

**February 14, 2012 Advisory Letter---Subsistence pay to “inside electricians”  
working & residing within Lea County**

The Honorable Carroll Leavell  
New Mexico State Senator  
P.O. Drawer D  
Jal, NM 88252

Dear Senator Leavell:

You have asked this Office to examine the legality of the New Mexico Department of Workforce Solutions (“Department”) regulation requiring public works employers to pay subsistence pay to “inside electricians” working and residing within Lea County. For the reasons set out below, we conclude that the regulation and the Department’s interpretation of the regulation are valid.

The New Mexico Prevailing Minimum Wage Act (“Act”), NMSA 1978, Sections 13-4-10 to -17 (1937, as amended through 2009), applies to public works projects that the state and its political subdivisions pay contractors to build. The Department is authorized to promulgate regulations to implement the Act. See NMSA 1978, Section 13-4-11(E).

Your question references the prevailing pay rates set for zone, incentive or subsistence pay as part of the prevailing wage set for construction work on public works projects pursuant to the Act. The regulations promulgated by the Department set forth the process for determining prevailing wage rates, including the rate for zone, incentive or subsistence pay.

Rule 11.1.2.11(B) NMAC states in relevant part:

However, while zone, incentive, or subsistence pay shall not be considered in determining the statewide base wage rate, it shall be computed and applied on a locality basis in type "B" and type "C" construction in accordance with the same formula utilized to determine the prevailing statewide base wage rate. For the purpose of zone, incentive or subsistence pay determination, "locality basis" shall mean location, municipality or site from which the zone, incentive or subsistence pay data emanated for the survey.[1]

Zone, incentive or subsistence pay is provided to compensate workers for costs of travel, food and lodging or to provide an incentive or industry promotion to classifications of workers that may not be prevalent in an area. Zone, incentive or subsistence pay is standard in the construction industry. It generally is not considered part of “fringe benefits” and is therefore paid in addition to the base wage and fringe benefit rate. See In re Calculus, Inc., WAB Case No. 93-06 (U.S. Dept. of Labor Wage Appeal Bd. Oct. 29, 1993), 1993 DOL Wage App. Bd. LEXIS 26, 1993 WL 537381.

The official publication of prevailing rates sets forth subsistence and incentive rates by trade and location. See Official Notice of 2009 rates published by the Department of Workforce Solutions, Labor Relations Division. For the rate at issue, the publication states: “#1-Inside Electricians working at a Lea County job site get \$75.00/day subsistence pay plus base/fringe.”

The rate was set based on documentation of subsistence rates actually paid the prior year to “inside electricians” in Lea County, New Mexico. This information was submitted to the Department as part of the annual survey process that was required by Section 13-4-11(B) of the Act before it was amended in 2009.[2] According to the Department, 8,571 hours of work wages in Lea County were submitted through the survey process in 2008. The prevailing subsistence rate in the surveyed hours was \$75.00 per day. Pursuant to regulation, the prevailing rate is the rate most often reflected in a particular craft in the prior year. See Rule 11.1.2 .11 NMAC.

Lea County covers 4,393 square miles (north to south spans 108 miles and the widest span east to west is 44 miles) and contains at least 13 municipalities and smaller communities[3]. This county is three times the size of the state of Rhode Island and is only slightly smaller than Connecticut[4]. If subsistence rates paid to inside electricians in Lea County were higher than those paid in other counties, as your request suggests, they may have reflected market factors necessary to attract that particular classification to work in a rural area,[5] such as a higher cost of travel to the area, a higher cost of food and lodging in the area or some other market factor.

The Department was required to use the prior rate information paid in Lea County when setting a subsistence rate from the following year and a public hearing provided an opportunity to the public to challenge evidence of the prior rate. The prior pay evidence based on 8,571 work hours in Lea County provides a rational basis for the rate you question and therefore appears to be valid.

Your request to us was for a formal Attorney General Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

MARK REYNOLDS  
Assistant Attorney General

[1] Potential amendments to this regulation are the subject of pending litigation in the Second Judicial District Court. See Building & Construction Trades Council v. Marquez, Case No. D-202-CV-2011-09263.

[2] The 2009 amendments to Section 13-4-11(B) substituted a review of collective bargaining agreements and other information in lieu of the prior survey system. The principle of setting zone, incentive or subsistence pay in the same manner as the prevailing base wage has not changed.

[3] [www.Leacounty.net](http://www.Leacounty.net)

[4] [www.Leacounty.net](http://www.Leacounty.net)

[5] While the Department's Official Notice termed the rate for inside electricians "subsistence," the regulation does not require a differentiation between zone, incentive or subsistence pay. Since the market drives the rate, it is quite possible that some percentage of the rate determined from the annual survey included pay that was designed to provide incentive. See Rule 11.1.2.11(B) NMAC.