TESTIMONY OF MARC FURMAN

Good afternoon Chairman Miller, Chairman Keller and the members of the entire Labor and Industry Committee. My name is Marc Furman and I chair the Labor & Employment Group at Cohen, Seglias, Pallas, Greenhall & Furman, P.C. We are a full service law firm to the construction industry, serving over a thousand construction-related clients, from owners and developers, to design professionals, to manufacturers and suppliers, to general, prime, specialty and subcontractors. We service the entire United States out of our New Jersey, Delaware, Maryland, West Virginia, and our three Pennsylvania offices – one of which is right across the street from us. I am resident in our main office in Philadelphia.

For over thirty years, my practice has been limited to representing employers in labor and employment matters. This includes traditional labor law, such as union organizing campaigns, defense and prosecution of unfair labor practice charges before the National Labor Relations Board, collective bargaining negotiations, collective bargaining agreement (CBA) administration, grievances and arbitrations, dealing with strikes and picketing, as well as the full gamut of employment law – discrimination suits before local, state and federal agencies. During this time, I have handled countless wage-hour and prevailing wage matters in the federal and state arena. I have also served as an adjunct professor of law at The Dickinson School of Law of The Pennsylvania State University for a decade, and I routinely lecture around the United States before trade, industry and client groups, as well as before other lawyers, on various labor and employment related topics.

You have heard many people testify today before me on all sides of the issues relating to the Prevailing Wage Act ("PWA"). Some have advocated a complete repeal of the PWA. Some have advocated raising the threshold level above its current $25,000 floor to $100,000 or $250,000. Some have proposed giving school boards the choice of whether their school should be built at prevailing rates. Others have advocated leaving things just the way they are. And there were many other positions taken in between.

I will not be advocating one of these positions. Instead, I will presume that in some fashion, the PWA will continue to exist. With that background, my purpose in testifying today is to bring to the attention of this committee the meaningful problems that I have seen with the implementation and interpretation of the PWA. I will offer some suggestions on how the PWA can be improved to help not only employees and employers, but also the tax-paying public. It is my strong belief that the PWA can be improved, meet its original goals and purposes, and enhance the value that the public is entitled to receive as a purchaser of construction services.

The Prevailing Wage Act was enacted in 1961 and has not been amended in any meaningful or significant way for decades. In fact, former L&I Secretaries have acknowledged that the PWA is an antiquated piece of legislation that is in dire need of reform. I hope that whoever is appointed and confirmed for the position of Secretary of Labor & Industry is amenable to changing the PWA so it properly reflects the present day needs of employers, employees and the tax paying public.

Before I begin a broader discussion of the PWA, let me be blunt. I think we all recognize that the PWA has, unfortunately, been a political football for decades. Its interpretation and implementation has created an atmosphere that employers and employees, union and merit shop companies, cannot work together and that they have irreconcilable competing interests. I do not believe that is true. Having represented both union and merit shop companies for my entire career, I know that there is common ground between those interests, and that common ground is founded in common sense. Because of that, I firmly believe that the PWA can be amended in a manner that benefits all the interests it is intended to safeguard.

The basic intent of the PWA, which includes ensuring that employees receive a fair wage and benefits, and ensuring that companies are competing fairly when it comes to obtaining public projects, is laudable.

While this may come as a surprise to some of you, and it may also contradict the position of others in the construction industry, I am not here to try to persuade you to undo decades of prevailing wage history. Because of the Prevailing Wage Act, many companies are able to provide their employees with a significant rate of pay and benefits, which allow them to recruit and keep some of the best field and management personnel in the mechanical construction industry. In addition, literally hundreds of subcontractors, suppliers, vendors and customers with whom these contractors work on a daily basis also benefit from the PWA. In this regard, the core concept of paying workers prevailing rate has successfully affected the economic development of the construction industry in Pennsylvania.

Unfortunately, once we move beyond the core concepts of the PWA and begin to examine its application and enforcement, we find that the Act has come up short – far short. More specifically, the application and implementation of the Act has failed the construction industry by creating a battle ground between union and merit shop contractors, failed employers by simply being unworkable, and worst of all, it has failed the very people that it claims to protect - employees. All of which has a negative impact on the tax paying public.

I am not a policy maker, nor am I a public official. Rather, I am an advocate of companies which, just over the last 5 years, have suffered mightily because of poor implementation and enforcement of the Act. As a result, I want to give this committee specific examples of the Act's shortcomings, and I ask that each member consider all of these when determining how the Act should be amended.

First, the Act and its Regulations are woefully ambiguous and unworkable. Under the Act, employees are supposed to be paid for the type of work they perform. If an employee performs plumbing work, he or she should be paid at the posted prevailing rate of a plumber. An employee performing carpentry tasks should be paid at the carpenter's prevailing rate. However, neither the Act nor its Regulations specifically define what tasks are included in particular crafts.

Probably the most common source of confusion is that no one knows what a "laborer" can or cannot do on a public works project because the Act does not define it. Some projects

have no definition. Other projects in the "Five County Area" (i.e., Philadelphia, Delaware, Montgomery, Chester, and Bucks Counties) do, but it is of no help, as the definition of a "laborer" is "common laborer". That's it – just two words.

You should know that this definition is issued by L&I and, at times, placed on their website. You should also know that only a couple of years ago, L&I was prosecuting my client, Worth & Co., Inc., and trying to debar it from performing public projects for three years. A significant portion of L&I's case rested on the claim that Worth intentionally misclassified its employees as "laborers" when they should have been classified as performing the work of a different craft. That case, which had the potential to result in a significant loss of employment for Worth employees if the L&I was successful in its debarment attempt, devolved into questions such as whether a worker who moves a piece of pipe from a stockpile to a point of installation can properly be classified as a laborer or not. Even though L&I had only a two word definition of what a laborer can do on a public project, it was seeking debarment because Worth, at times, classified the moving of that piece of pipe as a laborer's task. Effectively, L&I had an unworkable two word definition of what a laborer can do, and yet it was seeking the administrative equivalent of the death penalty against Worth.

In another example, a contractor engaged to install a standing seam metal roof in the Philadelphia area who calls the local L&I office will be told that the prevailing rate for that work is that of a sheet metal mechanic under the Sheet Metal Workers Local 19 collective bargaining agreement. The fact, however, is that the both the Roofers and Carpenters Unions claim this work as well. I have been involved in ongoing substantial litigation before the National Labor Relations Board and the federal court (presently at the Third Circuit Court of Appeals) involving this very issue – namely the right of the Carpenters to perform this work and to be "awarded" this work if there is a work jurisdictional issue. Routinely, those bodies determine that more than one union traditionally performs and claims that work. As you can see, PWA issues are not just union vs. non-union issues. In my practice, I see just as many cases involving one trade union versus another.

In New Jersey, by statute, it is not a violation of their prevailing wage law to pay the rate of another union which also claims that work. The result is that no such issues arise in New Jersey. The contractors know what rate (or rates) is permissible. There is no litigation. There are no risks of debarment. The tax paying public gets the advantage of the contractor paying a lawful prevailing rate and choosing the trade workers the contractor believes is best suited to perform the work involved. This results in more accurate, and more competitive, bidding. If New Jersey can do this, why can't we in Pennsylvania?

The Worth case also involved issues of who gets to move material around the job site. On one of the larger projects in question in that case, there were various locations where pipe or piping materials were stored. For a mechanical contractor a significant amount of time is spent moving pipe and piping materials from one location to another. This is commonly called material handling. A number of industry studies indicate that up to 42% of overall field labor is associated with material handling. Most L&I representatives accept the notion that a laborer can unload a truck, and then move pipe from a truck to an initial stockpile. Thereafter, L&I's own representatives have interpretations of the Act that diverge. Some L&I representatives say

that a laborer can move materials from one stockpile to another, others do not. Some L&I representatives say that a laborer can move materials from a second stockpile to a point of installation, others do not. And probably most confusing is that until the prior administration came in office, previous L&I administrations held that a laborer can rightly move materials anywhere on a project. Union contractors can use registered apprentices to handle material at a lower rate. Non-union contractors can use laborers (whose rates are generally higher than the lowest allowable apprentice rates). Shouldn't the tax paying public be given the advantage of having its work performed at the most cost-effective rates? Given the level of confusion, one would think that L&I would want to clarify its position. Unfortunately, L&I refuses to do so. In fact, not only does L&I fail to provide the proper guidance so that contractors can proactively implement the Act and its Regulations, but L&I was enforcing a new set of work rules for projects that commenced under an entirely different administration.

Getting back to the Worth matter, L&I's own witnesses included representatives from the Laborers Union. When dealing with the issue of what a laborer can and cannot do, they routinely supported Worth's practice of considering the movement of materials on the job site to be laborers' work. I ask each of you to ask yourself, "If I were a business person, how would I be able to properly bid where the definition is a moving target?" Simply put, you can't.

My last common example of the confusion that exists with classification issues under the PWA involves core-drilling holes. Until the prior administration, previous Directors of the Bureau of Labor Law Compliance held that a laborer could properly core-drill any hole on a public project. In fact, there are companies that specialize in core-drilling through concrete, using laborers who may be union or non-union. For some inexplicable reason, under the prior administration, a laborer may only drill a "multi-purpose hole." This means that a laborer can drill the hole of identical size and angle to a hole right near it, if multiple trades are expected to run material through it. However, a laborer cannot drill the other hole nearby because only one trade is expected to run material through that hole. L&I's position is that if you classify a worker as a "laborer" and that worker drills a single-purpose hole, you have intentionally violated the Act and L&I will seek to debar the company. Notwithstanding this draconian measure for such a small issue, L&I has not, and will not, explain this position in writing, leaving many companies to hope that L&I does not seek debarment if an issue such as this arises.

During the Worth hearing, we had the absurd testimony that it was not a violation for a laborer to drill a hole as long as it had no particular purpose. Now I ask you, is a contractor going to pay prevailing rate – even at a laborer's rate – just to drill holes which have no purpose? All holes on a job can be laid out by the particular craft involved. The laborer is more than capable of drilling that hole. The skill to drill a hole for duct work is the same skill to drill a hole for a water line or an electrical conduit. It is a hole, and nothing more.

Instead of providing a simple remedy to the problem of who can do what work by establishing a statewide definition for each construction craft, L&I has failed or refused to do this. In fact, L&I refuses to provide a written definition for "construction laborer" in the Five County Area even though contractors have specifically requested a written definition. Instead,

L&I relies on a nebulous term called "custom and usage" when describing what work a laborer can perform on a public project. Unfortunately, most contractors have found that "custom and usage" has no specific definition. It has different meanings to different people even at L&I, and therefore, L&I may as well be speaking a different language when using "custom and usage" as their explanation.

Moreover, our experience with those who claim to know what "custom and usage" is demonstrates that it is whatever is in each individual's own head, and therefore, not agreed upon by any two people. So, while employers and employees wait for a clear and implementable definition, contractors will continue to be prosecuted with those very same ambiguous definitions. A union laboring company will contact its union and be told that the work is that of the Laborers. A union pipe fitting company will be told that the work is that of the Pipe Fitters Union. L&I expects non-union companies to determine what the "custom and usage" is by making inquiry. But, of whom? On which union can the non-union company rely? When the non-union company gets an answer from one union, must it survey all? What if there are an equal number of unions on different sides of this issue? Does the contractor (union or non-union) have a safe harbor in making a decision?

In short, this issue comes down to leadership. The legislature must lead, and in doing so make the decision in the best interest of employees across Pennsylvania as to what craft can perform what work. Litigation is expensive for the contractor and for the tax payers. Debarment is an expensive process and its effects devastating. Is the goal to play "hide the ball" and see who can get caught? Or does basic fairness demand properly determined rules and definition and appropriate notice so that compliance can be assured? Clarity can only lead to more accurate bidding and a better result for the tax paying public.

Another major shortcoming of the Prevailing Wage Act is the process of debarment itself. A debarment case seeks the penalty of prohibiting a company from being able to bid on public projects in Pennsylvania for three (3) years. The standard for this draconian measure, which undoubtedly adversely affects the employees of any employer debarred, is that an employer will be debarred if it "intentionally" violated the Act. Unfortunately, the Prevailing Wage Act and its Regulations provide little guidance of what is meant by "intentional". At present, a one time error as small as $1 committed by an employer of any size can result in debarment if L&I believes the $1 underpayment was done on purpose. There is no consideration given: to any factors that indicate that the company is trying to following the Prevailing Wage Act, the number of years in business, the company's compliance history, the size of the company, the number of employees who will be adversely affected by being debarred; how well the employer treats its employees; whether the employer provides discretionary bonuses and other benefits which exceed the minimum rate of pay and benefits required under the Act; or any other mitigating circumstance for that matter. In short, if someone at L&I thinks that a company "intentionally" underpaid an employee even $1, a multi-million dollar company can find itself fighting for its life in a debarment hearing.

A "progressive" penalty process (like that implemented in New Jersey) would go a long way toward resolving this problem. At present, a company faced with debarment has no real

option to settle due to the extreme nature of the penalty. Costly litigation is the only recourse when there is no progressive penalty system in place.

L&I should be required to enumerate the factors it uses when deciding whether to seek a debarment action. At present, there is no standard. L&I is permitted to pick and chose what it thinks is an "intentional" act. Unfortunately, where such unbridled discretion exists, hubris follows. And furthermore, where such unbridled discretion exists due process is lost.

This leads to the next short-coming. The process followed by L&I is considered "administrative" and therefore, when a hearing results, the contractor is subject to "litigation by ambush". The charged employer has no right to typical due process one would expect in normal litigation. The employer receives little, if any, information – documentation or otherwise – other than a simple, non-specific Order to Show Cause. Such an Order merely notifies an employer of the general claims being made against it. This Order to Show Cause is issued, of course, after L&I conducts a complete investigation by gathering as many documents and speaking to as many witnesses as it sees fit. This could take years. The employer, however, is not permitted to receive even one document from L&I in return. An employer that is fighting for its business survival is forced to defend itself against the Commonwealth without having received even one document or deposed one witness, prior to a debarment hearing, even though the Commonwealth has been gathering documents and speaking with witnesses for however long it wants. Such inequity is contrary to the core values of due process, and must be changed immediately.

How can the Act be amended to insure that every employer is afforded its due process rights? Change the Act or Regulations to allow for discovery during the process. Require L&I to produce the relevant portions of its case just like every person or company must do in a lawsuit filed in any Court of Common Pleas in Pennsylvania or in federal court. State agency representatives may say that a debarment case is an administrative hearing, and therefore, no discovery is necessary. So why then do other administrative agencies allow for discovery? You only need to look at the discovery available to all parties in a matter before the Pennsylvania Human Relations Commission, a state agency just like L&I, to see the flaw in this argument.

Another due process argument is that there is no statute of limitations on claims. As you can imagine, this leads to a host of problems. How can a contractor ever "close out" a job, as it never knows if it will ever be subject to a claim going back many years? An even more troublesome point is that when an administration changes, and thereby the "interpretations change", the contractor is subject to an *ex post facto* dilemma. In the Worth matter, work was performed in accordance with the practices and interpretations in place at the time the work was performed. This work occurred in 1999, during a different administration. When the subsequent administration came in, and Worth was subject to audits in the mid-2000's, L&I reached back to 1999 and determined that a 2007 interpretation should have applied when the work was performed in 1999.

The risk the contractor runs by bidding public work is so disproportionate that many contractors incorporate into their bids a line item for "legal" – that is, what will it cost to

defend an action if the contractor's position is not upheld by L&I. Such an approach leads to either an unwillingness to bid at all (reducing the number of qualified bidders) or an inflated bid price to take into account contingencies which L&I could avoid, but does not. As you heard during the testimony, there is a very real reluctance by most contractors to avoid this unnecessary risk and just not bid public work. All of this leads to higher pricing to the detriment of the tax paying public. As the Act has no provision for an independent system of review, there is no oversight of any kind to insure that L&I is acting appropriately when prosecuting a company.

The foregoing problems are just a few of the issues that this committee, and the Pennsylvania Legislature as a whole, must address if an honest attempt at correcting the PWA is to happen. A clear path of what is expected of contractors under the PWA is critical to the construction industry. Without clear criteria, the PWA will continue to be a sword wielded by whoever is in power, and by whoever may misuse that power.

Unless the PWA is appropriately amended, three things can be predicted: (1) union and merit shop companies will continue to use the PWA to fight each other and the Commonwealth; (2) the PWA will continue to fail to protect employees; and, (3) the tax paying public will continue to be caught in the middle of this Hatfield and McCoy feud – and fund the bill for it. It is not in the interest of anyone, particularly in these times where the tax paying public is revolting against high deficit spending and historically wasteful practices.

If we are serious about having fair, equitable economic growth in Pennsylvania, then the PWA must be significantly overhauled. If we are serious about economic growth and development in the construction industry, the friction that currently exists between L&I and the construction industry must end. More specifically, the focus of both employers and L&I must be re-adjusted. Right now, employers run from L&I because they are seen as the enemy. Equally wrong, L&I is focused on implementing work rules and prosecuting employers, instead of promoting training in order to avoid problems before they develop.

The notion that government and business can work together for the benefit of employers and employees cannot continue to be a mere platitude that is callously tossed about. The panel of Representatives seated before me is different. And for that reason, we ask that you continue to work with all having a legitimate interest - labor organizations, contracting organizations, public interest groups, public authorities and companies across Pennsylvania - and commit yourselves to leading Pennsylvania in the development of a vibrant economic environment.

On behalf of my clients and all of their employees, I want to thank each member of this committee for your time and commitment to this cause.

Respectfully,

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Cohen, Seglias, Pallas, Greenhall & Furman, P.C.

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