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ANALYSIS

## Prevailing Wage Law in New York's Construction Industry

A summary of the purpose, main requirements, and enforcement of Article 8 of the New York Labor Law, the law that governs the payment of prevailing wages in New York's construction industry.

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Prevailing wage law can be difficult to understand even for practitioners experienced in wage-and-hour laws. It is not always clear what the law requires of employers or what rights are available to employees. This article summarizes the purpose, main requirements, and enforcement of Article 8 of the New York Labor Law (NYLL), the law that governs the payment of prevailing wages in New York's construction industry.

### 'Public Work' and the Prevailing Rates

The payment of prevailing wages is so important in New York State that it is embodied in the state's Constitution. Article 1, §17 of the New York State Constitution provides: "No laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work shall...be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used."

The prevailing wage is the rate of pay due to construction workers engaged on "public work" construction worksites. A construction worksite is considered a "public work" within the meaning of the law if: (1) a government agency entered into a contract with a private entity calling for construction work to be performed by workers; (2) the work is construction-like in nature and will be paid for using public funds; and (3) the primary objective of the work is to benefit the general public. As the Court of Appeals noted in *De la Cruz v. Caddell Dry Dock & Repair Co.*, 21 N.Y.3d 530 (2013), the third factor of this test applies on a case-by-case basis.

Article 8 of the NYLL embodies the state's constitutional mandate to pay prevailing wages to workers engaged on public work construction sites. To this end, §220(3)(c) of the NYLL charges a governmental "fiscal officer" with setting "the schedules of supplements to be provided and wages to be paid workers, laborers, and mechanics on such public work." In New York City, the fiscal officer is the Comptroller, whose office publishes prevailing wage schedules each year on its website.

In the rest of New York State, the Commissioner of Labor sets the applicable prevailing wage rates. Like the comptroller, the commissioner of labor also publishes prevailing wage schedules each year. Article 8 of the NYLL gives great leeway to both fiscal officers in classifying workers' trades and determining the prevailing wage rates applicable to them in each locality.

Regardless of a worker's classification, he/she must be paid "prevailing wages" consisting of (1) a regular hourly cash wage and (2) a wage supplement, also known as fringe or supplemental benefits. Fringe benefits can be non-cash benefits (e.g., insurance or retirement benefits), an hourly cash payment, or a combination of both. The combined value of the cash wage and supplemental benefit is typically equal to the average amounts paid to unionized private construction workers in the same locality.

In New York, prevailing wage rates vary by trade from county to county and change every year. For example, from July 1, 2021, through June 30, 2022, a building carpenter in Albany County must be paid at least \$32.73 per regular hour worked and \$23.34 in supplemental benefits per hour worked. A building carpenter performing the same work duties in a public worksite in New York County during the same period must be paid at least \$54.75 per regular hour worked and \$47.13 in supplemental benefits per hour worked.

## Employer Requirements

All employers engaging workers on a public works construction site must pay their workers prevailing wages. The prevailing wage law imposes several notice and recordkeeping requirements on employers that help them comply with the law.

First, §220(3)(e) of the NYLL requires all contractors on a public construction worksite to display a poster titled "Prevailing Wage Rates," in letters no smaller than two by two inches, made of a material capable of withstanding all weather conditions. The poster must be displayed in a prominent and accessible place on the worksite and reflect all wage and supplemental benefit rates payable to workers as set forth in the contract requiring the public construction work.

Second, in addition to complying with the requirements of the New York State Wage Theft Prevention Act, all contractors must provide their public works employees with a notice upon hire and on July 1 of each year reflecting the specific prevailing wage and supplemental benefit rates applicable to their trades. Workers must also receive this information in each of their weekly statements accompanying their wage payments.

Third, every contractor and subcontractor must maintain for at least six years, and for at least three years after the end of a public works project, payroll records and transcripts accurately reflecting the number of hours that each worker worked per day, the trades each worker worked per day, the hourly wage and supplemental benefit rates paid to each worker, and each workers' full name and address. Contractors and subcontractors must affirm under penalty of perjury that the payroll records are accurate and truthful.

Related to these obligations, the New York City Comptroller's Office requires contractors to maintain daily sheets for each public worksite, signed by employees, reflecting each employee's trade classification, name, and start and end times.

These obligations help contractors pay all required wages and avoid worker misclassification, a common violation of the prevailing wage law. Although employers can require their workers to perform different construction work duties, the employer is always responsible for paying workers at least the applicable prevailing wage and supplemental benefits rates for the work performed. Labels are irrelevant in this area of the law.

The work performed determines a worker's trade classification. For example, an employer cannot require a worker to perform the duties of an electrician and pay the worker at the general "construction laborer" rate simply by labeling him or her as such.

## Enforcement Proceedings

For purposes of Article 8 of the NYLL, it does not matter whether an employee is undocumented, holds the required training or licenses to perform the work duties of a trade, or is paid in cash. It also does not matter whether the worker's employer was the prime or sub-contractor on a project, because Article 8 makes the prime contractor responsible for paying prevailing wages to all construction workers engaged on a public worksite.

All that matters under Article 8 is that the worker performed construction-like work duties on a public works project. If so, the worker must be paid the applicable prevailing wage rates.

Workers owed unpaid prevailing wages can enforce their rights in two ways. They can do so indirectly by contacting the New York City Comptroller's Office or the New York State Department of Labor. The government can initiate an investigation and, if necessary, an enforcement proceeding.

The government can fine employers, withhold payment of sums due to them, order them to pay workers their unpaid wages, and, in instances of repeated and/or more severe violations, refer matters to the attorney general's office for criminal enforcement. The government can also place employers on the debarment list, blacklisting them from bidding on future public works contracts.

Alternatively, workers can institute a private breach of contract action against the prime contractor to recover unpaid prevailing wages, fringe benefits, and pre- and post-judgment interest.

Employees can also sue the prime contractor's bond holder, a company tasked with holding an amount of money in escrow for the benefit of, among others, employees not paid prevailing wages.

This private action rests on a third-party beneficiary to a contract theory. The prime contractor's contract with a government agency mandates payment of prevailing wages to workers on the public works construction site. The employees are therefore third-party beneficiaries to the contract and can sue to recover their unpaid prevailing wages. The statute of limitations for this type of lawsuit is six years, and workers can assert it on a class action basis.

## Conclusion

NYLL Article 8 provides important protections for construction workers and ensures that they receive a fair wage for performing public construction work. Failures to comply with the law have resulted in multi-million-dollar class action lawsuits and settlements and, in severe cases, imprisonment. It therefore behooves construction companies and their counsel to educate themselves about this law and comply with its requirements.

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