

June __, 2021

Re: **Appropriate Job Classifications**

This letter determines the appropriate job classifications for the following tasks: (1) patching block walls; (2) rubbing block walls; (3) cutting joints; (4) rubbing and cleaning bricks; and (5) installing wall ties.

The Massachusetts Prevailing Wage Law applies to the construction of public works by the commonwealth, or by a country, town, authority or district. G.L. c. 149 §§ 26 and 27. The term "construction" includes "additions and alternations" of public works, including the repair and replacement of public works. G.L. c. 149, § 27D. The Department of Labor Standards sets prevailing wage rates established by "collective agreements or understandings in the private construction industry between organized labor and employers." G.L. c. 149 §26. DLS also determines the appropriate job classifications under the prevailing wage law by consulting these agreements and understandings and a range of other evidence, and may revise such classifications as deemed advisable. *See* G.L. c. 149, § 27.

Historically there has been some confusion and disagreement regarding the Department's classification of the five tasks itemized above. There have been consistent questions regarding whether the tasks should be classified as the work of the Mason (under the "Brick/Stone/Artificial Masonry (inc. Waterproof Masonry)" or "Cement Mason/Plasterer" occupational classifications) or the Laborer (under the "Laborer: Mason Tender" classification). No other trades have been considered and no other job classifications have been raised as possibilities. In recent years, the Department of Labor Standards has attempted to clarify the confusion around those tasks, but questions have persisted from representatives of contractors and unions.

Following a hearing conducted on January 27, 2021 and the consideration of additional evidence submitted by interested parties, and pursuant to its Public Review Process for Prevailing Wage Opinion Letters, the Department is now issuing job classifications for each of the five tasks that were the subject of the proceeding, as detailed below.

Recent History

In 2004, the Division of Occupational Safety (the predecessor agency to the Department) received a request regarding the appropriate classification for "cutting brick and block on a school building project." Relying exclusively on its review of then-current collective bargaining agreements, the Department concluded that "it appears from these agreements that the work of cutting brick and block . . . would be the work of the *Brick/Stone/Artificial Masonry (inc. Waterproof Masonry)* occupational classification." (*Prevailing Wage Opinion Letter 5-12-04* (Sept. 8, 2004), www.mass.gov/files/documents/2017/11/13/PW%20Opinion%2005-12-04.pdf.)

On November 2, 2006, an Assistant Attorney General requested an opinion from DOS regarding the job classifications on a prevailing wage project for all five of the tasks at issue here. That 2006 request from the Attorney General's Office highlighted both the confusion regarding the classification of the tasks at issue and the considerable limitations of DOS's 2004 analysis. The

request stated, “[t]he question is whether certain work is under the jurisdiction of the masons/bricklayers or the laborers. Both collective bargaining agreements lay claim to the work”. [AGO Letter to DOS, November 2, 2006.] On March 23, 2007, the Department issued an opinion letter, relying exclusively on its review of various collective bargaining agreements to determine that three of the five tasks in question were properly classified as Cement Mason/Plasterer and two tasks belonged to the Brick/Stone/Artificial Masonry classification.

On May 8, 2008, the Department issued another opinion letter on the issue. The May 8, 2008 letter was not in response to a new or different request, explicitly rescinded the March 23, 2007 letter, and was specific to the King Phillip Regional School project. Without analysis, public input from stakeholders, or reference to any collective bargaining agreements, the 2008 opinion letter removed the Cement Mason/Plasterer classification entirely and instead simply listed the five tasks and stated after each, “The proper job classification for this work is Brick/Stone/Artificial Masonry (inc. Masonry Waterproofing).” (*Prevailing Wage Opinion Letter 05-08-08* (May 8, 2008), www.mass.gov/files/documents/2017/11/09/PW-Opinion-05-08-08.pdf.)

More recently, on October 3, 2016, in response to a request from the Fair Labor Division of the Office of the Attorney General, the Department issued an opinion letter regarding the five tasks addressed in 2008 and again at issue here. Although the 2016 letter stated that “various trade representatives” were heard from on the matter it did not follow any structured public process to consider stakeholder evidence and affirmed the findings in the 2008 letter that all five tasks were properly classified as Brick/Stone/Artificial Masonry work. Additionally, unlike the 2008, letter which was specific to a particular project, the 2016 opinion letter stated that these tasks would “continue to be classified” as Brick/Stone/Artificial Masonry (inc. Masonry Waterproofing). Amid controversy, that letter was soon removed from the Department’s website and marked as, “Matter Under Review”.

On January 27, 2021, the Department of Labor Standards held a public hearing regarding the classification of the above-mentioned five tasks, at which interested parties gave testimony and presented evidence. The hearing was conducted pursuant to the Department’s “Public review process for Prevailing Wage opinion letters” (“DLS PW Policy”). Following the hearing, the Department kept the record open for a period during which parties could submit additional evidence.

Statutory, Legal, and Procedural Framework

Pursuant to section 27 of c. 149 of the General Laws, the Director of the Department of Labor Standards has authority to make job classifications. Moreover, the Director’s discretion under section 27 is plenary; he has discretion not only to “classify [] jobs” but also to “revise such classification from time to time, as he may deem advisable.” G.L. c. 149, § 27; *see also Constr. Indus. of Mass. v. Comm’r of Labor & Indus.*, 406 Mass. 162, 173 (1989) (citing *DiLoreto*, 418 N.E.2d 612) (explaining the inherent fairness in the statutory process regarding wage determinations and job classifications). Based upon those classifications, the Director also sets prevailing wage rates. *See* G.L. c. 149, §§ 26, 27.

Generally speaking, the Prevailing Wage Act requires that prevailing wage rates shall not be less than the wage rates that “have been established in certain trades and occupations by collective agreements or understandings in the private construction industry between organized labor and

employers.” See G.L. c. 149, § 26. As such, the setting of wage rates often requires exclusive reference to collective bargaining agreements. Job classification does not, although relevant collective bargaining agreements are certainly one factor that may be considered. Section 26 of chapter 149, which covers prevailing wage rates, expressly refers to collective bargaining agreements as one basis for setting those rates, but section 27—regarding job classifications, contains no such reference. In order to make these classifications, and revisions to these classifications, the Director must look to a myriad of factors.

There are many instances where a particular task is included in multiple collective bargaining agreements. In those cases, the agreements would be of limited assistance to the Department in resolving the classification question. Even in cases where a task is claimed by only one CBA, the Department’s inquiry should not end there. Courts have explained that the Prevailing Wage Act’s “primary goal is ‘to achieve parity between the wages of workers engaged in public construction projects and workers in the rest of the construction industry.’” *Donis v. Am. Waste Servs., LLC*, 485 Mass. 257, 263 (2020) (quoting *Mullally v. Waste Mgt. of Mass., Inc.*, 452 Mass. 526, 532 (2008)). As such, “the Prevailing Wage Act not only protects an employee’s interest in receiving a wage commensurate with his or her labor, it also prevents a contractor from ‘offer[ing] its services for less than what is customarily charged by its competitors for nonpublic works contracts.’” *Donis*, 485 Mass. at 263–64 (quoting *Mullally* at 533).

In 2017, in an attempt to make its opinion letter process more consistent, fair, and transparent, the Department developed its “Public review process for Prevailing Wage opinion letters” (“DLS PW Policy”). See <https://www.mass.gov/service-details/public-review-process-for-prevailing-wage-opinion-letters>. The DLS PW Policy sets forth the circumstances under which the Department issues prevailing wage opinion letters and the procedure for doing so. Under the DLS PW Policy, before issuing an opinion letter, the Department must notify stakeholders and host a public hearing on the matter, as occurred here. Following the hearing, the DLS PW Policy requires the Department to “consider all relevant evidence presented at the hearing or in any additional submittals, including but not limited to: testimony of persons with knowledge and expertise, provisions of CBAs that address the work at issue, standards of relevant professional licensing authorities, pertinent documents and/or photographs, evidence of current practices (union and non-union), and policies in other jurisdictions.” Importantly, pursuant to the DLS PW Policy, “[w]hile DLS will endeavor to classify a specific type of work into a single category . . . work might not fit perfectly into a single category. In those instances, DLS may classify the work in more than one category.”

In this instance, following the January 27, 2021 public hearing and in consideration of all relevant evidence, the Department issues the following classifications to be applied prospectively to all construction-related Prevailing Wage jobs:

Job Classifications

1. **Patching Block Walls:** *workers patch interior concrete block walls with a trowel and jointer. This is the process through which imperfections in block walls are repaired and/or corrected using filler or grouting materials.*

Evidence in the record shows that the Patching of Block Walls requires the skill of a mason. There was not compelling evidence provided showing that this task is performed regularly by laborers on non-prevailing wage projects. Furthermore, the evidence shows that the Patching of

Block Walls is claimed by the Bricklayers and Allied Craftsmen in all their collective bargaining agreements covering Massachusetts. There is no overlapping language in any other collective bargaining agreements related to patching of block walls.. Based on this evidence, the Director of the Department of Labor Standards hereby classifies this job as exclusively:

- *Bricklayers and Allied Craftsmen: Brick/Stone/Artificial Masonry (inc. Waterproof Masonry)*

2. **Rubbing Block Walls:** *upon construction of the new wall, workers use a rubbing stone and/or grinder to rub concrete block walls. This is the process through which brick surfaces are prepared for finishing.*

Evidence in the record shows that the Rubbing of Block Walls is claimed by the Bricklayers and Allied Craftsmen in all their collective bargaining agreements covering Massachusetts. However, the Laborers in their collective bargaining agreements covering Massachusetts claim trade autonomy over “Cleanup”, which includes the following:

- “[R]emoval of surplus material from all fixtures within the confines of the structure and cleaning of all debris for all trades in the building and construction area.”
- “The general clean-up for all trades including sweeping, cleaning, washdown, and wiping of construction facility, equipment and furnishings and removal of loading or burning of all debris including crates, boxes, packaging waste material shall be the work of the laborers.”
- “Washing and cleaning of walls, partitions, ceilings, windows, bathrooms, kitchens, laboratory, and all fixtures and facilities therein shall be the work of the laborers.”
- Furthermore, evidence provided both orally and in writing shows that this job is routinely performed by laborers in non-prevailing wage projects.

Based on this evidence, the Director of the Department of Labor Standards hereby classifies this job as both:

- *Bricklayers and Allied Craftsmen: Brick/Stone/Artificial Masonry (inc. Waterproof Masonry)*
- *Laborer: Mason Tender*

3. **Cutting Joints:** *workers cut concrete block joints on new interior concrete block walls by saw or grinder. Specifically, damaged bricks are ground and/or removed in order to prepare an area for new mortar.*

Evidence in the record shows that the cutting of joints is claimed by the Bricklayers and Allied Craftsmen in all their collective bargaining agreements covering Massachusetts, and that cutting, chipping, and grinding of concrete are tasks claimed by Laborers in the Building and Site Construction Agreement between Massachusetts & Northern New England Laborers I District Council and the Labor Relations Division of the Associated General Contractors of

Massachusetts, Inc. and Building Trades Employers Association of Boston and Eastern Massachusetts, Inc. Furthermore, evidence provided both orally and in writing shows that this job is performed by laborers on non-prevailing wage projects. Based on this evidence, the Director of the Department of Labor Standards hereby classifies this job as both:

- *Bricklayers and Allied Craftsmen: Brick/Stone/Artificial Masonry (inc. Waterproof Masonry)*
- *Laborer: Mason Tender*

4. **Rubbing, Cleaning Bricks:** *after installation of the brick-face, workers use water or acid to wash the brick, exterior wall; they also use a brush and stone to smooth the brick surface. This involves using water and a mix of chemical solutions to clear and prepare surfaces for finishing. After the cleaning solution is applied, bricks are rubbed down to remove excess mortar/materials, and prepared for finishing. Bricks are also rinsed.*

Evidence in the record shows that the Rubbing and Cleaning of Bricks is claimed by the Bricklayers and Allied Craftsmen in all their collective bargaining agreements covering Massachusetts. However, the Laborers in their collective bargaining agreements covering Massachusetts claim trade autonomy over “Cleanup”, which includes the following:

- “[R]emoval of surplus material from all fixtures within the confines of the structure and cleaning of all debris for all trades in the building and construction area.”
- “The general clean-up for all trades including sweeping, cleaning, washdown, and wiping of construction facility, equipment and furnishings and removal of loading or burning of all debris including crates, boxes, packaging waste material shall be the work of the laborers.”
- “Washing and cleaning of walls, partitions, ceilings, windows, bathrooms, kitchens, laboratory, and all fixtures and facilities therein shall be the work of the laborers.”

Furthermore, evidence provided both orally and in writing shows that this job is routinely performed by laborers in non-prevailing wage projects. Based on this evidence, the Director of the Department of Labor Standards hereby classifies this job as both:

- *Bricklayers and Allied Craftsmen: Brick/Stone/Artificial Masonry (inc. Waterproof Masonry)*
- *Laborer: Mason Tender*

5. **Installing Wall Ties:** *using wall ties to secure the brick face to the surface of an exterior wall; in some circumstances ties are installed through use of a power screw gun. A wall tie, sometimes called a brick tie, is a metal anchor used to join together internal and external walls.*

Evidence in the record shows that there are multiple elements involved in the job of installing wall ties, as well as different methods for doing so. In the most common method, a base or anchor is installed on the supporting wall (screwed or hammered into drilled hole). The actual “tie” is looped through this base or anchor and incorporated into the mortar between courses of brick. In this circumstance, the installation of the base or anchor could be considered preparation of material for the use of the mason, as claimed in the craft jurisdiction of the Laborers. Furthermore, compelling evidence was provided demonstrating that the installation of the base or anchor is regularly and successfully performed by laborers. There is general agreement that the “tie” is then installed by the mason as a matter of connecting it to the base or anchor and incorporating it into the brick and mortar as they are laid down. This portion of the job is claimed solely by the Bricklayers and Allied Craftsmen in all their collective bargaining agreements covering Massachusetts. Based on this evidence, the Director of the Department of Labor Standards hereby classifies this job as both:

- *Bricklayers and Allied Craftsmen: Brick/Stone/Artificial Masonry (inc. Waterproof Masonry)*
- *Laborer: Mason Tender*

DLS endeavored to classify these jobs into single categories. In four instances DLS was not able to do so based on overlapping trade autonomy in two collective bargaining agreements, a lack of clear, objective standards for applying one classification rather than another, and a lack of consistency within how the jobs are assigned in prevailing wage and non-prevailing wage work. Where DLS has classified a specific job as belonging to more than one classification, contractors must pay one of the applicable wage rates.

Very Truly Yours,