

DON'T GET HAMMERED: WAGE LIABILITY TO YOUR SUBCONTRACTORS' WORKERS Adam Browser, Esq.

You may not have realized it but being a contractor in New York got harder on January 4, 2022. On that date, Labor Law section 198-e went into effect. It imposes liability upon a contractor for any wage claim that its subcontractor or sub-subcontractor owes to one of their employees. In other words, contractors can now be jointly liable along with its subcontractor for an unpaid wage claim. Prior to this, a contractor could be liable to pay a subcontractor's wage claims if it was considered a "joint employer".

Fortunately, the new law does not apply to home remodelers. It specifically excludes: (a) home improvement contracts between a remodeler and an owner; and (b) construction contracts for one or two family dwellings, except where the contractor will be constructing ten or more one or two family dwellings at one site. The law also excludes public works contracts.

Those remodelers that occasionally handle a commercial construction project or a residential development of ten or more houses need to be wary. The law will apply to those projects. Due to the additional potential liability, a contractor may choose to forego such a project. If it chooses to proceed, it should consider the additional risk when pricing the job, when selecting what subcontractors it will use and whether to allow the subcontractor to use a sub-subcontractor. Moreover, it must pay close attention to payment requisitions and obtain reliable payroll records from subcontractors, documenting that the subcontract has timely paid its workers the appropriate wages, including overtime when required, and complying with other wage-related laws.

Wage claims are difficult and expensive to defend. A successful defense requires unimpeachable payroll records, which many contractors fail to maintain. The penalties that can be assessed against a contractor

are substantial, and include pre-judgment interest, recovery of attorneys' fees and liquidated damages equal to 100% of the unpaid wages or 300% if the violation is willful.

General Business Law 756-f, enacted as part of the new law, permits contractors to demand that their subcontractors and sub-subcontractors provide certified payroll records, including the names of all workers and independent contractors. Failure to provide the information is a basis to withhold payment. Besides obtaining payroll information from subcontractors, the contractor should require, and strictly enforce, sign-in sheets, daily and weekly logs and other real-time timekeeping records. Contractors should retain the records for

at least three years after the completion of the project. That is the statute of limitation under Labor Law section 198-e.

The new law may not affect you. However, it is a reminder that New York continues to take steps to protect workers and toward that end continues to impose new requirements on employers. This is also a reminder of the significant potential liability that may accrue for wage claims and the need to vigilantly manage your business to avoid those claims.



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