

Date of Hearing: June 22, 2021

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT

Ash Kara, Chair

SB 727 (Leyva) – As Amended April 29, 2021

SENATE VOTE: 29-9

SUBJECT: Labor-related liabilities: direct contractor

SUMMARY: Extends, for contracts entered into on or after January 1, 2022, a direct contractor's liability to penalties, liquidated damages, and interest owed by a subcontractor arising out of failure to pay wages, fringe benefits, or contributions earned by workers on a labor project. Specifically, **this bill:**

- 1) Provides that for contracts entered into on or after January 1, 2022, a direct contractor taking a contract in the state for the erection, construction, alteration, or repair of a building, structure, or other private work, shall assume, and is liable for, any debt owed to a wage claimant incurred by a subcontractor acting under the direct contractor.
- 2) Provides that the direct contractor's liability extends to penalties and liquidated damages if the direct contractor had knowledge of the subcontractor's failure to pay the specified wage or benefit.
- 3) Provides that an employer that violates any occupational safety or health standard, order, or special order, Section 25910 of the Health and Safety Code, or any provision of this division, may be assessed a civil penalty for each violation, as specified.
- 4) Provides that the direct contractor's liability extends to penalties and liquidated damages if the direct contractor fails to comply with the following requirements:
 - a) The contractor must monitor the payment of subcontractor wages, fringe and other benefits by periodic review of payroll records.
 - b) Upon becoming aware of a failure of the subcontractor to pay wages, the contractor must take diligent corrective action to halt or rectify the failure, including, but not limited to, withholding payments from the subcontractor.
 - c) Prior to making final payment to the subcontractor, the contractor must obtain an affidavit from the subcontractor affirming that all workers have been properly paid.
- 5) Requires the Division of Labor Standards Enforcement (DLSE) must notify the contractor and subcontractor within 15 days of the receipt of a complaint of a failure to pay specified wages or benefits.
- 6) Specifies that this section does not prohibit a direct contractor or subcontractor at any tier from establishing a contract that addresses liability created by failure to pay wages, including penalties and liquidated damages.

- 7) Authorizes the Labor Commissioner (LC), a third party acting on a wage claimant's behalf, or a joint labor-management cooperation committee to bring a civil action against a direct contractor to enforce the liability created by the failure to pay wages or other benefits.
- 8) Exempts work performed by employees of the state or any political subdivision of the state from the provisions of this section.
- 9) Provides that the LC, a third party owed fringe or other benefit payments or contributions on a wage claimant's behalf, or a joint labor management cooperation committee established pursuant to the federal Labor Management Cooperation Act of 1978 may bring a civil action against a direct contractor to enforce the liability for any unpaid wage, fringe or other benefit payment or contribution, penalties or liquidated damages, and interest owed by the subcontractor on account of the performance of the labor, and specifies that no other party may bring an action against a direct contractor to enforce the liability created by this section.
- 10) Requires any liquidated damages awarded by the LC or the court to be paid to the aggrieved employee.
- 11) Requires a subcontractor, and any lower tier subcontractors to provide payroll records, as specified, to a direct contractor upon request and to provide the following information:
 - a) The project name.
 - b) The name and address of the subcontractor.
 - c) The contractor with whom the subcontractor is under contract.
 - d) Anticipated start date.
 - e) Duration.
 - f) Estimated journeymen and apprentice hours.
 - g) Contact information for its subcontractors on the project.
- 12) Provides that a subcontractor's failure to provide the information requested, as specified, does not relieve a direct contractor from any of the obligations contained in this provision.
 - a) Authorizes a direct contractor to withhold as disputed, all sums owed if a subcontractor does not provide the information requested above.
 - b) Provides that for any contract entered into on or after January 1, 2022, in order for a direct contractor to withhold all sums owed as disputed, the direct contractor must specify, in its contract with the subcontractor, the specific documents and information that the direct contractor will require that the subcontractor provide.

EXISTING LAW:

- 1) Requires that, if a final judgment against an employer for nonpayment of wages remains unsatisfied after a period of 30 days after the time to appeal has expired and no appeal is pending, the employer is prohibited conducting business in this state, including conducting

business using the labor of another business, contractor, or subcontractor, unless the employer has obtained a surety bond and has filed a copy of that bond with the LC.

- 2) Provides that for contracts entered into on or after January 1, 2018, a direct contractor making or taking a contract in the state for the erection, construction, alteration, or repair of a building, structure, or other private work, shall assume, and is liable for, any debt owed to a wage claimant or third party on the wage claimant's behalf, incurred by a subcontractor at any tier acting under, by, or for the direct contractor for the wage claimant's performance of labor included in the subject of the contract between the direct contractor and the owner.
- 3) Provides that the direct contractor's liability under this section shall extend only to any unpaid wage, fringe or other benefit payment or contribution, including interest owed but shall not extend to penalties or liquidated damages.
- 4) Provides that the LC may enforce against a direct contractor the liability for unpaid wages, as specified, or through a civil action but limits the direct contractor's liability to unpaid wages, including any interest owed.
- 5) Authorizes a third party owed fringe or other benefit payments or contributions on a wage claimant's behalf to bring a civil action against a direct contractor to enforce such liabilities.
- 6) Requires that the court to award a prevailing plaintiff in relevant enforcement actions reasonable attorney's fees and costs, including expert witness fees.
- 7) Provides that upon request by a direct contractor to a subcontractor, the subcontractor and any lower tier subcontractors under contract to the subcontractor shall provide relevant payroll records containing information sufficient to apprise the requesting party of the subcontractor's payment status in making fringe or other benefit payments or contributions to a third party on the employee's behalf.
- 8) Authorizes a direct contractor to withhold as "disputed" all sums owed to a subcontractor if that subcontractor does not provide the relevant payroll records with which to verify that relevant wage and hour standards are being met.
- 9) Authorizes a joint labor-management cooperation committee to bring an action in any court of competent jurisdiction against a direct contractor or subcontractor at any tier for unpaid wages for the performance of private work
- 10) Requires a joint labor-management cooperation committee, prior to commencement of an action against a direct contractor, to provide the direct contractor and subcontractor that employed the wage claimant with at least 30 days' notice by first-class mail. The notice need only describe the general nature of the claim and does not limit the liability of the direct contractor or preclude subsequent amendments of an action to encompass additional wage claimants employed by the subcontractor

FISCAL EFFECT: According to the Senate Appropriations Committee, the Department of Industrial Relations (DIR) indicates that it would incur first year costs of \$1.6 million, and \$1.5 million annually thereafter, to implement the provisions of the bill (Labor Enforcement and Compliance Fund).

COMMENTS: Note: This bill is double-referred to the Assembly Judiciary Committee upon passage out of this Committee.

According to a 2017-18 report by the LC's office, over \$4 million in penalties were assessed within the construction industry by various labor enforcement agencies; however, only approximately \$500,000 was collected.¹ The Labor Enforcement Task Force (LETf) also issued a report that found that 93% of businesses inspected were out of compliance with labor laws enforced by at least one partner enforcement agency.²

According to the author, "California's construction industry built our world class infrastructure, is a key driver of the state's economy, and has provided hundreds of thousands of housing units annually to address the needs of a growing California population. Due to the skills required and the fair wages and benefits workers received, the industry provided a pathway to the middle class for tens of thousands of construction workers who could then afford to purchase the homes they built. Like many other sectors, construction wages have gone down, but wage theft and cash payments have increased. A key factor driving this trend is the lack of enforcement of basic labor laws on job sites. Unscrupulous contractors that do not play by the rules have an illegal and unfair advantage over honest contractors, and also undermine wages and working conditions throughout the industry. While AB 1701 (Thurmond)—which took effect in 2018—has made some difference, it has unfortunately not done enough. [This bill] will provide necessary enforcement tools to effectively deter continued wage theft by ensuring that direct contractors no longer ignore the violations of the subcontractors they hire to build their projects."

Arguments in Support

According to the California Conference of Carpenters, sponsor of the bill, "An Economic Roundtable report in 2011 found that one in six California construction workers were in the 'informal' economy, paid off the books or misclassified. [This bill] will build upon 2017 legislation that requires direct contractors to share in the liability for the payment of wages and other contributions if their subcontractor's failed to make those payments. However enforcement remains rare; the likelihood of an inspection is approximately once every 300 years. As a consequence, it provides no effective deterrence for continued wage theft violations. Dishonest contractors that do not play by the rules not only steal from their employees and undermine wages and working conditions throughout the industry, they have an illegal, unfair advantage over honest contractors."

Argument in Opposition

According to a coalition of employer organizations, including the California Building Industry Association, "Penalties and liquidated damages are punitive and like punitive damages are only appropriate when an intentional wrong is committed with malice aforethought. This is not and cannot be the case when the party penalized (the homebuilder or general contractor) does not know or control what the other party (subcontractor) does. Moreover, there is no public list made

¹ California Department of Industrial Relations. 2017-2018 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement, 2018.

² California Department of Industrial Relations. Labor Enforcement Task Force Report to the Legislature, March 2019.

available by any public agency that identifies bad actors.

In the three years since AB 1701 took effect, there has only been one case identified in which a subcontractor underpaid its employees. In that case, AB 1701 worked to ensure that the general contractor paid the subcontractor's workers what was due to them. That is exactly how it was intended to work, and there is no evidence that AB 1701's remedies are insufficient."

Prior Legislation

AB 1701 (Thurmond) Chapter 804, Statutes of 2017 holds general contractors and subcontractors jointly liable for unpaid wages, including fringe benefits.

REGISTERED SUPPORT / OPPOSITION:

Support

California Conference of Carpenters
Northern California Carpenters Regional Council
Santa Clara & San Benito Counties Building & Construction Trades Council
Southwest Regional Council of Carpenters
State Building and Construction Trades Council of CA

Oppose

Associated General Contractors of California
Brea Chamber of Commerce
Building Industry Association of Fresno and Madera Counties
Building Industry Association of Southern California, INC.
Building Industry Association of The Greater Valley
California Apartment Association
California Builders Alliance
California Building Industry Association
California Business Properties Association
California Chamber of Commerce
California Forestry Association
California Landscape Contractor's Association
California Retailers Association
Carlsbad Chamber of Commerce
Casita Coalition
Contractors Association of Truckee Tahoe
Garden Grove Chamber of Commerce
Greater High Desert Chamber of Commerce
Lodi Chamber of Commerce
Nevada County Contractors Association
North Coast Builders Exchange
North Orange County Chamber
North Orange County Chamber of Commerce
North State Building Industry Association
Oceanside Chamber of Commerce

Painting & Decorating Contractors Association of Sacramento
Pleasanton Chamber of Commerce
Rancho Cordova Area Chamber of Commerce
Redondo Beach Chamber of Commerce
Sacramento Regional Builders Exchange
Santa Barbara Contractors Association
Santa Barbara South Coast Chamber of Commerce
Santa Rosa Metro Chamber of Commerce
Shasta Builders Exchange
Simi Valley Chamber of Commerce
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
Tmg Partners
Torrance Area Chamber of Commerce
Tulare Chamber of Commerce
Valley Contractors Exchange
Ventura County Contractors Association
Wilmington Chamber of Commerce

Other

California Legislative Conference of Plumbing, Heating & Piping Industry
Construction Employers' Association
Contractors State License Board
National Electrical Contractors Association
Northern California Allied Trades
Southern California Glass Management Association
Wall and Ceiling Alliance
Western Wall and Ceiling Contractors Association

Analysis Prepared by: Martin Vindiola / L. & E. /