



New York State Department of Labor  
David A. Paterson, Governor  
M. Patricia Smith, Commissioner

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January 12, 2009

[REDACTED]

Re: Request for Opinion / Test and Repair Contracts  
Our File No. RO-08-0158

Dear [REDACTED]:

Your letter asks for Counsel's opinion on two questions related to the applicability of the prevailing wage law to contracts involving work performed by technicians who perform testing and servicing duties with respect to security alarms and fire protection systems that exist in virtually every governmental facility. First, you ask if those technicians, who work under "test and repair" service contract must be paid prevailing wages, and, second, whether an employee who uses tools to perform such tests and inspections would likewise be entitled to prevailing wages. Reference is made to certain contracts between the Office of Mental Health and [REDACTED] in relation to alarm and fire protection systems.

Labor Law §220 "applies only to workers involved in the construction, replacement, maintenance and repair of 'public works' in a legally restricted sense of that term (*Matter of Pinkwater v Joseph*, 300 NY 729). It would appear that the workers identified in your letter are performing maintenance and repair work under a state contract. The question, then, is whether specific work that is performed by a laborer, workman or mechanic is such that the work is covered by the prevailing wage law.

Technological changes in recent years have changed the nature of maintenance work performed by workers in public facilities. For instance, phone, elevator or HVAC operations formerly maintained and repaired on site, have now been computerized to such a degree that testing, and sometimes repair, can often take place from remote locations by technicians working from lap top computers. Sometimes, a technician simply plugs into equipment on site, operations information is generated and fed into the technician's computer, diagnostic information is obtained and repairs can be effectuated immediately electronically. Such

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advances have created challenges in the manner in which determinations must be made as to which workers are construction trades persons who were intended to be within the statutes mandates.

Generally, it has been the Bureau of Public Work's policy that workers performing duties at a public work site pursuant to a "test and repair" contract are employees subject to the prevailing wage law. Their on-site testing of equipment, coupled with their actual work in performing such repairs, is covered work and they must be paid the applicable prevailing wage for the work they perform. Exceptions would include those who are performing supervisory work (although part time supervisors would have to be paid prevailing wages for those periods of time in which they perform other than supervisory work, see *Tenalp Construction Corporation v. Roberts*, 141 A.D.2d 81 (2<sup>nd</sup> Dept., 1988)); those who are merely performing testing as a matter of code compliance; or other non covered work (i.e. paperwork, sales, repair or upgrade estimations, certain programming matters). While warranty testing prior to the issuance of a warranty is not subject to the prevailing wage law, repairs under an existing warranty are subject to the law. Where testing is required as part of the installation of new equipment, such testing is subject to the prevailing wage law. Where the testing is contemplated and performed as part of a testing and repair program, even when not part of an installation contract, subject to specific determinations as to the nature of the work performed, both the testing and the repair of such tested equipment is work performed under the prevailing wage law.

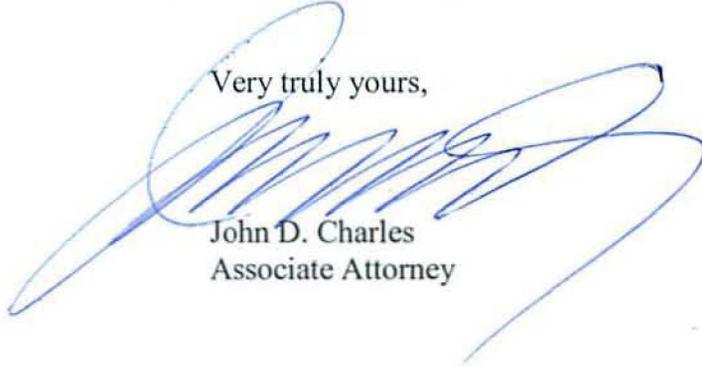
Given the nature of this type of work, long existing considerations concerning the use of tools as a barometer in determining if a particular task is subject to the prevailing wage law may not be applicable. That standard may have been useful in the past in distinguishing between supervisors, time keepers, system design and estimating employees or others who performed no actual work, as opposed to laborers who worked with tools to advance a project, but in this situation the use of a screwdriver to access a testing portal as opposed to accessing the same panel with a latch or wing nut would seem to be a distinction with little meaning. Rather, while it might be productive to consider the lap top computer to be a tool, much in the same way as a caliper or a laser level would be a tool, the better test would be to look to the task that is being performed in making a prevailing wage determination. Any task that is ordinarily performed by trades people, associated with the construction, maintenance or repair of a public work project, which historically and/or pursuant to collective bargaining agreements has been performed by construction trades would be subject to the requirements of the prevailing wage law. Whether certain specific tasks would be covered by such law would be subject to determination on a case by case basis by the Bureau of Public Work, much in the same manner as that Bureau currently makes classification determinations.

Finally, you ask whether an employee working on a project in a testing and repair capacity would be paid a prevailing wage rate for the entire period of time that he works on that site. For those test and repair contract workers permanently stationed at a site, the overwhelming majority, if not all, of the work that they perform would be subject to the prevailing wage law, subject, of course, to a determination as noted above, with regard to the specific tasks that these individuals perform. For all outside contract employees, a worker is entitled to prevailing wage rates for those times during the day that they perform prevailing wage work. To the extent that a

worker performs other work not subject to the prevailing wage law, the rate of pay for such work would not necessarily be at prevailing wage.

I hope this response serves to answer your inquiry. Please advise if you have any further questions in this regard.

Very truly yours,



John D. Charles  
Associate Attorney

cc: Pico Ben-Amotz  
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