

Updated Rules For NYC's 421-a Tax Exemption Beneficiaries

By **Daniel Bernstein** (October 18, 2018, 3:54 PM EDT)

New York City residential property owners, developers and lenders who are seeking, or currently receiving, 421-a tax exemption benefits face a host of new requirements and considerations. Those who do not understand and correctly comply with 421-a wage requirements may well experience the suspension or revocation of benefits, and face payment of significant back wages and penalties.

The 421-a tax exemption program was initially established in 1971 to incentivize the development of new rental apartments in NYC. The program has been extraordinarily successful, leading to tens of thousands of new units. Under 421-a, developers of new residential buildings receive a significant reduction in property taxes by agreeing to comply with 421-a program requirements, such as rent stabilization, affordability, etc. Notably, 421-a requires the payment of “prevailing wages” to building service employees in most large- and medium-sized buildings commenced in late December of 2007 and after.



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Starting in 2017 and after, there have been numerous changes to the 421-a statute and rules, altering and clarifying 421-a prevailing wage requirements and imposing construction wage requirements for large new buildings. It is helpful to understand the history of wage requirements under the 421-a program and the progression of changes.

To begin, we consider the original 421-a prevailing wage requirements. Properties of 50 or more dwelling units qualifying for 10, 15, 20 or 25 year 421-a benefits that commenced construction on or after Dec. 28, 2007 — the “Old 421-a” — must pay “building service employees” the wages plus fringe benefits under Section 230 of the Labor Law posted on New York City comptroller’s website. Exceptions apply for certain affordable buildings.

Between 2008 and 2015, the New York State Legislature periodically amended prevailing wage statutory language for Old 421-a projects, modifying the definition of “Building service employee” and deleting the previously existing definition of “prevailing wage” which referenced Section 230 of the Labor Law, among other changes. The New York City comptroller was assigned the power to define and enforce the prevailing wage provisions under Old 421-a.

Prevailing wage requirements changed under 421-a(16) — the “New 421-a.” Under this provision, properties of 30 or more dwelling units qualifying for 35-year New 421-a benefits must also pay the

appropriate prevailing wage to building service employees. This includes properties commencing construction after Dec. 31, 2015, and on or before June 15, 2022, plus older properties that can opt into the New 421-a program. Exceptions apply for certain affordable buildings, though these are narrower than under old 421-a.

The next major milestone is construction wage requirements for large properties. In April 2017, after a long political battle in Albany over whether and how to impose construction wage requirements to 421-a projects, the Affordable New York legislation passed into law. This legislation imposes, for the first time, a minimum average construction wage for certain large developments under the New 421-a program. Developments of 300 or more dwelling units in certain locations (including Manhattan south of 96th Street and certain areas of Brooklyn and Queens), or developments of 300 or more units elsewhere in the city that opt into the enhanced 35-year New 421-a benefit program, must pay a minimum average construction wage. Initially this wage is set at \$60 in a specified Manhattan area, and \$45 in specified Brooklyn and Queens areas, subject to increases over time. Developments of fewer than 300 dwelling units are exempt from this minimum average construction wage requirement, as are certain projects with at least 50 percent affordable units. The use of a project labor agreement is deemed to be proof that the minimum average construction wage requirement was met. Several developers are currently in the process of building, or planning to build, large developments in compliance with the New 421-a minimum average construction wage requirements.

Recently, the New York City Department of Housing Preservation and Development adopted new rules for Old 421-a and New 421-a properties, clarify prevailing wage requirements for building service employees and minimum average construction wage requirements for contractors. For building service employees, the rules even set the credit that owners will receive for providing a free apartment to an employee and other relevant details. The rules also detail how construction contractors should document, submit and evaluate laborers' wages.

HPD's rules establish procedures for the NYC comptroller to review and adjudicate complaints of underpayment of prevailing wages and of minimum average construction wages in Old 421-a and New 421-a properties. The NYC comptroller has the authority to impose penalties for underpayment of wages to building service employees, which can range from the wage shortfall plus penalties, to the revocation of 421-a benefits in the most extreme cases for building service employees. In addition, the NYC comptroller has the authority to impose penalties for the underpayment of minimum average construction wages in New 421-a properties.

Owners, developers and lenders must understand all these changes and how to comply and document compliance with the prevailing wage requirements for building service employees that apply to Old 421-a and New 421-a properties. Similarly, developers of large residential properties in New York City must understand New 421-a's minimum average construction wage requirements. Since the New 421-a program requires commencement of construction on or before June 15, 2022, any renewal of the New 421-a program thereafter will likely involve a discussion of what wage requirements (for building service workers and for construction workers) would be appropriate.

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