

Contractors, Your Subcontractors' Wage and Hour Practices are Your Business

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A prime or general contractor may be held jointly and severally liable for any violations, including wage and hour violations, by its subcontractors if the contractor is found to be a joint employer with the subcontractor under applicable federal or state law. As most contractors who work on construction projects covered by the federal Davis-Bacon Act (DBA) (direct contracts) and DBA Related Acts (federal funding or loan guarantees) (together, DBRAs) know, a prime or higher tier contractor is jointly and severally liable for violations by its subcontractors without the requirement of a joint employer finding. Many state prevailing wage laws (which require that wages for construction workers on public works projects be paid according to published wage scales) mirror the DBRAs' liability law. The consequences for violations of the DBRAs, which are enforced by the U.S. Department of Labor (DOL), include back pay, penalties under the Contract Work Hours Safety Standards Act (CWHSSA) for overtime violations, and debarment from holding or working on any government contracts (after a referral and hearing process) for a period of up to three years.

For these reasons, contractors on DBRAs-covered projects should include terms and language in their subcontracts to help ensure their subcontractors are complying with the DBRAs regarding proper classification of workers, accurate timekeeping, timely payment of the correct prevailing wages and benefits based on job classification and hours worked, proper payment of overtime under CWHSSA, and the submission of accurate certified payroll. While rare, in addition to holding the prime or higher tier contractor responsible for payment of back pay and CWHSSA penalties for subcontractor violations if the subcontractor cannot pay or will not pay, the DOL has debarred prime contractors that have failed to properly monitor their subcontractors with respect to the DBRAs' requirements.

District of Columbia; Maryland

For construction contractors who work on projects in the District of Columbia (D.C.) or Maryland, there is even more reason to mind the pay practices of subcontractors. In the last few years, both of these jurisdictions have enacted laws that, like the DBA, hold higher tier contractors jointly and severally liable for their subcontractors' violations of local wage and hour laws.

In D.C., the local wage and hour laws specify that prevailing wages are covered, and can be recovered, in addition to local minimum and overtime wages.

The potential damages that can be recovered are crushing. In D.C., in addition to back pay, a contractor can be liable for an additional three times the back pay in damages (or *quadruple recovery*) as well as attorneys' fees and additional penalties. In Maryland, the liability is slightly less, back pay plus two times the back pay in damages (or *triple recovery*) as well as attorneys' fees and penalties.

Particularly in D.C., both the plaintiff's bar and the D.C. Attorney General's Office are actively and aggressively pursuing wage and prevailing wage claims against construction

contractors for subcontractor violations. In a typical lawsuit, named defendants will include the subcontractor against which the violations are alleged, the upper tier subcontractor, and the prime or general contractor. The types of violations alleged include: failure to pay any overtime, failure to pay overtime at the overtime rate (often with attendant claims that the workers were misclassified as independent contractors), and failure to keep accurate time records and pay for all hours worked. Often, the subcontractor has gone out of business, has failed to keep time and pay records, or both, making these cases more difficult to defend.

Take Steps to Mitigate

General contractors can take steps to minimize potential damages and mitigate liability with language in subcontracts and by actively monitoring worker classification and pay practices. These and other steps will be discussed in more detail in an upcoming article.

Please contact Jackson Lewis with any questions.

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