

# Prevailing Wage: Coming to a Private Project Near You

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Any company or individual involved in an industrial development agency (IDA) transaction needs to keep New York's Prevailing Wage Law in mind when considering the financing of a public or private project.

New York's Labor Law has long required the payment of "prevailing wages" on publicly funded construction contracts. Section 224-a of the Labor Law expands the reach of this requirement to privately owned and funded projects if at least 30% of the total construction project costs are publicly funded. Public funds include IDA benefits and a number of state-supported grants and loans (but not brownfield tax credits). Some exceptions to the public funds definition are maddeningly vague. For example, "funds that are not provided primarily to promote, incentivize or ensure that construction work is performed" or tax benefits "the length or value of which are not able to be calculated at the time the work is to be performed."

The statute also specifically exempts a number of categories of projects, including:

- Owner-occupied, one- or two-family residences.
- Work for small (annual revenue less than \$5 million) not-for-profits.
- Certain affordable or supportive multi-family housing.
- Small (under \$5 million) renewable energy systems, renewable heating or cooling systems or energy storage systems.
- Projects receiving historic rehabilitation credits.

There are several reporting requirements imposed on both the public entity providing any public funds and on the developer receiving them. The public entity must "identify the nature and dollar value" of the public funds and whether any funds fall under an exemption, and it must also notify the developer of its obligations under the statute. For the developer, there are recordkeeping obligations and a circular bit of self-reporting. If a project is covered by the statute, the developer must certify, under penalties of perjury, within five days of commencement of construction work, whether the provisions of the statute apply.

In an attempt to bring order to this chaos, the legislature created a Public Subsidy Board. This 13-member board is designed to represent a cross section of affected constituents (e.g., construction industry, developers, union representatives) and meets on an as-needed basis. This board has made a number of rulings about whether a particular project is covered by the statute, but its proceedings with regard to a particular project are confidential and conducted in executive session. Thus, its rulings are not very enlightening. However, at its meeting on June 27, 2024, the board tabled a proposal that

would include an obligation to recite the basis for each such decision.

The board, however, is now beginning, albeit slowly, to refine and define the statute. On May 20, 2024, the board held a public hearing on the topic of "calculating tax savings and other funds."

Also at its June 27 meeting, the board conducted an open discussion of the public hearing. The board members focused primarily on the suggestion that benefits to be received over time (e.g., a PILOT from

an IDA) should be discounted to a present value. This makes sense as the benefits are being compared to the project cost. If the benefits are realized in the future (possibly far into the future), but the costs are incurred now, the calculation would seem to be skewed. While there appeared to be a consensus for the concept, the board did not seem able to come to any agreement on a formula for doing so, and punted the issue for "further information."

Care should be taken with regard to any project receiving any form of public financial assistance

as these sands continue to shift and the possible unexpected application of prevailing wages to a project could be decisive.

The attorneys at Phillips Lytle are able to help you navigate through these shifting sands.

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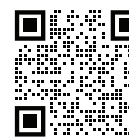
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