

# STATE OF NEW YORK

323

2017-2018 Regular Sessions

## IN SENATE

(Prefiled)

January 4, 2017

Introduced by Sen. PERALTA -- 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

§ 2. Subdivisions 1, 2, 3, 4, 6, 8, 9 and 10 of section 230 of the labor law, subdivision 1 as amended and subdivision 9 as added by chapter 542 of the laws of 1984, subdivisions 2, 3, 6 and 8 as added by chapter 777 of the laws of 1971, 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, food or security service work for a contractor under contract with a public agency which is in excess of one thousand five hundred 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 thousand five hundred dollars and the principal purpose of which is to furnish services through the use of ~~[building]~~ service employees.

"~~[Building-service]~~ Service employee" or "employee" includes, but is not limited, to, watchman, guard, doorman, building cleaner, porter,

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

LBD00043-01-7

handyman, janitor, gardener, groundskeeper, stationary fireman, elevator operator and starter, window cleaner, food service worker, cook, baker, dishwasher, meat cutter, waiter, driver 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]~~. "Service work" shall also include work performed under a contract for the benefit of a public agency with any third party person or entity acting in place of, on behalf of or for the benefit of such public agency pursuant to any lease, permit or other agreement between such third party person or entity and the public agency.

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 business improvement district with more than one million dollars per year in total revenue, 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.

§ 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.

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.

8. The requirements of this section shall apply to any person or entity that enters into any lease, permit or other agreement with a public agency that includes the provision of service work by employees who would be required to be paid scheduled wages pursuant to this section in

1 the absence of such agreement. Any third party person or entity that  
2 contracts for or otherwise arranges for the payment for or performance  
3 of service work for the benefit of a public agency pursuant to any such  
4 agreement shall do so as an agent of the public agency. No public agen-  
5 cy shall enter into any such agreement with any person or entity without  
6 (a) preparation of an agreement between the public agency and the third  
7 party person or entity that clearly delineates the responsibilities of  
8 each with respect to reporting, filing and retention of payrolls and  
9 other documents, and any other actions required pursuant to this arti-  
10 cle, and (b) receipt by the public agency of a written acknowledgement  
11 from such third party person or entity that the person or entity agrees  
12 to undertake those responsibilities as the agent of the public agency,  
13 and affirming such person or entity's nondelegable obligation to pay not  
14 less than the wages specified in each applicable schedule. Such docu-  
15 ments shall be in a form satisfactory to the fiscal officer and shall be  
16 subscribed and confirmed as required by such officer. Such documents  
17 shall be retained as provided in section two hundred thirty-three of  
18 this article, and a copy of each such document shall be filed by the  
19 public agency with the fiscal officer within ten days of its execution.  
20 Notwithstanding any such agreement, nothing in this subdivision shall be  
21 deemed to relieve the public agency of its responsibilities to ensure  
22 compliance with this article. Any lease, permit or agreement made in  
23 contravention of this subdivision shall be void as a matter of public  
24 policy. The fiscal officer may take all actions necessary to ensure  
25 compliance with the provisions of this article against the public agen-  
26 cy, any third party acting in place of, on behalf of or for the benefit  
27 of such public agency pursuant to any lease, permit or other agreement  
28 between such third party person or entity and the public agency, or both  
29 the public agency and third party jointly.

30 § 4. Paragraphs a and c of subdivision 2 and subdivision 7 of section  
31 235 of the labor law, paragraph a of subdivision 2 and subdivision 7 as  
32 amended and paragraph c of subdivision 2 as added by chapter 547 of the  
33 laws of 1998, are amended and subdivision 2 is amended by adding a new  
34 paragraph g to read as follows:

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

50 c. The notice of withholding shall provide that the fiscal officer  
51 intends to instruct the financial officer, not less than ten days  
52 following service of the notice by mail, to withhold sufficient moneys  
53 to safeguard the rights of the service employees and to cover the civil  
54 penalty that may be assessed as provided herein, from any payment due  
55 the notified party under any [building] service work contract pending  
56 final determination. The notice of withholding shall provide that within

1 thirty days following the date of the notice of withholding the notified  
2 party may, contest the withholding on the basis that the notified party  
3 is not a partner or one of the five largest shareholders of the subcon-  
4 tractor or contractor, an officer of the contractor or subcontractor who  
5 knowingly participated in the violation of this article, a substantial-  
6 ly-owned affiliated entity or successor. If the notified party fails to  
7 contest the notice of withholding, or if the fiscal officer, after  
8 reviewing the information provided by the notified party in such  
9 contest, determines that the notified party is a partner or one of the  
10 five largest shareholders, a substantially-owned affiliated entity, an  
11 officer of the contractor or subcontractor who knowingly participated in  
12 the violation of this article, or a successor, the fiscal officer may  
13 instruct the financial officer to immediately withhold sufficient moneys  
14 to safeguard the rights of the service employees and to cover the civil  
15 penalty that may be assessed as provided herein from any payment due the  
16 notified party under any [building] service work contract pending the  
17 final determination.

18 g. The fiscal officer may require any person or corporation performing  
19 such public work to file with the fiscal officer within ten days of  
20 receipt of said request, payroll records, sworn to as to their validity  
21 and accuracy, requested by the fiscal officer, for said service work or  
22 for any public or private work performed by said person or corporation  
23 during the same period of time as said service work. In the event said  
24 person or corporation fails to provide the requested information within  
25 the allotted ten days, the fiscal officer shall, within fifteen days,  
26 order the financial officer of the public agency to immediately withhold  
27 from payment to said person or corporation up to twenty-five percent of  
28 the amount, not to exceed five hundred thousand dollars, to be paid to  
29 said person or corporation under the terms of the contract pursuant to  
30 which said service work is being performed. Said amount withheld shall  
31 be immediately released upon receipt by the public agency of a notice  
32 from the fiscal officer indicating that the request for records had been  
33 satisfied.

34 7. When, pursuant to the provisions of this section, two final orders  
35 have been entered against a contractor, subcontractor, successor, or any  
36 substantially-owned affiliated entity of the contractor or subcontrac-  
37 tor, any of the partners if the contractor or subcontractor is a part-  
38 nership, any of the five largest shareholders of the contractor or  
39 subcontractor, any officer of the contractor or subcontractor who know-  
40 ingly participated in the violation of this article within any consec-  
41 utive six-year period determining that such contractor or subcontractor  
42 and/or its successor, substantially-owned affiliated entity of the  
43 contractor or subcontractor, any of the partners or any of the five  
44 largest shareholders of the contractor or subcontractor, any officer of  
45 the contractor or subcontractor who knowingly participated in the  
46 violation of this article has willfully failed to pay the prevailing  
47 wages in accordance with the provisions of this article, whether such  
48 failures were concurrent or consecutive and whether or not such final  
49 determinations concerning separate public [building] service work  
50 contracts are rendered simultaneously, such contractor, subcontractor,  
51 successor, and if the contractor, subcontractor, successor, or any  
52 substantially-owned affiliated entity of the contractor or subcontrac-  
53 tor, any of the partners if the contractor or subcontractor is a part-  
54 nership, or any of the five largest shareholders of the contractor or  
55 subcontractor, any officer of the contractor or subcontractor who know-  
56 ingly participated in the violation of this article, or any successor is

1 a corporation, any officer of such corporation who knowingly partic-  
2 ipated in such failure, shall be ineligible to submit a bid on or be  
3 awarded any public [~~building~~] service work for a period of five years  
4 from the date of the second order, provided, however, that where any  
5 such final order involves the falsification of payroll records or the  
6 kickback of wages, the contractor, subcontractor, successor, substan-  
7 tially-owned affiliated entity of the contractor or subcontractor, any  
8 partner if the contractor or subcontractor is a partnership or any of  
9 the five largest shareholders of the contractor or subcontractor, any  
10 officer of the contractor or subcontractor who knowingly participated in  
11 the violation of this article shall be ineligible to submit a bid on or  
12 be awarded any public [~~building~~] service ~~work~~ contract or subcontract  
13 with the state, any municipal corporation or public body for a period of  
14 five years from the date of the first final order. Nothing in this  
15 subdivision shall be construed as affecting any provision of any other  
16 law or regulation relating to the awarding of public contracts.

17 § 5. Subdivision 2 of section 237 of the labor law, as amended by  
18 chapter 698 of the laws of 1988, is amended to read as follows:

19 2. a. Before payment is made by or on behalf of a public agency of any  
20 sums due on account of a contract for service work, it shall be the duty  
21 of the comptroller of the state or the financial officer of such public  
22 agency or other officer or person charged with the custody and disburse-  
23 ment of the state or corporate funds applicable to the contract under  
24 and pursuant to which payment is made, to require the contractor to file  
25 a statement in writing in form satisfactory to such officer certifying  
26 to the amounts then due and owing from such contractor filing such  
27 statement to or on behalf of any and all service employees for daily or  
28 weekly wages on account of labor performed upon the work under the  
29 contract, setting forth therein the names of the persons whose wages are  
30 unpaid and the amount due to or on behalf of each respectively, which  
31 statement so to be filed shall be verified by the oath of the contractor  
32 that he or she has read such statement subscribed by him or her and  
33 knows the contents thereof, and that the same is true of his or her own  
34 knowledge. The contractor shall file these payroll records verified  
35 under oath within ninety days after any labor is performed upon the work  
36 under contract, or such other time as the fiscal officer may authorize.  
37 Any person who willfully fails to file such payroll records with the  
38 public agency shall be guilty of a class E felony.

39 b. Each public agency shall designate in writing an individual  
40 employed by such department responsible for the receipt, collection and  
41 review for facial validity of a contractor's certified payroll state-  
42 ment, as set forth in this subdivision, before payment is made. Said  
43 designation shall be filed with the fiscal officer and posted in a  
44 conspicuous location at the work site. If the designated individual  
45 cannot perform the receipt, collection and review of certified payrolls  
46 duties as indicated above, for any reason, including but not limited to  
47 reassignment, promotion or separation from employment, the public agency  
48 must immediately designate another individual employed by such agency to  
49 fulfill such responsibilities. In the event that a public agency fails  
50 to name an individual responsible for the receipt, collection and review  
51 for facial validity of contractors' certified payrolls, then the indi-  
52 vidual so responsible shall be the individual who is the chief policy-  
53 making officer of such public agency.

54 § 6. Subdivision 2 of section 238 of the labor law, as added by chap-  
55 ter 777 of the laws of 1971, is amended to read as follows:

2. a. 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]~~ :

(i) such failure results in underpayments which in the aggregate amount to all workers employed by the contractor or subcontractor results in an amount less than twenty-five thousand dollars, the contractor or subcontractor shall be guilty of a class A misdemeanor;

(ii) such failure results in underpayments, which in the aggregate amount to all workers employed by such contractor or subcontractor, results in an amount greater than twenty-five thousand dollars, the contractor or subcontractor shall be guilty of a class E felony;

(iii) such failure results in underpayments, which in the aggregate amount to all workers employed by such contractor or subcontractor, results in an amount greater than one hundred thousand dollars, the contractor or subcontractor shall be guilty of a class D felony; or

(iv) such failure results in underpayments, which in the aggregate amount to all workers employed by such contractor or subcontractor, results in an amount greater than five hundred thousand dollars, the contractor or subcontractor shall be guilty of a class C felony.

b. In addition thereto 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 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 paragraph a of this subdivision and the criminal and civil penalties ~~[herein]~~ of this subdivision shall attach to such officer upon conviction.

§ 7. 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.

§ 8. 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.