S T A T E O F N E W Y O R K

7434

I N S E N A T E

May 16, 2012

Introduced by Sen. SAVINO -- 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:

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

PREVAILING WAGE FOR [BUILDING] SERVICE EMPLOYEES

S 2. Subdivisions 1, 2, 3, 4, 6, 8, 9 and 10 of section 230 of the labor law, as added by chapter 777 of the laws of 1971, subdivision 1 as amended and subdivision 9 as added by chapter 542 of the laws of 1984, subdivision 4 as amended by chapter 678 of the laws of 2007 and subdivision 10 as added by chapter 547 of the laws of 1998, are amended and a new subdivision 15 is added to read as follows:

1. "[Building service] SERVICE employee" or "employee" means any person performing JANITORIAL, OR SECURITY SERVICE WORK FOR A CONTRACTOR, UNDER CONTRACT WITH A PUBLIC AGENCY WHICH IS IN EXCESS OF TWO THOUSAND DOLLARS AND THE PRINCIPAL PURPOSE OF WHICH IS TO FURNISH SERVICES THROUGH THE USE OF SERVICE EMPLOYEES, OR ANY OTHER PERSON PERFORMING work in connection with the care or maintenance of an existing building, or in connection with the transportation of office furniture or equipment to or from such building, or in connection with the transportation and delivery of fossil fuel to such building, for a contractor under a contract with a public agency which is in excess of [one] TWO thousand [five hundred] dollars and the principal purpose of which is to furnish services through the use of [building] service employees. THE PROVISIONS OF THIS ARTICLE SHALL NOT APPLY TO ANY EMPLOYEE DIRECTLY OR INDIRECTLY PERFORMING WORK FOR OR ON BEHALF OF A BUSINESS IMPROVEMENT DISTRICT UNLESS SUCH WORK WOULD HAVE BEEN SUBJECT TO THE REQUIREMENTS OF THIS ARTICLE AS IN EFFECT ON JANUARY FIRST, TWO THOUSAND ELEVEN. THE PRECEDING SENTENCE SHALL NOT BE CONSTRUED TO AFFECT ANY DETERMINATION HEREAFTER BY THE FISCAL OFFICER OR A COURT OF COMPETENT JURISDICTION AS

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

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TO THE APPLICABILITY OR INAPPLICABILITY TO SUCH WORK OF SUCH REQUIREMENTS.

"[Building service] SERVICE employee" or "employee" includes, but is not limited, to, watchman, guard, doorman, building cleaner, porter, handyman, janitor, gardener, groundskeeper, stationary fireman, elevator operator and starter, window cleaner, and occupations relating to the collection of garbage or refuse, and to the transportation of office furniture and equipment, and to the transportation and delivery of 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 JANITORIAL OR SECURITY WORK PERFORMED ON THE PREMISES OWNED OR OPERATED BY THE POWER AUTHORITY OF THE STATE OF NEW YORK UNLESS SUCH PREMISES ARE JOINTLY OWNED OR OPERATED WITH ANY NON-GOVERNMENTAL UTILITY OR SUBSTANTIALLY-OWNED OR AFFILIATED ENTITY OF SUCH PUBLIC UTILITY AS DEFINED IN SUBDIVISION THREE OF THIS SECTION.

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, AND ANY PUBLIC UTILITY THAT DISTRIBUTES ELECTRIC LIGHT OR POWER, OR GAS OR STEAM SERVICES AT RETAIL RATES REGULATED BY THE PUBLIC SERVICE COMMISSION PURSUANT TO A FRANCHISE GRANTED UNDER THE PROVISIONS OF SECTION SIXTY-EIGHT OR EIGHTY-ONE OF THE PUBLIC SERVICE LAW, AND ANY SUBSTANTIALLY-OWNED AFFILIATED ENTITY OF SUCH PUBLIC UTILITY.

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.]

10. "Substantially-owned affiliated entity" shall mean the parent company of the PUBLIC UTILITY, contractor or subcontractor, any subsidiary of the PUBLIC UTILITY, contractor or subcontractor, or any entity in which the parent of the PUBLIC UTILITY, contractor or subcontractor owns more than fifty percent of the voting stock, or an entity in which one or more of the top five shareholders of the PUBLIC UTILITY, contractor or subcontractor individually or collectively also owns a controlling share of the voting stock, or an entity which exhibits any other indicia of control over the PUBLIC UTILITY, contractor or subcontractor or over which the PUBLIC UTILITY, contractor or subcontractor exhibits control, regardless of whether or not the controlling party or parties have any identifiable or documented ownership interest. Such indicia shall include: power or responsibility over employment decisions, access to and/or use of the relevant entity's assets or equipment, power or responsibility over contracts of the entity, responsibility for maintenance or submission of certified payroll records, and influence over the business decisions of the relevant entity.

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. Subdivision 4 of section 230 of the labor law, as added by chapter 777 of the laws of 1971, is amended to read as follows:

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 his subcontractors.

S 4. Subdivisions 1, 3, 4 and 5 of section 231 of the labor law, 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 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.

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

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

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

S 5. Subdivision 5 of section 231 of the labor law, as added by chapter 777 of the laws of 1971, is amended to read as follows:

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

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

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

c. The notice of withholding shall provide that the fiscal officer intends to instruct the financial officer, not less than ten days following service of the notice by mail, to withhold sufficient moneys to safeguard the rights of the service employees and to cover the civil penalty that may be assessed as provided herein, from any payment due the notified party under any [building] service work contract pending final determination. The notice of withholding shall provide that within thirty days following the date of the notice of withholding the notified party may, contest the withholding on the basis that the notified party is not a partner or one of the five largest shareholders of the subcontractor or contractor, an officer of the contractor or subcontractor who knowingly participated in the violation of this article, a substantially-owned affiliated entity or successor. If the notified party fails to contest the notice of withholding, or if the fiscal officer, after reviewing the information provided by the notified party in such contest, determines that the notified party is a partner or one of the five largest shareholders, a substantially-owned affiliated entity, an officer of the contractor or subcontractor who knowingly participated in the violation of this article, or a successor, the fiscal officer may instruct the financial officer to immediately withhold sufficient moneys to safeguard the rights of the service employees and to cover the civil penalty that may be assessed as provided herein from any payment due the notified party under any [building] service work contract pending the final determination.

G. THE FISCAL OFFICER MAY REQUIRE ANY PERSON OR CORPORATION PERFORMING SUCH PUBLIC WORK TO FILE WITH THE FISCAL OFFICER WITHIN TEN DAYS OF RECEIPT OF SAID REQUEST, PAYROLL RECORDS, SWORN TO AS TO THEIR VALIDITY AND ACCURACY, REQUESTED BY THE FISCAL OFFICER, FOR SAID SERVICE WORK OR

FOR ANY PUBLIC OR PRIVATE WORK PERFORMED BY SAID PERSON OR CORPORATION DURING THE SAME PERIOD OF TIME AS SAID SERVICE WORK. IN THE EVENT SAID PERSON OR CORPORATION FAILS TO PROVIDE THE REQUESTED INFORMATION WITHIN THE ALLOTTED TEN DAYS, THE FISCAL OFFICER MAY, WITHIN FIFTEEN DAYS, ORDER THE FINANCIAL OFFICER OF THE PUBLIC AGENCY TO IMMEDIATELY WITHHOLD FROM PAYMENT TO SAID PERSON OR CORPORATION UP TO TWENTY-FIVE PERCENT OF THE AMOUNT, NOT TO EXCEED FIVE HUNDRED THOUSAND DOLLARS, TO BE PAID TO SAID PERSON OR CORPORATION UNDER THE TERMS OF THE CONTRACT PURSUANT TO WHICH SAID SERVICE WORK IS BEING PERFORMED. SAID AMOUNT WITHHELD SHALL BE IMMEDIATELY RELEASED UPON RECEIPT BY THE PUBLIC AGENCY OF A NOTICE FROM THE FISCAL OFFICER INDICATING THAT THE REQUEST FOR RECORDS HAD BEEN SATISFIED.

7. When, pursuant to the provisions of this section, two final orders have been entered against a contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article within any consecutive six-year period determining that such contractor or subcontractor and/or its successor, substantially-owned affiliated entity of the contractor or subcontractor, any of the partners or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article has willfully failed to pay the prevailing wages in accordance with the provisions of this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public [building] service WORK contracts are rendered simultaneously, such contractor, subcontractor, successor, and if the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, or any successor is a corporation, any officer of such corporation who knowingly participated in such failure, shall be ineligible to submit a bid on or be awarded any public [building] service work for a period of five years from the date of the second order, provided, however, that where any such final order involves the falsification of payroll records or the kickback of wages, the contractor, subcontractor, successor, substantially-owned affiliated entity of the contractor or subcontractor, any partner if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public [building] service WORK contract or subcontract with the state, any municipal corporation or public body for a period of five years from the date of the first final order. Nothing in this subdivision shall be construed as affecting any provision of any other law or regulation relating to the awarding of public contracts.

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

2. A. Before payment is made by or on behalf of a public agency of any sums due on account of a contract for service work, it shall be the duty of the comptroller of the state or the financial officer of such public

agency or other officer or person charged with the custody and disbursement of the state or corporate funds applicable to the contract under and pursuant to which payment is made, to require the contractor to file a statement in writing in form satisfactory to such officer certifying to the amounts then due and owing from such contractor filing such statement to or on behalf of any and all service employees for daily or weekly wages on account of labor performed upon the work under the contract, setting forth therein the names of the persons whose wages are unpaid and the amount due to or on behalf of each respectively, which statement so to be filed shall be verified by the oath of the contractor that he or she has read such statement subscribed by him or her and knows the contents thereof, and that the same is true of his or her own knowledge. THE CONTRACTOR SHALL FILE THESE PAYROLL RECORDS VERIFIED UNDER OATH WITHIN NINETY DAYS AFTER ANY LABOR IS PERFORMED UPON THE WORK UNDER CONTRACT, OR SUCH OTHER TIME AS THE FISCAL OFFICER MAY AUTHORIZE. ANY PERSON WHO WILLFULLY FAILS TO FILE SUCH PAYROLL RECORDS WITH THE PUBLIC AGENCY SHALL BE GUILTY OF A CLASS E FELONY.

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

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

2. When a contract for service work contains as part thereof a schedule of wages as provided for in this article, any [contractor] PERSON who, after entering into such contract[, and any subcontractor of such contractor who] WILLFULLY fails to pay to any service employee the wages stipulated in such wage schedule [is guilty of a misdemeanor and upon conviction shall be punished for a first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days or by both fine and imprisonment; for a second offense by a fine of one thousand dollars, and in] SHALL BE GUILTY OF A MISDEMEANOR FOR THE FIRST OFFENSE AND UPON CONVICTION THEREFOR SHALL BE FINED TWO THOUSAND FIVE HUNDRED DOLLARS OR TWICE THE AMOUNT OF UNDERPAYMENT, WHICHEVER IS GREATER OR IMPRISONED FOR NOT MORE THAN ONE YEAR, OR BOTH. IF A PERSON STANDS CONVICTED OF A VIOLATION OF THIS SECTION AND WITHIN THE PREVIOUS SIX YEARS HAS BEEN CONVICTED ONE OR MORE TIMES OF A VIOLATION OF THIS SECTION IN SEPARATE TRANSACTIONS, THEN SUCH PERSON SHALL BE GUILTY OF A CLASS E FELONY UPON CONVICTION FOR SUCH SUBSEQUENT OFFENSE, AND SHALL BE FINED FIVE THOUSAND DOLLARS OR TRIPLE THE AMOUNT OF UNDERPAYMENT, WHICHEVER IS GREATER OR IMPRISONED AS AUTHORIZED BY SECTION 70.00 OF THE PENAL LAW OR PUNISHED BY BOTH SUCH FINE AND IMPRISONMENT, FOR EACH SUCH OFFENSE. IN addition [thereto] TO ANY OTHER FINE OR PENALTY THAT MAY BE IMPOSED FOR SUCH FELONY OFFENSE, the contract on which the violation has occurred shall be forfeited; and no such contractor shall be entitled to

receive any sum, nor shall any officer, agent or employee of the contracting public agency pay any such sum or authorize its payment from the funds under his OR HER charge or control to such contractor for work done upon the contract on which the contractor has been convicted of a second offense. If the contractor or subcontractor is a corporation, any officer of such corporation who knowingly permits the corporation to fail to make such payment shall also be guilty of [a misdemeanor] THE OFFENSE DEFINED IN THIS SUBDIVISION and the criminal and civil penalties [herein] OF THIS SUBDIVISION shall attach to such officer upon conviction.

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

S 10. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to all contracts or other agreements entered into, renewed or extended on or after such date; provided, however, that:

(a) the amendments to subdivision 4 of section 230 of the labor law made by section two of this act shall be subject to the expiration and reversion of such subdivision pursuant to section 5 of chapter 678 of the laws of 2007, as amended, when upon such date the provisions of section three of this act shall take effect; and

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