

# Rules of the City of New York

## Title 44. Comptroller.

### Chapter 2. Comptroller's Prevailing Wage Law Regulations.

#### §2-01. Applicability.

These regulations apply to Comptroller investigations, determinations, hearings, reports and recommendations, and orders under New York state labor law articles eight and nine and New York city administrative code section 19-142; Comptroller investigations, determinations, hearings and reports and recommendations made to the New York city department of housing preservation and development under New York state real property tax law sections 421-a (8), (16)(h) and (17)(g); and Comptroller investigations, determinations, hearings and reports and recommendations made to city agencies under the prevailing wage provisions of New York city administrative code section 6-109.

#### §2-02. Definitions.

As used in this chapter, the following terms have the following meanings. Capitalized terms that are not specifically defined in this chapter have the meanings set forth in the laws designated in section 2-01.

**Bona Fide Fringe Benefit.** "Bona Fide Fringe Benefit" means any payment made by a Covered Employer, other than wages, that directly benefits a Covered Worker, including but not limited to paid vacation or sick leave, medical or dental insurance, retirement accounts or annuities and apprenticeship training.

**Bureau.** "Bureau" means the comptroller's bureau of labor law.

**Certified Payroll Report.** "Certified Payroll Report" means a weekly payroll record in the form provided on the comptroller's website.

**Complaining Worker.** "Complaining Worker" means a worker who has filed a written complaint for the underpayment of Prevailing Wages and Supplements with the Bureau.

**Comptroller.** "Comptroller" means the city of New York comptroller or the comptroller's designee.

**Covered Employer.** "Covered Employer" means any person or entity subject to liability for Prevailing Wages and/or Supplements under labor law articles eight or nine on public works projects or building service contracts for the city of New York by and through its agencies or public benefit corporations; or under real property tax law sections 421-a (8), (16)(h), or 17(g); or New York city administrative code sections 6-109 or 19-142.

**Covered Work.** "Covered Work" means any work that is subject to the requirements of articles eight or nine of the labor law on public works projects or building service contracts for the city of New York by and through its agencies or public benefit corporations; or subject to the requirements of real property tax law sections 421-a (8), (16)(h) or (17)(g); or New York city administrative code sections 6-109 or 19-142. "Covered Work" does not include purely supervisory work, or work that is not performed on or about the site of the project, contract or building in question.

**Covered Worker.** "Covered Worker" means any person who performs Covered Work.

**Daily Sign-In Log.** "Daily Sign-In Log" means a daily attendance record in the form provided on the comptroller's website.

**Document.** "Document" means records in any form or electronically stored information, including writings, graphs, charts and other data or data compilations stored in any medium.

**Prevailing Wage and/or Supplement.** "Prevailing Wage and Supplement" or "Prevailing Wage" or "Prevailing Supplement" mean Prevailing Wages and/or Supplements as defined in labor law articles eight and nine; real property tax law sections 421-a (8), (16)(h) or (17)(g); and New York city administrative code sections 6-109(a) and 19-142.

**Worker Notice Poster.** "Worker Notice Poster" means a notice in the form provided on the comptroller's website detailing the Prevailing Wages and Supplements due for Covered Work performed on a particular project, contract or building.

## **§2-03. Annual Prevailing Wage and Supplement determinations.**

- (a) **Prevailing Wage Schedules.** On June 1 of each year, the Bureau preliminarily determines and publishes Prevailing Wage and Supplement rates for each trade classification. The Bureau then considers any comments from interested persons asserting errors or omissions in the preliminary Prevailing Wage and Supplement rates if such comments are submitted in writing on or before June 15 of the same year. On July 1 of each year, the Bureau determines and publishes the Prevailing Wage and Supplement rates for each trade classification effective from the date of publication until June 30 of the following year. In January of each year, the Bureau may publish updated Prevailing Wage and Supplement rates for each trade classification, without a comment period, effective from the date of publication until June 30 of the same year.
- (b) **Standard for Prevailing Wage and Supplement Rates.**
- (1) The Prevailing Wage and Supplement rates for each trade classification are based upon the rate of wage paid and supplements provided by virtue of a collective bargaining agreement between a bona fide labor organization and employers of the private sector performing public or private work, provided the employers party to the agreement employ at least 30 percent of the workers in the same trade or occupation in the city of New York. If it is determined that less than 30 percent of the workers in a particular trade or occupation in the city of New York receive a collectively bargained rate of wage and supplements, then the average wage paid and supplements provided to such workers in the same trade or occupation in the city of New York during the prior year is the Prevailing Wage and Supplement rate.
  - (2) For all Prevailing Wage and Supplement rates other than those governed by labor law article eight, the Bureau considers: (i) wage and fringe benefit data from the Occupational Employment Statistics survey and the National Compensation survey; (ii) classification data from the Standard Occupational Classification System and the North American Industry Classification System; as well as (iii) any other competent evidence submitted by an interested person before the Bureau adopts rates from a collective bargaining agreement.
- (c) **Challenges to Prevailing Wage and Supplement Determinations.** An interested person that seeks to challenge an annual determination of Prevailing Wage and Supplement rates by the Bureau for a trade classification must request a redetermination by the Bureau for that trade

classification in writing on or before March 1 in order for the redetermination to be effective on July 1 of that year. The request for redetermination must include competent evidence that the Bureau's prior annual determination of Prevailing Wage and Supplement rates for that trade classification was erroneous in accordance with the standard set forth in section 2-03(b).

**(d) Inability to Determine or Invalidity of Prevailing Wage or Supplement Rates.** If the Bureau is unable to determine or update the Prevailing Wage or Supplement rates for a trade classification in time for publication in any schedule, for any reason, such as the failure to obtain information concerning collective bargaining agreements, or if the Prevailing Wage or Supplement rates for any trade classification in any schedule are declared invalid by a court of competent jurisdiction, then the last valid Prevailing Wage or Supplement rate determination for that trade classification remains the Prevailing Wage and Supplement rate for that schedule.

## **§2-04. Prevailing Wage and Supplement requirements and recordkeeping.**

**(a) Applicable rates.** The Prevailing Wage and Supplement rates that are required for Covered Work are the rates that are published and effective as set forth in section 2-03(a) at the time that the Covered Work is performed.

### **(b) Prevailing Supplement rates.**

(1) The obligation to pay Prevailing Supplements may be discharged by either the provision of (i) Bona Fide Fringe Benefits that cost no less than the Prevailing Supplement rate, (ii) a supplement to the hourly wage in an amount no less than the Prevailing Supplement rate, or (iii) a combination of Bona Fide Fringe Benefits and wage supplements that, collectively, costs no less than the Prevailing Supplement rate.

(2) The obligation to pay Prevailing Wages cannot be reduced or discharged through the provision of Bona Fide Fringe Benefits that cost more than the Prevailing Supplement rate.

(3) The hourly cost of a Bona Fide Fringe Benefit provided by a Covered Employer to a Covered Worker under section 2-04(b)(1) must be determined by dividing the total annual cost or contribution for providing such Bona Fide Fringe Benefit by the total annual hours of Covered Work and all other work performed by that Covered Worker for that Covered Employer. However, a Covered Employer that provides an hourly contribution for each hour of Covered Work to an individual account for a Covered Worker is credited for such hourly contribution.

### **(c) Required records.**

(1) Covered Employers must maintain Documents consisting of the following records for six years after Covered Work is performed, must preserve the records immediately when notified by the Bureau of a compliance investigation, and must produce true copies of all such records within the time requested by the Bureau after notice of the right to counsel described in section 2-05(f):

- i) Contracts and subcontracts for Covered Work;
- ii) Certified Payroll Reports for Covered Work;
- iii) Daily Sign-In Logs for Covered Work;
- iv) Weekly payroll records, registers or journals required by labor law section 195;

- v) All Documents and records concerning the cost of Bona Fide Fringe Benefits provided to Covered Workers, including but not limited to invoices, account statements, benefits remittance reports and benefits plan descriptions; and
- vi) All federal and state employment tax returns and filings, including but not limited to quarterly combined withholding, wage reporting, and unemployment insurance form NYS-45 returns; employers' quarterly federal tax form 941 returns; wage and tax form W-2 statements; and miscellaneous income form 1099 statements.

(2) Each Covered Employer must maintain one weekly Certified Payroll Report for each project, contract or building on which it performs Covered Work. The Certified Payroll Report must set forth the names, addresses and trade classifications for all Covered Workers employed by the Covered Employer on the project, contract or building, as well as the hours and days of Covered Work, the hourly wage and supplement rates, and the weekly gross and net pay amounts for each Covered Worker. The Certified Payroll Report must be signed and affirmed to be true under penalties of perjury by an officer or principal of the Covered Employer.

(3) Each Covered Employer must maintain one Daily Sign-In Log for each project, contract or building on which it performs Covered Work. The Daily Sign-In Log must set forth the names, trade classifications, daily start and end times of Covered Work for, and must be signed by, each Covered Worker employed by the Covered Employer on the project, contract or building.

(4) Each Covered Employer must post a Worker Notice Poster in a prominent and accessible place at each project, contract or building on which it performs Covered Work. The Worker Notice Poster must set forth the Prevailing Wages and Supplements due for the Covered Work performed on that project, contract or building.

## **§2-05. Compliance investigations, compliance determinations, settlements, interest and penalties.**

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(a) The Bureau investigates and determines underpayments of Prevailing Wages and Supplements by Covered Employers under labor law articles eight and nine, real property tax law sections 421-a (8), (16)(h), and (17)(g) and New York city administrative code section 19-142 for Covered Work performed within the two-year period immediately preceding the earlier of: (i) the commencement of the compliance investigation by the Bureau, or (ii) the filing of a written complaint by a Covered Worker with the Bureau or the New York State Department of Labor.

(b) The Bureau investigates and determines underpayments of Prevailing Wages and Supplements by Covered Employers under New York city administrative code section 6-109 for Covered Work performed within the three-year period immediately preceding the earlier of: (i) the commencement of the compliance investigation by the Bureau, or (ii) the filing of a written complaint with the Bureau by a Covered Worker, the representative of a Covered Worker or a labor union with an interest in the Covered Work at issue. Compliance investigations concerning underpayment of Prevailing Wages and Supplements for Building Service Employees that are also covered by labor law article nine are governed by the provisions of section 2-05(a).

(c) The Bureau may decline to investigate and determine underpayments of Prevailing Wages and/or Supplements if the Complaining Worker or the Complaining Worker's representative has participated in any other legal proceeding to recover the same unpaid Prevailing Wages and/or Supplements that are the subject of the complaint.

(d) A private settlement between a Covered Worker and a Covered Employer, or the execution of a release by a Covered Worker in favor of a Covered Employer, does not preclude investigation and determination as to underpayment of Prevailing Wages and/or Supplements by the Bureau.

(e) The Bureau does not disclose the names or identities of Complaining Workers unless necessary for settlement or hearing.

(f) Covered Employers under investigation by the Bureau have the right to be represented by counsel at their own expense. Covered Employers are notified of the right to counsel at the commencement of a compliance investigation in which records, described in sections 2-04(c), 2-05 and 2-06 may be demanded. Counsel must file a written notice of appearance with the Bureau. All subsequent notices, Documents or other communications are sent to such counsel and deemed service upon the Covered Employer.

(g) During the compliance investigation, the Covered Employer must provide all relevant information and Documents within the time requested by the Bureau, including but not limited to the records required by section 2-04(c). Upon completion of a compliance investigation with a finding of violation, the Bureau sends a written thirty day notice to the Covered Employer that it will begin calculations of Prevailing Wage and/or Supplement underpayments for a determination. In preparing its determination, the Bureau will not consider any information or Documents requested by the Bureau and not provided by the Covered Employer within thirty days of the written notice.

(h) If a Covered Employer failed to keep or provide to the Bureau in a timely manner accurate records as required by section 2-04(c), the Bureau is permitted to calculate underpayments of Prevailing Wages and/or Supplements due to Covered Workers by using the best available evidence and the burden shifts to the Covered Employer to negate the reasonableness of the Bureau's calculations. In such case, the amount and extent of underpayment is a matter of reasonable inference and may be based upon the statements of Covered Workers.

(i) The Bureau may resolve a compliance determination by stipulation of settlement with a Covered Employer, which includes: (i) findings and assessments as to the underpayment of Prevailing Wages and/or Supplements, (ii) findings as to the willfulness of the violation, (iii) assessments of interest and, (iv) in cases brought under labor law articles eight and nine and New York city administrative code sections 6-109 and 19-142 only, assessment of a civil penalty.

(j) Stipulations of settlement resolving compliance determinations under labor law articles eight and nine and New York city administrative code section 19-142 are endorsed by the Comptroller and have the effect of an order of the Fiscal Officer under those laws. Stipulations of settlement resolving compliance investigations under real property tax law sections 421-a (8), (16)(h) and (17)(g) must be endorsed by the New York city department of housing preservation and development in order to have final effect under that statute. Stipulations of settlement resolving compliance investigations under New York city administrative code section 6-109 must be endorsed by the contracting agency in order to have final effect under that statute.

(k) Interest.

(1) The Bureau assesses interest due on the underpayment of Prevailing Wages and/or Supplements from the date of underpayment, and such interest cannot be waived by stipulation of settlement.

(2) Upon resolution of a compliance determination by stipulation of settlement, the Bureau may reduce the rate of interest on the underpayment of Prevailing Wages and/or

Supplements from the rate of interest then in effect as prescribed by the superintendent of banks under section fourteen-a of the banking law per annum to a rate of interest not less than six percent, based upon due consideration of the size of the Covered Employer's business, the good faith of the Covered Employer, the gravity of the violation, the history of previous violations and the failure to comply with recordkeeping or other non-wage requirements.

(l) Civil Penalty.

(1) In cases brought under labor law articles eight and nine and New York city administrative code sections 6-109 and 19-142, the Bureau assesses any civil penalty in accordance with the criteria set forth in labor law sections 220(8), 220-b (2)(d) and 235(5)(b) and New York city administrative code section 6-109(e)(1)(a).

(2) The Bureau may waive the civil penalty for a Covered Employer entering into a stipulation of settlement for underpayments of Prevailing Wages and/or Supplements by its subcontractor where there is uncontroverted evidence of all of the following:

- (i) the Covered Employer or its agent provided the subcontractor with the applicable Prevailing Wage and Supplement schedule for the project or contract;
- (ii) the Covered Employer made a good faith effort to ensure that the subcontractor complied with all Prevailing Wage and Supplement requirements, including but not limited to requesting and reviewing Certified Payroll Reports;
- (iii) the subcontractor cannot be located, despite the Covered Employer having made a good faith attempt to locate said subcontractor, or the subcontractor has filed for bankruptcy protection, or the subcontractor is no longer in business;
- (iv) the Covered Employer has paid the subcontractor in full in accordance with the terms of its subcontract agreement;
- (v) the Covered Employer has fully cooperated, in a timely manner, with the Bureau's compliance investigation; and
- (vi) in all likelihood, the Covered Employer will be unable to receive indemnification from the for the restitution the Covered Employer has paid.

(m) The Bureau sends written notice to a Complaining Worker or the Complaining Worker's representative upon closure of a compliance investigation without a finding of violation. This notice of a final determination, binding on the Complaining Worker, commences any applicable time limits under article 78 of the New York state civil practice law and rules. If the Covered Employer under investigation has been notified of a compliance investigation, the Bureau sends written notice of closure without a finding of violation to the Covered Employer.

## **§2-06. Hearings, reports and recommendations and orders.**

**(a) Designation.** All hearings required by New York labor law articles eight and nine; real property tax law sections 421-a (8), (16)(h) and (17)(g); and New York city administrative code sections 6-109 and 19-142 are held by the office of administrative trials and hearings trials division.

**(b) Discovery.** Each party must provide to all other parties, no later than ten business days before trial: (i) the names of all witnesses the party expects to present at trial, (ii) copies of all Documents or other exhibits the party expects to introduce at trial, (iii) copies of all Documents provided by each Complaining Worker and (iv) copies of all statements, in any form, provided by each Covered Employer that is a party to the hearing.

**(c) Preclusion.**

(1) Failure of a Covered Employer to provide any information or Document requested by the Bureau in a timely manner as set forth in section 2-05(g) and (h) may be grounds for preclusion of that Document or drawing of an adverse inference at the trial upon motion to the administrative law judge.

(2) No party may seek to introduce any testimonial, documentary or other evidence concerning the immigration status of Covered Workers at the trial, including but not limited to information about their social security or individual taxpayer identification numbers, except upon motion to the administrative law judge for good cause shown.

**(d) Report and recommendation.**

(1) Within a reasonable time after the conclusion of the hearing, the administrative law judge issues a written report, including proposed findings of fact and conclusions of law, and recommendation as to the order.

(2) In cases brought under labor law articles eight and nine and New York city administrative code section 19-142, the administrative law judge forwards the report and recommendation to the Comptroller for consideration and the Comptroller issues an order.

(3) In cases brought under real property tax law sections 421-a (8), (16)(h), and (17)(g), the administrative law judge forwards the report and recommendation to the New York city department of housing preservation and development for consideration and that agency issues an order.

(4) In cases brought under New York city administrative code section 6-109, the administrative law judge forwards the report and recommendation to the contracting agency for consideration, and the contracting agency issues an order.

**(e) Order.**

(1) In cases brought under labor law articles eight and nine and New York city administrative code section 19-142, the Comptroller may, on his or her own initiative or on application duly made, on notice to all parties: (i) request further information or briefing on any relevant issue or (ii) provide copies of any recalculation of Prevailing Wages and Supplements underpayment, interest and civil penalty, and request comments from the parties to the hearing before issuing an order. Such request and any responses are part of the record.

(2) In cases brought under labor law articles eight and nine and New York city administrative code section 19-142, the Comptroller may adopt, reject or modify the administrative law judge's report and recommendation when issuing an order; such order is to be based exclusively upon the record as a whole, including facts of which official notice has been taken.

(3) The Bureau files the order of the Comptroller and serves a notice of filing, with copy of the order, on every party.