



This Week in New York

Covering New York State and City Government

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October 6, 2017 Edition



In the News – New York State

New York’s Constitutional Convention Threatens Prevailing Wage Protections

The state constitution requires a referendum be held every 20 years on whether to call a Constitutional Convention. This method of voting on the question began in 1957, although multiple conventions have been called by other means before then since its original ratification in 1777. The state legislature is still authorized to call for a convention outside the twenty-year cycle. The next vote on the question will be held this November.

The constitution also establishes, in its Bill of Rights, certain protections for labor; hours and wages in public work; and the right to organize and bargain collectively. This note will focus on the threat a Constitutional Convention poses for wage and hour protections in public works.

In government contracting, a prevailing wage is generally defined as the hourly wage, usual benefits and overtime, paid to the majority of workers, laborers, and mechanics within a particular area for performance of public work. Prevailing wages are established by regulatory agencies for each trade and occupation employed in the performance of public work, as well as by state Departments of Labor or their equivalents. New York first passed a prevailing wage requirement for public works projects in 1894. Today in New York, prevailing wage schedules are issued separately for “General Construction Projects” and “Residential Construction Projects” on a county-by-county basis.

Article 1, Section 17 of the state constitution specifies:

“Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed. No laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work, ...shall...be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected, or used.”

This guiding principle enshrined at the 1938 Constitutional Convention was intended to prevent the government from using the power of its purse to suppress wages.

As currently written, however, neither the provision nor the labor law underlying it include a clear definition of “public work,” a significant designation that triggers the prevailing wage requirement. As a result, the protection has been attacked and diminished ever since by court cases challenging the public work status of certain construction projects and diminished even further by administrative rule

interpretations of the constitutional and statutory language regulating the performance of the work. This well-intended provision, which trade unions still hold sacred, proved too ambiguously drafted to live up to its intent. The result is workers' basic constitutional rights to receive the prevailing wage when working on government-funded projects have been gradually, but substantially, narrowed.

The provision needs to be reinforced rather than threatened with repeal. The last two state legislative sessions have seen well-organized and sustained efforts by labor to reinforce this constitutional language. By defining "public works", again - through the standard legislative process, the legislation would restore the constitution to its intended meaning to fulfill the promise of a prevailing wage to laborers in the performance of such work.

A Constitutional Convention would no doubt be influenced by interests, including fiscal conservatives and anti-union forces, who have spent years attacking this labor protection. Over the past decade, the trend in New York has been to attract private investment by leveraging public money. These economic development initiatives often result in construction projects that benefit from monetary grants, subsidies, abatements, or transfers of state land to private vehicles. The trend includes the erosion of Wicks Law protections meant to encourage transparency and accountability in the award of publically-funded construction contracts, in favor of other "alternative procurement mechanisms" such as "design-build" and other "public-private partnerships" that integrate wages into the bidding equation for work that is no longer classified as "public work". Expanding these alternative procurement mechanisms would create further environments where contractors, absent further public intervention, are forced to lower their pay scale in order to compete for contracts.

Conclusion

A prevailing "yes" vote this November would make it that much more likely that construction workers on publically-funded construction projects would be guaranteed no more than the minimum wage, an outcome that would only be compounded downstream on unsafe worksites that would also suffer from a poorer quality of craftsmanship. It would promote a "race-to-the-bottom" model featuring more out-of-state contractors and workforces, privatized public assets, revenue flight to other states, and increased costs to repair and maintain substandard construction over time.

On the other hand, a "no" vote would support improving the current constitutional prevailing wage protection to fulfill the promise made to all New Yorkers in 1938. It would promote the better approach to economic development in New York - an approach supporting good-paying jobs, increased productivity and construction safety, ensuring the public treasury is not raided for private benefit, and articulating a pathway to the middle class for New Yorkers.

The stakes are too high for New York workers to vote to open a potentially unwieldy and devastating constitutional convention. It is an unnecessary risk and expenditure and viable alternatives to enact change – while protecting hard-earned rights and benefits in the process – already exist.

The current constitutional amendment mechanism presents great opportunity for workers in New York State, making a convention unnecessary.



Governor's Office to PSC: Review Charter Communications ASAP



Governor Andrew Cuomo's chief counsel Alphonso David this week called upon the State Public Service Commission (PSC) to immediately review the administration's "pressing concerns" regarding Charter Communications.

Specifically, Mr. David cited the possible violation of last year's Charter/Time Warner Cable merger agreement in relation to broadband service expansion and the reduction in Charter's skilled workforce.

The text of the letter is below:

October 2, 2017

John Rhodes
Chair and Chief Executive Officer
New York State Public Service Commission
Empire State Plaza
Agency Building 3
Albany, NY 12223-1350

Dear Mr. Rhodes,

I write to raise pressing concerns regarding Charter Communications ("Charter") that require your immediate review.

First, I have learned that Charter is not providing broadband service to areas without access, which appears to violate the essential terms and conditions of Charter and Time Warner Cable's merger agreement with the State of New York. Providing broadband access throughout the State is one of Governor Cuomo's major initiatives. For Charter to have failed to comply with the terms of the merger agreement so early in the process raises significant concerns about Charter's ability to meet its obligations moving forward.

Second, I have been advised that Charter employed 1,700 experienced employees when the Public Service Commission approved the Charter merger. I have also been advised that Charter represented to the Commission that it would maintain its skilled and experienced customer-facing workforce. However, I understand that as a result of the current strike, Charter's employee workforce has been diminished in size and skill, leaving customers vulnerable to poor service. Charter's actions therefore contradict the representations it made to the State's regulator.

Charter provides an essential service to New York citizens, and these issues cause deep concern over its willingness to deliver those services as represented in its merger agreement. Please review these matters immediately and take all necessary action to ensure that New Yorkers receive the services and actions promised under the merger agreement.

Sincerely,

ALPHONSO DAVID

October Brings Fiscal Pain for NY

Federal Health Cuts Went Into Effect October 1st

Governor Andrew Cuomo this week appealed to New York's congressional delegates to fight back against cuts to the State's hospital funding and children's health insurance program. The cuts, which total over \$2 billion, went into effect October 1st.

"These devastating federal cuts are a dagger in the heart to New York State, attacking needy healthcare patients, stripping away healthcare from children, forcing cuts on stressed hospitals and local governments and ultimately raising taxes on New Yorkers," Governor Cuomo said. "We will not stand idly by while the federal government targets middle and working class New Yorkers -- we must speak up now, mobilize to stop these devastating cuts and stand up for our New York values."



Federal Cuts to DSH - Disproportionate Share Hospital Payments

Congress did not rescind Disproportionate Share Hospital (DSH) payment cuts that became effective on October 1, thereby reducing federal funding that reimburses hospitals through the Medicaid program for uncompensated health care costs. In the next 18 months, these cuts will cost New York State \$1.1 billion, and will cost New York State hospitals \$2.6 billion when fully phased in. These cuts ultimately will impact all 219 hospitals across New York.

Under current state law for DSH distribution, funding first goes to all private hospitals for uninsured expenses up to the current legal cap, approximately 25 percent. Additional funding then goes to public hospitals if a local government puts up matching funds. Finally, funding goes to all public hospitals for up to 100 percent of the Medicaid and uninsured losses.

Governor Cuomo asserted that there is no way to adequately fund the public hospitals if the \$1.1 billion cut is not rolled back. All hospitals will need to find savings and local and State government will need to find ways to work with the hospitals.

State law says that if a Medicaid cut over \$850 million takes place, the new plan is subject to legislation. KPMG has been retained as a financial adviser to advise on a detailed financial analysis of each hospital and their overall condition and to determine a strategy for how to best absorb the impact of next year's \$1.1 billion hit. The State will also reconvene the Medicaid Redesign Team.

Cuts to CHIP - Children's Health Insurance Program –

The federal Congress failed to reauthorize the Children's Health Insurance Program which was set to expire September 30th. The program insures children in families at up to 400 percent of the federal poverty level, covering those who are otherwise not eligible for Medicaid. The program in New York costs approximately \$1.3 billion. New York State stands to lose close to \$1.1 billion in federal CHIP funding if the program is not reauthorized.

The program provides comprehensive health care coverage for 330,000 New York State children, including coverage for routine checkups, immunizations, doctor visits, prescriptions, dental and vision care, inpatient and outpatient hospital care, laboratory and x-ray services and emergency services.

Under provisions passed with this year's state budget, if there is a Medicaid cut which is over \$850 million dollars, the Administration must develop a plan on how to allocate those cuts. The Legislature then has the option to approve or disapprove that plan. If the federal cuts are not rolled back, the State would have to initiate the plan.

According to Governor Cuomo the State has engaged KPMG to analyze the finances of the situation, to look at the hospitals, to look at their relative positions. In addition, he will reconvene the Medicaid Redesign Team.

"There's a slight unknown in all of this," Governor Cuomo explained. "Some members of the congressional delegation believe the cuts will be restored by December 31. That would be great and we should all pray for that. If we know the cuts will not be restored by December 31, I'm considering calling a special session to bring the legislature back, because they would have to change the law on the distribution of the DISH funds, as the DISH amount has changed. If the law is still in effect on December 31, we'll pass a new distribution formula in the state budget."



Comptroller DiNapoli: NY Sending More Tax Dollars to Feds Than it Gets Back

New York State received 84 cents for every dollar it sent in taxes to the federal government in 2016, according to a report released this week by State Comptroller Thomas DiNapoli.

"New York sent an estimated \$40.9 billion more in tax payments to Washington in 2016 than it received back in federal spending," Comptroller DiNapoli said. "While the Empire State fares well in some areas, in total it receives significantly less per tax dollar than the vast majority of states. Federal decision makers should consider this imbalance as they debate proposed budget and policy changes that could significantly impact New York and other states."

The report shows federal spending in New York during 2016 included \$55 billion in Social Security payments, \$47 billion for Medicare and more than \$46 billion for Medicaid and other safety net grants. Federal dollars also supported transportation, education and veterans benefits programs. Meanwhile, New Yorkers paid almost \$255 billion in taxes to the federal government.

According to the Comptroller, while New York received 16 cents less per dollar contributed, most states received more than they paid. The average return for all states was \$1.18 cents per tax dollar sent to Washington.

New York's per capita contribution to the federal treasury in 2016 was \$12,914, which was 36 percent more than the national average of \$9,476. New York received \$10,844 in per capita federal spending, slightly below the national average of \$11,183. New York generated 8.3 percent of federal tax payments, while the state represented 6.1 percent of the nation's population in 2016.

Individual income taxes made up over \$1.5 trillion, or 50.3 percent, of all taxes paid to the federal government in FFY 2016. New York's payments of more than \$145 billion represented 9.4 percent of total federal income taxes. New York's per capita individual income tax payments of \$7,361 were 54 percent higher than the national average of \$4,768.

In the News – New York City

Vincent Sapienza Tapped as Commissioner of the Department of Environmental Protection



Commissioner Sapienza

Mayor Bill de Blasio this week named Vincent Sapienza as the Commissioner of the City's Department of Environmental Protection (DEP). During his 34 years with DEP, Mr. Sapienza has served in leadership posts for several of the key operating divisions, has overseen major capital improvements and managed during emergencies, including Hurricane Sandy. He has been serving as the Acting Commissioner of the department since 2016.

“All 8.5 million New Yorkers rely every day on the essential services provided by DEP, including a reliable supply of the best tap water in the world, and that is one reason Vinny's over three decades of experience at the department make him the ideal candidate to be its next leader,” said Mayor de Blasio. “Vinny has also led DEP's wastewater treatment bureau, which is primarily responsible for the incredible rebound in the health of our waterways, and the department's capital improvement program, one of the largest in the region. Moving forward we will work together to ensure that we maintain reasonable water and sewer rates, while continuing to push forward critical infrastructure projects that are essential to the future of our city.”

In the coming years, the Commissioner will oversee several projects critical to New York City including finalizing the Filtration Avoidance Determination for the City's West of Hudson reservoirs, building the Delaware Aqueduct Bypass Tunnel 600 feet below the Hudson River and preparing for the shutdown of the Aqueduct in 2022. He will also push to continue the work to improve the health of New York Harbor, including the ongoing build-out of the City's Green Infrastructure program.

Since joining DEP in 1983, Mr. Sapienza has dedicated his career to protecting and improving New York City's critical water infrastructure. Prior to his role as Acting Commissioner, he served as Deputy Commissioner for DEP's Bureau of Engineering Design and Construction, where he managed the water and wastewater capital improvement programs, including the construction of the \$3.2 billion Croton Water Filtration Plant in the Bronx. He has also served as Deputy Commissioner of DEP's Bureau of Wastewater Treatment, where he oversaw the collection and treatment of wastewater and led the effort to create the NYC Wastewater Resiliency Plan.

Mr. Sapienza is a New York State Licensed Professional Engineer and holds a B.S. from Columbia University and an MBA from Hofstra University's School of Business.

DEP is the largest municipal water and wastewater utility in the nation. This critical work includes providing approximately 1 billion gallons of high quality drinking water each day to more than 9 million residents. The watershed extends more than 125 miles from the city, comprising 19 reservoirs and three controlled lakes. Approximately 7,000 miles of water mains, tunnels and aqueducts deliver water throughout the five boroughs, and 7,500 miles of sewer lines and 96 pump stations take wastewater to 14 treatment plants. DEP has nearly 6,000 employees. In addition, DEP has one of the largest capital programs in the region that will help to create up to 3,000 construction-related jobs per year. DEP also regulates air quality, hazardous waste, and critical quality of life issues, including noise.



PA James Calls for Workers' Rights Protections & Reforms to Companies that Mandate Arbitration in NYC

Public Advocate Letitia James this week issued recommendations requiring the disclosure of the use of binding arbitration as a term of employment for workers in New York City.

According to the Public Advocate, binding arbitration, or "forced arbitration," requires employees to resolve workplace disputes, including wage disputes, sexual harassment disputes, wrongful termination disputes, through binding arbitration instead of in a court of law. The clauses are often outlined in employee contracts or employee handbooks.

"Forced arbitration creates a private, secret system of justice, contradictory to the values of transparency and fairness that are fundamental to our democracy," said Public Advocate Letitia James. "By implementing these recommendations, we can ensure that every worker in New York City is fully aware of the realities of forced arbitration. At a time when the federal government is turning its back on workers, New York City stands stronger than ever for workers' rights."

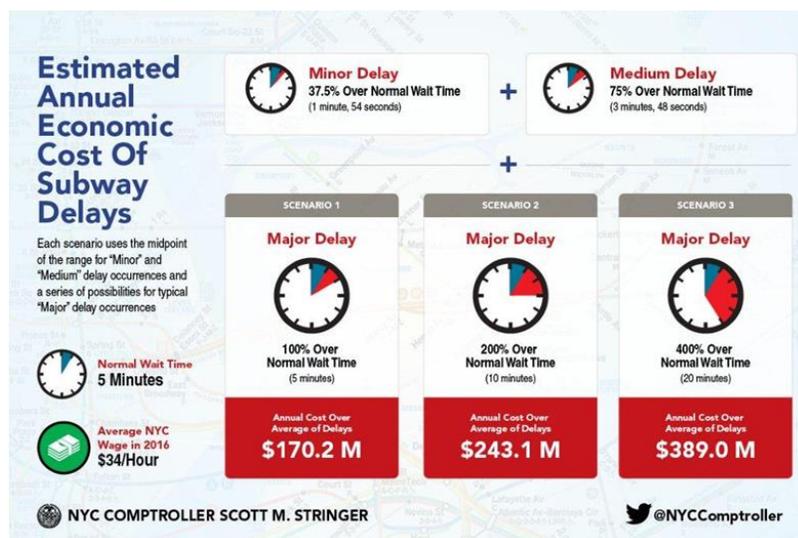
Public Advocate James asserted that workers are more likely to win cases in court than in arbitration. Workers win their cases 59 percent in federal court and 38 percent in state court, compared to only 21 percent of the time in forced arbitration. Additionally, the Public Advocate noted, the losing party is typically forced to pay arbitration fees and expenses.

Public Advocate James called for several reforms to protect workers, including:

- Create a NYC Forced Arbitration and Nondisparagement Clause Registry: New York City should require companies to register if they require forced arbitration or nondisparagement clauses.
- Mandate that companies that require forced arbitration and nondisparagement clauses for employment must declare this in job advertisements.
- New York City should not do business with, or provide benefits or incentives to companies that require forced arbitration to resolve workplace disputes.
- Enact the New York State Empowering People in Rights Enforcement (EMPIRE) Act (A7958) that promotes enforcement of Local Laws by delegating enforcement activity.
- Enact the New York State Bill (A2842) that prohibits the State from contracting with companies that use forced arbitration clauses in their employment contracts and in certain consumer contracts.
- Examine the feasibility of allowing representative actions on behalf of the New York City by delegating the enforcement activity of the NYC Commission on Human Rights so that workers could bring actions against their employers for discrimination claims.

The legislation noted, A2842 and A7958, include exemptions for arbitration related to collective bargaining agreements.

Comptroller Stringer: Subway Delays Hit City Economy



Governor Cuomo's "Fix NYC" Advisory Panel

Panel Tasked with Advising State on Proposals to Create a Dedicated Funding Stream to Mass Transit and Reduce Traffic

Governor Andrew Cuomo this week announced the appointment of "Fix NYC," an advisory panel tasked with addressing congestion on New York City roads and highways and producing a dedicated funding stream for the MTA. The panel will report findings in December of 2017 for consideration in next year's legislative session.

The panel will work with HNTB Corporation, who will provide technical assistance and modeling, and evaluate various proposals. After the panel offers proposals and models for implementation, New York State Comptroller Thomas DiNapoli will work with the advisory panel and HNTB to review any cost savings or cost generating options to the state and how they could impact the State's budget moving forward.

Members of the "Fix NYC" Advisory Panel include:

- ***Mitchell L. Moss***, Henry Hart Rice Professor of Urban Policy and Planning, and Director of the Rudin Center for Transportation
- ***Sam Schwartz***, CEO at Sam Schwartz Engineering
- ***Scott Rechler***, Chairman of Regional Plan Association
- ***Kathy Wylde***, President and CEO of Partnership for New York
- ***Bill Rudin***, Chairman of Association for a Better New York
- ***John Samuelson***, International President for Transport Workers Union
- ***Peter Ward***, President of The New York Hotel Trades Council & Board member of the MTA
- ***Tom Prendergast***, former chairman and CEO of MTA
- ***Freddy Ferrer***, former Bronx Borough President & Vice Chairman of the MTA Board
- ***Reverend Dr. Floyd Flake***, Former U.S. Congressman
- ***David Paterson***, former Governor of New York State
- ***Darryl Towns***, former Assemblyman from Brooklyn, and former Commissioner & CEO of New York State Homes and Community Renewal
- ***James Molinaro***, former Borough President of Staten Island
- ***Kevin Law***, President & CEO at Long Island Association
- ***Steve Bellone***, Suffolk County Executive
- ***Mike Spano***, Mayor of the City of Yonkers

Briefs

NYS Budget Call Letter Asks for No Growth

State Budget Director Robert Mujica this week issued the annual “call letter” to State Agency heads, again looking for budgets that project zero growth. In a letter to Commissioners, Budget Director Mujica indicated that the agency focus should be on maintenance and to assume that the outyears will have the same “flat agency budgets.” Agency’s budget requests are due by October 18, 2017.

Accordingly, the FY 2019 Executive Budget will continue the pattern of fiscal discipline by once again holding spending growth below two percent. Agencies are directed to submit budget requests for FY 2019 State Operations and Aid to Localities that assume zero growth from FY 2018 cash ceilings (excluding School Aid and Medicaid, which are subject to different caps, and Federal funds). Planning assumptions for the out-years should likewise assume flat agency budgets.

The state is facing a \$4 billion deficit in the coming fiscal year.

SUNY/CUNY Free Tuition

Approximately 53 percent of full-time SUNY and CUNY in-state students, more than 210,000 New York residents, are going to school tuition-free under financial aid programs. The State’s new Excelsior Scholarship added 22,000 students in its first round. In addition, another 23,000 students who applied for the scholarship will receive free tuition through existing state and federal financial aid, which they may not have sought out were it not for the Excelsior application process. There are currently nearly 400,000 full-time in-state SUNY and CUNY students.

In the SUNY system, the University at Buffalo, the University at Albany, Stony Brook University and Binghamton rank the highest in terms of students receiving free tuition. Nearly 3,500 students at Buffalo are slated to get a full discount on tuition this year, followed by 2,665 students at UAlbany, 2,430 students at Stony Brook University and 1,900 students at Binghamton University.

Court Rules Public Advocate has No Standing to Represent Disabled Schoolchildren in Bus Controversy

A Manhattan appeals court unanimously found that New York City’s Public Advocate does not have the standing to pursue an Article 78 proceeding aimed at forcing the city to provide air-conditioned school busing to disabled children.

“The Public Advocate lacks capacity to bring this suit, she undisputedly lacks express statutory authority to do so, and such capacity is not implied by her powers and duties pursuant to the city charter,” the decision says.

In 2015, Public Advocate Leticia James filed a suit against the City Department of Education on behalf of the City’s disabled students.

Coming Up

New York State

Tuesday October 10th

To hear from stakeholders on the implementation of Plan 2014

Senate Standing Committee on Environmental Conservation, Mexico High School, Mexico, NY, 4 p.m.

Thursday October 12th

Oversight: SFY 2017-2018 State Budget for the NYS Department of Agriculture and Markets

Assembly Committee on Agriculture, Hearing Room C, Legislative Office Building, Albany, 11 a.m.

New York City

Tuesday October 10th

Subcommittee on Zoning and Franchises, Council Chambers - City Hall, 9:30 a.m.

Subcommittee on Planning, Dispositions and Concession, Committee Room – City Hall, 1 p.m.

Wednesday October 11th

Committee on Education, Committee Room, 16th Floor – 250 Broadway, 10 a.m.

Committee on General Welfare, Committee Room, 16th Floor – 250 Broadway, 10 a.m.

Committee on Small Business, Committee Room, 14th Floor – 250 Broadway, 10 a.m.

Committee Room on Land Use, Council Chambers – City Hall, 11 a.m.

Subcommittee on Zoning and Franchises, Council Chambers – City Hall, 12 p.m.

Committee Rules, Privileges and Elections, Committee Room – City Hall, 1 p.m.

Committee on Recovery and Resiliency, Committee Room, 16th Floor – 250 Broadway, 1 p.m.

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To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or regarding any legislative, government relations or political or consulting or related issues in general, please contact the Pitta Bishop & Del Giorno LLC professional with whom you usually work.

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120 Broadway, 28th Floor
New York, New York 10271
Telephone (212) 652-3890
Facsimile (212) 652-3891

111 Washington Avenue, St. 401
Albany, New York 12210
Telephone (518) 449-3320
Facsimile (518) 449-5812

25 Hyatt Street, St. 202
Staten Island, New York 10301
Telephone (718) 943-1050
Facsimile (718) 943-1051