

Management Alert



Mayor Expands NYC Living Wage Law to Include Tenants and Contractors of Subsidized Commercial Properties

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On September 30, 2014, Mayor Bill de Blasio issued an Executive Order raising the “Living Wage” in New York City and dramatically expanding the number of employers who must pay these higher wages to their employees. Under the Order, not only are recipients of City subsidies required to pay the Living Wage, but so too are their tenants, subtenants and contractors. Even at this early stage, it is clear that the Order will have a substantial impact on many landlords, developers, and contractors, as well as retail, hospitality and other businesses that lease space in subsidized New York City buildings.

Expanding the Scope of the 2012 Fair Wages for New Yorkers Act

In 2012, the New York City Council passed the Fair Wages for New Yorkers Act. The 2012 Act established a Living Wage for entities that received at least \$1 million in financial assistance from the City. The 2012 Act broadly defined covered financial assistance to include not only direct cash payments, but also bond financing, tax abatements, energy cost reductions and other discretionary assistance. Because of certain exemptions and its limited coverage to entities that received direct financial assistance, the 2012 Act applied to approximately 1,200 employees City-wide.

On September 30, Mayor de Blasio issued Executive Order No. 7, the purpose of which was to “to take clear and decisive action to implement . . . the ‘Fair Wages for New Yorkers Act.’” Although the purported basis for the Order was to implement the 2012 Act, it made several key changes to the existing law, which substantially increased the Living Wage and the number of employers who must pay it. The City estimates that the new law will impact 18,000 employees over the next five years. We discuss some of the important changes below.

Increasing Living Wage Requirements

The Order hiked the Living Wage to \$11.50 per hour for employees who receive benefits (from \$10.30), and \$13.13 per hour for employees who do not receive benefits (from \$11.90). According to the City’s projections, the annual earnings of lowest-paid workers will increase from \$16,640 to \$27,310 per year because of the new law.

Under the Order, the Living Wage will be adjusted annually to reflect changes to the Consumer Price Index, and will be announced by the Department of Consumer Affairs (“DCA”) each January. The Living Wage for employees without benefits is expected to reach \$15.22 by 2019.

Expanding Coverage to Tenants and Contractors in Subsidized Buildings

The most controversial expansion of the Living Wage is the extension of this law to tenants, contractors and concessionaires in subsidized commercial properties. The Order provides that if a tenant, subtenant, or concessionaire occupies property improved or developed with at least \$1 million in financial assistance, it may qualify as an “Additional Covered Employer.” Persons or entities that enter into contracts with covered employers to perform services for at least 90 days on property improved or developed with the requisite amount of financial assistance are also covered.

This is a significant expansion because the Order covers certain entities that do not receive direct financial assistance from the City, which now must pay the Living Wage because they occupy space in, or perform services for, subsidized commercial properties. Accordingly, the new law may have a substantial impact on the labor costs and profit margins of retailers, restaurants, and other businesses that lease space in commercial properties receiving financial assistance from the City, as well as contractors who provide services at these properties. The Order will likely have an even greater impact on developments that are not located in high rent neighborhoods, which rely on retail spaces to generate greater profits.

Expanding the Definition of Subsidy Recipients to Purchasers, Assignees and Transferees

Another expansion of the Living Wage law is the inclusion of assignees or purchasers of property benefited by City financial assistance within the definition of a Subsidiary Recipient. The 2012 Act included only the actual “financial assistance recipient” within its definition of a Covered Employer. However, the new law has now expanded the definition of a financial benefits recipient to include “any assignee or successor in interest of real property improved or developed with financial assistance.” This may have implications for the City’s real estate market, since purchasers, assignees and other transferees of such property will request, among other things, full disclosure of the subsidized benefits and assurances of compliance with the Living Wage law. Parties involved in the purchase, assignment or transfer of a real property interest in a subsidized commercial building should carefully consider the impact the Order will have on their project.

It should be noted that the requirements of the Order and the Living Wage law apply exclusively to discretionary financial assistance that is negotiated or awarded by the City or City Economic Development Entity. The Living Wage law and the Order do not apply to recipients of as-of-right financial assistance, tax abatements or benefits, such as those under the Industrial and Commercial Abatement Program, the J-51 Program, and other similar programs.

Narrowing the Definition of an Exempt “Small Business”

The 2012 Act exempted small business from the Living Wage law. It defined small business as employers generating less than \$5 million in annual gross revenues. The new law substantially lowered the threshold for this exemption. Under the Order, only employers with annual consolidated gross revenues of less than \$3 million will be exempt from Living Wage requirements under the “Small Business Cap” exemption.

Eliminating Exemptions for Independent Contractors and the Hudson Yards Project

The 2012 Act exempted both construction contractors and building services contractors (e.g. maintenance workers, security guards, porters, etc.) that otherwise qualify as covered employers. In addition, the 2012 Act exempted entities occupying or operating at the Hudson Yards development project on the West Side of Manhattan, as well as contractors or subcontractors providing services there. The Order eliminates these exemptions.

Consequently, construction contractors and building services contractors performing work for entities receiving the requisite amount of financial assistance must pay their employees the Living Wage. In addition, property owners and developers at the Hudson Yards project, as well as their tenants and contractors, must also pay the Living Wage.

Implementation and Duration of the Requirement to Pay the Living Wage

The Order provides that each City Agency and City Economic Development Entity shall take appropriate steps to ensure that the policies in the Order are fully implemented and that covered employers pay the Living Wage. With respect to the duration of covered employers' obligation to pay the Living Wage, the Order provides that they must pay their employees the Living Wage for the term of the financial assistance, or 10 years from the date the project commences (or commences operations), whichever is later.

Covered Employers Must Ensure that Tipped Employees' Earnings Meet the Living Wage

Under the definition of "Living Wage," the 2012 Act provides that, with respect to tipped employees, where the sum of an employee's wages and tips for any pay period is less than the Living Wage, a covered employer must pay the difference in cash wages. The 2012 Act permits covered employers to apply a credit for tips received and retained by employees, as long as they are employees who customarily receive tips. As the Order incorporates the definition of "Living Wage" in the 2012 Act, it would appear that employers covered by the Order also must ensure that employees' wages and tips for each pay period meet the Living Wage, although the Order does not expressly address this issue.

Effective Date and Other Ambiguities

The Order is effective immediately, although it also provides that it cannot be applied "in a manner that will interfere with contracts or agreements entered into by the City or any City Economic Development Entity prior to the effective date of this Order." The impact of the Order on existing projects with assistance provided on a continuing or installment basis is not precisely clear. We have made several inquiries to various City agencies and are presently seeking clarification that the Order only applies to financial assistance awarded on or after the effective date rather than upon receipt of assistance from pre-existing awards.

It is also unclear as to whether employees have a private right of action for violations of the Order (although there is a private right of action for violations of the 2012 Act). Also, there is ambiguity as to whether the Office of the Comptroller or the DCA will enforce the Order, and how these enforcement responsibilities will be allocated among the two agencies.

We continue to seek the City's position on these issues, so stay tuned for further updates. In any event, what is clear is that the Order has made substantial changes to the wage and hour landscape for many employers with operations in New York City.

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