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RULE ADOPTIONS

LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF WAGE AND HOUR COMPLIANCE

47 N.J.R. 535(a)

Adopted New Rule: *N.J.A.C. 12:60-3A.1*

Prevailing Wage Determinations for Air Conditioning and Refrigeration - Service and Repair; Scope

Proposed: June 16, 2014, at *46 N.J.R. 1409(a)*.

Adopted: February 5, 2015, by Harold J. Wirths, Commissioner, Department of Labor and Workforce Development.

Filed: February 5, 2015, as R.2015 d.034, **without change**.

Authority: *N.J.S.A. 34:11-56.25* et seq., specifically 34:11-56.43.

Effective Date: March 2, 2015.

[page=536] Expiration Date: July 23, 2016.

Summary of Hearing Officer's Recommendations:

A public hearing regarding the proposed new rule was held on July 15, 2014, at the Department of Labor and Workforce Development. David Fish, Executive Director, Legal and Regulatory Services, was available to preside at the public hearing and to receive testimony. One individual testified at the public hearing. Written comments were also submitted directly to the Office of Legal and Regulatory Services. After reviewing the testimony and written comments, the hearing officer recommended that the Department proceed with the new rule without change. The record of the public hearing may be reviewed by contacting David Fish, Executive Director, Legal and Regulatory Services, Department of Labor and Workforce Development, P.O. Box 110, Trenton, New Jersey 08625-0110.

Summary of Public Comments and Agency Responses:

Dean Feasel, United Association of Plumbers & Pipefitters Local 9, Englishtown, New Jersey testified at the July 15, 2014, public hearing.

COMMENT: The commenter supports the new rule, explaining that, historically, the shift from air conditioning and refrigeration system installation to the service and repair of such a system occurs when the building in which the system has been installed receives a certificate of occupancy. He states that the Department's use of this policy for the

purpose of defining and delimiting air conditioning and refrigeration service and repair has "served the HVAC industry and New Jersey taxpayers very well throughout the years with little or no issues," adding that he "hopes by defining this long time practice of the NJ DOL future challenges on this issue will be eliminated." (1).

RESPONSE: The Department agrees that the new rule should eliminate any possible confusion among public works contractors as to the proper scope of work covered by the Department wage determinations for air conditioning and refrigeration - service and repair.

Written comments were submitted by the following individuals. The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

1. Michael K. Maloney, Plumbers and Pipefitters Local Union No. 9, Englishtown, New Jersey.

2. Russell J. McEwan, Esq., Littler Mendelson, P.C., Newark, New Jersey.

3. Edward J. Frisch, Esq., Lindabury, McCormick, Estabrook & Cooper, P.C., Westfield, New Jersey.

COMMENT: The commenter states that, "the NJDOL use of the Certificate of Occupancy (CO) rule for the past 40+ years has represented the industry very well solidifying what is already clearly an industry standard." He states that, "work related to the proper start-up and operation of HVAC equipment has always been an intrinsic part of any mechanical installation no matter how big or small the project," adding, "[e]very piece of HVAC equipment, regardless of who manufactures the product, comes with an 'Installation Manual' that has a 'Start-Up' checklist which identifies tasks that need to be performed before equipment can be put into service and have the warranty validated." The commenter indicates that, "[a]ny claims that HVAC equipment is checked, tested and started adequately at the factory or has a guaranteed factory warranty when delivered to a jobsite is inconsistent with the installation and warranty requirements for HVAC products," adding, "[t]raditionally, the turning point is signified when the building receives a certificate of occupancy or in the case of replacing equipment in occupied buildings when the equipment has had final inspection from the municipality and becomes the customer's responsibility to maintain." (1).

RESPONSE: The Department agrees that it is appropriate at this juncture to memorialize through a rule its long-standing past practice of using the issuance of a certificate of occupancy to distinguish between installation and service and repair for the purpose of determining on a case-by-case basis which air conditioning and refrigeration work prevailing wage rate should apply.

COMMENT: The commenter had submitted a written response to the earlier December 3, 2012 notice of proposal (see *44 N.J.R. 2989(a)*), which notice of proposal later expired pursuant to *N.J.A.C. 1:30-6.2(c)*, after not having been adopted and filed with the Office of Administrative Law on or before December 3, 2013. Although the commenter did not submit a separate written comment following publication of the June 16, 2014 notice of proposal (see *46 N.J.R. 1409(a)*), it is fair and appropriate to incorporate his earlier comment into this rulemaking through its inclusion and the inclusion of a Department response within this notice of adoption. Thus, the following is a summary of the commenter's written remarks in response to publication of the December 3, 2012 notice of proposal.

The commenter takes issue with the Department's definition within the new rule of the term "occupied facility" to mean a facility for which a certificate of occupancy has been issued. He states:

[T]he term 'occupied facility' is not defined in the Agreement [that is, the National Service and Maintenance Agreement between the UA and the Mechanical Service Contractors of America]. It is neither reasonable nor defensible for Labor to give meaning to undefined terms, especially where there has been no apparent effort to understand whether the term has a different meaning in the industry than DOL's assumed meaning, whether the term has ever been given a different meaning through the past practice of those operating under the Agreement, or has ever been interpreted in arbitral or case law decisions. In fact, there is no reason to conclude that the term "occupied facility" in Article VII of the Agreement means one for which a C of O has issued, as opposed to one that is, for example, occupied by other trades who are able to perform work only because equipment has already been installed and is operating under warranty.

Regarding the Department's proposed definition of the term "occupied facility" as facility for which a certificate of occupancy has been issued, the commenter also asserts the following:

It is neither reasonable nor defensible for Labor to rely upon the Agreement alone when the Agreement itself recognizes and permits at Article XX the use of local Schedule A agreements that may be applicable to individual projects based on geographic jurisdiction. Without considering the impact that any applicable Schedule A has or could have on

DOL's proposed definition of an occupied facility renders the analysis underling its proposed rule incomplete and therefore unreasonable.

The commenter also states,

The proposed regulation cherry picks from the Agreement, incorporating within its coverage only some of the work plainly recognized in the Agreement as service work. Specifically, the proposed regulation permits use of the service rate only with respect to "[s]ervice, repair or maintenance work;" while Article VII of the agreement expressly provides that it also covers "inspection, service, maintenance, start-up, testing, balancing, adjusting, repair, modification and replacement of mechanical, refrigeration or plumbing equipment including related piping connections and controls in addition to all other service, maintenance and operations work..." Similarly, Article XXV of the Agreement extends its coverage to "New Construction, Installation and Remodel" of certain refrigeration systems, yet DOL's proposed new regulation would not permit use of the service rate in these areas. If the Agreement controls - as the Prevailing Wage says it must - it should control fully and consistently.

Regarding the Department's use of the phrase, "operating in an efficient manner" within *N.J.A.C. 12:60-3A.1(a)*2, the commenter states,

DOL's use of the words "operating in an efficient manner" in the proposed regulation contradicts express terms of the Agreement and would further limit the permissible use of the service rate in a manner that is both unjustified and that would create an administrative nightmare. The Agreement covers work performed "in order to meet customer obligations," which is quite different and obviously more expansive than work performed to keep systems "operating in an efficient manner." DOL has offered no explanation for its deviation from the clear language of the Agreement, and its proposed regulation is, therefore, by definition, arbitrary and capricious.

The commenter adds the following:

By failing to specifically address use of the service rate on projects involving the replacement of air conditioning and [page=537] refrigeration systems in existing/"occupied" structures that already have a certificate of occupancy, the DOL's proposed regulation will create more questions than it answers, and could have unintended consequences. In this regard, use of the word "existing" in conjunction with the term "occupied facility" could be read to mean that the service rate alone can be used for a newly installed system in an occupied facility, which we do not believe was DOL's intent. In sum, because new equipment can be installed in new and old structures alike, the regulation must address both scenarios.

In conclusion, the commenter asserts that a more appropriate point at which to mark the transition from an installation rate to a service rate is "after the system becomes operable and enters the warranty period." The commenter explains:

Regardless of what type of product is being purchased and/or installed, most would agree that the purchase/installation ends (and the period during which the customer is responsible for servicing his purchase begins) when the customer accepts the underlying product as operable. Add in the formal commencement of the products warranty period, and there is little upon which to base the conclusion that the initial purchase/installation part of the transaction should be deemed as continuing.(2)

RESPONSE: Regarding the commenter's assertion that it is, "neither reasonable nor defensible for the Department to give meaning to undefined terms," all administrative agencies, not just the Department of Labor and Workforce Development, utilize rulemaking to define previously undefined terms. This is an integral part of the rulemaking process; which is to say, not every term used within a given chapter of the New Jersey Administrative Code has an existing statutory definition. Those terms that do not have an existing statutory definition, must often be defined by the agency through rulemaking in order to eliminate confusion and enable effective enforcement of the law by the agency.

Regarding the commenter's claim that the Department has not engaged in any effort to understand whether the term "occupied facility" has a different meaning in the industry than the Department's "assumed meaning," or whether the term has ever been given a different meaning through past practice or has ever been interpreted in arbitral or case law decisions, it is not clear what is the basis for the commenter's characterization of the Department's definition for the term "occupied facility" as "DOL's *assumed* meaning" (emphasis added), nor is it clear on what basis the commenter concludes that the Department has made "no apparent effort" to understand whether the term has been given a different meaning through past practice or through arbitral or case law. The Department has, in fact, evaluated the various options and their relative merits and has utilized its best judgment in arriving at the new rule, which is the subject of this rule-

making. Furthermore, if a contrary past practice or arbitration and/or court decision(s) exist as alluded to by the commenter in his remarks, then this notice and comment process is the commenter's opportunity to bring such details to the attention of the Department. The commenter has provided no such details.

Regarding the commenter's assertion that, "[i]t is neither reasonable nor defensible for the Department to rely upon the Agreement alone when the Agreement itself recognizes and permits at Article XX the use of local Schedule A agreements that may be applicable to individual projects based on geography," the Department does not now, nor has it ever, determined the prevailing wage rate based on rates set for individual projects. As required by law, the Department determines the prevailing wage based on the wage rate paid by virtue of collective bargaining agreements by employers employing a majority of workers of that craft or trade subject to said collective bargaining agreements, in the locality in which the public work is done. *N.J.S.A. 34:11-56.26*. The term "locality" is defined within *N.J.A.C. 12:60-2.1* to mean, "any political subdivision of the State, combination of the same or parts thereof, or any geological area or areas classified, designated and fixed by the commissioner from time to time, provided that in determining the 'locality' the commissioner shall be guided by the boundary lines of political subdivisions or parts thereof, or by a consideration of the areas with respect to which it has been the practice of employers of particular crafts or trades to engage in collective bargaining with the representatives of workmen in such craft or trade." Nowhere in law or rule is the Department empowered to establish the prevailing wage rate using "local Schedule A agreements that may be applicable to individual projects."

Regarding the commenter's assertion that the Department has "cherry pick[ed] from the Agreement, incorporating within its coverage only some of the work plainly recognized in the Agreement as service work," the language included within the rule is taken virtually verbatim from the Agreement; specifically, from the first sentence of the article entitled, "Scope of Service, Maintenance and Operations Work." This first sentence is the root sentence of the article and defines the overall scope of the Agreement. It states that the Agreement "shall apply to and cover all work performed by the Employer, and all its subsidiaries and branches in the United States, *in order to keep existing mechanical, refrigeration and plumbing systems within occupied facilities operating in an efficient manner*" (emphasis added). The second sentence upon which the commenter focuses, states that the work referred to in the first sentence "shall include the inspection, service, maintenance, start-up, testing, balancing, adjusting, repair, modification and replacement of mechanical, refrigeration or plumbing equipment related final piping connections and controls in addition to all other service, maintenance and operations work in order to meet customer obligations." Consequently, where the work at issue falls within one of the categories listed within the second sentence, in order to be considered covered work it must still first be work in order to keep, (1) existing mechanical, refrigeration, and plumbing systems, (2) within occupied facilities, (3) operating in an efficient manner. Under the circumstances, it is entirely appropriate for the Department to include within the new rule a statement that the Department's prevailing wage determinations for air conditioning and refrigeration - service and repair, shall apply to all work that is both "public work" as that term is defined in the chapter, and service, repair, or maintenance work performed in order to keep an existing air conditioning or refrigeration system within an occupied facility operating in an efficient manner.

The commenter takes issue with the Department's use within the proposed new rule of the phrase, "operating in an efficient manner," asserting that use of this phrase "contradicts the express terms of the Agreement." As indicated above, this phrase is taken verbatim from the Agreement. Consequently, it is difficult to understand how one could assert that its use "contradicts the express terms of the Agreement." In any event, the Department has no intention of replacing it with any other phrase. For the reasons set forth above, the Department believes that use of the phrase is entirely appropriate.

Regarding the commenter's assertion that, "by failing to specifically address use of the service rate on projects involving the replacement of air conditioning and refrigeration systems in existing/'occupied' structures that already have a certificate of occupancy, the DOL's proposed regulation will create more questions than it answers," the Department respectfully disagrees both with the commenter's underlying premise and with his ultimate conclusion. The Department has not failed to address use of the service rate on projects involving the replacement of air conditioning and refrigeration systems in existing/"occupied" structures that already have a certificate of occupancy. Under the new rule, the issuance of a certificate of occupancy is utilized only to define what constitutes an "occupied facility." In order to be covered under the wage determination for air conditioning and refrigeration - service and repair, the work must not only be performed on a system within an occupied facility (that is, a facility for which a certificate of occupancy has been issued), but it must also be work performed on an "existing" system and it must be "service, repair, or maintenance work" (as opposed to installation work). Consequently, even after a certificate of occupancy has been issued, if the work is not "service, repair or maintenance work" and/or is not work on an "existing air conditioning or refrigeration system," then

it will not be covered by the Department's prevailing wage determination for air conditioning and refrigeration - service and repair.

Regarding the commenter's suggestion that a more appropriate point at which to mark the transition from an installation rate to a service rate is "after the system becomes operable and enters the warranty period," there are several problems from an enforcement perspective. First, the phrase "becomes operable" is untenably ambiguous. Does the system become operable when the unit is turned on and appears to operate, or does it become operable when the entire system, including the duct work, etc., is turned on, appears to operate and is tested to confirm that it is operating [page=538] (not to mention the other countless scenarios where opinions could differ as to what constitutes a system becoming "operable")? Second, the moment at which a warranty is issued is in large measure within the control of the employer responsible for paying the prevailing wage rate. Consequently, if the Department were to adopt the rule suggested by the commenter, the employer could, through its own actions, control when the rate transitions from the installation rate to the service rate. The certificate of occupancy is issued by a construction code official, who is applying established regulatory criteria for the issuance of the certificate. Third, and most importantly, there is no basis within the appropriate collective bargaining agreement for delineation between installation and service/repair in the manner suggested by the commenter. For all of the foregoing reasons, the Department declines to make the change suggested by the commenter.

COMMENT: Each commenter here also had submitted a written response to the earlier December 3, 2012 notice of proposal (see *44 N.J.R. 2989(a)*), which notice of proposal later expired pursuant to *N.J.A.C. 1:30-6.2(c)*, after not having been adopted and filed with the Office of Administrative Law on or before December 3, 2013. Although neither commenter submitted a separate written comment following publication of the June 16, 2014 notice of proposal (see *46 N.J.R. 1409(a)*), it is fair and appropriate to incorporate their earlier comments into this rulemaking through their inclusion and the inclusion of a Department response within this rulemaking. Thus, the following is a summary of the commenters' written remarks in response to publication of the December 3, 2012 notice of proposal.

The commenters suggest that the words "temporary or permanent" should be added immediately before the words "certificate of occupancy" in *N.J.A.C. 12:60-3A.1(b)*, so that the full section reads: "For purposes of this section, the term 'occupied facility' shall mean a facility for which a temporary or permanent certificate of occupancy has been issued." It is acknowledged that the Summary in the notice of proposal already indicates that the term "certificate of occupancy" is intended to encompass all certificates of occupancy, including both temporary and permanent certificates of occupancy. However, one commenter feels "that if this is carried through to the actual rule, it would avoid issues of whether the rule meant to include a temporary certificate of occupancy." (2, 3)

RESPONSE: The Department does not believe that the change suggested by the commenters is necessary. The rule states that the term "occupied facility" shall mean a facility for which "a certificate of occupancy has been issued." It is axiomatic that this includes any and all certificates of occupancy. Furthermore, as acknowledged by the commenters, the Summary statement in the notice of proposal, which is part of the official record of this rulemaking, states that "certificate of occupancy" includes both permanent and temporary certificates of occupancy.

Federal Standards Statement

The adopted new rule is governed by the New Jersey Prevailing Wage Act, *N.J.S.A. 34:11-56.25* et seq., and is not subject to any Federal standards or requirements. Therefore, a Federal standards analysis is not required.

Full text of the adopted new rule follows:

SUBCHAPTER 3A. PREVAILING WAGE DETERMINATIONS FOR AIR CONDITIONING AND REFRIGERATION - SERVICE AND REPAIR; SCOPE

12:60-3A.1 Prevailing wage determinations for air conditioning and refrigeration--service and repair; scope

(a) The Department's prevailing wage determinations for air conditioning and refrigeration - service and repair, shall apply to all work which is both:

1. "Public work," as that term is defined in this chapter; and

2. Service, repair, or maintenance work performed in order to keep an existing air conditioning or refrigeration system within an occupied facility operating in an efficient manner.

(b) For purposes of this subchapter, the term "occupied facility" shall mean a facility for which a certificate of occupancy has been issued.