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Time Is Money: A Quick Wage-Hour Tip on … New York's New Rule on Contractors' Liability for Subcontractor Employee Wages

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The doctrine "joint employer" liability has received significant attention in recent months, including on this blog. Under the Fair Labor Standards Act, an employee may be deemed to have multiple employers—each of whom would be liable jointly for all aspects of FLSA compliance, including with regard to the payment of wages—in connection with his or her performance of the same work. During the prior administration, the U.S. DOL issued a rule intended to standardize the parameters of joint employer liability. Months later, however, a federal court invalidated a portion of the new rule, holding that it impermissibly narrowed the scope of the joint employer doctrine. And, in July 2021, the DOL announced its outright repeal of the rule—i.e., whether a business might face joint employer liability will again be governed by the multi-factor "economic reality" test subject to varying judicial interpretations.

An important new development in New York law, however, essentially renders the concept of joint employment, and the standards that govern it, a moot point—at least in terms of wage liability in the construction industry. In September 2021, Governor Hochul signed Senate Bill S2766C (A3350), titled "An act to amend the labor law and the general business law, in relation to actions for non-payment of wages," which adds new sections to the New York Labor Law (198-e) and General Business Law (756-f). As stated in the bill's Justification, the law is intended to "provide New York construction workers with a new remedy against wage theft"—specifically, by pinning liability on contractors when one of their subcontractors fails to pay wages owed to its (the subcontractor's) employees. This transfer of liability occurs without any regard to whether the contractor could rightly be considered a joint employer of the subcontractor's employee.

The critical aspects of Labor Law § 198-e, which will take effect on January 4, 2022, are as follows:

- The law transfers liability to "contractors," which includes any person or business entity that "enters into a construction contract with an owner."

- The law applies to work performed pursuant to a "construction contract," which is defined broadly, but *excludes* public works contracts, home improvement contracts made by the owners of an owner-occupied dwelling, and some (but not all) contracts for the construction of one- or two-family homes.

- The law renders contractors liable for wages owed but not paid by subcontractors at "any tier"—i.e., the contractor is accountable for the wages of its subcontractors' subcontractors, etc.

- Releases of liability granted to contractors by subcontractors or their employees will generally be invalid—though waivers granted by way of a collective bargaining agreement may be effective, provide certain criteria are met.

- The law establishes an abridged, three-year period limitation for wage claims that a subcontractor's employee may wish to assert against a contractor—in contrast to the ordinary six-year period of limitation that applies in other contexts under the Labor Law.

- While contractors must assume liability for wages owed by subcontractors in the first instance, they may bring an action against the relevant subcontractor to recover wages paid to the subcontractor's employees.

As noted in the bill's Justification, the legislature's intent was not only to ensure that "construction workers are quickly able to collect unpaid wages," but also, at the same time, to "creat[e] an incentive for the construction industry to better self-police itself in turn[.]" To the latter end, corresponding revisions to the General Business Law are purported to arm contractors with tools to monitor their subcontractors, and thereby reduce their exposure to wage liability. Specifically, upon a contractor's request, a subcontractor (at any tier) must provide:

- certified payroll records containing "sufficient information to apprise the contractor . . . of such subcontractor's payment status in paying wages and making any applicable fringe or other benefit payments or contributions to a third party on its employee's behalf";

- the names of all of the subcontractor's workers (including independent contractors) on a project;

- as applicable, "the name of the contractor's subcontractor with whom such subcontractor is under contract";

- the subcontractor's contract start date and duration of work;

- the identity of unions with which the subcontractor is a signatory; and

- contact information for the subcontractor's designated contact.

If a subcontractor at any tier fails to provide the foregoing information, the contractor may withhold payment otherwise due to that subcontractor.

Contractors potentially impacted by the new law should note that it applies not only to new contracts made on or after January 4, 2022, but also to contracts "*renewed, modified or amended*" on or after that date. Therefore, contractors in New York should:

- Consider revisions to their standard contracts, including, at a minimum:

1. requirements that the subcontractor recurrently, without the need for an affirmative request, provide all of the information to which the contractor is entitled under the revisions to the General Business Law;

2. indemnity provisions explicitly referencing the new section of the Labor Law (such provisions are expressly permitted under the new law, as it states that it does not "prohibit a contractor . . . *from establishing by contract* or enforcing any other lawful remedies against a subcontractor it hires for liability created by violation of this section"); and

3. obligations that subcontractors certify and/or demonstrate compliance with applicable wage laws.

- Be sure to implement the foregoing types of protective provisions if and when there is any renewal, modification, or amendment of an existing contract.

- Develop and implement practical procedures for collecting and reviewing the information that they are entitled to receive from subcontractors under the new law, and any additional information that they may otherwise demand for the purpose of reducing exposure to wage claims under the new law.

Finally, while the new law applies to one industry, keeping an eye on its impacts may be worthwhile even from a broader perspective. As noted, the departure from fundamental notions of joint employer liability is jarring. And the dual justifications for that departure—i.e., that (i) certain actors in the industry are "unscrupulous" and may try to "make themselves judgment proof" and (ii) good faith actors in the industry are in a position to influence the behavior of those would-be bad actors—would not necessarily be unique to this space. Time will tell if New York's new rule is an anomaly or the front edge of a trend.

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