New Changes to Illinois' Wage Payment and Collection Law Seeks to Pressure General Contractors to Become Union Signatory

Labor & Employment Law Update

By John Hayes and Jack Sanker on June 28, 2022

On June 10, 2022 Governor Pritzker signed into law two new amendments to the Illinois Wage Payment and Collection Act ("Act") that now expose non-union general contractors to liability for the wages of their subcontractor's employees. Essentially, the amendments open up general contractors entering into construction contracts in Illinois to potential liability for claims brought under the Act against their subcontractors, for all contracts entered into on or after July 1, 2022.

The amendments add a new section to the Act (Section 13.5), which applies to all primary contractors with a direct contractual relationship with the property owner who enters into a contract for the "erection, construction, alteration, or repair of a building, structure, or other private work in the State where the aggregate cost of the Project exceeds $20,000." The new law does provide an exclusion for any general contractor that is a signatory to a collective bargaining agreement on the project where the work is being performed. Also excluded are contracts performed for federal, state or local government entities as well as contracts on any single-family home or residence.

However, for those general contractors who are not party to a collective bargaining agreement (even if the subcontractors are union signatory employers) the law creates significant increased risk. The new law opens up liability for the primary contractor (i.e. construction managers and general contractors) if their subcontractors – of any tier – do not properly pay their own employees proper wages and benefits. This includes claims of unpaid wages and fringe or other benefit payments or contributions. The Act also provides for interest, penalties assessed by the Illinois Department of Labor, and attorney's fees and costs.

Under these new changes, prior to the commencement of a civil action, a claimant must provide written notice to both the employer and primary contractor at least 10 days prior to the initiation of a civil action, detailing the exact nature and basis for the claim. This essentially gives both the subcontractor and contractor 10 days (with language in the Act allowing for an agreed upon period extending the 10 day deadline) to attempt to resolve the claim with the employee.

Thus, if any primary contractor fails to pay its employees' wages or benefits, the primary contractor will be liable for such wages and benefits even though it was not the employer and even if the general contractor fully paid its subcontractor. Specifically, the primary contractor is liable for "unpaid wages or fringe or other benefit payments or contributions, including interest owed" subcontractors' employees. Also, it should be noted that the law does require a non-paying subcontractor to indemnify the paying upstream contractor. However, this will be ineffective if the subcontractor is in bankruptcy (a likely scenario where there is non-payment of wages by the subcontractor to its own employees).

What this means for contractors…

Generally, while the Act has the potential to impose additional liabilities on a primary contractor, it is largely duplicative of existing rules already in effect. For example, the federal Davis-Bacon Act imposes similar wage liabilities on upstream contractors (regardless of union signatory status) for federal construction projects. The Illinois Mechanics Lien Act can impose liability for wages as well; and, of course, liabilities and liens pursuant to union contracts already exist that require union signatory general contractors to be "on the hook" for the non-payment of wages and benefits if downstream contractors don't honor their wage and benefit obligations under a collective bargaining agreement. And, of course, a union signatory general contractor is contractually limited as to who it can subcontract work to.

The fact that primary contractors party to a union contract are exempt from liability indicates that the intent of the Act is to protect union workers from non-paying contractors, at the expense of non-union primary contractors.

Nonetheless, the Act will likely be limited in its application. The biggest risks will be to private, non-union projects, which are not subject to the various exemptions contained in the Act.

As noted above, the Act does require a non-paying subcontractor to indemnify the upstream primary contractor in the event a claim is brought under this Act; however, if the subcontractor cannot afford to pay the wages or is insolvent, it is unlikely that the indemnity provision will provide much protection to the primary contractor.

The Act could cause primary contractors to shy away from using smaller, less well-financed subcontractors, and could encourage primary contractors to do more of the work on the project themselves.

What to consider going forward…

To protect themselves, primary contractors could utilize performance bonds or conditional payment terms as an added layer of protection against actions brought under this new law; however, these measure may drive costs up. Beyond that, primary contractors can mitigate risk by more actively auditing or reviewing the pay practices of its subcontractors and/or insist on contract terms that require proof of payment to workers. Additionally, intense prequalification measures of any subcontractor in general can lessen the risk of non-payment occurring in the first place. Finally, requiring the owners, directors or officers of the subcontractor to provide personal guarantees and/or indemnification can certainly help diminish financial risks.

For more on this bill, listen to Amundsen Davis's weekly podcast, "Litigation Nation," episode 27.