Prevailing Wages and Supplements

Prepared by:
Anthony J. Adams Jr.
Adams Leclair LLP, Attorneys

LORMAN®

Published on www.lorman.com - October 2021

LORMAN®

Lorman Education Services is a leading provider of online professional learning, serving individuals and teams seeking training and CE credits. Whether you're looking for professional continuing education or an enterprise-wide learning and development solution, you will find what you need in Lorman's growing library of resources.

Lorman helps professionals meet their needs with more than 100 live training sessions each month and a growing collection of over 13,000 ondemand courses and resources developed by noted industry experts and professionals.

Learn more about Lorman's individual programs, economical All-Access Pass, and Enterprise Packages:

www.lorman.com

PREVAILING WAGES AND SUPPLEMENTS

Labor Law § 220 defines the "prevailing rate of wage" for a particular trade or occupation as the rate provided in local collective bargaining agreements ("CBA") between bona fide unions and construction industry employers. Subdivision (5)(a). Prevailing "supplements" is defined as employment benefits paid other than in cash, such as health, welfare, retirement and vacation benefits and the like, again as provided in local collective bargaining agreements. *Id*. (b) and (c). In each case it is required that at least 30% of trades persons in the locality work for employers who are party to such CBAs, but the 30% requirement is presumed in effect unless proven to the contrary for any particular region. See, *id*. (6).

Responsibility for determining and publishing the rates of prevailing wages and supplements is assigned to the Commissioner of Labor, except that for New York City contracts the responsibility is assigned to the New York City Comptroller. *Id*. (3)(c) and (5)(e). The Commissioner of Labor has delegated her responsibilities and authority in regard to prevailing wages to the Department's Bureau of Public Work (BPW).

Both the BPW and the NYC Comptroller annually prepare and publish Prevailing Rate Schedules ("PRS"), prepared by county in the case of the BPW, that list classifications of workers, and for each such classification the wage rates (including overtime rates) and schedules of supplements taken from local collective bargaining agreements. BPW publishes such schedules by County. As noted, the schedules are updated as of July 1 each year. The first few pages from a sample PRS are reproduced as Appendix A.

The wage rate assigned to a particular classification of work is the gross hourly rate of pay required to be included in a worker's paycheck for each hour engaged in that particular

classification of work. Required supplements are also reported as one or more hourly values, which a contractor can pay directly to the appropriate union benefit funds, assuming it has an agreement allowing it to do so. Non-union contractors who provide their employees with any of the kinds of benefits listed as supplements (like health insurance or paid vacation) are entitled to credit for the costs of those benefits. But the hourly amount of that credit must be "annualized" by dividing the amount paid annually for an employee's benefits by the total number of hours that employee worked for the employer -- on all projects, public and private -- during that year. 12 NYCRR § 220.2; see *Chesterfield Associates v. New York State Dept. of Labor*, 4 NY3d 597 (2005). Any shortfall between the hourly credit so determined and the amounts specified in the PRS for all required supplements must be added to the employee's weekly paycheck, as an additional cash payment. 12 NYCRR § 220.2, *supra*; see *Action Elec. Contractors Co., Inc. v. Goldin*, 64 NY2d 213 (1984).

The BPW publishes annual prevailing rate schedules for each county in the State, often taking the worker classifications, wage rates and supplement rates straight from the collective bargaining agreements, applicable in the County, for the various building trades. Sometimes a work classification (such as laborer) may include a description of the work performed within that classification. But such descriptions in a PRS may not be relied upon by a contractor in deciding how to classify and pay for the work of its employees for prevailing wage purposes. *CNP Mechanical, Inc. v. Angello*, 31 AD3d 925, Lv. to App. Den. 8 NY3d 802 (2007).

Rather, the "proper" classification of work is ultimately determined by BPW wage investigators, who make those determinations based on common practices among the local building trades, as well as the wage investigator's own notion of the "nature of the work" performed. *Lantry v. State*, 6 NY3d 49, 55 (2005). A contractor who applies the "wrong"

classification, even in good faith, risks being found responsible for substantial underpayments long after a project has been completed. *CNP Mechanical Inc.*, *supra*. The Department of Labor's "solution" to this problem is to encourage contractors undertaking a public work to consult with the local BPW in advance of the work, to obtain guidance as to how particular work activities should be classified for prevailing wage purposes. But cf., *Pegasus Cleaning Corp. v. Smith, 73 AD3d 1328* (3d Dept. 2010) [no defense that employer followed advice of wage investigators in paying employees].

In any event, if, in the course of a day or week, an employee performs work that falls within more than one classification he or she must be paid the appropriate prevailing wage and supplements for each such classification, depending upon on the number of hours worked in each classification.

Prevailing Rate Schedules often include lower wage and benefits rates of pay for apprentices, but these are applicable only to apprentices registered with a state-approved apprenticeship program. Furthermore, the BPW and NYC Comptroller also limit the number of apprentices, relative to journeymen, that may be used on a project. Those permitted ratios are also included in each PRS. Notably, they do not have to accord with similar provisions in local collective bargaining agreements. *International Union of Painters & Allied Trades v. New York State Department of Labor*, 32 NY3d 198 (2018).