

New York City Department of Consumer Affairs

Notice of Public Hearing and Opportunity to Comment on Proposed Rules

What are we proposing? The Department of Consumer Affairs (the “Department”) is proposing rules pursuant to Section 130 of Chapter 1 of Title 6 of the Administrative Code of the City of New York (as added by Local Law 27 for the year 2012), which establishes a prevailing wage for building service employees in city leased or financially assisted facilities, to implement the law and meet its goals and to provide guidance to covered employees and employers.

When and where is the hearing? The Department of Consumer Affairs will hold a public hearing on the proposed rules. The public hearing will take place at 10:00 am on Thursday, March 31, 2016. The hearing will be in the Department of Consumer Affairs hearing room at 66 John Street, 11th Floor, New York, NY 10038.

How do I comment on the proposed rules? Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to the Department of Consumer Affairs through the New York City rules website at <http://rules.cityofnewyork.us>.
- **Email.** You can email written comments to Rulecomments@dca.nyc.gov .
- **Mail.** You can mail written comments to Steven Ettannani, Senior Advisor, State and Federal Policy, New York City Department of Consumer Affairs, 42 Broadway, New York, NY 10004.
- **Fax.** You can fax written comments to the Department of Consumer Affairs, (646) 500-5962.

By speaking at the hearing. Anyone who wants to comment on the proposed rules at the public hearing must sign up to speak. You can sign up before the hearing by calling (212) 436-0210. You can also sign up in the hearing room before the hearing begins on March 31. You can speak for up to three minutes.

Is there a deadline to submit written comments? Yes. You must submit any written comments to the proposed rules on or before March 31.

Do you need assistance to participate in the hearing? You must tell the Office of Legislative Affairs at the Department of Consumer Affairs if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You can tell us by mail at the mailing address given above. You may also tell us by telephone at (212) 436-0155. You must tell us by March 28.

Can I review the comments made on the proposed rules? You can review the comments made online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A few days

after the hearing, a transcript of the hearing and copies of the written comments will be available to the public at the Office of Legal Affairs.

What authorizes the Department of Consumer Affairs to make this rule? Section 1043 of the City Charter and Section 6-130(d)(1) of Chapter 1 of Title 6 of the Administrative Code of the City of New York authorize the Commissioner of the Department of Consumer Affairs to make this proposed rule. This proposed rule was not included in the regulatory agenda of the Department of Consumer Affairs for this fiscal year because it was not contemplated when the Department published the agenda.

Where can I find the rules of the Department of Consumer Affairs? The Department of Consumer Affairs' rules are in Title 6 of the Rules of the City of New York.

What rules govern the rulemaking process? The Department of Consumer Affairs must meet the requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043(b) of the City Charter.

Statement of Basis and Purpose of Proposed Rules

Section 6-130¹ of the Administrative Code of the City of New York (the Prevailing Wage Law), added by Local Law 27 of 2012, requires certain developers receiving City financial assistance and certain lessors leasing commercial office space or commercial office facilities to the City to pay their building service employees the prevailing wage.

These proposed rules clarify provisions in the Prevailing Wage Law, establish requirements to implement the law and meet its goals, and provide guidance to employers and employees.

Specifically, these rules:

- Establish that covered employers must require all building service contractors to pay the prevailing wage to their building service employees;
- Set forth the distribution and posting requirements for employee notices required by the Prevailing Wage Law;
- Set forth the recordkeeping requirements under the Prevailing Wage Law;
- Clarify the Prevailing Wage Law’s definition of “covered developer” and “building service work;”
- Outline the Department’s enforcement steps, including how a covered employer may cure a violation of the Prevailing Wage Law, how the Department will commence a case, and how the Department may settle a complaint;
- Clarify that the Office of Administrative Trials and Hearings (OATH) will issue a decision on the record in all cases;
- Provide guidance on how an OATH administrative law judge may calculate back wages for a building service employee;
- Clarify that if one or more building service employees start or have a civil action pending , it does not preclude the Department from commencing, prosecuting, or settling a case based on some or all of the same violations; and
- Clarify what other appropriate relief may be imposed for a violation of the Prevailing Wage Law, in addition to the penalties set forth in the law.

New text is underlined; deleted material is in [brackets].

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

¹ There are two Sections 6-130 in the Administrative Code of the City of New York.

Proposed Rules

Section 1. A new Chapter 9 of Title 6 of the Rules of the City of New York is added to read as follows:

CHAPTER 9

PREVAILING WAGE LAW

<u>Subchapter A</u>	<u>General</u>
<u>Subchapter B</u>	<u>Construction</u>
<u>Subchapter C</u>	<u>Enforcement</u>

SUBCHAPTER A

GENERAL

§9-01 Definitions.

(a) For purposes of this chapter, the following terms mean:

Building Service Contractor. The term “Building Service Contractor” means any partnership, association, joint venture, limited liability company, corporation or any other form of doing business providing Building Service Work for a Covered Lessor or Covered Developer.

Building Service Employee. The term “Building Service Employee” has the same meaning as set forth in the Prevailing Wage Law.

Building Service Work. The term “Building Service Work” has the same meaning as set forth in the Prevailing Wage Law.

Case. The term “Case” means an enforcement proceeding commenced by the Department before OATH based upon an alleged violation of the Prevailing Wage Law.

City. The term “City” means the City of New York or any City Economic Development Entity.

City Economic Development Entity. The term “City Economic Development Entity” has the same meaning as set forth in the Prevailing Wage Law.

City Development Project. The term “City Development Project” has the same meaning as set forth in the Prevailing Wage Law.

Commissioner. The term “Commissioner” means the Commissioner of the Department or his or her designee.

Comptroller. The term “Comptroller” means the Office of the Comptroller of the City of New York.

Covered Employer. The term “Covered Employer” means any Covered Lessor or Covered Developer.

Covered Developer. The term “Covered Developer” has the same meaning as set forth in the Prevailing Wage Law.

Covered Lessor. The term “Covered Lessor” has the same meaning as set forth in the Prevailing Wage Law.

Department. The term “Department” means the New York City Department of Consumer Affairs.

Financial Assistance. The term “Financial Assistance” has the same meaning as set forth in the Prevailing Wage Law.

Lease. The term “Lease” has the same meaning as set forth in the Prevailing Wage Law.

Payroll Records. The term “Payroll Records” means all time cards, cancelled checks, cash receipts, books, documents, schedules, forms, reports, receipts or other evidence that reflect job assignments, work schedules by days and hours, and the disbursement of funds to an employee by cash, check, or in any other form or manner.

Person. The term “Person” means any individual, sole proprietorship, partnership, association, joint venture, limited liability company, corporation or any other form of doing business.

Prevailing Wage. The term “Prevailing Wage” has the same meaning as set forth in the Prevailing Wage Law.

Prevailing Wage Law. The term “Prevailing Wage Law” means Section 6-130 of Chapter 1 of Title 6 of the New York City Administrative Code, entitled “Prevailing Wage for Building Service Employees in City Leased or Financially Assisted Facilities.”

- (b) Other Terms. The terms “Administrative Law Judge,” “OATH,” “Petition,” “Petitioner,” and “Respondent” have the same meanings as set forth in Section 1-01 of Chapter 1 of Title 48 of the Rules of the City of New York.

§9-02 Compliance by Building Service Contractors.

Every Covered Employer must require that all building service contractors pay the prevailing wage to all such Building Service Contractors’ employees performing Building Service Work for the Covered Employer at the premises to which a lease pertains or in connection with a City Development Project.

§9-03 Employee Notices.

- (a) Within 15 days after the City provides copies of the adjusted employee notices required by the Prevailing Wage Law, Covered Employers must post the notices in a prominent and accessible location and deliver the notices to their employees. Prominent and accessible locations for posting of the notice include areas frequented by employees such as break rooms, pantries and employee lounges. Covered Employers must promptly replace any posted notice that is damaged, defaced, illegible or removed for any reason.
- (b) The notices must be delivered to employees in a manner that reasonably ensures that employees receive the notice, including delivery by the Covered Employer by hand, electronic mail or certified mail, return receipt requested.

- (c) Covered Employers must post and deliver versions of the notices in English, Spanish and any other languages that are spoken by the Covered Employer's employees at each work location if the City has prepared forms of the notice in those languages and provided them to the Covered Employer. The City may make copies of the notice available to Covered Employers on one or more websites maintained by the City.

§9-04 Records.

- (a) Employee Notices. Covered Employers must maintain written records of their delivery of the employee notices required by the Prevailing Wage Law. Acceptable records include logs with signed employee acknowledgments, and/or email receipts reflecting delivery of the notices. Failure to maintain these records shall create a rebuttable presumption that the Covered Employer did not deliver the required notices to its employees.
- (b) Building Service Contracts. Covered Employers must maintain copies of all agreements with building service contractors.
- (c) Employee Claims. Covered Employers must maintain all records related to any complaint or any pending, threatened, or resolved legal action or grievance by or from any employee concerning the Prevailing Wage Law.
- (d) Termination or Adverse Employment Action. Covered Employers must maintain all records related to the discharge, demotion, suspension, reduction of hours, or other adverse employment action against any employee subject to the Prevailing Wage Law. Failure to maintain these records shall create a rebuttable presumption that any adverse employment action was in retaliation for the applicable employee exercising his or her rights under the Prevailing Wage Law.
- (e) Obligation to Produce on Demand. Covered Employers must furnish copies of any of the records specified in this section to the City within 15 days of a request by the City.
- (f) Retention Period. Covered Employers must retain all records specified in this section for six years after the applicable Building Service Work is performed.

§9-05 Employee Addresses.

Covered Employers must provide the Department with the name and last known address of all employees subject to the Prevailing Wage Law within 15 days of a request by the Department.

SUBCHAPTER B
CONSTRUCTION

§9-10 Successors and Assignees.

The definition of the term “Covered Developer” set forth in section 8 of subdivision a of the Prevailing Wage Law shall be construed to include any successor in interest, whether through merger, pledge, transfer, assignment, operation of law or otherwise, of any Covered Developer.

§9-11 Building Service Work.

For purposes of the Prevailing Wage Law, “Building Service Work” shall be construed to include occupations relating to the collection of garbage or refuse, the transportation of office furniture and equipment, and the delivery of fossil fuel.

SUBCHAPTER C
ENFORCEMENT

§9-20 Cure Notice.

- (a) Prior to commencing a Case, the Department shall deliver a written notice to the applicable Covered Employer informing the Covered Employer that the Department may commence a Case unless the Covered Employer demonstrates, to the reasonable satisfaction of the Department, within 30 days, that the Covered Employer has cured its violations of the Prevailing Wage Law. The notice shall indicate that the Covered Employer may contact the Department if it wishes to settle the alleged violation(s) of the Prevailing Wage Law, and note that any settlement is at the discretion of the Department.
- (b) Cure may be in the form of (1) payment of back wages or the monetary value of health benefits withheld, including interest from the date of the underpayment to the Building Service Employee; (2) payment of civil penalties pursuant to the Prevailing Wage Law; (3) filing or disclosure of any records that were not filed or made available to the public; (4) reinstatement or other appropriate relief for any employee subjected to retaliation or discrimination in violation of the Prevailing Wage Law; or (5) any other relief reasonably calculated to remedy the violation of the Wage Laws. The Department may, in its discretion, extend the time for the Covered Employer to cure.

§9-21 Petition.

- (a) Charges in Petition. The Department shall commence Cases by service and filing of a Petition in accordance with Section 1-23 of Chapter 1 of Title 48 of the Rules of the City of New York. The Department shall concurrently serve a copy of the Petition on any employee complainants.
- (b) Delivery of Complaint. Concurrent with service of a Petition, the Department shall deliver copies to the Respondent of any employee complaints concerning the Respondent’s alleged non-compliance with the Prevailing Wage Law.

§9-22 Settlements.

- (a) General. The Department may settle a complaint at any time after it is referred to the Department. The Department is authorized to determine the terms of settlement, taking into account (1) the facts of the complaint, (2) the interests of the City in ensuring compliance with the Prevailing Wage Law, (3) the interests of the complainant(s), (4) the Covered Employer's history of compliance with the Prevailing Wage Law, (5) the size of the Covered Employer, (6) the good faith of the Covered Employer, (7) the Covered Employer's compliance with record-keeping and notice requirements, and (8) any other factors relevant to achieving a fair and reasonable settlement.
- (b) Filing of Settlement Agreements. Every agreement settling a Case, complaint or investigation shall be in writing and shall be deemed an "order" for purposes section 7 of subdivision d of the Prevailing Wage Law.
- (c) Complainants. The Department may settle a complaint or Case with a Covered Employer with or without the consent of the applicable complainant(s). The Department may dismiss a Case in the event the complainant refuses to accept the relief in a proposed settlement.
- (d) Private Settlements. A complainant and a Covered Employer may resolve a complaint through a private settlement without authorization from the Department, but the settlement shall not preclude (1) the Department from commencing, prosecuting or settling a Case concerning the complaint or other potential violations by the Covered Employer of the Prevailing Wage Law, or (2) the City or City Economic Development Entity from enforcing its remedies under any agreement or lease with the Covered Employer.

§9-23 Order and Determination.

- (a) Decision on the Record. Notwithstanding any provision to the contrary in Section 1-51.1 of Chapter 1 of Title 48 of the Rules of the City of New York, Administrative Law Judges shall issue a decision on the record in all Cases. Provided that no party has commenced a challenge to the decision pursuant to Article 78 of the Civil Practice Law and Rules of New York, and the time to commence such a challenge shall have expired, the decision shall constitute an "order" for purposes of this chapter and section 7 of subdivision d of the Prevailing Wage Law.
- (b) Judicial Challenge. If a party commences a timely challenge to a decision on the record, then the final, non-appealable disposition of the appeal, whether by order of a court of competent jurisdiction or settlement, shall constitute an "order" for purposes of this chapter and section 7 of subdivision d of the Prevailing Wage Law.
- (c) Entry of Order. If an order (including any settlement deemed to be an order for purposes of this chapter) sustains some or all of the charges in the Petition, and provided that (1) the Person found violating the Prevailing Wage Law has failed to comply with the payment or other terms of the order, and (2) no proceeding for judicial review is pending

and the time for initiation of such proceeding has expired, the Department shall, as soon as is practicable, file a copy of the order with the clerk of the county of residence or place of business of the Respondent.

§9-24 Calculation of Back Wages.

If a Covered Employer has failed to maintain original Payroll Records as required by the Prevailing Wage Law, an Administrative Law Judge may determine the amount of the unpaid wages and benefits based on the Payroll Records and other evidence that are available, making reasonable inferences based upon the customary staffing practices of, and wages and benefits paid by, the Covered Employer.

§9-25 Private Right of Action.

The commencement or pendency of a civil action by one or more employees of a Covered Employer for violation the Prevailing Wage Law shall not preclude the Department from commencing, prosecuting or settling a Case against the Covered Employer based upon some or all of the same violations.

§9-26 Other Appropriate Relief.

For purposes of section 4 of subdivision d of the Prevailing Wage Law, “other appropriate relief” shall include an order to (i) reinstate an employee or offer the employee a position comparable to their former position, (ii) reverse any adverse employment action, including demotion, reassignment or reduction in hours, (iii) cease retaliatory practices and institute measures to prevent such conduct in the future, (iv) pay the wages and, if applicable, the monetary equivalent of the benefits that the employee subjected to retaliation or discrimination would have been granted or paid but for the adverse employment actions by the Covered Employer, or (v) pay additional amounts to the extent necessary to compensate employees for additional tax liability resulting from a lump sum payment of back wages in a single year.

NEW YORK CITY LAW DEPARTMENT

DIVISION OF LEGAL COUNSEL

100 CHURCH STREET

NEW YORK, NY 10007

212-356-4028

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Rules Implementing Prevailing Wage Law

REFERENCE NUMBER: 2015 RG 140

RULEMAKING AGENCY: Department of Consumer Affairs

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN

Date: February 17, 2016

Acting Corporation Counsel

NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS

253 BROADWAY, 10th FLOOR

NEW YORK, NY 10007

212-788-1400

CERTIFICATION / ANALYSIS

PURSUANT TO CHARTER SECTION 1043(d)

RULE TITLE: Rules Implementing Prevailing Wage Law

REFERENCE NUMBER: DCA-45

RULEMAKING AGENCY: DCA

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ Francisco X. Navarro

Mayor's Office of Operations

February 16, 2015

Date