



**REPORT ON LEGISLATION BY THE  
CONSTRUCTION LAW COMMITTEE**

**A.3350**

**M. of A. Joyner**

**- and -**

**S.2766-A**

**Sen. Ramos**

AN ACT to amend the Labor Law, in relation to actions for non-payment of wages.

**REVISIONS RECOMMENDED**

**I. INTRODUCTION**

The Construction Law Committee (the “Committee”) of the New York City Bar Association addresses the legal and policy issues affecting the construction industry. The Committee respectfully submits this report urging the Legislature to carefully consider the ramifications of enacting A.3350 and S.2766-A (collectively the “Bill”) in their current forms. The Bill proposes adding section 198-e to the Labor Law to permit a private right of action to hold a general contractor “jointly and severally liable for any unpaid wages, benefits, wage supplements, penalties, liquidated damages, attorneys’ fees and any other costs” owed a laborer for work performed on behalf of any lower-tiered subcontractor.

The stated purpose of the Bill is “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.” Trying to ensure that laborers are properly compensated is a laudable goal, and we support the Legislature’s attempt to identify new techniques to do so. However, we are concerned that the Bill as drafted will create unintended economic consequences, some that may affect the very population the Bill seeks to protect. As elaborated below, the added burden to be placed on general contractors as envisioned by this Bill – well beyond the actual role of a general contractor – would likely result in increased construction project costs, decreased development, and have a disparate impact on small contractors, limit opportunities for Minority/Woman-Owned Business Entities (“M/WBEs”) and stunt economic growth, thereby reducing job opportunities for laborers. Further, a portion of this

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

Bill is preempted by ERISA. We ask the Legislature to reevaluate its strategy, as discussed below, in the context of the distinctive features of a construction project and the role and responsibilities of a general contractor and consider our recommendations.

Our recommended revisions to the Bill (explained in more detail below):

- Add notice provision.
- Add whistleblower language.
- Limit general contractor's potential liability to payments made to purported delinquent lower-tiered subcontractor after GC has received notice of potential wage theft claim; permit GC to withhold payments due to subcontractor until GC directly pays laborer or claim is otherwise resolved.
- Amend General Business Law Section 756-c on Retention.
- Remove any reference to liquidated damages, attorneys' fees and costs to be imposed on a general contractor under this section, including a reference to the remedies available under Labor Law Section 198.

## **II. GENERAL CONTRACTORS AND CONSTRUCTION PROJECTS**

By way of background, a general contractor is retained by a property owner to oversee a construction project based on an architectural and/or engineering design. The general contractor achieves this by retaining separate business entities, i.e., the trade contractors, or subcontractors, each with its own specialty to deliver to the project (*e.g.*, mechanical, electrical and plumbing). The general contractor's primary duty to the owner is to ensure that the project is constructed in accordance with the design plans and specifications within the timeframes provided for in the contract. The general contractor's primary obligation to the subcontractors is to ensure that they receive payment for their work.

At times, owners contract directly with each trade contractor, or subcontractor. However, that is atypical because of the risk associated with the complexities and uncertainties of construction projects. Thus, owners hire general contractors for their experience and expertise to coordinate the trades and oversee the work. Toward that end, typically general contractors are responsible for, among other obligations, planning, organizing, obtaining permits and licenses, adhering to project timelines and budgets, evaluating the workmanship and compliance with the plans and specifications, and overseeing security, safety, environmental impact, integration, management, changing client requirements, quality control and completion, and ensuring that warranties are delivered.

Throughout the project and at the completion of each subcontractor's work, the general contractor will administer payment to subcontractors with funds the general contractor receives from the owner. Incidental to a general contractor's responsibilities is to provide evidence to an owner that it has paid the subcontractors, and that the subcontractors acknowledge same, often in

what is called a “lien waiver.” This assures an owner that those subcontractors, tradesmen, materialmen and suppliers performing work on the project will not encumber the property by filing a “lien” on it for non-payment. Generally, compliance with payment obligations is demonstrated to a general contractor by attestations; significantly, there is no process by which the general contractor could verify the authenticity of the subcontractors’ attestations.

Additionally, the construction industry is transient as the projects are at a set location for a limited duration and by design intended to have a firm end date. They are different from retail businesses, restaurants, professional service firms or other private sector companies that are created to exist indefinitely. Once the project officially ends, anyone accountable for missed wage payments has moved on to other projects. Owners and general contractors alike may withhold a certain percentage of payments, *e.g.*, 10%, until substantial completion of the work. This is known as “retainage” and is intended to protect the owner and general contractor, respectively, in case there is defective or missing work, and to ensure that the work is completed. Once the retainage is released and the full contract sum is paid, the general contractor no longer has any leverage over the subcontractors to recoup any amounts due as a result of a subcontractor’s wage theft.

Further, although performance bonds and payment bonds are tools general contractors use to guarantee performance and payment, respectively, the obligations of a surety end soon after a project’s completion and increase the cost of the project.

### **III. CONSIDERATIONS**

A. Noticed Time Limitations. The Bill does not require notice or limit the time a general contractor can be held liable for another employer’s wage theft. Thus, years after project completion and without notice or the ability to cure, an unsuspecting general contractor could be held liable for one of its former lower-tiered subcontractor’s wage theft. As explained above, upon project completion, the general contractor may not be able to collect amounts paid due to another employer’s wage theft or investigate and weed out false claims. If a subcontractor’s principals transfer assets and dissolve the company, the general contractor is in no better position to recoup the missing laborers’ payments than anyone else. Not only does this place significant and largely unmanageable risk on the general contractor, going outside the contractual limits allows the perpetrators of the violation to effectively get away with the theft. Someone else has paid the price for their crime.

B. Impact on M/WBE’s and New/Small Contractors. As a result, to minimize risk if the Bill were to be enacted in its current form, general contractors may, for example, require bonding from lower-tiered subcontractors, increase bids to cover potentially higher insurance premiums, or contract with larger companies with greater chances of collection, which will impede small and new construction companies, in effect, hampering development and limiting laborers’ employment opportunities. Moreover, many M/WBEs cannot satisfy the underwriting criteria to obtain surety bonds, and thus, the Bill creates another barrier to these disadvantaged entities participating in the construction industry. Therefore, from a policy perspective, the Legislature should consider a less draconian approach, such as to ensure, through notice within the project timeframe, that the general contractor has the tools to collect the funds for the worker and make the offending party pay.

C. Auditing Subcontractors. The Bill in its current form requires that a general contractor ensure its subcontractors are paying laborers the correct amount of wages and supplemental benefits or risk liability for another employer's wage theft and associated damages, placing oppressive financial and time-consuming burdens on general contractors. Further, for a general contractor to ascertain if its lower-tiered subcontractors comply with wage payment obligations would require audits of each of its subcontractor's books and records, which, on any given project, may be dozens, if not hundreds, of subcontractors. Thus, requiring a general contractor to micromanage and monitor each and every one of its subcontractors' compliance with their payment obligations is unduly burdensome and particularly onerous for a general contractor of a small construction project.

D. Enforce Existing Laws. If the goal is to protect workers and deter offending behavior, a more effective solution may be to reinforce the existing laws or add provisions thereto. To more effectively induce subcontractors to pay the requisite wage payments, the Legislature can publicize and urge the enforcement of Article 6 of the Labor Law that criminalizes wage theft as opposed to passively reallocating the financial responsibility onto the general contractor. Section 198-a imposes criminal penalties, including potential prison time, and monetary penalties on employers and their individual officers and agents who do not pay the requisite wages of their employees. It would seem that this is already a great tool to use and leverage.

E. Preemption. The Committee believes that the Bill is preempted by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), insofar as it concerns benefits paid to union trust funds. That is, the Act states: ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any [ERISA-covered] employee benefit plan."<sup>1</sup> This is to protect ERISA's "comprehensive civil enforcement that reflects the legislature's desire to include certain remedies and exclude others, and states are not free to add or subtract additional remedies to the mix, even if doing so would be helpful to the interests of plan beneficiaries or participants."<sup>2</sup> To that end, the Second Circuit has held that ERISA preempted a New York statute that impermissibly required general contractors to assume a subcontractor's benefit fund obligations<sup>3</sup> and where it created "an alternative enforcement mechanism" that made property owners "liable for the ERISA obligations of [a general contractor]."<sup>4</sup> Therefore, the Committee recommends inserting clarifying language to obviate the waste of time and money that would be spent on claims preempted by ERISA.

#### IV. POTENTIAL CONSEQUENCES OF ENACTING THE BILL

If effectuated in its current form, the Committee believes the Bill will result in some or all of the following:

---

<sup>1</sup> 29 US §1144(a).

<sup>2</sup> *Plumbing Indus. Bd., Plumbing Local Union No. 1 v. E.W. Howell Co.*, 126 F.3d 61, 68 (2d Cir. 1997) (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 US 41, 54 (1987)).

<sup>3</sup> See *id.* at 69 (citations omitted).

<sup>4</sup> See *EklecCo. v. Workers Locals 40, 361, & 417 Union Sec. Funds*, 170 F.3d 353, 357 (2d 1999).

- Higher bids on projects due to increased costs incurred by general contractors, inevitably narrowing the pool of bidders.
- Increased costs of private projects, reducing necessary and beneficial community development and jobs.
- Payment bond requirements for subcontractors, reducing the pool of eligible subcontractors, which will also likely have a disproportionate impact on M/WBEs and new and small businesses.
- Years-long litigations will burden government resources and general contractors' funds needed to finance this litigation, adding costs that will either be passed on to prospective developers or result in fewer construction projects.
- Oppressive financial and time-consuming burdens on general contractors working on smaller projects.

## **V. PROPOSED REVISIONS**

The Committee recommends revising the Bill as follows:

- Add a notice provision, requiring that notice of a lower-tiered subcontractor's failure to pay wages be in writing and sent to the general contractor within 90 days of a missed payment.
- Add whistleblower language, prohibiting discrimination and retaliation against a reporting laborer, to protect workers and encourage reporting; and permit anonymous reporting to the general contractor.
- Limit the general contractor's potential liability to payments made to a purported delinquent lower-tiered subcontractor after the general contractor received notice of a potential wage theft claim, and permit the general contractor to withhold payments due the lower-tiered subcontractor until the general contractor directly pays the laborer the proper amount of wages or the claim is otherwise resolved.
- Amend General Business Law Section 756-c on Retention to permit a general contractor to retain more funds from its lower-tiered subcontractors than the owner currently retains to avoid placing a general contractor in economic duress.
- Remove any reference to liquidated damages, attorneys' fees and costs to be imposed on a general contractor under this section, including a reference to the remedies available under Labor Law Section 198. There is no justification to add punitive measures onto a party that lacked the ability to prevent the wage theft.

## **VI. CONCLUSION**

For these reasons, the Committee urges the Legislature to refrain from approving the Bill in its current form and urges reconsideration thereof.

Construction Law Committee  
Robert C. Angelillo, Chair

Drafting subcommittee  
Paul A. Alongi  
Michelle Callner  
Joseph P. Hogan  
Virginia K. Trunkes

May 2021

### **Contact**

Elizabeth Kocienda, Director of Advocacy | 212.382.4788 | [ekocienda@nycbar.org](mailto:ekocienda@nycbar.org)  
Mary Margulis-Ohnuma, Policy Counsel | 212.382.6767 | [mmargulis-ohnuma@nycbar.org](mailto:mmargulis-ohnuma@nycbar.org)