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## Executive Order Broadens Reach of New York City's Living Wage Act

On September 30, 2014, New York City Mayor Bill de Blasio signed Executive Order No. 7 (the "Order")<sup>1</sup> significantly expanding the reach of the City's Fair Wages for New Yorkers Act (the "Act")<sup>2</sup> as it applies in economic development transactions. Most importantly, the Order:

- Extends coverage of living wage requirements to tenants of projects that receive financial assistance of more than \$1 million irrespective of the tenant's ownership; and
- Increases the living wage rate from \$11.90 per hour to \$13.13 per hour with annual adjustments for inflation.

Over the past decade, many major economic development projects undertaken in the city have received some form of City financial assistance, projects ranging from Atlantic Yards to Hudson Yards to a number of larger-scale outer borough retail projects. By extending the living wage requirements to most tenants in these types of projects, the Order will have implications for the structuring of future economic development deals. In particular, developers will need to carefully consider how these requirements are incorporated into project agreements, contracts of sale, ground leases, and space leases as well as how these requirements may affect project marketability and profitability.

### The Act's Initial Limited Reach

The Act, which was passed by the New York City Council on June 28, 2012, instituted a living wage requirement for real estate projects in which the City or a city economic development entity provides \$1 million or more in financial assistance as estimated on a present value basis. The Act broadly defined financial assistance as any City discretionary benefit, including:

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<sup>1</sup> N.Y.C. Exec. Order No. 7 (September 30, 2014), *available at*: [http://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2014/eo\\_7.pdf](http://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2014/eo_7.pdf).

<sup>2</sup> Fair Wages for New Yorkers Act, N.Y.C. Admin. Code §6-134, *available at*: <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=664291&GUID=A83A5A5B-9589-4589-AAD7-5B2C6884610F>.

- Cash payments or grants;
- Tax abatements or exemptions (e.g., real estate, sales, or mortgage recording taxes);
- Write-downs in the market value of building, land, or leases;
- Bond financing;
- Energy cost reductions; and
- Environmental remediation costs.<sup>3</sup>

Since historically many commercial and larger-scale retail development projects, particularly in the outer boroughs, received some form of City discretionary financial assistance, the Act sought to cover most economic development projects on a moving-forward basis.

In practice, however, the definition of “Covered Employer” under the Act limited its effect on such projects. Covered Employers included financial assistance recipients and tenants of financial assistance recipients if the financial recipient owned 50 percent or more of the tenant. The Act exempted, among others, construction contractors and building services contractors. Since, in a typical development, a developer has few, if any, employees on the premises and generally does not have a controlling interest in tenants and since construction and building service contractors could claim an exemption, the Act did not have a significant impact on real estate development projects.

### **The Order’s Practical Implications for Covered Projects**

The Order signed by the Mayor expands the reach of the living wage requirements by eliminating or modifying a number of exemptions under the Act. Most importantly, the Order makes tenants in covered projects subject to the Act regardless of whether the financial assistance recipient owns 50 percent or more of the tenant.<sup>4</sup> It also eliminates the exemption for construction contractors and building services contractors in cases where services are being provided for more than 90 days.<sup>5</sup> Moving forward, developers undertaking such real estate development projects will need to give special consideration as to how their agreements incorporate these requirements.

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<sup>3</sup> It should be noted that financial assistance does not include as-of-right benefits, such as those provided through the Industrial and Commercial Abatement Program or J-51 Program.

<sup>4</sup> The Order also eliminates the exemption under the Act for employers located in “Zone 3 Adjacent Developments” of the Hudson Yards area, which is bounded by (i) West 30th and West 34th Streets and 11th and 12th Avenues and (ii) West 30th and West 33rd Streets and 10th and 11th Avenues. See First Amendment to the Third Amended and Restated Uniform Tax Exemption Policy of the New York City Industrial Development Agency (August 3, 2010), available at: [http://www.hydc.org/downloads/pdf/utep\\_3ar\\_with1st\\_amendment.pdf](http://www.hydc.org/downloads/pdf/utep_3ar_with1st_amendment.pdf).

<sup>5</sup> To the extent the Order conflicts with provisions of the Prevailing Wage for Building Service Employees in City Leased or Financially Assisted Facilities Act, the Prevailing Wage Act supersedes. See Prevailing Wage Act, N.Y.C. Admin. Code §6-130, available at: <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=648823&GUID=1C04704A-7CC3-4728-BD33-0D3B95DE5E6F&Options=&Search=>.

To illustrate the implications of these changes, we can consider the example of a commercial/retail project that is estimated to receive more than \$1 million in City benefits. From a timing perspective, the developer will likely enter into a project agreement, contract of sale, or ground lease involving City financial assistance well before it has tenants or firm financing commitments. Nevertheless, such agreement will need to address certification and record-keeping obligations as well as remedies for violations. With respect to certification, the developer will need to certify annually that (i) its employees on the premises are paid a living wage and (ii) notification has been given to tenants on the premises that they must also comply with the Act. In terms of record keeping, developers will need to maintain six years of original payroll records. Since developers may provide construction or building service contractor services through affiliated entities, developers will likely need to undertake more extensive internal compliance efforts.

With respect to space leases, the developer will need to make sure that the compliance provisions included in the applicable project agreement are incorporated into space leases since tenants also will need to certify that their employees on the premises are paid a living wage and maintain six years of original payroll records. In cases involving national retailers or tenants with multiple office locations, this may prove particularly challenging and impact project marketability because even though the living wage requirements apply only to employees on the covered project's premises, tenants may have concerns with respect to how their entire workforce may be affected. Developers and tenants will also need to address occurrences of violations and appropriate indemnification provisions. It is worth noting that remedies for violations include:<sup>6</sup>

- Payment of wages and benefits wrongly denied with interest accruing from the date of underpayment;
- Civil penalty in an amount not to exceed 200 percent of the underpayment; and
- Declaration of ineligibility to receive financial assistance or operate on the premises of a financial assistance recipient.<sup>7</sup>

Given the potential effect on project marketability and profitability as well as the minimum 10-year compliance requirement, the developer will need to consider how the living wage requirements affect project financing. Joint venture partners and lenders will likely have concerns with respect to ensuring that a project remains in compliance during the length of the obligation so that their interest in the project is not adversely affected. Since the Act applies to the developer's assignees and successors in interest, subsequent purchasers also will need to comply with the living wage requirements, which may limit the universe of potential purchasers.

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<sup>6</sup> The Order designates the Commissioner of the Department of Consumer Affairs as the official that is to work with the City Comptroller in investigating potential violations by employers.

<sup>7</sup> This remedy is to apply in cases where there has been a final disposition in two instances of non-compliance within any consecutive six-year period.

## Exemptions From the Living Wage Requirements

The Order states that it does not apply to projects where financial assistance already has been authorized or awarded nor will it be applied in a manner that would interfere with existing agreements. Hence, the Order does not affect certain larger-scale developments such as those that have already been authorized at Hudson Yards, City Point in Brooklyn, or Empire Outlets in Staten Island. The Order also gives the Deputy Mayor with jurisdiction over the agency granting the financial assistance the discretion to exempt certain employers from the Order if a project contributes to the “economic well-being of the City and cannot be reasonably achieved” in a manner consistent with the living wage requirements. Furthermore, the Act as modified by the Order provides exemptions for (i) not-for-profit organizations; (ii) manufacturing employers; (iii) grocery stores participating in the FRESH program; (iv) small businesses with annual consolidated gross revenues of less than \$3 million (annually adjusted for inflation); (v) certain qualifying affordable housing projects;<sup>8</sup> and (vi) employers who work closely with a “Qualified Workforce Program”.<sup>9</sup> Entities that qualify for an exemption must provide a certification that they are exempt from the Act’s requirements and must provide the basis for the exemption.

If you have any questions, please feel free to contact any of your regular contacts at the firm. You may also contact our partners and counsel listed under [Real Estate](#) located in the “Practices” section of our website at <http://www.clearygottlieb.com>.

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<sup>8</sup> Employers in a project that is more than 75 percent residential and where 75 percent of the units are affordable to families earning less than 125 percent of area median income are exempt. Additionally, employers in a project that is more than 75 percent residential and where 100 percent of the units are subject to rent regulation are exempt.

<sup>9</sup> A list of such programs is to be published by the Director of the Mayor’s Office of Workforce Development.

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