

## "The Construction Industry Wage Theft Act: Beware," by Michael Ganz, partner, published in Nassau Lawyer, 10-2023

Nassau Lawyer Michael Ganz Esq Construction Wage Theft Law October 2023

Wage theft, particularly in the construction industry, has become a hot button issue that has put greater onus on general contractors to ensure that construction workers are paid fairly. In Fiscal Year 2022 alone, the United States Department of Labor's Wage and Hour Division recouped more than \$32.9 million in back wages in the construction industry for more than 17,000 employees.

Locally, in January 2022, New York State passed the Construction Industry Wage Theft Act (New York Labor Law 198-E) (the "Act"), joining a host of other states that have passed similar laws, including Illinois and Minnesota. The purpose of this bill was to amend the existing wage theft law to increase the likelihood that exploited workers in the construction industry will be able to secure payment and collect unpaid wages and benefits for work that has already been performed.

Compliance is critical, considering wage theft continues to fall under the scrutiny of enforcement officials. Among enforcement efforts, last July, NYS launched a hotline to report wage theft and recover stolen wages<sup>3</sup>; this past February, Manhattan District Attorney Alvin L. Bragg, Jr. announced the creation of the Office's first-ever Worker Protection Unit, of which the Office's Construction Fraud Task Force will be part of, to investigate and prosecute wage theft.

During the past few years, and especially heightened by the Covid-19 Pandemic, construction contractors have come under increased financial pressure due to enormous increases in material prices, as well as timely availability of those materials. Moreover, recent labor issues, which affect all aspects of the economy are particularly problematic in the construction industry. Unfortunately, contractors often seek to skirt New York's labor laws by underpaying their workers in order to increase their profits, gain an unfair advantage over other contractors bidding on the same work, and even to simply survive. Since contractors generally purchase equipment and materials from similar sources and at similar rates, a contractor's most effective price reduction option is to focus on its labor costs, which are also its largest cost component on most projects.

New York State's Construction Industry Wage Theft Act, which went into effect January 4, 2022, is intended to curb this wage abuse. It applies to the majority of construction projects within New York State for which contracts were entered into, renewed, revised or amended on or after that date. Specifically excluded from the reach of this law are home improvement contracts for 'occupied homes' or projects for the construction of less than ten (10) 1 or 2 family homes at one location. Obviously, there are nuances to the above, but as the law is still relatively new, the exact implications, restrictions and liabilities have not been tested in the courts.

Specifically, the Act imposes strict liability on a contractor for wage violations, not only for the actions of its direct subcontractors, but also for any-tier of subcontractor performing work under the contractor. This can be particularly challenging, considering many contractors may not even know the identities of all tiers of sub-subcontractors on its projects. Regardless, the law makes this practice even more egregious than before because the contractor is considered jointly and severally liable for its subcontractor's and the subcontractor's subcontractors' unpaid wages, benefits, wage supplements, and any other remedies available pursuant to the requirements of the Act.<sup>6</sup> Prior to the law change, workers could only lodge a private lawsuit for unpaid wages against their direct employer.

It is also noteworthy that employees or subcontractors cannot waive the liability assigned to the contractor except under a very narrow exception, specifically if it is done through "a collective bargaining agreement with a bona fide building and construction trade labor organization," and the waiver explicitly references the statute. Presumably, the Act acknowledges the efficacy of the collective bargaining agreement to protect the employees subject to that agreement. In addition, the remedies against the contractor are civil and administrative, not criminal, though of course, there are criminal penalties associated with certain violations of labor law, but not specifically in the new Act.<sup>8</sup> Claims under the new Act may be brought by the employee directly, or an organization or collective bargaining agent.<sup>9</sup> Moreover, the attorney general may also bring an action against the contractor.

The Act itself provides some protection for a contractor on account of its own subcontractor's violations of the Act. Indeed, the Act explicitly does not prohibit the contractor (or subcontractor for its down stream sub-subcontractors) from establishing contractual

remedies and availing itself of certain common law remedies as long as the contractual provisions do not diminish the rights of the employees under the statute. Therefore, to assist contractors with ensuring their subcontractors pay their employees, General Business Law §756-f requires subcontractors to provide certain certified payroll records at the contractor's request which is discussed below. The Act provides definitions for a 'construction contract', 'contractor', 'owner', and 'subcontractor'.

A contractor's liability under the Act is applicable for any claims occurring no later than three years prior to the initiation of such claim in a court of competent jurisdiction or the commencement of a civil action brought forth by the attorney general or NYS Dept of Labor. Therefore, the Act provides a three-year statute of limitations for a contractor's liability under the new statute.<sup>13</sup> This cuts the contractor's period of liability exposure in half because employers are generally subject to a six-year statute of limitations for failure to pay wages.

The final section of the Act provides that the Act does not diminish any rights afforded by an applicable collective bargaining agreement. The Wage Theft Prevention and Enforcement Law Concomitant with the Act is N.Y. Gen. Bus. Law § 756-f. 'Wage Theft Prevention and Enforcement.' (the "Law") Specifically, there are reporting duties for a subcontractor, requiring, upon a contractor's request, that it provide certified payroll records for all of its employees on the project, as well as the following additional information, whenever applicable.

1. The names of all of a subcontractor's employees, and those of any sub-subcontractors working on the project, including the names of all those designated as independent contractors; [Note, the last four digits of each employee's SS# must be provided]
2. The name of each sub-subcontractor;
3. The anticipated contract start date of each sub-subcontractor;
4. The scheduled duration of work of each sub-subcontractor;
5. The name of the local union(s) with whom the subcontractor and each sub-subcontractor is a signatory contractor; and
6. The name, address and phone number of a contact for each sub-subcontractor.

Notably, if a subcontractor fails to timely comply with a request for this information, the Law provides that the contractor may withhold payments owed to the subcontractor.<sup>18</sup> This is crucial to defeat any claim of breach of contract by the subcontractor against the contractor. The Law also applies to subcontractors in their relationship with their sub-subcontractors.

#### How Construction Industry Clients Can Be Proactive

In light of these new laws, contractors (and subcontractors) might consider adding terms to their subcontracts (and sub-subcontracts) adding indemnification clauses related to suits against them by subcontractor and sub-subcontractors' employees, including attorneys' fees, interest, costs, and any other related damages. Moreover, contractors can also seek to add personal guarantees from principals of the subcontractors for wage violations. Further, contractors (and subcontractors) should consider including penalties in their subcontract (and sub-subcontracts) for non-payment and non-compliance with record production, including work stoppages, withholding of payment, liquidated damages, and default and termination terms.

Equally as important and also as a preventative measure, contractors (and subcontractors to their downstream sub-subcontractors) should also include provisions requiring that, upon signing the contract, and at regular intervals throughout the project (e.g. monthly), the subcontractor and its sub-subcontractors provide the contractor with all payroll records and information required by N.Y. Gen. Bus. Law §756-f. These provisions are critical because as stated above, the law states that they must provide this information to contractors, but only upon request.

Accordingly, contractors should ensure that subcontractors provide the required information prior to commencing any work, and also supplement the reporting information if circumstances change. For example, if a labor law issue does arise, perhaps shortening the reporting requirements on a weekly basis. Again, this is not a one-fit all scenario and the contractors and subcontractors must be ready to adapt this law to fit the project's circumstances within the bounds of the law. Therefore, a subcontractor must be prepared to regularly and timely produce all of its payroll records and information to contractors upon request; otherwise the subcontractors' payments may be legally withheld until the subcontractor complies.

This information is required to be provided upon request, even if it is not mentioned in the subcontract agreement, so collecting and producing these records should become a part of the regular payment submission practice. These types of certified payroll submissions are required and standard on public improvement projects for the relevant government agency to issue payment to the contractor, but

*not required on private projects unless incorporated into the contracts. However, with the Act and Law in place, this distinction is and will continue to be less significant, especially on the larger private construction projects. Importantly, if an employee wage claim arises the contractor will have significant documentation in hand to address such a claim early in the process including the employee's wage information, benefit requirements and time of performance on the Project.*

#### Other Key Considerations of the New Statute and Reporting Requirements

All of the above referenced reporting requirements and indemnification clauses are logical in the face of these new laws, but contractors also have to consider the impact of these requirements in their subcontracts with entities with whom they have often had a very long relationship. Now, the contractor's subcontractors will see new onerous requirements to produce further information for their own employees and those of their sub-subcontractors' employees on a monthly basis as a condition for payment. Moreover, the subcontractors may also encounter new stricter indemnification clauses in their subcontracts and seek to object to such inclusion.

#### Recommendations for Helping Clients

Given the Act's nuances, attorneys for contractors and subcontractors must be ready to explain the new laws to their clients, propose additional language to be inserted into subcontracts, and educate applicable parties on the reasons behind the new laws and additional obligations and liabilities contractors and subcontractors may encounter. Taking these relatively straightforward actions now can head off future problems if an employee wage claim issue does arise and ensure that your client has favorable contract language and employee reporting requirements in place.  
effective 8/1/23).

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