

Status Update – Unpaid Wage Law, New York Senate Bill S2766C

New York has enacted an unpaid wage law that imposes liability upon upstream contractors. Senate Bill S2766C is intended to provide recourse to construction workers whose employers fail to pay wages owed for completed work. Critically, the Bill amends New York's existing Labor Law and General Business Law to hold upstream contractors liable for any unpaid wages owed to employees of their subcontractors of any tier. The Bill was signed into law by Governor Hochul on September 6, 2021, and will become effective January 4, 2022.

Summary of Bill & Potential Sources of Contractor Exposure:

- The Bill adds section 198-e to the Labor Law, which imposes liability upon a Contractor for amounts owed to a wage claimant by subcontractors of any tier.
- Contractors are also potentially liable 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, or up to 300% of such wages for willful violations.
- Liability may not be waived by agreement between a contractor and subcontractor except by collective bargaining agreement.
- Remedies for a wage claimant are only civil or administrative, no criminal liability imposed.
- Contractor's liability limited to 3 years from date of claim; subcontractor faces 6-year limitation period.
- Significant risk of exposure due to aggregated claims of multiple unpaid and underpaid workers.
- Exposure increases exponentially due to the high defense costs Contractors are likely to incur and liability for wage claimant's attorney fees.

Recommendations for Mitigating Exposure:

- There is no safe-harbor afforded to Contractors that have paid wages owed to subcontractors in good faith. If a subcontractor fails to pay its employees for wages owed, the Contractor may still be liable for such unpaid wages.
- Contractors may request certified payroll records from subcontractors to confirm compliance with wage and benefit requirements. Contractors may withhold payments owed a Subcontractor for failure to comply with such requests.
- Contractors are jointly and severally liable with downstream Subcontractors for unpaid wages and permitted to file suit against a Subcontractor to recover amounts paid due to the Subcontractor's non-payment of employee wages.

Contractual Safeguards

- It is critical that contractors review and revise their subcontracts to ensure all rights available are effectively reserved, and that subcontractor indemnity obligations are sufficiently broad to address and include liability for wage and hour violations.

- Contractors should expressly reserve the right to request that Subcontractors submit certified payroll records, and failure to comply with such requests may result in the Contractor withholding payments owed.

Insurance Solutions

- Contractors should consider whether to purchase insurance products that cover such wage and hour claims.
- Additionally, Contractors should evaluate their scope of exposure for such claims and assess any current policies they have in place that may respond, including Employment Practices Liability Insurance (“EPLI”) and Subcontractor Default Insurance (“SDI”) policies.
- Exclusions for wage and hour claims remain standard in EPLI and other policy forms.
- Wage and Hour defense-only coverage endorsements can be purchased as part of a Contractor’s EPLI policy but are limited to the cost to defend a wage and hour claim and generally will not indemnify a Contractor for any resulting liability.
- Wage and Hour Defense and Indemnity Insurance has become available in more recent years and is currently offered by a number of insurers.
- It is important that Contractors considering such coverage note that Wage & Hour Defense & Indemnity policies typically include large self-insured retentions (\$1M). Contractors must also confirm that the limits available are sufficient and make note of any problematic exclusions or limitations typically included on such forms (i.e., Prior Acts, Restrictive Notice Conditions, Interrelated Wrongful Acts, Coinsurance/Hammer Clause).
- Contractors may find further relief under Subcontractor Default Insurance policies, which generally indemnify an insured Contractor for losses arising out of a subcontractor default for failure to fulfill the material terms of any relevant subcontract or purchase order.
- Contractors should further note that, like the Wage & Hour Defense & Indemnity policies, SDI policies also typically include a large self-insured retention and other problematic terms that would restrict or eliminate coverage for such Wage & Hour claims.

This is an update to the previous Legislative Alert: New York Considers Amendments to Construction Industry Wage Laws that Would Impose Significant Burden Upon Contractors. Click [here](#) to read the original alert.

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