



## **New York wage theft law promises major change for contractors by Jason Finkelstein and Aaron Brotman**

January 11, 2022 - Front Section

Jason Finkelstein

Aaron Brotman

New York's new wage theft law – expected to have a major impact on the construction industry state-wide – went into effect on January 4th, 2022 and will apply to contracts executed, modified, extended, or renewed from that date forward. Most notably, the law will impose (a) greater liability risk on prime contractors, and (b) reporting requirements on subcontractors.

The underlying bill, S2766-C (which can be found at

<https://legislation.nysenate.gov/pdf/bills/2021/S2766C>), adds a new section to NY Labor Law § 198 and was signed into law on Labor Day by governor Hochul. It extends full and complete liability to the prime contractor or construction manager on a project for any deviation of proper payment of wages by any subcontractor. The prime contractor or construction manager remains responsible for unpaid wages for all subcontractors, no matter how far down the subcontractor chain the wage theft occurs.

Under the new law, a worker who claims wage theft – or another party acting on their behalf, such as a union or even the attorney general acting on its own accord – can seek payment from both the worker's employer and the prime contractor on the project. The prime contractor and direct employer will be jointly and severally liable for damages, including back wages, benefits, and penalties. This is all a dramatic change in the law.

The prime contractor's liability cannot be waived except through a collective bargaining agreement. The prime contractor can also seek indemnification and reimbursement from the subcontractor that failed to pay full wages, though in many instances we expect the ability to obtain this recovery will be limited, at best.

The legislation also amends General Business Law § 756 to provide that, even without specific contractual provisions, subcontractors performing work on a project submit up the chain employee names and contact information, as well as wage and benefit details, so that the prime contractor can properly audit wages and benefits paid. The law also expressly makes the failure to provide this information justification for withholding of payments to any subcontractor at any tier.

With the right to obtain payroll, wage, and benefit details for subcontractor labor, prime contractors, even those that do not self-perform work, will have to become experts and learn to oversee New York labor law requirements to determine where their subcontractors may have failed to meet their obligations.

The goal of the new law is to provide deeper pockets for workers seeking compensation for non-payment of wages and benefits, as well as to have the prime contractors police their subcontractors regarding payment of wages. It imposes an increased risk and administrative expense to prime contractors and heightened reporting costs to trade contractors. It also provides a benefit to trade unions in that a waiver of this liability can only occur pursuant to a collective bargaining agreement, and union contractors already engage in reporting requirements regarding wage and benefit details.

There are a myriad of questions relating the law's coverage that will likely have to wait for courts to resolve, however. The law, for example, does not specifically provide for liability to project owners, intermediate subcontractors, advisory construction managers, or to hired developers. Will courts read liability for any or all of them? Would a court accept attempts to circumvent the law by having all contracts be held directly by the owner? If the owner contracts directly, does it assume liability as a general contractor if it is acting in that capacity?

In preparation for these changes, every prime and intermediate contractor should closely review and update its subcontracts to clarify its audit rights and to provide for indemnification rights against its lower-tier subs for any action brought under the new law. All subcontractors should also familiarize themselves with their existing and future contracts to best understand how the new law will not only impact their potential liability for unpaid wage claims, but also their ability to obtain work on future projects while facing increased scrutiny from prime and intermediate contractors. Additionally, union prime contractors should consider seeking an addendum to their existing collective bargaining agreements to waive this new statutory provision.

Jason Finkelstein is a member of the Litigation Department at Cole Schotz, Hackensack, N.J. Aaron Brotman is an associate in the Real Estate Department and a member of the Construction Services Practice Group at Cole Schotz, New York, N.Y.

New York Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540