

# Overview of Prevailing Wage Law and Litigation

The minimum wage and overtime provisions under federal and New York law affect all employers, but construction firms are subject to an additional, unique wage scheme in the form of prevailing wages. The New York Labor Law (NYLL) § 220(3) provides that the wages paid to laborers, workmen, and mechanics on public works construction projects may not be less than "the prevailing rate



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for a day's work in the same trade or occupation in the locality within the state where such public work . . . is to be situated, erected or used."<sup>1</sup> Similar requirements appear in the federal Davis-Bacon Act,<sup>2</sup> but this article discusses the New York statute only. Regardless of their source, prevailing wage laws effectively establish a series of occupation-dependent and locality-dependent minimum wages for the various classes of workers on certain public improvement construction projects.

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prevailing wage provisions, ranging from a misdemeanor offense to a felony offense depending upon the amount underpaid.<sup>3</sup> A construction firm convicted of two prevailing wage violations within five years may be required to disgorge profits and may be barred from collecting monies due and owing on its contract or subcontract.<sup>4</sup> Moreover, the statute empowers the fiscal officer, after a hearing on an alleged violation, to impose a civil penalty of up to 25% of the amount found to be due.<sup>5</sup> Finally, a contractor that fails to pay prevailing wages may be precluded on public policy grounds from enforcing the contract.<sup>6</sup>

As if the possibility of criminal prosecution, fines, and forfeiture of contract monies were not daunting enough, contractors and subcontractors may also be subject to liability directly to employees for failing to pay prevailing wages. The NYLL allows employees to bring action against the contractor, subcontractor, and the surety on the project's payment bond for unpaid wages, supplements, and interest,<sup>7</sup> although courts have consistently held that unpaid or underpaid employees on public works projects exhaust their administrative remedies by applying to the fiscal officer in charge of the project for a determination that wages are due before resorting to judicial remedies.<sup>8</sup> On the other hand, employees on public works projects have been acknowledged to be third-party beneficiaries of the contracts between their employers and municipalities, so they may still bring a common law cause of action for breach of contract, regardless of their exhaustion of administrative remedies, provided they are pleaded in adequate detail.<sup>9</sup>

It seems clear, both from the NYLL itself and the body of case law surrounding prevailing wage violations, that New York public policy favors holding contractors to a high standard of prevailing wage compliance. All but the most inadvertent violations are deemed willful, and the consequences of such willful violations are severe.

## Prevailing Wage Rate Defined

The "prevailing rate of wage" is defined in detail in the NYLL and takes into account the rate negotiated for various trades in collective bargaining agreements in the locality where the public work is located in order to determine the wages applicable to the public improvement contract.<sup>3</sup> The prevailing rates for each class of workers on a project are determined in advance by the fiscal officer, the Commissioner of Labor or, on public works performed for a city with a population in excess of one million people, the municipality's comptroller, and are incorporated into the specifications for the public work.<sup>4</sup> Theoretically, contractors should therefore have access to the prevailing wages required on a public work project, but inadvertently, and sometimes intentionally, contractors have failed to pay the required prevailing wage, which has generated substantial litigation.

## Does Prevailing Wage Apply?

A threshold issue that has often been litigated is whether the prevailing wage provisions of the NYLL bear upon a particular project. For the provisions to apply, "(1) the public agency must be a party to a contract involving the employment of laborers, workmen, or

mechanics; and (2) the contract must concern a public works project."<sup>5</sup>

In one interesting case, *County of Suffolk v. Coram Equities, LLC*, the Second Department ruled that the construction of a building, only part of which was to be leased to a municipality for a public use, did not constitute a public work under the NYLL.<sup>6</sup>

In another interesting case, *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, the First Department was called upon to decide whether the repair of vessels owned by municipalities and their agencies, including the City of New York, constituted a public work subject to prevailing wages.<sup>7</sup> The court found that the contract was not subject to the prevailing wage law, noting that "the prevailing wage law is limited to those workers employed in the construction, repair and maintenance work of fixed structures, and does not apply to workers who are servicing a commodity owned by [a public entity]."<sup>8</sup>

## A Deferential Standard for Violations

Where the prevailing wage law applies, the fiscal officer in charge of the particular public work is the first resort for determinations whether a violation has occurred, and a body of case law has arisen reviewing these determinations. As in traditional

Article 78 review of the determinations of agencies, the courts generally defer to the judgment of the fiscal officer, as long as it is supported by substantial evidence.<sup>9</sup> While the violation must be more than accidental to subject the contractor to penalties, "it is not necessary to prove an intent to defraud; all that is required is proof that the employer knew or should have known that it was violating the prevailing wage laws."<sup>10</sup>

While the standard may seem permissive, the courts will look to all surrounding circumstances before accepting a contractor's claim that a violation was accidental. For example, an employer's lengthy experience with public works projects may be cited as supporting a determination that its violation was willful so as to warrant penalties,<sup>11</sup> and a history of prevailing wage violations on the part of an employer may contribute to such a finding as well.<sup>12</sup> Because of the deferential standard, the fiscal officer's determination of a prevailing wage violation is generally upheld.

## Consequences of Violations

Violations of the prevailing wage law bring with them a range of consequences. The NYLL sets forth criminal penalties for violations of the

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presented consternation to construction firms, but ultimately the choice of whether to take on public improvement projects and incur those requirements may be a business consideration that contractors must decide before bidding on public work projects.

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1. NYLL § 220(3).
2. 40 USC § 3142.
3. NYLL § 220(5)(a).
4. NYLL §§ 220(3)(c) and (5)(e).
5. *County of Suffolk v. Coram Equities, LLC*, 31 A.D.3d 687 (2d Dept. 2006).
6. *Id.*
7. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 95 A.D.3d 297 (1st Dept. 2012).
8. *Id.*
9. *Matter of Central City Roofing Co., Inc. v. Musolino*, 136 A.D.3d 1186 (3d Dept. 2016).
10. *Id.*
11. *Id.*
12. *Matter of Consolidated Masonry Contrs. v. Angello*, 2 A.D.3d 997 (3d Dept. 2003).
13. NYLL § 220(3)(d)(i).
14. NYLL § 220(3)(d)(iii).
15. NYLL § 220(6).
16. *Alpha Interiors, Inc. v. Tulger Constr. Corp.*, 101 A.D.3d 660 (2d Dept. 2012).
17. NYLL § 220-g.