

PUBLICATIONS

Topics / Wage/Hour

New York City Ramps Up Efforts to Enforce the Prevailing Wage Requirement of Its 421-a Affordable Housing Tax Exemption

Date Nov 14, 2016

Executive Summary: Owners of 421-a tax exempt buildings and developments should practice extreme caution when considering responding (or failing to respond) to the recent notices (Notices) sent by the City of New York Department of Housing Preservation and Development (HPD), New York State Office of Attorney General (NYSOGA) and the New York City Comptroller's Office (Comptroller) concerning prevailing wage compliance. These Notices signal the start of an aggressive enforcement effort of the prevailing wage requirement that accompanies the 421-a exemption.

New York City can be an expensive place to do business. Even something advertised as free—as a tax abatement or even exemption—comes at a hefty price. Recently, Notices were issued jointly by HPD, NYSOAG and the Comptroller to owners of real estate developments enjoying tax exemptions under Real Property Tax Law (RPTL) § 421-a (421-a tax exemption). The Notices require owners of 421-a tax exempt buildings to provide certified statements confirming payment of prevailing wages under Article 9 of the New York Labor Law (NYLL) to building service employees working in their 421-a tax exempt buildings, and disclosing all efforts to ensure compliance with the prevailing wage requirement. The Notices signal an aggressive enforcement effort by HPD, NYSOAG and the Comptroller to ensure compliance with the NYLL and RPTL.

Requirement to Pay Prevailing Wages under 421-a Exemption

While many building owners engage building services companies to manage and perform janitorial, security and other building services work, the law places the onus on the building owners to ensure their building services providers pay prevailing wages to the affected workers. It is crucial for property and development owners to determine whether the prevailing wage requirement applies to their properties.

The 421-a requirement applies to all multiple dwellings receiving tax benefits pursuant to the Affordable Housing Exemption for which construction began after December 27, 2007, and that contain fifty or more dwelling units. The owners of such properties must ensure payment of prevailing wages to all building service employees for the length of the tax abatement, unless they received a certification of exemption^[1] by HPD. A building service employee is defined as "any person who is regularly employed at a building who performs work in connection with the care or maintenance of such building." See RPTL 421-a(8); N.Y. Lab. Law § 230(1). Such an employee "includes, but is not limited to, watchman, guard, doorman, building cleaner, porter, handyman, janitor, gardener, groundskeeper, elevator operator and

starter, and window cleaner, but shall not include persons regularly scheduled to work fewer than eight hours per week in the building." *Id.*

What Are Prevailing Wages?

Article 9 of NYLL governs payment of prevailing wages to service employees. Specific wage rates are established based on job duties and occupations of the workers. Applicable wage rates can be found in wage schedules promulgated by either the New York State Commissioner of Labor or the Comptroller. Prevailing wage requirements under Article 9 of NYLL not only govern rates of pay for building services workers, but also require payment of fringe benefits in addition to payment of the prevailing wage rate. The requirements set forth rules that affect a wide range of terms and conditions of work. The law further places strict payroll reporting and record retention requirements on employers, such as submission of certified payrolls attesting to the truth and accuracy of hours worked and wages paid to workers and maintenance of these time and pay records for a minimum of six years.

What Does This Mean for Building Owners?

These Notices and the prevailing wage requirement must be taken seriously. Since the Notices require building owners to certify to HPD that service employees working at their 421-a tax exempt buildings have been paid prevailing wage rates, and furnish detailed information regarding the work classification and payments to workers, building owners must tread carefully in furnishing a response to the Notices. Admission by building owners to non-compliance with the prevailing wage requirement will result in loss of tax benefits and exposure to liability for underpayment of wages. A failure or refusal to respond by a building owner may trigger further investigation by NYSOAG, HPD or the Comptroller. A response containing false or inaccurate representations will expose the building owner to significant legal liability. This may further result in the referral by HPD for criminal prosecution on the basis of filing of false instruments or violation of mail or wire fraud statutes.

To ensure compliance with the prevailing wage requirements under the 421-a tax exemption, building owners who self-manage building services workers in 421-a tax exempt buildings must ensure that the required wages and supplemental benefits are paid to their janitors, cleaning staff, doorpersons, security staff, porters and other building services staff. To the extent that these owners seek to satisfy their supplemental benefits portion of prevailing wages through their existing fringe benefit plans, they must make sure that contributions made to their fringe benefit plans are made on an "annualized basis." Building owners should also consult the applicable prevailing wage schedule concerning their obligations in meeting hours worked rules, holidays, paid time off, overtime and premium time requirements.

Building owners who engage building management companies to provide building services work at their 421-a tax exempt buildings must take steps to ensure that the building services contracts with these building management companies contain terms specifically providing that payment of prevailing wages is a material obligation under these contracts and include applicable prevailing wage schedules in the contracts. Building owners must also require their management companies to submit certified payrolls as part of their invoicing process. These certified payrolls must be supported by time records and cancelled checks or paystubs. Upon inquiry by the enforcement agencies (i.e. NYSOAG, HPD and the Comptroller), building owners must be able to demonstrate compliance with the prevailing wage requirements through certified payroll documents from their management companies showing that appropriate wage rates and fringe benefits were paid and provided to the affected workers for hours worked at the covered buildings.

Finally, Article 9 includes job site posting requirements with which building owners must comply, as well as the requirement that prevailing wage schedules be available to workers. Building owners who perform their own building services work must be aware of these requirements. If building owners engage others to perform building services work, a best practice is to include such requirements in the operative contract and, further, make the posting of notices and the availability of prevailing wage schedules material terms of that contract.

Ultimately, both responding incorrectly or inaccurately and failing to respond to these Notices can result in serious consequences including protracted investigations and sanctions. If you have received one of these Notices, you should begin a thorough review of the contracts, payroll records, paystubs and all other supporting records related to the 421-a tax exempt property. To implement a compliance plan, and avoid sanctions and investigations to the extent possible, we recommend that owners of 421-a tax exempt buildings and developments seek the advice of counsel.

If you have any questions regarding this Alert or other labor or employment issues impacting employers in New York, please feel free to contact the authors, Eric Su, esu@fordharrison.com, or Allan Bahn, abahn@fordharrison.com, partners in our New York City office and co-chairs of FordHarrison's Construction practice group, or Alyssa Smilowitz, asmilowitz@fordharrison.com, who is an associate in our New York City office. You may also contact the FordHarrison attorney with whom you usually work.

[1] To receive certification of exemption, HPD must certify that (1) the project reached the affordable housing ratio exemption standard, which requires that, at initial occupancy, at least 50 percent of dwelling units were affordable to individuals or families with a gross household income at or below 125 percent of Area Median Income— and (2) that those units in rental buildings will be subject to restrictions to ensure that they will remain affordable for the entire 421-a benefit period.



ERIC SU
Partner



ALLAN M. BAHN
Partner



ALYSSA M. SMILOWITZ
Associate



Copyright © FordHarrison 2016