

New York City Department of Consumer and Worker Protection

Notice of Public Hearing and Opportunity to Comment on Proposed Rules

What are we proposing? The Department of Consumer and Worker Protection (“DCWP” or “Department”) is proposing to amend rules related to the prevailing wage for building service employees in City-leased or financially-assisted facilities (“Prevailing Wage Law”). Local Law 212 of 2019 amended the Prevailing Wage Law by adding a new protected wage for certain covered projects.

This proposed rule amendment would implement the new law by setting forth the mechanism for protected wage increases due to changes in the cost of living and in the cost of providing benefits.

When and where is the hearing? DCWP will hold a public hearing on the proposed rule. The public hearing will take place at 11:00 AM on Monday, August 9, 2021. The public hearing will be accessible by phone and videoconference.

- To participate in the public hearing via phone, please dial 646 558 8656
 - Meeting Code: 861 7984 4544
- To participate in the public hearing via videoconference, please follow the online link:
<https://us02web.zoom.us/j/86179844544>
 - Meeting Code: 861 7984 4544

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

- **Website.** You can submit comments to DCWP through the NYC rules website at <http://rules.cityofnewyork.us>.
- **Email.** You can email comments to Rulecomments@dca.nyc.gov.
- **By speaking at the hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by emailing rulecomments@dca.nyc.gov. You can also sign up on the phone or videoconference before the hearing begins at 11:00 AM on Monday, August 9, 2021. You can speak for up to three minutes.

Is there a deadline to submit comments? Yes. You must submit any comments to the proposed rule on or before August 9, 2021.

What if I need assistance to participate in the hearing? You must tell DCWP’s External Affairs division if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You may tell us by telephone at (212) 436-0345 or by email at Rulecomments@dca.nyc.gov. Advance notice is requested to allow sufficient time to arrange the accommodation. Please tell us by August 5, 2021.

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, all comments received by DCWP on the proposed rule will be made available to the public online at <http://www1.nyc.gov/site/dca/about/public-hearings-comments.page>.

What authorizes DCWP to make this rule? Sections 1043 and 2203(f) of the New York City Charter and Section 6-130 of the New York City Administrative Code authorize the Department of Consumer and Worker Protection to make these proposed rules.

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

What laws govern the rulemaking process? DCWP 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 of the City Charter.

Statement of Basis and Purpose of Proposed Rule

The Department of Consumer and Worker Protection (“DCWP” or “Department”) is proposing to amend rules related to the payment of prevailing wages to building service employees in City-leased or financially-assisted facilities, as required under section 6-130 of the Administrative Code (“Prevailing Wage Law”). Local Law 212 for the year 2019 amended the Prevailing Wage Law, in part, by adding a new “protected wage” for building service employees working in preservation projects receiving discretionary financial assistance from the City or a City economic development entity.

The protected wage is the rate of wages and cost of benefits paid to a building service employee in a preservation project on the date that financial assistance for such project is received from the City, plus an annual increase to account for any change in the cost of living and in the cost of providing benefits. The proposed rule would implement Section 6-130(d)(9) of the New York City Administrative Code by setting forth the mechanism for yearly increases to the protected wage. The proposed rule would also classify a dwelling unit provided to a building service employee free of charge as a benefit and provide additional guidance on how to assess the value of such dwelling unit for purposes of calculating the protected wage. Lastly, the proposed rule would amend other aspects of the Prevailing Wage Law rules by:

- Removing from section 9-01 defined terms whose meaning is the same as in the Prevailing Wage Law, and moving the defined terms “Covered Developer” and “Building Service Work” from subchapter B of chapter nine into section 9-01 to create a more concise and consolidated definitions section.
- Replacing references to “employees” with “Building Service Employees”, and the term “Covered Employer” with “Responsible Party” throughout.
- Clarifying in section 9-23 that administrative law judges will issue Recommended Decisions subject to the Department’s review in accordance with section 2203(h)(1) of the New York City Charter and section 6-02 of title 6 of the Rules of the City of New York.
- Updating references to the correct sections of the Prevailing Wage Law throughout.

Sections 1043 and 2203(f) of the New York City Charter and Section 6-130 of the New York City Administrative Code authorize the Department of Consumer and Worker Protection to make these proposed rules.

New material 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.

Proposed Rule Amendments

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

§ 9-01 Definitions.

(a) [For purposes of] As used in this chapter, the following terms [mean] have the following meanings:

Administrative Law Judge. The term “Administrative Law Judge” has the meaning provided in section 1-01 of title 48 of the Rules of the City of New York.

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, or Protected Developer, including entities providing such Building Service Work through a subcontractor.

[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, except that, for the purposes of this chapter, "Building Service Work" also includes work relating to the collection of garbage or refuse, the transportation of office furniture and equipment, and the delivery of fossil fuel.

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]and Worker Protection.

[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.]

OATH. The term "OATH" has the meaning provided in section 1-01 of title 48 of the Rules of the City of New York.

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.]

Petition. The term "Petition" has the meaning provided in section 1-01 of title 48 of the Rules of the City of New York.

[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]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."]as amended by Local Law 212 for the year 2019.

Responsible Party. The term "Responsible Party" means any Covered Lessor, Covered Developer or Protected Developer.

(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]Any term used in this chapter and defined in the Prevailing Wage Law shall have the same meaning as provided in the Prevailing Wage Law, unless otherwise provided in this section.

§ 9-02 Compliance by Building Service Contractors.

Every [Covered Employer]Responsible Party must require that all Building Service Contractors pay no less than the [prevailing wage]Prevailing Wage or Protected Wage, as applicable, to all [such Building Service Contractors' employees] Building Service Employees performing Building Service Work at the premises to which a [lease]Lease pertains, [or] in connection with a City Development Project, or in connection with a Preservation Project, as applicable.

§ 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]Responsible Parties must post the notices in a prominent and accessible location and deliver the notices to all Building Service Employees covered by the Prevailing Wage Law at each work location. Prominent and accessible locations for posting of the notice include areas frequented by employees such as break rooms, pantries and employee lounges. [Covered Employers]Responsible Parties must promptly replace any posted notice that is damaged, defaced, illegible or removed for any reason.

(b) The notices must be delivered to [employees]Building Service Employees in a manner that reasonably ensures that such employees receive the notice, including delivery by the [Covered Employer]Responsible Party 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 Building Service 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]Responsible Parties must maintain written records of their delivery of the employee notices required by the Prevailing Wage Law and by this section. 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]Responsible Party did not deliver the required notices to the Building Service Employees.

(b) *Building Service Contracts.* [Covered Employers]Responsible Parties must maintain copies of all agreements with Building Service Contractors.

(c) *Employee Claims.* [Covered Employers]Responsible Parties 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]Responsible Parties 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]Responsible Parties 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]Responsible Parties 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]Responsible Parties 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.

§ 9-06 Annual Increases in the Protected Wage Rate.

The rate of wages and the cost of benefits paid to a Building Service Employee who receives a Protected Wage must each respectively increase, on an annual basis, by no less than one percent. "Paid," as used in this section, means with respect to wages, wages paid to a Building Service Employee, and, with respect to benefits, any combination of in-kind benefits or payments provided to such employee.

§ 9-07 Provision of Dwelling Unit for Building Service Employees.

The provision of a dwelling unit free of charge to a Building Service Employee who receives a Protected Wage shall be considered a bona fide benefit with a cost of no more than the value of prevailing rentals in the locality for comparable dwelling units.

§ 2. Subchapter B of Chapter 9 of Title 6 of the Rules of the City of New York, relating to the construction of the terms of such Chapter 9, is REPEALED.

§ 3. Subchapter C of Chapter 9 of Title 6 of the Rules of the City of New York is amended to read as follows:

Subchapter [C]B: Enforcement

§ 9-20 Cure Notice.

(a) Prior to commencing a Case, the Department shall deliver a written notice to the applicable [Covered Employer]Responsible Party informing the [Covered Employer]Responsible Party that the Department may commence a Case unless the [Covered Employer]Responsible Party demonstrates, within 30 days and to the reasonable satisfaction of the Department, [within 30 days,] that the [Covered Employer]Responsible Party has

cured its violations of the Prevailing Wage Law. The notice shall indicate that the [Covered Employer]Responsible Party 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]Building Service 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 Prevailing Wage [Laws] Law. The Department may, in its discretion, extend the time for the [Covered Employer]Responsible Party 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]section 1-23 [of Chapter 1] of [Title]title 48 of the Rules of the City of New York. The Department shall concurrently serve a copy of the Petition on any [employee]Building Service Employee complainants.

(b) *Delivery of Complaint.* Concurrent with service of a Petition, the Department shall deliver copies to the [Respondent]Responsible Party of any [employee]Building Service Employee complaints concerning the [Respondent's]Responsible Party'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]Responsible Party's history of compliance with the Prevailing Wage Law, (5) the size of the [Covered Employer]Responsible Party, (6) the good faith of the [Covered Employer]Responsible Party, (7) the [Covered Employer's]Responsible Party's compliance with record-keeping and notice requirements, and (8) any other factors relevant to achieving a fair and reasonable settlement. Prior to settling any complaint, the Department shall provide each complainant with notice of the proposed 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] of paragraph 7 of subdivision d of the Prevailing Wage Law.

(c) *Complainants.* The Department may settle a complaint or Case with a [Covered Employer]Responsible Party 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, but such dismissal shall not preclude a complainant from commencing a civil action.

(d) *Private Settlements.* A complainant and a [Covered Employer]Responsible Party 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]Responsible Party of the Prevailing Wage Law, or (2) the City or City Economic Development Entity from enforcing its remedies under any agreement or [lease]Lease with the [Covered Employer]Responsible Party.

§ 9-23 Order and Determination.

(a) *Decision on the Record.* Notwithstanding any provision to the contrary in [Section]section 1-51.1 [of Chapter 1] of [Title]title 48 of the Rules of the City of New York, Administrative Law Judges shall issue a recommended decision on the record in all Cases. The Department will review this recommended decision and issue a written decision in accordance with section 6-02 of title 6 of the Rules of the City of New York. Provided that no party has commenced a challenge to the Department's final 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 Department's final decision shall constitute an "order" for purposes of this chapter and [section]paragraph 7 of subdivision d of the Prevailing Wage Law.

(b) *Judicial Challenge.* If a party commences a timely challenge to [a]the Department's final 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]paragraph 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]Responsible Party 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]Responsible Party.

§ 9-24 Calculation of Back Wages.

[If] For purposes of section 9-23(a), if a [Covered Employer]Responsible Party has failed to maintain original Payroll Records as required by the Prevailing Wage Law, an Administrative Law Judge may [determine] assess 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]Responsible Party.

§ 9-25 Private Right of Action.

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

§ 9-26 Other Appropriate Relief.

For purposes of [section]paragraph 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]Responsible Party, 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.

**DIVISION OF LEGAL COUNSEL
100 CHURCH STREET
NEW YORK, NY 10007
212-356-4028**

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

RULE TITLE: Application of Prevailing Wage and Protected Wage Requirements to Building Service Workers at City Development Projects

REFERENCE NUMBER: 2021 RG 041

RULEMAKING AGENCY: Department of Consumer and Worker Protection

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
Acting Corporation Counsel

Date: June 23, 2021

**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: Application of Prevailing Wage and Protected Wage Requirements to Building Service Workers at City Development Projects

REFERENCE NUMBER: DCWP-4

RULEMAKING AGENCY: Department of Consumer and Worker Protection

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

June 24, 2021
Date