

New York Considers Amendments to Construction Industry Wage Laws that Would Impose Significant Burden Upon Contractors

A bill that would amend the the wage and hour requirements of the New York Labor Law was recently passed by the New York State Legislature and is expected to be signed by Governor Cuomo. Bill Number S2766C (the "Bill") is intended to protect construction workers against wage theft. However, it places a heavy burden on contractors to police the payroll practices of its downstream subcontractors and exposes them to potentially significant liability for the wage and hour violations of their subcontractors.

The proposed Bill would make a contractor or upstream subcontractor jointly and severally liable for any wages owed to employees of their subcontractors. The Bill allows for a private right of action for such subcontractor's employee (or such employee's representative) to bring a civil or administrative action seeking payment of unpaid wages owed pursuant to Section 198 of the New York Labor Law. In such an action against a subcontractor for unpaid wages, the contractor or upstream subcontractor is not only jointly and severally liable for any unpaid wages, but also for the prevailing claimant's reasonable attorney fees, prejudgment interest, and, absent a good faith defense, liquidated damages equal to the amount of the wages owed.¹

Mitigating Contractor Safeguards

The Bill invalidates any attempted waiver of such contractor's liability by an employee or subcontractor² but does provide some limited safeguards to contractors and upstream subcontractors. The Bill proposes to add a new § 756-f to the General Business Law, which would permit contractors to request certified payroll records of their subcontractors. The records must contain, at a minimum, all lawfully required information on the subcontractor's employees sufficient to apprise the contractor of the subcontractor's status in paying wages owed to its employees. Failure by the subcontractor to comply with such a request in a timely fashion shall entitle the contractor to withhold payments owed to such subcontractor. However, in addition to imposing a heavy burden upon contractors to scrutinize payroll records of their subcontractors, the utility of this protection is limited by the accuracy of the subcontractor's records. In practice, a contractor who expends the resources to review the payroll records of all of its subcontractors would still be left without any ability to discover unrecorded hours worked by an employee, and with limited means of mitigating liability for unpaid wages owed.

The Bill would also permit contractors to file suit against their subcontractors to recover amounts paid to the subcontractor for employee wages owed but never paid. It provides a catch-all remedy that the contractor may create by contract or enforce through "any other lawful remedies" available against their subcontractors. Finally, the Bill would limit a contractor's exposure for such wage violations to three years prior to the commencement of a civil action.³

¹N.Y. Lab. Law § 198. Liquidated damages may increase to 300% of the wages owed inf a willful violation of N.Y. Lab. Law § 194 (Differential in rate of pay because of protected class status prohibited) is found.

²Except by way of a collective bargaining agreement with a bona fide building and construction trade labor organization.

³Reduced from the typical six-year statute of limitations for failure to pay wages under the New York Labor Law. N.Y. Lab. Law § 198.

The Bill would ultimately impose a heavy burden upon contractors and affords limited means of protection, even to those contractors that have otherwise acted in good faith. As such, in anticipation of the Bill's passage, we recommend contractors with New York operations begin to review and develop internal procedures for the collection and evaluation of subcontractor payroll records and enhance current subcontracts with language that will ensure they are protected to the fullest extent permitted by law. Such enhancements should specifically include language that reinforces a contractor's right to request copies of its subcontractor's certified payroll records and withhold payments owed when subcontractors fail to comply with such requests. Contractors should seek to broaden the indemnity language contained in their subcontracts to expressly require subcontractors to indemnify the contractor against liability for unpaid wages owed as a result of a subcontractor's wage and hour violations. Additionally, contractors should carefully review their current insurance policies and the coverage provided under their subcontractor's insurance policies to evaluate their potential exposure and confirm the scope of coverage available for such wage and hour claims.

Most Commercial General Liability, Employment Practices Liability, and Directors & Officers Liability policy forms include broad exclusions for wage and hour claims. Wage and Hour coverage endorsements can be added to Employment Practices Liability Insurance policies to cover the cost of defense, which can be invaluable to contractors seeking to mitigate exposure for such wage and hour violations. It is important to note that coverage provided under these insurance products is limited to the defense of such claims and generally excludes indemnity for unpaid wages. Dedicated Wage and Hour policies that provide defense and indemnity to a contractor for liability to pay unpaid wages may be available. Contractors should note that these insurance products, in most cases, include large self-insured retentions of up to \$1M and sub-limited coverage and standard exclusions, which should be reviewed in light of a contractor's unique scope of exposure.

SDV will continue to monitor the proposed legislation, which can be found [here](#), and provide updates regarding the status of the Bill.

For more information, including recommended solutions for mitigating the Bill's potential impact on your business, contact Richard Brown at RBrown@sdvlaw.com and Michael Angotti at MAngotti@sdvlaw.com or call 203.287.2115.