

7096

I N S E N A T E

March 11, 2010

Introduced by Sen. SCHNEIDERMAN -- read twice and ordered printed, and
when printed to be committed to the Committee on Labor

AN ACT to amend the labor law, in relation to prevailing wages for
service workers

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. The article heading of article 9 of the labor law, as added
2 by chapter 777 of the laws of 1971, is amended to read as follows:

3 PREVAILING WAGE FOR [BUILDING] SERVICE EMPLOYEES

4 S 2. Subdivisions 1, 2, 3, 4, 6, 8 and 9 of section 230 of the labor
5 law, subdivision 1 as amended and subdivision 9 as added by chapter 542
6 of the laws of 1984, subdivisions 2, 3, 6 and 8 as added by chapter 777
7 of the laws of 1971, subdivision 4 as amended by chapter 678 of the laws
8 of 2007, are amended and a new subdivision 15 is added to read as
9 follows:

10 1. "[Building service] SERVICE employee" or "employee" means any
11 person performing JANITORIAL, FOOD OR SECURITY SERVICE WORK FOR A
12 CONTRACTOR UNDER CONTRACT WITH A PUBLIC AGENCY WHICH IS IN EXCESS OF ONE
13 THOUSAND FIVE HUNDRED DOLLARS AND THE PRINCIPAL PURPOSE OF WHICH IS TO
14 FURNISH SERVICES THROUGH THE USE OF SERVICE EMPLOYEES, OR ANY OTHER
15 PERSON PERFORMING work in connection with the care or maintenance of an
16 existing building, or in connection with the transportation of office
17 furniture or equipment to or from such building, or in connection with
18 the transportation and delivery of fossil fuel to such building, for a
19 contractor under a contract with a public agency which is in excess of
20 one thousand five hundred dollars and the principal purpose of which is
21 to furnish services through the use of [building] service employees.

22 "[Building service] SERVICE employee" or "employee" includes, but is
23 not limited, to, watchman, guard, doorman, building cleaner, porter,
24 handyman, janitor, gardener, groundskeeper, stationary fireman, elevator
25 operator and starter, window cleaner, FOOD SERVICE WORKER, COOK, BAKER,
26 DISHWASHER, MEAT CUTTER, WAITER, DRIVER and occupations relating to the
27 collection of garbage or refuse, and to the transportation of office
28 furniture and equipment, and to the transportation and delivery of

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[] is old law to be omitted.

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fossil fuel but does not include clerical, sales, professional, technician and related occupations.

"[Building service] SERVICE employee" or "employee" also does not include any employee to whom the provisions of articles eight and [eight-a] EIGHT-A of this chapter are applicable.

2. "[Building service] SERVICE work" or "service work" means work performed by a [building] service employee, but does not include work performed for a contractor under a contract for the furnishing of services by radio, telephone, telegraph or cable companies[; and any contract for public utility services, including electric light and power, water, steam and gas], OR FOOD SERVICE WORK PERFORMED PURSUANT TO A FOOD CONCESSION CONTRACT.

3. "Public agency" means the state, any of its political subdivisions, a public benefit corporation, a public authority, INCLUDING A PUBLIC AUTHORITY PROVIDING PUBLIC UTILITY SERVICES, or commission or special purpose district board appointed pursuant to law, [and] a board of education, A PUBLIC UTILITY REGULATED BY THE STATE'S PUBLIC SERVICE COMMISSION THAT PROVIDES ELECTRIC LIGHT OR POWER, GAS OR STEAM SERVICES, A BUSINESS IMPROVEMENT DISTRICT WITH MORE THAN ONE MILLION DOLLARS PER YEAR IN TOTAL REVENUE, AND ANY THIRD PARTY PERSON OR ENTITY ACTING IN PLACE OF, ON BEHALF OF AND FOR THE BENEFIT OF SUCH PUBLIC AGENCY PURSUANT TO A LEASE, PERMIT, OR OTHER AGREEMENT BETWEEN THE THIRD PARTY PERSON OR ENTITY AND A PUBLIC AGENCY.

4. "Contractor" means any employer who employs employees to perform [building] service work under a contract with a public agency and shall include any of the contractor's subcontractors.

6. "Prevailing wage" means 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 the minimum wage specified in such local law.

8. "Fiscal officer" means the industrial commissioner, except for [building] service work performed by or on behalf of a city, in which case "fiscal officer" means the comptroller or other analogous officer of such city.

9. "Fossil fuel" shall mean coal, petroleum products and fuel gases. "Coal" shall include bituminous coal, anthracite coal and lignite. "Fuel gases" shall include but not be limited to methane, natural gas, liquefied natural gas and manufactured fuel gases. "Petroleum products" shall include all products refined or rerefined from synthetic or crude oil or oil extracted from other sources, including natural gas liquids. [Provided that nothing in this subdivision shall affect the exclusion for public utility services set forth in subdivision two of this section.]

15. "PERSON" SHALL MEAN A HUMAN BEING AND SHALL INCLUDE AN "ENTITY" AS DEFINED IN THIS ARTICLE, INCLUDING, BUT NOT LIMITED TO A CONTRACTOR OR SUBCONTRACTOR.

S 3. Subdivisions 1, 3, 4 and 5 of section 231 of the labor law, subdivisions 1, 3 and 4 as added by chapter 777 of the laws of 1971 and subdivision 5 as amended by chapter 678 of the laws of 2007, are amended and a new subdivision 8 is added to read as follows:

1. Every contractor shall pay a service employee under a contract for [building] service work a wage of not less than the prevailing wage in the locality for the craft, trade or occupation of the service employee.

1 3. Each contract for [building] service work shall contain as part of
2 the specifications thereof a schedule of the wages required to be paid
3 to the various classes of service employees on such work, and each such
4 contract shall further contain a provision obligating the contractor to
5 pay each employee on such work not less than the wage specified for his
6 craft, trade or occupation in such schedule.

7 4. The public agency, or appropriate officer or agent thereof, whose
8 responsibility it is to prepare or direct the preparation of the plans
9 and specifications for a contract for [building] service work, shall
10 ascertain from such plans and specifications the classifications of
11 employees to be employed on such work and shall file a list of such
12 classifications with the fiscal officer, together with a statement of
13 the work to be performed. The fiscal officer shall determine the crafts,
14 trades and occupations required for such work and shall make a determi-
15 nation of the wages required to be paid in the locality for each such
16 craft, trade or occupation. A schedule of such wages shall be annexed to
17 and form a part of the specifications for the contract prior to the time
18 of the advertisement for bids on such contract and shall constitute the
19 schedule of wages referred to in subdivision three of this section.

20 5. Upon the award of a contract for [building] service work by a
21 public agency other than a city, the contracting public agency shall
22 immediately furnish to the commissioner: (a) the name and address of the
23 contractor to whom the contract was awarded; (b) the date when the
24 contract was awarded; and (c) the approximate consideration stipulated
25 for in the contract.

26 8. THE REQUIREMENTS OF THIS SECTION SHALL APPLY TO ANY PERSON OR ENTI-
27 TY THAT ENTERS INTO ANY LEASE, PERMIT OR OTHER AGREEMENT WITH A PUBLIC
28 AGENCY THAT INCLUDES THE PROVISION OF SERVICE WORK BY EMPLOYEES WHO
29 WOULD BE REQUIRED TO BE PAID SCHEDULED WAGES PURSUANT TO THIS SECTION IN
30 THE ABSENCE OF SUCH AGREEMENT. NO PUBLIC AGENCY SHALL ENTER INTO ANY
31 SUCH AGREEMENT WITH ANY PERSON OR ENTITY WITHOUT RECEIPT OF A WRITTEN
32 ACKNOWLEDGEMENT FROM SUCH PERSON OR ENTITY AFFIRMING SUCH PERSON OR
33 ENTITY'S NONDELEGABLE OBLIGATION TO PAY NOT LESS THAN THE WAGES SPECI-
34 FIED IN SUCH SCHEDULE. NOTWITHSTANDING ANY SUCH AGREEMENT, NOTHING IN
35 THIS SUBDIVISION SHALL BE DEEMED TO RELIEVE THE PUBLIC AGENCY OF ITS
36 RESPONSIBILITIES TO ENSURE COMPLIANCE WITH THIS ARTICLE. ANY LEASE,
37 PERMIT OR AGREEMENT MADE IN CONTRAVENTION OF THIS SUBDIVISION SHALL BE
38 VOID AS A MATTER OF PUBLIC POLICY.

39 S 4. Subdivision 4 of section 230 of the labor law, as added by chap-
40 ter 777 of the laws of 1971, is amended to read as follows:

41 4. "Contractor" means any employer who employs employees to perform
42 [building] service work under a contract with a public agency, and shall
43 include any of his subcontractors.

44 S 5. Subdivision 5 of section 231 of the labor law, as added by chap-
45 ter 777 of the laws of 1971, is amended to read as follows:

46 5. Upon the award of a contract for [building] service work by a
47 public agency other than a city, the contracting public agency shall
48 immediately furnish to the industrial commissioner: (a) the name and
49 address of the contractor to whom the contract was awarded; (b) the date
50 when the contract was awarded; and (c) the approximate consideration
51 stipulated for in the contract.

52 S 6. Paragraphs a and c of subdivision 2 and subdivision 7 of section
53 235 of the labor law, paragraph a of subdivision 2 and subdivision 7 as
54 amended and paragraph c of subdivision 2 as added by chapter 547 of the
55 laws of 1998, are amended and subdivision 2 is amended by adding a new
56 paragraph g to read as follows:

1 a. At the start of such investigation the fiscal officer may notify
2 the financial officer of the public agency interested who shall, at the
3 direction of the fiscal officer, forthwith withhold from any payment due
4 to the contractor executing the contract sufficient money to safeguard
5 the rights of the service employees and to cover the civil penalty that
6 may be assessed as provided herein, or, if there are insufficient moneys
7 still due or earned to the contractor or subcontractor to safeguard the
8 rights of the service employees and to cover the civil penalty that may
9 be assessed as provided herein, the financial officer of another civil
10 division which has entered or subsequently enters into a [building]
11 service work contract with the contractor or subcontractor, who shall
12 withhold from any payment due the contractor or subcontractor executing
13 any [building] service work, sufficient moneys to safeguard the rights
14 of the service employees and to cover the civil penalty that may be
15 assessed as provided herein.

16 c. The notice of withholding shall provide that the fiscal officer
17 intends to instruct the financial officer, not less than ten days
18 following service of the notice by mail, to withhold sufficient moneys
19 to safeguard the rights of the service employees and to cover the civil
20 penalty that may be assessed as provided herein, from any payment due
21 the notified party under any [building] service work contract pending
22 final determination. The notice of withholding shall provide that within
23 thirty days following the date of the notice of withholding the notified
24 party may, contest the withholding on the basis that the notified party
25 is not a partner or one of the five largest shareholders of the subcon-
26 tractor or contractor, an officer of the contractor or subcontractor who
27 knowingly participated in the violation of this article, a substantial-
28 ly-owned affiliated entity or successor. If the notified party fails to
29 contest the notice of withholding, or if the fiscal officer, after
30 reviewing the information provided by the notified party in such
31 contest, determines that the notified party is a partner or one of the
32 five largest shareholders, a substantially-owned affiliated entity, an
33 officer of the contractor or subcontractor who knowingly participated in
34 the violation of this article, or a successor, the fiscal officer may
35 instruct the financial officer to immediately withhold sufficient moneys
36 to safeguard the rights of the service employees and to cover the civil
37 penalty that may be assessed as provided herein from any payment due the
38 notified party under any [building] service work contract pending the
39 final determination.

40 G. THE FISCAL OFFICER MAY REQUIRE ANY PERSON OR CORPORATION PERFORMING
41 SUCH PUBLIC WORK TO FILE WITH THE FISCAL OFFICER WITHIN TEN DAYS OF
42 RECEIPT OF SAID REQUEST, PAYROLL RECORDS, SWORN TO AS TO THEIR VALIDITY
43 AND ACCURACY, REQUESTED BY THE FISCAL OFFICER, FOR SAID SERVICE WORK OR
44 FOR ANY PUBLIC OR PRIVATE WORK PERFORMED BY SAID PERSON OR CORPORATION
45 DURING THE SAME PERIOD OF TIME AS SAID SERVICE WORK. IN THE EVENT SAID
46 PERSON OR CORPORATION FAILS TO PROVIDE THE REQUESTED INFORMATION WITHIN
47 THE ALLOTTED TEN DAYS, THE FISCAL OFFICER SHALL, WITHIN FIFTEEN DAYS,
48 ORDER THE FINANCIAL OFFICER OF THE PUBLIC AGENCY TO IMMEDIATELY WITHHOLD
49 FROM PAYMENT TO SAID PERSON OR CORPORATION UP TO TWENTY-FIVE PERCENT OF
50 THE AMOUNT, NOT TO EXCEED FIVE HUNDRED THOUSAND DOLLARS, TO BE PAID TO
51 SAID PERSON OR CORPORATION UNDER THE TERMS OF THE CONTRACT PURSUANT TO
52 WHICH SAID SERVICE WORK IS BEING PERFORMED. SAID AMOUNT WITHHELD SHALL
53 BE IMMEDIATELY RELEASED UPON RECEIPT BY THE PUBLIC AGENCY OF A NOTICE
54 FROM THE FISCAL OFFICER INDICATING THAT THE REQUEST FOR RECORDS HAD BEEN
55 SATISFIED.

1 7. When, pursuant to the provisions of this section, two final orders
2 have been entered against a contractor, subcontractor, successor, or any
3 substantially-owned affiliated entity of the contractor or subcontractor,
4 any of the partners if the contractor or subcontractor is a partnership,
5 any of the five largest shareholders of the contractor or subcontractor,
6 any officer of the contractor or subcontractor who knowingly participated
7 in the violation of this article within any consecutive six-year period
8 determining that such contractor or subcontractor and/or its successor,
9 substantially-owned affiliated entity of the contractor or subcontractor,
10 any of the partners or any of the five largest shareholders of the contractor
11 or subcontractor, any officer of the contractor or subcontractor who knowingly
12 participated in the violation of this article has willfully failed to pay the
13 prevailing wages in accordance with the provisions of this article, whether
14 such failures were concurrent or consecutive and whether or not such final
15 determinations concerning separate public [building] service WORK contracts
16 are rendered simultaneously, such contractor, subcontractor, successor,
17 and if the contractor, subcontractor, successor, or any substantially-owned
18 affiliated entity of the contractor or subcontractor, any of the partners
19 if the contractor or subcontractor is a partnership, or any of the five
20 largest shareholders of the contractor or subcontractor, any officer of the
21 contractor or subcontractor who knowingly participated in the violation of
22 this article, or any successor is a corporation, any officer of such
23 corporation who knowingly participated in such failure, shall be ineligible
24 to submit a bid on or be awarded any public [building] service work for a
25 period of five years from the date of the second order, provided, however,
26 that where any such final order involves the falsification of payroll
27 records or the kickback of wages, the contractor, subcontractor, successor,
28 substantially-owned affiliated entity of the contractor or subcontractor,
29 any partner if the contractor or subcontractor is a partnership or any of
30 the five largest shareholders of the contractor or subcontractor, any
31 officer of the contractor or subcontractor who knowingly participated in
32 the violation of this article shall be ineligible to submit a bid on or
33 be awarded any public [building] service WORK contract or subcontract
34 with the state, any municipal corporation or public body for a period of
35 five years from the date of the first final order. Nothing in this
36 subdivision shall be construed as affecting any provision of any other
37 law or regulation relating to the awarding of public contracts.

40 S 7. Subdivision 2 of section 237 of the labor law, as amended by
41 chapter 698 of the laws of 1988, is amended to read as follows:

42 2. A. Before payment is made by or on behalf of a public agency of any
43 sums due on account of a contract for service work, it shall be the duty
44 of the comptroller of the state or the financial officer of such public
45 agency or other officer or person charged with the custody and disbursement
46 of the state or corporate funds applicable to the contract under and pursuant
47 to which payment is made, to require the contractor to file a statement
48 in writing in form satisfactory to such officer certifying to the amounts
49 then due and owing from such contractor filing such statement to or on
50 behalf of any and all service employees for daily or weekly wages on
51 account of labor performed upon the work under the contract, setting forth
52 therein the names of the persons whose wages are unpaid and the amount
53 due to or on behalf of each respectively, which statement so to be filed
54 shall be verified by the oath of the contractor that he or she has read
55 such statement subscribed by him or her and knows the contents thereof,
56 and that the same is true of his or her own

1 knowledge. THE CONTRACTOR SHALL FILE THESE PAYROLL RECORDS VERIFIED
2 UNDER OATH WITHIN NINETY DAYS AFTER LABOR IS PERFORMED UPON THE WORK
3 UNDER CONTRACT, OR SUCH OTHER TIME AS THE FISCAL OFFICER MAY AUTHORIZE.
4 ANY PERSON WHO WILLFULLY FAILS TO FILE SUCH PAYROLL RECORDS WITH THE
5 PUBLIC AGENCY SHALL BE GUILTY OF A CLASS E FELONY.

6 B. EACH PUBLIC AGENCY SHALL DESIGNATE IN WRITING AN INDIVIDUAL
7 EMPLOYED BY SUCH DEPARTMENT RESPONSIBLE FOR THE RECEIPT, COLLECTION AND
8 REVIEW FOR FACIAL VALIDITY OF A CONTRACTOR'S CERTIFIED PAYROLL STATE-
9 MENT, AS SET FORTH IN THIS SUBDIVISION, BEFORE PAYMENT IS MADE. SAID
10 DESIGNATION SHALL BE FILED WITH THE FISCAL OFFICER AND POSTED IN A
11 CONSPICUOUS LOCATION AT THE WORK SITE. IF THE DESIGNATED INDIVIDUAL
12 CANNOT PERFORM THE RECEIPT, COLLECTION AND REVIEW OF CERTIFIED PAYROLLS
13 DUTIES AS INDICATED ABOVE, FOR ANY REASON, INCLUDING BUT NOT LIMITED TO
14 REASSIGNMENT, PROMOTION OR SEPARATION FROM EMPLOYMENT, THE PUBLIC AGENCY
15 MUST IMMEDIATELY DESIGNATE ANOTHER INDIVIDUAL EMPLOYED BY SUCH AGENCY TO
16 FULFILL SUCH RESPONSIBILITIES. IN THE EVENT THAT A PUBLIC AGENCY FAILS
17 TO NAME AN INDIVIDUAL RESPONSIBLE FOR THE RECEIPT, COLLECTION AND REVIEW
18 FOR FACIAL VALIDITY OF CONTRACTORS' CERTIFIED PAYROLLS, THEN THE INDI-
19 VIDUAL SO RESPONSIBLE SHALL BE THE INDIVIDUAL WHO IS THE CHIEF
20 POLICY-MAKING OFFICER OF SUCH PUBLIC AGENCY.

21 S 8. Subdivision 2 of section 238 of the labor law, as added by chap-
22 ter 777 of the laws of 1971, is amended to read as follows:

23 2. A. When a contract for service work contains as part thereof a
24 schedule of wages as provided for in this article, any [contractor]
25 PERSON who, after entering into such contract[, and any subcontractor of
26 such contractor who] WILLFULLY fails to pay to any service employee the
27 wages stipulated in such wage schedule [is guilty of a misdemeanor and
28 upon conviction shall be punished for a first offense by a fine of five
29 hundred dollars or by imprisonment for not more than thirty days or by
30 both fine and imprisonment; for a second offense by a fine of one thou-
31 sand dollars], and [in]:

32 (I) SUCH FAILURE RESULTS IN UNDERPAYMENTS WHICH IN THE AGGREGATE
33 AMOUNT TO ALL WORKERS EMPLOYED BY THE CONTRACTOR OR SUBCONTRACTOR
34 RESULTS IN AN AMOUNT LESS THAN TWENTY-FIVE THOUSAND DOLLARS, THE
35 CONTRACTOR OR SUBCONTRACTOR SHALL BE GUILTY OF A CLASS A MISDEMEANOR;

36 (II) SUCH FAILURE RESULTS IN UNDERPAYMENTS, WHICH IN THE AGGREGATE
37 AMOUNT TO ALL WORKERS EMPLOYED BY SUCH CONTRACTOR OR SUBCONTRACTOR,
38 RESULTS IN AN AMOUNT GREATER THAN TWENTY-FIVE THOUSAND DOLLARS, THE
39 CONTRACTOR OR SUBCONTRACTOR SHALL BE GUILTY OF A CLASS E FELONY;

40 (III) SUCH FAILURE RESULTS IN UNDERPAYMENTS, WHICH IN THE AGGREGATE
41 AMOUNT TO ALL WORKERS EMPLOYED BY SUCH CONTRACTOR OR SUBCONTRACTOR,
42 RESULTS IN AN AMOUNT GREATER THAN ONE HUNDRED THOUSAND DOLLARS, THE
43 CONTRACTOR OR SUBCONTRACTOR SHALL BE GUILTY OF A CLASS D FELONY; OR

44 (IV) SUCH FAILURE RESULTS IN UNDERPAYMENTS, WHICH IN THE AGGREGATE
45 AMOUNT TO ALL WORKERS EMPLOYED BY SUCH CONTRACTOR OR SUBCONTRACTOR,
46 RESULTS IN AN AMOUNT GREATER THAN FIVE HUNDRED THOUSAND DOLLARS, THE
47 CONTRACTOR OR SUBCONTRACTOR SHALL BE GUILTY OF A CLASS C FELONY.

48 B. IN addition thereto the contract on which the violation has
49 occurred shall be forfeited; and no such contractor shall be entitled to
50 receive any sum, nor shall any officer, agent or employee of the
51 contracting public agency pay any such sum or authorize its payment from
52 the funds under his charge or control to such contractor for work done
53 upon the contract on which the contractor has been convicted of a second
54 offense. If the contractor or subcontractor is a corporation, any offi-
55 cer of such corporation who knowingly permits the corporation to fail to
56 make such payment shall also be guilty of [a misdemeanor] THE OFFENSE

1 DEFINED IN PARAGRAPH A OF THIS SUBDIVISION and the criminal and civil
2 penalties [herein] OF THIS SUBDIVISION shall attach to such officer upon
3 conviction.

4 S 9. Severability. If any clause, sentence, paragraph, section or part
5 of this act be adjudged by any court of competent jurisdiction to be
6 invalid and after exhaustion of all further judicial review, the judg-
7 ment shall not affect, impair or invalidate the remainder thereof, but
8 shall be confined in its operation to the clause, sentence, paragraph,
9 section or part of this act directly involved in the controversy in
10 which the judgment shall have been rendered.

11 S 10. This act shall take effect on the ninetieth day after it shall
12 have become a law, and shall apply to all contracts or other agreements
13 entered into, renewed, or extended on or after such date; provided,
14 however: (a) the amendments to subdivision 4 of section 230 of the
15 labor law made by section two of this act shall be subject to the expi-
16 ration and reversion of such subdivision pursuant to section 5 of chap-
17 ter 678 of the laws of 2007, as amended, when upon such date the
18 provisions of section four of this act shall take effect; and

19 (b) the amendments to subdivision 5 of section 231 of the labor law
20 made by section three of this act shall be subject to the expiration and
21 reversion of such subdivision pursuant to section 5 of chapter 678 of
22 the laws of 2007, as amended, when upon such date the provisions of
23 section five of this act shall take effect.