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.

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 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 performing building service work at a covered utility location regardless of the employing entity are paid no less than the prevailing wage.**

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

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. **Any lease, contract for management services or any other contract pertaining to the provision of building services at a covered utility location entered into by a covered utility shall contain the following provision: "All building service employees shall be paid no less than the prevailing wage as provided by the fiscal officer as described in section two hundred thirty-four of the labor law. Any covered employer as defined in section two hundred thirty of the labor law shall maintain all records relating to the employment of building service workers as described in section two hundred and thirty-three of the labor law which are to be provided to the covered utility. This requirement shall apply to any covered utility location as provided by article nine of the labor law."**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Whenever the fiscal officer has reason to believe that **a service employee at a covered utility location has been paid less than the applicable prevailing wage or that** a service employee has been paid less than the wages stipulated in the contract, or if such contract has no wage schedule attached thereto and the fiscal officer has reason to believe that a service employee has been paid less than the wages prevailing for his craft, trade or occupation, the fiscal officer may, and upon receipt of a written complaint from an employee employed thereon, shall conduct a special investigation to determine the facts relating thereto.

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

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

due consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations of the employer, successor or substantially-owned affiliated entity or any successor of the contractor**, covered utility, covered employer,** or subcontractor, any officer of the contractor**, covered utility, covered employer,** or subcontractor who knowingly participated in the violation of this article, and any of the partners if the contractor**, covered utility, covered employer,** or subcontractor is a partnership or any of the five largest shareholders of the contractor**, covered utility, covered employer,** or subcontractor, as determined by the fiscal officer, of such underpayment of wages or supplements, and any officer of the contractor**, covered utility, covered employer,** or subcontractor who knowingly participated in the violation of this article, and the failure to comply with recordkeeping or other non-wage requirements. Where the fiscal officer is the commissioner, the penalty shall be paid to the commissioner for deposit in the state treasury. Where the fiscal officer is a city comptroller or other analogous officer, the penalty shall be paid to said officer for deposit in the city treasury.

c. If the order directs the payment to specified employees of wages found to be due and unpaid, including interest at a rate not less than six per centum per year and not more than the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the time such wages should have been paid, the financial officer of such public agency shall, upon the service to him of such order, pay to such employees from the trust money withheld the amounts specified in such order and shall pay the civil penalty as provided herein, provided no review proceeding pursuant to the provisions of article seventy-eight of the civil practice law and rules is commenced within thirty days of the date said order was filed in the office of the fiscal officer. If such review is timely commenced, the money withheld shall remain in trust pending final disposition of the review proceeding. In determining the rate of interest to be imposed the fiscal officer shall consider the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations of the employer, successor or substantially-owned affiliated entity or any successor of the contractor**, covered utility, covered employer,** or subcontractor, any officer of the contractor**, covered utility, covered employer,** or subcontractor who knowingly participated in the violation of this article, and any of the partners if the contractor**, covered utility, covered employer,** or subcontractor is a partnership or any of the five largest shareholders of the contractor**, covered utility, covered employer,** or subcontractor, as determined by the fiscal officer, and the failure to comply with recordkeeping or other non-wage requirements.

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

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

8. a. When a final determination has been made in favor of a complainant and the contractor, covered utility, covered employer, or subcontractor found violating this article has failed to make payment as required by the order of the fiscal officer, and provided that no relevant proceeding for judicial review shall then be pending and the time for initiation of such proceeding shall have expired, the fiscal officer may file a copy of the order of the fiscal officer containing the amount found to be due with the county clerk of the county of residence or place of business of any of the following:

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

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

(iii) any officer of the contractor, covered utility, covered employer, or subcontractor who knowingly participated in the violation of this article; provided, however, that the fiscal officer shall within five days of the filing of the order provide notice thereof to the partner or top five shareholder or successor or substantially-owned affiliated entity. The notified party may contest the filing on the basis that it is not a partner or five largest shareholders, an officer of the contractor, covered utility, covered employer, or subcontractor who knowingly participated in the violation of this article, successor or substantially-owned affiliated entity. If, after reviewing the information provided by the notified party in support of such contest, the fiscal officer determines that the notified party is not within the definitions described herein, the fiscal officer shall immediately withdraw his filing of the order.

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

9. When a final determination has been made against a subcontractor or covered employer in favor of a complainant and the contractor or covered utility has made payment to the complainant of any wages and interest due the complainant and any civil penalty, and providing that no relevant proceeding for judicial review shall then be pending and the time for initiation of such proceeding shall have expired, the contractor or covered utility may file a copy of the order of the fiscal officer containing the amount found to be due with the county clerk of the county of residence or place of business of the subcontractor or covered employer. The filing of such order shall have the full force and effect of a judgment duly docketed in the office of such clerk. The judgment may be docketed in favor of the contractor or covered utility who may proceed as a judgment creditor against the subcontractor or covered

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

§ 7. Section 237 of the labor law is amended by adding a new subdivision 5 to read as follows:

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

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

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

2. When a contract for service work contains as part thereof a schedule of wages as provided for in this article, any contractor who, after entering into such contract, and any subcontractor of such contractor who fails to pay to any service employee the wages stipulated in such wage schedule or any covered utility or covered employer who fails to pay the prevailing wage 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 for contractors 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, covered utility, covered employer, 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 and the criminal and civil penalties herein shall attach to such officer upon conviction.

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

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

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