

STATE OF NEW YORK

8083--A

2019-2020 Regular Sessions

IN ASSEMBLY

May 31, 2019

Introduced by M. of A. NIOU, DINOWITZ, SIMOTAS, WEPRIN, REYES, BARRON, CARROLL, ORTIZ, RAYNOR -- read once and referred to the Committee on Labor -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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]~~ eight-A of this chapter are applicable. "Building service employee" or "employ-

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

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1 ee" also does not include any employee directly or indirectly performing
2 work for or on behalf of a business improvement district unless such
3 work would have been subject to the requirements of this article prior
4 to the effective date of a chapter of the laws of two thousand nineteen
5 that amended this subdivision. The preceding sentence shall not be
6 construed to affect any determination hereafter by the fiscal officer or
7 a court of competent jurisdiction as to the applicability or inapplica-
8 bility to such work of such requirements.

9 2. "Building service work" or "service work" means work performed by a
10 building service employee, but does not include work performed for a
11 contractor under a contract for the furnishing of services by radio,
12 telephone, telegraph or cable companies[~~, and any contract for public~~
13 ~~utility services, including electric light and power, water, steam and~~
14 ~~gas~~].

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

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

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

32 6. "Prevailing wage" means the wage determined by the fiscal officer
33 to be prevailing for the various classes of building service employees
34 in the locality. In no event shall the basic hourly cash rate of pay be
35 less than the statutory minimum wage established by article nineteen of
36 this chapter, or, in a city with a local law requiring a higher minimum
37 wage on city contract work, less than the minimum wage specified in such
38 local law.

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

44 8. "Fiscal officer" means the industrial commissioner, except for
45 building service work performed by or on behalf of a city, or where the
46 covered utility location is located within a city with a population of
47 one million or more in which case "fiscal officer" means the comptroller
48 or other analogous officer of such city.

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

10. "Substantially-owned affiliated entity" shall mean the parent company of the contractor, covered utility, or subcontractor, any subsidiary of the contractor, covered utility, covered employer, or subcontractor, or any entity in which the parent of the contractor, covered utility, covered employer, 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 contractor, covered utility, covered employer, 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 contractor, covered utility, covered employer, or subcontractor or over which the contractor, covered utility, covered employer, 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.

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

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

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

14. "Successor" shall mean an entity engaged in work substantially similar to that of the predecessor, where there is substantial continuity of operation with that of the predecessor.

15. "Covered utility" shall mean any entity other than a municipal corporation 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 covered utility.

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

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

§ 2. Subdivisions 1, 2, 3 and 6 of section 231 of the labor law, as added by chapter 777 of the laws of 1971, 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. Covered utilities shall ensure that all building service employees

1 performing building service work at a covered utility location regard-
2 less of the employing entity are paid no less than the prevailing wage.

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

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

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

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

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

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

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

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

51 2. Where the wages paid include sums which are not paid directly to
52 the workmen weekly and which are expended for supplements, the records
53 required to be maintained shall include a record of such hourly payment
54 on behalf of such employees, the supplement for which such payment has
55 been made, and the name and address of the person to whom such payment
56 has been made. In all such cases, the contractor or covered utility

1 shall keep a true and inscribed copy of the agreement under which such
2 payments are made, a record of all net payments made thereunder, and a
3 list of all persons for whom such payments are made.

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

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

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

15 6. The requirements of this article shall apply to covered utilities
16 so long as they retain their status as covered utilities.

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

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

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

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

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

48 b. In addition to directing payment of wages found to be due, such
49 order of the fiscal officer may direct payment of a further sum as a
50 civil penalty in an amount not exceeding twenty-five percent of the
51 total amount found to be due. In assessing the amount of the penalty,
52 due consideration shall be given to the size of the employer's business,
53 the good faith of the employer, the gravity of the violation, the histo-
54 ry of previous violations of the employer, successor or substantially-
55 owned affiliated entity or any successor of the contractor, covered
56 utility, covered employer, or subcontractor, any officer of the contrac-

1 tor, covered utility, covered employer, or subcontractor who knowingly
2 participated in the violation of this article, and any of the partners
3 if the contractor, covered utility, covered employer, or subcontractor
4 is a partnership or any of the five largest shareholders of the contrac-
5 tor, covered utility, covered employer, or subcontractor, as determined
6 by the fiscal officer, of such underpayment of wages or supplements, and
7 any officer of the contractor, covered utility, covered employer, or
8 subcontractor who knowingly participated in the violation of this arti-
9 cle, and the failure to comply with recordkeeping or other non-wage
10 requirements. Where the fiscal officer is the commissioner, the penalty
11 shall be paid to the commissioner for deposit in the state treasury.
12 Where the fiscal officer is a city comptroller or other analogous offi-
13 cer, the penalty shall be paid to said officer for deposit in the city
14 treasury.

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

41 When a final determination has been made and such determination is in
42 favor of an employee, such employee may, in addition to any other remedy
43 provided by this article, institute an action in any court of appropri-
44 ate jurisdiction against the person or corporation found to have
45 violated this article, any substantially-owned affiliated entity or any
46 successor of the contractor, covered utility, covered employer, or
47 subcontractor, any officer of the contractor, covered utility, covered
48 employer, or subcontractor who knowingly participated in the violation
49 of this article, and any of the partners if the contractor, covered
50 utility, covered employer, or subcontractor is a partnership or any of
51 the five largest shareholders of the contractor, covered utility,
52 covered employer, or subcontractor, as determined by the fiscal officer,
53 for the recovery of the difference between the sum, if any, actually
54 paid to him by the aforesaid financial officer pursuant to said order
55 and the amount found to be due him as determined by said order. Such
56 action must be commenced within three years from the date of the filing

1 of said order, or if the said order is reviewed in a proceeding pursuant
2 to article seventy-eight of the civil practice law and rules, within
3 three years after the termination of such review proceeding.

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

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

15 (ii) any of the partners if the contractor, covered utility, covered
16 employer, or subcontractor is a partnership or any of the five largest
17 shareholders of the contractor or subcontractor, as determined by the
18 fiscal officer; or

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

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

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

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

55 5. A covered utility shall annually provide the fiscal officer a veri-
56 fied statement that all building service employees at any covered utili-

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

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

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

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

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

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

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