

STATE OF NEW YORK

6265

2019-2020 Regular Sessions

IN SENATE

May 31, 2019

Introduced by Sen. GIANARIS -- 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 ensuring that utility employees receive the prevailing wage

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. 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 subdivisions 10, 11, 12, 13 and 14 as added by chapter 547 of the laws of 1998, is amended to read as follows:

§ 230. Definitions. As used in this article:

1. "Building service employee" or "employee" means any person performing work in connection with the care or maintenance of an existing building or facility, or in connection with the transportation of office furniture or equipment to or from such building or facility, or in connection with the transportation and delivery of fossil fuel to such building or facility, 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 or at a covered utility location.

"Building 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 employee" or "employee" also does not include any employee to whom the provisions of articles eight and eight-a of this

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

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chapter are applicable. "Building service employee" or "employee" also does not include 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 prior to the effective date of a chapter of the laws of two thousand nineteen that amended this subdivision. The preceding sentence shall not be construed to affect any determination hereafter by the fiscal officer or a court of competent jurisdiction as to the applicability or inapplicability to such work of such requirements.

2. "Building 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]~~.

3. "Public agency" means the state, any of its political subdivisions, a public benefit corporation, a public authority or commission or special purpose district board appointed pursuant to law, and a board of education.

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.

5. "Wage" includes: (a) basic hourly cash rate of pay; and (b) supplements. The term "supplements" means fringe benefits including medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by federal, state or local law to be provided by the contractor or subcontractor, covered utility or covered employer.

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.

7. "Locality" means the state, a town, city, village or other civil division or area of the state as determined by the fiscal officer. The fiscal officer may fix a different geographic area in determining the locality for the prevailing basic hourly cash rate of pay and the locality for prevailing supplements.

8. "Fiscal officer" means the industrial commissioner, except for building service work performed by or on behalf of a city, or where the covered utility location is located within a city with a population of one million or more 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.

1 Provided that nothing in this subdivision shall affect the exclusion for
2 public utility services set forth in subdivision two of this section.

3 10. "Substantially-owned affiliated entity" shall mean the parent
4 company of the contractor, covered utility, or subcontractor, any
5 subsidiary of the contractor, covered utility, covered employer, or
6 subcontractor, or any entity in which the parent of the contractor,
7 covered utility, covered employer, or subcontractor owns more than fifty
8 percent of the voting stock, or an entity in which one or more of the
9 top five shareholders of the contractor, covered utility, covered
10 employer, or subcontractor individually or collectively also owns a
11 controlling share of the voting stock, or an entity which exhibits any
12 other indicia of control over the contractor, covered utility, covered
13 employer, or subcontractor or over which the contractor, covered utili-
14 ty, covered employer, or subcontractor exhibits control, regardless of
15 whether or not the controlling party or parties have any identifiable or
16 documented ownership interest. Such indicia shall include: power or
17 responsibility over employment decisions, access to and/or use of the
18 relevant entity's assets or equipment, power or responsibility over
19 contracts of the entity, responsibility for maintenance or submission of
20 certified payroll records, and influence over the business decisions of
21 the relevant entity.

22 11. "Entity" shall mean a partnership, association, joint venture,
23 company, sole proprietorship, corporation or any other form of doing
24 business.

25 12. "Parent company" shall mean an entity that directly controls the
26 contractor, covered utility, or subcontractor.

27 13. "Subsidiary" shall mean an entity that is controlled directly, or
28 indirectly through one or more intermediaries, by a contractor or
29 subcontractor, covered utility, or the contractor's parent company.

30 14. "Successor" shall mean an entity engaged in work substantially
31 similar to that of the predecessor, where there is substantial continui-
32 ty of operation with that of the predecessor.

33 15. "Covered utility" shall mean any entity other than a municipal
34 corporation that distributes electric light or power, or gas or steam
35 services at retail rates regulated by the public service commission
36 pursuant to a franchise granted under the provisions of section sixty-
37 eight or eighty-one of the public service law, and any substantially-
38 owned affiliated entity of such covered utility.

39 16. "Covered utility location" shall mean any real property, including
40 facilities used in the generation, storage, transmission, distribution
41 or sale of gas, electricity, steam, owned or leased by a covered utility
42 provided that where such covered utility location is an office space,
43 such office space shall be a covered utility location only if it is
44 larger than one hundred thousand square feet; and further provided that
45 if such office space is leased, such office space shall be a covered
46 utility location only if through a single agreement or multiple agree-
47 ments no less than fifty-one percent of the total square footage of the
48 office space is leased by the covered utility.

49 17. "Covered employer" shall mean any entity, other than a covered
50 utility that employs building service employees at a covered utility
51 location.

52 § 2. Subdivisions 1, 2, 3 and 6 of section 231 of the labor law, as
53 added by chapter 777 of the laws of 1971, are amended and a new subdivi-
54 sion 8 is added to read as follows:

55 1. Every contractor shall pay a service employee under a contract for
56 building service work a wage of not less than the prevailing wage in the

1 locality for the craft, trade or occupation of the service employee.
2 Covered utilities shall ensure that all building service employees
3 performing building service work at a covered utility location regard-
4 less of the employing entity are paid no less than the prevailing wage.

5 2. The obligation of a contractor or covered utility to pay prevailing
6 supplements may be discharged by furnishing any equivalent combinations
7 of fringe benefits or by making equivalent or differential payments in
8 cash under rules and regulations established by the fiscal officer.

9 3. Each contract for building service work shall contain as part of
10 the specifications thereof a schedule of the wages required to be paid
11 to the various classes of service employees on such work, and each such
12 contract shall further contain a provision obligating the contractor to
13 pay each employee on such work not less than the wage specified for his
14 craft, trade or occupation in such schedule. Any lease, contract for
15 management services or any other contract pertaining to the provision of
16 building services at a covered utility location entered into by a
17 covered utility shall contain the following provision: "All building
18 service employees shall be paid no less than the prevailing wage as
19 provided by the fiscal officer as described in section two hundred thir-
20 ty-four of the labor law. Any covered employer as defined in section two
21 hundred thirty of the labor law shall maintain all records relating to
22 the employment of building service workers as described in section two
23 hundred and thirty-three of the labor law which are to be provided to
24 the covered utility. This requirement shall apply to any covered utility
25 location as provided by article nine of the labor law."

26 6. No later than the first day upon which work on said contract is
27 performed by any employee, or within sixty days of the effective date of
28 a chapter of the laws of two thousand nineteen that amended this subdi-
29 vision the contractor or covered utility shall post in a prominent and
30 accessible place on the site of the work a legible statement of the
31 wages to be paid to the workmen employed thereon.

32 8. This section shall not preempt any public agency from establishing
33 higher minimum wages for employees performing building service work at
34 covered utilities. Nor shall any covered utility be preempted from
35 paying higher than the prevailing wage.

36 § 3. Section 232 of the labor law, as added by chapter 777 of the laws
37 of 1971, is amended to read as follows:

38 § 232. Overtime. An employee, employed at a covered utility location
39 or by a contractor, who works more than eight hours in any one day or
40 more than forty hours in any workweek shall be paid wages for such over-
41 time at a rate not less than one-and-one-half times his prevailing basic
42 cash hourly rate.

43 § 4. Section 233 of the labor law, as added by chapter 777 of the laws
44 of 1971, is amended to read as follows:

45 § 233. Record keeping. 1. In all cases where service work is being
46 performed pursuant to a contract therefor or at a covered utility
47 location, the contractor or covered utility shall keep original payrolls
48 or transcripts thereof, subscribed and confirmed by him as true, under
49 penalties of perjury, showing the hours and days worked by each employ-
50 ee, the craft, trade or occupation at which he was employed, and the
51 wages paid. A covered utility may satisfy this requirement by obtaining
52 copies of employment records from a covered employer.

53 2. Where the wages paid include sums which are not paid directly to
54 the workmen weekly and which are expended for supplements, the records
55 required to be maintained shall include a record of such hourly payment
56 on behalf of such employees, the supplement for which such payment has

1 been made, and the name and address of the person to whom such payment
2 has been made. In all such cases, the contractor or covered utility
3 shall keep a true and inscribed copy of the agreement under which such
4 payments are made, a record of all net payments made thereunder, and a
5 list of all persons for whom such payments are made.

6 3. The records required to be maintained shall be kept on the site of
7 the work during all of the time that work under the contract is being
8 performed or for three years after completion for a covered utility.

9 4. All records required to be maintained shall be preserved for a
10 period of three years after the completion of work.

11 5. A covered utility shall include a requirement in all leases and
12 contracts pertaining to the provision of building services that any
13 covered employer shall comply with the recordkeeping requirements of
14 this section. The covered utility shall obtain such records from any
15 covered employer and preserve such records for a period of three years
16 after the completion of the employee's work.

17 6. Failure to maintain such records as required by this section shall
18 create a rebuttable presumption that the building service employees were
19 not paid the wages required under this article.

20 7. The requirements of this article shall apply to covered utilities
21 so long as they retain their status as covered utilities.

22 § 5. Paragraph (f) of subdivision 1 of section 234 of the labor law,
23 as added by chapter 777 of the laws of 1971, is amended to read as
24 follows:

25 (f) to require a contractor or covered utility to file with the fiscal
26 officer a record of the wages actually paid by such contractor or
27 covered utility to the employees and of their hours of work;

28 § 6. Subdivisions 1 and 5, the opening paragraph of subdivision 6, and
29 subdivisions 8 and 9 of section 235 of the labor law, subdivision 1 as
30 added by chapter 777 of the laws of 1971, subdivision 5 as amended and
31 subdivisions 8 and 9 as added by chapter 547 of the laws of 1998, para-
32 graph c of subdivision 5 as further amended by section 104 of part A of
33 chapter 62 of the laws of 2011, and the opening paragraph of subdivision
34 6 as amended by chapter 491 of the laws of 1999, are amended to read as
35 follows:

36 1. Whenever the fiscal officer has reason to believe that a service
37 employee at a covered utility location has been paid less than the
38 applicable prevailing wage or that a service employee has been paid less
39 than the wages stipulated in the contract, or if such contract has no
40 wage schedule attached thereto and the fiscal officer has reason to
41 believe that a service employee has been paid less than the wages
42 prevailing for his craft, trade or occupation, the fiscal officer may,
43 and upon receipt of a written complaint from an employee employed there-
44 on, shall conduct a special investigation to determine the facts relat-
45 ing thereto.

46 5. a. The investigation and hearing shall be expeditiously conducted
47 and upon the completion thereof the fiscal officer shall determine the
48 issues raised and shall make and file an order in his office stating
49 such determination and forthwith serve personally or by mail a copy of
50 such order and determination together with a notice of filing upon all
51 parties to the proceeding and upon the financial officer of the public
52 agency involved.

53 b. In addition to directing payment of wages found to be due, such
54 order of the fiscal officer may direct payment of a further sum as a
55 civil penalty in an amount not exceeding twenty-five percent of the
56 total amount found to be due. In assessing the amount of the penalty,

1 due consideration shall be given to the size of the employer's business,
2 the good faith of the employer, the gravity of the violation, the histo-
3 ry of previous violations of the employer, successor or substantially-
4 owned affiliated entity or any successor of the contractor, covered
5 utility, covered employer, or subcontractor, any officer of the contrac-
6 tor, covered utility, covered employer, or subcontractor who knowingly
7 participated in the violation of this article, and any of the partners
8 if the contractor, covered utility, covered employer, or subcontractor
9 is a partnership or any of the five largest shareholders of the contrac-
10 tor, covered utility, covered employer, or subcontractor, as determined
11 by the fiscal officer, of such underpayment of wages or supplements, and
12 any officer of the contractor, covered utility, covered employer, or
13 subcontractor who knowingly participated in the violation of this arti-
14 cle, and the failure to comply with recordkeeping or other non-wage
15 requirements. Where the fiscal officer is the commissioner, the penalty
16 shall be paid to the commissioner for deposit in the state treasury.
17 Where the fiscal officer is a city comptroller or other analogous offi-
18 cer, the penalty shall be paid to said officer for deposit in the city
19 treasury.

20 c. If the order directs the payment to specified employees of wages
21 found to be due and unpaid, including interest at a rate not less than
22 six per centum per year and not more than the rate of interest then in
23 effect as prescribed by the superintendent of financial services pursu-
24 ant to section fourteen-a of the banking law per annum from the time
25 such wages should have been paid, the financial officer of such public
26 agency shall, upon the service to him of such order, pay to such employ-
27 ees from the trust money withheld the amounts specified in such order
28 and shall pay the civil penalty as provided herein, provided no review
29 proceeding pursuant to the provisions of article seventy-eight of the
30 civil practice law and rules is commenced within thirty days of the date
31 said order was filed in the office of the fiscal officer. If such review
32 is timely commenced, the money withheld shall remain in trust pending
33 final disposition of the review proceeding. In determining the rate of
34 interest to be imposed the fiscal officer shall consider the size of the
35 employer's business, the good faith of the employer, the gravity of the
36 violation, the history of previous violations of the employer, successor
37 or substantially-owned affiliated entity or any successor of the
38 contractor, covered utility, covered employer, or subcontractor, any
39 officer of the contractor, covered utility, covered employer, or subcon-
40 tractor who knowingly participated in the violation of this article, and
41 any of the partners if the contractor, covered utility, covered employ-
42 er, or subcontractor is a partnership or any of the five largest share-
43 holders of the contractor, covered utility, covered employer, or subcon-
44 tractor, as determined by the fiscal officer, and the failure to comply
45 with recordkeeping or other non-wage requirements.

46 When a final determination has been made and such determination is in
47 favor of an employee, such employee may, in addition to any other remedy
48 provided by this article, institute an action in any court of appropri-
49 ate jurisdiction against the person or corporation found to have
50 violated this article, any substantially-owned affiliated entity or any
51 successor of the contractor, covered utility, covered employer, or
52 subcontractor, any officer of the contractor, covered utility, covered
53 employer, or subcontractor who knowingly participated in the violation
54 of this article, and any of the partners if the contractor, covered
55 utility, covered employer, or subcontractor is a partnership or any of
56 the five largest shareholders of the contractor, covered utility,

1 covered employer, or subcontractor, as determined by the fiscal officer,
2 for the recovery of the difference between the sum, if any, actually
3 paid to him by the aforesaid financial officer pursuant to said order
4 and the amount found to be due him as determined by said order. Such
5 action must be commenced within three years from the date of the filing
6 of said order, or if the said order is reviewed in a proceeding pursuant
7 to article seventy-eight of the civil practice law and rules, within
8 three years after the termination of such review proceeding.

9 8. a. When a final determination has been made in favor of a complain-
10 ant and the contractor, covered utility, covered employer, or subcon-
11 tractor found violating this article has failed to make payment as
12 required by the order of the fiscal officer, and provided that no rele-
13 vant proceeding for judicial review shall then be pending and the time
14 for initiation of such proceeding shall have expired, the fiscal officer
15 may file a copy of the order of the fiscal officer containing the amount
16 found to be due with the county clerk of the county of residence or
17 place of business of any of the following:

18 (i) any substantially-owned affiliated entity or any successor of the
19 contractor, covered utility, covered employer, or subcontractor;

20 (ii) any of the partners if the contractor, covered utility, covered
21 employer, or subcontractor is a partnership or any of the five largest
22 shareholders of the contractor or subcontractor, as determined by the
23 fiscal officer; or

24 (iii) any officer of the contractor, covered utility, covered employ-
25 er, or subcontractor who knowingly participated in the violation of this
26 article; provided, however, that the fiscal officer shall within five
27 days of the filing of the order provide notice thereof to the partner or
28 top five shareholder or successor or substantially-owned affiliated
29 entity. The notified party may contest the filing on the basis that it
30 is not a partner or five largest shareholders, an officer of the
31 contractor, covered utility, covered employer, or subcontractor who
32 knowingly participated in the violation of this article, successor or
33 substantially-owned affiliated entity. If, after reviewing the informa-
34 tion provided by the notified party in support of such contest, the
35 fiscal officer determines that the notified party is not within the
36 definitions described herein, the fiscal officer shall immediately with-
37 draw his filing of the order.

38 b. The filing of such order shall have the full force and effect of a
39 judgment duly docketed in the office of such clerk. The order may be
40 enforced by and in the name of the fiscal officer in the same manner,
41 and with like effect, as that prescribed by the civil practice law and
42 rules for the enforcement of a money judgment.

43 9. When a final determination has been made against a subcontractor or
44 covered employer in favor of a complainant and the contractor or covered
45 utility has made payment to the complainant of any wages and interest
46 due the complainant and any civil penalty, and providing that no rele-
47 vant proceeding for judicial review shall then be pending and the time
48 for initiation of such proceeding shall have expired, the contractor or
49 covered utility may file a copy of the order of the fiscal officer
50 containing the amount found to be due with the county clerk of the coun-
51 ty of residence or place of business of the subcontractor or covered
52 employer. The filing of such order shall have the full force and effect
53 of a judgment duly docketed in the office of such clerk. The judgment
54 may be docketed in favor of the contractor or covered utility who may
55 proceed as a judgment creditor against the subcontractor or covered

1 employer for the recovery of all monies paid by the contractor or
2 covered utility under such order.

3 § 7. Section 237 of the labor law is amended by adding a new subdivi-
4 sion 5 to read as follows:

5 5. A covered utility shall annually provide the fiscal officer a veri-
6 fied statement that all building service employees at any covered utili-
7 ty location have been paid the prevailing wage. Such verified statement
8 shall include a record of the days and hours worked and the wages paid
9 to each building service employee employed at a covered utility
10 location. Where the wages paid include such sums which are not paid
11 directly to the workmen weekly and which are expended for supplements,
12 the statement shall include a record of such hourly payments on behalf
13 of such employees, the supplement for which such payment has been made,
14 and the name and address of the person to whom the payment has been
15 made. Such statement shall be verified by the oath of the chief execu-
16 tive or chief financial officer of the covered utility or the designee
17 of any such person that he or she has read such statements subscribed by
18 him or her and knows the contents thereof, and that the same is true of
19 his or her own knowledge, except to wages and supplements owing by
20 contract which may be certified upon information and belief. A violation
21 of any provision of the statement, or failure to provide such statement,
22 shall constitute a violation of this article. The fiscal officer may
23 inspect the records maintained pursuant to section two hundred thirty-
24 three of this article to verify these statements.

25 § 8. Section 238 of the labor law, as added by chapter 777 of the laws
26 of 1971, is amended to read as follows:

27 § 238. Penalties. 1. Any contractor, covered utility or subcontractor
28 who shall upon his oath verify any statement required to be filed under
29 this article which is known by him to be false shall be guilty of perju-
30 ry and punishable as provided by the penal law.

31 2. When a contract for service work contains as part thereof a sched-
32 ule of wages as provided for in this article, any contractor who, after
33 entering into such contract, and any subcontractor of such contractor
34 who fails to pay to any service employee the wages stipulated in such
35 wage schedule or any covered utility or covered employer who fails to
36 pay the prevailing wage is guilty of a misdemeanor and upon conviction
37 shall be punished for a first offense by a fine of five hundred dollars
38 or by imprisonment for not more than thirty days or by both fine and
39 imprisonment; for a second offense by a fine of one thousand dollars,
40 and for contractors in addition thereto the contract on which the
41 violation has occurred shall be forfeited; and no such contractor shall
42 be entitled to receive any sum, nor shall any officer, agent or employee
43 of the contracting public agency pay any such sum or authorize its
44 payment from the funds under his charge or control to such contractor
45 for work done upon the contract on which the contractor has been
46 convicted of a second offense. If the contractor, covered utility,
47 covered employer, or subcontractor is a corporation, any officer of such
48 corporation who knowingly permits the corporation to fail to make such
49 payment shall also be guilty of a misdemeanor and the criminal and civil
50 penalties herein shall attach to such officer upon conviction.

51 § 9. The opening paragraph of section 239 of the labor law, as added
52 by chapter 777 of the laws of 1971, is amended to read as follows:

53 Provisions in contracts prohibiting discrimination on account of race,
54 creed, color, national origin, age or sex. Every contract for service
55 work shall contain provisions by which the contractor agrees and in
56 which all covered utilities shall ensure:

1 § 10. This act shall take effect on the one hundred twentieth day
2 after it shall have become a law. Effective immediately, the addition,
3 amendment and/or repeal of any rule or regulation necessary for the
4 implementation of this act on its effective date are authorized to be
5 made and completed on or before such effective date.