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## New York State Prevailing Wage Law: Defining Public Work

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## New York State Prevailing Wage Law: Defining Public Work

### Abstract

New York's prevailing wage standards require that contractors on state funded construction projects pay their workers no less than wage and benefit levels "prevailing" within the local construction market.

Much has changed since the prevailing wage was enacted by statute in 1897 and written into New York's Constitution in 1938. "Public works" projects then typically meant construction of public facilities, funded by public money, for public use. Today public resources are leveraged creatively to attract private capital for economic development.

The commingling of the various forms of public support with private funding has blurred the definition or boundaries of "public work."

Sixteen other states have statutes that more broadly apply the standards to include loans, tax incentives, and other forms of public support to private projects. New York is among ten other states that enable private developers to accept public money without paying prevailing wages and benefits.

This report examines the taxpayer interest in redefining "public work" to include both traditionally funded public works projects and private, economic development projects funded at least in part by public assets.

### Keywords

New York state, wages, prevailing wage, contractors, construction, public works, public works

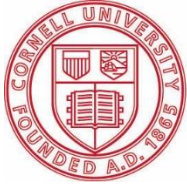
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## **ILR Impact Brief**

# **New York State Prevailing Wage Law: Defining Public Work**

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## TABLE OF CONTENTS

<b>INTRODUCTION</b> .....	3
<b>PART ONE: THE RATIONALE FOR PREVAILING WAGE LAWS</b> .....	6
<b>PART TWO: COSTS AND BENEFITS OF PREVAILING WAGE LAWS</b> .....	7
IMPACT OF THE PREVAILING WAGE ON OVERALL CONSTRUCTION COSTS.....	7
THE PREVAILING WAGE PROTECTS LOCAL CONTRACTORS BY “LEVELING THE PLAYING FIELD” FOR LABOR COSTS.....	10
THE PREVAILING WAGE DRIVES ECONOMIC DEVELOPMENT THROUGH INCREASED CONSUMER DEMAND .....	11
PREVAILING WAGE LAWS BOOST EARNINGS AND TAX REVENUES .....	12
THE PREVAILING WAGE LAW PROTECTS LOCAL CONTRACTORS AND WORKERS FROM OUT-OF-STATE AND LOW-PAYING COMPETITION .....	12
THE PREVAILING WAGE LAW IS NECESSARY TO AVOID THE COST SHIFT TO TAXPAYERS FOR WORKER BENEFITS .....	14
THE PREVAILING WAGE PROMOTES A PATH TO MIDDLE-CLASS LIVING STANDARDS THROUGH APPRENTICESHIP .....	15
<b>PART THREE: TOWARD AN APPROPRIATE LEGISLATIVE STANDARD</b> .....	16
“PUBLIC WORK” IS NOT DEFINED IN NEW YORK’S CURRENT STATUTE .....	16
HOW STATUTES IN OTHER JURISDICTIONS DEFINE AND INTERPRET “PUBLIC WORK” .....	17
PUBLIC CHARACTER OF ECONOMIC DEVELOPMENT ENTITIES.....	25
<b>CONCLUSION</b> .....	28
<b>BIBLIOGRAPHY</b> .....	29

## INTRODUCTION

New York’s prevailing wage standards require that contractors on state funded construction projects pay their workers no less than wage and benefit levels “prevailing” within the local construction market.<sup>1</sup> These requirements are intended to protect in-state contractors and workers from those contractors who seek public work but pay below that typical in the local labor market.

Much has changed since the prevailing wage was enacted by statute in 1894 and written into New York’s Constitution in 1938. “Public works” projects then typically meant construction of public facilities, funded by public money, for public use. Today public resources are leveraged creatively to attract private capital for economic development.

Public financial support takes various forms: direct grants, subsidies, and loans, but also tax incentives and credits, lease arrangements as well as transfers of state land. Vehicles for delivery of New York public resources include such public or quasi-public sources as: Industrial Development Agencies [IDAs], Local Development Corporations [LDCs], Regional Economic Development Councils [REDCs], and initiatives such as Start-Up New York, and Buffalo Billion.

The commingling of the various forms of public support with private funding has blurred the definition or boundaries of “public work.”

Since private developers can always choose to build without public funds to avoid having prevailing wages apply, the broad policy questions are these: How are taxpayers and workers to be well-served when government entities partner with private capital for a range of infrastructure and economic development projects? What reasonable “ground rules” might be set when public funds are provided to private interests?

The questions are especially relevant with respect to New York’s prevailing wage standards as articulated in Labor Law Section 220 and Article 1, Section 17 of the 1938 New York State constitution. Neither the state Labor Law nor the New York Constitution define “public work.”

The ambiguity of what is or is not “public work” and when the payment of prevailing wages is mandated has generated conflicting court decisions. Legislative action is needed to resolve those inconsistencies, provide direction to courts, and clarify how prevailing wage standards are now to be applied consistent with the original legislative intent.

Sixteen other states have statutes that more broadly apply the standards to include loans, tax incentives, and other forms of public support to private projects. New York is among ten other

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<sup>1</sup> New York State’s prevailing wage law, Labor Law Section 220, regulates wages, hours, and supplements paid to construction workers on public works projects. In addition to wages, health and pension benefits, non-occupational disability benefits, vacation benefits, holiday pay, life insurance, and apprenticeship training collectively make up what is known as the prevailing wage. *NY CLS Labor §220*; Also see: *89 NY Jur Public Works and Contracts § 94*

states that enable private developers to accept public money without paying prevailing wages and benefits.

This report examines the taxpayer interest in redefining “public work” to include both traditionally funded public works projects and private, economic development projects funded at least in part by public assets.

Part One covers the public policy rationale for prevailing wage laws. The longstanding underpinning principle, promoted by both political parties, is this: when government contracts for construction services, it infuses significant public dollars into a local labor market and its considerable purchasing power should not adversely impact a community’s wage levels and standards.

The delegates to the 1938 New York State Constitutional Convention incorporated the prevailing wage provision into the state’s Constitution because they considered protective labor standards and economic stability to be inseparable. The bipartisan political consensus that emerged during the economic crisis of the 1930s held that government intervention is necessary to counter recurrent economic recessions that raise unemployment rates and contract workers’ buying power.

Adequate income is needed, in a free market consumer economy, to buy the goods and services that the economy produces. Without such income, the economy stagnates or, if the reduction in income is great enough, contracts. Paying prevailing wages can counter those downturns and act as an economic stimulus for working families and local communities.

Worker spending has a positive “multiplier effect” as it moves through the economy. *Every dollar spent on prevailing wage jobs generates \$1.50 for local economies.*<sup>2</sup> Prevailing wages translate to buying more cars, homes, appliances, and clothing, larger turnout at restaurants and theaters, and making it easier for families to pay for education, health care, or to save for retirement.

The total family income for construction workers is estimated to be 12.5% higher in prevailing wage states than in non-prevailing wage states.<sup>3</sup> But when prevailing wages are not paid, worker income and purchasing power are lower, reducing local economic benefits and ultimately tax revenues.

Part Two focuses on costs and benefits of these laws. Some argue that private parties will be less inclined to pursue economic development opportunities if they are required to pay construction workers the prevailing wage. This assumes that a higher construction wage

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<sup>2</sup> *Self-Sufficient Construction Workers: Why Prevailing Wage Laws are the Best Deal for Taxpayers*, Frank Manzo IV and LeNee Carroll, Midwest Economic Policy Institute, August 2014, at 3; available at: [http://www.faircontracting.org/wp-content/uploads/2014/08/Self-Sufficient-Construction-Workers\\_ManzoCarroll.pdf](http://www.faircontracting.org/wp-content/uploads/2014/08/Self-Sufficient-Construction-Workers_ManzoCarroll.pdf).

<sup>3</sup> *Ibid.* at 5.

translates into a higher overall construction cost. But that assumption is not supported by several studies conducted over the past two decades.

These researchers find that the payment of prevailing wages does not appreciably raise construction costs or change the level of bid competition.<sup>4</sup> This includes the experience in states, such as California, that more broadly define “public work.” Public construction costs are minimally, if at all, affected by prevailing wage as contractor efficiencies offset higher labor costs.

While overall construction costs are essentially neutral, benefits are assessed to include the following:

- increasing consumer demand that supports small, local businesses;
- protecting communities, workers, and contractors from lower-paying, out-of-state competition;
- increasing incomes and state tax revenues;
- avoiding the cost shift to taxpayers for worker health and retirement benefits;
- promoting apprenticeship and training, worker efficiency and job safety; and
- providing an avenue to middle-class careers for veterans and youth.

Part Three reviews the scope of prevailing wage laws in four other jurisdictions with similar construction markets: California, New Jersey, Illinois and Connecticut. These states are among sixteen that more broadly apply prevailing wage standards than New York. Eleven states, including New York, enable private developers to accept public money without paying prevailing wages and benefits.

The public interest accompanies public assets. Taxpayers become stakeholders when public decision makers commit public assets to private initiatives. The form of those assets should not matter: grants, bond premiums, loans, lease agreements, as well as tax reductions and transfers of property at below market value. When private developers receive public support from public or quasi-public entities such as the IDA, they derive a benefit and have a duty to honor public policy objectives. Developers can always choose to build projects without public support and without the accompanying responsibility to pay the prevailing wage.

The State of New York has an opportunity to promote responsible economic development by broadening the scope of the prevailing wage law so that “public work” includes all publicly-assisted projects.

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<sup>4</sup> See discussion *infra* and references listed at fn 12.



## PART ONE: THE RATIONALE FOR PREVAILING WAGE LAWS

The rationale for all prevailing wage laws, since the first federal law was enacted after the Civil War,<sup>5</sup> is essentially this: when government contracts for construction services, infusing significant public dollars into a local labor market, its considerable purchasing power should not adversely impact a community's wage standards.

Public officials must of course be mindful of costs and “protect the public fisc,” but the responsibility to taxpayers also requires that they account for “externalities” and consider the public interest in the economic and social impact of their decisions. This is distinguished from corporate decision-making, which is instead driven by executives' fiduciary duty to maximize profits.

The public interest standard is reflected elsewhere: in the policies and procedures underlying competitive bidding statutes, responsible contracting, and for determining the appropriateness of public-sector Project Labor Agreements in New York State.<sup>6</sup>

Prevailing wage laws have a long history of bipartisan political support. New York State enacted its prevailing wage law in 1894. Seven states adopted laws between 1891 and 1923. Eighteen more states followed during the Great Depression of the 1930s. The federal prevailing wage law, commonly known as Davis-Bacon, for its two Republican co-sponsors,<sup>7</sup> was enacted in 1931 and signed into law by Republican President Herbert Hoover.<sup>8</sup>

New York Republican Congressman Robert L. Bacon introduced the original federal prevailing wage bill in 1927. Congressman Bacon provided a rationale that is no less relevant for today's industry than it was eighty years ago and is worth noting here:

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<sup>5</sup>Report on the Prevailing Wage Law of Nevada: Its History, Costs, and Effects, Peter Phillips, May 2001, at 12-20; available at: <http://www.faircontracting.org/wp-content/uploads/2014/10/Report-on-the-Prevailing-Wage-Law-of-Nevada-Its-History-Cost-and-Effects.pdf>

<sup>6</sup> Executive Order No. 49 – promulgated by Governor Pataki and endorsed by Governor Spitzer and Patterson – endorses the use of Project Labor Agreements on appropriate public works construction projects. The Order articulates the broad policy goals for state-funded construction by declaring that

it is in the best interests of the People of the State of New York to promote timely completion of public construction projects... while at the same time limiting the cost of such projects to the greatest extent possible consistent with the law and principles of fairness and equity. *Executive Order No. 5, Review, Continuation and Expiration of Prior Executive Orders, January 1, 2007; Executive Order No. 9, Review, Continuation and Expiration of Prior Executive Orders, June 18, 2008.*

<sup>7</sup> Senator James J. Davis (R-PA) and Representative Robert L. Bacon (R-NY 1).

<sup>8</sup> “Under Davis-Bacon, the prevailing rate is the rate paid to at least 50% of workers in a construction occupation for a local area. If there is no single rate for at least 50% of workers in that occupation, then the prevailing wage is the average rate paid in the area for that occupation. States, counties, and cities have adopted their own prevailing wage legislation, and policies vary widely. Prevailing wages in states and localities might be set as the local union wage rate, the average wage for construction occupations in the area, or a combination of the two.” *Prevailing Wages and Government Contracting Costs: A Review of the Research*, Nooshin Mahalia, Economic Policy Institute, July 8, 2008 | EPI Briefing Paper #215, available at: <http://www.epi.org/publications/entry/bp215/>

The Government is engaged in building in my district a Veteran’s Bureau hospital. Bids were asked for. Several New York contractors bid, and in their bids, of course, they had to take into consideration the high labor standards prevailing in the State of New York... The bid, however, was let to a firm from Alabama who had brought some thousand non-union laborers from Alabama into Long Island, N.Y.; into my district. They were herded onto this job, they were housed in shacks, they were paid a very low wage, and the work proceeded... It seemed to me that the federal Government should not engage in construction work in any state and undermine the labor conditions and the labor wages paid in that State... The least the federal Government can do is comply with the local standards of wages and labor prevailing in the locality where the building construction is to take place.<sup>9</sup>

Another demonstration of New York’s policy leadership in the nation is that delegates to New York’s 1938 Constitution Convention incorporated the prevailing wage requirement into the state’s Constitution.<sup>10</sup> New York can again provide leadership by expanding the scope of its prevailing wage law to include economic development projects funded, at least in part, by public assets.

## PART TWO: COSTS AND BENEFITS OF PREVAILING WAGE LAWS

### Impact of the prevailing wage on overall construction costs

One might logically assume that a higher construction wage translates to a higher project cost. However, the calculation is more complicated, and studies differ on the actual impact of the prevailing wage on construction costs.

Studies on one side of the debate focus on per hour labor costs, comparing prevailing wages with lower “market rate” wages, then claim that these translate into higher project costs. Representing this view are reports from the Citizens Housing and Planning Council (CHPC), The Center for Governmental Research (CGR), the Center for Urban Research (CURE) and the Empire Center.

The CHPC study claims that the prevailing wage accounts for 25% higher construction costs for affordable housing.<sup>11</sup> The CGR report states that the law “marks-up” typical construction projects by a range of 19% to 55%.<sup>12</sup> The CURE study includes a detailed side-by-side wage

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<sup>9</sup> *Report on the Prevailing Wage Law of Nevada: Its History, Costs, and Effects*, Peter Phillips, at 20-21, May 2001, fn. 19 *U.S. House of Representatives, Hearings before the Committee on Labor on HR 17069, 69<sup>th</sup> Congress, 2<sup>nd</sup> Session at 2, February 18, 1927.*

<sup>10</sup> Article 1, Section 17: *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.*

<sup>11</sup> *Prevailing Wisdom: The Potential Impact of Prevailing Wages on Affordable Housing*, Elizabeth A. Roistacher, Jerilyn Perine, Harold Shultz, Citizens Housing and Planning Council, December 2008, at 4; available at: <http://chpcny.org/wp-content/uploads/2011/02/Prevailing-Wisdom-web-version1.pdf>

<sup>12</sup> *Prevailing Wage in New York State: The Impact on Project Cost and Competitiveness*, Kent Gardner, Michelle Ruffer, The Center for Government Research, January 2008, at 6; available at: <http://reports.cgr.org/details/1532>

comparison and concludes that the prevailing wage “add(s) 25-30% to development costs.” It specifically recommends that that the prevailing wage not be extended to Industrial Development Agency (IDA) funded projects.<sup>13</sup> The Empire Center report also makes the following observation:

The application of prevailing wage brings two public policy goals into conflict. Economic development policy seeks to improve both the quantity *and* the quality of jobs, thus the pay going to workers. *After all, higher-paid workers purchase more goods and services from workers in other sectors and pay higher taxes.* The prevailing wage law was intended to reserve publicly funded work for locally based labor in the face of competition from itinerant workers, including immigrants. (Italics added)<sup>14</sup>

Public funds are limited, however. Mandating higher wages and benefits for workers on publicly supported projects will reduce the quantity of public goods and services that can be purchased.

The argument that a fixed sum of public funds limits total consumption assumes that higher wages do not translate into greater purchasing power.

On the other side of the policy debate are further studies that view the “wage differential analysis” used in the reports referenced above as simplistic and inaccurate.<sup>15</sup> And these researchers come to a different conclusion: the prevailing wage requirement has little or no

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<sup>13</sup> *The Complex World of New York Prevailing Wage*, Julia Vitullo-Martin, The Center for Urban Real Estate, June 2012, at 37; available at: <https://www.nysafah.org/cmsBuilder/uploads/The-Complex-World-of-Prevailing-Wage.pdf>

<sup>14</sup> *Prevailing Wage: New York’s Costly Publicly Works Pay Mandate*, EJ. McMahon and Kent Gardner, Empire Center for Public Policy, 2017, at 15-16; available at: <https://www.empirecenter.org/reports/>

<sup>15</sup> For a critical discussion of the methodology, see *Prevailing Wage Laws: What Do We Know?*, Kevin Duncan and Russell Ormiston, Institute for Construction Economic Research, 2014, at 9-11. The report is available at: <http://icer.es.org/wp-content/uploads/2014/10/prevailing-wage-review-duncan-ormiston.pdf>. The following excerpts are especially clear:

Studies relying on the wage differential approach... suffer from methodological defects that render them misleading as critical analyses of the cost impact of prevailing wage laws. First by simply comparing the prevailing wage to some arbitrary lower rate, this method is built upon the assumption that prevailing wage laws *must* increase construction costs. However, ... most academic studies fail to find statistically significant evidence supporting that position. As a result, the wage differential approach rules out the potential cost offsets attributable to contractors hiring few and more skilled workers or substituting capital for more expensive labor. (at 9)

A second methodological defect of the wage differential method is that most studies compare prevailing wages to the average wage for all construction workers in a state, including those working in residential construction. But residential construction workers are typically drawn from a different subset of craft workers – who are typically less skilled and earn less – than those employed elsewhere in the construction industry. (at 10)

Finally, the startling assumption of the wage differential method also implicitly presumes that any construction cost increases are necessarily and completely borne by taxpayers. In contrast, Duncan and Lantsberg (2015) demonstrate that contractor profits and material costs are lower in states with prevailing wage laws, offering a reminder that the burden of cost increases – if they exist – may be shared between contractors and the government. Previous studies relying on the wage differential method have ignored this outcome, further overstating the presumed cost effects of prevailing wage laws. Taken together, it is clear that the methodological defects of the wage differential method demonstrate an incomplete understanding of construction labor markets that produces inaccurate estimates of the cost effects of prevailing wage laws. (at 11)

impact on a project's total costs. The key to this analysis is the relatively low percentage of labor costs to total project costs along with efficiencies employed by higher paying contractors.

Commenting on accumulated academic research, economists Frank Manzo, Alex Lantsberg, and Kevin Duncan make the following observation:

The overwhelming majority of peer-reviewed research conducted over the last 15 years forms the consensus view that construction costs are not affected by prevailing wages. For example, 80% of the peer-reviewed studies find that the wage policy does not affect the cost of building public schools. For all project types examined, 75% of studies reach the same conclusion. This body of research utilizes state-of-the-art statistical techniques and software to empirically examine samples of construction projects.<sup>16</sup>

These researchers then ask, "How can construction costs not be affected by prevailing wages? Higher prevailing wages can be offset by contractor and worker efficiencies. They explain:

First, labor costs comprise a low and historically declining share of total costs in the construction industry. According to data from the Economic Census of Construction, labor costs (wages and benefits) represent 22.8% of total construction costs for the entire U.S. construction industry in 2012. Second, peer-reviewed research indicates that, when wages increase in the construction industry, skilled workers replace less-skilled workers and more capital equipment is utilized. These changes increase productivity and tend to offset the cost effect of higher wages... (W)hen wages are higher, contractors reduce material, fuel, and rental equipment costs as well as profit rates. These changes increase efficiency, stabilize costs, and allow for continued competitive bids.<sup>17</sup>

Because labor costs, including benefits and payroll taxes, on average represent less than one-fourth of total construction costs, another researcher noted that a 10% increase that might be attributable to prevailing wage standards translates into a relatively small 2.5% increase in overall project costs.<sup>18</sup>

The efficiencies of higher-paying contractors can result in projects being built with fewer errors and fewer expensive change orders. Low-wage employers, on the other hand, hire lower-

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<sup>16</sup> *The Economic, Fiscal, and Social Impacts of Prevailing Wage Laws: Choosing Between the High Road and the Low Road in the Construction Industry*, Frank Manzo IV, Alex Lantsberg, Kevin Duncan,, Illinois Economic Policy Institute, February 2016; at iv; available at: <http://www.faircontracting.org/wp-content/uploads/2016/02/PW-national-impact-study-FINAL2.9.16.pdf>;

<sup>17</sup> *Ibid.* at 11.

<sup>18</sup> *Prevailing Wages and Government Contracting Costs: A Review of the Research*, Nooshin Mahalia, Economic Policy Institute, EPI Briefing Paper #215, July 2008, available at: [www.epi.org/publications/entry/bp215](http://www.epi.org/publications/entry/bp215). The following comment from economist Peter Philips elaborates on these points:

Opponents of prevailing wage laws say that these laws significantly increase public construction costs—often by 25% or more. Conceptually, these are doubtful claims. Labor costs as a percent of total costs (including benefits and payroll taxes) are, on average, only about 25% of total construction costs. So if you are going to save 25% on total costs by eliminating prevailing wage laws, then everyone would have to work for free. But this conceptual mistake is rooted in a deeper analytical mistake. Opponents of prevailing wage laws assume that cheap labor and low skilled labor is just as productive as more expensive, skilled workers. This is just not true.

*Quality Construction – Quality Communities: The Effect of Prevailing Wage Regulation on the Construction Industry of Iowa*, Working Paper, Peter Philips, at 3,34; available at 5: [http://www.faircontracting.org/PDFs/prevailing\\_wages/PreConstIowa.pdf](http://www.faircontracting.org/PDFs/prevailing_wages/PreConstIowa.pdf)

skilled workers. This often results in expensive change orders to correct poor quality with little cost savings, and potential inconvenience to owners and clients, when jobs do not get completed on time.

A 2014 report by economists Kevin Duncan and Russel Ormiston reviews the results of academic research going back to the 1980s. Their comments on the policy debate over construction costs are worth noting here:

Among policymakers and researchers, the predominant interest in prevailing wage laws has been in understanding their effect on public construction costs. The most common public argument supporting the repeal of existing prevailing wage laws has been that doing so will save taxpayers money. This logic assumes that repeal will lead to lower wages and, as a result, lower labor costs on public projects. However, this argument ignores fundamental differences between high-wage and low-wage construction. This includes skill and productivity differences between high-wage and low-wage workers, greater use of capital as labor costs increase, increased rates of training and safety among high-wage workers, and other issues tied to variations in the quality of labor, capital and management. These effects have the potential to offset some, if not all, of the cost increases associated with higher wage and benefit rates.<sup>19</sup>

Duncan and Ormiston found that schools and highway construction provide the strongest examples and that these projects in California did “not have a statistically significant impact” on overall construction costs. The same study saw a possible exception for public housing but noted that results in that area are inconclusive.<sup>20</sup>

The prevailing wage protects local contractors by “leveling the playing field” for labor costs

Construction is a fiercely competitive contract industry, characterized by slim profit margins and high injury and workers’ compensation rates. All the elements are present for competition that destabilizes the industry and incentivizes a “race to the bottom” approach that disadvantages law-abiding contractors. The industry is comprised largely of numerous small to medium-sized companies that often operate beyond the view of state regulators. It is labor-intensive, its jobs are temporary, and its workforce is mobile. It is a lucrative industry for unscrupulous contractors who exploit workers.

The prevailing wage law is one deterrent to protect against these various circumstances because it requires all project bidders to “play on a level playing field” with respect to labor costs. As a result, they are relieved of the pressure to lower wages or eliminate benefits to gain a competitive advantage. The industry is stabilized to the extent that labor costs are removed from the bidding “equation” and contractors are forced to compete by other means: through “cost efficiencies” with a higher skilled and presumably more productive workforce; the

<sup>19</sup> *Prevailing Wage Laws: What Do We Know?*, Kevin Duncan and Russell Ormiston, at 3-4.

<sup>20</sup> *Ibid.* at 13-15. Comments on public housing relate to studies conducted by California public agencies between 1997 and 2011. The results of a recent (2011) unpublished study “suggest that prevailing wage laws increase public housing construction costs by 11%”. Duncan and Ormiston note that the study’s authors urge caution against generalizing the 11% figure due to project variables.

application of technologies and equipment; and their reputation for completing jobs with quality work that is on-time and on-budget.<sup>21</sup>

The prevailing wage drives economic development through increased consumer demand

Worker spending has a positive “multiplier effect” that moves through the economy. *Every dollar spent on prevailing wage jobs generates \$1.50 for local economies.*<sup>22</sup> The total family income for construction workers is estimated to be 12.5% higher in prevailing wage states than in non-prevailing wage states.<sup>23</sup>

While there is no single definition of “economic development,” the term generally refers to those government policies adopted to improve the economic well-being of a community or state. Such policies are often aimed at job creation and retention, improving the business climate, and enhancing the overall quality of life.

The prevailing wage requirement is closely aligned with the concept of economic development. Prevailing wages drive an area’s economic development by shoring up consumer demand within their respective communities and boosting local businesses.

Pending legislation presents New York with the opportunity to use the prevailing wage to expand such economic stimulus in upstate communities. Looking at current Bureau of Labor Statistics for unemployment rates among all states and industries, New York is tied with Mississippi at #37 with an official 4.6% rate, just slightly ahead of Michigan’s 4.7%.<sup>24</sup> But these numbers do not reflect how unemployment is distributed among New York’s 62 counties. Unemployment declined in New York City but increased Upstate during 2017. The Watertown-Fort Drum Metro Area records the highest rate at 7.2%.<sup>25</sup> Nineteen Upstate counties registered unemployment levels above 6.0% with Hamilton County showing the highest rate at 11.3%.<sup>26</sup>

Construction workers’ wages should be factored into the overall value of the state’s investment in economic development projects. The prevailing wage law is itself an economic stimulus and

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<sup>21</sup> The prevailing wage standards are akin to responsible contracting procedures intended to disqualify contractors who cheat on payroll taxes, fail to pay unemployment insurance and workers compensation premiums, cut corners on safety, inadequately train, violate other wage and hour laws, or are financially unstable. They also relate to competitive bidding statutes designed to protect taxpayers from the cut-rate, shoddy work of unscrupulous contractors.

<sup>22</sup> *Self-Sufficient Construction Workers*, Manzo and Carroll, at 3.

<sup>23</sup> *Ibid.* at 5.

<sup>24</sup> <https://www.bls.gov/web/laus/laumstrk.htm>; January 2018.

<sup>25</sup> <https://labor.ny.gov/stats/pressreleases/prlaus.shtm>, January 23, 2018.

<sup>26</sup> <https://www.labor.ny.gov/stats/LSLAUS.shtm>

can reasonably be considered as part of a broader economic development strategy for the state.

#### Prevailing wage laws boost earnings and tax revenues

A recent report issued by the Economic Policy Institute looks at statewide earnings losses if New York repealed its prevailing wage law. It estimates that the state's construction workforce earned nearly \$19 billion in 2016; a repeal of the prevailing wage law would result in a 2-4% fall in wages or a net statewide earnings loss of between \$326.4 million and \$652.7 million. The authors comment that, short of repeal, even a weakening of prevailing wage standards "would have a significant and deleterious effect on New York's economy."<sup>27</sup>

Construction workers in the prevailing wage states, according to another study, account for 36% higher federal tax payments, after deductions and credits, than industry workers in non-prevailing wage states. And they disproportionately contribute to state treasuries. Of all construction workers, those in the prevailing wage states contribute 72% of after-credit state income taxes and 78% of property taxes.<sup>28</sup>

Prevailing wage laws, for example, account for these increased annual state tax revenues: "\$19 million in Wisconsin, \$36 million in Missouri, \$44 million in Illinois, \$20 million in Kentucky, and \$21 million in Indiana."<sup>29</sup>

#### The prevailing wage law protects local contractors and workers from out-of-state and low-paying competition

The prevailing wage law protects local construction contractors from low-paying and out-of-state competition.<sup>30</sup> By removing labor costs from the bidding equation, out-of-state contractors who might undercut in-state contractors on labor costs lose the competitive advantage they would otherwise gain from paying substandard wages. Local contractors, as a result, are not then pressured to slash wages and benefits to win bids.

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<sup>27</sup> *New York's Prevailing Wage Law: A Cost-Benefit Analysis*, Russell Ormiston, Dale Belman, Matt Hinkel, Economic Policy Institute Working Paper, November 2017, access at [epi.org/137294](http://epi.org/137294), at 13-14. The authors note that their estimates of income losses are conservative and could be twice those projected. Fn 19.

<sup>28</sup> *Self-Sufficient Construction Workers*, Manzo and Carroll, at 5-7. Many states offer tax credits that mirror those for federal income taxes.

<sup>29</sup> *Ibid.* at 3-4.

<sup>30</sup> "A 1999 study found that out-of-state contractors are 5.15 percent less likely to win bids on public construction projects in PWL states and that less than 10 percent of all public-school projects valued above \$750,000 were performed by out-of-state contractors." *Self-Sufficient Construction Workers: Why Prevailing Wage Laws are the Best Deal for Taxpayers*, Frank Manzo IV and LeNee Carroll, Midwest Economic Policy Institute, August 2014, at 2; available at: [http://www.faircontracting.org/wp-content/uploads/2014/08/Self-Sufficient-Construction-Workers\\_ManzoCarroll.pdf](http://www.faircontracting.org/wp-content/uploads/2014/08/Self-Sufficient-Construction-Workers_ManzoCarroll.pdf); The comment refers to: *The Effect of State Prevailing Wage Laws on Total Construction Costs*, Mark Prus, State University of New York – Cortland, January 1996; available at: [http://www.faircontracting.org/PDFs/prevailing\\_wages/effects\\_davisbacon.pdf](http://www.faircontracting.org/PDFs/prevailing_wages/effects_davisbacon.pdf)



When wages are taken out of competition, contractors compete for bid awards based on other criteria such as the cost efficiencies discussed earlier, their reputation for quality work, safety, absence of law violations, financial stability, and experience providing on-time, on-budget performance. A policy that favors local New York contractors may provide further economic benefits if local contractors locally source materials, fuel, and rental equipment and who hire area workers.

Just how large might be the impact on various industries of the weakening or repeal of existing laws? A significant negative impact or “ripple effect” was predicted for various industries due to decreased worker income, benefits and spending from the weakening or repeal of existing prevailing wage laws<sup>31</sup>:

If the 25 states with strong/average prevailing wages were to weaken or repeal their policies, the health care industry would lose of (sic) 85,000 jobs and suffer a decrease of approximately \$10 billion in revenue. The overall service industries (including food, real estate, financial, and all other services) would lose approximately 266,000 jobs and over \$36 billion in revenue with a change in prevailing wage policy. Among goods producers, the construction and manufacturing industries would each lose over 21,000 jobs and experience revenue reductions of \$4.3 billion and \$11.0 billion, respectively. Employment would decrease by over 34,000 jobs in the retail sector due to revenue loss of over \$2.7 billion. These impacts, which would be experienced each year after a change in the wage policy, are primarily the result of the decrease in construction worker income and benefits.<sup>32</sup>

Economists Frank Manzo, Alex Lantsberg, and Kevin Duncan estimated an overall decline of \$82 billion in economic activity, the loss of a half million jobs across various industries and a combined federal, state, and local reduction in tax revenues of \$10 billion.<sup>33</sup>

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<sup>31</sup> Economists since 1995 have used a model that evaluates and “scores” prevailing wage laws by comparing contract thresholds, contracts covered, wage rates, benefits paid, and the scope of work covered. The scoring puts each state into one of two categories: states with 1) “strong or average” prevailing wage laws; and 2) states with “weak or no laws.” As summarized within the 2017 Economic Policy Institute report,

*“The ‘strength’ of a state’s prevailing wage law was originally introduced by Thieblot (1995). This scoring system classifies state policies on the basis of five categories—minimum contract threshold, contracts covered, enforced wage rate, breadth of work covered, and an “other” category—and awards points based on established criteria. Thieblot (1995) classifies “strong” laws as those with 12+ points, “average” laws as those with 7–11 points and “weak” laws as those with 1–6 points. Belman, Ormiston, and Petty (2017) used these guidelines to reevaluate state prevailing wage laws in 1979, 1994, and 2006.” New York’s Prevailing Wage Law: A Cost-Benefit Analysis, Russell Ormiston, Dale Belman, Matt Hinkel, fn 24, at 32.*

Although 16 states have broader prevailing wage laws, New York is listed in the “strong or average” category.

<sup>32</sup> *The Economic, Fiscal, and Social Impacts of Prevailing Wage Laws*, Manzo, Lantsberg, and Duncan, at Ibid. at 43.

<sup>33</sup> Ibid. at 41.



The prevailing wage law is necessary to avoid the cost shift to taxpayers for worker health and retirement benefits

Construction is one of the most dangerous industries. In 2016, there were 991 fatalities in the private construction industry, more than any other industry sector.<sup>34</sup> With more than 197,000 non-fatal construction injuries nationwide, the need for health insurance is obvious.<sup>35</sup> One study reports a 24% reduction in construction-related fatalities in prevailing wage law states. The number rises to a 35% reduction in fatalities when states firmly enforce these laws.<sup>36</sup>

New York's prevailing wage law requires that employers provide health care benefits. Without that protection, construction workers and their families may have inadequate or publicly-subsidized health insurance. If New York expanded the scope of its prevailing wage law to more projects, more working families would receive health benefits.

In a cost-shift to taxpayers, workers with inadequate or no employer-provided health benefits, and who typically earn low pay, are often forced to get their medical care at public expense. These workers might qualify for Medicaid, coverage under the Affordable Care Act, or seek help for themselves and family members at emergency rooms, safety-net hospitals and clinics. Those who are undocumented or paid "under the table" might not access Medicaid coverage even if they do qualify, putting themselves, their families and their coworkers at risk.

Costs are also shifted to New York's responsible employers. Under the state's Health Care Reform Act, responsible employers who provide health coverage pay a surcharge for certain medical expenses; they are required to pay up to several hundred dollars per worker per year to make-up for what their unscrupulous competitors do not provide.<sup>37</sup>

Retirement benefits are an especially important issue for construction workers who face higher injury risks and sustained physical demands that limit the overall length of their employment. As with health care benefits, employers are required by the prevailing wage statute to pay into pension funds. States with "strong or average" prevailing wage laws have a 35.69% contribution rate to construction worker pensions versus a 24.86% rate for states with "weak or nonexistent" prevailing wage laws.<sup>38</sup>

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<sup>34</sup> <https://www.bls.gov/iif/oshwc/cfoi/cfch0015.pdf> at 14; the fatal work injury rate (rate of fatalities per 100,000 full-time equivalent workers) for private construction was 10.1, tied for third highest.

<sup>35</sup> <https://www.bls.gov/iif/osch0060.pdf> at 2.

<sup>36</sup> *Quality Construction – Quality Communities: The Effect of Prevailing Wage Regulation on the Construction Industry of Iowa*, Working Paper, Peter Philips, at 3,34; available at: [http://www.faircontracting.org/PDFs/prevailing\\_wages/PreConstIowa.pdf](http://www.faircontracting.org/PDFs/prevailing_wages/PreConstIowa.pdf)

<sup>37</sup> [https://www.health.ny.gov/regulations/hcra/rates/2009-04\\_thru\\_2020-12\\_payor\\_rates.htm](https://www.health.ny.gov/regulations/hcra/rates/2009-04_thru_2020-12_payor_rates.htm)

<sup>38</sup> *New York's Prevailing Wage Law*, EPI, at 18.

## The prevailing wage promotes a path to middle-class living standards through apprenticeship

Prevailing wage regulations permit employer contributions for training as part of the law's required compensation. This provides an incentive for employers to invest in apprenticeship and training programs.<sup>39</sup> Prevailing wage laws increase apprenticeship utilization by 40%<sup>40</sup> and reward both union and nonunion contractors who have apprenticeship programs.

New York State public policy strongly values apprenticeship, and for good reason. As stated in Labor Law Section 810:

Skilled manpower constitutes a great resource in this state. Apprenticeship programs, through supervised training and education, develop skilled craftsmen and help meet the increasing needs for such workers in the state's labor force. The continuing development of skilled manpower is essential for individual self-realization and for an expanding industrial economy. To these ends, it is the declared public policy of the state of New York to develop sound apprenticeship training standards and to encourage industry and labor to institute training programs.<sup>41</sup>

New York's policy reflects the view that publicly-funded projects require high quality construction because of the longer life expectancy of public infrastructure.<sup>42</sup> Jobs are to be completed on-time and on-budget. Performance and quality relate closely to the skill-level of the construction workforce and contractor efficiencies.<sup>43</sup> Higher skill means higher productivity – one estimate is that skilled construction workers are as much as 20 percent more productive than less skilled workers.<sup>44</sup> Higher productivity can mean a reduction in unit costs and the need for supervision as well as potentially lower an employer's recruitment costs.

Apprenticeship is critical to New York's need for a continued supply of highly-skilled workers. It benefits the industry while providing valuable, meaningful career opportunities – and middle-class living standards – for a key segment of the nation's blue-collar workforce. This path to a stable and secure living standard is especially important for non-college educated blue-collar New Yorkers, a group whose economic opportunities have sharply declined with the loss of

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<sup>39</sup> New York State's prevailing wage law, Labor Law Section 220, regulates wages, hours, and supplements paid to construction workers on public works projects. In addition to wages, health and pension benefits, non-occupational disability benefits, vacation benefits, holiday pay, life insurance, and apprenticeship training collectively make up what is known as the prevailing wage. *NY CLS Labor §220*; Also see: *89 NY Jur Public Works and Contracts § 94*; *Prevailing Wage Laws: What Do We Know?*, Kevin Duncan and Russell Ormiston, Institute for Construction Economic Research, 2014, at 17. Available at: <http://iceres.org/wp-content/uploads/2014/10/prevailing-wage-review-duncan-ormiston.pdf>.

<sup>40</sup> *Self-Sufficient Construction Workers*, Manzo and Carroll, at 2.

<sup>41</sup> *New York Consolidated Laws, Labor Law, LAB Sec. 810*.

<sup>42</sup> *The Economic, Fiscal, and Social Impacts of State Prevailing Wage Laws*, at 6.

<sup>43</sup> *Quality Construction – Strong Communities: The Effect of Prevailing Wage Regulations on the Construction Industry in Iowa*, Working Paper, Peter Phillips, at 4-5.

<sup>44</sup> *Building Up New York, Tearing Down Job Quality*, James Parrot, at 22; available at: [http://www.fiscalpolicy.org/publications2007/FPI\\_BuildingUpNY\\_TearingDownJobQuality.pdf](http://www.fiscalpolicy.org/publications2007/FPI_BuildingUpNY_TearingDownJobQuality.pdf)

manufacturing jobs. Those with jobs earning at least \$40,000 and with health and retirement benefits, for example, dropped from 20.8% in 2000 to 13.9% in 2016.<sup>45</sup>

Apprenticeship also benefits a very important demographic within the industry – veterans - who represent 6.9% of the blue-collar construction workforce as compared to 5.8% for all industries.<sup>46</sup> Veterans come equipped with highly desirable, transferable skills prized by contractors. They provide the kind of discipline, commitment to teamwork, and drive that translate well to the industry’s requirements. Prevailing wage laws provide veterans with incomes that are 7.0 to 10.7% higher than they would otherwise earn, an 11.2 to 14.6% greater likelihood of health benefits, and a significant – 23.7 to 31.4% - reduction in veteran poverty levels.<sup>47</sup>

### **PART THREE: TOWARD AN APPROPRIATE STATUTORY STANDARD**

“Public work” is not defined in New York’s current statute

The landscape for public works and economic development has markedly changed since the enactment of New York’s prevailing wage law in 1894. The leveraging of public resources for private ventures is today a key economic development strategy for New York State. Public support takes various forms: direct grants, subsidies, and loans, but also tax incentives and credits, lease arrangements as well as transfers of state land.

Public or quasi-public entities serve as conduits for the transfer of public assets. These include: Industrial Development Agencies [IDAs], Local Development Corporations [LDCs], Regional Economic Development Councils [REDCs], and such initiatives as Start-Up New York, and Buffalo Billion.

The commingling of the various forms of public support with private funding has obscured the meaning of “public work.” The broad policy question is this: How is the public interest to be served, and how are taxpayers and workers to be protected, when government entities partner with private capital for a range of productive infrastructure and economic development projects?

The question is especially relevant to New York’s prevailing wage standards. The statutory basis for those standards are Labor Law Section 220 and the New York State Constitution. Neither define “public work.” Nor do these provisions define “public entity.”<sup>48</sup> This ambiguity

<sup>45</sup> *New York’s Prevailing Wage Law: A Cost-Benefit Analysis*, EPI, at 18-19.

<sup>46</sup> *The Impact of Prevailing Wage Laws on Military Veterans: An Economic and Labor Market Analysis*, Frank Manzo IV, Bob Bruno, and Kevin Duncan, VoteVets.org, May 2016; available at: [http://b3cdn.net/votevets/62350ae9afd6c4c714\\_0im6bsc5b.pdf](http://b3cdn.net/votevets/62350ae9afd6c4c714_0im6bsc5b.pdf)

<sup>47</sup> *Ibid.*

<sup>48</sup> Neither the Constitutional provision nor the Labor Law define “public work”:

has generated conflicting court decisions some of which have arguably narrowed the scope of the law's application. The challenge then is to enact clear statutory language aligned with the original legislative intent. This will provide courts with the proper guidance when asked to interpret the law.<sup>49</sup>

#### How statutes in other jurisdictions define and interpret "public work"

Sixteen other states have statutes that more broadly apply the standards.<sup>50</sup> New York is among eleven states that enable private developers to accept public money without paying prevailing wages and benefits.<sup>51</sup>

The focus here is on the statutes of four states with a broader definition and application: California, Illinois, New Jersey, and Connecticut. California was selected because it is the largest state economy; New Jersey and Connecticut were chosen because they border New York; and all the selected states have labor and construction markets that are similar in structure if not in size.

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##### NY CLS 220(2): NY Labor Code Section 220:

Each contract to which the state or a public benefit corporation or a municipal corporation or a commission appointed pursuant to law is a party, and **any contract for public work** entered into by a third party acting in place of, on behalf of and for the benefit of such **public entity** pursuant to any lease, permit or other agreement between such third party and the public entity, and which may involve the employment of laborers, workers or mechanics shall contain...

##### New York Constitution (1938) Article I, Section 17:

No laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any **public work**, shall be permitted to work more than eight hours in any day or more than five days in any week, except in cases of extraordinary emergency; nor shall he or she 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.

<sup>49</sup> See discussion of legislative intent in Part One above. The issue is truly global. The Organisation for Economic Co-Operation and Development [OECD] advises emerging nations pursuing public-private partnerships for infrastructure development: "When privately owned infrastructure providers coexist with publicly owned incumbents, particular measures to maintain a level playing field may be needed." The broader discussion highlights that access to private capital and risk-sharing advantages must be cautiously balanced against the public interest. One principle discusses anti-corruption procedures: "Public authorities should take effective measures to ensure public and private sector integrity and accountability and establish appropriate procedures to deter, detect and sanction corruption." *OECD Principles for Private Sector Participation in Infrastructure*, Organisation for Economic Co-operation and Development, 2007, at 15-16; full report available at: <http://www.oecd.org/daf/inv/investment-policy/ppp.htm>.

<sup>50</sup> California, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, Ohio, Pennsylvania, Texas, Vermont, Washington, Wisconsin, and Wyoming.

<sup>51</sup> Alaska, Delaware, Maine, Maryland, Michigan, Montana, New Mexico, New York, Oregon, Rhode Island, and Tennessee.

## **California statute**<sup>52</sup>

California Labor Code Section 1720 defines public work as

- Construction, alteration, demolition, installation, maintenance, or repair work,
- Done under contract, and
- Paid for in whole or in part out of public funds including:
  - A transfer by the state of an asset of value for less than fair market value;
  - Fees, costs, rents, loans, or other obligations that are charged at less than fair market value;
  - Money loaned by the state to be paid on a contingent basis; and
  - Credits applied against repayment obligations.
    - It can include work performed prior to, in the design phase, and following construction.

Prevailing wages are required when public funding on private projects exceeds the “de minimis standard” [of section (c) (3)]. This has been interpreted by the state’s courts and Department of Industrial Relations as public funding that is at least 1.64% of total project costs.

## Relevant case notes<sup>53</sup>:

- A movie theater development project was paid for in part with public funds and therefore considered "public work" subject to the prevailing wage law; the development agreement and related agreements called for loans and one-time non-conditional payment, and the developer received the benefit of a newly constructed, publicly funded, \$ 1,500,000 parking lot adjacent to the theater, which, though owned by city, was the developer's and its successors' to use for as long as they operated the theater. *Cal. Lab. Code § 1720(b)(2). Cinema West, LLC v. Baker, 13 Cal. App. 5th 194, 2017 Wage & Hour Cas. 2d (BNA) 227608, 2017 WL 2822794 (1st Dist. 2017).*
- Public funding of part of a master planned community development financed through bonds issued by a community facilities district rendered entire development a "public work" under the Prevailing Wage Law. *West's Ann.Cal.Labor Code § 1720(a)(1). Azusa Land Partners v. Department of Indus. Relations, 191 Cal. App. 4th 1, 2010 WL 5158551 (2d Dist. 2010).*

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<sup>52</sup> *Cal Lab Code § 1720.* The legislative intent for California’s Section 1720 is related to that for federal Davis-Bacon Act. It is consistent as well with the legislative intent, as discussed earlier, underlying New York State’s constitutional provision and Labor Code Section 220. As articulated by a 1997 California appellate decision:

The overall purpose and object of California’s prevailing wage law ([Lab C, §§ 1720](#) et seq.) is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees. The overall purpose and object of the federal Davis-Bacon Act ([40 USCS § 276a\(a\)](#)) is to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area. The state’s prevailing wage law and the Davis-Bacon Act each carry out a similar purpose. Read as a unit, they set out two separate, but parallel, systems regulating wages on public contracts. The prevailing wage law covers state contracts and the Davis-Bacon Act covers federal contracts.

*Southern Cal. Labor Mgmt. Operating Eng'rs Contract Compliance Comm. v. Aubry (Cal. App. 1st Dist. Mar. 31, 1997), 54 Cal. App. 4th 873, 63 Cal. Rptr. 2d 106, 1997 Cal. App. LEXIS 347.*

<sup>53</sup> 5 A.L.R.5<sup>th</sup> 470

- A hotel construction project under a ground lease specifically provided for a rent credit from the public entity that owned the land. The construction was done under contract paid for in whole or in part out of public funds. It was held to be a public work covered by the prevailing wage law. *Hensel Phelps Construction Co. v. San Diego Unified Port Dist.*, 197 Cal. App. 4th 1020, 129 Cal. Rptr. 3d 59, 2011 Cal. App. LEXIS 964, 17 Wage & Hour Cas. 2d (BNA) 1744.
- “Public works” includes work done under private contract where at least 50% of property was to be leased to the state or a political subdivision. The prevailing wage law applies beyond areas actually leased to include the entire renovation of a privately-owned building leased in sufficient part to the county. *West’s Ann.Cal. Labor Code §1720.2 Plumbers and Steamfitters Local 290 v. Duncan*, 157 Cal. App. 4th 1083, 69 Cal. Rptr. 3d 184 (1st Dist. 2007).

California’s statute also strongly endorses apprenticeship through the prevailing wage. Subsections of the amendment are worth including here:

**SECTION 1.**

The Legislature finds and declares all of the following:

(a) It is a matter of statewide concern that California has an available workforce of skilled construction workers to efficiently complete both public and private infrastructure projects, and maintaining that workforce requires the continual training of new workers to replace the aging workforce. An in-state workforce of skilled construction workers who can complete projects in a streamlined manner benefits the state’s economy.

(b) The state’s prevailing wage law promotes the creation of a skilled construction workforce. The requirement that contractors on public work pay prevailing wages to their employees encourages contractors to hire the most skilled workers and to invest in their training. The incentives provided in the prevailing wage law for formal apprenticeship training in state-approved programs provide the financial support and on-the-job training opportunities necessary to train the next generation of skilled construction workers.

(c) The majority of California workers do not have four-year college degrees, and maintaining construction work as an occupation that can provide good jobs to California workers is important to the future of the state.

(d) The state’s prevailing wage law helps to maintain construction work as an occupation that provides middle-class jobs to hundreds of thousands of California workers, enabling the workers to support families and contribute to their communities. The prevailing wage law also provides necessary on-the-job training opportunities for the more than 50,000 apprentices enrolled in state-approved apprenticeship programs in the building and construction trades, enabling the apprentices to graduate from the programs and pursue careers as journey-level workers.<sup>54</sup>

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<sup>54</sup> California Labor Code Section 1782. 2013 Cal ALS 794 | 2013 Cal SB 7 | 2013 Cal Stats. ch. 794; enacted October 13, 2013.

### **Illinois statute**<sup>55</sup>

Illinois Chapter 820 Employment. [Prevailing Wage Act] defines public work as:

- All fixed works constructed or demolished by any public body or
- Paid for, in whole or part, out of public funds including
  - Projects financed in whole or part with bonds, grants, and other funds made available through certain programs as well as leased facilities for airport use and new wind power by a “High Impact Business”
  - Bonds issued under
    - Industrial Project Revenue Bond Act
    - Illinois Finance Authority Act
    - Illinois Sports Facilities Authority Act
    - Build Illinois Bond Act
  - Loans or other funds made available pursuant to
    - Riverfront Development Act of the River Edge Redevelopment Zone Act
    - Funds for Illinois’ Future
    - Funds for school construction and infrastructure
    - Funds for transportation purposes
  - All projects financed with funds from the Department of Commerce and Economic Opportunity (where no Project Labor Agreement)
  - All work performed under Public Private Agreements for the Illiana Expressway and South Suburban Airport as well as under the Public-Private Partnerships for Transportation Act
- Public work does not include:
  - Work done directly by a public utility
  - Projects undertaken by the owner at an owner-occupied unit of a multi-family residence

### Relevant case notes:

- A private, not-for-profit, nonsectarian hospital was a “public body” under the state prevailing wage act because the hospital received public tax monies for construction of a new canopy over its emergency room entrance. The hospital argued that the tax revenue reflected only a fraction of its budget and that it should not therefore be considered “public”. The court disagreed because the statute was sufficiently broad and clear; the hospital received its funding “in part” from public assets such that it would be considered a “public body” for purposes of the act.

The court noted that the act’s purpose was to ensure that workers on public projects receive a decent wage and that public works be completed expeditiously. Contractors on the project were required to pay the prevailing wage. *People ex rel. Bernardi v Illini Community Hospital (1987, 4th Dist)* 163 Ill App 3d 987, 114 Ill Dec 926, 516 NE2d 1320, 28 BNA WH Cas 1167, 5ALR5th 1101, app den 119 Ill 2d 574, 119 Ill Dec 396, 522 NE2d 1255

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<sup>55</sup> 820 ILCS 130/2 [Illinois Compiled Statutes Annotated, Chapter 820 Employment]: paragraphs reformatted by the author.



- Remodeling project at a privately-owned rehabilitation center that received over half its income from state contracts, tax monies and grants was a “public body” and subject to the prevailing wage act. (Ill Rev Stat ch 48 para 39s-1 et seq. (1987)), the court, in *Opportunity Center of Southeastern Illinois, Inc. v Bernardi* (1990, 5th Dist) 204 Ill App 3d 945, 150 Ill Dec 250, 562 NE2d 1053, 118 CCH LC P 56548, app den 136 Ill 2d 546, 153 Ill Dec 376, 567 NE2d 334.

### **New Jersey statute**<sup>56</sup>

New Jersey’s statutory definition of “public work” is particularly straightforward. If public assets are used, prevailing wage standards apply.

(5) “Public work” means construction, reconstruction, demolition, alteration, custom fabrication, or repair work, or maintenance work, including painting and decorating, done under contract and paid for in whole or in part out of the funds of a public body, except work performed under a rehabilitation program. “Public work” shall also mean construction, reconstruction, demolition, alteration, custom fabrication, or repair work, done on any property or premises, whether or not the work is paid for from public funds, if, at the time of the entering into of the contract the property or premises is owned by the public body or:

- (a) Not less than 55% of the property or premises is leased by a public body, or is subject to an agreement to be subsequently leased by the public body; and
- (b) The portion of the property or premises that is leased or subject to an agreement to be subsequently leased by the public body measures more than 20,000 square feet.

New Jersey Authorities that provide “loans, loan guarantees, expenditures, investments, tax exemptions, incentives, or other financial assistance for private sector construction projects have an obligation to require compliance with the Prevailing Wage Act...” These Authorities include the following:

- NJ Economic Development Authority
- NJ Redevelopment Authority (NJRA)
- NJ Housing and Mortgage Finance Agency (NJHMFA)
- Urban Enterprise Zone Authority (NJ Commerce, Economic Growth, and Tourism Commission)
- Casino Reinvestment Development Authority
- NJ Educational Facilities Authority
- NJ Health Care Facilities Financing Authority
- Any County Improvement Authority<sup>57</sup>

The statutory language governing projects receiving funds from the New Jersey Economic Development Authority is below. Language defining “authority financial assistance” appears here in bold:

§ 34:1B-5.1. Rules and regulations relative to payment of prevailing wage rate; “authority financial assistance” defined

- The New Jersey Economic Development Authority shall adopt rules and regulations requiring that not less than the prevailing wage rate be paid to workers employed in the performance of any construction

<sup>56</sup> *New Jersey Annotated Statutes 34:11-56.26*

<sup>57</sup> [http://lwd.dol.state.nj.us/labor/wagehour/content/prevailing\\_wage\\_rate\\_faqs.html](http://lwd.dol.state.nj.us/labor/wagehour/content/prevailing_wage_rate_faqs.html)



contract, including contracts for millwork fabrication, undertaken in connection with authority financial assistance or any of its projects, those projects which it undertakes pursuant to [P.L.2002, c.43\(C.52:27BBB-1](#) et al.), or undertaken to fulfill any condition of receiving authority financial assistance, including the performance of any contract to construct, renovate or otherwise prepare a facility for operations which are necessary for the receipt of authority financial assistance, unless the work performed under the contract is performed on a facility owned by a landlord of the entity receiving the assistance and less than 55% of the facility is leased by the entity at the time of the contract and under any agreement to subsequently lease the facility. The prevailing wage rate shall be the rate determined by the Commissioner of Labor and Workforce Development pursuant to the provisions of P.L.1963, c.150 ([C.34:11-56.25](#) et seq.). For the purposes of this section, **“authority financial assistance” means any loan, loan guarantee, grant, incentive, tax exemption or other financial assistance that is approved, funded, authorized, administered or provided by the authority to any entity and is provided before, during or after completion of a project, including but not limited to, all authority financial assistance received by the entity pursuant to the “Business Employment Incentive Program Act,” P.L.1996, c.26(C.34:1B-124 et al.) that enables the entity to engage in a construction contract, but this section shall not be construed as requiring the payment of the prevailing wage for construction commencing more than two years after an entity has executed with the authority a commitment letter regarding authority financial assistance and the first payment or other provision of the assistance is received.<sup>58</sup>**

### **Connecticut statute<sup>59</sup>**

Connecticut’s prevailing wage law applies to contracts for the “construction, remodeling, refurbishing, rehabilitation, alteration or repair of any public works project by the state or any of its agents.”

The law provides an express preference for in-state workers and contractors:

In the employment of mechanics, laborers and workmen in the construction, remodeling or repairing of any public building, by the state or any of its agents or by persons contracting therewith, preference shall be given to citizens of the state, and, if they cannot be obtained in sufficient numbers, then to citizens of the United States. Any contractor who knowingly and willfully employs any person in violation of any provision of this subsection shall be fined two hundred dollars for each week or fraction of a week each such person is so employed.<sup>60</sup>

Its purpose is articulated on the Connecticut Department of Labor website:

The prevailing wage law was enacted to provide for competitive bidding on a level playing field and at the same time provide an appropriate standard of living for Connecticut’s workers. Over the years, the law has withstood many repeal attempts. In the 1993 and 1997 legislative sessions, the law was actually strengthened to ensure increased compliance.<sup>61</sup>

The statute’s definition of financial assistance is broad and includes the following: any and all forms of loans, cash payments, grants, extensions of credit, loan guarantees, equity

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<sup>58</sup> *N.J. Stat. § 34:1B-5.1*

<sup>59</sup> *Connecticut General Statutes Section [Section 31-53](#) and [31-53a](#).*

<sup>60</sup> *Conn. Gen. Stat. § 31-52*

<sup>61</sup> <https://www.ctdol.state.ct.us/wgwkstnd/prevailing-rates/PrevailingWageGuide/2ContractingAgencies.htm>

investments, tax abatements or other forms of financing. Projects conducted for public-private partnerships are also within the scope.<sup>62</sup>

The Department of Labor offers this advice for public agencies entering into lease agreements:

Recently, we have seen quite a few lease projects where title is not held with the State, but the construction is clearly authorized and paid for by the State. In this type of situation, there should be a contract which describes the construction work or renovations to be performed. Even if the contract is called a "lease agreement" and even if it is between the State and the owner of the property who eventually subcontracts the actual construction, it is work carried on by the authority of the State or with funds of the State and is thus subject to the mandates of Section 31-53.<sup>63</sup>

The article ends with this statement of how the State ought to deal with fluctuations in the economy and construction market:

Our experience has shown that during economic times where private construction is minimal there is tremendous competition to win government contracts. It is also during this time that there is increased pressure on contracting agencies to lower the cost of projects. However, without regard to the various arguments surrounding the impact of prevailing wage on the cost of construction, it is important for the Labor Department to stay the course despite market fluctuation. Over the years, this has been done to the benefit of contractors, workers, and agencies who need to know there is consistency in maintaining a "level playing field".<sup>64</sup>

One issue concerning the scope of various prevailing wage laws in the U.S. is whether the laws should apply to prefabricated work or work that is part of the overall project but conducted off-site then brought to the larger project site. Statutes vary somewhat but typically do not extend to offsite or prefabricated work.

A second issue relates to a minimum threshold for application of the prevailing wage. Twenty-one of the twenty-eight states that have prevailing wage laws, as of January 2018, have some contract threshold or minimum dollar amount for projects required for prevailing wage standards to apply.

Thresholds vary considerably among states and within respective state statutes. California, for example, has a \$1000 threshold but may be higher depending on the work involved: \$15,000 [alteration] or \$25,000 [construction]. New Jersey has a \$15,444 threshold for municipal contracts and \$2000 for all other public entities. Nine states have no minimum threshold: New York, Illinois, Massachusetts, Kentucky, Michigan, Missouri, Nebraska, Texas, and Washington.<sup>65</sup>

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<sup>62</sup> *Conn. Gen. Stat Sec. 31-53(c)*

<sup>63</sup> <https://www.ctdol.state.ct.us/wgwkstnd/prevailing-rates/PrevailingWageGuide/print/2Contracting%20Agencies-print.pdf>

<sup>64</sup> *Ibid.*

<sup>65</sup> For a table of all thresholds, see *U.S. Department of Labor, Wage and Hour Division, Dollar Threshold Amount for Contract Coverage Under State Prevailing Wage Laws*, January 1, 2018; <https://www.dol.gov/whd/state/dollar.htm#1>.

A 2016 study by researchers at the University of Illinois and the Illinois Economic Policy Institute evaluated the impact of contract thresholds for in-state contractors and construction workers. The study found that higher thresholds can negatively impact both groups. Higher thresholds which limit the scope of the prevailing wage law led to lower revenues for in-state contractors as more out-of-state contractors bid on projects. A \$100,000 threshold increase translated to a 1.2 percentage drop in the market share of Illinois' in-state contractors or an annual loss of \$139 million. The same increase would mean a \$53 million decline in blue-collar construction worker income and loss of health benefits for between 600 and 2,040 workers.<sup>66</sup>

### Forms of Public Support for Economic Development Subject to the Prevailing Wage

Public assets	California	New Jersey	Connecticut	Illinois	New York
<i>Public works fully-funded by the state</i>	X	X	X	X	X
<i>Grants</i>	X	X	X	X	
<i>Loans</i>	X	X	X	X	
<i>Bonds</i>	X	X	X	X	
<i>Loan guarantees</i>	X	X	X	X	
<i>Investments</i>			X		
<i>Cash payments</i>	X	X	X	X	
<i>Tax abatements</i>	X	X	X	X	
<i>Rents below FMV</i>	X				
<i>Fees below FMV</i>	X				
<i>Costs below FMV</i>	X				
<i>Transfers of assets below FMV</i>	X				
<i>Credits applied against repayment obligations</i>	X				
<i>Other financial assistance</i>	X	X	X	X	

<sup>66</sup> *An Analysis of the Impact of Prevailing Wage Thresholds on Public Construction*, Frank Manzo and Robert Bruno, Illinois Economic Policy Institute and the Project for Middle Class Renewal, University of Illinois, April 2016, at I, 1, 5-10; available at: <https://ler.illinois.edu/wp-content/uploads/2016/04/ILEPI-PMCR-Prevailing-Wage-Thresholds-FINAL.pdf>.

## Public character of economic development entities

To what extent are New York's economic development entities public or share characteristics of public bodies? The focus here is on three principal players in construction and economic development: Industrial Development Agencies [IDAs], Local Development Corporations [LDCs], and Regional Economic Development Councils [REDCs].

**Industrial Development Agencies** are essentially public in that they are creations of the state legislature, controlled by boards comprised of political appointees, with power over public assets, and are required to hold public hearings and to act in the interest of local governments and taxpayers. IDAs are empowered to provide tax incentives and issue tax exempt bonds. A 2010 report estimates that IDAs in 2008 issued \$27 billion in tax exempt bonds and \$645 million in net tax breaks with disappointing job creation. It also stated that many of the jobs they did create were low-paying.<sup>67</sup>

The essentially public character of IDAs is clearly articulated in this 2006 report by State Comptroller Hevasi:

Industrial Development Agencies (IDAs) are public benefit corporations originally authorized by the Industrial Development Agency Act of 196911 and governed by the provisions of Article 18-A of the General Municipal Law...

According to the authorizing statute, the purpose of an IDA is to promote, develop, encourage and assist in acquiring, constructing, improving, maintaining or equipping certain facilities, thereby advancing the job opportunities, health, general prosperity and the economic welfare of the people of New York. Each IDA is an independent public benefit corporation *established by a special act of the State Legislature at the request of a sponsoring municipality, and each is expected to act in the interest of that particular local government and its residents*. Although administrative arrangements vary considerably, an IDA is generally governed by a board consisting of three to seven members. The Industrial Development Agency Act stipulates that, except as may be provided by a special act, *board members must be appointed by the governing board of each sponsoring municipality*, and may include local government representatives, employees and officials, as well as members of school boards, organized labor, and business groups...

IDAs can offer several benefits to private companies as inducements for them to relocate to, expand in or remain in their jurisdictions. Statute provides the following:

- IDAs have been legally empowered to acquire, own and dispose of property.
- IDAs are able to directly issue debt.
- Real property owned by IDAs is exempt from property taxes and mortgage recording taxes.
- Purchases made in support of approved projects are eligible for exemption from State and local sales taxes.<sup>68</sup>

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<sup>67</sup> *No Return on Our Investment: The Failure of New York's Industrial Development Agencies*, New York Jobs with Justice and Urban Agenda, 2010, at 1, 4, 6, 13, 15; available at: [https://publicauthorities.files.wordpress.com/2011/10/noreturnonourinvestment\\_final.pdf](https://publicauthorities.files.wordpress.com/2011/10/noreturnonourinvestment_final.pdf). See also *Regions, Clusters, and Reform: Economic Development Policy Under Andrew Cuomo*, Richard McGahey, 5 Alb. Gov't L. Rev. 810; 2012, at 7-8.

<sup>68</sup> *Industrial Development Agencies in New York State: Background, Issues and Recommendations*, Office of the New York State Comptroller, Division of Local Government Services & Economic Development, Alan G. Hevasi, May 2006, at 7; available at: <https://www.osc.state.ny.us/localgov/pubs/research/idabackground.pdf> [Italics added]

The following is from a 2011 Opinion of the Office of the New York State Comptroller:

These figures from fiscal year 2015 illustrate the current scale of IDA activity:

- Active IDAs: 109
- IDA projects: 4,484
- Total value of IDA projects: \$88.7 billion
  - Net tax exemptions received by projects: \$694.7 million<sup>69</sup>

**Local Development Corporations** are Not-for-Profit Corporations that, like IDAs, have power to develop projects and issue bonds. The public character of LDCs was at issue in *Matter of Griffiss Local Dev. Corp. v. State of N.Y. Auth. Budget Off.*<sup>70</sup> The 2011 Appellate Division held that the LDC, created by Oneida County to redevelop a local air force base, was a “local authority” subject to provisions of the Public Authorities Accountability Act [PAAA] of 2005. The court noted a “close relationship” between the LDC and local government and that local officials comprised a majority of the LDC board. The LDC was responsible to meet certain statutory requirements for “audits, reporting, and board member training.”

**New York’s Regional Economic Development Councils**, created by Governor Cuomo in 2011, perhaps best represent the new model for economic development. While Council structure and operations are public-private, REDCs are essentially public institutions and would not exist without extensive public funding and participation. The Lieutenant Governor serves as Chair of each of ten regional councils. Each regional council has two co-chairs, one each from the private sector and from a public university. Council members are appointed by the Governor and each Council competes for state funding of targeted projects within their respective regions.

As reported in 2017, the state has awarded nearly \$4.6 billion through six rounds of the Regional Council competition for more than 5,200 projects.<sup>71</sup> The website now claims that \$5.4 billion have since been awarded to 6,300 projects.<sup>72</sup> The Governor recently [December 2017]

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IDAAs are formed for the benefit of municipalities by special act of the State Legislature (see [General Municipal Law § 856](#) [1] [a]; see also [NY Const, art X, § 5](#)). With limited exceptions, these special acts establish IDAs for the purposes specified in Article 18-A of the General Municipal Law, and require their operations and activities to be governed in all respects as provided by that statute (see General Municipal Law, art 18-A, title 2 [§ 890 et seq.]). March 21, 2011; *2011 N.Y. Comp. LEXIS 1*

<sup>69</sup> Annual Performance Report on New York State’s Industrial Development Agencies: Fiscal Years Ending 2015, Office of the New York State Comptroller, Thomas DiNapoli, March 2017; available at: [https://www.osc.state.ny.us/localgov/pubs/research/ida\\_reports/2017/idaperformance.pdf](https://www.osc.state.ny.us/localgov/pubs/research/ida_reports/2017/idaperformance.pdf)

<sup>70</sup> 85 A.D.3d 1402 \*; 925 N.Y.S.2d 712 \*\*; 2011 N.Y. App. Div. LEXIS 5229; 2011 NY Slip Op 5150, June 16, 2011. We agree with Supreme Court's well-reasoned determination that petitioner is a local authority, subject to the provisions of the PAAA. *HN2* [ ] The intention of the Legislature in enacting the PAAA was to “improve oversight, accountability, and transparency [with respect to] public authorities, thereby strengthening public confidence in their important work” (Senate Introducer Mem in Support, Bill Jacket, L 2005, ch 766, at 7). Toward that end, the PAAA defines a local authority as “a not-for-profit corporation affiliated with, sponsored by, or created by a county, city, town or village government” (*Public Authorities Law § 2 [2] [b]*), as amended by L 2005, ch 766, § 2).

<sup>71</sup> *Regional Economic Development Councils: Implementing Our Plans 2017*, at 3-4; available at: [https://regionalcouncils.ny.gov/sites/default/files/2017-12/REDC\\_2017\\_Guidebook.pdf](https://regionalcouncils.ny.gov/sites/default/files/2017-12/REDC_2017_Guidebook.pdf)

<sup>72</sup> <https://regionalcouncils.ny.gov/>

announced \$755 million awarded to Councils.<sup>73</sup> It is beyond the scope of this report to detail or provide in-depth analysis of the various projects. A review of state awards clearly shows that many projects provide direct support to businesses and many others involve infrastructure revitalization and are, in the more traditional sense, public works.

The public interest accompanies public assets. Taxpayers become stakeholders when public decision makers commit public assets to private initiatives. The form of those assets should not matter: grants, bond premiums, loans, lease agreements, as well as tax reductions and transfers of property at below market value. When private developers receive public support from public or quasi-public entities such as the IDA, they derive a benefit and have a duty to honor public policy objectives. Developers can always choose to build projects without public support and without the accompanying responsibility to pay the prevailing wage.

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<sup>73</sup> <https://www.governor.ny.gov/news/governor-cuomo-announces-more-755-million-economic-and-community-development-resources-awarded>

## CONCLUSION

The landscape for public works and economic development has markedly changed since the enactment of New York's prevailing wage law in 1894.

- The leveraging of public resources for private ventures is today a key economic development strategy for New York State.
- The public assets for development projects now take many forms: grants, bond premiums, loans, lease agreements, as well as tax reductions and transfers of property at below market value.
- Prevailing wage laws of sixteen states, including California, New Jersey, Connecticut, and Illinois, now cover a more complete range of publicly-funded projects than does New York's law.

There is a strong public interest, and taxpayers become stakeholders, when public decision makers commit public assets to private initiatives. New York taxpayers, small businesses, and workers may be well-served by joining the sixteen states, including California, New Jersey, Connecticut, and Illinois, with prevailing wage laws covering a broader range of public support.

Expanding the scope of New York's prevailing wage law to encompass the current forms and scale of public investment would align the founder's original intent with present-day realities and broaden New York's overall economic development strategy.

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