

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT

Notice of Adoption of Rules Governing RPTL Section 421-a(8) Prevailing Wage Requirements for Building Service Workers

Notice is hereby given that pursuant to the authority vested in the Commissioner of the Department of Housing Preservation and Development by Section 1802 of the City Charter and Section 421-a of the New York State Real Property Tax Law, and in accordance with the requirements of Section 1043 of the New York City Charter, the Department of Housing Preservation and Development is adding a new chapter 50 to Title 28 of the Rules of the City of New York to implement the prevailing wage requirement for building service employees in buildings receiving tax benefits under New York State Real Property Tax Law section 421-a (the "421-a Statute") enacted by the State Legislature by Chapter 618 of the Laws of 2007 and further amended by Chapter 15 of the Laws of 2008 and Chapter 20 of the Laws of 2015.

A notice of proposed rulemaking was published in the City Record on July 5, 2016. A public hearing was held on August 9, 2016.

Statement of Basis and Purpose of Rules

The 421-a Statute 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 the exemption's eligibility requirements, including the requirement that the applicant's building service employees receive a prevailing wage. HPD is adopting a new Chapter 50 of Title 28 of the Rules of the City of New York to implement the prevailing wage requirement.

Subdivision 8 of the 421-a Statute, which contains the prevailing wage requirement, applies to all multiple dwellings receiving tax benefits pursuant to the 421-a Statute whose construction began after December 27, 2007, and that contain fifty or more dwelling units. Such buildings must pay the prevailing wage to all building service employees unless HPD certifies that at initial occupancy (1) at least 50% of the dwelling units were affordable to individuals or families with a gross household income at or below 125% of Area Median Income and (2) that any such units in rental buildings will be subject to restrictions to ensure that they will remain affordable for the entire 421-a benefit period.

When the building service employees' prevailing wage requirement was first enacted in 2007, it lacked an enforcement mechanism. Chapter 20 of the Laws of 2015 corrected that omission by providing 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, including 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.

The Comptroller's hearing practice and procedure are covered by existing rules codified at Chapter 2 of Title 44 of the Rules of the City of New York.

HPD's rules:

- Provide that the prevailing wage and supplement rates for the various classifications set forth in the Comptroller's annual Labor Law Section 230 Prevailing Wage Schedules for Building Service Employees apply to building service employees in buildings subject to the 421-a building service employees prevailing wage requirements.
- Determine how the obligation to pay prevailing supplements may be discharged.

- Establish the applicable prevailing wage and supplement rate for apprentices.
- Provide that after receiving from the Comptroller either an executed stipulation of settlement or a report and recommendation, accompanied by the complete hearing record, concerning compliance with the building service employees prevailing wage requirement, HPD can issue an order that either adopts, in whole or in part, or rejects the report and recommendation, or that approves any stipulation of settlement between or among the parties.
- Provide that those found to have violated the building service employees prevailing wage requirement must be directed to pay to the Comptroller (a) wages and supplements found to be due for work performed no more than two years from the earlier of the complaint filing date or the investigation commencement date, and (b) interest at an annual rate of not less than 6% and not more than the rate then prescribed by the superintendent of banks pursuant to Banking Law Section 14-a on all wages and supplements found to be due. The factors to be considered in determining such interest rate are also established by the adopted rules.
- Direct HPD to revoke all 421-a benefits when (a) an applicant fails to make the payments the Comptroller required by an order within 120 days of receiving the order, (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.

HPD's authority for these rules is found in sections 1043 and 1802 of the New York City Charter and section 421-a of the Real Property Tax Law.

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.

Adopted Rules

Section 1. Title 28 of the Rules of the City of New York is amended by adding a new chapter 50 to read as follows:

Chapter 50

Building Service Employees Prevailing Wage Requirements in Buildings Receiving Benefits Pursuant to Real Property Tax Law Section 421-a

§ 50-01. Definitions. As used in this chapter, the following terms shall have the following meanings. Capitalized terms that are not specifically defined in this chapter shall have the meanings set forth in the Act.

125% Limit. "125% Limit" shall mean, with respect to any unit, that the income of the household renting or purchasing such unit does not exceed one hundred twenty-five percent of the area median income, adjusted for family size, at the time that such household initially occupies such unit, and that either (a) for a multiple dwelling owned and operated as a rental, the rent at the time of initial rental and upon each subsequent rental following a vacancy does not exceed thirty percent of one hundred twenty-five percent of the area median income, adjusted for family size, minus the amount of any applicable Utility Allowance, or (b) for a multiple dwelling owned and operated as a condominium or cooperative development by individual condominium unit owners or shareholders, the sales price at the time of initial sale results in mortgage payments

(including both interest and principal calculated at the Mortgage Rate and assuming the mortgage constitutes 90% of the purchase price) and common charges or carrying charges, respectively, that, collectively, do not exceed thirty percent of one hundred twenty-five percent of the area median income, adjusted for family size.

125% Unit. "125% Unit" shall mean (a) if a multiple dwelling is owned and operated as a rental, a unit that complies with the 125% Limit upon initial rental and upon each subsequent rental following a vacancy, or (b) if the multiple dwelling is owned and operated as a condominium or cooperative development by individual condominium unit owners or shareholders, a unit that complies with the 125% Limit upon the initial sale of such unit.

Act. "Act" shall mean subdivision 8 of Section 421-a of the Real Property Tax Law.

Agency. "Agency" shall mean the department of housing preservation and development.

Applicant. "Applicant" shall mean an applicant for Benefits and any successor to such applicant, including, but not limited to, any Owner, or any employer of Building Service Employees for such applicant, successor or Owner, including, but not limited to, a property management company or contractor.

Apprenticeship Program. "Apprenticeship Program" shall mean an apprenticeship program registered with the New York State Department of Labor in conformity with the provisions of Article 23 of the Labor Law.

Benefits. "Benefits" shall mean real property tax exemption benefits pursuant to Section 421-a of the Real Property Tax Law.

Comptroller. "Comptroller" shall mean the comptroller of the city of New York or his or her designee.

Comptroller Schedule. "Comptroller Schedule" shall mean the annual Labor Law Section 230 Prevailing Wage Schedules for Building Service Employees that are in effect at the time the relevant Building Service Employee performs the work and that are published at www.comptroller.nyc.gov/prevailingwage.

Construction Benefits. "Construction Benefits" shall mean Benefits for the period before issuance of either a permanent certificate of occupancy for the entire building or a temporary certificate of occupancy for all of the residential areas contained therein.

Final Certificate of Eligibility. "Final Certificate of Eligibility" shall mean the document issued by the Agency in accordance with chapter six of this title that provides for Post-Construction Benefits.

Mortgage Rate. "Mortgage Rate" shall mean the single family mortgage rate for a thirty-year fixed rate loan established by the Federal Home Loan Mortgage Association and the Federal National Mortgage Association plus 150 basis points that is either (a) for purposes of the application for a Preliminary Certificate of Eligibility, quoted for the month in which the construction of such multiple dwelling commences, or (2) for purposes of the application for a Final Certificate of Eligibility, quoted for the month in which the first certificate of occupancy or temporary certificate of occupancy for the first unit in such multiple dwelling that is owned and operated as a condominium or cooperative development by individual condominium unit owners or shareholders, is issued.

Order. "Order" shall mean an order issued by the Agency pursuant to subdivision (f) of the Act 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.

Owner. "Owner" shall mean the fee owner of the real property receiving Benefits and any ground lessee of such real property.

Preliminary Certificate of Eligibility. "Preliminary Certificate of Eligibility" shall mean the document issued by the Agency in accordance with chapter 6 of this title that provides for Construction Benefits.

Post-Construction Benefits. "Post-Construction Benefits" shall mean Benefits for the period after issuance of either a permanent certificate of occupancy for the entire building or a temporary certificate of occupancy for all of the residential areas contained therein.

Prevailing Wage. "Prevailing Wage" shall mean the prevailing wage and supplement rates for the various classifications set forth in the Comptroller Schedule.

Prevailing Wage Requirement. "Prevailing Wage Requirement" shall mean the requirements under the Act and this chapter that are applicable to any Multiple Dwelling whose construction began on or after December 28, 2007, except as otherwise provided in paragraph (e) of the Act, that all Building Service Employees receive the Prevailing Wage for the duration of the applicable Benefits period.

Report and Recommendation. "Report and Recommendation" shall mean a report and recommendation issued by the Comptroller or the Comptroller's designee after a hearing is conducted regarding an alleged violation of the Prevailing Wage Requirement.

Stipulation of Settlement. "Stipulation of Settlement" shall mean a stipulation of settlement executed by the Comptroller and an Applicant regarding an alleged violation of the Prevailing Wage Requirement.

Utility Allowance. "Utility Allowance" shall mean an allowance set forth by the Agency for the payment of utilities where the tenant of a 125% Unit is required to pay all or a portion of the utility costs with respect to such unit in addition to any payments of rent.

§ 50-02. Prevailing Wage for Apprentices. The Prevailing Wage for purposes of an apprentice in a classification may only be the prevailing apprentice wage and supplement rate set forth in the Comptroller Schedule if such apprentice has been individually registered in an Apprenticeship Program prior to his or her employment as an apprentice on the applicable work.

§ 50-03. Compliance with Requirement to Pay Supplements. The obligation to pay prevailing supplements may be discharged by either the provision of (a) bona fide fringe benefits that cost no less than the prevailing supplement rate in the Comptroller Schedule, (b) a supplement to the hourly wage in an amount no less than such prevailing supplement rate, or (c) a combination of bona fide fringe benefits and wage supplements that, collectively, costs no less than such prevailing supplement rate. The provision of a dwelling unit free of charge to a Building Service Employee shall be considered a bona fide fringe benefit with a cost of no more than the value of prevailing rentals in the locality for comparable dwelling units. Notwithstanding the foregoing, the obligation to pay prevailing wages cannot be reduced or discharged through the provision of bona fide fringe benefits that cost more than the prevailing supplement rate in the Comptroller Schedule.

§ 50-04. Prevailing Wage Violations. a. An Applicant found to have violated the Prevailing Wage Requirement shall be liable for any underpayment of the Prevailing Wage for work performed by Building Service Employees for no more than two years from the earlier of (a) the date that the related complaint was filed with the Comptroller, or (b) the date of the commencement of the Comptroller's independent investigation into the Applicant's compliance with the Prevailing Wage Requirement.

b. An Applicant found to have violated the Prevailing Wage Requirement shall be liable for interest on the underpayment of the Prevailing Wage at a rate of not less than six per cent per year and not more than the rate of interest then in effect as prescribed by the superintendent of banks pursuant to Section 14-a of the Banking Law per annum from the time such Prevailing Wage should have been paid. The rate of

interest on such underpayment shall be calculated with due consideration to the number of persons employed by the Applicant, the good faith of the Applicant, the gravity of the Prevailing Wage violation, the history of the Applicant's previous Prevailing Wage violations and the Applicant's failure to comply with recordkeeping or other non-wage requirements.

c. An Owner shall be jointly liable for any violation of the Act at the property receiving Benefits without regard to whether the Building Service Employees were directly employed by such Owner.

§ 50-05. Prevailing Wage Requirement Orders. a. After receiving from the Comptroller a Report and Recommendation with a summary of the underpayment setting forth the respective amounts of Prevailing Wage underpayment and interest due to each Building Service Employee and the complete hearing record, the Agency shall issue an Order, which shall include instructions for payment of any such respective amounts of Prevailing Wage underpayment and interest to the Comptroller.

b. If the Agency approves a Stipulation of Settlement, it shall have the full force and effect of an Order of the Agency.

c. The Agency shall mail an Order to all parties named in such Order. The Order shall be deemed to have been received by the third business day after such Order has been deposited in the United States mail.

§ 50-05. 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.

§ 50-06. Agency Certification of Prevailing Wage Exemption. An Applicant who requests a certification of exemption from the Prevailing Wage Requirement pursuant to paragraph (e) of the Act must submit all of the documentation necessary to prove that at least fifty percent of the dwelling units in such Applicant's building are 125% Units, including, but not limited to, (a) 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, (b) 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.