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Real Estate Alert

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New York contractors to be jointly liable for subcontractor non-payment of wages

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Contractors must be aware of changes to liability allocations regarding unpaid wages.



What's the Impact?

- / A new law allows unpaid employees to sue the general contractor, in addition to the relevant subcontractor, for unpaid wages
- / General contractors can and should take steps to protect themselves before the new law takes effect

In an effort to ensure that all workers are paid earned wages for work performed and to encourage the construction industry to “self-police” less scrupulous members, New York Governor Kathy Hochul recently signed into law Assembly Bill Number A3350-A/Senate Bill Number S2766-C. The new law, which comes into effect on January 4, 2022, adds provisions to the New York Labor Law and General Business Law, imposing liability on contractors for the failure of their subcontractors at any tier to pay their workers.

Historically, unpaid construction workers have been able to bring a lawsuit against only their direct employers to collect unpaid wages. The most nefarious subcontractors have often dodged those suits by various means, including hiding assets and corporate restructuring—meaning that

prevailing on such a claim could be difficult. Accordingly, the new law allows unpaid employees to sue the general contractor on a joint-and-several liability basis, in addition to the relevant subcontractor, for the unpaid wages.

Unfortunately for general contractors, the new law invalidates any effort by an employee or subcontractor to waive the general contractor's potential liability. However, general contractors can and should take steps contractually to protect themselves. First, general contractors should evaluate their subcontracting pool to weed out problematic subcontractors before the new law takes effect. Second, although new Section 756-f of the General Business Law statutorily requires subcontractors to provide certified payroll records upon request, general contractors should contractually implement a record gathering and review process to document and resolve payroll issues before they rise to the litigation level. Finally, as additional protection, general contractors should consider expanding typical indemnification clauses to require subcontractors to indemnify them from any claims, costs, and expenses incurred by the general contractor arising from the subcontractors' failure to pay employees.

The new law was signed by the Governor after securing the agreement of the Legislature to make some changes to the law, including implementing a ten (10) business day cure period before a lawsuit can be brought. We will continue to monitor any developments in the lead up to the law's effective date.

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