



Promoting an Equitable and Sustainable Economy

State versus local prevailing wage

There is no state prevailing wage in the strictest sense. Rather, annually, the State of New York, through its Department of Labor, establishes prevailing wage rates on a county by county basis¹, except for New York City.²

New York State Labor Law § 220-5(e) provides that the comptroller or other analogous officer of a city with a population in excess of one million within that locality exercise the powers and execute the obligations of the state Commissioner of Labor in the determination of prevailing wages and the enforcement of state prevailing-wage and related labor laws, with respect to public work projects let by that city.³

¹ See “General Provisions of Laws Covering Workers on Public Work Contracts,” New York State Department of Labor, at <http://www.labor.state.ny.us/workerprotection/publicwork/PWGeneralProvisions.Shtm> (“The Labor Department issues wage schedules on a county-by-county basis that contain minimum rates of pay for different work classifications”). See also FAQs, “Some Commonly Asked Questions: Prevailing Wage Background,” The New York State Center for Fair Contracting, at <http://www.virtualflow.com/cfc/faq.cfm> (“Prevailing wages are the hourly rates, set by the state, for work on a public works job. The state determines the prevailing wages annually on a public works job by craft, classification or worker and region with the state (usually by county)”).

² Answering the question “Does the Commissioner of Labor enforce the prevailing wage requirements on public work projects in New York City?” in a section titled “Public Work – General Information: Frequently Asked Questions” on its Web site, The New York State Department of Labor says:

The Commissioner of Labor enforces the prevailing wage requirements on all projects let by the state or its political subdivisions with the exception of projects let by the City of New York. For New York City public work projects, the New York City Comptroller is responsible for the enforcement of Article 8. Any complaints or questions on public work projects let by New York City should be addressed to the New York City Comptroller, Municipal Building, Room 530, New York, New York 10007.

http://www.labor.state.ny.us/workerprotection/publicwork/PW_faq1.shtm.

A June 28, 2001 press release by the state Labor Commissioner announcing the availability of the prevailing-wage schedule on the department’s Web page briefly mentions jurisdiction:

The department’s Bureau of Public Work inspects construction projects at the state and local levels to make sure that contractors comply with requirements covering wages, fringe benefits and hours of work. The bureau is responsible for the administration of Articles 8 and 9 of State Labor Law. Article 8 covers public construction and Article 9 covers building service contracts. The bureau has jurisdiction throughout the state except for projects let by the city of New York.

“State Labor Department Adds Prevailing Wage Schedule to Web Page: Construction Wage Rates, List of Banned Contractors Now Readily Available,” at <http://www.labor.state.ny.us/agency/pressrel/aa062901.htm>.

³ This provision states: “The ‘fiscal officer,’ as used herein [New York State Labor Law 220], shall be deemed to be, on public work performed by or on behalf of the state or a public benefit corporation or a county or a village, or other civil

Since New York City meets the population threshold of this provision, its Comptroller – through his or her office’s Bureau of Labor –enforces New York State Labor Law §§ 220 and 230, in addition to New York City Administrative Code § 6-109 (the city’s living-wage law). Consequently, it is the city Comptroller who issues prevailing wage schedules, or wage rates, for various types of trades and occupations in New York City, and who has responsibility for ensuring that private sector contractors engaged in public work projects in the city pay no less than the prevailing wage to their employees for work covered under the aforesaid state and city statutes.⁴

All told, the local prevailing wages established by the city Comptroller are in essence, if not in fact, the state prevailing wages for the five boroughs.

Local prevailing wage for affordable-housing construction workers

New York City’s “living wage” law, which became effective on February 2003, replaced the city’s previous prevailing-wage law. Codified under Chapter 109 of Title 6 (“Living Wage, Prevailing Wage and Health Benefits”) of the New York City Administrative Code, this ordinance requires City service contractors and subcontractors that provide Medicaid homecare services, center-based day care, Head Start Program services, or services to persons with cerebral palsy to pay the living wage to those employees who are working under a city contract.

In addition, city service contractors or subcontractors that provide building services, including janitorial and security, food services, and temporary services, must pay the greater of the living wage or a prevailing wage rate to which the employee may be entitled. Under narrow conditions, a covered employee need not pay a living wage to certain categories of employees including minors, employees in a bona fide training program, and disabled employees covered by a sub-minimum wage certificate issued by the United States Department of Labor.⁵

Nothing in this or another section of the New York City Administrative Code mandates a living or prevailing wage for construction workers, however. Indeed, there is no *city* law to this effect. Rather, it is state law—New York State Labor Law Article 8, Section 220 – that requires it and solely with respect to a project defined as a public work.

division of this state, except a city, with a population in excess of one million, the commissioner of labor; and on public work performed by or on behalf of a city with a population in excess of one million, the comptroller or other analogous officer of such city.”

As for the duties of the fiscal officer, New York State Labor Law § 220-3 requires for example: “It shall be the duty of the fiscal officer, as defined in this section, to ascertain and determine the schedules of supplements to be provided and wages to be paid workmen, laborers and mechanics of such public work, prior to the time of the advertisement for bids, and such schedules shall be annexed to and form a part of the specifications for the work. Such fiscal officer shall file with the department having jurisdiction such schedules to the time of the commencement of the advertisement for bids on all public works to be constructed.”

⁴ “Labor Law,” Office of the New York City Comptroller, at <http://www.comptroller.nyc.gov/bureaus/b11/index.asp>. See also *supra* text accompanying note 2.

⁵ Charles H. Kaplan et al., “Recent Legislative Developments in New York in Labor and Employment Law,” Certain NYC Contractors Are Now Subject to “Living Wage” Law, at http://www.thelenreid.com/articles/article/art_187.htm.

What constitutes a public work is not defined in the statute, but has been determined by its interpretation in a series of appellate-level court rulings. In one of the most well-known cases, *In Re Vulcan Affordable Housing Corp. v. Hartnett*,⁶ the Third Department of the Appellate Division of the Supreme Court “held that a project to construct affordable housing is not a public work [and therefore did not have to pay prevailing wage], even though the project would have been partially subsidized by the government and would rehabilitate neighborhoods, thereby serving some public function, where the project engaged a private contractor, was privately owned, and offered no public access or enjoyment to the units.”⁷

Determination of prevailing wage

The City and the State of New York⁸ base their calculation of the prevailing wage on collective bargaining agreements. New York State Labor Law Article 8, Section 220 requires that contractors on public-work construction projects provide their employees with wages and fringe benefits commensurate with the prevailing wage and practices applicable to similarly employed workers in the locality of project.⁹ As a result, in New York City, prevailing wages consist of union wages plus fringe benefits in all trades for which collective bargaining agreements exist.¹⁰

The federal government, through the U.S. Department of Labor, determines its prevailing wages differently than the City and State of New York. It averages the results it obtains from surveys it has sent to all the contractors, union and non-union, in a given geographical area.¹¹ However, the Davis-Bacon Act does not set specific wage rates that contractors must pay their workers; nor does it require contractors to pay union scale. Rather, it calls for contractors bidding on U.S. federal construction projects exceeding \$2,000 to pay their employees *not* less than the standard wage and benefit that the U.S. Department of Labor has determined that workers in the area performing similar work are earning.¹²

⁶ 151 A.D.2d 83 (3rd Dep’t 1989), 545 N.Y.S.2d 952.

⁷ Memorandum re Prevailing Wage from Neda Matar, Milbank Tweed Hadley & McCloy, to John Edward Dallas (Jan. 11, 2006) (appended to Interoffice Memorandum re Compilation of my Freedom of Information requests and other inquiries, From John Edward Dallas to Elly Spicer [Aug. 14, 2006]). This memorandum contains a short but informative discussion of what qualifies a housing construction project as a public work, in light of appellate court decisions.

⁸ On its Web site, the New York State Center for Fair Contracting states in response to the question “How are prevailing wages determined [by the state] and how often are they paid?” “Prevailing wage rates are determined by negotiated agreements between labor and employee associations.” <http://www.virtualflow.com/cfc/faq.cfm>. This accords with the state Department of Labor’s Web Site, which says: “Prevailing rates in a locality are determined by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, provided said employers employ at least 30% of workers in the same trade or occupation in the locality where the work is being performed. (Section 220, subd 5a)” “Public work – Prevailing Wages & Supplements: Frequently Asked Questions,” at http://www.labor.state.ny.us/workerprotection/publicwork/PW_faq2.shtm.

⁹ “Department of Labor - Enforcement of the Prevailing Wage on Public Construction Contracts,” Report 2001-S-68 (issued 2/20/03, Office of the New York State Comptroller, at 4 of 27, at <http://nysosc3.osc.state.ny.us/audits/allaudits/093003/093003-h/01s68.htm>).

¹⁰ Jerry J. Salama et al., “Reducing the Cost of New Housing Construction in New York City: 2005 Update,” at 26.

¹¹ Bendix Anderson, “Prevailing Wage Fight Spreads to California,” at <http://www.housingfinance.com/ahf/articles/2002/02NovDecPrevailingWage>.

¹² “Davis-Bacon Under Attack—Beware of Stealth Strategies,” International Brotherhood of Electrical Workers – AFL-CIO-CLC, at <http://www.ibew.org/stories/02journal/0204/p.12.htm>.

What happens when the federal and state—or, in this case, the local or New York City—prevailing wages differ?

“New York, and a few other states, require public managers to choose whichever rules impose *higher* wages (and taxpayer costs) on a given project,” says one (notably cynical) researcher.¹³ (Emphasis in original.) This is true. That is, the higher wage must be paid, according to a labor specialist with HUD’s New York City regional office, Marlene Moses.

She said that when a “local contracting agency,” or LCA, such is HPD, is receiving HUD funds mandating prevailing wage and the state prevailing wage is higher than the federal prevailing wage, the LCA must pay the state prevailing wage. If the federal prevailing wage is higher, that rate supercedes the state prevailing wage. “This is a federal regulation,” she added.¹⁴

Discrepancies between the federal and state prevailing wages are common particularly in New York City, where the state prevailing wage is typically higher than the federal one, said Richard Balletta,¹⁵ an assistant state attorney general who handles prevailing wage cases. The variation, he explained, has to do with how the rates are calculated. “Davis-Bacon,” he said, “takes in a large area. Let’s say the New York metropolitan area and the whole Northeast, so that its rates are generally lower for most classifications of work in New York City,” where the state prevailing wage is pegged to the union wages. The federal prevailing wage, he continued, is “definitely lower in New York City,” surmising that “it’s probably lower across the board in every classification.”

In terms of enforcement, when there’s difference between the federal and state prevailing wages, in an action for underpayment the state Attorney General’s Office “will enforce only up to the Davis-Bacon wage,” said Mr. Balletta. As an example he posed that the state prevailing wage for a given job classification in New York City is \$45 an hour and the federal one \$40. His office would enforce only up to \$40, he said.

Enforcement of prevailing-wage laws (jurisdiction)

By law the state Commissioner of Labor has jurisdiction over prevailing-wage contracts everywhere in the state of New York, except for New York City, said Mr. Balletta, and there are two aspects of prevailing-wage law enforcement – civil and criminal.

In the five boroughs, a civil or administrative proceeding is brought by the city Comptroller. “If whoever is not happy with the decision, if all proceedings have been exhausted, they then would

¹³ Robert B. Ward, “The \$163 Lightbulb: How Albany’s Mandates Drive Up Your Local Taxes,” The Public Policy Institute of New York State, at 54. Mr. Ward is most likely referring to New York State Labor Law § 230-6, which defines prevailing wage as “the wage determined by the fiscal officer to be prevailing for the various classes of building service employees in the locality. In no event shall the basic hourly cash rate of pay be less than the statutory minimum wage established by article nineteen of this chapter, or, in a city with a local law requiring a higher minimum wage on city contract work, less than minimum wage specified in such local law.”

¹⁴ Telephone Interview with Marlene Moses, HUD (Nov. 16, 2005). Cf. “States and other jurisdictions often have their own employment standards laws. If both federal and state or local laws apply to your business, your employees are entitled to the most generous benefit provided under either law.” “State and Local Laws,” Small Business Development Center, Stony Brook, Compliance Plan, at <http://www.naples.cc.sunysb.edu/CEAS/smallbusiness.nsf/pages/compliance>.

¹⁵ Telephone Interview with Richard Balletta, New York State Office of the Attorney General (Nov. 16, 2005).

have the opportunity to appeal to a court by way of Article 78,” he said. In this case, the Comptroller would turn the case over to the city Corporation Counsel. Outside New York City, the civil proceeding would be initiated by the state Commissioner of Labor and, after this process has run its course, an appeal to the court system would be handled by the state Attorney General.

Locally, a criminal case can be prosecuted by the district attorney of the county where the prevailing wage violation took place. Outside the city, the Attorney General would prosecute the case. However, the Attorney General has legal standing to prosecute criminal cases in the city, as well, said Mr. Balletta, adding that state law gives the Attorney General concurrent jurisdiction in prevailing-wage and other cases with the district attorneys of the five boroughs or counties.

When does the Attorney General intervene in prevailing wage cases in the city? “A city agency might notify us and we then have to decide to whether or not to handle the case. Or an agency might refer the case to us,” he said. “The bottom line is that we”—as opposed to the local district attorneys—“have *the* expertise in prevailing wage.”

He mentioned that where the state or federal law or regulations do not require it, the City can on its own require prevailing wage or a comparable rate on a construction project. It could do this, and frequently does, by incorporating this requirement into the terms of a contract. (“Anyone, even the City, can essentially put can put anything into a contract,” he said.) However, in this situation, if a contractor should breach the contract by failing to pay the prevailing wage, enforcement would be outside the Attorney General’s responsibilities, instead falling to the city Comptroller. “The contract does not involve a public work subject to the prevailing wage law, and is in essence a private contract between the City and another party,” explained Mr. Barretta.

Every affordable construction project of HPD or NYCHA which uses HUD funds does not necessarily have to pay prevailing wage, he said. It depends on how the money is used; for example, whether the public money is being used for private use. If it’s public funding for private use, then it’s not subject to prevailing wage.¹⁶

What role does the federal government play in enforcing prevailing wage?

Wayne Horbert, the specialist on prevailing wage at H.U.D.’s New York City regional office, said responsibility for enforcement of federal prevailing wage resides with “the local contracting agency,” such as NYCHA or HPD. Thus, for example, when his office receives a written or verbal complaint from a worker regarding prevailing-wage, it’s required to make an inquiry of the agency that has the contract and direct them to investigate. He believes this is the most effective way to handle complaints because his office has “very little staff” and, in the case of, for example, HPD, “under Christina Harris” it “is very knowledgeable and has a competent staff.”¹⁷

Posting requirements

¹⁶ See *supra* note 7.

¹⁷ Telephone Interview with Wayne Horbert, HUD (Nov. 16, 2005).

How are workers to know whether the affordable housing construction job site they are employed at is prevailing wage?¹⁸

State law requires that a notice be posted: “The contractor and every subcontractor on public work contracts shall post in a prominent and accessible place on the site of the work at legible statement of all wage rates and supplements as specified in the contract to be paid or provided....”¹⁹ In addition, the prevailing wage schedule must be encased in, or constructed of, materials capable of withstanding adverse weather conditions and be titled ‘PREVAILING RATE OF WAGES’ in letters no smaller than two inches by two inches.²⁰

Is the notice required to be in a language other than English?

The answer is no, according to a Mr. W., an employee in the Public Work division of the New York City office of the state Department of Labor, who refused to identify himself after apparently believing he may have spoken too bluntly. If, he said, the state required the notice to be in, for example, Spanish, it would be open up a Pandora’s box, inconveniently obligating contractors to post signs in all the other foreign languages spoken by construction workers. He speculated that since the information on prevailing wage is available only in English on the department’s Web site, English is the official language for notice-posting purposes.

When asked if contractors were aware of the posting requirement, he insisted they’re informed of it after being awarded their contract during what he termed the “kickoff” meeting between them and Department of Labor representatives. His experience has been that that in general those contractors who aren’t paying the prevailing wage as they are required to, don’t post the notice.

¹⁸ In an article on the status of legislation produced during the 229th session of the New York State Legislature, The New York Times recently reported as awaiting signature or veto, a bill that would require contractors and subcontractors on public works projects to inform workers of their right to receive prevailing wages. Danny Hakim and Jennifer Medina, *The 229th Legislative Session: A Blend of Accomplishment and Dysfunction*, N.Y. Times, July 16, 1990, at ___. On Aug. 17, 2006, I contacted Gov. Pataki’s office in Albany and was told by a staffer that the bill, A11291 (also S8309), was vetoed on July 26, 2007. I confirmed this with an aide of the bill’s primary sponsor, Assemblyman Richard L. Brodsky (D-Westchester).

More precisely, the bill required contractors and subcontractors to give *written* notification to workers of the prevailing wage rates and supplements (that they are entitled to receive for their particular job classifications) at the beginning, and during the performance, of every public works contract. According to the New York State Assembly’s Web site, the bill addressed a defect in the state Labor Law which does not presently require contractors and subcontractors to provide written notification of prevailing wage rates to all laborers, workers or mechanics working on public worker jobs. The bill required written notice to be provided at the beginning of every public works contract and every eight weeks thereafter, and also to be provided to every new laborer, worker or mechanic hired thereafter. The written notice was to be provided with every laborer’s, worker’s or mechanic’s paycheck. Bill Summary – 11291, New York State Assembly, at <http://assembly.state.ny.us/leg/?bn=A11291>.

There are two other interesting aspects of the bill. First, mentioned under “the justification” for its passage is testimony during public hearings that non-English speaking workers in particular, because of their inability to speak English and their lack of knowledge of the prevailing-wage rates, are being taken advantage of by unscrupulous contractors and subcontractors. Second, no penalties were cited for violation of the bill’s provisions.

¹⁹ New York State Labor Law § 220-3(a).

²⁰ Summary of Notice Posting Requirements, “General Provisions of Laws Covering Workers on Public Work Contracts,” at 4, at <http://www.labor.state.ny.us/workerprotection/publicwork/PWGeneralProvisions.shtm>. See also “New York State Posting Requirements (Non-Agricultural),” at <http://www.labor.state.ny.us/workprotection/laborstandards/employer/posters.shtm>.

The notice is important, he went on to say, because it is primary means by which the Department of Labor learns of prevailing-wage violations by contractors; workers read the notice and file a complaint. “We don’t walk around and ask workers whether they are getting prevailing wage,” he added wryly.²¹ (Interestingly, a report by the State Comptroller on prevailing-wage enforcement by the Department of Labor describes two methods of enforcement: response to complaints and proactive investigations.²²)

I contacted Mr. W.’s office on a later occasion and spoke with Luis Gadoy, a wage investigator whom I had had the pleasure of speaking with once before. He said that all contractors receive a packet with the prevailing-wage rate schedules for all job classifications. Contractors are obligated to post “where everyone can see it” at the worksite the rates for all relevant job classifications, he mentioned, with their failure to do resulting in a citation or warning.

What if when inspectors from the Department of Labor return, they still don’t find the wages posted? “We begin an investigation into the contractor immediately. Our assumption being, if the contractor didn’t post the rates, he doesn’t want to pay the workers prevailing wage,” he replied.

Is the prevailing wage notice required to be in a language other than English? No, he said. What does a non-English-speaker worker do if he has questions about prevailing wage? “They can call this office,” he said. “If they speak Spanish, since I speak Spanish, I can take care of them. If they speak Russian or Chinese or another language, we’ll find someone that can take care of them.”²³

Interestingly, The New York City Housing Authority, which requires that every contractor whom it awards a construction or building services contract pay its workers wages and supplemental benefits equal to or greater than the applicable prevailing wage, has guidelines for multilingual prevailing-wage notices. As part of its new initiative to step up its ability to monitor and enforce the payment of prevailing wage by contractors and subcontractors, since 2003 NYCHA has obligated contractors to place an advisory poster at the work site informing workers of the prevailing wage in English and Urdu, Russian, Spanish, Chinese, Hindi, and Polish.²⁴ (In addition, the poster must list a toll-free where workers can call for assistance or further information, 1-888-692-4279.)²⁵

In addition to a state prevailing-wage posting requirement, there is a federal one. “Every employer performing work covered by the labor standards of The Davis-Bacon and Related Acts shall

²¹ Telephone Interview with Mr. W., New York State Department of Labor (Nov. 13, 2005).

²² “Department of Labor: Enforcement of the Prevailing Wage on Public Construction Contracts,” *supra* note 8, at 9 of 27.

²³ Telephone Interview with Luis Gadoy, NYCHA (Nov. 28, 2005).

²⁴ As for HPD prevailing-wage projects, “contractors are required to post a notice on site stating that this [sic] fact to their employees (with heading that reads ‘Notice to Employee’). HPD’s Labor Standards Unit conducts site visits as part of the monitoring process and also hands out individual flyers to workers in four languages, English, Chinese, Russian and Spanish.” E-mail From Laurie LoPrimo, Deputy Commissioner, Office of Housing Operations, HPD, to John Edward Dallas (Jan. 5, 2006) (appended to Interoffice Memorandum re Compilation of my Freedom of Information requests and other inquiries, From John Edward Dallas to Elly Spicer [Aug. 14, 2006]).

²⁵ “NYCHA Prevailing Wage Initiative: A Wake-up Call to Contractors,” Press Release, April 16, 2003, *at* http://www.ci.nyc.ny.us/html/nycha/html/prapr2003_01.html. I called the toll-free number on Nov. 28, 2005 to see if it is still in operation and reached Anthony Ruiz. I inquired as to what extent his department is able to assist non-English-speaking workers. In a very cordial and professional manner, Mr. Ruiz replied that they have a large number of Spanish-speakers on hand, but that they do their best to find someone to interpret for a caller who speaks another foreign language.

post a notice (including any applicable wage determination) at the site of the work in a prominent and accessible place where it may be easily seen by employees,” says U.S. Department of Labor Web site under Employment Standards Administration, Wage and Hour Division.²⁶

This requirement applies to a contractor or subcontractor engaged in contracts in excess of \$2,000 for the actual construction, alteration/repair of a public building or public work or building or work financed in whole or in part from federal funds, federal guarantee, or federal pledge which is subject to the labor standards provisions of any of the acts listed in 29 CFR 5.1, which includes Davis-Bacon. However, the requirement has no teeth since there are no citations or penalties for failure to post.²⁷

²⁶ <http://www.dol.gov/esa/regs/compliance/posters/davis.htm>.

²⁷ “U.S. Department of Labor Workplace Poster Requirements for Small Businesses and Other Employers,” Small Business Development Center, Stony Brook, Compliance Plan, at <http://naples.cc.sunysb.edu/CEAS/smallbusiness.nsf/pages/compliance>. “Notice to All Employees on Federal or Federally Financed Construction Projects (Davis-Bacon Act),” Employment Standards Administration, Wage and Hour Division. 29 CFR 5.5(a)(1).