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Affordable Housing Alert

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Some private construction projects in New York now subject to prevailing wage requirements

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If public funds are used for the construction of private projects, property owners and developers may be required to follow prevailing wage requirements.

What's the Impact?

- Receiving public funds to complete a project may not be as advantageous as it seems; it means you must comply with prevailing wage requirements and other stringent state regulations
- Determining whether or not a project may be a "covered project" will help weigh the pros and cons of accepting public funds
- Experienced real estate counsel can review your project goals and specs and help you assess your options

As of January 1, 2022, prevailing wage requirements in the state of New York have been extended to cover some private construction projects, in addition to the public construction projects with which they are more commonly associated. Going forward, owners/developers of private construction projects in the state of New York seeking public subsidies or other forms of public

financial benefits will need to determine whether their projects are subject to prevailing wage requirements, based on new Labor Law Section 224-a, discussed further below.

What is a prevailing wage?

Prevailing wage requirements, instituted at the federal level via the Davis-Bacon Act of 1931 and at the state level through various state prevailing wage laws,[1] when applicable, effectively set a "minimum wage" requirement for applicable projects equal to the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the specific trade classification on similar projects in the area during the period in question. The Davis-Bacon prevailing wage is the combination of the basic hourly wage rate and any fringe benefits rate listed for a specific classification of workers in the applicable Davis-Bacon wage determination and may be met by either paying each laborer and mechanic the applicable prevailing wage entirely as cash or wages or by a combination of cash wages and employer-provided bona fide fringe benefits. The Davis-Bacon and Related Acts, apply to contractors and subcontractors performing on federally funded or assisted contracts in excess of $2,000 for the construction, alteration, or repair of public buildings or public works. Federal rates are calculated by the Wage and Hour Division of the U.S. Department of Labor. Supporters of prevailing wage requirements claim that they keep construction wages high, maintain a high quality of work, and prevent out-of-town firms from taking local jobs by using lower-paid workers from other areas of the country. On the other hand, opponents of prevailing wage argue that these requirements increase the overall cost of public construction projects, potentially leading to higher taxes and/or fewer construction projects overall. They also claim that the voluminous amounts of paperwork involved (especially at the federal level) can discourage smaller firms from bidding for the work.

New NY Labor Law Section 224-a

Pursuant to the newly passed NY Labor Law Section 224-a ("Section 224-a"), certain private construction projects in the state of New York "paid for in whole or in part out of public funds," also known as "covered projects" under Section 224-a, shall be required to comply with the prevailing wage requirements set forth in Section 220 of the NY Labor Law.

What is a "covered project"?

Subject to the various exclusions below, a "covered project" is generally defined in Section 224-a as construction work where (i) the project costs exceed $5 million, and (ii) the project is receiving ***public funds*** covering, in the aggregate, at least 30 percent of the total construction project costs. This determination requires further unpacking, and review of various exclusions, which are outlined below.

[1] Several states enacted their own state-level prevailing wage laws prior to the Davis-Bacon Act of 1931, and such individual state laws are each often referred to as "Little Davis-Bacon Laws" in their respective states.

Exclusions from "covered projects?"

Specifically excluded from "covered projects" are projects (i) related to one or two family dwellings where the property is the owner's primary residence or where the owner owns no more than four dwelling units; (ii) performed under contract with a not-for-profit (except where the not-for-profit was formed exclusively to hold title to the property and collect income thereof) with gross annual revenue less than $5 million; (iii) in certain instances of construction on a multiple residence and/or ancillary amenities or installations wholly privately owned; (iv) on certain manufactured home parks; (v) under a pre-hire collective bargaining agreement; (vi) funded by Section 16-n of the urban development corporation act or the downtown revitalization initiative; (vii) in connection with the installation of a renewable energy system, renewable HVAC, or certain energy storage systems; (viii) related to supermarkets under New York's "FRESH" Program; (ix) for small business incubation program interior fit-outs under ten thousand square feet; (x) for space under sixty thousand square feet to be used as a school; and (xi) certain historic rehabilitation projects.

What types of project funds qualify as "public funds?"

Receipt of public funds, for the purpose of Section 224-a, is broadly defined to include not only payments made or money loaned by public entities, but also any project savings achieved (including through tax credits) via the involvement of a public entity. This includes any savings attributable to below-market fees, rents, interest rates, loan costs, and insurance costs, as well as reduced taxes, tax abatements, tax increment financing, and other savings from reduced, waived, or forgiven costs.

Exclusions from "public funds"

Specifically excluded from the definition of what constitutes "public funds" are:

- benefits under Section 421-a of the real property tax law
- funds that are not provided "primarily to promote, incentivize, or ensure that construction work is performed"
- funds used to incentivize or ensure the development of a comprehensive sewage system
- tax benefits provided for projects the length or value of which are not able to be calculated at the time the work is performed
- tax benefits related to brownfield remediation or redevelopment
- funds provided pursuant to subdivision 3 of Section 2853 of the Education Law
- any other public monies determined by the subsidy board (described further below) to be exempt

Subsidy Board

Section 224-c of the new law creates a "Public Subsidy Board" made up of 13 members, chaired by the Commissioner of the New York State Department of Labor. Nine of the 13 members are to be appointed by the governor and must meet specific requirements set forth in the section,

including various individuals across the construction and development industry, as well as related NY State government personnel. There is no guidance as to the appointment of the remaining four members, however. The board has broad authority to make changes to rules regarding the minimum threshold and definition of public funds; the dollar threshold of project costs; and other implementation criteria, and has the authority to issue binding determinations[2] to any public entity, or any private or not-for-profit owner or developer as to "any particular matter related to an existing or potential covered project." (See Section 224-c(5)). Opponents of this new law are concerned with the broad authority of such a governing body of unelected officials, and the ability of that body to confidentially deliberate about specific projects. (See Section 224-c(2)).

Compliance with, and enforcement of, Section 224-a

Owners/Developers of a "covered" project must, pursuant to Section 224-a(8)(a), certify under penalty of perjury within five days of commencement of construction work whether their project is subject to the provisions of Section 224. This certification is to be provided on a standard form to be developed by the "fiscal officer" (the Commissioner of the New York State Department of Labor, hereinafter referred to as the "NYSDOL"), who is responsible for the enforcement of Section 224-a[3]. Owners/developers uncertain of whether their project may be a "covered project" may seek guidance from the Public Subsidy Board, which can render an opinion which shall not be reviewable by the fiscal officer or the NYSDOL.

Owners/developers shall be responsible for retaining payroll records[4] for a period of six years from the conclusion of "such work," and those records shall be subject to inspection on the request of the fiscal officer. Owners/developers may authorize contractors to maintain such records, but owners/developers will remain jointly and severally liable for any of contractor's violations in connection therewith.

Public entities providing any "public funds" are required to identify to the Owner/Developer the nature and dollar value of any such funds, whether any such funds are excluded from Section 224-a, and the recipient's obligations with respect to the reporting requirement in Section 224-a(8)(a)[5].

Pursuant to Section 224-b, if the fiscal officer receives a complaint, or upon his or her own investigation finds, that any person in connection with the performance of any contract related to a covered project has "substantially and materially failed to comply with or intentionally evaded

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[2] It's unclear whether or not these determinations are subject to appeal; opponents believe they are not.

[3] As of mid-January 2022, there does not appear to be such a standard form provided on the NYSDOL website.

[4] This is a possible justification for requiring a contractor to provide certified payrolls from itself and its subcontractors. The contractor would then rely on recent changes to the Labor Law and General Business Law to require same from its subcontractors.

[5] It is not at all clear how successful this will be, especially given general public entity unwillingness to advise regarding applicable wage rates and other features of prevailing wage laws.

the provisions" of Section 224-a, the fiscal officer may issue a stop-work order. In such case, the fiscal officer must first provide such person with notice of a right to a hearing on the issue, as well as the factual basis upon which the forthcoming stop-work order is based. Following the hearing, which is to be "expeditiously conducted," if a stop-work order is issued, it shall remain in place until the failure to comply or evasion has been deemed by the fiscal officer to be corrected. The person against whom the order is issued can, as a last ditch effort, within thirty days of issuance of the stop-work order, make an application in affidavit form for a redetermination review of the stop-work order. In such case, the fiscal officer shall review the application and make a decision in writing on the issues raised therein. If the fiscal officer finds that the applicant has taken "meaningful and good faith steps to comply," the fiscal officer may direct a conditional release from the stop-work order.

MWBE and other applicable requirements

In addition to the requirements referenced above, owners/developers of "covered projects" are also required to comply with Articles 15-A and 17-B of the executive law related to the objectives and goals of minority and women-owned business enterprises and service-disabled veteran owned businesses, respectively.

What does this mean going forward?

Any private projects seeking to avail themselves of "public funds" should take care to evaluate the overall impact of accepting such "public funds" if acceptance of same would subject the project to the prevailing wage requirements set forth in Section 224-a. While the Public Subsidy Board is said to be available for assistance in determining whether or not a project may be a "covered project," it is unclear as of the date of publication how to contact the board (aside from submitting a general inquiry to the NYSDOL), if there is an established schedule upon which the board will convene, or when project owners/developers can expect a response on their request for clarification from the board, etc.

At this point, owners/developers should discuss the potential Section 224-a-related implications with any public entities that may be providing "public funds" in connection with such projects. As more "covered projects" commence throughout the year, we will continue to monitor any updated guidance issued by the NYSDOL, the Public Subsidy Board, and others.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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