

TABLE of EXPERTS

PREVAILING WAGE

The *Albany Business Review* hosted three experts to discuss how prevailing wage impacts the construction industry, labor unions, wages and the economy. The discussion was moderated by Sierra Kehn of the *Albany Business Review*.

Note: This discussion took place before the legislative session ended. No action was taken to expand the state's prevailing wage.

What is prevailing wage and what does it actually mean?

Joe Hogan: Prevailing wage has been around for quite some time. It's part of the state constitution and it relates to public work. The payment of the prevailing wage is in the location where the project is taking place, similar to something on the national level of Davis-Bacon. Where it's different is that in 1983, the law changed to where the union wage, or what was negotiated by the union agreements in the locale, is automatically the presumptive prevailing wage. There is a very high bar to get over if you want to go with something different than that. No one's ever gotten over that bar. The union wage is the prevailing wage on public work throughout New York state.

How would new legislation requiring the prevailing wage on some private work affect contractors?

Tom Santa Barbara: It would greatly affect contractors. The merit shop contractors are now going to have a myriad of legislative issues and administrative issues and compliance issues that they have to deal with that many of them haven't dealt with before. What are the rates? Is the project going to be prevailing wage or not? Who's responsible for knowing whether the job is public or not? Is it the developer? Is it the contractor? Is it both of them? There are some issues that are going to be prevalent when you start looking at contractors that are doing these public work jobs.

Hogan: What's been an issue throughout is that idea of, what is public work, what isn't public work, when does it kick in, what are the rates? The labor department typically will get involved not only with whether it's prevailing wage, but also which jurisdiction it lies in. Whether you're paying a laborer's rate or whether you're paying an ironworker rate, somehow it defaults to the ironworker rate, amazingly enough. And that creates a real air of uncertainty on the industry and a great deal of risk, particularly for the general contractor.

Within the prevailing wage law there's Section 223, which says that the general contractor is responsible for the underpayment of prevailing wages by their subcontractors and the like, and their suppliers. That can happen as long as six, 10, 12 years after the job is done. The general contractor is left holding the bag for an underpayment and sometimes it's an underpayment of benefits, too. It even happens with union subcontractors if they've underpaid the benefits. There's a level of uncertainty that is a tremendous problem for us and for our members.

Santa Barbara: The general contractors need a policy and procedure to make sure that if subcontractors are using any type of bonafide plan, they're annualizing benefits. That's No.1. No. 2, they need to know that those contractors are paying the proper wage in the proper locale for each of their men because the contractor is ultimately responsible.

General contractors need to have that policy and procedure to get plan documents so that they have a bonafide trust to see the certified payroll and make sure the deposits made for those individuals are correct. It's going to be even more critical if the legislation passes.

Rebecca Lamorte: This legislation also sprang forth from the Department of Labor throwing their hands up in rage, not knowing when to have contractors pay these wages or not based on the real gray area that exists within the law and the "gray" prevailing wage public works requirement in the constitution. Having this legislation and this clarification will help clear a lot of the issues we believe that you are experiencing, where the contractors and developers go to the DOL and say "Do I pay this rate? Do I not pay this rate? Is this public work? Is this not public work?" Everyone is struggling with it.

We're fully supportive of mechanisms that ensure workers get paid and everything is happening properly. Wage theft is rampant in the industry and it's something that we at the laborers union have fought continually and have won back millions of dollars for workers. Having these prevailing wage requirements also help with that as well. States with prevailing wage requirements have more mechanisms in place for wage reporting and oversight to make sure the wages are paid on the backside when the

project's complete. On the whole, this legislation is really a great policy.

Hogan: There is no question that in New York state there currently is no definition of public work and it's begging for a definition. I don't agree with the definition of public work as has been presented, and we faced this on a local project. We have dormitories that are being built on public land by a private developer and it was gray area until there was a case called *De La Cruz v. The City of New York*, which clarified what that definition should be.

The local project was with Hudson Valley Community College, and when they were putting the proposals out, there was a real question of whether this was public work or private work – not only regarding whether prevailing wage applied but whether competitive bidding applied. When the developers and contractors asked Hudson Valley Community College whether this was public work or not, which wage they should pay, the answer was "Well, you figure it out." There's no question that there is a need for a definition.

How do increased wages factor in when it comes to improving the economy, specifically in places like upstate New York?

Lamorte: Having strong wages are the No. 1 way to promote local economies. Studies show that for every dollar paid in prevailing wages, \$1.50 goes directly back into local economies. And break that down for rural parts of this state. That means going to a local business. That means you're taking your family out because you have the extra dollar in your pocket. Also, the tax revenue coming out of your paycheck locally goes back to the local municipality, which the state helps allocate. When you pay someone more, they have more and it goes right back into the economy.

Strong wages in places like upstate New York or Long Island are even more important where people are struggling and we are seeing a breakdown in jobs with an influx of funding for economic development. We're not anti-development. We're admittedly pro-development. I'm sure we can all agree on that. As construction workers, we just want to make sure that it's development with checks and balanc-

es in place to be assured that these taxpayers that make it possible in these parts of the state currently are getting what they deserve on the backside when they're on these jobs.

Santa Barbara: We can all agree we're pro-employee and pro-wages and support pumping more money into the economy. The question is, is this legislation going to deter that growth? Is it going to put the developers in a position where those increased wages really don't make up for the loss or the addition of any benefit that they would receive tax-wise, or from bonds or from any other assistance?

We may be in a situation where we have unintended consequences. Maybe we have a wonderful and a noble view of providing great benefits and great salaries with benefits to employees, but the unintended consequence is we drop the development because it just doesn't make sense anymore. I'm worried about that.

Hogan: We're fearful that as you increase those wages, the development's not going to happen – and then you're not paying employees anything at all. That's ultimately the balance in the concern that we have. You're losing development, you're losing affordable housing and that's going to have a real devastating impact on the economy in New York, particularly upstate, because folks will walk away.

I'm not sure that we quite agree on the math. We're partnering with AGC of America and they look at the return and the return is difficult to measure. There is definitely a return on the investment. It depends on the type of project that's being built, and usually it's direct versus indirect spinoff that comes to it. Usually it's a \$1.10 to every \$1 spent, but again, you get to a certain level. But if we have zero level, then all of that is kind of moot.

Expanding it to the point that we lose economic development is a big problem and I think there are two parts of it. One is just the cost itself. The other is the uncertainty and the administrative impact of that, of frankly having to deal with the Department of Labor in determining what is the prevailing wage.

Lamorte: It's unfortunate that any time we try and



From left: Joe Hogan, Rebecca Lamorte and Thomas Santa Barbara.

DONNA ABBOTT-VLAHOS

legislate around these issues via licensing, training, safety, wages, we get the pushback: "Development will stop. There will be no cranes in the sky. No shovels in the ground. My members, they'll be on the breadline. We're done." And that's just simply false news. That is just hair-on-fire-rhetoric that we, the laborers, don't believe. You can look to states like California that have this law. They haven't seen development stop. You can look at our neighbor, New Jersey. They haven't seen development stopped.

The math may not work on small projects. We're on board with common-sense approaches to those kinds of projects and those smaller contractors, but this legislation is really about subsidy accountability and making sure that our public dollars come with a public responsibility. And the studies show there is a negligible impact on a project's bottom line.

This bill is a great union/non-union piece. It's about all construction workers. Yes, we're talking about what should we pay a carpenter, a laborer, a painter, a glazer, an ironworker. But what do you say to someone on a very large project getting millions of public dollars who is getting paid say \$10 or \$15, what do you say to them? What's their accountability? How do we know they're getting paid what they deserve?

This legislation clarifies all of that and raises the floor and makes sure contractors know what they should be paying. I would not be here advocating for something that would not keep my members working actively.

Hogan: I can tell you there is a \$600 million development project on the north shore of Long Island that

MEET THE PANELISTS



JOE HOGAN
Vice President
Associated General
Contractors of
New York State
Representing Don't Block
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Joe Hogan is the Vice President of Building Services for the Associated General Contractors of New York State; a chapter of the AGC of America. For over 30 years, he has worked as liaison for the members of AGC before public and private construction users, architects/engineers and subcontractors. In addition, he regularly reviews and offers commentary on contract documents as well as project delivery and procurement issues.



THOMAS SANTA BARBARA
Co-Founder
DirectAdvisors

Tom Santa Barbara is co-founder of DirectAdvisors. Tom started his career, in the insurance and employee benefit business that took him from Boston to California and finally back home to the Albany, New York area.



REBECCA LAMORTE
Legislative
Communications
Coordinator
NYSLIUNA

Rebecca Lamorte is an advocate for working New Yorkers, and has worked for the last eight years on issues important to labor and the middle class. Rebecca is the legislative and communication Coordinator for the New York State LECET where she focuses on public policy, legislation, communications and issue based campaigns. The New York State LECET fund helps over 40,000 laborers and their union contractors secure projects, jobs and increase union market share.





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because of the specter of this legislation, has stopped. There is a \$200 million project in the Hudson Valley that has stopped. The contractors were told, "Stop. We're not going forward with this project until this is settled because if it goes where it passes, these projects will not happen." We have real examples of where the projects will not happen.

Santa Barbara: I should disclose that I am chairman-elect of Associated Builders and Contractors for Empire Chapter for the 2020 year. We're open to some changes in the annualization rules in New York state. We've discussed with attorneys, unions and legislators that we have a retirement crisis in this country and we have a real problem in New York state because of the harsh annualization rules. Surrounding states don't have these rules. Pennsylvania does not have annualization for state work. New Jersey adopts the Davis Bacon model for annualization, which really means that if you have fringe dollars that a worker earns on a public job, that employer can take that fringe dollar and put it in a 100%-vested retirement plan for that worker and they would receive 100% credit for that.

We have a problem here in New York and that problem is many of these workers will get paid in cash. In other words, they will have that fringe benefit put into their check. It is not typically set up for retirement, just because of the antiquated system of annualization in New York. If that changed, it could help workers across the state be more retirement-ready. And that's what we've advocated quite a bit.

Lamorte: This legislation is really about returning to the original intent of the New York State Constitution to get a clear definition of public works. While we're sympathetic to other issues within the industry, like you mentioned, those are not conversations that we're interested in entertaining around the wage rates, around annualization, through this legislation. This is really about setting a really firm floor for all workers to have a great wage in New York state.

Hogan: Money has never been a leading factor in defining public work in New York. It's been ultimate

ownership of the project. It's been issues that have fallen to where if you've got a contract with a local school district, a public school district, that it's public work. If you have a contract with the City of Albany, it's public work. If you have a contract with the state of New York, it's public work.

There have been a few gray areas and we've got folks that are pushing the margins on that. Frankly, what happened with SUNY Poly and all the controversy and putting one particular contractor in jail happened because the feds believe it was public work even though they completely ignored the definition in De La Cruz. But the feds were not going to be swayed in that regard.

That kind of risk on the contractor is difficult. We've got municipalities that are creating these leaseback schemes. And again, most of the time it's to avoid competitive bidding and sometimes they require prevailing wage and sometimes they don't. Those are the things that we should be focusing on.

How can contractors satisfy the prevailing wage requirement?

Santa Barbara: First, they've got to make sure they identify that it's a public works job. They can satisfy it under Section 220 in three ways. They can pay the fringe benefit dollars in cash into the paycheck. They can pay into a bonafide trust, if they're eligible to do that under the annualization rules, which means they have to do between 85% and 90% public work. Or they can pay a combination of cash into the paycheck or in benefits. Each individual employee is their own little subset to make sure that the correct wage is paid in the locale for the classification or job they're performing. It's the obligation of the contractor to make sure that is being done correctly.

No. 2, they can use a bonafide trust, which means it's set up as an ERISA plan where those fringe dollars can go in. They're labeled for that individual worker and they are tracked all the way through to the end of the year and those fringe dollars are then used to pay benefits such as health insurance or paid time off or apprentice training or supplemental employment or eventually into retirement

benefits. But in New York, it's limited because of annualization.

Eighty percent of contractors in this country are having problems getting employees. What it does do is force contractors to pay more money. We have sampled our contractors and what they pay on private jobs and it's very close to the base rate that you would get on a public job. There are outliers, but the wage is pretty close. And most of our contractors are paying a portion of the health insurance and some benefits on the retirement side. The playing field is actually more level than it's ever been and the reason is there are not enough people to handle all the jobs that are available in the trades right now.

Lamorte: There's a labor shortage in a number of industries and that falls on a number of fronts, the main one being that in school you're told, "go to college," and not "get a job in the trades." And so if you think you're going to get paid \$10 cash and wonder if you can support yourself, this also causes a breakdown in the labor market where people aren't necessarily as open to jumping in and taking that opportunity. Having these wage rates codified in law lets people know they can go into the trades and be a construction worker.

Have other states recently expanded prevailing wage and if so, what are the results?

Lamorte: Sixteen states have prevailing wage laws similar to what we're trying to pass here in New York state, including California, Texas, and we'll even go to the Midwest, Missouri, Illinois, and our neighbors, New Jersey, Connecticut, Pennsylvania. They all have similar laws with thresholds and carve-outs and exemptions for whatever works for their state because everyone's different. They've seen it work. Their workers are benefiting. Their contractors are still working.

Hogan: I haven't analyzed all 16 states as to how they set rates, but I would venture that the vast majority, if not all of them, are set in a point where prevailing means prevailing, not what the union automatical-

ly negotiates. The larger issue, though, is that jurisdictional piece.

The largest problem in New York is that the way the prevailing wage is set and the way it's administered, really raises things to a point that it's more difficult. In upstate New York, for example, the union agreements are a lot cleaner than we see in some parts of the state. There's a certain degree of economic pressure to keep those agreements clean and to avoid some of the problems, which is why in upstate New York, I would venture that the wage differential between union and non-union is very, very minor. Benefits, again, are another matter.

Santa Barbara: We're talking about the worker and rightly so, Rebecca, your point of view is to make sure that worker gets a fair wage. We're very strong advocates of a minimum wage for construction workers in the state of New York. The pressure from supply and demand is forcing those wages and benefits up anyway on private jobs. So I think we're close on those private projects with parity, frankly.

Lamorte: Worker misclassification is rampant in the industry, where you get locked into paying an ironworker rate for someone who could be a laborer or a painter's rate. The DOL has the tools in their toolbox to go in and say, "That's a laborer. That's a painter. That's a glazer," and having the paperwork on the other side to prove that will help make sure that this worker misclassification is occurring less and less.

Hogan: That's a completely different thing. If someone was supposed to be paying laborer rate, carpenter rate or whatever rate, and they're paying the minimum wage, \$12 an hour or paying on a contract basis and misclassifying them an independent contractor, that's a different issue altogether and I want to make sure we're keeping that clear.

Why does compliance with state and federal Davis Bacon and Service Contract Act regulations matter?

Santa Barbara: It matters because the penalties in New York state for non-compliance are very harsh, up to debarment. The labor department has really looked at the bad actors on the compliance side. Two willfuls, and you're debarred. Compliance with these rules in New York state is really important because in 1983, there were a bunch of contractors that were hit with penalties, some debarment, very, very harsh penalties.

Hogan: 25% penalties.

Santa Barbara: Our job is to help everyone comply with the regulations with a fully transparent, compliant program. Transparency is important.

From a national perspective, can you speak to prevailing wage laws in other states?

Santa Barbara: It varies. The two most difficult states in the country are California and New York, where the regulations are at their peak. There's no question about it. Pennsylvania does not have a state annualization rule and they're doing just fine. New Jersey has adopt-

ed the Davis-Bacon rules. What we're seeing around the country is states saying, "Hey, we don't have to recreate the wheel when it comes to annualization enforcement. We can take the model of Davis-Bacon, which uses basically the health and welfare benefits of the fringe that are annualized, but also the retirement part of it, where the employer gets 100% credit for depositing those fringe benefits and a 100%-vested retirement plan, where you're looking at the worker and saying, "We have a retirement crisis. This is one of the solutions." We're unique in New York. So is California. But most states have the Davis-Bacon adoption.

Lamorte: We're not going to agree on everything, but we all want what's best for New York in the long-term. There are going to be pieces we'll never see eye-to-eye on, but we're not anti-development and the laborers have grown and changed with the market as it ebbs and flows, and we'll continue doing so to make sure we have a common-sense approach that gets this over the finish line. It isn't disenfran-

chising development on any side. It's making sure families and their friends see this and interest just starts organically.

Our organizers go to job fairs. Like college fairs, we'll have tables set up there to let them know, "This is when the apprenticeship lottery opens. This is what you can do. This is what you can make." Because in school, the education for the trades is not there. Learning a trade, shop class, all of that, it just doesn't necessarily happen, especially for women. Speaking as a sister in the movement, so it's really important that we work with these programs, which are very successful in getting people into the trades.

Hogan: As a son of a union bricklayer, there's a real honor in this kind of a career and there's some real significant money that can be made – probably better than a lot of folks that go through four years of college.

We're doing some interesting things working with the City of Schenectady and AMENY, Association of Minority Enterprises of New York, from the standpoint of diversifying our industry. As an industry,

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we need to diversify and there is a real marketplace importance to that. It's getting into the schools, even before high school, and changing minds and making sure that students know the path forward, maybe before they drop out of school.

Like Rebecca and the laborers, we're involved with ACE mentoring programs. There's a lot of work to be done. We need to change the dialogue and the discourse politically and otherwise, to really value those paths.

Santa Barbara: The good news is I think we're starting the movement. The paradigm shift is happening. It's really at the grammar school and the middle school levels where you start identifying kids' aptitudes. You're not labeling them, but you're looking at their strengths. It's not a pejorative to say "go to BOCES" anymore. We need to boost those programs up.

We're looking at real creative ways from the Association of Builders and Contractors to bring new people into the construction trades. We have a pilot program that we established at Fort Drum that reaches out to military veterans or soon-to-be veterans that are in that transition period from coming back from overseas to working at a base to transition into everyday life. We have a program to introduce them to the trades. We're going to try to employ it on a national level because it's really that important. ■

TRANSCRIPT LIGHTLY EDITED FOR SPACE AND CLARITY.

Aside from prevailing wage, the industry is experiencing serious labor shortages. What are your organizations doing in terms of outreach to talk to kids about the great opportunities that exist for them?

Lamorte: We work with some great pre-apprenticeship programs that start targeting children in high school, people who may not be going to college. Construction fields in New York City start working with children in the New York City high schools and getting them trained. Then, they have direct entry into a union apprenticeship program. Once they graduate from the apprenticeship program, we do a graduation ceremony, cap and gown, just like it was for college, because it's a four-year apprenticeship and a commitment to your trade.

We are honoring that and trying to promote that positive image as well. Also, we work with some other great apprenticeship programs that target different markets like women or formerly incarcerated individuals. Once you work with these populations, their

Thank you to our participants

