



Prevailing Wage *News*



NEW YORK CITY COMPTROLLER
JOHN C. LIU

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New York, NY 10007

COMPTROLLER COLLECTS OVER \$10.5 MILLION FOR WORKERS

During Comptroller Liu's first two years in office, the Bureau of Labor Law collected from contractors more than \$10.5 million in wages and benefits due to employees who had been cheated out of prevailing wages for work they performed on City projects. The \$10.5 million is by far the most levied for workers by any Comptroller during a two-year period.

"I am pleased that my office has helped hundreds of workers recover wages owed to them by municipal contractors who failed to comply with the law," Liu said. "Our prevailing wage laws are important to taxpayers who want high quality construction work done safely. They are critical to workers who deserve to make a decent living and work in safe conditions. They are important to honest businesses who want to compete fairly for government contracts."

The Comptroller's Bureau of Labor Law also collected \$526,738 in penalty money from law-breaking contractors for the City treasury in 2010 and 2011. Liu has also debarred 12 contractors from doing business with the City as a result of labor law violations.

Comptroller Liu said: *"Although I am very proud of the accomplishments of my Bureau of Labor Law, it has never been my goal to try and collect the most money ever from companies who underpaid their employees. But we do want to send a message to dishonest municipal contractors that the price for cheating your workers is high and that you will be caught. Toward this end, we are also expanding our efforts to educate City agencies and contractors about the labor law in order to make sure they understand the law's requirements*

and curb the abuses that we've seen." The Comptroller sponsored numerous prevailing wage seminars in 2011 for city officials and contractors. Government agencies such as the New York City Department of Education and private entities such as Con Edison and the General Contractors Association of New York have all sponsored the Comptroller's labor law workshops. This year, the Comptroller's office is also continuing its efforts to educate workers, including immigrant workers, about prevailing wages. The goal is to ensure that both immigrant and native-born workers receive their lawful wages and benefits when employed on government projects.

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The New York City Comptroller enforces State laws that require private sector companies to pay their employees prevailing wages and benefits when they work on contracts with the City to provide construction or building services. The New York State Department of Labor enforces these same laws on state contracts and all other contracts outside the five boroughs. The Comptroller also enforces New York City's living wage law.

COMPTROLLER LIU CELEBRATES 40th ANNIVERSARY OF THE PREVAILING WAGE COUNCIL

In 1971, when Abe Beame was Comptroller, the late IBEW Local 3 Business Manager Harry Van Arsdale Jr., Stanley Smith, and the late Lee Schrage of the Association of Electrical Contractors founded New York City's Prevailing Wage Council (PWC). Every Comptroller since that time has hosted

this organization's meetings. The PWC is a group of labor leaders (mostly from the building trades), contractor association directors, City agency prevailing wage investigators, state/federal government representatives, and law enforcement officials, who all have an interest in the enforcement of the labor laws.

continued on page 3

INSIDE...

▶ **Comptroller Liu Collects \$1.2 Million from HPD Contractor for Cheated Immigrants**

▶ **First Department Upholds Comptroller's Wage Determination**

▶ **Mayor Moves to Remove Prevailing Wage Protections from City Workers**

COMPTROLLER LIU COLLECTS \$1.2 MILLION FROM HPD CONTRACTOR FOR CHEATED IMMIGRANTS

Firm Barred from Government Work

In February, Comptroller Liu's Bureau of Labor Law entered into a \$1.2 million settlement on behalf of workers who were cheated out of wages and benefits for work at City sites. The Comptroller also barred the contractor, Mascon Restoration, and its principal owner from bidding on or receiving any public works contracts for five years.

Some of the Mascon workers have yet to file claims for their unpaid wages possibly because they were told that the Comptroller's labor law investigators were immigration agents. Comptroller Liu is encouraging these workers to call the Bureau of Labor Law at (212) 669-4443. In 2007, a New York State Supreme Court judge ruled that workers are entitled to prevailing wage protection when employed on public construction projects regardless of their immigration status.

The Mascon case involved contracts between the NYC Department of Housing Preservation and Development (HPD) and three construction management firms that were hired to renovate HPD buildings in Harlem. These firms in turn hired Mascon to perform demolition, carpentry, masonry, and iron work. Mascon underpaid its employees on these City-funded projects. Mascon and the construction management firms – Promanagement Associates, Delcor Associates, and JF Contracting – have now paid a total of \$1,178,323 to the Comptroller's office for the wage violations. Of that amount, \$107,120 is payment to the City's general fund as a civil penalty.

The case began when investigators from the Comptroller's office visited various HPD construction projects in 2007 after receiving information on possible prevailing wage violations from the Carpenters, Mason Tenders, and other unions. After uncovering evidence of underpayments, they conducted sweeps of other HPD buildings in 2008 – along with investigators from the New York State Department of Labor and the Workers Compensation Board who were part of the Governor's Joint Enforcement Task Force on Employee Misclassification. Investigators concluded that most of Mascon's workforce on these contracts consisted of immigrant workers who were not being paid the prevailing wage. Eventually, three employees filed verified complaints with the Comptroller. With assistance from HPD officials, the Comptroller's Bureau of Labor Law sorted through agency inspection reports, documents from workers and voluminous other evidence to move the case forward.



Comptroller Liu looks on as one of the immigrant workers talks about the situation at the Mascon Restoration construction site.

As part of a separate plea agreement with the New York County District Attorney's Office, Mascon agreed to plead guilty to one count of Offering a False Instrument for Filing in the First Degree in violation of Penal Law 177.35, a class E felony. Mascon will also pay \$243,880 to the New York State Department of Labor relating to its underpayment of unemployment insurance and \$75,000 to the District Attorney's Office in lieu of fine, forfeiture, and for the cost of investigation and prosecution.

Comptroller Escheats \$366K in Unclaimed Labor Law Funds to the City Treasury

Money Also Goes to 11 Lost Workers

Last year, Comptroller Liu placed advertisements in newspapers to notify missing workers of unclaimed prevailing wage awards. Eleven construction workers who responded to the ads were surprised to learn that the Comptroller had money in escrow for them – a total of \$55,634.92. These workers had filed prevailing wage claims with the Bureau of Labor Law but had moved with no forwarding address and had lost touch with the Bureau. Meanwhile, the Bureau had resolved their cases and collected the funds from the contractors that underpaid them.

The Comptroller also returned \$366,760.10 to the City of New York from this escheat. Unclaimed labor law funds not paid to workers may go back to the City treasury after six years.

First Department Upholds Comptroller's Wage Determination

Last month, an Appellate Court unanimously upheld Comptroller Liu's Order and Determination that required the City of New York to pay City-employed Laborers wages and benefits commensurate with those of the Mason Tenders affiliated with Laborers Local 79. In its decision, the court said: "The Comptroller's findings that mason tenders in Local 79 perform comparable duties to laborers and City laborers is supported by substantial evidence. The Comptroller conducted a thorough investigation that included a comparison of the civil service job specification and collective bargaining

agreements, a survey of private sector interviewees, discussions with management, and four site visits..."

After receiving a petition from DC 37, the Comptroller's Bureau of Labor Law convened a ten-day fact finding hearing at the Office of Trials and Hearings (OATH) in 2009. DC 37 initially took the position that its members should be paid the same rates as laborers represented by Local 1018 of the Pavers & Road Builders District Council – a higher paid trade than the Local 79 Mason Tenders. The Mayor's Office of Labor Relations (OLR) argued

that the appropriate match was the Porters, represented by SEIU Local 32B/J, whose rates were less than both Local 79's and the City employees. At the end of the hearing process, the OATH judge issued a report and recommendation in 2010 agreeing with the Comptroller's position that these workers should be paid comparable to the Mason Tenders. Represented by the New York City Law Department, the Mayor's Office of Labor Relations (OLR) then pursued its unsuccessful appeal to the Appellate Division, delaying further resolution of this ten-year bargaining dispute.



Parks Contractor Pays \$135K and Takes a Willful Violation

In 2010, investigators from the New York City Department of Parks & Recreation (DPR) found discrepancies in records submitted to the agency by S.M. Construction Company. This contractor was performing work in Van Cortlandt Park and DeVoe Park in the Bronx. DPR officials and the Comptroller's labor law investigators then interviewed workers on the projects and both agencies pored over the contractor's records. The DPR performed a comprehensive audit and determined that the seventeen workers had been underpaid. When the DPR was unable to fully resolve the case directly with the contractor, it turned the matter over to the Bureau of Labor Law. The Bureau conducted an investigation and negotiated a settlement with S.M. to pay \$135,171 in full restitution to its employees and the City of New York. In the settlement, S.M. acknowledged that it willfully violated the labor law; if it receives a second willful violation within the next six years, S.M. will be debarred from public works contracting for five years. The firm also can no longer work on any DPR projects pursuant to a non-responsibility determination by the agency.

Comptroller Liu Celebrates 40th Anniversary of the Prevailing Wage Council

continued from front page

At the fourth Prevailing Wage Council meeting of his administration in November 2011, Comptroller Liu celebrated the 40th Anniversary of the PWC by presenting a commendation to co-founder Stan Smith. Even after 40 years, Mr. Smith rarely misses a meeting and his participation in the PWC is always appreciated.

The guest speaker at this meeting was Chairman of the New York State Assembly Labor Committee Keith Wright. Assemblyman Wright recognized the great partnership represented at the PWC between organized labor, management, agency officials who are charged with monitoring wage standards, and law enforcement officials who prosecute the most egregious violators of the labor law. He also commended Comptroller Liu for sending a strong message to the contracting community that they must play by the rules. The Assemblyman then spoke about some of the important bills that the legislature has enacted such as the Construction Industry Fair Play Act, which made construction companies subject to additional criminal and civil penalties if they pay employees off the books or willfully misclassify employees as independent contractors in order to underpay them or dodge taxes. He also spoke about his support for diversity in the construction industry, the need for a robust capital program, and his commitment to passage of additional legislation to strengthen the labor laws in 2012.

MAYOR MOVES TO REMOVE PREVAILING WAGE PROTECTIONS FROM CITY WORKERS

For over 100 years, New York State Labor Law 220 allowed certain "prevailing wage" titles to petition the Comptroller's office to determine their wages and supplements if the civil service unions representing these municipal employees were unable to come to an agreement with the City through good faith negotiations. To do this, the Bureau of Labor Law would typically convene a hearing at OATH (Office of Administrative Trials & Hearing) before a judge where all parties could provide testimony and evidence. The OATH judge would then issue a report and recommendation which could be adopted, rejected, or modified by the Comptroller as a final determination.

On April 11, 2012, Mayor Bloomberg issued personnel orders that purported to reclassify all City workers in prevailing wage titles and place them in new pay plans with pay ranges for related titles. Their compensation would be decided by collective bargaining alone without the ability to come to the Comptroller for a wage determination should good faith negotiations break down.

"No effort was made to communicate with the workers. They deserve more than that and that's why we back their legal challenge."

— NYC Central Labor Council President Vincent Alvarez

In response to the orders, the Comptroller's general counsel Valerie Budzik said *"State Labor Law provisions authorizing the Comptroller to determine wage rates for City prevailing wage titles have been on the books for over 100 years. Where the parties are unable to reach agreement, it is important to have a carefully prescribed mechanism to resolve the dispute. City Hall cites a figure of over \$600 million in back wages, but that figure is high only because the Comptroller is called upon to resolve wage disputes that have dragged on for years, with back wages piling up. The Comptroller's determinations have been upheld by the appellate courts multiple times."* The Comptroller's Communications Director Peter Thorne said that *"It seems strange that City Hall would sign an Executive Order to oversee collective bargaining with three percent of the workforce, when they have an established a track record of failure with the existing ninety-seven percent of City workers with whom they pledged to negotiate in good faith only to allow their contracts to expire. In fact, right now there are more than two hundred thousand City employees – from firefighters to teachers to police officers - working without a contract. This situation is not good for workers or taxpayers. It is fiscally irresponsible because City Hall's failed efforts threaten to defer billions of dollars of current costs to future City budgets. The current process has been in place for quite some time and actually works, so any move to unilaterally circumvent it will be sure to engender opposition."*

Several unions have filed court challenges contesting the legality of the Mayor's personnel orders. Stating that civil service law notice provisions may have been violated, State Supreme Court Justice Manuel Mendez on May 4, 2012 signed an order temporarily enjoining the City from implementing its reclassification plan pending the outcome of the lawsuits. New York City Central Labor Council President Vincent Alvarez said: *"The Executive order was done without public discussion and behind closed doors. No effort was made to communicate with the workers. They deserve more than that and that's why we back their legal challenge."*





COMPTROLLER PRESSES CAMPAIGN TO STAMP-OUT CONSTRUCTION FRAUD

Comptroller Liu has put on a full-court press to eliminate fraud in municipal government construction contracting, including schemes to cheat workers out of prevailing wages. In 2011, the Comptroller directed his staff to revise and update his Internal Control and Accountability Directive #7 for the first time since 1995. This Directive provides agency Engineer Audit Officers (EAO's) with specific guidelines for independently pre-auditing payment requests for construction and construction-related service contracts. EAO's have the responsibility of insuring, prior to payment, that the City has received appropriate value under these contracts. As part of this revised Directive, EAO's must follow certain audit procedures to ensure contractor compliance with prevailing wage requirements and are empowered to withhold progress payments from firms that appear to be violating the labor law. A copy of the Directive can be found in the Bureau of Accountancy's section of the Comptroller's website, www.comptroller.nyc.gov.

Last summer, the Comptroller sent out a memorandum to all agency heads with a copy of new Directive #7. As a follow up, the Comptroller's Bureau of Engineering then partnered with Ernst & Young to convene a seminar on Construction Fraud for EAO's with a comprehensive overview of the changes to Directive #7. And in January, Comptroller Liu spoke to 400 City auditors and investigators at his Joint Fraud Conference entitled *Procurement & Construction Fraud in the Government Environment* at One Police Plaza. The conference featured educational workshops on prevailing wage theft presented by the MTA Inspector General and many other speakers on improving fiscal controls and construction fraud detection. It was co-sponsored by New York State Comptroller Tom DiNapoli and the New York Chapter of the Association of Certified Fraud Examiners.

S.A. HVAC Makes \$204K in Restitution

The New York City Department of Design & Construction (DDC) contracted with LIRO Program and Construction Management to perform construction management services for DDC's Fire Department portfolio including rehabilitation projects at two Brooklyn engine companies. LIRO hired S.A. HVAC to perform necessary heating, ventilation and air conditioning work at these FDNY facilities in 2008. Labor Law investigators visited one of the firehouses after Heat & Frost Insulators Local 12 officials stated that that workers were being underpaid. The Bureau opened a case and eventually determined that S.A. HVAC misclassified and underpaid four steamfitters and mason tenders on this job. To resolve the case, both firms entered into a stipulation with the Comptroller to make restitution to the workers and the City of New York in the amount of \$204,604. As part of the settlement, S.A. HVAC accepted a willful violation of the labor law. If this employer receives a second such violation within the next six years, it will be debarred from public works contracting for five years.

Prevailing Wage Violator Starts Two-Year Prison Term

On March 2 2012, the owner of Start Elevator was sentenced in Manhattan federal court to two years in prison for his participation in a scheme to cheat workers out of federal prevailing wages at his company. John O'Shea underpaid his employees on federally funded New York City Housing Authority projects subject to the Davis Bacon Act by more than \$1.1 million and submitted fraudulent certified payroll records to cover up his wrongdoing. Investigators from the Housing Authority and the New York City Department of Investigation brought this case to the United States Attorney for the Southern District of New York for prosecution.

In a separate 2008 stipulation of settlement with the New York City Comptroller's office, Start Elevator agreed not to bid on or be awarded any City or State public works contract for five years. That case involved the firm's subcontract to replace elevators in the MTA's West 4th Street subway station.

Sanitation Cleaning Company Debarred

El Trebol Special Cleaning Services and its president, Oliver Holguin, have entered into a stipulation of settlement with the Comptroller whereby the company admitted that it failed to pay the prevailing rate of wages and benefits to two cleaners it employed on contracts with the Department of Sanitation (DOS) and concealed the underpayment in payroll records it submitted to DOS. The firm accepted a debarment as part of the settlement and agreed to pay \$31,388 to its employees and a \$3,138 civil penalty to the City of New York. El Trebol cleaned several DOS facilities from 2009 to 2011.

Court Agrees with Comptroller that Some Repair Work Not Subject to Prevailing Wages

Acme American Repairs AKA Acme Refrigeration Inc., a union contractor, lost a bid on a Department of Education (DOE) contract to repair stoves and other removable kitchen equipment in public school cafeterias. The company contended that the bid solicitation should have contained a prevailing wage schedule and that other bidders should have submitted bids based on wage rates in this schedule. The DOE and the Comptroller disagreed with the contractor and jointly took the position that repair of these types of appliances within a City-owned building does not constitute "public work" within the meaning of Labor Law 220. Acme filed an Article 78 petition with the State Supreme Court contesting this determination. Acme asserted that that the Comptroller should not register the DOE contract and that the work should be re-bid in accordance with Labor Law 220. After hearing the case, Judge Stallman dismissed Acme's petition on the ground of timeliness, but explicitly stated that he had no reason to question the Office of the Comptroller's long-standing interpretation of the labor law that such work is not subject to prevailing wage.