

WACA ALERT

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Overview of AB 1701 / New Labor Code Section 218.7 – the Facts and the Reality

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AB 1701 was a top priority of California building trade unions and perhaps the most contentious industry measure of 2017. While we worked diligently to try and improve the measure to limit its impact on quality union subcontractors, future litigation will ultimately shape how, and to what extent, this statute will impact the construction industry. Due to the increased attention and confusion on what the new law does and doesn't do, we have prepared the summary below.

Overview of AB 1701 / New Labor Code Section 218.7 - the Facts and the Reality

On October 14, 2017, Governor Brown signed AB 1701 into law; extending joint and several liability to direct contractors performing work on privately-funded construction projects.

AB 1701 added Section 218.7 to the California Labor Code and applies to construction contracts entered into on or after January 1, 2018, for "erection, construction, alteration, or repair of a building, structure, or other private work."

Under the provisions of the law, a direct contractor on a private project "shall assume, and is liable for, any debt owed" by a subcontractor for wages and benefits. The law applies to wages and benefits owed by any subcontractor, regardless of tier. The direct contractor's liability extends only to any unpaid wage, fringe benefit or other benefit payment or contribution, including interest, but doesn't extend to penalties or liquidated damages. For judgments rendered against direct contractors, their property may be attached to satisfy judgment.

The new law does not directly make a first-tier subcontractor liable if a lower tier subcontractor fails to pay its workers. Subsequently, the law allows direct contractors to request relevant payroll records from their subcontractors.

The information that can be requested is limited to employees' wage statements which were already required to be kept under Labor Code section 226 (a) and payroll records that already must be maintained under Labor Code section 1174. Direct contractors and subcontractors also have the right to request from subcontractors below them "award information that includes the project name, name and address of the subcontractor, contractor with whom the subcontractor is under contract, anticipated start date, duration, estimated journeymen and apprentice hours, and contact information for its subcontractors on the project."

A direct contractor may withhold as “disputed” sums owed to a subcontractor if that subcontractor fails to provide the payroll or project information referenced above, until that information is provided. If the information is provided, all prompt payment rights are specifically protected.

The new law authorizes enforcement actions from (1) the California Labor Commissioner; (2) a third party that is owed fringe or other benefit payments or contributions (typically, this would be a union trust fund); and (3) a joint labor-management cooperation committee established pursuant to the federal Labor Management Cooperation Act of 1978. Notably, employees do not have standing to enforce section 218.7 on their own, there is no private right of action for potentially unpaid employees to bring a claim against the direct contractor for unpaid wages themselves.

Labor-management cooperation committees and union trust funds who prevail in an action against a direct contractor for unpaid wages, will be entitled to their reasonable attorney’s fees and costs, including expert witness fees.

Effect of the New Law

Direct contractors on public works were already liable for amounts owed by a subcontractor or lower tier subcontractor who fails to pay wages, benefits, and other contributions. Also, on public works, subcontractors are required to submit certified payroll. One effect of AB 1701, similar to public works, may be that direct contractors on private projects will be more likely to subcontract with reputable, better capitalized subcontractors that are less likely to fail to pay their workers.

Because AB 1701 allows direct contractors to require that subcontractors provide payroll information on private projects, subcontractors will need to make sure that proper accounting systems are in place in order to generate certified payroll reports. All employers, not just contractors and subcontractors, are already required to maintain the wage and hour information that must be supplied under AB 1701 (in many instances, this information must be included on employee paychecks under other labor laws). Compliance with requirements to furnish payroll information should be straightforward if accounting systems are in place.

Because AB 1701 holds direct contractors responsible for the payment of benefits as well, it would be prudent to work with industry pension trusts to ensure that they are equipped to quickly provide status letters to contractors to include with their progress payment submittals.

Review - New Labor Code Section 218.7 Requirements

- The new provisions apply to private works contracts that are entered into “on or after January 1, 2018”. (Labor Code Section 218.7 (a)(1)).
- The statute imposes liability on “direct contractors” 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”. (Labor Code Section 218.7(a)(2).
- For purposes of the new provisions, a direct contractor is a contractor who has a direct contractual relationship with the project owner as provided in California Civil Code Section 8018. (Labor Code Section 218.7(g)). Accordingly, general contractors are “direct contractors”.

- The direct contractor's liability "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". (Labor Code Section 218.7(a)(2)).
- The new law permits "a direct contractor or subcontractor at any tier from establishing by contract or enforcing any otherwise lawful remedies" against lower tier subcontractors whose nonpayment of wages and fringe benefits create liability for the direct contractor or upper tier subcontractor. (Labor Code Section 218.7(a)(3)).
- The new provisions do not create a private right of action for individual wage claimants. Labor Code Section 218.7 (b)(4) ensures that enforcement rights do not extend beyond the class of claimants listed in sections (b)(1), (2) and (3), none of which includes individual laborers. Section (b)(4) clarifies that that "no other party may bring an action against a direct contractor to enforce the liability created by subdivision (a)", that is, no one other than the listed entities may enforce the statutory provision that creates this cause of action.
- For purposes of enforcement, the statute authorizes the California Labor Commissioner to bring civil or administrative actions against the direct contractor for "unpaid wages including interest" (Labor Code Section 218.7 (b)(1)).
- A third party (such as a union trust fund) that is "owed fringe or other benefit payments or contributions on a wage claimant's behalf may bring a civil action against a direct contractor" and the prevailing party is entitled to recover its reasonable attorneys' fees and costs, including expert witness fees. (Labor Code Section 218.7(b)(2)).
- In addition, a "joint labor-management cooperation committee established pursuant to the federal Labor Management Cooperation Act of 1978 (29 U.S.C. Sec. 175a)" may sue a direct contractor or subcontractor for wages they owe directly to a wage claimant or for "unpaid wages owed by the direct contractor, pursuant to subdivision (a)" of the new law. The committee is required to provide at least 30 days' notice to the direct contractor or subcontractor prior to filing an action and, in such an action, the court shall award a prevailing plaintiff its reasonable attorney's fees and costs, including expert witness fees. (Labor Code Section 218.7(b)(3)).
- Wage claims must be brought within 1 year after recordation of a notice of completion or cessation, or actual completion of the work, whichever event occurs first. (Labor Code Section 218.7(d)(1-3)).
- Direct contractors are entitled to request subcontractors to provide payroll and other subcontractor project information and to withhold payments as "disputed" if the subcontractor(s) do not timely provide the requested information. (Labor Code Section 218.7 (f)(1) and (2), and (i)). However, the subcontractor's failure to provide the information does not relieve the direct contractor of its obligations under Section 218.7. (Labor Code Section 218.7(f)(3)).
- Following trial, the property of the direct contractor may be attached to pay for any judgment that is entered against it. (Labor Code Section 218.7(c)).

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