



The Hard Hat Bulletin



News Concerning the Insurance and Construction Industries

On September 13, 2017 the California Legislature passed Assembly Bill No. 1701, which requires the General Contractor of a private construction project to pay all unpaid wages and fringe benefits owed to an employee of a subcontractor, irrespective of the tier, and even if the General Contractor made the payment. With the Governor's recent signature, Assembly Bill No. 1701 is now the law of the land. Here is what you need to know:

- It applies to all private (but not public) construction contracts entered into on or after January 1, 2018;
- It gives a subcontractor's employee a direct cause of action against the General Contractor for any unpaid wages and fringe benefits, even if the General Contractor has fully paid the subcontractor;
- It gives a third party owed fringe or other benefits a cause of action against the General Contractor;
- All actions by the employee or third party must be filed within one year of the earliest of the recordation of the notice of completion, the recordation of the notice of cessation of work, or the actual completion of the work;
- The General Contractor cannot contract to avoid the liability imposed by Assembly Bill No. 1701, but it can seek indemnity from the subcontractor; and
- At the General Contractor's request, the subcontractor shall provide the General Contractor with its payroll records.

This legislation is obviously NOT good for contractors but in addition this will most definitely increase housing costs for the consumer. These increased costs will inevitably be passed on to home buyers and project developers.

NEW REQUIREMENTS:

• Applies to All Private Works Contracts That Are Entered Starting January 1, 2018.

For private works contracts entered on or after January 1, 2018, a "direct contractor" (i.e., prime contractor or contractor who has direct contractual relationship with an owner) must assume and be liable for any debt which its subcontractor or a lower tier subcontractor incurs "for wage claimant's performance of labor included in the subject of the contract between the direct contractor and the owner."

• The Labor Commissioner and Joint Labor-Management Cooperation Committees May Bring Action to Recover Unpaid Wages on Behalf of Wage Claimants.

The California Labor Commissioner and joint Labor-Management Cooperation Committees established under the federal Labor Management Cooperation Act of 1978 may bring a civil action against the direct contractor for unpaid wages owed to a wage claimant. The Labor Commissioner may also bring its claims through administrative hearings or by citations

• Third Parties That Are Owed Fringe or Other Benefit Payments or Contribution on Behalf of Wage Claimants (Labor Unions) May Bring Action.

Third parties who are owed fringe or other benefit payments or contributions on a wage claimant's behalf may bring a civil action against the direct contractor for such unpaid benefit payments or contributions. It does not confer wage claimants with any right to sue direct contractors.

AB 1701 gives the Labor Commissioner, Labor-Management Cooperation Committees and the unions standing to bring an action against the direct contractor, but it does not confer any private right of action by the wage claimants against the direct contractor.



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- **Labor-Management Cooperation Committees and Labor Unions Shall Recover as Prevailing Plaintiffs Their Attorneys' Fees and Costs, Including Expert Fees.**

For actions brought by Labor-Management Cooperation Committees or labor unions, “the court shall award a prevailing plaintiff in such an action its reasonable attorney’s fees and costs, including expert witness fees.”

- **Direct Contractor’s Property May Be Attached to Pay for Judgment.**

AB 1701 authorizes the attachment of direct contractor’s property to pay for any judgment that is entered pursuant to this section.

- **One-Year Statute of Limitation to Bring Action under This Section.**

Actions brought pursuant to this section must be filed within one year of the earliest of: (1) recordation of a notice of completion of the direct contract; (2) recordation of a notice of cessation of the work covered by direct contract; or (3) actual completion of work covered by direct contract.

- **Rights to Receive Payroll Records and Project Award Information from Subcontractors and to Withdraw All Payments Owed for Their Failure to Comply.**

Upon the direct contractor’s request, subcontractors and lower tier subcontractors must provide payroll records and project award information. Direct contractor may withhold as “disputed” all sums owed if a subcontractor does not timely provide the requested records and information without specifying what is untimely and such failure to comply does not excuse direct contractor from any liability under this section.

- **Further Legislative Efforts on Subdivision (h) Are Expected in 2018.**

Subdivision (h), which states that “the obligations and remedies provided in this section shall be in addition to any obligations and remedies otherwise provided by law . . .” is potentially misleading since the author and sponsor of the bill have indicated that the bill is not intended to punish direct contractors with liquidated damages or penalties. As such, further legislative efforts on subdivision (h) are expected in 2018.

ADDITIONAL CONSIDERATIONS

While workers should be paid for the work they perform, AB 1701 would place undue burden on general contractors to monitor their subcontractors’ payroll, confirm that all wages and benefits are paid timely and withhold disputed payments from non-compliant subcontractors. General contractors would also need to caution against the chain reaction that could result from such withholding, including work stoppage, increased change order requests, and an overall increase in construction costs. Finally, general contractors would need to brace themselves for at least a year after project completion against any union or a Labor-Management Cooperation Committee actions armed with a prevailing party’s right to recover attorneys’ fees and expert fees, for previously unidentified subcontractor or sub-subcontractor workers.

STRATEGIES DEVELOPERS AND GENERAL CONTRACTORS SHOULD LOOK FOR

In anticipation of AB 1701 being signed into law and its potentially harsh effects, developers and general contractors are advised to consult their attorneys for a review and revision of their existing contracts, to develop plans for accessing and monitoring subcontractor payroll records, and to consider strategies for mitigating claims that may be brought against them, as follows:

- ***Execute all pending agreements*** before January 1, 2018 to avoid the effects of AB 1701;
- ***As part of the subcontractor qualification or bidding process***, require subcontractors to disclose in writing: a) all wage claim claims filed against them in the last five years, as well as the outcome of the claim; and b) all collections lawsuits, whether a plaintiff or defendant;
- ***Include an audit provision*** requiring subcontractors and sub-subcontractors to provide payroll records (at minimum, information set forth in Labor Code section 226) and project award information, regularly and/or upon request, with specific deadlines for such production, as subdivision does not specify what is untimely;



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- ***Include defense and indemnity provisions*** that would require subcontractors to defend and indemnify the general contractor for claims that are brought pursuant to this section arising from labor performed by employees for subcontractors and sub-subcontractors, and require subcontractors to include a similar provision in their own contracts with sub-subcontractors that would require lower tier subcontractors to also defend and indemnify the general contractor for claims arising from their respective employees' work;
- ***Include a provision that would place the subcontractor in material breach of contract*** if the subcontractor is in default under any loan or credit agreement;
- ***Include a provision that would require the subcontractor to notify the general contractor*** of any wage claims or collection actions;
- ***Require or at least consider subcontractors to provide a payment bond and/or a letter of credit*** to satisfy claims that are made against the general contractor under this section;
- ***Require or at least consider personal guarantees*** from owners, partners or key subcontractor personnel;
- ***Include withholding and back-charge provisions*** that would allow general contractors to withhold or charge back the subcontractors for disputed amounts, for claims brought against them, and for failure to comply with the audit, bond, and guarantee requirements.
- ***Consider implementing a system to confirm evidence of payments***, such as signed acknowledgment of payment by each subcontractor and sub-subcontractor employees and by third parties entitled to recover fringe and other benefit payments or contribution, possibly working with electronic billing software providers to implement such system.

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