



Vol. 44, No. 1

(518) 869-9800

July 2026

Prevailing Wage for Custom Fabrication Work on Hold

NESCA members may recall that back in December Governor Hochul signed into law legislation that will greatly expand the application of Section 220 of the Labor Law (the prevailing wage law) in New York State by including certain off-site custom fabrication as public work for purposes of payment of the prevailing wage. Under the amendment, off-site fabricators will be required to pay the onsite prevailing wage at the rate where the project is located. Specifically, the legislation requires payment of the prevailing wage rate for the fabrication of exterior or interior wall panel systems, woodwork, electrical, plumbing, heating, cooling, ventilation or exhaust duct systems, rebar cages, and mechanical insulation solely and specifically designed and engineered for installation in the construction, repair or renovation of a public project or covered private project. However, because the amendment requires that custom fabrication “shall include” the above specified products, many believe DOL could expand the application and enforcement of this law to fabricated items that are not specifically listed in the law, such as structural steel fabrication.

On May 28th NESCA joined AGC-NYS and a coalition of construction industry and business organizations in filing a federal lawsuit in the U.S. District Court for the Northern District challenging the amendment to the law on constitutional grounds. The coalition asked the federal court to issue a temporary restraining order and/or preliminary injunction to halt enforcement of the amendment while the case proceeds on the merits. In addition to NESCA and AGC-NYS, coalition members include Associated General Contractors of America, Business Council of NYS, National Electrical Contractors Association, Allied Building Metal Industries, Building Contractors Association, Precast/Prestressed Concrete Institute, Utility Contractors Association of NY, and several construction companies.

On June 8th the amendment, which was scheduled to take effect on June 18th, was put on hold until further notice pursuant to a Consent Order for Preliminary Injunction signed by federal court judge Anne M. Nardacci. The Consent Order stops the amendment from taking effect until the Court rules on the parties’ initial motion papers, which are scheduled to be submitted by August 25, 2026. What this means for now is:

- Defendants (NYS Department of Labor and Attorney General) are barred from enforcing any aspect of the Amendment.
- No public owner, including agencies, municipalities, and school districts, and no private owner, including owners of private projects that are subject to New York State prevailing wages, shall be required to comply with the Amendment, or to include its terms as a condition of their contracts.
- No general contractor, subcontractor, fabricator, or other project participant, regardless of location, shall be required to comply with the Amendment or any of its conditions.
- Defendants are barred from taking any enforcement action, including civil penalties, debarment proceedings, or criminal referrals, against any of the Plaintiffs or their members, or any public owner, contractor, subcontractor, fabricator, or other project participant, on account of alleged noncompliance with the Amendment.

NESCA will continue to keep members updated on any new developments as they occur. Our efforts will continue as the coalition moves forward with its challenge to have the amendment invalidated in full.

Appellate Court Says No to Piggybacking

On May 21, 2026 the Appellate Division 3rd Department affirmed a NYS Supreme Court (Broome County) ruling that “Piggybacking” violates New York State’s competitive bidding laws. Piggybacking is a means of awarding public contracts without competitive bidding via a cooperative purchasing model and is authorized by Section 103(16) of the General Municipal Law. The Supreme Court had determined that this section of law applies to the purchase of specific classes of *things* but not to public works projects. In upholding the lower court’s decision, the Appellate Division found that “Although the Legislature could have explicitly identified public works contracts as being subject to the piggybacking provision of subsection (16), it chose not to do so.... Thus, it appears that the Legislature contemplated that the piggybacking provision would be used to facilitate procurement in the context of purchase contracts, as opposed to construction and renovation projects.



PRESIDENT'S MESSAGE

Happy summer everyone! As NESCA kicks off it's busy summer season, I would like to thank the membership, Board of Directors and the NESCA staff for their trust and support in electing me as your 2026-2027 president. It is truly an honor to follow in the footsteps of the many great past presidents that have represented NESCA over the years. I would also like to thank Joe Jerkowski for all his hard work as former president and will look to him for advice during the upcoming year.

It has been both a fulfilling and rewarding experience being involved with the NESCA board. Starting as an alternate director all the way to your current president, I have been surrounded by a group that I believe mirrors the membership – great people! I have made many new friends along the way, and I encourage my fellow members to be involved.

NESCA's summer season kicks off with two popular summer social events. The July 23rd NESCA Day at the Races in Saratoga with 300 tickets sold and our September 14th NESCA Golf

Outing at Shaker Ridge Country Club, which was sold out in less than a week! 250 golfers will be participating in the morning and afternoon flights.

The summer months are also busy for NESCA committees as we prepare for the coming year of membership meetings, educational programs and special events. Our Education, Trade Show and Program Committees will all soon meet to begin their work. The NESCA Scholarship Committee recently met and have awarded scholarships to six deserving applicants who are enrolled in construction-related college degree programs during the 2026-27 academic year. Congratulations to all six recipients! The Young Professionals Group will also be working on upcoming events.

While NESCA was not successful in ushering either of its two legislative initiatives through the State Legislature this year, the association continues to work diligently with a coalition of construction industry organizations to prevent enforcement of and ultimately to invalidate the recently enacted "prevailing wage on custom fabrication" law. On May 28th the coalition filed a lawsuit in the U.S. District Court for the Northern District of New York, and on June 8th the court entered a consent order preventing the State from enforcing the law pending further court proceedings. This is more evidence that NESCA is always looking out for the well-being of our businesses.

Finally, I encourage members to take full advantage of your NESCA membership. If you're not getting paid on a project, file a lien through NESCA's lien filing service. If you have a question about competitive bidding, the prevailing wage law, remedies for non-payment or

many other topics related to running a construction business, call the NESCA office. More often than not, NESCA can either answer your question directly or put you in touch with someone who can.

I look forward to seeing everyone at the upcoming meetings and events while we continue to work with fellow NESCA members to address issues that impact on the industry within which we all strive to succeed.

Jeffrey Orvis, President

NESCA NEWSLETTER

Published monthly by the Northeastern Subcontractors Association, Inc.

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COUNSEL'S MESSAGE

It is not unusual for owners (and for some Construction Managers) to attribute fault for various deficiencies which occur during the construction of a project to the Contractor or subcontractors. The existence of a defect or deficiency does not automatically dictate that the cause of the deficiency is the fault of the contractor/subcontractor.

As a general rule, and subject to contractual modification, the contractor/subcontractor is only responsible for the performance of its construction contract. If the contractor/subcontractor/material supplier performs in a workmanlike manner according to the plans, specifications and contract agreement it will not be held liable even if the building is defective.

The contractor's obligation is to follow the plans and specifications prepared by a licensed design professional. It does not warrant that the plans and specifications are correct or defect free. However, there is some responsibility for interpreting the plans

and specifications. If a defect, error or deficiency is suspected or identified by the contractor it has a duty to bring that information to the attention of the Owner and design professional. If it fails to do so, and the deficient drawings and specifications result in a defective structure, the contractor may share responsibility for that defect.

It is important to recognize a contractor's standard of work is judged by the standards established in the geographical area, or technical surroundings, within which the work is performed. A minimal standard is that the contractor will perform the work in a skillful and workmanlike manner. However, the parties contract may impose a significantly higher standard such as "using the best standard of the industry with the highest degree of skill and workmanship in its trade".

If the defect is the result of the contractor not fully completing its work the owner need not pay the full contract price. However, if the contract scope of work is "substantially completed" the contractor is entitled to the contract price less the cost of correcting any defects and the completion cost of the contract work.

The contractor retains the legal burden of proving its substantial completion of the work as well as the value of work it did not perform before it becomes entitled to any payment. This legal burden can be difficult to satisfy absent documentation, daily reports and pictures of all stages of work performed. Establishing the value of work not performed will involve the engagement of expert testimony.

Defects in the work if remediable, even though substantial, the damage value measurement is the cost of completing or correcting the work after which any contractual balance is paid to the contractor.

It is important to remember the principles outlined in this article can be modified to impose a stricter standard or enhanced degree of responsibility by usage of the contract language. It is critical that the contractor/subcontractor or materialman conduct a rigid examination of the entire contract and in negotiations eliminate standards not considered customary in the industry.

Walter G. Breakell, NESCA Legal Counsel

Member Payment Tip

Subcontractors should not be timid about exercising their lien rights. Indeed, subcontractors often wait too long before deciding to file a lien, only to discover that their lien rights have expired. In New York, a private mechanic's lien filed in the County Clerk's Office in the county where the project is located becomes an encumbrance on the real property upon which the project is located. The main usefulness of the lien is that it creates a cloud on title to the property. Owners need clear title to refinance or transfer the property. When a public improvement lien is filed on a public project, it is not a lien on the real property but rather is a claim against the public fund set up for payment of the construction of the project. The most frequent effect is that the public agency withholds one and one-half times the amount of the lien from the payment to the contractor until the lien has been satisfied.

Subcontractors doing business in New York State may not be compelled to waive their lien rights as a condition of the subcontract. The law, however, does not prohibit the general contractor from requesting the execution of interim or partial lien waivers in exchange for payment on monthly requisitions.

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Calendar of Events

July 23, 2026

NESCA Day at the Races
Saratoga Race Course, 11 am

August 6, 2026

Board of Directors Meeting
Italian American Comm. Ctr. 6 pm

September 3, 2026

Board of Directors Meeting
Italian American Comm. Ctr. 6 pm

September 14, 2026

NESCA Annual Golf Outing
Shaker Ridge Country Club

NESCA Member Milestone Anniversaries

RBT CPA's, LLP
25-Year Member

Callanan Industries, Inc.
40-Year Member

Legislature Passes Construction Reporting Pay Act

In the waning days of the 2026 legislative session, the NYS Legislature passed the "Construction Reporting Pay Act" which will be sent to the Governor for her consideration. If approved by the Governor, this legislation will require construction industry employers to provide four (4) hours pay at the prevailing rate (for

public projects), or four (4) hours pay at the employee's regular hourly rate (for non-public projects) if the employee reports for work and is sent home. The legislation will also require employers to provide two hours pay if a shift is canceled with less than twelve (12) hours' notice.

More specifically, the legislation requires for any construction projects covered by the NYS prevailing wage, "...each laborer, worker or mechanic in the employ of a contractor who by request or permission of an employer reports for work on any day shall be paid no less than four hours at the prevailing rate of wages, including supplements...for the employee's regularly scheduled classification of work, however, this section shall not be applicable if the posted prevailing rate of wages provides for reporting pay wages or benefits greater than set forth in this section." Further, "...each laborer, worker or mechanic in the employ of a contractor who by request or permission of an employer is scheduled to report to work on any day shall be paid for two hours at the prevailing rate of wages, including supplements, ...for the regularly scheduled classification of work when such scheduled shift is cancelled on less than twelve hours' notice to the employee."

The requirements are similar for private work (not subject to the prevailing wage) except that the rate of pay shall be at the employee's "promised hourly wage".

Since 2017, all employers in New York have been required to comply with Department of Labor promulgated "Call in Pay" regulations. These regulations require employees who report to work to be paid for a least four hours at the basic minimum hourly wage. The sponsors of this legislation argue that the minimum wage is inadequate for the construction industry, where the minimum wage is far lower than the prevailing rate of wages or the employee's regular rate of pay on most construction jobs.

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