An Introduction to New York Prevailing Wage Update

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A. INTRODUCTION

The Federal Government and about half the states in the country have prevailing wage laws that fix minimum wages for construction workers on public works projects at the rates "prevailing" in the community for similar work. In New York, such wages are guaranteed by the State Constitution, Article 1, Section 17, which provides, in part: "no laborer, worker or mechanic, in the employ of a contractor or a subcontractor engaged in the performance of any public work, shall . . . be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such pubic work is to be situated, erected or used."

This provision became part of the State Constitution in 1938 but even before that the Labor Law contained a similar, statutory requirement. Today, the constitutional mandate is implemented by Labor Law Article 8, and particularly § 220 and § 220-b.[1]

Section 220 itself spans several pages of text, but at its core it requires that for any public work performed pursuant to a contract with a state or a municipal agency, a public benefit corporation or a commission appointed pursuant to law, that all "laborers, workmen or mechanics upon such public works" shall be paid "not less than the prevailing rate of wages as hereinafter defined," as well as wage supplements (i.e., fringe benefits) "in accordance with the prevailing practices in the locality." As discussed further below, both prevailing wages and supplements are generally defined by reference to local collective bargaining agreements between building trades unions and signatory construction contractors.

[1] In 1971 the State Legislature extended similar "prevailing wage" protection, by enactment of a new Article 9, to the employees of government contractors providing building "care or maintenance." See *Executive Cleaning Services Corporation v. New York State Department of Labor*, 193 AD3d 13 (3d Dept. 2021). Article 9 mirrors the requirements and enforcement provisions of Article 8.

1. "Public Work"

As noted, the Constitutional obligation to pay prevailing wages and supplements is limited to "public works," and until now the obligation under Labor Law Article 8 has been similarly limited. Neither Constitution nor statute define "public work," however, except that Labor Law § 220 limits the term to work performed under a contract with or on behalf of State or municipal agencies or public benefit corporations[2] or a "commission appointed pursuant to law," which "may involve the employment of laborers, workers or mechanics."[3]

Over the years, case law developed a two-pronged test to determine whether or not prevailing wage requirements extended to a particular project: (1) there has to be a contract with a specified agency involving the employment of laborers, workmen and mechanics, and (2) the contract must concern construction-like labor on a project whose primary object is to benefit the public. See *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 535-536 (2013).

Employing this test, courts have rebuffed efforts by the Commissioner of Labor to extend prevailing wage requirements to projects involving quasi-governmental participants like industrial development authorities (*Matter of Erie County Indus, Dev. Agency v. Roberts*, 94 AD2d 532, aff'd on opinion below, 63 NY2d 810 [1984]), charter schools, (*Matter of New York Charter School Assn. v. Smith*, 15 NY3d 403 [2010]) and not-for-profit fire corporations (*M.G.M. Insulation, Inc. v. Gardner*, 20 NY3d 469 [2013]; or to certain publicly-assisted but privately operated projects, such as of affordable housing (*Vulcan Affordable Housing Corp v. Hartnett*, 151

[2] A public benefit corporation is "a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other States, or to the people thereof." General Construction Law § 66(4).

[3] The only exception is that, in 1930, the Legislature decreed that certain work involving the elimination of railroad grade crossings to be public work. See Labor Law Article 8-a and *Long Island R. Co. v. Department of Labor of State of New York*, 256 NY 498 (1931).

AD2d 84 [3d Dept. 1989]), commercial office space intended for lease to a state agency (*Matter of 60 Mkt. St. Assoc. v. Hartnett*, 153 AD2d 205, aff'd on Op. below 76 NY2d 993 [1990]), privately owned emergency housing (*Cattaraugus Community Action v. Hartnett*, 166 AD2d 891 [4th Dept. 1990]), and construction of a new private railroad line (*Matter of National R.R. Passenger Corp. v. Hartnett*, 169 AD2d 127 [3rd Dept. 1991]).

More recently, the Court of Appeals articulated a new three-pronged test to determine whether a publicly aided product is subject to prevailing wage requirements. Under this test, the first requirement is that a public agency specified in the Statute must be a party to a contract involving the employment of laborers, workers, or mechanics. The second, is that the contract must concern a project that "primarily involves construction-like labor and is paid for by public funds." The third, is that the primary objection or function of the work product must be "the use or other benefit of the general public." *De La Cruz v. Caddell Dry Dock & Repair Co Inc.*, 21 NY3d 530, *supra*, at 538. This test is arguably more restrictive than tests previously applied, adding that the project actually must be paid for by public funds. See *Matter of W.M. Schultz Constr., Inc. v. Musolino*, 147 AD3d 1259 lv to app. den. 30 NY3d 903 (2017).

2. Changes Coming

But while New York's Prevailing Wage Law has historically applied only to certain public construction projects readily identifiable as such, that is changing, apparently as early as January 1, 2022. Because the state budget bill passed in 2020 added new sections to Labor Law Article 8 that will extend prevailing wage requirements to many private projects that receive government assistance in any of various forms, including purely private projects that

receive support from a local industrial development agency ("IDA") or from a not-for-profit local development corporation ("LDC").

The recent changes to Labor Law Article 8, scheduled to take effect on January 1, 2022, are discussed in a subsequent section. What follows first, though, is a general discussion about how the current Prevailing Wage Law is administered and enforced.