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Pending New York Construction Wage Theft Legislation Holds Contractors will be Strictly Liable for Unpaid Wage Claims of Employees of Subcontractors at Every Tier

If New York State Governor Andrew Cuomo decides to sign the current version of this bill, S2766-C, into law, the law will take effect within 120 days and it will make all contractors on private projects strictly liable for unpaid wage claims (including benefits) by employees of subcontractors at every tier. The new law would be consistent with federal law, which expressly holds contractors liable for subcontractors’ prevailing wage law violations, and broadly expand the exposure to virtually all private projects of significance in the state.

The ostensible purpose of this trend, which holds contractors liable for the wage payment failures of lower tiers, is to promote pay legitimacy by exposing contractors to the financial risk of their lower tiers’ non-payment and, thereby, to incentivize contractors to police wage payment. While, as discussed below, the legislation provides some tools to assist in this effort, it may very well be a burdensome challenge. Because it imposes strict liability, good faith efforts to promote compliance provide no defense. Thus, contractors are going to have to carefully consider their financial risk exposure and make appropriate investments in compliance monitoring efforts. Effective risk management will likely require bolstering subcontracts to give contractors rights to demand information and to take action when concerns are raised, burdensome record and data collection from lower tier contractors, meaningful review and analysis of the collected information to spot red-flags and taking various forms of prompt action to address potential non-compliance. These are lessons learned over time from those contractors who have performed federal prevailing wage work, and who have long been subject to this type of exposure.

The law applies to work performed under a “construction contract,” which is broadly defined as any written or oral agreement for the construction, reconstruction, alteration, maintenance, moving, or demolition of any building, structure or improvement, or relating to the excavation or other development or improvement to land. Liability attaches to any “contractor,” which is defined as any person or entity, including a construction manager or joint venture, or any combination thereof which enters into a construction contract with an owner.

Under the proposed legislation, the contractor assumes the wage and benefit liabilities of any subcontractor, at any tier, that has undertaken work within the scope of the contractor’s contract with the owner. While it is not clear in the proposed legislation, that exposure may apply regardless of whether the worker worked on or off site. As drafted, liability may extend to all employees of subcontractors, not just trade workers, and the law silent on whether “subcontractors” includes vendors and suppliers. Home improvement contracts or contracts covered by New York State Prevailing Wage Law are expressly excluded, as are any projects under a Collective Bargaining Agreement (CBA), where the CBA expressly waives the applicability of this legislation. However, outside of that limited potential CBA waiver, there is no way to contractually waive or evade the applicability of this law, and any attempt to do is deemed void under the law.

Under S2766-c, claims may be brought in court or before the NY State Department of Labor by individual employees or their designated representatives, or the New York State Attorney General. Claims may be brought for wages unpaid for up to three years prior to the filing of the claim. Under existing NY law, liability for unpaid wage claims results in damages and penalties equal to double the amount of pay owed, plus an award of attorney fees to successful employee. Consequently, seemingly small exposures can quickly mount.

The legislation incorporates two potential tools for contractors to try to mitigate their exposure: a) contractors are entitled – but not required – to request that subcontractors provide certified payroll and other wage and benefit data in order to monitor compliance, and are entitled to withhold payment to a subcontractor if and so long as the subcontractor fails to produce requested information; and, b) a contractor may include in its subcontracts a right to indemnity—which might otherwise be prohibited under New York common law.

In combination with existing New York State Law, the proposed legislation creates a deep thicket of legal risk and practical difficulties for a contractor. For example, plaintiffs and their counsel may try to utilize the new law to commence class/collective action claims against a contractor for virtually any employee associated with the project. Once an employee asserts a wage claim, as a general rule, the claim cannot be resolved and released by the employee without approval of the settlement by the NY State Department of Labor or a state or federal court, making resolution more unwieldy than a typical commercial dispute.

Contractors should be considering a multi-faceted approach to addressing the liability created by this legislation. An effective approach will likely include, among other things: implementing additional pre-qualification protocols; tracking, through technology or otherwise, to ensure accurate time and attendance recordkeeping for all project workers; training for their staff and ensuring their subcontractors are properly trained in these risks and to promote compliance; beefing up subcontracts to include wage-specific clauses addressing risk shifting and investigatory/audit rights and including new powers to withhold payment and to declare material breaches for failures to comply; implementation of certified payroll collection, analysis and verification protocols; and, where justified, withholding of payment from lower tiers in reasonable amounts sufficient to protect against potential exposure.

Peckar & Abramson will be conducting live webinars in the near future, which will provide further information.

This client alert provides information on the proposed law and general concepts for potential risk mitigation strategies. Implementation of a compliance program requires careful planning and implementation tailored to each organization. Similarly, the appropriateness of a response to discovered noncompliance requires examination on a case by case basis. Subsequent DOL rulemaking, if any, should further inform any interpretation of the law, risk mitigation strategy or corrective action response. If you would like to discuss compliance programs, or best practices for risk mitigation and how to respond to suspected or confirmed failures by any subcontractor to pay its employees, please contact Peckar & Abramson P.C.

The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.

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