Ohio Department of Transportation

Trucking Guidelines – Revised May 2021

Federal and State Projects

Site of Work

Laborers and mechanics must be paid prevailing wage for work performed at the site of work. Site of work is defined in the Code of Federal Regulations (CFR) as follows:

29 CFR 5.2(l)(1) states: "*The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project*."

29 CFR 5.2(l)(2) states that other work areas not located on the site of permanent construction (e.g., job headquarters, tool yards, batch plants, borrow pits, etc.), may be part of the site of work "…*provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of work*."

Any drivers who are not owner-operators and are working ***within*** the site of work, as described above, are entitled to prevailing wage. Additionally, drivers operating between two "site of work" areas are also entitled to prevailing wage. Based on the holding found in *L.P. Cavett Company v. U.S. Dep't of Labor*, 101 F.3d 1111 (6th Cir. 1996), ODOT will consider site of work within two (2) miles from the project limits.

It is important to understand that each project could have many variables and therefore will be evaluated on a case-by-case basis. Evaluations will be conducted at the site of work to determine whether prevailing wage must be paid.

Trucking Firm

A "trucking firm" is any legal business entity that owns more than one truck and hires those trucks to broker firms or contractors on public works projects. The owner(s) of a trucking firm may either drive the vehicle or hire employees to drive the vehicles. If the owner(s) hire(s) an employee to drive, that employee driver is subject to the appropriate prevailing wage.

DBE Trucking Firm (Federally-Funded Projects Only)

A DBE trucking firm hired as a subcontractor for its transportation services provided on the project, using trucks owned and insured by the DBE firm and driven by the DBE firm employees can be counted toward the DBE goal.

DBE firms may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE, and still receive the same credit. Any form of leasing agreements between DBE firms must be approved by the Ohio Department of Transportation, Division of Opportunity, Diversity, and Inclusion, Office of Civil Rights Compliance in collaboration with the Goal Attainment Coordinator in the Office of Business & Economic Opportunity, if needed, prior to use in a contract.

The DBE may also lease trucks from a non-DBE firm, as long as the lease is long term and the DBE is responsible for operating costs, including fuel, maintenance, and vehicle insurance. If the DBE firm leases trucks and employees from a non-DBE firm, the DBE will not receive credit for the services provided by the non-DBE firm.

Owner/Operator

To determine if an owner-operator is an independent contractor, the owner-operator or in essence one-person, one-truck, sole proprietor will be evaluated by the "right to control" method. The Department of Labor's 2015 and 2016 informal guidance on joint employment and independent contractors were withdrawn effective June 7, 2017. Removal of the two administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act or Migrant and Seasonal Agricultural Worker Protection Act, as reflected in the Department's long-standing regulations and case law. The Department will continue to fully and fairly enforce all laws within its jurisdiction including the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act. *See* https://www.dol.gov/agencies/whd/opinion-letters/administrator-interpretation/flsa#foot

In applying the economic realities factors, courts have described independent contractors as those workers with economic independence who are operating a business of their own. The owner-operator should evidence this relationship by contract between the prime contractor/subcontractor. On the other hand, workers who are economically dependent on the employer, regardless of skill level, are employees covered by the Fair Labors Standard Act.[1]

The owner-operator must assume all responsibility for the maintenance of the equipment and bear the principal burden of the operating costs such as fuel, repairs, supplies, vehicle insurance, and personal expenses while on the road.

Documentation such as a driver's license, vehicle registration, insurance, and lease agreements are required to be carried by the owner-operator and are routinely reviewed by ODOT project personnel.

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[1] *See, e.g., Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008) ("To determine if a worker qualifies as an employee, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself."); *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1437, 1440 (10th Cir. 1998) (the economic realities of the relationship govern, and the focal point is whether the individual is economically dependent on the business to which he renders services or is, as a matter of economic fact, in business for himself); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) ("The ultimate concern is whether, as a matter of economic reality, the workers depend on someone else's business…or are in business for themselves." "Ultimately, in considering economic dependence, the court focuses on whether an individual is 'in business for himself' or is 'dependent upon finding employment in the business of others'." *Scantland v. Jeffry Knight, Inc.*, F.3d 1308, 1312 (11th Cir. 2013) (quoting *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 301-02 (5th Cir. 1975).)

In some cases, an owner-operator may own additional trucks. Drivers of those trucks would not be classified as owner-operators (*see* footnote). Depending on the circumstance, those drivers may be subject to be paid prevailing wage.

Exemptions

29 CFR 5.2(l) provides that truck drivers who come onto the site of work to drop off construction materials are often exempt from the payment of prevailing wages. Davis Bacon wage rates are ***not*** applicable to truck drivers under the following types of situations:

- A truck driver is dropping off material from a project material source that is not considered dedicated to the project, adjacent or virtually adjacent, and time spent is *de minimis* or not more than 20% of his/her work week on the project **waiting to load/unload**.

- Drivers of a contractor or subcontractor traveling between a prevailing wage job and a commercial facility while they are off the "site of work."

- An owner-operator meeting the criteria in the definition noted above.

Example Calculation of 20% Rule

When a driver spends more than *de minimis* or 20% or more cumulative time of their work week (7 consecutive days) on the site of work, the driver is entitled to prevailing wage for all time spent on the site during that work week. Below is an example of calculating the prevailing wages for one week as this rule applies:

Truck driver work week: 40 hours
9 hours driving within the site of work loading/unloading and/or waiting
31 hours driving to or from a commercial off-site location
Regular pay: $10 per hour
Prevailing wage: $13 per hour plus $7 per hour fringe benefit pay for a total of $20 per hour

31 hours x	$10	=$310.00
9 hours x	$20	=$180.00
Gross Wages		=$490.00

Employee v. Independent Contractor

In recent years, the Wage and Hour Division of the U.S. DOL, the ODOC Bureau of Wage and Hour, and ODOT's Division of Opportunity, Diversity, and Inclusion have undergone several investigations involving the determination of the independent contractor and the employee. It is prevalent in the industry to attempt to employ individuals as independent contractors when, in

fact, they are an employee. The following information will give reference to authority in these matters and source information in attempt to provide guidance to the industry.

The definition of an independent contractor by the Internal Revenue Service (IRS) are "[p]eople such as doctors, dentists, veterinarians, lawyers, accountants, contractors, subcontractors, public stenographers, or auctioneers who are in an independent trade, business, or profession in which they offer their services to the general public are generally independent contractors. However, whether these people are independent contractors or employees depends on the facts in each case. The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done. The earnings of a person who is working as an independent contractor are subject to Self-Employment Tax.

If you are an independent contractor, you are self-employed. To find out what your tax obligations are, visit the Self-Employed Tax Center."

Therefore, "You are not an independent contractor if you perform services that can be controlled by an employer (what will be done and how it will be done). This applies even if you are given freedom of action. What matters is that the employer has the legal right to control the details of how the services are performed.

If an employer-employee relationship exists (regardless of what the relationship is called), you are not an independent contractor and your earnings are generally not subject to Self-Employment Tax.

However, your earnings as an employee may be subject to FICA (Social Security tax and Medicare) and income tax withholding.

For more information on determining whether you are an independent contractor or an employee, refer to the section on Independent Contractors or Employees.

Source: https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined

Employee misclassification is also referred to above under the heading of Owner/Operator. Reference and resources in that section are made to U.S. DOL.