

Employment & Labor Law Alert

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New York City Law Requires Labor Peace Agreements for Certain City Economic Development Projects

New York City has enacted legislation requiring employers at certain retail and food service establishments that are recipients of at least \$500,000 in city financial assistance (CFA), occupants of properties that will be improved or developed with this amount of CFA, and certain contractors/subcontractors to sign "labor peace agreements" with unions seeking to represent their "covered employees" (if any). The new law, enacted Dec. 24, 2021, covers retail and food service establishments with at least 10 premises-based employees, including any establishment that is required to have a license to sell alcohol pursuant to the alcohol beverage control law, and distribution centers with at least 20 employees. The law adds a new section (6-146) to the New York City Administrative Code, and its effective date is April 23, 2022.

The new law defines a "labor peace agreement" (LPA) as an agreement between a covered employer and a labor organization that seeks to represent covered employees agreeing (1) to the uninterrupted performance of work on the property, (2) to refrain from actions intended to or having the effect of interrupting the work, and (3) to include any other terms required by the implementing rules to be established by the mayor.

The mayor or his designee can issue rules implementing the law prior to its effective date; businesses should anticipate the possible publication of rules within the next month.

Key Takeaways

- The law applies to relevant projects with project agreements entered into on or after the April 23, 2022



effective date. It also applies to any relevant tenancy, subtenancy, lease, sublease, contract or subcontract entered into on or after the effective date.

- Covered employers have 90 days to certify either that they had signed an LPA with a labor organization or that no labor organization had sought to represent their workers.
- Landlords, developers and others seeking financial assistance from the city or city economic development entity to be received on or after April 23 should, at the outset of negotiations for this assistance, determine whether they would be required to comply with the LPA requirements or other reporting requirements, and in particular whether they would be an applicable CFA recipient and whether they employ, or would eventually employ, covered employees.
- Landlords that are CFA recipients must notify employers that they must comply with all requirements of the law, and are required to help the city investigate and remedy noncompliance by employers. Landlords must also provide an annual certification of compliance along with contact information of their employer occupants, even if they do not themselves have covered employees.

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- Potential tenants, subtenants, leaseholders or subleaseholders should, at the outset of scouting locations for a space to house their retail, food service or distribution center business, determine whether entering into an agreement effective April 23 or after for occupancy in a particular building would make them covered employers subject to compliance with the law. In particular, they should learn whether the potential landlord is a relevant CFA recipient; learn whether the building they would occupy is improved or developed with CFA; and determine whether they employ, or would eventually employ, covered employees.
- Potential contractors or subcontractors seeking to enter into contracts on or after April 23 to perform services for retail, food service or distribution centers in the city for a duration of at least 90 days should determine prior to negotiations whether they would be considered covered employers subject to compliance with the law. Specifically, contractors and subcontractors should determine whether the potential client is a relevant CFA or tenant, subtenant, leaseholder or subleaseholder of a relevant CFA recipient; whether they would be providing services at a building that has been improved or developed with CFA; whether the contract will be for an amount in excess of \$500,000; whether the services will be provided for 90 days or more; and whether they employ, or would eventually employ, covered employees.
- Small businesses, not-for-profits, businesses in Hunts Point, and businesses in developments that are at least 75% price-regulated housing or on manufacturing sites are exempt from certain requirements but must provide the required exemption certification.

What employers are covered by the law?

As of April 23, Section 6-146 of the New York City Administrative Code will apply to New York City retail or food service establishments with at least 10 premises-based employees (including any establishment that is required to have a license to sell liquor pursuant to the alcohol beverage control law) and distribution centers that have at least 20 premises-based employees, if the establishment employs covered employees and is any of the following:

- A direct recipient of CFA

- A tenant, subtenant, leaseholder or subleaseholder of a CFA recipient, and the establishment occupies the property improved or developed with CFA

Additionally, a person who employs covered employees and is performing services pursuant to a contract or subcontract is considered an employer covered by the law if they perform work for a period of 90 or more days for an amount in excess of \$500,000, for a CFA recipient or for a tenant, subtenant, leaseholder or subleaseholder of a CFA recipient, at a property that has been improved or developed with CFA.

City financial assistance is defined as financial assistance, other than as-of-right assistance, that is provided directly by the city or by a city economic development entity using funds provided in whole or in part by the city to a person for the improvement or development of property and that, at the time the CFA recipient enters into a project agreement, is expected to have a total present financial value of at least \$500,000. This financial assistance can be a cash payment, loan, bond, financing or tax increment financing; a tax abatement, credit or exemption; or a write-down in the market value of a building, land or lease.

- For purposes of determining whether financial assistance in the form of leasing property at below-market lease rates constitutes CFA, the value of the financial assistance is determined based on the difference in cost between the lease for the property and a market lease for a similar property.
- For purposes of determining whether financial assistance in the form of loans, bond financing or tax increment financing constitutes CFA, the value of the financial assistance is determined based on the difference between the financing costs to a borrower and the costs to a similar borrower that does not receive financial assistance from the city or a city economic development entity.

Beginning July 1, 2023, the \$500,000 amount will be adjusted annually, based on any 12-month percentage increases in the price index (published by the U.S. Department of Labor Bureau of Labor Statistics) for the most recent 12-month period for which data is available.

Covered employee means an employee, other than a building service employee or construction employee, working at a retail or food service establishment or a

distribution center located on property within the city that has been improved or developed using CFA and whose work involves the regular business operations of the retail or food service establishment or distribution center.

Retail or food service establishment means any retail store selling goods, any food services establishment, and any establishment that is required to have a license to sell liquor pursuant to the alcohol beverage control law, provided that (1) the store or establishment offers goods or services primarily to members of the general public and (2) 10 or more employees are employed on the premises of such store or establishment.

Distribution center means a warehouse, distribution center, sortation facility, fulfillment center or any other building stocked with products or goods to be redistributed to retailers, to wholesalers or directly to consumers and at which 20 or more employees are employed on the premises. The term "distribution center" does not include any facility used primarily for the storage or distribution of goods owned or manufactured by the person operating such facility or any affiliate of such person, provided that the business operations of such person and any affiliates within the city primarily involve the sale of goods owned or manufactured by such person or any affiliate.

Is the law retroactive?

The law does not apply to any project for which the project agreement was entered into prior to the bill's effective date of April 23, or any tenancy, subtenancy, lease, sublease, contract or subcontract entered into prior to that date.

What are employers required to do under the law?

Submit an attestation within 90 days. Employers covered by the law must, within 90 days after the project commencement date for a CFA recipient or the date an employer commences business operations at a project, submit an attestation signed by an applicable labor organization to the city or city economic development entity providing the CFA, reporting either:

- That the employer has entered into or is negotiating one or more LPAs and identifying (1) the classes of covered employees to whom the LPAs apply, (2) the classes of covered employees not currently

represented by a labor organization, and that no labor organization has sought to represent, and (3) the classes of covered employees for which LPA negotiations have commenced but not yet concluded.

- That its covered employees are not currently represented by a labor organization and that no labor organization has sought to represent such covered employees.

The attestation requirement applies for the longer of the term of the applicable project agreement or 10 years from the project commencement date.

If a labor organization seeks to represent covered employees after the 90-day period, or after the employer has submitted an attestation, whichever is earlier, and has provided notice of its interest to the covered employer and to the city or city economic development entity that provided the CFA, then, within 90 days after the date of the notice, the employer must submit an attestation signed by the labor organization, stating that it has entered into an LPA or that LPA negotiations have not yet concluded.

Submit a statement agreeing to comply with the law. Before beginning work at a property improved or developed with CFA, covered employers must also provide to the New York City comptroller and to the city or city economic development entity that executed the project agreement a statement agreeing to comply with the requirements of this law. A CFA recipient may be required to collect and transmit these statements for all employers operating on the project. These statements have to be certified by the CEO or CFO of the covered employer.

The certification will be maintained and made available for public inspection until six years after the conclusion of the project agreement's term.

The certification requirement applies for the longer of the term of the applicable project agreement or 10 years from the project commencement date.

Comply with CFA recipient annual certification requirements. CFA recipients have to provide to the New York City comptroller and the city or city economic development entity that executed the project agreement an annual certification:

- Confirming notification to all employers operating on the property improved or developed with CFA that

employers must comply with all requirements of the law, as applicable.

- Providing the names, addresses and telephone numbers of these employers.
- Affirming the CFA recipient's obligation to help the city investigate and remedy noncompliance by any employers.

The certification will be maintained and made available for public inspection until six years after the conclusion of the project agreement's term.

The certification requirement applies for the longer of the term of the applicable project agreement or 10 years from the project commencement date.

Are there exemptions?

The law includes the following exemptions from the attestation requirements and the statement agreeing to comply with the law:

- Small businesses — firms that do not exceed the small-business size standards established for its industry by the U.S. Small Business Administration during the prior calendar year.
- Not-for-profit organizations — entities that are either incorporated as not-for-profit corporations under the laws of the state of their incorporation or exempt from federal income tax per subdivision c of Section 501 of the U.S. Internal Revenue Code.
- Any retail or food service establishment or distribution center operating at a project in which either:
 - Residential units subject to a regulatory agreement with one or more federal, state or local government agencies comprise more than 75% of the project area, which agreement requires that no less than 75% of the units located are affordable for households earning on average less than 125% of the area median income.
 - Residential units comprise more than 75% of the project area, and all units are subject to a regulatory agreement with one or more federal, state or local government agencies, the terms of which govern the affordability of the units.
- Any retail or food service establishment or distribution center operating at the Hunts Point city property (meaning any city-owned property located in blocks 2770, 2775, 2778, 2780 or 2781 in Bronx County).

- Any retail or food service establishment or distribution center operating at a project for which the principal industry conducted on the property is or will be manufacturing, as defined by the North American Industry Classification System.

Qualifying entities must provide to the comptroller and the city or economic development entity that executed the project agreement a certification indicating the exemption they qualify for and the basis for the exemption. The certification will be maintained by the comptroller and the city or economic entity that executed the project agreement and made available for public inspection until six years after the conclusion of the project agreement's term. The certification requirement applies for the longer of the term of the applicable project agreement or 10 years from the project commencement date.

Will there be rules implementing the law?

Prior to the April 23 effective date, the mayor or his delegate can establish any rules necessary for implementation of the law and take any other measures as are necessary for its implementation.

What are the repercussions for violating the law?

The New York City comptroller is responsible for monitoring compliance with the requirements of the law and can investigate whenever it has reason to believe there has been a violation or when it receives a verified complaint in writing from an interested party. The results of the investigation are reported to the mayor, who will provide the CFA recipient or covered employer with an opportunity to cure any violations.

If a violation is not cured, the mayor can issue an order with an appropriate remedy:

- Requiring the filing of records required by the law
- Imposing sanctions against the CFA recipient or covered employer in accordance with rules established by the mayor
- Imposing contractual remedies under the project agreement
- Declaring the CFA recipient in default of the project agreement

The mayor must consider a number of factors when determining an appropriate remedy, including the gravity of the violation; any history of previous violations; the good faith of the CFA recipient or covered employer; and the failure to comply with record-keeping, reporting or other requirements. Before issuing an order, the mayor must provide notice of the order, along with a copy of the complaint. The mayor may also negotiate a settlement or refer the matter to the Office of Administrative Trials and Hearings for a hearing and recommended disposition.

Related Professionals

Lauren T. Williams lwilliams@loeb.com
Ian Carleton Schaefer ischaefer@loeb.com

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