

LABOR LAW GUIDANCE OUTLINE
ARTICLE 9, SECTION 230
Prevailing Wage for Building Service Employees

I. Building Service Contract

A. What is a Building Service Contract?

A contract, in excess of \$1500.00, between a contractor and a public agency in which the principal purpose is to furnish services through the use of building service employees.

B. What occupations does a “building service employee” include?

A “building service employee” includes but is not limited, to, watchman, guard, doorman, building cleaner, porter, 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 the transportation and delivery of fossil fuel.

C. What is considered a Public Agency?

A Public Agency is 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.

D. Does Article 9 cover maintenance to mechanical systems in a building?

No. Maintenance and repair to mechanical systems, which involves the employment of laborers, workers and

mechanics, is subject to Article 8 prevailing rates, i.e., electrical, heating and plumbing systems.

- E. If there is a question whether a public building service contract is subject to Article 9 wages who should be contacted?

The Bureau of Public Work will provide advisory opinions.

- F. Can a contractor be prohibited from bidding or being awarded a building service contract?

The New York State Labor Law prohibits contractors who have been debarred for violations of Article 9 from bidding or being awarded building service contracts for a period of five years. A contractor is debarred when two final determinations have been rendered within any consecutive six-year period that such entity has willfully failed to pay the prevailing rate, or one final determination has been rendered involving the falsification of payroll records or the kickback of wages and/or supplements. (Article 9, Section 235, subd.7)

- G. Is there any “service work” that is not covered by Article 9 wages?

Yes, work performed for a contractor under a contract for the furnishing services by radio, telephone, telegraph, or cable companies; and any contract for public utility services, including electric light and power, water, steam and gas are not covered.

II. PREVAILING WAGES AND SUPPLEMENTS

- A. What is the prevailing wage?

The “prevailing wage” means the wage determined by the fiscal officer to be prevailing for the various classes of building service employees in the locality. Wage includes the basic hourly cash rate of pay and supplements. In no event shall the basic hourly cash rate of pay be less than the statutory minimum wage established by Article 19 of the Labor Law, or, in a City with a local law requiring higher minimum wage on city contracts.

B. What are supplements?

Supplements are 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 unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, cost of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by federal, state or local law.

C. What is the locality to which specific wage rates apply?

“Locality” means the state, town, a city, village or other civil division or area of the state as determined by the fiscal officer.

D. Is Article 9 prevailing rate required to be annually determined?

No, building service contractors are required to pay the prevailing rates determined at the time of the execution of the contract.

E. If, despite the requirements of law, the contract for service work is awarded without a wage schedule attached, what wage rate is the contractor responsible to pay?

The wages prevailing at the time the work was performed must be paid.

III. HOURS OF WORK

- A. When is payment for overtime required on a building service contract?

An employee who works more than eight hours in any one day or more than forty hours in any workweek shall be paid at not less than one-and-one-half times the prevailing basic cash hourly rate.

- B. Are “coffee breaks” considered time worked?

Rest periods of 20 consecutive minutes or less are considered as time worked upon building service projects. Rest periods include coffee breaks and time for snacks, but do not include bona fide meal periods.

IV. RECORD KEEPING REQUIREMENTS

- A. What payroll records are required to be maintained by building service contractors?

The contractor 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. (Section 233) This includes all books and records pertaining to the rate of wages paid and supplements provided.

- B. Where do these records need to be maintained?

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. (Section 233, subd.3)

C. How long are records to be kept by the contractor?

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

V. PAYMENT OF WAGES AND SUPPLEMENTS

A. Can apprentices be used on building service contracts?

Yes. An apprentice in a craft or trade may work for a wage lower than a journeyman in such craft or trade if all of the following conditions are met:

- The apprentice is duly registered in a program approved by the Commissioner of Labor.
- The apprentice's registration occurred prior to his/her employment as an apprentice on service work.
- Written proof of the individual registration is submitted to the contracting public agency prior to the apprentice's employment.

B. How are apprentice ratios determined?

In no event shall the apprentice to journeyman employed on service work be greater than the lesser of the following ratios:

- The ratio permitted in the apprenticeship program approved by the Commissioner of Labor.

- The ratio prevailing in the locality where the service work will be performed.

C. Can trainees or helpers or pre-apprentices be used on service contracts?

They can only be used if they are paid at the journeypersons rate. Only registered apprentices can be paid less than the journey worker rate.

D. How may prevailing supplements be provided to workers?

- Cash payment in lieu of supplements
- Through irrevocable contributions to a fund, plan or program
- Any combination of the above

VI. COMPLAINTS, INVESTIGATIONS, HEARINGS, STIPULATIONS, APPEALS AND PENALTIES

A. Who may file a complaint on a building service contract? Are complaints kept confidential?

Any person interested or any employee organization or the Commissioner of Labor on his or her own initiative may cause a compliance investigation to be made to determine whether a contractor or a subcontractor has paid the prevailing rate of wages and supplements. During an investigation, all efforts are made to keep the name of the complainant confidential.

B. How is the complaint filed and with whom?

Complaints are filed in writing and should be submitted to the Bureau of Public Work.

- C. How is a prevailing wage investigation commenced? What records will the DOL request from a contractor?

Subsequent to its receipt of a complaint or on its own initiative, the Bureau of Public Work will request certified payroll records, daily time records, proof of payment of wages, i.e., cancelled checks and proof of the payment and/or providing supplemental benefits.

- D. What is a Stipulation?

A stipulation is a document of agreement used when a contractor who has underpaid prevailing rates agrees with the Department's findings and waives its right to a hearing on the issues.

- E. In what circumstances would an administrative hearing be held?

An administrative hearing is held when a contractor disagrees with the Department's findings.

- F. Once the Commissioner issues a final Order and Determination, what is the process for appealing this determination?

Any aggrieved party may file an appeal pursuant to Article 78 of the Civil Practice Law within 30 days from the date said determination was filed. Said proceeding shall be

commenced directly in the State Appellate Division of the Supreme Court.

G. What is a “willful” violation and how is willfulness determined?

A contractor may be found of willfully violating Article 9 of the Labor Law if they knew or should have known that it failed to pay the prevailing rates of wages and supplements. There are several circumstances that could constitute willful behavior:

The following is a partial listing:

- if a contractor had actual knowledge he/she was violating the law
- experience of the contractor – if there is credible evidence that a contractor “should have known” that it was violating Article 9, i.e. receipt of a prevailing wage schedule
- history of prior public prevailing wage violations
- gravity and nature of violation
- notification by DOL that it views the contractor’s act as a violation and the contractor fails to take corrective action

H. What penalties may be assessed against a contractor for underpayment of prevailing wages on a building service contract?

Interest up to 16% from the date of underpayments to the date of restitution and a penalty up to 25% of the wages, supplements and interest due.