



Electronic Dispatch

# Labor and Employment Law Information Memo

February 2008

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## AMENDMENTS TO THE NEW YORK PREVAILING WAGE LAW IMPOSE ADDITIONAL REQUIREMENTS ON PUBLIC WORK CONTRACTORS AND CREATE STIFFER PENALTIES FOR WILLFUL NON-COMPLIANCE

Recent amendments to the New York prevailing wage law (Section 220 of the New York Labor Law) impose additional requirements on contractors and subcontractors on public work projects, and create stiffer civil and criminal penalties if a contractor or subcontractor is found to have willfully failed to comply with the statute's requirements. This information memo summarizes these recent amendments.

### I. New Notice Requirements Effective February 24, 2008

Effective February 24, 2008, all contractors and subcontractors must notify all laborers, workers, and mechanics whom they employ on public work projects in writing of the prevailing wage rate for their particular job classification. This notification must be provided on each employee's first pay stub, and along with every pay stub thereafter. If an employee works in more than one job classification on a public work project, each job classification and the corresponding prevailing wage rate must be listed on the employee's pay stub.

In addition, at the beginning of the performance of every public work contract, contractors and subcontractors must notify all laborers, workers, and mechanics whom they employ on public work contracts of the telephone number and address of the Department of Labor. The same notification must be provided along with each employee's first pay check after July 1 of each year. The notice must inform each laborer, worker, and mechanic of his or her right to contact the Department of Labor if he or she does not receive the proper prevailing rate of wages or supplements for his or her job classification. The prescribed form issued by the Bureau of Public Work for public work contractors and subcontractors to provide this notification is enclosed with this information memo.

If, after an investigation, the Commissioner of Labor finds that a contractor or subcontractor failed to post the required notice, failed to set forth the prevailing wage rate on the pay stub, willfully posted the incorrect prevailing wage rate, or willfully set forth the incorrect prevailing wage rate on the pay stub, the Commissioner may assess a civil penalty of up to \$50.00 for the first violation, \$250.00 for the second violation, and \$500.00 for each subsequent violation. In assessing the amount of the penalty, the following factors are generally considered by the Commissioner: (1) the size of the employer's business; (2) the good faith of the employer; and (3) the gravity of the violation.

### II. Creation of Stiffer Potential Penalties for Willful Non-Compliance

Recent legislation was also enacted in early February 2008, that created stiffer potential civil and criminal penalties for willful non-compliance with the provisions of the prevailing wage law. The legislation takes effect on May 6, 2008.

Prior to the enactment of this new legislation, a contractor or subcontractor on a public work project who required employees to work more than eight hours per day (unless otherwise permitted by law) could have been found guilty of a misdemeanor and could have been subject to a fine of between \$500.00 and \$1,000.00. The new legislation continues to treat this offense as a misdemeanor,

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but provides that punishment will be in accordance with the Penal Law. Under the Penal Law, an offense designated outside of the Penal Law as a misdemeanor that carries with it no specific classification or sentence is treated as a Class A misdemeanor. A Class A misdemeanor may be punished under the Penal Law with up to one year of imprisonment and a fine of up to \$1,000.00.

Under this new legislation, a willful failure to pay the prevailing rate of wages or supplements can also subject a contractor or subcontractor to criminal prosecution. The classification of the offense and the potential criminal penalties associated with the offense depend on the aggregate amount of the underpayments. If the aggregate amount of the underpayments to all employees is less than \$25,000.00, the offense is a Class A misdemeanor, which carries with it a potential punishment of imprisonment for up to one year and a fine of up to \$1,000.00. If the aggregate amount of the underpayments to all employees is greater than \$25,000.00, the offense is a Class E felony, which carries with it a potential punishment of imprisonment for up to four years. If the aggregate amount of the underpayments to all employees is greater than \$100,000.00, the offense is a Class D felony, which carries with it a potential punishment of imprisonment for up to seven years. If the aggregate amount of the underpayments to all employees is greater than \$500,000.00, the offense is a Class D felony, which carries with it a potential punishment of imprisonment for up to 15 years. For all of the felony offenses, a contractor or subcontractor may also be required to pay a fine of up to \$5,000.00, or double the amount of the gain from the commission of the felony.

A contractor or subcontractor who commits a second offense of willful failure to pay the prevailing rate of wages or supplements within a five-year period must disgorge all profits from the public work contract and cannot receive any further payments due under the contract.

Every contractor and subcontractor on a public work contract is required to submit to the state or municipal entity that entered into the contract, within 30 days after issuance of its first payroll and every 30 days thereafter, a transcript of the original payroll record. The payroll record must be subscribed and sworn to, or affirmed as true, under penalties of perjury. The new legislation provides that a willful failure to file such payroll records constitutes a Class E felony. The initial legislation presented to Governor Spitzer also provided for a civil penalty of up to \$5,000.00 per day for a willful failure to file such payroll records in a timely fashion; however, the bill that was ultimately enacted reduced this amount to \$1,000.00 per day.

The initial legislation that passed both the Assembly and Senate also included a provision that a low bidder for a public work contract who submits a bid that is at least 10% less than the next lowest bidder would be presumed to be ineligible to receive the contract. In other words, the legislation would have imposed a presumption that the only way the lowest bidder could have performed the work would be by paying its employees less than the prevailing rate of wages and supplements. Fortunately, that controversial provision was removed from the bill that was enacted. Accordingly, there is no presumption of ineligibility if a contractor submits a bid that is substantially lower than all of the other bids for the contract.

If you have any questions regarding the amendments to the prevailing wage law, or need any assistance in complying with the prevailing wage law, please contact:

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