



RUTAN

RUTAN & TUCKER, LLP

GUIDING CLIENTS TO SUCCESS

www.rutan.com

Connect with Rutan  

Prime Contractors Now Directly Liable for Subcontractors' Unpaid Wages and Fringe Benefits including Health and Welfare Pension Fund Contributions

November 2017

A.B. 1701, chaptered as Labor Code section 218.7, creates a new liability for prime contractors on private construction projects. Effective with private works contracts entered into on or after January 1, 2018, prime contractors will be liable for unpaid wages, fringe and other benefit payments or contributions, including interest, of the employees of all of its downstream subcontractors, regardless of tier. Although the prime contractor has no liability for penalties or liquidated damages associated with unpaid wages or benefits, there are no safe harbor provisions that can protect it from this liability.

A prime contractor can be sued for recovery of unpaid wages and benefits by the Labor Commissioner, third parties on behalf of wage claimants (most likely unions and union trust funds), and a joint labor management cooperation committee. Except in an action brought by the Labor Commissioner, a prevailing plaintiff (but not the prime contractor) is entitled to attorneys' fees, costs, and expert fees.

A suit can be brought under A.B. 1701 within one year following the project "completion," as that term is defined by California's Mechanic's Lien Law (Civil Code §§ 8000 et. seq). Although this is a one-year statute of limitations, it is possible that a suit could seek to enforce liability for unpaid wages and benefits going back to the beginning of the project.

Although there are no safe harbor provisions to avoid the new potential liabilities created by A.B. 1701, the new statute makes clear prime contractors can take steps to mitigate its potential exposure by: (i) establishing by contract or enforcing otherwise lawful remedies against a subcontractor for liability created by the statute, and (ii) withholding under the prompt pay statutes as "disputed" all sums owed until the subcontractor provides certain requested payroll and other related information.

Accordingly, prime contractors should take steps to mitigate their potential exposure for the new potential liabilities created by A.B. 1701. Moreover, subcontractors should also take the following steps as prime contractors will certainly seek to pass their liability down to its subcontractors.

611 Anton Blvd., Suite 1400 • Costa Mesa, CA 92626 • 714.641.5100

3000 El Camino Real, Suite 200, Building 5 • Palo Alto, CA • 650.320.1500



- 1) Review their subcontract forms to ensure that indemnity and payment withholding provisions, as well as provisions regarding their ability to request certified payrolls and other information regarding the payment of wages and benefits, are up to date and compliant with the statute, and flow down to all subcontractors (regardless of tier) on a project. Consider new provisions: (i) requiring subcontractors to provide an affidavit under penalty of perjury from an officer of the subcontractor with each payment application, certifying that all wages and benefits have been paid in full and are up-to-date, and (ii) allowing it to audit the payroll records of each subcontractor.
- 2) Re-evaluate their pre-qualification programs and the financial criteria used to pre-qualify subcontractors.
- 3) Re-evaluate their policies on which subcontractors are required to provide payment and performance bonds for a project.
- 4) Re-evaluate their policies regarding whether principals of a subcontractor should be required to personally guarantee of the subcontractor's obligations under the subcontract.
- 5) Review and revise project management and accounting systems and procedures to ensure that certified payrolls are received and reviewed on private jobs.

If you would like further information, please contact your Rutan attorney.

This e-Alert is published periodically by the **Construction Law Practice Group** at Rutan & Tucker, LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only.