

(revised 1/17/12)

This document provides clarifications with respect to new **Labor Compliance Program (LCP)** requirements and procedures mandated by Assembly Bill 436 (effective January 1, 2012).

1. How did UC administer LCPs prior to January 1, 2012?

By statute, UC was required to have an LCP in effect for all projects funded by 2002 and 2004 GO Bonds (this could have been one systemwide LCP, or each campus could have adopted its own LCP). To comply with the statutory requirement, UC elected to utilize one LCP for the entire system. Five campuses (San Diego, San Francisco, Santa Barbara, Santa Cruz, and Irvine) used employees to administer the University's systemwide LCP at their campuses. The five remaining campuses (Berkeley, Davis, Los Angeles, Merced, and Riverside) used Contractor Compliance and Monitoring Inc. (CCMI) to administer the University's systemwide LCP at their campuses. CCMI also prepared an Annual Report covering all ten campuses that is submitted to the State.

2. What are the key changes mandated by AB 436, effective January 1, 2012?

- a. For all construction projects funded in whole or in part by bonds issued by the State of California, the University must either utilize an LCP or pay the Department of Industrial Relations (DIR) a fee of .25 of 1% of the bond funded portion of the project cost, in which case the DIR's Compliance Monitoring Unit (CMU) will enforce the prevailing wage laws on bond funded projects.
- b. The University had the option of continuing its systemwide LCP. Upon adoption of a systemwide LCP, no campus could avoid the LCP requirement for any of its bond funded projects by paying the .25 of 1% fee to the DIR.
- c. Alternatively, the University had the option of abolishing its systemwide LCP, in which case each campus could elect to either establish its own LCP, or pay the .25 of 1% fee to the DIR. All projects at a campus would either be subject to the campus LCP or the fee requirement (meaning that a campus could not pay the fee on some projects and use its campus LCP on other projects).
- d. UC cannot use an outside consultant like CCMI to run an LCP. CCMI can provide training and assistance with tasks to supplement the work of staff in charge of and responsible for an LCP. (See #12.)

3. How did UC elect to comply with AB 436?

UC elected to continue its system wide LCP, to be administered locally by each campus. Local options were not chosen because of perceived difficulty securing approval by the DIR, which could have forced all campuses to pay the fee to the DIR, notwithstanding the desire of most to continue with the LCP. UC's application to continue use of its systemwide LCP is current pending with the DIR (pending action on the application, UC intends to continue to utilize the existing LCP unless or until UC is directed not to by the DIR). Campuses can assist each other in performing compliance.

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4. What is entailed when a campus administers the systemwide LCP locally?

- a. Campus to add applicable language to Supplementary Conditions prior to bidding.
- b. Campus to submit a DIR-PWC 100 form to DIR prior to Notice to Proceed. (This informs DIR that the construction phase of a project is commencing.)
- c. Campus to use LCPtracker or comparable software. Use attached spreadsheet to calculate LCPtracker cost. (For further assistance, call Chris Hornbeck at 510-987-0312).
- d. Campus to conduct the preconstruction conference and cover LCP requirements with GC and first tier subs.
- e. Campus to display the State LCP poster at each work site.
- f. Campus to conduct on-site verification of required postings weekly.
- g. Campus to conduct on-site job interviews at least monthly.
- h. Campus to review monthly payroll and report violations.
- i. Campus to be responsible for informing the GC of wage violations, setting up of meetings with contractor, preparing documentation of violations. Campus to withhold payments to GC if necessary.
- j. Campus/OGC to report violation to the CMU.
- k. Campus to prepare an annual report.

5. Does AB 436 apply to projects funded by bonds issued by the Federal government, local public entities (counties) or UC?

AB 436 does not apply to projects funded by bonds issued by the Federal government or by local public entities (counties). UC takes the position that AB 436 does not apply to projects funded with bonds issued by UC. DIR has not taken a position on whether AB 436 applies to projects funded with bonds (UC would probably litigate the issue if the DIR tried to apply AB 436 to projects funded by UC bonds).

6. Does AB 436 apply to state bond funded contracts awarded on or after January 1, 2012, if the contract was advertised and bids were received prior to January 1?

Yes. AB 436 is a condition of funding any contract awarded on or after January 1, and therefore applies to all such contracts, without exception.

7. Will AB 436 apply to all state bond funded projects over \$1,000 funded by state bonds?

Yes. \$1,000 is the applicable threshold.

8. Will AB 436 apply to state bond funded maintenance and repair projects?

Yes. AB 436 applies to all state bond funded construction, alteration, demolition, installation (e.g., equipment installation, carpet installation), repair, or maintenance work done under construction or purchase contract costing more than \$1,000. It includes work performed during design/preconstruction (e.g., inspection and land surveying) where

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prevailing wages are required by statute.

9. Will AB 436 apply to energy projects funded by State Energy Partnership funds?

No. Any bond financing for energy projects is from bonds issued by UC (see #5 regarding UC bond-financed projects).

10. Will AB 436 apply to the installation of equipment funded by state bonds?

Yes, if the installation is subject to the prevailing wage laws (generally meaning that the equipment is in some fashion attached to a UC building or other structure, but legal advice should be sought on this issue). (See answer to #9, above.)

11. Where should the cost to implement the LCP Program appear in the Project Budget?

Sub 8.

12. A campus locally administering the systemwide LCP is allowed to hire a consultant to perform the following functions:

- a. For legal representation or other licensed professional services that are directly related to the operation of the labor compliance program and that require special expertise that is not available among the campus' own employed staff;
- b. To augment employed staff in the performance of tasks required under Title 8, section 16432 (copy attached), provided that the consultants exercise no discretionary authority on behalf of the campus and are under the direct day-to-day control and supervision of campus employees who are principally and primarily engaged in performing duties on behalf of the labor compliance program; or
- c. for the purpose of reviewing program operations or providing other assistance on a purely advisory basis in which the consultant has no authority to act or withhold action on behalf of the campus nor the authority to compel, withhold, or delay any action by the campus.

13. AB 436 applies to “any public works project awarded on or after January 1, 2012 that is funded in whole or in part from any bond issued by the state to fund public works projects.” When is a public works project awarded?

When the construction contract is awarded. On design build, when the design build contract is awarded; on CM at Risk, when the prime contract is awarded. On multiple prime, when the first prime contract is awarded.

14. Is the fee for University Design Build projects limited to a percentage of the bond funded portion of the project costs?

Yes.

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Information sources:

<http://www.dir.ca.gov/lcp.asp>

For operational or logistical non-legal questions:

LCP status questions: Victor Osorio, 415-703-5054 (Director's office)

Enforcement Responsibilities: Labor Commissioner (DLSE) Public Works Unit in Long Beach

UCOP: Chris Hornbeck - 510-987-0312

(Regulation section 16432 on following page)

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§16432. Investigation Methods for Labor Compliance Program – Definitions and Minimum Requirements, Including Review, Confirmation and Audits of Payroll Records; On-Site Visits; and Early Resolution of Audits.

(a) The primary function of the Labor Compliance Program is to ensure that public works contractors comply with the prevailing wage requirements found in the Public Works Chapter of the Labor Code. This regulation is intended to establish minimum requirements which all Labor Compliance Programs shall meet or exceed in carrying out that function. Definitions found throughout this regulation are intended to provide Labor Compliance Programs and representatives of the Department of Industrial Relations and the Division of Labor Standards Enforcement with common terminology as they each perform their respective roles in prevailing wage enforcement in furtherance of the Labor Code provisions establishing Labor Compliance Programs. This regulation is also intended to confirm that the proactive investigation methods, as described in detail herein, only comprise the minimum obligations required of Labor Compliance Programs to satisfy their duty to the Director to operate a Labor Compliance Program as specified in sections 16428 and 16434.

(b) Payroll records furnished by contractors and subcontractors in accordance with section 16421(a)(3) above, and in a format prescribed at section 16401 of Title 8 of the California Code of Regulations, shall be reviewed by the Labor Compliance Program as promptly as practicable after receipt thereof, but in no event more than 30 days after such receipt. “Review” for this purpose shall be defined as inspection of the records furnished to determine if (1) all appropriate data elements identified in Labor Code Section 1776(a) have been reported; (2) certification forms have been completed and signed in compliance with Labor Code Section 1776(b); and (3) the correct prevailing wage rates have been reported as paid for each classification of labor listed thereon, with confirmation of payment in the manner and to the extent described in subpart (c) below.

(c) “Confirmation” of payroll records furnished by contractors and subcontractors shall be defined as an independent corroboration of reported prevailing wage payments. Confirmation may be accomplished through worker interviews, examination of paychecks or paycheck stubs, direct confirmation of payments from third party recipients of “Employer Payments” (as defined at section 16000 of Title 8 of the California Code of Regulations), or any other reasonable method of corroboration. For each month in which a contractor or subcontractor reports having workers employed on the public work, confirmation of furnished payroll records shall be undertaken randomly for at least one worker for at least one weekly period within that month. Confirmation shall also be undertaken whenever complaints from workers or other interested persons or other circumstances or information reasonably suggest to the Labor Compliance Program that payroll records furnished by a contractor or subcontractor are inaccurate.

(d) Representatives of the Labor Compliance Program shall conduct in-person inspections at the site or sites at which the contract for public work is being performed (“On-Site Visits”). On-Site Visits may be undertaken randomly or as deemed necessary by the Labor Compliance Program, but shall be undertaken during each week that workers are present at sites at which the contract for public work is being performed. All On-Site Visits shall include visual inspection of (1) the copy of the determination(s) of the Director of Industrial Relations of the prevailing wage rate of per diem wages required to be posted at each job site in compliance with Labor Code Section 1773.2, and (2) the Notice of Labor Compliance Program Approval required to be posted at the job site in accordance with section 16429 above, listing a telephone number to call for inquiries, questions, or assistance with regard to the Labor Compliance Program. On-Site Visits may include other activities deemed necessary by the Labor Compliance Program to independently corroborate prevailing wage payments reported on payroll records furnished by contractors and subcontractors.

(e) An Audit, as defined herein, shall be prepared by the Labor Compliance Program whenever the Labor Compliance Program has determined that there has been a violation of the Public Works Chapter of the Labor Code resulting in the underpayment of wages. An “Audit” for this purpose shall be defined as a written summary reflecting prevailing wage deficiencies for each underpaid worker, and including any

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penalties to be assessed under Labor Code Sections 1775 and 1813, as determined by the Labor Compliance Program after consideration of the best information available as to actual hours worked, amounts paid, and classifications of workers employed in connection with the public work. Such available information may include, but is not limited to, worker interviews, complaints from workers or other interested persons, all time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project. An Audit is sufficiently detailed when it enables the Labor Commissioner, if requested to determine the amount of forfeiture under section 16437, to draw reasonable conclusions as to compliance with the requirements of the Public Works Chapter of the Labor Code, and to enable accurate computation of underpayments of wages to workers and of applicable penalties and forfeitures. An Audit using the forms in Appendix B, when accompanied by a brief narrative identifying the Bid Advertisement Date of the contract for public work and summarizing the nature of the violation and the basis upon which the determination of underpayment was made, presumptively demonstrates sufficiency. Records supporting an Audit shall be maintained by the Labor Compliance Program to satisfy its burden of coming forward with evidence in administrative review proceedings under Labor Code Section 1742 and the Prevailing Wage Hearing Regulations found at sections 17201-17270 of Title 8 of the California Code of Regulations.

(f) After the Labor Compliance Program has determined that violations of the prevailing wage laws have resulted in the underpayment of wages and an audit has been prepared, notification shall be provided to the contractor and affected subcontractor of an opportunity to resolve the wage deficiency prior to a determination of the amount of forfeiture by the Labor Commissioner pursuant to these regulations. The contractor and affected subcontractor shall be provided at least 10 days following such notification to submit exculpatory information consistent with the “good faith mistake” factors set forth in Labor Code Section 1775(a)(2)(A)(i) and (ii). If, based upon the contractor's submission, the Labor Compliance Program reasonably concludes that the failure to pay the correct wages was a good faith mistake, and has no knowledge that the contractor and affected subcontractor have a prior record of failing to meet their prevailing wage obligations, the Labor Compliance Program shall not be required to request the Labor Commissioner for a determination of the amount of penalties to be assessed under Labor Code Section 1775 if the underpayment of wages to workers is promptly corrected and proof of such payment is submitted to the Labor Compliance Program. For each instance in which a wage deficiency is resolved in accordance with this regulation, the Labor Compliance Program shall maintain a written record of the failure of the contractor or subcontractor to meet its prevailing wage obligation. The record shall identify the public works project, the contractor or affected subcontractor involved, and the gross amount of wages paid to workers to resolve the prevailing wage deficiency; and the record shall also include a copy of the Audit prepared pursuant to subpart (e) above along with any exculpatory information submitted to the Labor Compliance Program by the affected contractor or subcontractor.

NOTE: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1742, 1771.5, 1773.1, 1773.2, 1775, 1776, and 1813, Labor Code.