

Direct Contractors In California Should Take Steps Now To Reduce Exposure For Unpaid Wages By Subcontractors

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Tuesday, February 6, 2018

As of January 1, 2018, direct contractors in California who make or take a contract “for the erection, construction, alteration, or repair of a building, structure, or other private work” are jointly and severally liable with their subcontractors for any unpaid wages, fringe benefits and other benefit payments or contributions owed to wage claimants. Governor Brown approved [AB 1701](#) on October 14, 2017. The new law puts the onus on direct contractors to not only monitor their own payroll practices, but to ensure that their subcontractors and lower tier subcontractors are engaging in proper payroll practices.

AB 1701 does not afford individual workers a direct right to sue contractors. Instead, only three groups have the right to sue directly: the Labor Commissioner; a joint labor-management cooperation committee (29 U.S.C. §175a); or a third party owed fringe or other benefits on a wage claimant’s behalf. The bill also precludes recovery of liquidated damages or penalties. Nevertheless, critics of the bill anticipate that it will ultimately increase building costs, and will only exacerbate the current shortage of affordable housing in California. Indeed, direct contractors who have already paid a subcontractor in full for completed work may later find themselves on the hook for unpaid wages to subcontractors’ employees as well as lower tier

subcontractors. A direct contractor wishing to avoid that outcome must bear the burden of monitoring subcontractors' payroll practices, including confirming that employees were timely paid with owed wages.

To reduce potential exposure, contracts may need to be revised to include provisions:

- requiring subcontractors to indemnify and defend against claims for unpaid wages and benefits;
- requiring all subcontractors to obtain payment bonds;
- establishing firm deadlines for subcontractors to provide payroll records upon request or even as a condition precedent to payment; and
- creating systems and protocols to confirm timely payment of wages to subcontractors' workers.

AB 1701 "does not prohibit a direct contractor or subcontractor at any tier from establishing by contract or enforcing any otherwise lawful remedies against a subcontractor it hires for liability created..." Accordingly, direct contractors across California should take a closer look at the terms of their agreements with subcontractors.

Joint employment liability has been an ongoing trend in California. All California employers should be reminded of [Labor Code section 2810.3](#), which went into effect on January 1, 2016. Section 2810.3 requires businesses using workers provided by a staffing firm to share "all civil legal responsibility and civil liability" for wage payments and workers' compensation coverage. Employers should ensure that workers provided by staffing firms are paid correctly and covered by workers' compensation insurance, and should also carefully examine and draft indemnification agreements with staffing firms. It is expected that joint employer liability will be a top priority for the Labor Commissioner in 2018.

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