

New York City Department of Consumer Affairs

Notice of Public Hearing and Opportunity to Comment on Proposed Rules

What are we proposing? The Department of Consumer Affairs (the “Department”) is proposing to add a new chapter to its rules pursuant to the “Fair Wages for New Yorkers Act,” Section 6-134 of Chapter 1 of Title 6 of the Administrative Code of the City of New York (as added by Local Law 37 for the year 2012), which requires certain companies that receive at least one million dollars of financial assistance from the City of New York to pay their employees no less than a living wage, and pursuant to Executive Order No. 7 of 2014, which broadened the scope of the Fair Wages for New Yorkers Act. These rules help implement the law and the Executive Order and provide guidance to covered employers and employees.

When and where is the hearing? The Department of Consumer Affairs will hold a public hearing on the proposed rules. The public hearing will take place at 10:00 AM on Monday, August 22, 2016. The hearing will be in the Department of Consumer Affairs hearing room at 42 Broadway, 5th Floor, New York, NY 10004.

How do I comment on the proposed rules? Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to the Department of Consumer Affairs through the New York City rules website at <http://rules.cityofnewyork.us>.
- **Email.** You can email written comments to Rulecomments@dca.nyc.gov.
- **Mail.** You can mail written comments to Casey Adams, Deputy Director of City Legislative Affairs, New York City Department of Consumer Affairs, 42 Broadway, New York, NY 10004.
- **Fax.** You can fax written comments to the Department of Consumer Affairs, (646) 500-5962.

By speaking at the hearing. Anyone who wants to comment on the proposed rules at the public hearing must sign up to speak. You can sign up before the hearing by calling (212) 436-0095. You can also sign up in the hearing room before the hearing begins on Monday, August 22, 2016. You can speak for up to three minutes.

Is there a deadline to submit written comments? Yes. You must submit any written comments to the proposed rules on or before Monday, August 22, 2016.

Do you need assistance to participate in the hearing? You must tell the Office of Legislative Affairs at the Department of Consumer Affairs if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You can tell us

by mail at the mailing address given above. You may also tell us by telephone at (212) 436-0155. You must tell us by Friday, August 22, 2016.

Can I review the comments made on the proposed rules? You can review the comments made online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A few days after the hearing, a transcript of the hearing and copies of the written comments will be available to the public at the Office of Legal Affairs.

What authorizes the Department of Consumer Affairs to make this rule? Section 1043 of the City Charter and section 6-134 of the Administrative Code of the City of New York authorize the Commissioner of the Department of Consumer Affairs to make this proposed rule. This proposed rule was not included in the regulatory agenda of the Department of Consumer Affairs for this fiscal year because it was not contemplated when the Department published the agenda.

Where can I find the rules of the Department of Consumer Affairs? The Department of Consumer Affairs' rules are in Title 6 of the Rules of the City of New York.

What rules govern the rulemaking process? The Department of Consumer Affairs must meet the requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043(b) of the City Charter.

Statement of Basis and Purpose of Proposed Rules

The “Fair Wages for New Yorkers Act,” Section 6-134 of Chapter 1 of Title 6 of the Administrative Code of the City of New York (as added by Local Law 37 for the year 2012), requires certain companies that receive at least one million dollars of financial assistance from the City of New York to pay their employees no less than a living wage. Executive Order No. 7 for the year 2014 broadened the scope of the Fair Wages for New Yorkers Act, including specifying other “additional covered employers” that are required to pay no less the living wage to their employees at project sites.

These proposed rules would add a new Chapter 11 to Title 6 of the Rules of the City of New York to clarify provisions in the Fair Wages for New Yorkers Act (the Living Wage Law) and Executive Order No. 7, establish requirements to implement the law and meet its goals, and provide guidance to employers and employees. Specifically, these rules:

- Establish that covered employers and additional covered employers must pay the living wage to their employees;
- Set forth distribution and posting requirements for employee notices required;
- Set forth recordkeeping requirements;
- Clarify the Living Wage Law’s definition of “financial assistance recipient” and the Executive Order’s definition of “subsidy recipient;”
- Outline the Department’s enforcement steps, including how a covered employer may cure a violation, how the Department will commence a case, and how the Department may settle a complaint;
- Clarify that the Office of Administrative Trials and Hearings (OATH) will issue a decision on the record in all cases;
- Provide guidance to employers on how an OATH administrative law judge may calculate back wages for an employee;
- Clarify that if one or more employees start or have a civil action pending, it does not preclude the Department from commencing, prosecuting, or settling a case based on some or all of the same violations; and
- Clarify what other appropriate relief may be imposed for a violation, in addition to the penalties set forth in the law.

New text 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.

Proposed Rules

Section 1. A new Chapter 11 of Title 6 of the Rules of the City of New York is added to read as follows:

CHAPTER 11

LIVING WAGE LAW

<u>Subchapter A</u>	<u>General</u>
<u>Subchapter B</u>	<u>Construction</u>
<u>Subchapter C</u>	<u>Enforcement</u>

SUBCHAPTER A

GENERAL

§11-01 Definitions.

(a) For purposes of this chapter, the following terms mean:

Additional Covered Employer. The term “Additional Covered Employer” has the same meaning as set forth in the Living Wage Executive Order.

Case. The term “Case” means an enforcement proceeding commenced by the Department before OATH based upon an alleged violation of the Living Wage Law and the Living Wage Executive Order.

City. The term “City” means the City of New York or any City Economic Development Entity.

City Economic Development Entity. The term “City Economic Development Entity” has the same meaning as set forth in the Living Wage Law.

Commissioner. The term “Commissioner” means the Commissioner of the Department or his or her designee.

Comptroller. The term “Comptroller” means the Office of the Comptroller of the City of New York.

Covered Employer. The term “Covered Employer” has the same meaning as set forth in the Living Wage Law.

Department. The term “Department” means the New York City Department of Consumer Affairs.

Employee. The term “Employee” means any person employed by a Covered Employer or an Additional Covered Employer.

Financial Assistance. The term “Financial Assistance” has the same meaning as set forth in the Living Wage Law.

Living Wage. The term “Living Wage” has the same meaning as set forth in the Living Wage Law.

Living Wage Executive Order. The term “Living Wage Executive Order” means Executive Order No. 7 of 2014, dated September 30, 2014, entitled “Living Wage for City Economic Development Projects.”

Living Wage Law. The term “Living Wage Law” means Section 6-134 of Chapter 1 of Title 6 of the New York City Administrative Code, entitled “Living Wage for Employees in City Financially Assisted Facilities.”

Payroll Records. The term “Payroll Records” means all time cards, cancelled checks, cash receipts, books, documents, schedules, forms, reports, receipts or other evidence that reflect job assignments, work schedules by days and hours, and the disbursement of funds to an employee by cash, check, or in any other form or manner.

- (b) Other Terms. The terms “Administrative Law Judge,” “OATH,” “Petition,” “Petitioner,” and “Respondent” have the same meanings as set forth in Section 1-01 of Chapter 1 of Title 48 of the Rules of the City of New York.

§11-02 Compliance by Covered Employers and Additional Covered Employers.

Every Covered Employer and Additional Covered Employer must pay their Employees no less than the Living Wage.

§11-03 Employee Notices.

- (a) Covered Employers and Additional Covered Employers must post the notices required by the Living Wage Law in a prominent and accessible location and deliver the notices to all Employees at each work location. Prominent and accessible locations for posting of the notice include areas frequented by Employees such as break rooms, pantries and employee lounges. Covered Employers and Additional Covered Employers must promptly replace any posted notice that is damaged, defaced, illegible or removed for any reason.
- (b) The notices must be delivered to Employees in a manner that reasonably ensures that Employees receive the notice, including delivery by the Covered Employer or Additional Covered Employer by hand, electronic mail or certified mail, return receipt requested.
- (c) Covered Employers and Additional Covered Employers must post and deliver versions of the notices in English, Spanish and any other languages that are spoken by Employees at each work location if the City has prepared forms of the notice in those languages and provided them to the Covered Employer or Additional Covered Employer. The City may make copies of the notice available to Covered Employers and Additional Covered Employers on one or more websites maintained by the City.

§11-04 Records.

- (a) Employee Notices. Covered Employers and Additional Covered Employers must maintain written records of their delivery of the employee notices required by the Living Wage Law. Acceptable records include logs with signed employee acknowledgments,

and/or email receipts reflecting delivery of the notices. Failure to maintain these records creates a rebuttable presumption that the Covered Employer or Additional Covered Employer did not deliver the required notices to the Employees.

- (b) Employee Claims. Covered Employers and Additional Covered Employers must maintain all records related to any complaint or any pending, threatened, or resolved legal action or grievance by or from any Employee concerning the Living Wage Law.
- (c) Termination or Adverse Employment Action. Covered Employers and Additional Covered Employers must maintain all records related to the discharge, demotion, suspension, reduction of hours, or other adverse employment action against any Employee subject to the Living Wage Law. Failure to maintain these records creates a rebuttable presumption that any adverse employment action was in retaliation for the applicable Employee exercising his or her rights under the Living Wage Law.
- (d) Obligation to Produce on Demand. Covered Employers and Additional Covered Employers must furnish copies of any of the records specified in this section to the City within 15 days of a request by the City.
- (e) Retention Period. Covered Employers and Additional Covered Employers must retain all records specified in this section for six years after the applicable work is performed.

§11-05 Employee Addresses.

Covered Employers and Additional Covered Employers must provide the Department with the name and last known address of all Employees subject to the Living Wage Law within 15 days of a request by the Department.

SUBCHAPTER B
CONSTRUCTION

§11-10 Successors and Assignees.

The definition of the term “Financial Assistance Recipient” as set forth in the Living Wage Law and the definition of the term “Subsidy Recipient” as set forth in the Living Wage Executive Order shall be construed to include any successor in interest, whether through merger, pledge, transfer, assignment, operation of law or otherwise, of any Financial Assistance Recipient or Subsidy Recipient.

SUBCHAPTER C
ENFORCEMENT

§11-20 Cure Notice.

- (a) Prior to commencing a Case, the Department shall deliver a written notice to the applicable Covered Employer or Additional Covered Employer informing the Covered Employer or Additional Covered Employer that the Department may commence a Case unless the Covered Employer or Additional Covered Employers demonstrates, to the

reasonable satisfaction of the Department, within 30 days, that the Covered Employer or Additional Covered Employers has cured its violations of the Living Wage Law. The notice shall indicate that the Covered Employer or Additional Covered Employer may contact the Department to settle the alleged violation(s) of the Living Wage Law, and note that any settlement is at the discretion of the Department.

(b) Cure may be in the form of:

(1) payment of wages and/or the monetary equivalent of benefits wrongly denied to the Employee(s), including interest from the date of underpayment to the Employee(s), based on the interest rate then in effect as prescribed by the superintendent of banks pursuant to section 14-a of the state banking law, but in any event at a rate no less than six percent per year;

(2) payment of a further sum as a civil penalty to the City in an amount not exceeding two hundred percent of the total amount found to be due in violation of this section;

(3) the filing or disclosure of any records that were not filed or made available to the public as required by this section;

(4) the reinstatement of, or other appropriate relief for, any person found to have been subjected to retaliation or discrimination in violation of the Living Wage Law;

(5) payment of the sums withheld from the financial assistance recipient by the City pursuant to Section 6-134(g)(1) of the Living Wage Law at the commencement of the investigation and the interest that has accrued thereon to the Employee(s); or

(6) any other relief reasonably calculated to remedy the violation of the Living Wage Laws.

(c) The Department may, in its discretion, extend the time for the Covered Employer or Additional Covered Employer to cure.

§11-21 Petition.

(a) *Charges in Petition.* The Department shall commence Cases by service and filing of a Petition in accordance with Section 1-23 of Chapter 1 of Title 48 of the Rules of the City of New York. The Department shall concurrently serve a copy of the Petition on any Employee complainants.

(b) *Delivery of Complaint.* Concurrent with service of a Petition, the Department shall deliver copies to the Respondent of any Employee complaints concerning the Respondent's alleged non-compliance with the Living Wage Law.

§11-22 Settlements.

(a) *General.* The Department may settle a complaint at any time after it is referred to the Department. The Department is authorized to determine the terms of settlement, taking into account:

(1) the facts of the complaint,

(2) the interests of the City in ensuring compliance with the Living Wage Law,

(3) the interests of the complainant(s),

(4) the Covered Employer or Additional Covered Employer's history of compliance with the Living Wage Law,

- (5) the size of the Covered Employer or Additional Covered Employer,
- (6) the good faith of the Covered Employer or Additional Covered Employer,
- (7) the Covered Employer or Additional Covered Employer’s compliance with record-keeping and notice requirements, and,
- (8) any other factors relevant to achieving a fair and reasonable settlement.

Prior to settling any complaint, the Department shall provide each complainant with notice of the proposed settlement.

- (b) *Filing of Settlement Agreements.* Every agreement settling a Case, complaint or investigation shall be in writing and shall be deemed an “order” for purposes section 5 of subdivision g of the Living Wage Law.
- (c) *Complainants.* The Department may settle a complaint or Case with a Covered Employer or Additional Covered Employer with or without the consent of the applicable complainant(s). The Department may dismiss a Case in the event the complainant refuses to accept the relief in a proposed settlement, but such dismissal shall not preclude a complainant from commencing a civil action.
- (d) *Private Settlements.* A complainant and a Covered Employer or Additional Covered Employer may resolve a complaint through a private settlement without authorization from the Department, but the settlement shall not preclude (1) the Department from commencing, prosecuting or settling a Case concerning the complaint or other potential violations by the Covered Employer or Additional Covered Employer of the Living Wage Law, or (2) the City or City Economic Development Entity from enforcing its remedies under any contract with the Covered Employer.

§11-23 Order and Determination.

- (a) *Decision on the Record.* Notwithstanding any provision to the contrary in Section 1-51.1 of Chapter 1 of Title 48 of the Rules of the City of New York, Administrative Law Judges shall issue a decision on the record in all Cases. Provided that no party has commenced a challenge to the decision pursuant to Article 78 of the Civil Practice Law and Rules of New York, and the time to commence such a challenge shall have expired, the decision shall constitute an “order” for purposes of this chapter and section 5 of subdivision g of the Living Wage Law.
- (b) *Judicial Challenge.* If a party commences a timely challenge to a decision on the record, then the final, non-appealable disposition of the appeal, whether by order of a court of competent jurisdiction or settlement, shall constitute an “order” for purposes of this chapter and section 5 of subdivision g of the Living Wage Law.
- (c) *Entry of Order.* If an order (including any settlement deemed to be an order for purposes of this chapter) sustains some or all of the charges in the Petition, and provided that (1) the Respondent found violating the Living Wage Law has failed to comply with the payment or other terms of the order, and (2) no proceeding for judicial review is pending and the time for initiation of such proceeding has expired, the Department shall, as soon

as is practicable, file a copy of the order with the clerk of the county of residence or place of business of the Respondent.

§11-24 Calculation of Back Wages.

If a Covered Employer or Additional Covered Employer has failed to maintain original Payroll Records as required by the Living Wage Law, an Administrative Law Judge may determine the amount of the unpaid wages and benefits based on the available Payroll Records and other available evidence, making reasonable inferences based upon the customary staffing practices of, and wages and benefits paid by, the Covered Employer or Additional Covered Employer.

§11-25 Private Right of Action.

The commencement or pendency of a civil action by one or more Employees of a Covered Employer or Additional Covered Employer for violation the Living Wage Law shall not preclude the Department from commencing, prosecuting or settling a Case against the Covered Employer or Additional Covered Employer based upon some or all of the same violations.

§11-26 Other Appropriate Relief.

For purposes of section 2 of subdivision g of the Living Wage Law, “other appropriate relief” may include an order to:

- (i) reinstate an Employee or offer the Employee a position comparable to their former position,
- (ii) reverse any adverse employment action, including demotion, reassignment or reduction in hours,
- (iii) cease retaliatory practices and institute measures to prevent such conduct in the future,
- (iv) pay the wages and, if applicable, the monetary equivalent of the benefits that the Employee subjected to retaliation or discrimination would have been granted or paid but for the adverse employment actions by the Covered Employer or Additional Covered Employer, or
- (v) pay additional amounts to the extent necessary to compensate Employees for additional tax liability resulting from a lump sum payment of back wages in a single year.

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
253 BROADWAY, 10th FLOOR
NEW YORK, NY 10007
212-788-1400**

**CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)**

RULE TITLE: Implementation of Fair Wages for New Yorkers Act

REFERENCE NUMBER: DCA-53

RULEMAKING AGENCY: Department of Consumer Affairs

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Provides 30 days to cure violations of the Living Wage Law.

/s/ Francisco X. Navarro
Mayor's Office of Operations

July 12, 2016
Date

**NEW YORK CITY LAW DEPARTMENT
DIVISION OF LEGAL COUNSEL
100 CHURCH STREET
NEW YORK, NY 10007
212-356-4028**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Implementation of Fair Wages for New Yorkers Act

REFERENCE NUMBER: 2016 RG 048

RULEMAKING AGENCY: Department of Consumer Affairs

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: July 12, 2016