



LAW OFFICES OF YOUNG, MINNEY & CORR, LLP  
THE CHARTER LAW FIRM

SARAH J. KOLLMAN ESQ.

PARTNER ■ ATTORNEY AT LAW

skollman@mycharterlaw.com

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SENT VIA E-MAIL TO  
DIRECTOR@TRCSCHOOL.ORG

Kimberly Morgan,  
School Director/Principal  
Three Rivers Charter School  
1211 Del Mar Drive  
Fort Bragg, CA 95437

**Re: Prevailing Wage Applicability**

Dear Kimberly,

You have asked our office for an opinion regarding whether Three Rivers Charter School (hereinafter, the “Charter School”) is required to comply with prevailing wage laws in completing repairs to its school facilities, consisting of portable classrooms owned by a community college and located on a community college campus, and leased to the Charter School. These repairs will be carried out using the Charter School’s own accumulated savings, no other public entity has contributed to or will contribute to the cost of the repairs, and the Charter School is not using state bond funds or other facilities-specific state funds to complete the repair (“Project”).

Whether the contractors for the Project must comply with prevailing wage laws presents a question that has never been formally answered by a court. However, because the Charter School intends to pay for the Project using only savings from its general fund, which originated as apportionment dollars, the Charter School is not a “state or political subdivision” for purposes of prevailing wage compliance, and the repair project is not paid for in whole or in part out of public funds, the Project is likely not be subject to prevailing wage laws.

This letter first provides an overview of the prevailing wage laws and discusses the consequences for failing to properly identify a public works project as such. Next this letter finds that a charter school is not “the state or [a] political subdivision” whose construction and repair activities are subject to prevailing wage laws. This letter then finds that a charter school’s use of state apportionment dollars for construction and repair does not trigger the payment of prevailing wages, and concludes that as a result the Project does not need to comply with prevailing wage laws.

Prevailing Wage and Public Works Law

SACRAMENTO ■ LOS ANGELES ■ SAN DIEGO ■ WALNUT CREEK

MAIN OFFICE: 655 UNIVERSITY AVENUE, SUITE 150, SACRAMENTO, CA 95825 ■ WWW.MYCHARTERLAW.COM

TEL 916.646.1400 ■ FAX 916.646.1300

California law requires the payment of wages according to specific schedules on all public works. The term “public works” is defined by Labor Code section 1720.<sup>1</sup> Under that section, various construction, alteration, and repair activities, including the installation of modular buildings, are considered “public works” if they are “paid for in whole or in part out of public funds,” which can include both direct and indirect subsidies provided by the “state or a political subdivision.”

Under the prevailing wage law, all workers employed on a public works project must be paid wages at or above mandatory rates. The obligation to pay prevailing wages, and to furnish payroll records, applies to the contractor and any subcontractor that employs workers on a public works project. (§ 1774.) Any worker who does not receive wages at or above the prevailing rate may file a complaint with the Department of Industrial Relations, Division of Labor Standards Enforcement (the “Division”). The Division is required to notify the contractor of a complaint within fifteen (15) days of receipt. (§ 1775, subd. (c).)

If the Division determines that prevailing wages were required but not paid, the contractor (and any subcontractors) on the project can be required to pay statutory penalties between \$40 and \$200 per day for each worker paid less than prevailing wages on the project. (§ 1775, subd. (a).) While the prevailing wage law is primarily enforced by the Division, workers may also assert prevailing wage claims against the subcontractor who employed them, but not against the prime contractor. (*Violante v. Communities Southwest Development & Construction Co.* (2006) 138 Cal.App.4th 972, 979.)

There are also a number of additional requirements associated with public works projects, including the requirements for the contractor to be registered with the Division (§ 1725.5), for the preparation and maintenance of certified payroll records (§ 1776), and for the hiring of apprentices (§ 1777.5.)

### 1. *The Definition of “Paid for in Whole or in Part out of Public Funds”*

Whether a project requires prevailing wages and compliance with public works requirements often turns on whether the contractor will be paid “in whole or in part out of public funds.” (§ 1720, subd. (a).) The term “paid for in whole or in part out of public funds” is a term of art defined in the prevailing wage law as all of the following:

- (1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor or developer.
- (2) Performance of construction work by the state or political subdivision in execution of the project.
- (3) Transfer by the state or political subdivision of an asset of value for less than fair market price.

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Labor Code.



- (4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived or forgiven by the state or political subdivision.
- (5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis.
- (6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision.

(Labor Code § 1720, subd. (b).)

The foregoing list identifies circumstances under which a private contractor receives the benefit of public funds, either by receiving payment directly from the public agency, as in subdivision (1), or by receiving an offset of equal value, such as the reduction of costs in subdivision (4). Importantly, each of these circumstances identifies an action, such as payment, “by the state or political subdivision” for the benefit of the contractor. Thus, by defining the term “paid for in whole or in part out of public funds” by incorporating the term “state or political subdivision,” it must be presumed that the Legislature intended to limit the scope of the prevailing wage law to payments or subsidies provided by certain, discrete public agencies.

## *2. State or Political Subdivision*

Section 1721 defines “political subdivision” as “any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts.” A charter school is “deemed to be a ‘school district’” for certain purposes. (Educ. Code § 47612, subd. (c).) These relate to the way charter schools receive state funding for average daily attendance, transportation and other operations (Sections 14000-14022.5, 41301, 41302.5, 41850-41856 and 47638 of the Education Code).

However, the relevant sections of the Labor Code are conspicuously absent from the list of purposes for which a charter school is “deemed to be a school district” in Section 47612 of the Education Code. Labor Code Section 1721 itself lacks language (such as “includes but not limited to ...”) that would indicate that it was intended to specify a non-exclusive list. As a charter school is not a “district” (but is only “deemed” to be district for very limited, defined purposes) and is not an “agency of the state,” it is apparent that a charter school is not a “political subdivision” for purposes of the prevailing wage law.

While no court has directly considered this issue, this interpretation is consistent with the view expressed by the Department of Industrial Relations in 2009.<sup>2</sup> In Public Works Case No.

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<sup>2</sup> The Department administers the prevailing wage law and issues determinations of whether particular projects are “public works” and governed by Section 1720. While these determinations initially had precedential effect, this practice was discontinued in 2007. Still, courts frequently cite the Department’s determinations, which can be considered persuasive authority. However, a court does not defer to the Department when asked to review a public



2008-026 (“*King/Chavez*”), the Director determined “easily” that a charter school is not a “political subdivision” for purposes of Section 1721. The Director found support for this determination in the Supreme Court’s decision in *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164.

In *Wells*, the California Supreme Court recognized that the Legislature chose to make charter schools subject to only a limited selection of the laws that govern school districts. (*Wells, supra*, 29 Cal.4th at 1200-01.) Rather than being subject to all the same laws as school districts, charter schools operate independently from school districts, and are generally “exempt from the laws governing school districts.” (Educ. Code § 47610.) Furthermore, the construction, use and sale of school facilities by a school district is governed by a different set of statutes, in Part 10.5 of Title 1 of the Education Code (Sections 17210-17653), and these statutes are not included among the Education Code sections that apply to charter schools. Thus, because a charter school is not a type of “political subdivision” in Section 1721, nor are any of the laws requiring school districts to comply with prevailing wage laws made applicable to charter schools, the use of apportionment dollars alone cannot trigger the “public works” requirements under the prevailing wage law (as described more fully below).

In sum, despite being “deemed” to be school districts in a few, limited circumstances, charter schools are not classified as districts generally but are instead organized as non-profit corporations. (Educ. Code § 47604.) A charter school is therefore neither an agency of the state, nor a “political subdivision” for purposes of the prevailing wage and public works laws. Accordingly, its use of its own, private funds for repairs, alterations or construction activities does not require it to pay prevailing wages under Section 1720 of the Labor Code or comply with other public works requirements. Whether its receipt of state funds for educational or operational purposes triggers that requirement is discussed in the next section.

### 3. Average Daily Attendance Funding

Typically, charter schools receive state funding in the form of apportionment to cover the cost of providing education to students. This basic operational funding is based upon the average daily attendance of students enrolled in the school and other factors.

Whether a charter school using state apportionment dollars for construction projects triggers compliance with prevailing wage is an issue that has never been addressed by a court. However, in *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, the court considered a similar set of circumstances. In that case a residential care facility received operating funds from a county. Those funds were pooled with private donations and used to pay contractors to build a facility on land leased from the county. Construing a version of Section 1720 which has since been amended, the court found that receiving public funds for public services did not convert construction work paid for with those funds into a “public works” project under the prevailing wage law. (*McIntosh*, at p. 1586.)

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works determination but applies the law according to its own independent judgment. (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 949.)



In response to *McIntosh*, and after Governor Wilson left office in 1999, the Legislature made changes to the prevailing wage law which expanded its application in some respects. In 2001, the current Subdivision (b) was added, which now requires the payment of prevailing wages where public funds are provided in the form of a subsidy, as discussed in the next Section. While this would have required a different result in *McIntosh*, the addition of Subdivision (b) did not disturb its holding that funds for services do not convert incidental construction into a public works project.

This interpretation of *McIntosh* was confirmed by the Department of Industrial Relations in Public Works case No. 2008-025, *Humane Society Silicon Valley*. In that case, a non-profit corporation received aid from a city for its operational costs, which was just like the assistance that the residential care provider received from the county in *McIntosh*. The Department quoted the passage in the *McIntosh* decision where the court held that “paying public funds for public services does not make incidental construction work done by a private provider of those services ‘public works’ under section 1720, subdivision (a).” (*McIntosh* at 1586.) The Department found that, “[w]hile subsequent amendments to section 1720 have overturned certain other aspects of *McIntosh*, the above holding remains good law.” (*Humane Society* at 7.)

Since the *Humane Society* decision in 2009, no court has overturned or distinguished *McIntosh*. This letter therefore concludes that the case remains good law. In addition, the Department recently had the occasion<sup>3</sup> to consider whether a charter school’s use of its apportionment dollars to fund construction in itself triggered the prevailing wage requirement, in Leadership Public Schools, Public Works Case No. 2014-041 (“*Leadership Public Schools*”). However, because a portion of the project in that case was paid for using Charter School Facilities Incentive Grant Program dollars, which specifically requires use of prevailing wage, the Department concluded that the entire project required the payment of prevailing wages. In a footnote, the Department noted that it was not deciding the issue of whether the use of apportionment funds alone triggered the payment of prevailing wages because it already found that other funds used for the project required payment of prevailing wages. Therefore, the Department did not use the opportunity presented by the *Leadership* decision to memorialize its position as to whether the use of apportionment dollars by itself triggers prevailing wage.

Thus, consistent with the *King/Chavez* decision, it is likely that a charter school does not, solely by virtue of its receipt of state funding for educational services, incur liability for the payment of prevailing wages when it contracts with a contractor for repairs, alterations or construction of its facilities and uses its state funds to pay for the work. This advice would need to be reconsidered in the event that *McIntosh* is overruled or legislation is passed which either makes charter school construction activities subject to the prevailing wage law or changes the definition of “public works” in Section 1720 to repudiate *McIntosh*. In addition, it is possible that the Department will issue a decision in the future that takes a position on this specific issue.

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<sup>3</sup> In 2015, I received verbal information from the Department stating that it believed the use of apportionment dollars for construction projects triggered prevailing wage. When it had the opportunity



#### 4. AB 2765 (Labor Code § 1720.8)

In 2020, the California Legislature passed AB 2765, which added Labor Code Section 1720.8, which provides as follows:

For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, “public works” also means any construction, alteration, installation, or repair work done under private contract on a project for a charter school, when the project is paid for, in whole or in part, with the proceeds of conduit revenue bonds, as defined in Section 5870 of the Government Code, issued on or after January 1, 2021, by a public agency.

Although AB 2765 imposes prevailing wage requirements on charter school projects even partly funded by conduit revenue bonds, these requirements do not apply here, because the Charter School is not planning to use conduit revenue bond funding for the Project. The Legislature did not take this opportunity, too, to amend any other Labor Code provisions to make charter school projects paid for with sources of funds other than conduit bonds subject to prevailing wage.

#### 5. Liability Associated with Non-Compliance

For reference, we have included a brief, non-exhaustive summary of the liability related to non-compliance with prevailing wage and public works laws. In *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, the Supreme Court held that where a contractor reasonably relies upon a public agency’s representation that a public works project is a private work not subject to prevailing wage, the contractor is entitled to indemnity from the public agency for penalties imposed by the Department. This holding was codified in 2003 with the addition of Section 1781, which authorizes such a claim for reimbursement by a contractor who is required to pay penalties or added costs because the body awarding the contract did not properly identify the project as a “public works” project. The public body which awarded the contract is liable for the reimbursement unless it can show that it identified the project as a public work. (§ 1781, subd. (a)(2).)

In addition to the agency’s obligation to reimburse the contractor, individual members of the awarding body may also be held criminally liable. Specifically, under Section 1777, any “officer, agent or representative” of a “political subdivision” who “willfully violates” any provision of Article 2 of the prevailing wage law (Sections 1770-1784) is guilty of a misdemeanor. In the context of a criminal prosecution, willfully “generally means an act done stubbornly, obstinately, perversely, or with a bad purpose; without justifiable excuse.” (Gifis, Law Dictionary (1996) at 553.) In a prosecution for embezzlement, the California Supreme Court recognized that the term “willful” connotes specific intent, or “a mental element as to the presence or absence of legal authorization or obligation.” (*Stark v. Superior Court* (2011) 52 Cal.4th 368, 396.)



If public officials and others entrusted with control of public funds subjectively believe their actions or omissions are authorized by law, they are protected from criminal liability unless that belief is objectively unreasonable, i.e., is the product of criminal negligence in ascertaining legal obligations. Public officials and others should not be criminally liable for a reasonable, good faith mistake regarding their legal responsibilities.

(*Stark, supra*, 52 Cal.4th at 400.) Under *Stark*, a member of a non-profit board does not “willfully” violate the law by taking an action that is based upon an objectively reasonable (albeit erroneous) mistake of law.

### Conclusion

While a charter school receives state apportionment funds, and operates like a traditional public school in certain respects, it is very likely that a charter school is not a “school district” for purposes of school construction (including competitive bidding and design-build procurement) and is not a “political subdivision” whose expenditures for construction projects, repairs and alterations are “public works” that require the payment of prevailing wages, or compliance with other public works requirements. Therefore, it is very likely that construction and repair work paid for by a charter school out of its apportionment dollars is not an activity “paid for in whole or in part out of public funds” as those terms are defined in the prevailing wage law, and thus that the Charter School does not need to ensure compliance with prevailing wage and public works requirements when performing the work at issue. However, as no court of law or state agency has opined on this specific issue, we cannot provide absolute assurance as to how this issue will be interpreted in that circumstance.

Please do not hesitate to contact me should you have any questions.

Very truly yours,

**LAW OFFICES OF YOUNG,  
MINNEY & CORR, LLP**

*Sarah Kollman*

**SARAH J. KOLLMAN  
ATTORNEY AT LAW**

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