BRIEF

New York state legislature passes construction wage theft bill

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Dive Brief:

- The New York State Senate and State Assembly passed legislation Wednesday that could shift liability to general contractors for wage theft cases on private construction projects.
- In a usual wage theft case, a worker files suit against whomever directly employs them, such as a subcontractor, to recover unpaid wages. With this bill, sponsored by state Sen. Jessica Ramos, general contractors are directly liable, as a way to incentivize them to police their subcontractors' wage practices, as well as their own.
- The bill will be delivered to Gov. Andrew Cuomo's desk for him to either sign into law or veto. It would make New York the sixth state, in addition to Washington, D.C., to adopt this type of protective wage theft for construction workers.

Dive Insight:

Under the legislation, the contractor — defined as the construction manager, general/prime contractor or joint venture which entered into contract with the owner — will be liable for unpaid wages owed to a worker by any subcontractor on any level of the project. However, subcontractors would not be liable for unpaid workers

upstream or downstream of themselves, Jim Barlow, attorney at Cotney Attorneys & Consultants, told Construction Dive.

Wage theft is the denial of salary payment or other benefits to an employee by an employer. Some estimate wage theft in New York costs workers as much as $1 billion a year, Barlow said.

The New York State Building & Construction Trades Council, which represents over 200,000 unionized employees, called the bill's passage a "monumental victory for working people."

"From day one, this legislation was all about putting the interests of working people ahead of those of unscrupulous contractors in the construction industry," Gary LaBarbera, president of the Trades Council, said in a statement shared with Construction Dive.

For workers, Barlow said, recouping wages would be much easier, as a contractor cannot shield itself from liability by requiring parties to sign waivers, Barlow said. Additionally, should a poorly funded subcontractor go out of business, an unpaid worker could still bring suit to recover wages against the contractor.

The Associated General Contractors of New York State, which represents construction employers, opposes the legislation. According to Mike Elmendorf, CEO of AGC NYS, the group supports wage theft prevention, but finds the legislation flawed and problematic. The bill means a GC is liable for up to three years after a project has been completed, even if the wage theft was by a subcontractor tiers down, and not detected by the GC.

"It creates an unmanageable level of risk for GCs," Elmendorf said, adding that the legislation could complicate contractors' abilities to insure projects and slow payments to subcontractors, while raising the cost of construction.

"We think a requirement that the GC be given clear notice while the contract is still active of any non-payment would have made much more sense and been more effective," Elmendorf said.

"Instead, under this bill ... contractors may well find out years after the fact that there was a problem and be left holding the bag."

For contractors to be prepared, they can specifically request a subcontractor formally certify that all workers have been paid, or request to view certified payroll as a condition of payment, Barlow said. Additionally, he said, contractors can insert indemnification provisions into contracts to shift liability back to subcontractors; however, in the event that the subcontractor goes bankrupt, the liability reverts back to the GC.

The five other states with wage theft laws are California, Nevada, Maryland, New Jersey and Virginia.

Local jurisdictions are also cracking down on fraud. For example, in light of recent incidents involving unreported cash payments by subcontractors on construction projects, Pittsburgh Mayor William Peduto recently signed an executive order to stop construction companies in the city from committing tax, insurance and workers' compensation fraud. It also aims to stop the practice of paying workers in cash to avoid taxes.