

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT

Notice of Adoption

Notice is hereby given that pursuant to the authority vested in the Commissioner of the Department of Housing Preservation and Development (“HPD”) by Section 1802 of the New York City Charter, and in accordance with Section 1043 of the City Charter, HPD is adopting amendments to Chapter 50 to Title 28 of the Rules of the City of New York regarding the affordability exception to the prevailing wage requirement for building service workers in projects receiving Real Property Tax Law Section 421-a benefits.

A notice of proposed rulemaking was published in the City Record on December 3, 2018. A public hearing was held on January 15, 2019.

Statement of Basis and Purpose

Section 421-a of the Real Property Tax Law (RPTL) provides real property tax exemptions for eligible new multiple dwellings. In New York City, HPD determines eligibility for these exemptions and is responsible for ensuring that applicants for the exemption comply with eligibility requirements, including the requirement that the applicant’s building service employees receive a prevailing wage.

Chapter 20 of the Laws of 2015 amended the 421-a statute to add enforcement oversight over the building service employees’ prevailing wage requirements by designating enforcement authority to the fiscal officer, which, in New York City, is the Comptroller. Chapter 20 of the Laws of 2015 also articulated the fiscal officer’s enforcement powers, which include conducting investigations to determine the prevailing wage for building service employees, holding related hearings, and issuing rules necessary for the proper execution of the duties, responsibilities, and powers conferred upon the fiscal officer by Chapter 20.

Chapter 20 additionally adopted a new extended benefit, provided in subdivision 17 of RPTL 421-a, that is available to multiple dwellings that commenced construction prior to July 1, 2008, and that had been granted either 25 or 20 years of Section 421-a benefits prior to June 15, 2015, for making at least 20% of their dwelling units affordable to persons or families of low income. The Comptroller is also the designated enforcement authority over the building service employees’ prevailing wage requirements for buildings receiving the Section 421-a (17) extended benefits.

Chapter 59 of the Laws of 2017 amended RPTL Section 421-a(16) and provided for Affordable New York Housing Program tax exemption benefits for buildings that commenced construction after December 31, 2015, and on or before June 15, 2022, and who completed construction no later than June 15, 2026. Chapter 59 of the Laws of 2017 requires compliance with the prevailing wage requirements for building service workers and also provides enforcement authority to the Comptroller.

Certain buildings are exempt from the prevailing wage requirement for building service workers based upon a designated percentage of affordable units at a prescribed Area Median Income and, in the situation of a rental building, the maintenance of the affordability of such units for the

duration of the respective restriction period (“Affordability Exception”). By statutory fiat, HPD must decide whether or not a building is eligible for the Affordability Exception.

HPD’s rule amendments clarify that any decision that HPD renders regarding the Affordability Exception is not a final determination until HPD either (a) issues an Order pursuant to this Chapter 50, or (b) issues an Applicant a letter indicating that such Applicant is ineligible for the real property tax exemption associated with such prevailing wage for building service workers requirement. The rule amendments also make some technical corrections to Chapter 50.

New material is underlined.
[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. The following definition of “Benefits Ineligibility Letter” is added in alphabetical order to Section 50-01 of chapter 50 of title 28 of the Rules of the City of New York, and the definitions of “Final Certificate of Eligibility”, “Order” and “Prevailing Wage Requirement” contained therein are amended, to read as follows:

Benefits Ineligibility Letter. “Benefits Ineligibility Letter” shall mean the letter that the Agency issues to the Applicant indicating that such Applicant is ineligible for any real property tax exemption benefits pursuant to the Act, the new 421-a Act, or the Extended Affordability Act, as applicable.

Final Certificate of Eligibility. “Final Certificate of Eligibility” shall mean either (a) the document issued by the Agency in accordance with chapter six of this title that provides for Post-Construction Benefits; [or] (b) the document issued by the Agency in accordance with chapter 49 of this title which provides the Extended Benefit; or (c) the document issued by the Agency in accordance with chapter 51 of this title that provides for Affordable New York Housing Program Benefits.

Order. “Order” shall mean an order issued by the Agency pursuant to paragraph [(f)] (d) of the Act [or] subparagraph (iv) of the New 421-a Act or subparagraph (iv) of the Extended Affordability Act, respectively, that either (a) adopts, in whole or in part, or rejects a Report and Recommendation, or (b) approves any Stipulation of Settlement between the Comptroller and the Applicant.

Prevailing Wage Requirement. “Prevailing Wage Requirement” shall mean the requirements under the Act [or], the New 421-a Act or the Extended Affordability Act, respectively, and this chapter that are applicable, with respect to the Act or the New 421-a Act, to any Multiple Dwelling whose construction began on or after December 28, 2007, and with respect to the Extended Affordability Act, to any Extended Affordability Property, except as otherwise provided in paragraph (e) of the Act [or], subparagraph (v) of the New 421-a Act, or subparagraph (v) of the Extended Affordability Act, as applicable, that all Building Service Employees receive the Prevailing Wage for the duration of the applicable Benefits period.

§ 2. Subdivision (c) of Section 50-04 of title 28 of the Rules of the City of New York is amended to read as follows:

c. An Owner shall be jointly liable for any violation of the Act [or], the New 421-a Act or the Extended Affordability Act, as applicable, at the property receiving Benefits without regard to whether the Building Service Employees were directly employed by such Owner.

§ 3. The second section 50-05 of chapter 50 of title 28 of the Rules of the City of New York is renumbered as follows:

§ [50-05.] 50-06. Benefit Revocation. The Agency shall commence benefit revocation proceedings pursuant to chapter 39 of this title if: (a) an Applicant fails to make the payments to the Comptroller required by an Order within 120 calendar days of receiving the Order, in which the sole cause for such revocation shall be the failure to make such payments on or before the prescribed deadline, (b) two Orders determining a willful failure to pay the Prevailing Wage for the same multiple dwelling have been issued within a six-year period, or (c) an Order determines a willful failure to pay the Prevailing Wage that involves a falsification of payroll records or the kickback of wages or supplements.

§ 4. The original section 50-06 of chapter 50 of title 28 of the Rules of the City of New York is renumbered and amended, and sections 50-07 and 50-08 of such chapter are renumbered, to read as follows:

§ [50-06] 50-07. Agency Determination of Prevailing Wage Exemption. 1. An Applicant who requests a determination of exemption from the Prevailing Wage Requirement pursuant to the Act, the New 421-a Act, or the Extended Affordability Act, as applicable, must submit all of the documentation necessary to prove that:

(a) with respect to a multiple dwelling that is not receiving benefits pursuant to subdivisions sixteen or seventeen of Real Property Tax Law § 421-a, at least fifty percent of the dwelling units in such Applicant's building are 125% Units, including, but not limited to, (i) with respect to a multiple dwelling owned and operated as a rental, the initial rents for such 125% Units, the income certifications for the initial occupants of such 125% Units, and proof that the building is required to maintain such 125% Units during the entire period of Post-Construction Benefits, and, (ii) with respect to 125% Units in a multiple dwelling owned and operated as a condominium or cooperative development by individual condominium unit owners or shareholders, the initial unit sale prices and the income certifications for all of the initial purchasers of such 125% Units;

(b) with respect to an Eligible Multiple Dwelling that is receiving benefits pursuant to subdivision sixteen of Real Property Tax Law § 421-a, all of the dwelling units in such Eligible Multiple Dwelling are Affordable Housing Units, and at least fifty percent of the Affordable Housing Units, upon initial rental and upon each subsequent rental after a vacancy during the Restriction Period or the Extended Restriction Period, are 125% Units, including, but not limited to, the initial rents for such Affordable Housing Units and 125% Units, the income certifications for the initial occupants of such Affordable Housing Units and 125% Units, and proof that the Eligible Multiple Dwelling is required to maintain such Affordable Housing Units and 125% Units during the entire Restriction Period or Extended Restriction Period, as applicable; or

(c) with respect to an Extended Affordability Property that is receiving benefits pursuant to subdivision seventeen of Real Property Tax Law § 421-a, all of the dwelling units in such Extended Affordability Property are Affordable Housing Units, and at least fifty percent of the Affordable Housing Units, upon initial rental and upon each

subsequent rental after a vacancy during the Extended Affordability Period, are 125% Units, including, but not limited to, the initial rents for such Affordable Housing Units and 125% Units, the income certifications for the initial occupants of such Affordable Housing Units and 125% Units, and proof that the Extended Affordability Property is required to maintain such Affordable Housing Units and 125% Units during the entire Extended Affordability Period.

2. An Agency determination of ineligibility for an exemption from the Prevailing Wage Requirement is deemed a final determination when the Agency issues either an Order or a Benefits Ineligibility Letter, after which the only review available to the Applicant is pursuant to Article 78 of the Civil Practice Law and Rules.

§ [50-07.] 50-08. Contractor Certified Payroll Report. a. Eligible Multiple Dwellings that are required to submit a Contractor Certified Payroll Report pursuant to paragraph (vi) of the Minimum Average Hourly Wage Act shall use the form provided on the Comptroller's website at www.comptroller.nyc.gov/prevailingwage, and shall identify all Construction Workers employed by the contractor or subcontractor and set forth the dates for all hours worked, the hourly wage and benefit rates, and the weekly gross and net pay amounts for each such Construction Worker. The Contractor Certified Payroll Report shall be accompanied by employee daily sign-in logs in the form provided on the Comptroller's website at www.comptroller.nyc.gov/prevailingwage, and shall identify all Construction Workers employed by the contractor or subcontractor, set forth the daily start and end times of work for each such Construction Worker, and include each such Construction Worker's original signature.

b. Notwithstanding anything to the contrary contained in subdivision a of this section, the requirement for employee daily sign-in logs shall be waived for any Construction Work that took place on any days prior to the effective date of this subdivision.

§ [50-08.] 50-09. Failure to Submit Required Reports, Failure to Submit Accurate Reports or Failure to Pay Minimum Average Hourly Wages in Accordance with the Minimum Average Hourly Wage Act.

a. The Comptroller shall only approve a plan submitted by the Third Party Fund Administrator pursuant to paragraph (vii) of the Minimum Average Hourly Wage Act if distribution of the deficiency is limited to all Construction Workers whose wages equal less than the minimum average hourly wage applicable to such Eligible Site.

b. In the event that the Third Party Fund Administrator cannot distribute funds to any Construction Workers within one year of receiving the Comptroller's approval of such Third Party Fund Administrator's plan, the Third Party Fund Administrator shall pay the unclaimed funds to the Comptroller and the Comptroller shall hold such funds for such Construction Workers until they claim their awards.

c. In the event that any contractor or subcontractor does not submit the Contractor Certified Payroll Report, or if it appears to the Comptroller that any Contractor Certified Payroll Report is inaccurate, the Comptroller shall conduct an investigation to determine: (i) the actual wages paid to all Construction Workers employed by the contractor or subcontractor that did not submit the Contractor Certified Payroll Report or that submitted an inaccurate Contractor Certified Payroll Report, and, if relevant, (ii) the

difference between the actual wages paid and the wages set forth in the inaccurate Contractor Certified Payroll Report.

d. The Comptroller shall provide the Independent Monitor with a statement of actual wages paid to all Construction Workers employed by a contractor or subcontractor that did not submit the Contractor Certified Payroll Report, and the Independent Monitor shall use such statement to complete the Project-Wide Certified Payroll Report.

e. A contractor or subcontractor who submits an inaccurate Contractor Certified Payroll Report shall be liable for the difference between the wages set forth in such Contractor Certified Payroll Report and the actual wages paid, with interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to Section 14-a of the Banking Law per annum from the date of the underpayment to the date of the payment of such difference.

Commissioner Maria Torres-Springer
February 11, 2019