



NY Wage Theft Act Managing Subcontractor Wage & Benefit Underpayments: Public and Private Projects

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WHAT WILL BE COVERED TODAY?

A complex web of New York Laws which require employers to:

- Pay workers their promised wages and benefits;
- Pay weekly;
- Provide Notices with detailed wage, benefit and withholding information at time of hire, with each paystub, and when changes are implemented;
- Obtain written acknowledgment from workers regarding their wages and benefits;
- Maintain records for 6 years;
- Refrain from improperly misclassifying workers as independent contractors.

WHAT WILL BE COVERED TODAY?

(CONT.)

- Employers are liable for fines, penalties, liquidated damages (double pay owed) and attorney fees.
- New provisions: Contractors are jointly and severally liable for subcontractor violations at any tier.
- New provisions: Contractors may “audit” subcontractors for compliance and may withhold payment if they fail to comply.
- What should contractors do to comply with or to mitigate risks?

WHAT NEW YORK LAWS ARE RELEVANT?

A. NEW YORK LABOR LAW CHAPTER 31

1. Article 6 Sections 190 to 199 Payment of wages:
 - Nonpayment of wages and supplements and remedies.
 - Wage notices and remedies.
2. New Section 198-e Construction Wage Theft:
 - Joint and Several Liability for contractors.
3. Article 25-B NYS Construction Industry Fair Play Act:
 - Criminal/civil penalties for misclassification of construction trade workers as independent contractors.

WHAT NEW YORK LAWS ARE RELEVANT? (CONT.)

B. NEW YORK GENERAL BUSINESS LAW CHAPTER 35-E

1. 35-E Construction Contracts:
 - Addresses prompt payment.

2. New Section 755-f Wage Theft Prevention and Enforcement:
 - Enables contractors to audit subs, withhold payment and possibly to seek indemnity.

NY LABOR LAW CHAPTER 31, ARTICLE 6 PAYMENT OF WAGES

FREQUENCY OF PAYMENTS

- Manual Labor: Weekly, and not later than 7 days after the week in which the wages were earned.

EXCEPTION:

- Can pay every two weeks, if certain DOL standards are met (at minimum 1,000 employees and responsible employer).
- If terminated, must be paid no later than their regular payday.

NYLL 193 DEDUCTIONS FROM WAGES

No deductions from pay except deductions:

- A. Required by law; or
- B. Authorized in writing or in a CBA **for the benefit of the employee.**
- C. Related to recovery of wages paid in error or wage advances.
- D. Deductions made in conjunction with an employer sponsored pre-tax contribution plan.

NYLL 195 WAGE NOTICES AND RECORDKEEPING REQUIREMENTS

NOTICE AT TIME OF HIRE

Provide a Notice, in the Employee's primary language:

- The rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances;
- Prevailing wage supplements claimed under NYS PWL (or benefit portion for home care workers);
- Employer name (and any d/b/a), main office address, telephone number.

WAGE NOTICE AT TIME OF HIRE

- Where PW supplements are claimed, identify:
 - (i) The hourly rate claimed;
 - (ii) Type of supplement/ benefit;
 - (iii) Name and address of entity providing supplement/benefit; and
 - (iv) The agreement requiring or providing for such supplement/ benefit (such as the CBA) with info regarding how a copy of the agreement (or summary of the agreement) can be obtained.
- Obtain a signed and dated written acknowledgement in the Employees primary language. Notify employee at least seven days prior to any change.

WAGE NOTICE AT TIME OF HIRE (CONT.)

- For all employees who are not OT exempt, the notice must state the regular hourly rate and overtime rate of pay.
- Applies to employees covered by a union contract.
- Applies to salaried/exempt employees.
- Hiring notice templates:
See DOL Website.
- Maintain for 6 years.
- Penalty: \$50/employee per day not to exceed \$5,000 per employee. If DOL is involved, penalties may be greater.

WAGE NOTICE AT TIME OF HIRE (CONT.)

ACKNOWLEDGMENT must include:

- Affirmation by the employee that the employee accurately identified his or her primary language to the employer.
- For non-exempt employees, must state the regular hourly rate and overtime rate of pay.
- TEMPLATES are available in the following languages: Burmese, Chinese, English, Haitian-Creole, Italian, Korean, Polish, Russian, Spanish, Vietnamese, Yiddish.
- If no template exists for employee's primary language, use English.
- Templates exist for employees paid an hourly rate, multiple rates, piece or flat rates, salary, etc.

WAGE NOTICE AT TIME OF HIRE (CONT.)

- Salespersons: Labor Law Section 191(1)(c) already requires commission salespersons to receive and sign for a copy of their commission agreement. The agreement should be attached to the pay notice and a copy of each document kept by the employer.

PAYSTUB NOTICE

With each wage payment, provide everything required in the Hiring Notice plus:

- Gross wage:
 - Deductions; allowances, if any, claimed as part of the minimum wage; prevailing wage supplements/benefits; and net wages.
- For non-exempt employees:
 - Must include the regular hourly rate or rates of pay; the overtime rate or rates of pay; the number of regular hours worked, and the number of overtime hours worked.
- For all employees paid a piece rate, the statement shall include the applicable piece rate or rates of pay and number of pieces completed at each piece rate.

PAYSTUB NOTICE (CONT.)

- Interesting FAQs from DOL website:
- 20. What if I have a bonus or incentive plan on a weekly or less frequent time period? **So long as the employee initially was given a description or it is clearly shown on the wage statement for the period in which it is paid, no additional notice is required.**
- 21. What about retroactive wage increases? **The amounts need to be noted separately on the wage statement for the period in which it is paid.**
- 23. Are exempt employees, including professionals, executives, or administrators, excluded from the notice requirements? **No.**
- 28. Can wage statements be provided electronically? **Yes, but workers must be able to access their statements on a computer provided by the employer and be able to print a copy for their records.**

PAYSTUB NOTICE (CONT.)

- Upon the request of an employee, an employer shall furnish an explanation in writing of how such wages were computed.
- Weekly Notice Penalty:
 - \$250 per employee, per day, not to exceed \$5K. If DOL is involved, penalties may be greater.
- Affirmative defense:
 - 1) employees were actually paid what was due, and;
 - 2) employer believed in good faith it was not required to provide the notice.
- Employees and their representatives may sue for penalties and attorney fees.
- Class actions.

OTHER NOTICE/RECORD KEEPING REQUIREMENTS

- Within 5 days of termination, notify employee, in writing, of their exact termination date and date for cancellation of any benefits.
- Notify Employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays and hours.
- For six years, maintain payroll records, plus records concerning sick, vacation, personal and holiday leave.

WHO MAY FILE COMPLAINTS OR ENFORCE THE LAW?

- Labor Commissioner.
- Individual employees, third parties such as collective bargaining representative.
- Class actions.

COSTS, REMEDIES FOR UNPAID WAGES/BENEFITS

Employees may recover unpaid wages and benefits from Employer, plus:

- 100% of the underpayment as liquidated damages unless the Employer can establish that it had a good faith legal basis for the underpayment.
- Attorneys' fees.
- Prejudgment interest.
- Other civil/criminal penalties.
- Employer = person with authority to hire/fire, set pay, supervise and maintain records.

NEW SECTION: §198-e. CONSTRUCTION INDUSTRY WAGE THEFT

- Contractor jointly and severally liable for unpaid wages benefits and fines for violation of Notice Wage requirements of subcontractors at any tier.
- Contractor= Person, firm, etc., including Construction Manager.
- Does not expressly exclude material suppliers, office employees or off-site workers.
- Does not apply to prevailing wage projects, home improvement, or certain small residential projects.
- May be waived in a CBA with a “bona fide building construction trade labor organization.”

NEW SECTION: §198-e. CONSTRUCTION INDUSTRY WAGE THEFT (CONT.)

INDEMNITY?

- “The provisions of this section shall not be deemed to impair the rights of a contractor to maintain an action against a subcontractor for amounts for owed wages that are paid by a contractor pursuant to this section.”
- Does that mean a contractor can sue a sub for indemnity? Prior case law in NY prohibits indemnity for unpaid wages.

NEW SECTION: §198-e. CONSTRUCTION INDUSTRY WAGE THEFT (CONT.)

Period of Liability:

- No earlier than three years prior to the initiation of such claim, however, must give 10 days notice and an opportunity to cure.

Note: Period of liability for the direct employer: 6 years.

NEW SECTION: §198-e. CONSTRUCTION INDUSTRY WAGE THEFT (CONT.)

When does the change take effect? Unclear.

- January 4, 2022: shall apply to construction contracts entered into, renewed, modified or amended on or after such effective date, and shall apply only to wages, benefits, and or wage supplements earned on or after such effective date.
- A proposed chapter amendment has confused the issue.

MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS: CONSTRUCTION INDUSTRY FAIR PLAY ACT

Misclassification occurs if an employer treats people as independent contractors when they are employees. Some employers use this tactic to avoid compliance with:

- Unemployment insurance (UI);
- Workers' Compensation;
- Social Security;
- Tax withholding;
- Temporary disability;
- Minimum wage and overtime laws that protect workers.

STANDARD FOR DETERMINING WHETHER A PERSON IS AN EMPLOYEE OR INDEPENDENT CONTRACTOR IN THE CONSTRUCTION INDUSTRY

The law presumes that individuals working for an employer are employees unless they meet all three criteria below.

The individual must be:

1. Free from control and direction in performing the job, both under contract and in fact.
2. Performing services outside of the usual course of business for the company.
3. Engaged in an independently established trade, occupation or business that is similar to the service they perform.

SEPARATE BUSINESS ENTITY?

The law also contains a 12-part test to determine when a sole proprietor, partnership, corporation or other entity will be considered a “separate business entity” from the contractor for whom it provides a service.

If an entity meets all of the 12 criteria, it will not be considered an employee of the contractor. Instead, it will be a separate business that is itself subject to the new law regarding its own employees.

SEPARATE BUSINESS ENTITY? (CONT.)

SEPARATE BUSINESS ENTITY TEST

To be considered a separate business entity from the business to which services are provided, a sole proprietor, partnership, corporation or other entity must:

1. Be performing the service free from the direction or control over the means and manner of providing the service subject only to the right of the contractor to specify the desired result.
2. Not be subject to cancellation when its work with the contractor ends.
3. Have a substantial investment of capital in the entity beyond ordinary tools and equipment and a personal vehicle.
4. Own the capital goods and realize gains and losses of the entity.
5. Make its services available to the general public or business community on a regular basis.

SEPARATE BUSINESS ENTITY? (CONT.)

6. Include the services provided on a federal income tax schedule as an independent business.
7. Perform the services under the entity's name.
8. Obtain and pay for any required license or permit in the entity's name.
9. Furnish the tools and equipment necessary to provide the service.
10. Hire its own employees without contractor approval, pay the employees without reimbursement from the contractor and report the employees' income to the Internal Revenue Service.
11. Have the right to perform similar services for others on whatever basis and whenever it chooses.
12. The contractor does not represent the entity or the employees of the entity as its own employees to its customers.

The entity must meet all 12 criteria to be considered a separate business entity.

MISCLASSIFICATION: PENALTIES/CONSEQUENCES

- Fines for Willful violations:
 - Civil penalties of up to a \$2,500 fine per misclassified employee for a first violation and up to \$5,000 per misclassified employee for a second violation within a five-year period.
- Willfully means “knew or should have known that conduct was prohibited by the law.”
- Criminal Prosecution.
- Debarment.
- A contractor does not appear to be liable for fines for subcontractor’s violations, but is liable for unpaid wages.

MISCLASSIFICATION: PENALTIES/CONSEQUENCES (CONT.)

- Corporate officers, certain shareholders and **substantially affiliated entities** may be liable for fines and penalties.
- Misclassified workers are entitled to unpaid wages, benefits, attorney fees and other benefits. May file claims with DOL or sue civilly individually or as part of a class action.
- By virtue of the Construction Wage Theft Act, Contractors are jointly and severally liable for unpaid wages/benefits of misclassified employees.

GENERAL BUSINESS LAW, CHAPTER 20, ARTICLE 35-E CONSTRUCTION CONTRACTS

- Article deals with payment scheduling and other related aspects of private construction contracts.
- Excludes prevailing wage, certain residential construction.

WAGE THEFT PREVENTION ACT ADDED SECTION 756-f RIGHT TO WITHHOLD PAYMENT IF CONTRACTOR FAILS TO PROVIDE PAYROLL INFORMATION

Upon request of a contractor, a subcontractor shall provide:

- a) The names of all workers of such subcontractor on the project, including the names of all those designated as independent contractors;
- b) When applicable, the name of the contractor's subcontractor with whom such subcontractor is under contract;
- c) The anticipated contract start date;

WAGE THEFT PREVENTION ACT ADDED SECTION 756-f RIGHT TO WITHHOLD PAYMENT IF CONTRACTOR FAILS TO PROVIDE PAYROLL INFORMATION (CONT.)

- d) The scheduled duration of work;
- e) When applicable, local unions with whom such subcontractor is a signatory contractor;
- f) The name, address and phone number of a contact for such subcontractor; and
- g) Certified payroll records which, at a minimum, contain all lawfully required information required by articles six (wage notices) and nineteen (minimum wage) of the labor law for all employees providing labor on the project.

CONTRACTOR MAY WITHHOLD PAYMENT IF SUBCONTRACTOR FAILS TO PROVIDE REQUESTED INFORMATION

Failure to timely comply with a request for information as provided herein shall be a basis for a contractor to withhold payments owed to a subcontractor at any tier.

WHEN DOES CHANGE TAKE EFFECT?

- January 4, 2022: shall apply to construction contracts entered into, renewed, modified or amended on or after such effective date, and shall apply only to wages, benefits, and or wage supplements earned on or after such effective date.

IS THE WTA PREEMPTED BY FEDERAL BENEFITS LAW?

- Maybe, if an ERISA benefit plan is the party pursuing contributions. Case pending in Federal Court (SDNY)
 - Probably not, if the worker is pursuing unpaid benefits supplements

WHAT CAN A CONTRACTOR DO TO REDUCE RISK OF LIABILITY FOR SUBCONTRACTOR VIOLATIONS?

- Include appropriate subcontract language.
- Request information during prequalification process.
- Prohibit use of “independent contractors” or “labor brokers.”
- Review contractors Wage Notices.
- Review Pay Notices, Certified Payroll.
- Maintain attendance records.
- Spot-check accuracy of documents with “in field” observations.
- Include indemnity provisions in contracts.
- Withhold payment/terminate contractor where appropriate.
- Report violations to the DOL.

KEY TAKEAWAYS

- NY laws enable the NYS DOL and private parties to enforce wage/benefit obligations against employers, with special tools focusing on the construction industry.
- Class action wage claims are burgeoning.
- Substantial criminal and civil penalties may be imposed.
- Contractors are strictly liable for subcontractor violations.
- Appropriate measures must be implemented to reduce risk.

DISCUSSION