

ILLINOIS PREVAILING WAGE UPDATE!

SB 223 (PA 96-0058) May Not Serve Labor's Agenda... Illinois Appellate Court Rejects Notion that Illinois' Prevailing Wage Act Applies to TIF Funding

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Introduction: The Illinois Prevailing Wage Act (820 ILCS 130/0.01 et. seq.) (the "IPWA") requires contractors to pay workers a prevailing rate of wages and benefits while engaged on construction projects constructed by a *public body*. These projects are referred under the Act as *public works*. These terms [*public body and public works*] have been the subject of litigation and controversy over their intended meanings. Many construction projects have fallen prey to the Act's ambiguity as to what specific projects should be deemed as *public works* and thus subject to the Act's coverage.

Labor's Attempt to Broaden the IPWA: Having handled hundreds of prevailing wage matters over the years, Labor often argues that the IPWA applies to construction projects undertaken by purely private entities which receive funds, monies or grants from the government (State or local). In other words, purely private entities receiving public financial assistance often find themselves being forced to observe Illinois' expansive prevailing wage requirements. However, the IPWA's application to local TIF-Districts, local Business Development Districts, local Special Service Areas and other local enterprise zones containing special tax breaks or financial incentives by and for private development is not exactly settled. Consequently, Labor has championed legislation to specifically amend the IPWA to include projects in TIF-districts, enterprise zones, etc... Labor's latest efforts were disrupted earlier this year thanks in large measure to the Illinois Chamber's Employment Law Council and Jay Dee Shattuck. Despite this victory, Labor did manage to push through another piece of legislation (SB223) aimed to expand the IPWA's reach.

SB223 (PA 96-0058): SB223 was signed into law by Governor Quinn on July 23, 2009 as PA 96-0058 (effective January 1, 2010). This new law amends the definition of *public works* contained in the IPWA to include *all projects financed in whole or in part with bonds, grants, loans or other funds made available by and through the State or any of its political subdivisions*. Although the Illinois Department of Labor and Governor Quinn describe this new law as a form of "clarity" to the IPWA, it was feared that the law would accomplish what Labor originally intended but was unsuccessful in changing – the application of the IPWA to TIF-districts, private enterprise zones, and other purely private development projects financed in part through government incentives.

Case Law Update (*Town of Normal v. F.J. Hafner et. al.*): Although it's way too early to predict how PA 96-0058 will play out in the courts, a recent Illinois appellate court decision shines some light on the issue of private enterprise being subjected to the IPWA

and TIF funding. On November 20, 2009, the Appellate Court for the 4th District of Illinois handed down a decision in the case of *Town of Normal v. F.J. Hafner and Fred Hafner* (2009 WL 4263546). The Appellate Court decided the issue of whether the IPWA should apply to private developers constructing private family residences in a tax increment financing district where the developers receive a public incentive in the form of a portion of the tax increment generated from the project? The Court held that the IPWA does not apply in such context. In reaching its finding, the Court relied on the rules of statutory construction where the IPWA does not expressly include TIF funding. Specifically, the Court held that the private developer was not a *public body* under the IPWA and when a private individual uses only TIF funds to redevelop an area the project is not a *public work*.

Labor's Anticipated Reaction to *Town of Normal v. F.J. Hafner et. al.*: First, there's no guarantee that this ruling will stand since the case could go to the Illinois Supreme Court for further ruling. Second, this decision obviously relied on facts and law existing prior to the enactment of SB223. That noted... The 4th District Appellate Court has soundly rejected the notion that private development supported through TIF funding results in the application of the IPWA. In light of the Court's opinion and analysis, Labor will be hard-pressed to successfully argue that the IPWA (even with SB223) should apply to TIF-Districts, local Business Development Districts, local Special Service Areas and other local enterprise zones containing special tax breaks or financial incentives by and for private development. The IPWA simply and clearly does not expressly provide for such a result. Therefore, it should be anticipated that Labor will once again push for the immediate passage of law that amends the IPWA to expressly include such projects, development and funding.

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