

Dereliction of Duty:

Who Enforces the Prevailing Wage Laws In New York City,
Who Doesn't, and Why Does it Matter?

By

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Foreword

This report has been prepared by Dr. Moshe Adler, a member of the part-time faculty of The Harry Van Arsdale Jr. Center for Labor Studies, in conjunction with the center's growing program of research and publication on labor issues.

"Dereliction of Duty" is a particularly important contribution to this program for it documents, clearly and convincingly, how the prevailing wage laws, which are important policy instruments intended to help ensure that everyone shares equitably in the economy's bountiful harvest, are systematically neglected and ignored, if not actively opposed, by those responsible for their enforcement.

The Van Arsdale Center provides trade unionists with an opportunity to pursue a college-level course of study, and to earn a degree, in an environment that celebrates their historic achievements and acknowledges their distinctive needs.

This past year, Van Arsdale Center faculty and students have completed significant studies of safety and health issues facing apprentices and mechanics, oral histories of working lives and struggles, a fact book of the construction industry, and a collection of essays by, about, and for electrical apprentices.

For more information about these and other programs at the center, please contact us.

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1. Background

The construction industry accounts for 5.5 percent of the total Gross Domestic Product (GDP) of the US and employs nearly 7 million workers.¹ Nearly one-quarter (24 percent) of this output is purchased by governments of all levels, federal, state and local.² As a result, approximately 1.3 million workers in the construction industry, almost one in four, work on construction projects that are purchased directly by government entities.

The government also finances projects that they do not own, such as low-income housing or economic development projects. In 2003 the federal government alone spent \$40 billion on low income housing subsidies, although it is not clear how much of this money was devoted to new construction.³ The proportion of construction workers who work either for the government or on government-financed projects is therefore higher than one in four.

By federal law, workers who work on construction projects that receive US government funds must be paid the “prevailing wage” for their work, defined as the wage that is paid to the majority of workers in their classification on similar projects in the same area and at the same time. (For more on the various exceptions and formulas, see below.) Several states, among them New York, have similar prevailing wage laws that cover the construction industry. Given the high level of government involvement in the construction industry, the prevailing wage laws could play a crucial role in ensuring that construction workers can earn enough to sustain a middle-class standard of living despite

Acknowledgements: The author wishes to thank Ryan Moodie for able research assistance and Ellen Adler and Mike Merrill for important editorial comments and suggestions.

¹ This is based on the data for New York State. See below.

² BEA IO Use table, 2004 (government purchases for consumption and intermediate goods).

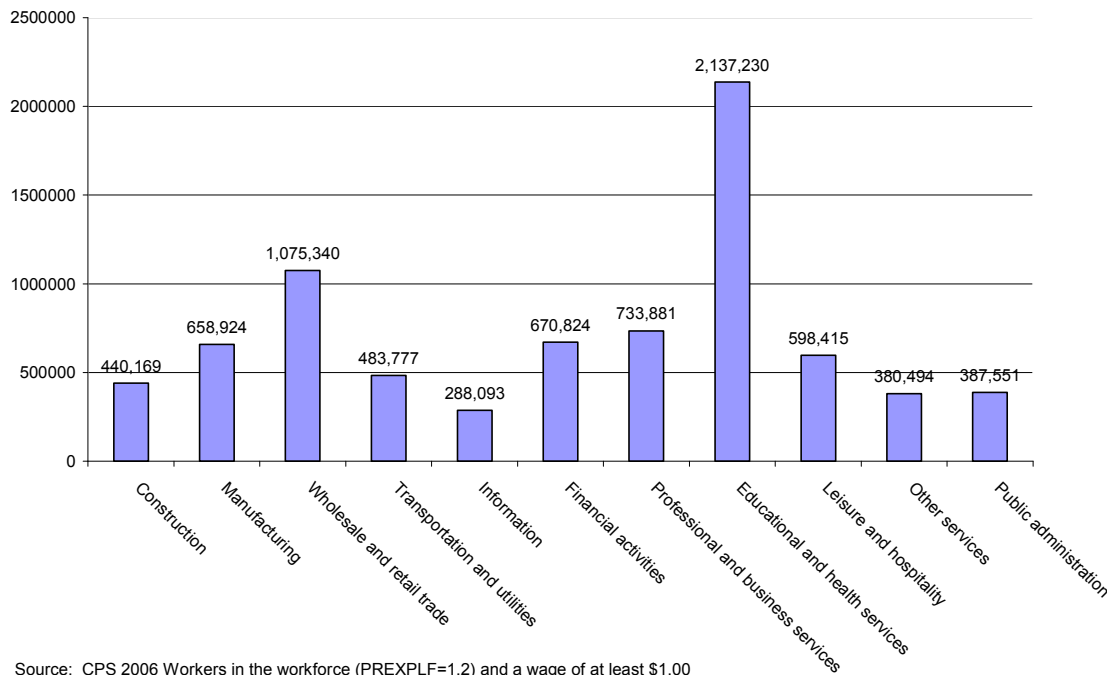
³ <http://www.nlihc.org/pubs/changingpriorities.pdf>, Table 7, BEA IO Use table, 2003. Author’s calculations.

the contingent and irregular nature of their employment. This report concentrates on New York’s prevailing wage and shows that its potential is squandered. In order to achieve its goal, the law needs to be modified and its enforcement strengthened significantly. As it stands the law covers too few workers, and it is practically impossible to know either which workers are covered by it or whether those covered are in fact being paid the wages to which they are legally entitled.

2. The Construction Industry in the New York State Economy

As Figure 1 shows, construction is a significant but a relatively small industry in the state: It employs about 6 percent, or 1 in 18, New Yorkers statewide.

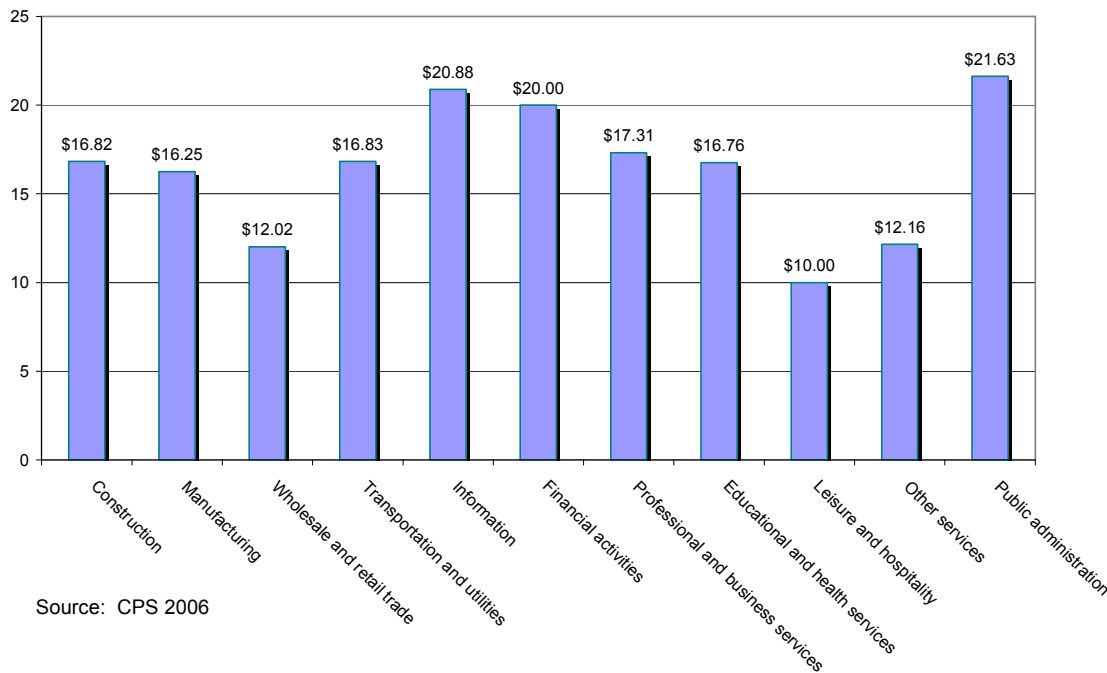
Figure 1: Employment by Industry, New York State, 2006



As Figure 2 below illustrates, construction wages are substantially lower than in information services, financial services, and public administration. Thanks in part to the prevailing wage laws, however, and to the relatively high rate of unionization in the

construction trades, which guarantees enforcement of the laws even if the government cannot, construction wages are comparable to those in manufacturing, transportation and utilities, and in educational and health services. Without these protections, the wages of many construction workers, for whom work is short-term and uncertain, could easily be forced down toward those in the wholesale and retail sector. This is the opposite of the preferable drift of public policy, which ought to helping to raise wages in the low wage sectors rather than lower them in the high wage sectors.

Figure 2: Median Wage by Industry, New York State, 2006



3. The Wages of New York Construction Workers

Information about workers’ wages is available from two sources: from a survey of employers (Occupational Employment Statistics) and from the survey of workers (Current Population Survey) already used earlier in this report. Table 1 reports the wages from both surveys.

As can be seen from the table, employers report paying significantly higher wages than workers report they receive.⁴ For example, according to the employers’ survey, construction laborers are paid a median wage of \$18, while the workers’ survey reports a median wage of only \$13. Employers say they pay carpenters a median wage of \$21, whereas carpenters report a median wage of only \$16. For electricians the respective numbers are \$26 and \$20, for plumbers, \$28 and \$19, and for the average for all construction occupations combined, \$22 and \$17.

Table 1: Wages, Workers and Employers Surveys for Selected Trades

<i>Selected Trades</i>	<u>WORKERS' SURVEY</u>			<u>EMPLOYER'S SURVEY</u>			<i>Percent Difference between Employer and Worker Reported Median</i>
	<i>Number</i>	<i>Mean</i>	<i>Median</i>	<i>Number</i>	<i>Mean</i>	<i>Median</i>	
Construction laborers	70,338	\$ 16.13	\$ 13.16	45,340	\$19.53	\$18.12	38%
Carpenters	59,379	\$ 19.56	\$ 16.00	48,240	\$22.47	\$20.68	29%
Electricians	41,029	\$ 23.45	\$ 20.26	36,790	\$28.38	\$25.70	27%
Pipelayers, plumbers, pipefitters, and steamfitters	28,283	\$ 21.11	\$ 19.23	26,680	\$28.78		18%*
Painters, construction and maintenance	26,533	\$ 18.34	\$ 14.57	12,390	\$20.90	\$19.40	33%
First-line supervisors/managers	25,649	\$ 25.87	\$ 22.76	27,120	\$33.13	\$30.67	35%
Construction and building inspectors (47-4011)	7,201	\$ 20.55	\$ 19.76	5,110	\$23.75	\$23.17	17%
Sheet metal workers	7,671	\$ 19.44	\$ 16.00	6,770	\$26.12	\$25.54	60%
Structural iron and steel workers	6,503	\$ 23.64	\$ 20.00	3,810	\$33.10	\$34.16	71%
Elevator installers and repairers	3,497	\$ 28.45	\$ 25.00	2,790	\$30.19	\$31.12	24%

⁴ For some occupations, such as roofers, the workers report higher wages than the employers do. But these are occupations with relatively few workers and, therefore, few observations in the data sets. The estimated wages for these occupations are therefore not reliable, and we correct for this problem in the rest of the report by grouping the small occupations into “other occupations.”

Operating engineers and other construction equipment operators	15,732	\$ 23.53	\$ 21.07	13,090	\$26.64	\$24.08	14%
Roofers	8,409	\$ 15.89	\$ 15.08	4,400	\$19.16	\$17.05	13%
Glaziers	2,642	\$ 15.51	\$ 18.00	2,700	\$20.06	\$17.98	0%
Hazardous materials removal workers	4,159	\$ 20.55	\$ 17.56	3,840	\$23.83	\$24.75	41%
Reinforcing iron and rebar workers	784	\$ 47.14	\$ 51.43	1,110	\$29.18	\$28.77	-44%
Plasterers and stucco masons	2,723	\$ 19.08	\$ 17.12	1,770	\$25.51	\$24.47	43%
Cement masons, concrete finishers, and terrazzo workers	598	\$ 15.18	\$ 10.54	5,890	\$22.29	\$20.75	97%
Insulation workers	963	\$ 19.02	\$ 22.66	940	\$25.14	\$22.07	-3%
Fence erectors	2,244	\$ 11.71	\$ 12.00	1,320	\$13.64	\$12.62	5%
Highway maintenance workers	6,179	\$ 18.28	\$ 13.66	15,740	\$16.41	\$15.86	16%
Rail-track laying and maintenance equipment operators	924	\$ 20.10	\$ 24.03	720	\$20.69	\$20.70	-14%
Other extraction workers	314	\$ 12.50	\$ 12.50	520	\$18.21	\$16.93	35%
Construction and Extraction Occupations	356,937	\$ 19.82	\$ 16.84	308,170	\$23.90	\$21.86	30%
* Difference of means. Sources: Current Population Survey and Occupational Employment Statistics, 2004-2006, pooled data.							
Note: 2004 and 2005 wages were adjusted to 2006 wages by the wage increase for all construction and extraction occupations, \$2006/\$2004 and \$2006/\$2005 respectively.							

Why are wages higher in the employers' survey? Part of the explanation can be attributed to a difference in perspectives. The workers' survey probably captures more of those who are self-employed. In addition workers and employers may classify occupations differently. A worker may classify herself as a carpenter, for instance, whereas the employer may classify her as a helper or a laborer. Or a worker who sometimes helps a carpenter and at other times helps a painter may classify herself as a "construction laborer," whereas her different two employers would classify her as a "carpenter helper" and a "painter helper" respectively.

Such differences in perspective partly explain why employers report a smaller number of “construction laborers” and a larger number of helpers than the workers themselves do. ***But the fact that employers have an incentive to report higher wages than they actually do also cannot be ignored.*** Employers must comply with the prevailing wage laws and some may report wages higher than they actually pay in order at least to appear to be in compliance with the statute.

For both these reasons, the employee survey is more reliable and the rest of this report relies on it.

In the next section, we will set out the various federal and local prevailing wage laws that apply to the New York construction market and summarize the reasons why these laws were adopted. We will then describe our efforts to determine the number of construction workers in New York actually covered by the prevailing wage requirements, as well as the various ways in which these efforts have so far come to naught. (We hope those charged with enforcing the law have an easier time figuring out who is in fact covered by it but, for reasons we will set forth, we don’t think they do.) The report will next outline the penalties imposed for violating the prevailing wage requirements and then look closely at how the law is enforced (or not). This section, in particular, will consider both the ways violators are expected to come to the attention of the authorities and important loopholes in the application of the law that limit its scope and effectiveness. Finally, the report concludes with a series of recommendations the adoption of which would help to ensure that the existing prevailing wage requirements are more effectively enforced.

4. Federal and State Prevailing Wage Statutes

4.1. Federal Law: The Davis-Bacon Act

Definition. The prevailing wage, according to federal law, is “the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question.” When many different workers are paid the same exact wage, this usually means that the workers are represented by a union. When there isn’t one wage that prevails, the law states that “the prevailing wage shall be the average of the wages paid, weighted by the total employed in the classification.”⁵

Coverage. Construction workers on a construction project that receives US government funds must be paid the “prevailing wage.” The Davis-Bacon Act established this requirement in 1931 and has been subsequently amended several times. It was named after its Republican sponsors, James Davis, a Senator from Pennsylvania, and Representative Robert L. Bacon of Long Island, New York.

The current requirements of the Act, according to the US Department of Labor, are as follows:

The Davis-Bacon Act, as amended, requires that each contract over \$2,000 to which the United States or the District of Columbia is a party for the construction, alteration, or repair of public buildings or public works shall contain a clause setting forth the minimum wages to be paid to various classes of laborers and mechanics employed under the contract.

⁵ US Code of Federal Regulations 29 CFR 1:2 at: http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_1/29CFR1.2.htm. Accessed July 25, 2007. The prevailing wage is set by the Wage and Hour Division in the Employment Standards Agency of the US Department of Labor and they change regularly. The latest determinations are published by the Government Printing Office and are now posted on line at: <http://www.access.gpo.gov/davisbacon/>. Different prevailing wage determinations may also be viewed at [Wage Determinations On-Line.gov](http://www.wdol.gov/index.html) at <http://www.wdol.gov/index.html>.

Under the provisions of the Act, contractors or their subcontractors are to pay workers employed directly upon the site of the work no less than the locally prevailing wages and fringe benefits paid on projects of a similar character.

The Davis-Bacon Act directs the Secretary of Labor to determine such local prevailing wage rates.

In addition to the Davis-Bacon Act itself, Congress has added prevailing wage provisions to approximately 60 statutes which *assist construction projects through grants, loans, loan guarantees, and insurance* [emphasis added].

These "related Acts" involve construction in such areas as transportation, housing, air and water pollution reduction, and health.

If a construction project is funded or assisted under more than one Federal statute, the Davis-Bacon prevailing wage provisions may apply to the project if any of the applicable statutes requires payment of Davis-Bacon wage rates.⁶

It is important to note that the applicability of the federal prevailing wage law is determined by who funds it: A project is subject to the law if it receives federal financial assistance. As we will see below, this is very different from the way that New York State determines the applicability of the prevailing wage law.

Penalties. Contractors who are found to be in violation of the prevailing wage requirements must pay the back wages (with interest) owed all those they underpaid. However, being required to pay what the law requires—no more, no less—is *not* a punishment, since it is only the amount violators would have had to pay if they had obeyed the law in the first place.⁷ There is no additional civil penalty or fine and the workers are not entitled to compensatory damages for any other losses suffered as a result of the under-payment. Imagine being stopped on the highway for speeding and then, rather than being given a ticket and a fine, simply held up only long enough to ensure that

⁶ US Department of Labor, Employment Standards Administration, Wage and Hour Division. On-line at: <http://www.dol.gov/esa/programs/dbra/whatdbra.htm>. Accessed July 25, 2007.

⁷ That is, as long as the money saved is put to some desired use, with the profit earned or the satisfactions gained offsetting the interest paid with the back wages

you will arrive at your destination at the time you would have arrived had you not been speeding! This is a generous (and expensive) way to ensure obedience, but not a penalty.

The only true penalty for violating Davis-Bacon is a three-year debarment from doing work on a government contract, which is imposed on contractors whose violation of the law is “aggravated or willful.” Unfortunately, neither term is defined in the statute or federal regulations, leaving considerable leeway for the agencies charged with enforcing the provision.⁸ Moreover, since: 1) the only certain penalty is to pay the wages that would have been owed in any case; 2) debarment applies only to those found in “aggravated or willful” violation; and, 3) debarred contractors are only excluded from the one-quarter of the market funded by and for the government, profit-maximizing contractors actually appear to have an incentive *not* to obey the law. The expected gain from breaking the law (lower wage costs) is probably greater than the expected loss (discounted by the probability of discovery) that would be imposed if caught. Indeed, the greater the expected savings from by violating the law (e.g., the easier it is to hire low wage workers) and the greater the uncertainty of being caught, the greater the incentive to be a violator.

4.2. The New York State Prevailing Wage Law

Definitions. The prevailing wage in the state law is the average wage in collective bargaining agreements between private employers and labor organizations, provided that these agreements cover at least 30 percent of the workforce. Otherwise the wage is the average wage that is established in a survey.⁹

⁸ US Department of Labor, Office of Compliance Assistance Policy, accessed July 25, 2007

<http://www.dol.gov/compliance/laws/comp-dbra.htm>

⁹ See New York State Labor Law, Article 8, Section 220:5d, at http://law.onecle.com/new-york/labor/LAB0220_220.html Accessed July 25, 2007. For a summary of prevailing wage

Hence the state prevailing wage is not identical to the federal prevailing wage. Moreover, while in small jurisdictions the prevailing wage is determined by the state Commissioner of Labor, in New York City and other large cities it is determined by the cities' Comptrollers.¹⁰

Coverage. According to the relevant section of the New York State law, all “laborers, workmen or mechanics” employed pursuant to a “public works” contract—i.e., a “contract to which the state or a public benefit corporation or a municipal corporation or a commission appointed pursuant to law is a party”—are supposed to be paid “not less than” the prevailing rate of wages, as defined above, for their region and type of work.¹¹

Penalties. Contractors who violate the state prevailing wage laws must pay the missing back wages and benefits, plus interest, to the underpaid workers. They also may be assessed a Civil Penalty “not to exceed 25 percent of the total wages, supplements, and interest due.”¹² In addition, a contractor who willfully underpays his or her workers twice within a five-year period can be debarred from getting additional contracts for a period of five years.¹³ The same caveat that applies to “willful” violations under the federal law applies also to the state law, , but the expected cost of violating the law is

determination, see http://www.labor.state.ny.us/workforceindustrydata/prevailing_wage_H1b.shtml on the New York State Department of Labor website. Accessed July 25, 2007.

¹⁰ New York State Labor Law, Article 8, Section 220:5e, at http://law.onecle.com/new-york/labor/LAB0220_220.html Accessed July 25, 2007. The prevailing wage schedules at: <http://wpp.labor.state.ny.us/wpp/publicViewPWChanges.do?method=showIt> for all New York State counties.

¹¹ New York State Labor Law, Article 8, Section 220:2, at http://law.onecle.com/new-york/labor/LAB0220_220.html Accessed July 25, 2007. Interestingly, this section of the New York State labor law is primarily concerned with defining the legal workday as 8 hours and to ensure that employers do not evade the intent of the law by, in effect, treating 8 hours as part-time employment and paying workers less, etc.

¹² New York State Department of Labor, “General Provisions of Laws Covering Workers on Public Work Contracts” (<http://www.labor.state.ny.us/workerprotection/publicwork/PWGeneralProvisions.shtml>) Accessed July 26, 2007 See also New York Labor Law, Article 8, Section 220-B, *supra*.

¹³ *Ibid*.

higher because of the possibility of an assessed penalty. This greater expected cost is somewhat offset, however, by the fact that debarment only occurs after a second offense.

5. Workers Covered by Prevailing Wage Provisions

5.1. Federal Coverage

The Wage and Hours division of the US Department of Labor publishes detailed statistics about many aspects of the labor market. It provides no statistics at all, however, regarding the numbers of worksites or workers subject to the prevailing wage law. In an attempt to obtain this information, we submitted a Freedom of Information Law (FOIL) request, asking the department to provide data about the number of construction sites where work was currently being done that was subject to Davis-Bacon or similar provisions.

It could not do so. Instead, the department informed us that it did not know how many sites were subject to Davis-Bacon. It simply didn't have the information—at least not in a form that could be made available to us.

5.2. Local Coverage

The government of New York City also does not have a list of construction contracts showing which contracts are subject to the prevailing wage law. Neither does the City Comptroller, who by law is in charge not only of determining the applicable prevailing wage rates but also with enforcing the prevailing wage requirements. The mayor's Office of Contracts—the only mission of which is to improve the process of contracting by city agencies—does have a list of all the city contracts. But its list does include information about which contracts are subject to prevailing wage requirements.

The construction budgets of the several city agencies are shown in **Table 2**.

Table 2: Government Contracts
**Construction Services Contracts
 NYC 2006**

1	Dept. of Design and Construction	\$639,373,875
2	Dept. of Environmental Protection	\$290,885,142
3	Dept. of Transportation	\$210,295,597
4	Dept. of Sanitation	\$200,813,868
5	Dept. of Parks and Recreation	\$156,115,839
6	Dept. of City Wide Administrative Services	\$39,865,771
	Dept. of Housing Preservation and	
7	Development	\$14,333,119
8	Dept. of Homeless Services	\$8,107,820
9	Dept. of Corrections	\$6,560,606
10	Fire Department	\$6,288,357
Top 10	Sub-total	\$1,572,639,995
	Other Agencies	\$14,110,121
	Total	\$1,586,750,116

Source: City of New York, Office of Contract Services, *Agency Procurement Indicators Fiscal 2006* (http://www.nyc.gov/html/selltonyc/pdf/procurement_indicators_2006.pdf), p. 4.
 Accessed July 25, 2007.

FOIL requests were sent to the four largest contracting agencies: the departments of Design and Construction, Environmental Protection, Transportation and Sanitation.

Their responses were uniformly ambiguous. According to the response from the Department of Citywide Administrative Services:

Although the statute is entitled the ‘Freedom of Information Law,’ the statute places no obligation on public agencies to provide information to requesters, i.e., the title is a misnomer. Instead, the obligation imposed on public agencies is to provide copies of existing records that are responsive to those described in a FOIL request... The Dept. of Design and Construction has no existing records with answers to the questions you pose.”

The response of the Department of Sanitation was similar: “Please be informed that under FOIL a government agency is authorized to disclose documents only. Accordingly, please identify documents you are pursuing.” This response led to a new FOIL request, which raised the following issue: “How can anybody but the employees in your office [sanitation] possibly know the internal names of these documents?” The

department persisted: “The Department remains unable to comply with your FOIL request as there is no description of the requested documents.”

The other two departments responded by phone calls and also supplied no information.

We can only conclude that either the city agencies don’t keep lists of the contracts that are subject to the prevailing wage law, or they are unwilling to provide these lists to the public. In either case the government fails to divulge which of its contracts is subject to the prevailing wage law—a failure which has important enforcement implications: *If employers don’t inform their employees that their jobs are covered by the prevailing wage law, then the workers have no way of finding this information out on their own.* It simply is not available.

6. Enforcement Procedures: Federal and State

6.1. Federal Enforcement

The first step in enforcing the federal Davis-Bacon Act is to inform workers of the wage to which they are entitled. By law, an employer who is subject to the prevailing wage law must display a poster that informs the workers of these wages at the work place.¹⁴

In principle, the Wage and Hour Division of the US Dept. of Labor also conducts unannounced visits to workplaces to investigate whether employers comply with the law. According to the DOL, it conducts investigations in the following manner:¹⁵

- The WHD does not require an investigator to previously announce the scheduling of an investigation, although in many instances the investigator will advise an

¹⁴ The poster is available at: <http://www.dol.gov/esa/regs/compliance/posters/davis.htm> and is shown in the appendix.

¹⁵ U.S. Department of Labor, Employment Standards Administration Wage and Hour Division, “Fact Sheet #44: Visits to Employers,” 8/15/2003. <http://www.dol.gov/esa/regs/compliance/whd/whdfs44.htm>

employer prior to opening the investigation. The investigator has sufficient latitude to initiate unannounced investigations in many cases in order to directly observe normal business operations and develop factual information quickly.

- Interviews with certain employees in private. The purpose of these interviews is to verify the employer's payroll and time records, to identify workers' particular duties in sufficient detail to decide which exemptions apply, if any, and to confirm that minors are legally employed. Interviews are normally conducted on the employer's premises. In some instances, present and former employees may be interviewed at their homes or by mail or telephone.
- When all the fact-finding steps have been completed, the investigator will ask to meet with the employer and/or a representative of the firm who has authority to reach decisions and commit the employer to corrective actions if violations have occurred. The employer will be told whether violations have occurred and, if so, what they are and how to correct them. If back wages are owed to employees because of minimum wage or overtime violations, the investigator will request payment of back wages and may ask the employer to compute the amounts due.

In addition to the US DOL the enforcement of the Davis-Bacon act is also the responsibility of the agencies that award construction contracts. Major among these is HUD. Like the DOL, HUD also recognizes the need to conduct on-site-visits, and it requires it of the states in its publication "Making Davis-Bacon Work:"¹⁶

DOL Davis-Bacon regulations require contracting agencies to include in their enforcement protocol on-site interviews with the laborers and mechanics performing the contract or project work. On-site interviews with the workers provide another perspective of the employer's performance with respect to labor standards, a means to test the accuracy of the payroll reports. More importantly, perhaps, the interviewer can provide a firsthand account of his or her observations on-site including the number of workers on-the-job or in a particular crew and the duties they were performing.¹⁷

Nevertheless, even though on-site interviews are crucial, HUD does not conduct these interviews for all projects. Instead, it relies on "remote monitoring (such as payroll reviews)" and worker complaints. Where remote monitoring raises suspicion—in other

¹⁶ U.S. Department of Housing and Urban Development, "Making Davis Bacon Work," Summer 2006. http://www.hudclips.org/sub_nonhud/cgi/pdf/forms/4813-LR.pdf

¹⁷ US Department of Housing and Urban Development, "Factors of Labor Standards Applicability," undated. http://www.hud.gov/offices/olr/olr_foa.cfm

words, where the violator reports the violation—or when the responsible agency receives what it decides is a credible complaint, then, HUD compliance officers “strongly encourage” Contract Administrators to conduct on-site interviews. But where there is no reason to suspect violations have occurred, administrators are equally strongly encouraged *not* to conduct an on-site visit. Instead, administrators are to “target” their visits to work sites “where violations, are suspected and the interview data can be most useful.” (This strategy does make some sense, after all, since there are only limited enforcement resources.) “Targeting,” HUD goes on,

may mean that *no* interviews are conducted on certain contracts where remote monitoring (such a payroll reviews) indicates full compliance so that more interviews may be conducted where problems are indicated. *Targeting* does not mean closing our eyes but, rather, focusing our sights on potential violations.

This approach creates a problem, however, because it relies on either the contractor him or herself to report the underpayment, or, even more unlikely, on a worker—who most likely, would find it impossible to determine whether or not she was covered by it—to raise the suspicion required to trigger an inspection.

There are, then, only two options. Either prevailing wage enforcement is funded to a sufficient extent to enable the government to visit every work site covered by the law; or, adequate information is posted on line so that members of the work force can, in effect, “self-discover” if the prevailing wage laws apply to them and determine for themselves whether or not there is reason to suspect that their employer is violating the law.

6.2. Local Enforcement

Unlike the federal law, the state law does not have a standard prevailing wage poster. Nevertheless, the law requires that the wages be posted in the workplace:

The current Prevailing Rate Schedule must be posted in a prominent and accessible place on the site of the public work project. The prevailing wage schedule must be encased in, or constructed of, materials capable of withstanding adverse weather conditions and be titled "PREVAILING RATE OF WAGES" in letters no smaller than two (2) inches by two (2) inches.¹⁸

In New York City, however, Mayor Bloomberg has taken additional steps to improve compliance with the prevailing wage law. According to Executive Order # 73 issued in October of 2005:

If a significant discrepancy in price (the greater of 10 percent or \$300,000) occurs between the apparent low bid and the next lowest one, agencies must obtain detailed information from the low bidder and must conduct research to be certain that the services can (and will) be delivered with the workers on that contract, and on any affected subcontracts, paid as they are entitled, according to the prevailing wage schedules mandated by New York State Labor Law. Under Executive Order 73, before awards can be made to such bidders, MOCS must approve the agencies' due diligence efforts on prevailing wage compliance.¹⁹

To date this type of due diligence has not uncovered any contractor who submitted a bid insufficiently high to pay its eligible workers the prevailing wage.

Does the City of New York routinely inspect its project for compliance with the prevailing wage law or are inspections only initiated by complaint? The Comptroller only investigates when there is a complaint.²⁰ But in addition to the Comptroller

¹⁸ New York State Department of Labor, "General Provisions of Laws Covering Workers on Public Work Contracts," undated.

<http://www.labor.state.ny.us/workerprotection/publicwork/PWGeneralProvisions.shtm>

¹⁹ New York City, Mayor's Office of Contracts, "Agency Procurement Indicators," 2006.

http://www.nyc.gov/html/selltonyc/pdf/procurement_indicators_2006.pdf

²⁰ A FOIL request regarding this and other questions resulted in no written response but an invitation to an interview with Jeff Elmer, Assistant Comptroller, and Martin Moran, Bureau Chief for labor law. Elmer and Moran said they had no statistics regarding how many or even whether routine inspection, not initiated by complaint, ever took place. The Comptroller's first newsletter indicates that the Comptroller only investigates complaints.

agencies also police their own contractors and when they discover a violation they refer it to the Comptroller. Do they inspect their projects for compliance?

Perhaps the biggest case of underpayment under the prevailing wage law that was ever discovered in New York City was in contracts for the Housing Authority. Between 2000 and 2004, over a period of five years, workers were underpaid by \$6.5 million. This violation was discovered not by NYCHA but by two unions and their respective contractors: The New York City District Council of Carpenters joined forces with its contractors in the New York City and Vicinity Labor-Management Corporation and the Laborers' International Union of North America joined forces with its contractors in the Greater New York Labor-Employers Cooperation and Education Trust. The fact that the violation festered for so long is a direct result of the lack of inspections. As early as 2001 the newsletter of the tenants of NYCHA warned that because NYCHA does not investigate compliance with the prevailing wage law on the site, violations can go undetected.²¹

The Mayor's Office of Contract requires agencies to evaluate the performance of their construction contractors annually. The evaluation form contains many articles about compliance. But compliance with the prevailing wage law is not one of them. The evaluation form does not even indicate whether the work is subject to the prevailing wage law.

²¹ TenantNet, Public Housing Spotlight on NYCHA, Issue 83, April 26, 2001.
<http://www.tenant.net/nycha/pub-hous/pub-hous-83.html>

7. Enforcement Statistics

7.1. Federal Enforcement Statistics

A FOIL request was submitted on October 13, 2006, seeking information about the number of prevailing wage projects, the number of investigations conducted, the number of violations discovered, etc., for the period January 1, 2000, through October 10, 2006.

The results of this request are summarized below:

Prevailing Wage Investigations New York State US Dept. of Labor 2000-2006							
Number of Projects Subject to Prevailing Wage Law	Investigations Per Year	Violations discovered	Initiated by Complaint	Routine Inspection	Workers affected	Back Wage Per Worker	Compensatory Penalties
US DOL has no information	55	28	Data Refused	Data Refused	226	\$1,920	\$0

Source: FOIL request.
Enclosed: DOL response.

Are 55 investigations a year many or few? This depends on how many prevailing wage projects are taking place. But in its response to the FOIL request the US Dept. of Labor states that it does not know how many sites are subject to the prevailing wage law.

This response, like the “targeting” that HUD engages in, suggests that all DOL investigations are initiated only as the result of complaints. If the department does not know which sites are subject to the prevailing wage, it could not possibly inspect sites unless there is a complaint. And if it does not ensure that workers are informed about the prevailing wage status of their work site, they will receive fewer complaints. In its

response to the FOIL request the DOL states that it would not release the information how many of its investigations are initiated by complaints.

7.2. Local Enforcement Statistics

In 2006 the Comptroller's office oversaw the payment by contractors of \$5,002,082 of back wages. This is 0.3 percent of the value of construction projects in the city. In addition, the Comptroller assessed \$414,950 in penalties. The back wages are among the highest ever collected in any one year, and the penalties are actually the highest.

8. Exemptions from the Law

8.1. Federal Exemptions

The most important exemption from the Davis-Bacon Act is the one in the National Affordable Housing Act, Section 286(a) (HOME).²² This law exempts the construction of affordable housing from the payment of the prevailing wage if the financial assistance from the federal government applies to no more than 11 units. Furthermore, if a project receives financing through different government contracts, each of these contracts may be applied to a different set of 11 units within the same project, and each would then be exempt.

HUD explains this situation as follows:

First, a HOME project with 12 or more assisted units that is constructed under multiple contracts each containing less than 12 HOME units is not covered. (Note: HOME regulations prohibit breaking a single project into multiple contracts for the purpose of avoiding Davis-Bacon.)

Second, if multiple HOME projects each containing less than 12 assisted units are grouped into a contract(s) for construction that covers a total of 12 or more assisted units, the contract is covered.

²² US Department of Housing and Urban Development. Factors of Labor Standards Applicability. On-line at: http://www.hud.gov/offices/olr/olr_foa.cfm. Accessed July 25, 2007.

What the law does not explain is how a “project with 12 or more assisted units that is constructed under multiple contracts each containing less than 12 HOME units” can be distinguished from a single project that has been broken “into multiple contracts for the purpose of avoiding Davis-Bacon.”

8.2. Local Exemptions

The state law itself does not permit any exemptions. However, in 1988, in response to a suit by a contractor who thought he should be exempt from paying the prevailing wage, the New York State appellate division ruled that:

Although Labor Law #220 does not define the term “public works,” that term has a generally accepted plain meaning which depends upon the purpose or function of the particular project, and private construction projects, even though financed through industrial development agency bonds are not “public works” projects; moreover, other imaginative financial schemes, including giving tax exemptions to a project, does not transform an essentially private venture into a public one. The public must be a direct beneficiary of the work, and the project in question contemplated no public use of the structure, no public ownership, no public access, and no public enjoyment of what were to become private dwellings. The intent of Private Housing Finance Law article XIX is the promotion of home ownership, and the project in question is not a “public works” project even though it serves a public function, i.e., the rehabilitation of neighborhoods; the instant project is clearly differentiable from public housing projects are fully subsidized and owned by the government.²³

This is, of course, very different from the federal law, which requires that the prevailing wage be paid for any work that is financed by the government. The prevailing wage law has two purposes: To ensure that publicly funded construction work is done by qualified professionals and also that the government is not party to the suppression of

²³ 151 Appellate Division Reports, 2d Series, Vulcan Affordable housing Corporation, Respondent, v Thomas F. Hartnett, Commissioner of Labor of the State of New York, Appellant, Third Department, October 12, 1989.

wages. The test set by the court to determine when the law applies is inconsistent with both of these purposes.²⁴

How do the different agencies apply the court's decision? It is hard to know.

The Comptroller may try to enforce the requirement that contractors post signs informing workers when the prevailing wage applies, but with a small staff (which is why the Comptroller does not investigate unless there is a complaint; see below) and no list of contracts to which the law applies, he doesn't. It is reasonable to suspect, therefore, that a significant number of workers who are eligible to earn the prevailing wage are unaware of it.

As was documented in Section 3 of this report, the wages that employers say they pay are significantly higher than the wages that workers actually receive, and violations of the prevailing wage law may be part of the reason. Effective enforcement of the prevailing wage law should require that the government make public the information about which projects are subject to the law.

9. Recommendations

There is no doubt that current New York City Comptroller takes his responsibility of enforcing the prevailing wage law very seriously. The fact remains, however, that his enforcement is complaint driven. As was shown above, the most effective way to enforce the law is to have routine inspections of construction sites that

²⁴ In 1993, five years after this decision, New York State Assemblymen Calhoun, Acampora, Butler, Casale, Errigo, Kirwan and Townsend introduced a bill to define public works as follows: "[P]ublic works" shall include any program or project the financing of which is provided, in whole or in part, by any public benefit corporation, public authority, industrial development agency, or any subsidiary thereof." The bill has never yet left the different committees to which it was referred. In its latest incarnation, 13 years after it was first introduced, it was referred to the labor committee on January 17, 2007.

are subject to the law. This would require a much larger staff than the Comptroller has at his disposal. Given that for the foreseeable future the enforcement of the prevailing wage will continue to be complaint driven, it is important to make it easier for workers who are underpaid to know their rights and stand for them. The following steps may be useful to achieve this goal.

1. The Mayor's Office of Contracts should have a list of all construction contracts; this list should include the address of the site of each project, whether it is subject to the prevailing wage law, and should be available on the Internet. This would permit the workers themselves to know whether they are entitled to the prevailing wage. It would also permit others, including unions and interested taxpayers, to inform workers about their eligibility and to monitor work sites and determine whether the contractor has posted the prevailing wage posters. (The address should be included in the list because workers may not know the name that the city has given to the particular project they are working on.)
2. The information about contracts in the Vendex system should indicate whether a contract is subject to the prevailing wage law.
3. Contracts in the Vendex system should be identified by the address in which they take place (see 1). Currently the only information that identifies a contract in the Vendex system is the business name and the business address of the contractor. As a visit to the Vendex system by workers showed, workers often don't know the business name of their contractor or the address of the contractor's business.
4. The School Construction Authority requires workers to sign a document in which they state the pay they have received. This serves to inform the workers when there is a discrepancy between their actual pay and the pay they are entitled to. The form contains also the number of a complaint hotline. All prevailing wage contracts should follow this procedure.

5. Since workers may be reluctant to complain about their contractor for fear of retaliation, the single most effective way to enforce the prevailing wage law is to establish a meaningful reward for whistle blowers.
6. The Mayor's Office of Contracts should create a standard poster that contractors would have to post at their job site, notifying workers about the wages to which they are entitled.
7. The Performance Evaluation Form that agencies must fill should indicate whether the contractor displays the prevailing wage poster.

10. Appendix

NOTICE TO ALL EMPLOYEES



Working on Federal or Federally Financed Construction Projects

MINIMUM WAGES

You must be paid not less than the wage rate in the schedule posted with this Notice for the kind of work you perform.

OVERTIME

You must be paid not less than one and one-half times your basic rate of pay for all hours worked over 40 a week. There are some exceptions.

APPRENTICES

Apprentice rates apply only to apprentices properly registered under approved Federal or State apprenticeship programs.

PROPER PAY

If you do not receive proper pay, contact the Contracting Officer listed below:



or you may contact the nearest office of the Wage and Hour Division, U.S. Department of Labor. The Wage and Hour Division has offices in several hundred communities throughout the country. They are listed in the U.S. Government section of most telephone directories under:

**U.S. Department of Labor
Employment Standards Administration**

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