



## LEGAL ALERT

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### New Legislation Holds General Contractors Liable for Subcontractors' Unpaid Wages and Benefits

By: *L. Micha Ordway*

On September 6, 2021, Governor Hochul signed Senate Bill S2766 (the "Act") which creates a new remedy for construction workers seeking to recover unpaid wages, benefits and wage supplements. Under the Act, upstream contractors are now jointly and severally liable for their subcontractor's failure to pay wages (including overtime), wage supplements and benefits.

#### **Background**

The Act creates a new section (§198-e) in the Labor Law, which states that contractors making or taking a construction contract shall:

- assume liability for any debt resulting from an action under § 198 that is owed to a wage claimant (construction worker) ... incurred by a subcontractor at any tier acting under, by, or for the upstream contractor or its subcontractors for the wage claimant's performance of labor - N.Y. Lab. Law § 198-e(1) (McKinney).

Under this section, upstream contractors are liable for the unpaid wages, benefits, and other damages owed by their downstream subcontractors to their construction workers. The upstream contractors are also liable for the reasonable attorney's fees and costs incurred in a private civil action or administrative action brought by the construction worker.

#### **Additional Terms**

##### **Waiver:**

The Act specifically prohibits agreements, including releases, with employees or subcontractors that waive liability of upstream contractors unless such liability is waived through a collective bargaining agreement with a bona fide building and construction trade labor organization. However, any waiver contained in a collective bargaining agreement must specifically reference the applicable section of the law to be effective. N.Y. Lab. Law § 198-e (2) &(10) (McKinney).

##### **Indemnification:**

The Act prohibits upstream contractors from committing acts that are designed to negate their joint and several liability to construction workers. However, the Act does not prevent upstream contractors from entering into agreements or enforcing any other lawful remedies against subcontractors who failed to pay construction workers so long as such agreements do not diminish the right of construction workers created by the Act. N.Y. Lab. Law § 198-e(7) (McKinney). This means that upstream contractors may include indemnification clauses in their agreements with subcontractors to protect themselves against liability created by the subcontractors' failure to pay their workers - so long as doing so does not affect the employee's rights.

**Statute of Limitations:**

The Act creates a three-year statute of limitations during which time construction workers must bring their claims. While a three-year limitations period is lengthy, it is actually less time than the six-year statute of limitations for other wage claims brought under § 198. N.Y. Lab. Law § 198-e (9) (McKinney). As such, the exposure of upstream contractors is half that of other wage claims.

**Payroll Records:**

The Act also adds § 756-f to the General Business Law, which permits contractors to withhold payments to their subcontractors for failure to provide certain certified payroll records. It also requires downstream subcontractors to provide the following records upon the request of an upstream contractor:

- Certified payroll records which, at a minimum, contain all lawfully required information required for all employees providing labor on the project;
- The names of all workers of such subcontractor on the project, including the names of all those designated as independent contractors.
- The name of the contractor's subcontractor with whom such subcontractor is under contract.
- The anticipated contract start date.
- The scheduled duration of work.
- Local unions with whom such subcontractor is a signatory contractor.
- The name, address and phone number of a contact for such subcontractor.

Under § 756-f, the payroll records produced by the subcontractor must also contain "sufficient information to apprise the [upstream] contractor ... of such subcontractor's payment status in paying wages and making applicable fringe or other benefit payments or contributions to a third party on its employee's behalf." A contractor or subcontractor is not permitted to disclose an individual's personal identifying information to the general public, and appropriate redactions must be made to such records. N.Y. Gen. Bus. Law § 756-f (McKinney).

**What now?**

The Act creates a strong remedy for construction workers who were the victims of wage theft. It forces upstream contractors to police the acts of their downstream subcontractors in order to avoid liability themselves. Upstream contractors will certainly look to minimize their exposure to wage theft claims by including strong indemnification language in their contracts with downstream subcontractors and, thereby, force compliance by their downstream subcontractors. Contractors are also likely to require downstream subcontractors to produce the certified payroll records required by § 756-f and to maintain proper records which will be vital in the defense of any wage theft claims. Regardless, the industry will certainly see an increase in wage theft claims by construction workers.

Should you like more information regarding the Act, or if we can provide counsel, please feel free to contact L. Micha Ordway, Jr. Esq., at [lordway@blawpllc.com](mailto:lordway@blawpllc.com) or 315.701.6441 or the attorneys in the Bousquet Holstein Labor and Employment or Litigation Practice Groups.



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## Labor & Employment Practice

In recent years, there has been an explosion of employment-related lawsuits. This trend is the result of several factors including the growing awareness by both employers and employees of their rights and responsibilities in the workplace and the continual development of new case law and statutes on discrimination. Our employment and discrimination lawyers monitor this dynamic area of law including changes and developments regarding state and federal regulations and legislation.

Our attorneys and paralegals possess diverse talents and interdisciplinary skills whose areas of concentration include employer representation, executive compensation and employment contracts, employee advocacy, and litigation.

We have provided representation before various federal and state agencies including the New York State Division of Human Rights, the Department of Labor, the National Labor Relations Board, the Unemployment Insurance Appeal Board, and the Equal Employment Opportunity Commission. In every stage of these proceedings, from investigation and settlement conferences to hearings and appeals, our involvement has been highly effective. Contact us to learn more about how our services can protect your business.



John L. Valentino



L. Micha Ordway



Kavitha Janardhan



Sharon A. McAuliffe



Joseph J. Porcello



Gregory D. Eriksen



Cameron T. Bernard