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RULE PROPOSALS

**LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF WAGE AND HOUR COMPLIANCE**

46 N.J.R. 1409(a)

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

[Click here to view Interested Persons Statement](#)

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

Authorized By: Harold J. Wirths, Commissioner, Department of Labor and Workforce Development.

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

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2014-092.

A **public hearing** on the proposed new rule will be held on the following date at the following location:

Tuesday, July 15, 2014
10:00 A.M. to 12:00 noon
New Jersey Department of Labor and Workforce Development
John Fitch Plaza
2nd Floor, Large Conference Room
Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 292-2789 if you wish to be included on the list of speakers.

[page=1410] Submit written comments by August 15, 2014, to:

David Fish, Regulatory Officer
Office of Legal and Regulatory Services
New Jersey Department of Labor and Workforce Development
P.O. Box 110 - 13th Floor
Trenton, New Jersey 08625-0110

Fax to: (609) 292-8246

The agency proposal follows:

Summary

The Department of Labor and Workforce Development (Department) is proposing a new rule at N.J.A.C. 12:60-3A.1. This new rule was originally proposed on December 3, 2012 (see *44 N.J.R. 2989(a)*), but was not adopted and filed with the Office of Administrative Law on or before December 3, 2013. Therefore, pursuant to *N.J.A.C. 1:30-6.2(c)*, the proposal expired. As explained in the December 3, 2012, notice of proposal, new N.J.A.C. 12:60-3A.1 would define and delimit air conditioning and refrigeration service and repair for the purpose of determining, on a case-by-case basis, whether the prevailing wage rate for that particular craft or trade applies, or whether the ordinary (often higher) prevailing wage rate for the crafts and trades associated with the installation (as opposed to the service and repair) of air conditioning and refrigeration systems applies. As to where this line should be drawn between service/repair and installation, it is instructive to look to the National Service and Maintenance Agreement between the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the Mechanical Service Contractors of America. This collective bargaining agreement covers a majority of workers in the air conditioning and refrigeration service and repair craft and, therefore, is the collective bargaining agreement upon which the existing prevailing wage rate for the subject craft is based. See *N.J.S.A. 34:11-56.26(9)*. In the existing scope of work article of that collective bargaining agreement, service and repair is limited to certain work performed to keep existing systems within "occupied facilities" operating in an efficient manner. The Department is proposing to adopt this "occupied facility" standard for the purpose of defining and delimiting the service and repair of air conditioning and refrigeration systems (as opposed to the installation of such systems). Furthermore, the Department is proposing at N.J.A.C. 12:60-3A.1(b) to define the term "occupied facility" to mean a facility for which a certificate of occupancy has been issued. This definition is reasonable and defensible and is administratively efficient in that it places a manageable burden on inspectors; specifically, inspectors need simply look for the existence of the certificate of occupancy in order to determine which rate applies - the installation and new construction rate or the service and repair rate. Using the proposed definition of "occupied facility," all otherwise covered work performed after the issuance of the certificate of occupancy would be paid at the air conditioning and refrigeration service and repair rate, whereas all such work done prior to the issuance of the certificate of occupancy would be paid at the ordinary (often higher) rate for the crafts and trades associated with installation of air conditioning and refrigeration systems. This issue is unique among the crafts and trades to the area of air conditioning and refrigeration work.

The proposed definition for the term "occupied facility," as a facility for which a certificate of occupancy has been issued, applies whether that is a permanent or temporary certificate of occupancy. This is consistent with the way in which the Department has traditionally enforced the Prevailing Wage Act (PWA), *N.J.S.A. 34:11-56.25* et seq., relative to air conditioning and refrigeration work. The Department has, to date, used the issuance of the certificate of occupancy to draw the proverbial line between installation and new construction from service and repair for the purpose of determining which air conditioning and refrigeration work prevailing wage rate applies. That practice was recently challenged, which in turn prompted the Department to revisit the issue. Following the Department's reexamination, it has determined that its existing practice is, in fact, the best practice. The Department now memorializes the practice as a new rule.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements, pursuant to *N.J.A.C. 1:30-3.3(a)5*.

Social Impact

The proposed new rule would have a positive social impact in that it would eliminate any possible confusion among public works contractors as to the proper scope of work covered by Department wage determinations for air conditioning and refrigeration service and repair. The proposed new rule would also benefit the Department in that it would make clear to public works contractors the scope of work covered by Department wage determinations for air conditioning and refrigeration service and repair, thereby assisting in a more effective enforcement by the Department of the law.

Economic Impact

The proposed new rule would have a positive economic impact upon public works contractors who, but for the proposed new rule, might misunderstand the scope of work covered by Department wage determinations for air conditioning and refrigeration service and repair and, thereby, run the risk of incurring unnecessary expenses related to fines and penalties levied by the Department for violations of the law and rules. As indicated in the Social Impact above, the proposed new rule would eliminate any possible confusion among public works contractors with regard to the proper scope of work covered by Department wage determinations for air conditioning and refrigeration service and repair. This would presumably result in fewer violations and, consequently, the levying of fewer fines and penalties by the Department.

In those particular instances where the Department's proposed definition of "occupied facility" results in payment of the higher new construction and installation rate as opposed to the lower service and repair rate, there will be a negative economic impact upon those required to pay the higher rate - the contractor and, in turn, the public body. However, again, the approach set forth within this new rule is consistent with the Department's past practice. Furthermore, after having examined the issue thoroughly, the Department views this approach as the most reasonable and defensible.

Federal Standards Statement

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

Jobs Impact

The proposed new rule would have no impact on either the generation or loss of jobs.

Agriculture Industry Impact

The proposed new rule would have no impact on the agriculture industry.

Regulatory Flexibility Analysis

The proposed new rule would impose no reporting or recordkeeping requirements on small businesses, as that term is defined in the Regulatory Flexibility Act, *N.J.S.A. 52:14B-16* et seq. With regard to compliance requirements, the proposed new rule would require that the prevailing wage rate for air conditioning and refrigeration service and repair be paid within a covered facility for which a certificate of occupancy has been issued. The PWA does not differentiate between large and small businesses. Therefore, the Department must enforce the requirements of *N.J.A.C. 12:60* uniformly on all covered businesses, regardless of size. The Department does not anticipate that professional services will be required in order to comply with the proposed new rule.

Housing Affordability Impact Analysis

The proposed new rule will have an insignificant impact on affordable housing in New Jersey and there is an extreme unlikelihood that the rule would evoke a change in the average costs associated with housing. The basis for this finding is that the proposed new rule pertains to enforcement of the PWA and has nothing to do with housing.

[page=1411] **Smart Growth Development Impact Analysis**

The proposed new rule will have an insignificant impact on smart growth and there is an extreme unlikelihood that the rule would evoke a change in the housing production within Planning Areas 1 and 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed new rule pertains to enforcement of the PWA and has nothing to do with housing.

Full text of the proposed new rule follows:

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

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

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

1. "Public work," as that term is defined in this chapter; and
2. Service, repair, or maintenance work performed in order to keep an existing air conditioning or refrigeration system within an occupied facility operating in an efficient manner.

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