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What Do I Do When L&I Says I Misclassified Work and Owe Back Wages?

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I am frequently asked by my construction clients about what to do when L&I investigators tell them they misclassified workers and paid the wrong prevailing rate. One example might be a claim by L&I that a worker was paid at the roofer rate when the work should have been paid at the sheet metal rate (or some other higher rate). L&I often reviews certified payrolls for the entire project (or multiple projects) and claims you owe hundreds or even thousands in back wages. Contractors are often confused because they always paid for the same work at the rate they paid without a problem. *Why now, they ask, I've been paying for this work at the roofer rate for as long as I can remember?* Many think they have to accept L&I's position and that there is nothing they can do about it. But this isn't necessarily the case – often L&I cannot defend its position and backs down when pressed.

Contractors may have legitimate defenses and should consult with experienced construction counsel regarding defenses and the strength of L&I's position. When L&I claims work was misclassified, it almost always relies on a vague standard which it refers to as "custom and usage." The investigator might say to you, *"according to custom and usage, this is sheet metal work."* However, if you request that the investigator to show you a rule, law or regulation that actually lists the work activities that belong to that particular craft, he/she can almost never do so. This is because, in almost all cases, none exist. Basically, the investigator just makes up the so-called "rule" and then claims it's based on custom and usage because some union business agent told him that the work belongs to a particular craft.

ABC Keystone recently convinced L&I to make a list of tasks/activities that can be properly paid at the "Laborer" rate. That list of tasks appears on L&I's website. It provides valuable guidance as to the tasks that are within the laborer classification. There is no similar list of tasks for most of the other crafts/classifications. Consequently, when facing a misclassification allegation, you may want to ask the investigator to show you where it states in writing that the work belongs to the craft or classification he/she claims. In most cases, he/she will not be able to do so. In this writer's experience, requesting in writing that the investigator provide written justification for the rule has caused L&I to back off in some cases.

Be careful about providing more information than required to L&I investigators. The Prevailing Wage Act requires that contractors make their prevailing wage records available for inspection during normal business hours upon seven days' notice. The only records you are required to produce are those showing the worker's name, the rate paid and the number of hours he/she worked in each craft or classification. There is no requirement to produce more records or that you submit to an interview or meeting with L&I. The Act does not require you to produce many of the records that L&I often requests.



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In summary, be careful when dealing with L&I. If you receive a phone call or request to provide documents, consult with your attorney to guide you through the process. If L&I contacts you, it is usually due to a complaint by someone (a worker, a business agent or a union competitor). Don't make the mistake of assuming that L&I is just making a "routine" spot check.