



State Edition  
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# MERIT MESSENGER

6369 Collamer Drive, East Syracuse, NY 13057-1115 empire@abcnys.org  
315) 463-7539 Fax 7621 (800) 477-7743 Education (888) 696-2237

ENY ABC John Nerney 518-449-1062 / Fax 9084  
WNY ABC Chris Knospe 716-832-0777 / Fax 0749

## **INFORMATION ALERT – PUBLIC WORK BENEFIT PLANS**

**There is a recent development regarding fringe benefit plans contributed to by open shop public works contractors or subcontractors. The results of two pending legal actions may have substantial financial implications for you and your business. If you are a union or open shop general contractor or prime contractor with any open shop subcontractors, this may also have serious financial implications for you.**

**Background:** As you know, Section 220 of the NYS Labor Law requires employers to pay prevailing wages on public works projects, and to either pay cash or provide supplements such as health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay and life insurance. In the past, employers (both GC's and subs) could simply make contributions into any one of a number of benefit plans in order to meet the statutory obligation. In April 1999, the NYS Department of Labor (NYSDOL) issued a notice stating that it would not allow credit for payment used "to obtain benefits for a period of time during which the worker was engaged in a private project" - referred to as "annualization of benefits" – or to provide benefits "for individuals other than on whose behalf the payments were made" ("pooling").

**Legal Challenges:** This Notice was challenged in both state and federal court. In State Court, it was charged that NYSDOL's Notice was inconsistent with the policy previously enforced, and that a hearing was required under New York's State Administrative Procedures Act (SAPA) for adopting a new rule. NYSDOL claimed that their policy adopted under SAPA February 26, 1992 required annualization of benefits, and that policy had not changed. Despite transcripts of NYSDOL seminars and a letter to ABC which stated that contributions made to a pension plan or ERISA trust are not annualized, and that the entire amount contributed may be credited, provided that each employee is a bona fide participant in that plan, on December 9, 1999, NYS Supreme Court Justice Kavanagh ruled that the NYSDOL Notice was a clarification of policy which falls within the "interpretation" exception of SAPA.

In Federal Court, although Judge Scullin initially appeared skeptical of the annualization requirement, on January 22 he ruled from the bench that NYSDOL can determine a contractor's credit for paying benefits based on annualization. *HMI Mechanical Systems, Inc.; Compensation Programs, Inc.;* and *The CPI Open Shop Plan v James J. McGowan, Commissioner, New York State Department Of Labor.*

Unless a settlement is reached, both court rulings are expected to be appealed. However:

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**NYSDOL and Attorney General Enforcement** The NYSDOL has seized this opportunity and intends to enforce the Notice by investigating and penalizing contractors who may have paid prevailing wage supplements to provide benefits to anyone other than the public works employees, or for periods of time when the same covered employee may have been employed on non-public work projects. To accomplish this, the Department intends to “**annualize**” the benefits. NYSDOL will limit the prevailing supplements credit to: the total number of prevailing rate hours / total work hours of all plan participants = % of total prevailing supplements. For example: If the fringe contribution = \$5/hour, and

- \* The employee works two weeks on a public project, and two weeks on a nonpublic project; and

- \* No additional amounts are paid into the plan for the two weeks on nonpublic work; then

- \* According to NYSDOL, only half of the \$5 benefit went to the employee. Therefore, the employee was underpaid by that amount and must be compensated accordingly (plus interest and penalties).

Aside from creating a regulatory nightmare, this annualization concept means that any open shop employer who has not been paying the same fringe benefits on non public work is going to be subject to a recalculation. To make matters worse, it appears that NYSDOL intends to apply this new rule **retroactively** - how far back exactly, and as against which specific benefits, remains to be seen. In fact, one NYSDOL official indicated that NYSDOL may seek “**substantial reparations**” from companies in violation of the Notice. Furthermore, the Attorney General’s office (the "AG") may become involved even to the point of investigating non-complying contractors for statutory violations or fraudulent business practices.

This new “rule” affects almost every aspect of the industry. Not only are the parties to the litigation involved, but so too is anyone currently under DOL investigation regarding supplements; anyone using a plan under which benefits are not annualized or are pooled even if the company is not currently under investigation; any prime contractor who may have a subcontractor not in compliance with the Notice because, by law, prime contractors can be held responsible for the actions of their subs; and all other companies who may now be audited by DOL, even if in compliance with the Notice.

**What You Should Do Now** At this point, the judge has not issued a written decision and DOL is still determining how broadly to enforce the Notice. While it might appear that paying a cash supplement is “acceptable” this could result in other problems as well as being disruptive to your employees. Still unresolved by NYSDOL are questions as to whether annualization can be required for payments into pension plans, cafeteria plans, health plan hour banks, supplemental unemployment funds, or other plans where workers do not obtain the benefits on private work, but rather they get the benefit when they are retired or unemployed. We will continue to work with NYSDOL and others, and to review both pending and potential legal actions, to determine how employers can protect themselves. In the meantime, **we encourage you to review your benefit situation with your attorney, accountant and/or benefit provider.** As soon as more information is available, we will provide it to you.