New York
APARTMENT LAW INSIDER®

The How-to Resource for Owners, Managers & Real Estate Professionals

APRIL 2017

FEATURE

We'll explain fair housing considerations affecting your leasing office, common areas, and amenities, and offer six rules to follow to avoid potential problems.

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Comply with Fair Housing Law When Managing Common Areas & Amenities

In August 2016, the NYC Commission on Human Rights entered into a settlement agreement with an owner for alleged age discrimination. A rent-stabilized tenant had filed a complaint against a large real estate management company because the company opened an exercise room in the building and allowed only market-rate tenants, and not rent-regulated tenants, to use the gym. The tenant claimed that the gym's usage policy barring rent-regulated tenants had a disparate impact on older residents in the building.

The Commission's Law Enforcement Bureau (LEB) conducted an investigation, including a review of the building's and management company's policies. The LEB found that the building's denial of access to rent-regulated tenants was more likely than not to have a disparate impact on older residents in the building and issued a probable cause determination. The Commission and the owner entered into a conciliation agreement requiring the management company to charge the same reduced fee per month to all residents, whether market-rate or rent-regulated, for a period of five years; pay the complaining tenant $20,525 in compensatory damages; pay a sum of $40,000 to the City of New York; provide antidiscrimination training to all supervisory level personnel in the tenant's building as well as all buildings managed by the company; update its employment policies and procedures to comply with the NYC Human Rights Law; display copies of the Commission's "Fair Housing, It's the Law" posters in prominent common areas at its places of business, and establish recordkeeping protocols on information regarding access to exercise rooms in other buildings managed by the company.

Beyond general access issues to your building's amenities, there are fair housing compliance issues related to the operation and management of the leasing office, common areas, and amenities such as fitness centers and pools within your building. We will explain

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Fair Housing Law

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fair housing considerations affecting your leasing office, common areas, and amenities, and offer six rules to follow to avoid potential fair housing problems associated with managing those facilities.

Rule #1: Do Your Homework on Accessibility Requirements

Get to know the accessibility laws applicable to your building. In addition to learning about the design and construction requirements of the federal Fair Housing Act (FHA), it's important to understand accessibility requirements under other federal, state, and local laws.

For example, the Americans with Disabilities Act (ADA) applies to your leasing office and any commercial enterprise such as a convenience store open to the public located within your building. However, common use areas that are for use only by residents and their guests are not covered by the ADA. And if the building receives federal financial assistance, it must comply with the accessibility requirements under Section 504 of the Rehabilitation Act of 1973. When more than one law applies to a community, and there are different accessibility standards for each law, the governing principle to follow is that the more stringent requirements of each law apply, according to HUD.

Anytime you're considering renovations to common areas and amenities, the DOB will require that all new construction and alterations of public accommodations and commercial facilities in New York City subject to the ADA comply with the 2010 ADA Standards.

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Editor: Eric Yoo **Executive Editor:** Heather L. Stone **Director of Marketing:** Peggy Mullaney

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Rule #2: Ensure Access to Leasing Office

Accessibility issues are even more important when it comes to your leasing office. Because it serves the public, your leasing office is considered a public accommodation, so it's covered under the ADA. So even if your community isn't subject to the FHA's design and construction standards because it was intended or built for first occupancy before March 13, 1991, the ADA would require you to remove architectural barriers if doing so is "readily achievable," according to HUD.

Rule #3: Consider Reasonable Modification or Accommodation Requests

If you receive a request from a disabled resident to make any changes to your facilities or rules, take it seriously. Fair housing law requires buildings to make reasonable modifications—changes to existing structures—or reasonable accommodations—changes to rules—that are necessary to enable a person with a disability to have the same opportunity as everyone else to fully enjoy the building.

If a resident asks for an exception to your rules for a disability-related reason, treat it as a request for a reasonable accommodation. For example, you may receive a request from a resident with a disability who needs access to your fitness center an hour before or after its regular hours of operation. If there's a disability-related need for the request—perhaps that's the only time someone is available to help him follow doctor's orders to use the treadmill—then you would have to look at whether the request to keep it open an extra hour before or after regular hours is unreasonable. Unless the request imposes an undue financial or administrative burden on you, or would fundamentally alter your operations, you are required to grant the request.

Complaints about access to common areas and amenities in your community deserve particular attention. For one thing, it could alert you to a possible violation of accessibility requirements under the FHA's design requirements, the ADA, or state or local laws. In other words—it could put you on notice of a barrier that you may be legally responsible to remedy.

But even if it's not required under accessibility standards, you may have to grant a request for a reasonable modification to allow access by a resident with a disability to common areas or amenities, such as the pool, fitness center, or community meeting room. If there's a clear connection between the resident's disability and the requested modification, then you must allow the resident to make the requested modification as long as it's reasonable.

Rule #4: Ban Bad Behavior—Not Children

Buildings have a legitimate reason to adopt rules governing behavior in common areas and while using amenities. Such rules generally are necessary to prevent damage, protect safety, and minimize potential liability for injuries suffered by

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residents and guests using your facilities. And rules regulating conduct in the common areas within buildings are a legitimate way to prevent disturbances that interfere with residents' quiet enjoyment of their apartments.

To address these concerns, it's tempting to consider banning children from common areas or amenities. After all, it's not unreasonable to believe that children may be particularly vulnerable to injury in recreational facilities or that loud play in hallways may disturb the neighbors.

Nevertheless, fair housing law protects familial status, so you may not adopt rules that unduly interfere with the ability of families with minor children to use and enjoy the community's facilities. Just as the FHA prohibits you from steering families with minor children away from apartments on upper floors—where balconies pose safety risks for children—you can't ban children from your pool or fitness center to ensure that they won't get hurt.

It's best to adopt rules that focus on dangerous or disruptive behavior in your common areas and facilities—instead of on the age of the person who engages in that behavior. On the other hand, your building may offer amenities where restricting access to children—or requiring adult supervision—is justified based on safety concerns. To satisfy fair housing law, however, you must ensure that the rules are reasonable—that is, based on objective criteria and tailored to the particular facility. Depending on the risk of injury, it may be reasonable to require adult supervision for anyone under a particular age in some areas—your pool, for example—but to deny access to anyone under a particular age in others—a sauna, for example—based on objective criteria, such as local health and safety laws or manufacturers' instructions. In some cases, it may be an insurance issue—with restrictions imposed by the insurance company to maintain liability coverage for certain areas of the building.

Rule #5: Watch Your Language

Post signs in and around common areas and amenities to let everyone know your rules. But the language you use—on signs and in written rules—can make all the difference in warding off accusations of discrimination by families with minor children. Make sure that signs outlawing dangerous behavior in common areas apply to everyone, not just children.

As much as possible, avoid use of the word "children" in favor of generic terms like "anyone" or "person" under a particular age. And indicate the reason for the rule by using the key phrase "for your protection." So, for example, a sign posted in your fitness center might read, "For your protection, persons under age 14 must be accompanied by an adult."

Signs need to be clear, and visible to anyone in the vicinity. Make sure signs are posted low enough for someone in a wheelchair to read them. Be careful about putting signs on the backs of doors, where they can't be seen when the door is open.

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Rule #6: Be Consistent

Aside from disability-related requests, the key to preventing fair housing trouble is to ensure residents and guests have the same opportunity to use and enjoy your common areas and amenities regardless of race, color, religion/creed, age, national origin, alienage or citizenship status, gender (including sexual harassment), gender identity, sexual orientation, disability, pregnancy, marital status, and partnership status.

Generally, that means that you can't exclude some residents from your pool, fitness center, or meeting rooms based on a protected characteristic. For example, if you allow a Bible study group to use your community meeting room for weekly meetings, then you could be accused of housing discrimination if you deny use of the room to another religious group.

Likewise, it's unlawful to enforce rules more strictly on some residents than on others based on a protected characteristic. This may be a particular problem at pools, fitness centers, and other amenities, where you may have part-time or seasonal help. Without adequate training, these employees could trigger a fair housing complaint if it appears that they are singling out members of one protected class to punish for rules infractions, while ignoring violations by others. ♦

IN THE NEWS

➤ Mayor Promises to Continue Fight Against Water Rate Ruling

In *Matter of Prometheus Realty Corp. v. New York City Water Board,* the Appellate Division, First Department of the State Supreme Court ruled 3 – 1 that the city's water board lacked a rational basis to award the credit to owners of one- to three-family homes, while leaving other property owners ineligible.

Last April, Mayor De Blasio promoted the one-time credit, to be funded with a water board surplus, to cut annual water and sewer bills by 17 percent to 40 percent for about 664,000 homeowners. His proposal also included a 2.1 percent rate increase, and was to take effect last July 1.

In its decision, the appeals court said the credit "cannot be reconciled" with the city's budgetary needs, and the water board had no basis to conclude that small homeowners were "more needy" than other property owners or paid too much relative to them.

Following the ruling, Mayor De Blasio held a press conference to discuss the ruling and next steps. At the press conference, the mayor emphasized the dissenting opinion. In the dissent, Justice Marcy Kahn said the water board had authority to help "overburdened" lower and middle-class homeowners, including the elderly, facing rising water rates. And the De Blasio administration plans to rely on the argument in the dissenting opinion to pursue an appeal with the state's highest court, the Court of Appeals.

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At the press conference, Corporation Counsel Zachary Carter also spoke in support of the dissent. He stated, "The dissent applied the correct legal standard and that is that unless the decision of a regulatory body is arbitrary and capricious, the court has to defer to that decision. If the court had a different view of what was rational that doesn't count under the prevailing Court of Appeals laws. They don't have to agree with the particular rationale, they just have to decide that that rationale that was offered was not arbitrary and capricious."

➤ OATH ECB Proposes to Repeal Penalty Schedules

The Office of Administrative Trials and Hearings' Environmental Control Board (OATH ECB) is proposing to repeal its buildings penalty schedule, which consists of Buildings Penalty Schedule I and Buildings Penalty Schedule II. This schedule is found in 48 RCNY §3-103, and contains penalties for violations of Title 1 of the Rules of the City of New York (RCNY) and Titles 27 and 28 of the New York City Administrative Code. At the same time, DOB is also proposing to enact a Buildings Penalty Schedule within its own rules, which will be located in 1 RCNY §102-1.

The move to relocate the penalty schedules of each NYC agency with corresponding ECB hearings to each individual agency's charter is being proposed to make the penalty schedules easier to find for the public and to remove OATH ECB's need to approve proposed or amended penalties, which should speed up agency rulemaking.

Working with the city's rulemaking agencies, the Law Department, the Mayor's Office of Management and Budget, and the Mayor's Office of Operations conducted a retrospective rules review of the city's existing rules, identifying those rules that will be repealed or modified to reduce regulatory burdens, increase equity, support small businesses, and simplify and update content to help support public understanding and compliance. This proposed rule repeal was identified as meeting the criteria for this initiative.

The proposed rule is open for comments via email, fax, and mail, and an in-person session on Wed., March 29, from 10 a.m. through 11:30 p.m. You can submit comments to OATH ECB through the NYC Rules website at *http://rules.cityofnewyork.us.* You can email written comments to *Rules_Oath@oath.nyc.gov.* And you can mail written comments to OATH ECB, Attn.: Simone Salloum, Assistant General Counsel, 66 John St., 10th Fl., New York, NY 10038.

➤ Council Votes to Reform Nuisance Abatement Law

The City Council recently passed a package of bills intended to make it harder for the police to evict tenants committing nuisances such as drug dealing. The mayor is expected to sign the package.

The Nuisance Abatement Law (NAL) permits the shuttering of locations including commercial businesses and private residences without notice to the

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defendant. The law originated in the 1970s as a method of quickly closing down locations that were identified as sites of repeated criminal activity. Over time, concerns have arisen that NAL has been unevenly applied to a broad range of circumstances, often unwittingly targeting individuals who are not connected to the crimes in question. The Nuisance Abatement Fairness Act seeks to reform the practice of nuisance abatement through implementation of clearer guidelines on execution and transparency.

Introduction 1308-A would limit the application of temporary orders pursuant to NAL. These types of orders would be permitted only for nuisances involving prostitution, certain violations of the building code, and problematic commercial locations in which there is a significant risk of imminent physical harm to the public.

Nuisance abatement actions are often filed while actions addressing the same conduct proceed in venues such as the State Liquor Authority, Housing Court, and the New York City Housing Authority. To address these actions, which often lead to identical outcomes for defendants, Introduction 1315-A would require dismissal of a nuisance abatement action if there were any similar legal proceeding in the tribunals of NYCHA or Housing Court, unless the city could establish a "unique and compelling interest" in the NAL action.

Introduction 1317-A would eliminate misdemeanor possession of drugs and all misdemeanors related to marijuana from the nuisance abatement law. Felony possession or sale of drugs and all felonies related to marijuana would remain.

According to its sponsor, Committee on Public Safety Chair Vanessa Gibson, "The Nuisance Abatement Fairness Act will institute important and necessary guidelines for the NYPD and keep innocent New Yorkers from being unjustly barred from their homes or businesses. I thank the Speaker for her leadership and I am proud of the work my colleagues and I have done to restore justice to the justice system."

Introduction 1318-A would require the Law Department to "verify the ongoing occupancy of those persons alleged to have caused or permitted" nuisances within 15 days of filing a nuisance abatement action. "Verifying that the person responsible for the nuisance is still there before the city takes action will prevent innocent families from wrongful eviction," said Council Member Barry Grodenchik.

➤ Governor Vows to Veto 421-a Bill with No Union Labor Provisions

In a recent speech during the Building and Construction Trades Council of Greater New York Winter Conference, Governor Cuomo vowed to veto any 421-a legislation that doesn't include protections for union labor. The governor said that the exclusion of a prevailing wage provision is "the camel's nose under the tent" that may lead to weaker labor unions across the country.

Last November, the Real Estate Board of New York (REBNY) and the Building Trades reached a deal to revive the lapsed 421-a program. The agreement, which

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came 10 months after the tax abatement expired, would require buildings in Manhattan to pay an average hourly wage of $60 for construction workers. Construction projects in Brooklyn and Queens, meanwhile, would be required to pay $45 per hour.

Cuomo, who warned that labor unions across the country are under attack, said that the "fight" for the 421-a program is not just about a tax break for residential developers, it is also a struggle over New York principles. Cuomo advanced the replacement plan in January. As part of the initiative, the tax break has been renamed as "Affordable New York." The proposal is now with the State Legislature.

➤ *New Law Requires Clearly Marked Addresses at All Building Entrances*

The city council recently enacted a bill that would require street numbers to be placed on every side of a building that contains an entrance primarily used for day-to-day pedestrian ingress or egress. The bill is currently awaiting the mayor's signature before becoming law.

The bill also increases the civil penalty for failing to post street numbers from $25 to $250 and the daily penalty from $5 to $50. Borough presidents are tasked with enforcing the current law, which was written when they controlled the Bureau of Encroachments and Incumbrances. That department has since been eliminated and borough presidents are hoping a buildings-related agency such as the DOB will act in their place. ♦

LANDLORD V. TENANT

Each month our sister publication, NEW YORK LANDLORD V. TENANT, *summarizes about 60 decisions by the courts and the DHCR involving owners and tenants. Here are three from the March 2017 issue.*

LEAD PAINT

Child's Cognitive Impairment Wasn't Caused by Lead Paint Exposure

Tenant sued landlord, claiming that her child developed cognitive deficits due to exposure to lead-based paint in tenant's apartment. Landlord asked the court to dismiss the case without a trial. The court ruled against landlord, who appealed and won. The appeals court found that exposure to lead didn't cause the child's cognitive deficits, and that the reports of two doctors were insufficient to raise issues of fact requiring a trial. The child had undisputed speech and language deficits from infancy, well before his first known exposure to lead paint. The child received speech and language therapy and individualized education programs into high school and an expert pediatric neurologist's report showed that no peer-reviewed study had found that lead contributed to conditions in children with pre-existing cognitive deficits. A neuropsychologist's report submitted

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by tenant also was insufficient to raise any questions as to whether the child's exposure to lead created greater difficulties for him than he would have had if he hadn't been exposed to lead.

- Adrian T. v. Millshan Realty Co., LLC: 2017 NY Slip Op 01122, 2017 WL 536018 (App. Div. 1 Dept.; 2/10/17)

LANDLORD'S NEGLIGENCE

Landlord Not Responsible for Tenant's Burn Injury

Tenant sued landlord for negligence after she suffered a burn injury to her head when she used a match to try to light a burner on the top of her gas stove because the stove's igniter didn't work. The court denied landlord's request to dismiss the case without a trial. Landlord appealed and won. Tenant herself had bought the stove and had it installed. Tenant's lease required landlord to repair and maintain any appliance provided by landlord but imposed no duty on landlord to repair or maintain appliances supplied by tenant herself. So landlord wasn't liable for tenant's injuries. Tenant also claimed that the accident was related to a condition created by landlord in the course of a gas pipe replacement project in the building. But landlord showed that the project was performed by a licensed contractor in accordance with permits, and was inspected and certified as safe when completed two years before the accident. The project didn't involve any work on tenant's stove, except to assure that there was gas service to the stove and that it was safe with no leaks when the project was done.

- Kaplan v. Tai Properties, LLC: 45 N.Y.S.3d 792, 2017 NY Slip Op 00729 (App. Div. 1 Dept.; 2/2/17)

MAJOR CAPITAL IMPROVEMENTS

Rent Hike for Bathroom Modernization Granted Even Though Tenants Denied Access

The DRA granted landlord's MCI rent increase application based on bathroom modernization. Tenant appealed and lost. Tenant claimed that the bathroom modernization wasn't performed in her apartment. She said that since the bathroom and plumbing in her apartment were in good condition, landlord agreed not to replace them and made tenant sign a document declining the work. Landlord pointed out that tenant denied access for the bathroom replacement and that it remained ready to replace tenant's bathroom as soon as access was provided. The DHCR noted that tenant responded to the MCI application, admitting that she declined the bathroom modernization. This didn't exempt her from the MCI rent hike and tenant should provide access for landlord to complete the work. Tenant also claimed that the bathroom had been modernized 10 years before the MCI was performed, but there was no prior MCI application filed for any bathroom work. Tenant also claimed that the bathroom modernization was an individual apartment improvement. But it was the DHCR's established position that this work was an MCI. The fact that three of the building's 17 rent-stabilized tenants denied access for the work wasn't grounds to deny the MCI rent hike. ♦

- Heredia: DHCR Adm. Rev. Docket No. DP430034RT (1/31/17)

MANAGEMENT BASICS

Take Four Steps to Calculate Interest for Rent Overcharge Refunds

You probably know that if you promptly refund an overcharge to a tenant who has filed a rent overcharge complaint against you, the Division of Housing and Community Renewal (DHCR) shouldn't order you to pay triple damages for the amount of the overcharge. There are numerous DHCR decisions in which the DHCR denied or revoked triple damages tenants sought for rent overcharges because owners gave tenants rent credits or refunds, plus interest, while the tenants' complaints were pending. But to avoid that penalty, your refund must also include interest on the overcharge amount. The interest is set by statute, and it is currently at 9 percent per year [NYCPLR §5004].

Calculating the exact amount of interest to refund to the tenant can get confusing. That's because the 9 percent interest is based on a per-year amount, while most overcharge awards don't cover exactly one year.

Four Steps to Take

Take the following steps to calculate the interest amount:

Step #1: Start with the first month that you collected a rent overcharge. Multiply the rent overcharge amount you collected that month by .0075 (this is the 9 percent annual interest rate, divided by 12).

Step #2: Multiply the number you get in Step #1 by the number of months from the date you first collected the overcharge for that month until the date you refunded the overcharge amount. This number is the interest you must pay for that month's overcharge.

Step #3: For each subsequent month during which you collected a rent overcharge, repeat the same method of calculation set out in Steps #1 and #2. That is, multiply the rent overcharge amount you collected in the particular month by .0075 and then multiply that result by the number of months from the date you first collected the overcharge for that month until the date you refunded the overcharge amount.

Step #4: Add up the interest amounts you calculated using Steps #1, #2, and #3 for each month you collected an overcharge. This total is the interest amount you must refund to the tenant.

Example: On Jan. 21, 2017, you get a rent overcharge complaint that one of your tenants filed with the DHCR. After reviewing the apartment's rent history, you discover that, starting on Sept. 1, 2015, you collected a rent overcharge of $54 a month and continued to collect this rent overcharge for the next 12 months. On Sept. 1, 2016, you renewed the tenant's lease and the rent overcharge you collect-

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Management Basics

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ed from the tenant increased to $60 per month. You continued collecting this monthly $60 rent overcharge for five months. On Feb. 1, 2017, you reduced the tenant's rent to the legal regulated rent, stopped collecting any rent overcharge, and returned the entire overcharge amount, plus interest, to the tenant.

Following the above steps, here's how you would figure out the amount of interest you must give the tenant in addition to your refund of the actual overcharge amount:

Step #1: Start with September 2015 (the first month you collected a rent overcharge). Multiply the rent overcharge amount for that month ($54) by .0075.

$54 × .0075 = $0.405

Step #2: Multiply $0.405 by 17, which is the number of months from the date you first collected the overcharge for that month (Sept. 1, 2015) until the date that you refunded the overcharge amount (Feb. 1, 2017).

$0.405 × 17 = $6.89 (round up from $6.885)

Step #3: For each subsequent month during which you collected a rent overcharge, repeat the same method of calculation set out in Steps #1 and #2
(Note: round up to 2 decimals if third decimal is 5 or greater):

Month	Monthly Interest	# of Months	Interest
Oct. 2015	$54 × .0075 = $0.405	$0.405 × 16	= $6.48
Nov. 2015	$54 × .0075 = $0.405	$0.405 × 15	= $6.08
Dec. 2015	$54 × .0075 = $0.405	$0.405 × 14	= $5.67
Jan. 2016	$54 × .0075 = $0.405	$0.405 × 13	= $5.27
Feb. 2016	$54 × .0075 = $0.405	$0.405 × 12	= $4.86
March 2016	$54 × .0075 = $0.405	$0.405 × 11	= $4.46
April 2016	$54 × .0075 = $0.405	$0.405 × 10	= $4.05
May 2016	$54 × .0075 = $0.405	$0.405 × 9	= $3.65
June 2016	$54 × .0075 = $0.405	$0.405 × 8	= $3.24
July 2016	$54 × .0075 = $0.405	$0.405 × 7	= $2.84
Aug. 2016	$54 × .0075 = $0.405	$0.405 × 6	= $2.43
Sept. 2016	$60 × .0075 = $0.45	$0.45 × 5	= $2.25
Oct. 2016	$60 × .0075 = $0.45	$0.45 × 4	= $1.80
Nov. 2016	$60 × .0075 = $0.45	$0.45 × 3	= $1.35
Dec. 2016	$60 × .0075 = $0.45	$0.45 × 2	= $0.90
Jan. 2017	$60 × .0075 = $0.45	$0.45 × 1	= $0.45
		Subtotal	**= $55.78**

Step #4: Add up the interest amounts you calculated for the 17 months you collected a rent overcharge. **Total** **$62.67**

BUILDING MANAGEMENT CALENDAR

Key dates to add to your to-do list: April 1 through May 1, 2017.

4/3 MON

❑ Pay union contribution.

Service Employees Internatioal Union (Local 32BJ) quarterly contribution to its pension and welfare fund is due today. To avoid interest and penalties, pay by the end of the month.

❑ Pay New York City real property taxes.

Today is the final day to pay the last quarterly installment of 2016–17 taxes to the city's DOF.

❑ File 2017 Fuel Cost Adjustment Forms Online with DHCR.

Today is the last day to file fuel cost adjustment forms to charge rent-controlled tenants a fuel cost adjustment in 2017.

5/1 MON

❑ Send Income Certification form to high-rent tenants.

Today is the last day to deliver or mail the DHCR Income Certification form to rent-stabilized and rent-controlled tenants whose rent is $2,700 or more per month. If you send the form by mail, make sure your envelope is postmarked no later than May 1, 2017.

❑ File J-51 application.

The second filing period in 2017 for filing the J-51 tax abatement applications with HPD begins today. Applications can be filed during this period up to and including June 15, 2017.

❑ Submit annual water and energy benchmarking data to city.

Local Law 84 requires owners of buildings with more than 50,000 square feet to submit annual benchmarking data by May 1st of every year.