay all construction workers employed in the execution of the work at least the general prevailing wages, except that apprentices registered in programs approved by DAS may be paid the applicable apprentice prevailing rate;
3. All contractors and subcontractors shall maintain CPRs per Labor C. §1776 & make them available for inspection and copying; and
4. DLSE may issue a CWPA within 18 months after completion *of the development* and if DLSE does so, the contractor, subcontractor, and surety are liable for LDs as set forth in Lab. Code §1742.1.

## Distinctions in DLSE enforcement of Gov. C. §65913.4 from traditional Public Works enforcement.

Maintenance and inspection of CPRs and DLSE enforcement via CWPA *do not apply* if all contractors and subcontractors on the project are covered by a PLA, as defined in Pub. Contract C. §2500 (b)(1).

Despite Lab. C. §1773.1 (c)(2) requirement that employer payments not reduce the obligation to pay the hourly straight or overtime prevailing wage, this requirement *shall not apply* if otherwise provided in a CBA covering the worker.\* Also, the requirement to pay at least the PW rate *does not preclude the use of an alternative workweek schedule adopted pursuant to Lab. C. §§ 511 or 514.*

Gov. C. §65913.4 (a)(8)(A)(ii)(VI).

\*Gov. C. §65913.4 (a)(8)(A)(ii)(VI), unlike Lab. C. §1773.1 (c) (3), *does not require* that the employer payment contribution be “irrevocable unless made in error.”

See: California Dept. of Housing & Community Development's "Streamlined Ministerial Approval Guidelines," dated March 30, 2021, at <https://www.hcd.ca.gov/policy-research/docs/sb-35-guidelines-update-final.pdf>

## SCOPE OF "SKILLED AND TRAINED WORKFORCE" OBLIGATION UNDER GOV. CODE §65913.4 (a)(8)(B)

Certain multi-family housing developments that are not 100% "subsidized\* affordable housing" must use a "skilled and trained workforce" (as defined in Pub. Contract C., "Chapter 2.9" (§§ 2600 et seq.)). "Subsidized," as defined in Gov. C. §65913.4, subd. (k) (10), means units that are price or rent restricted such that they are permanently affordable to households meeting the definition of very low and lower income, as defined in Health & Safety Code §§ 50079.5 and 50105.

# What is a “skilled and trained workforce”?

(Public Contract Code §2601)

A STW meets ALL of the following conditions:

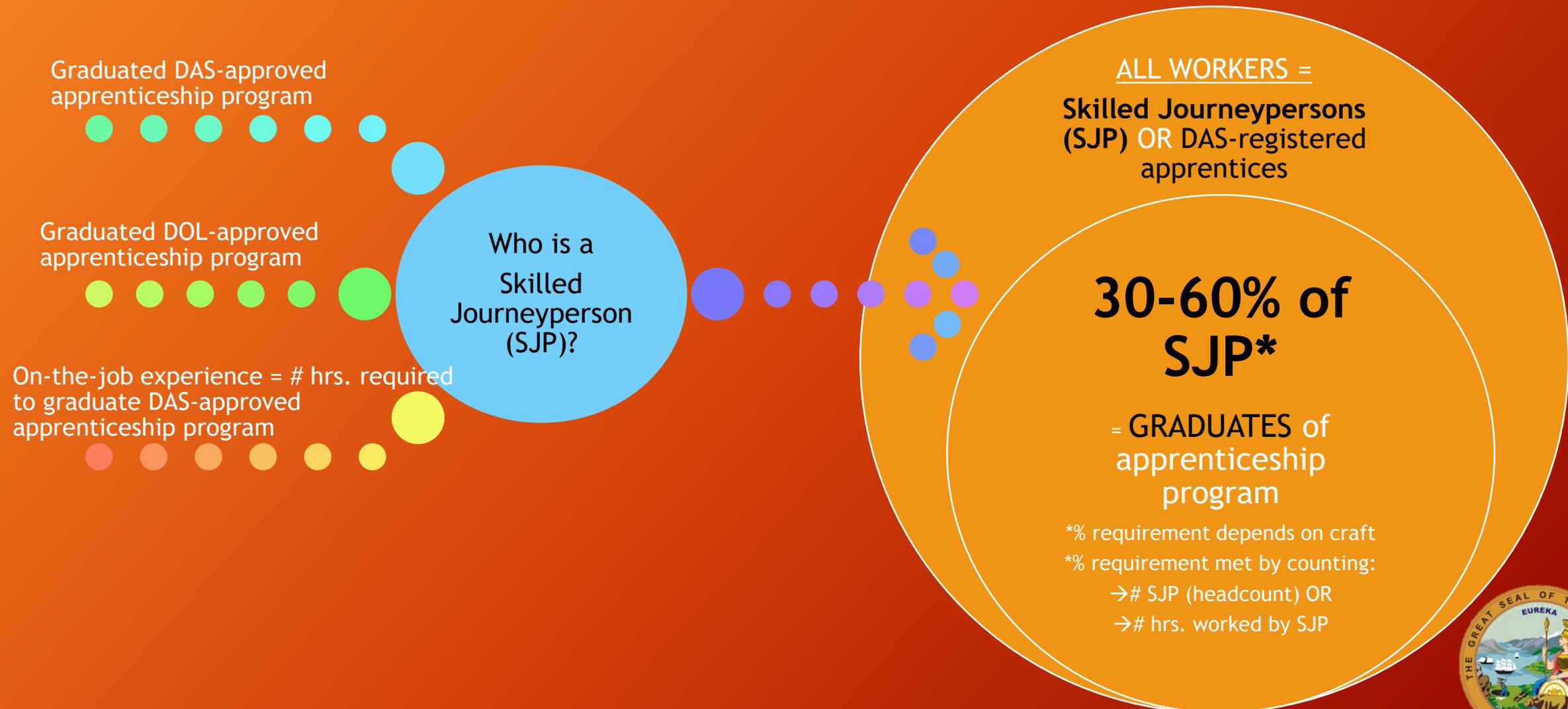
- ALL workers performing work in an apprenticeable occupation in the building and construction trades are EITHER:
  - Skilled Journeypersons OR
  - DAS-Registered Apprentices
- 30% - 60% of ALL Skilled Journeypersons must be **graduates of apprenticeship program**.
  - Graduation percentage requirement varies depending on specific craft.
  - Graduation percentage requirement can be met by counting EITHER:
    - Number of Skilled Journeypersons employed (head count) OR
    - Number of hours worked by Skilled Journeypersons (hours worked by trade)

## EXCEPT:

- The graduation percentage requirement does not apply if **less than 10 hours of work** were performed in a calendar month (in a particular craft).
- The graduation percentage requirement does not apply if BOTH:
  - Subcontractor is **not listed in the bid** as required by Pub. Contract Code §4104; **AND**
  - Subcontract **does not exceed ½%** of total contract.

# What is a “skilled and trained workforce”?

[For Visual Learners]



# Why the “Streamlined Ministerial Process”

- Why would a project developer want to deal with prevailing wage laws and the skilled & trained workforce requirements.
- The Streamlined process ministerial process allows developments to cut through red tape to get their projects approved.

# Department of Housing & Community Development (“HCD”) Programs.

*Multifamily Housing Program* (Health & Saf. Code, Div. 31, Part 2, Chapt. 37, §§50675 et seq.): To be eligible for a MHP loan, a sponsor "shall" agree to pay prevailing wages with respect to construction assisted with the loan. (Health & Saf. Code §50675.4, subd. (c)(2).)

*Transit-Oriented Development Implementation Program*: Requires that loans for the development of rental housing made through this program be administered consistent with the *Multifamily Housing Program* (i.e., “shall” agree to pay prevailing wages . . . ) (Health & Saf. Code §53562 (b)(3), effective Jan. 1, 2022.)

*Rental Construction Incentive Program* (Health & Saf. Code §50745 et seq.): Establishes that any rental housing development assisted pursuant to this article “shall” be governed by a regulatory agreement that “shall include” a requirement that prevailing wage rates be paid with respect to construction of the rental housing development. (See, Health & Saf. Code §50749, subd. (b); and Ca. Code of Regs., tit. 25, §7802.)

# HCD Programs - continued.

*Joe Serna Jr. Farmworker Housing Grant Program.* Requires that HCD makes funds available from, and administers loans under, this program "in a manner consistent with the *Multifamily Housing Program.*" (Health & Saf. Code §50517.5 (a) (1) (A) (ii) & (iii), effective Jan. 1, 2022.)

*Veterans and Affordable Housing Bond Act of 2018* (Health & Saf. Code, Part 16, §5400 et seq. together with Mil. & Vet. Code §998.600 et seq.): Establishes that programs funded with bond proceeds shall, when allocating financial support, *give preference to projects that are "public works" . . . and other projects on which all construction workers will be paid at least the general prevailing rate of per diem wages as determined by the Director of Industrial Relations.* (Health & Saf. Code 54009 (emphasis added).)

For links to various HCD Guidelines to these programs and others see: [https://www.hcd.ca.gov/grants-funding/docs/admin\\_memo21-06\\_stacking\\_prohibition\\_repeal.pdf](https://www.hcd.ca.gov/grants-funding/docs/admin_memo21-06_stacking_prohibition_repeal.pdf)

# HCD Programs-Continued

- Project Homekey is an HCD program to sustain and rapidly expand housing for persons experiencing homelessness or at risk of homelessness.
- Project Homekey - most projects funded by this grant will be considered a public works. It will require the contractor be registered with DIR and the payment of prevailing wages.
- Project Homekey - may require the use of a skilled and trained workforce.

Effect of funding conditions on “public works” analysis  
under Labor Code §1720.

Labor Code §1720 (c) exempts 5 categories of private development projects as “public work” otherwise defined under subdivision (b).

However, Labor Code §1720 (c) (1) and (c) (5) excludes *from the exemption*:

(1) Private residential projects built on private property . . . [if] *the projects are built pursuant to an agreement with a state agency, a redevelopment agency, a successor agency to a redevelopment agency when acting in that capacity, or a local public housing authority.*

. . .

(5) *[Where] otherwise required by a public funding program . . .*

Keep these exclusions in mind and take them into account where the funding conditions of the various HCD programs apply to require the payment of prevailing wages.

## Where preemption of HUD-funded work on Public Housing Authority owned or leased property applies, HUD requires:

“Any solicitation of bids or proposals issued by the PHA and any contract executed by the PHA for development, maintenance, and modernization of the project *shall* include a statement that any (state) prevailing wage rate . . . is inapplicable to the contract and shall not be enforced against the contractor or any subcontractor . . .”

(29 C.F.R. §965.101 (b). Emphasis added.)

# LINKS TO CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT PROGRAM GUIDELINES

[Multifamily Housing Program Final Guidelines \(ca.gov\) at p. 23, Section 7316, para. \(e\) - "Construction Requirements"](#)

[INFILL INFRASTRUCTURE GRANT GUIDELINES at p. 38, Section 314, "Prevailing Wages"](#)

[Transit-Oriented Development Guidelines - 4.30.2020 \(ca.gov\) at p. 30, para. E](#)

[Permanent Local Housing Allocation Program Non-Entitlement Local Government Competitive Notice of Funding Availability, Amended Nov. 6, 2020, at p. 12, para. D, "State Prevailing Wages"](#)

[No Place Like Home Program Round 3 Guidelines \(ca.gov\), at p. 42, Section 213; and p. 60, Section 304](#)

# LINKS TO CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT PROGRAM GUIDELINES

[Housing for a Healthy California Final Guidelines- Amended, at p. 30, Section 119, para. \(a\) Federal Overlays \(includes required compliance with state prevailing wage laws\).](#)

[Affordable Housing and Sustainable Communities Program, Round 5 Guidelines, amended 2/24/2021, at p. 53, Section 113 - "Prevailing Wages"](#)

[Home Investment Partnerships Program, Notice of Funding Availability \(ca.gov\), at p. 44, Section VII, para. A "Federal Overlays"; and p. 46](#)

[Updated Streamlined Ministerial Approval Process \(ca.gov\) at p.12, para. 4 \(A\); p. 21, para. d \(1\) \(A\) & d \(1\) \(B\); and pgs. 24-28, Section 403 "Labor Provisions"](#)

[Homekey Program Guidelines](#)

# Residential vs. Commercial projects & rates.

Contractors must be familiar with applicable PW regulations  
(Title 8, Cal. Code of Regs. §16001)

Title 8, Calif. Code of Regs., §16001, subds. (d) & (e) define  
“residential” and “commercial” projects as follows:

(d) **Residential Projects.** Residential projects consisting of *single family homes and apartments up to and including four stories* are subject to payment of [PWs] when paid for in whole or in part out of public funds, including federally-funded or assisted residential projects controlled or carried out by an awarding body. . . .

(e) **Commercial Projects.** All non-residential construction projects including new work, additions, alterations, reconstruction and repairs. *Includes residential projects over four stories.*

[Emphasis added.]

# Definitions summarized in recent Residential Prevailing Wage Determinations

## EXAMPLE:

“This residential determination applies only to the residential portion of the project meeting this definition. Construction of any structures or ancillary facilities on the project that does not meet this definition requires the payment of the general commercial prevailing wage rates. The general *commercial prevailing wage rates apply to all residential projects consisting of buildings of five or more stories*. The residential prevailing wage rates apply to all residential projects consisting of buildings *up to and including four stories*.” (Emphasis added.)

(RESIDENTIAL DETERMINATION: R-23-31-2-2021-1.)

# Assembly Bill 1023

Submission of Electronic Certified Payroll Records (eCPR)

# AB 1023

Assembly Bill 1023 (AB 1023) became effective on January 1, 2022.

- AB 1023 amends Labor Code §1771.4 to clarify the requirement that contractors and subcontractors on public works projects furnish electronic certified payroll records (eCPRs) to the Labor Commissioner and create new penalties for a contractor's failure to do so.
- Existing law required eCPRs to be submitted on at least a monthly basis since 2014 (SB 854). The Labor Commissioner has required contractors to report certified payroll information online using DIR's electronic certified payroll reporting system.
- A few projects are exempt from the requirement to submit eCPRs to the DIR:
  - 1) "Small projects" which are projects that do not exceed \$25,000 for construction, alteration, installation, demolition or repair, or \$15,000 for maintenance work.
  - 2) Projects covered by a qualifying project labor agreement.
  - 3) Projects monitored by a legacy Labor Compliance Program (Caltrans, City of Los Angeles, Los Angeles Unified School District, and County of Sacramento).

# AB 1023

- Submission of eCPRs is a separate and distinct requirement from other reporting obligations of contractors and subcontractors. For example, a contractor must provide certified copies of documents within 10 days of the Labor Commissioner’s written request. (Labor Code §1776(d).) Conversely, a contractor who provides payroll records in response to a written request from the Labor Commissioner is still required to submit eCPRs on a monthly basis. (See Office of the Labor Commissioner Public Works Manual, §3.1.6.)
- AB 1023 makes a contractor or subcontractor who fails to furnish eCPRs at least monthly liable for penalties of \$100 per day, up to \$5,000 per project. (Labor Code §1771.4(a)(3)(B).) Penalties only accrue against the actual contractor or subcontractor that failed to furnish eCPRs. These penalties are enforced through the CWPA process. (Labor Code §1741.)
- AB 1023 clarifies the term “monthly” as being “at least once every 30 days while work is being performed on the project and within 30 days after the final day of work performed on the project.” (Labor Code §1771.4(a)(3)(A)(i).)