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Effective July 1, 2022, Contractors Will be Liable for their Subcontractor's Failure to Pay its Employees' Wages and Benefits

On June 10, 2022, Illinois Governor J.B. Pritzker signed two House Bills that amend the Illinois Wage Payment & Collections Act, 820 ILCS 115 et. seq. (“Wage Act”), to provide greater protection for individuals working in the construction trades against wage theft in a defined class of projects. Pursuant to this new law, every general contractor, construction manager, or “primary contractor,” working on the projects included in the Bill’s purview will be liable for wages that have not been paid by a subcontractor or lower-tier subcontractor on any contract entered into after July 1, 2022, together with unpaid fringe benefits plus to attorneys’ fees and costs that are incurred by the employee in bringing an action under the Wage Act.

These amendments to the Wage Act apply to a primary contractor engaged in “erection, construction, alteration, or repair of a building structure, or other private work.” However, there are important limitations to the amendment’s applicability. The amendment does not apply to projects under contract with state or local government, or to general contractors that are parties to a collective bargaining agreement on a project where the work is being performed. Additionally, the amendment does not apply to primary contractors who are doing work with a value of less than \$20,000, or work that involves only the altering or repairing of an existing single-family dwelling or single residential unit in a multi-unit building.

Under the revisions to the Wage Act, an employee must provide written notice to the primary contractor and to the unpaid employee’s employer detailing the nature and basis of any alleged non-payment claim. If the employee’s employer fails to resolve the claim within ten (10) days after receipt of the written notice, the employee claimant may file a lawsuit to enforce the provisions of the Act, including a lawsuit against the primary contractor.

Importantly, the amendment does not require that the employee exhaust efforts to collect from the employee’s employer (usually a subcontractor) before pursuing the claim against the primary contractor. Thus, primary contractors on projects subject to the Bill are at risk of being required to pay and then to pursue claims against the subcontractor to recover what they have paid, which may be difficult since subcontractors that do not pay their workers are likely having financial troubles which might even lead them to bankruptcy. Importantly, the amendment *does not* allow primary contractors to execute contract provisions that contract away their liability under this amendment to the Wage Act. Therefore, primary contractors should consider other protections that may be useful to avoid this exposure.

Obtaining some form of security that can be accessed if the subcontractor fails to pay the wages and benefits is the preferred protection. This security could include a payment and/or performance bond from a subcontractor that requires the surety to pay the wages and benefits if the subcontractor fails to do so. The availability of insurance products (such as Subguard) that could provide such relief is also an excellent form of security. Bank letters of credit, personal guarantees from the principals of the subcontractor, or securing this risk with other valuable assets is also an excellent protection. However, not all subcontractors can provide appropriate security.

Absent such secured protection, primary contractors must consider “self-help” practices that should reduce the risk. Such practices include careful attention to payroll requirements, such as requiring certified payrolls and sworn pay applications certifying that all wages and benefits due have been paid. However, too often the sad reality is that a subcontractor that fails to pay its workers may submit false certified payrolls and false sworn payment applications. The fact that the primary contractor relied upon these sworn documents does not relieve that contractor of liability under the amendment. Thus, the most important proactive step primary contractors can take is to regularly require physical proof of payment from the subcontractor (such as a bank statement or third-party payroll report) as well as diplomatic inquiries to a sample of the subcontractor’s workers to learn if they are being paid, and indeed being paid properly. Learning there may be a problem early is the best way for a primary contractor to limit its exposure under the amendment to the Wage Act.

A full range of risk mitigation measures often involve legal issues and should be discussed with a contractor’s counsel.

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