Enforcement of Prevailing Wage Law

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ENFORCEMENT

The legal obligation to pay prevailing wages and supplements is enforced primarily through administrative procedures managed and controlled by the Department of Labor Bureau of Public Works (or the New York City Comptroller, for New York City Contracts). Some of the law's provisions are also enforceable criminally, and others may be enforced by private action by aggrieved workers or their union representatives.

1. Criminal Enforcement

Labor Law § 220 makes "willful" failure to pay a required prevailing wage or supplement a crime, ranging from a Class A misdemeanor where total underpayments are less than $25,000 up to a Class C Felony when underpayments exceed $500,000. Subdivision (3)(d)(i). In the event of conviction of a second offense within five years the Defendant must also disgorge any profits earned under the public works contract in question, and any unpaid amounts owing on such contract are forfeited. Subdivision (3)(d)(iii).

Criminal penalties can also apply if a contractors willfully fails to file certified payrolls as required (Subdivision [3-a][a][iii]), or willfully fails to provide such payroll records to the BPW (or NYC Comptroller) within 90 days of a demand (Subdivision [3-a][d]). It is also a misdemeanor, with similar penalties, to willfully refuse to pay any amounts found due through the administrative processes of the BPW or NYC Comptroller. Subdivision (9). In addition, any contractor or subcontractor that falsifies any certified payroll may be prosecuted and convicted for perjury. Labor Law § 220-c. Also see § 220-d, regarding minimum wages.

2. Private Enforcement

Labor Law § 220-G specifically authorizes an underpaid employee, or her union, to bring an action against the prime contractor, a subcontractor employer and/or the payment bond surety of either. (See State Finance Law § 137.) Additionally, State and federal courts

have recognized a private right of action against a non-employer prime contractor based on a third-party beneficiary theory. See *Solouk v. European Copper Specialties, Inc.*, 2019 WL 2181910 (SDNY 2019). Finally, § 220(8) affords a private right of action by an "affected person" against anyone found by the Commissioner to be liable for underpayments.

3. Enforcement by the BPW or NYC Comptroller

Criminal prosecutions under the statute are rare, however, and enforcement is overwhelmingly handled by BPW, who's regional wage investigators investigate compliance with prevailing wage requirements, either upon complaint (typically of an employee or a labor union) or on their own initiative. § 220(7). Typically such an investigation begins with a demand or a subpoena to the targeted contractor or subcontractor for certified payrolls, payroll journals and cancelled checks pertaining to the project under investigation. If a contractor fails to provide the requested records within 10 days or such additional time as the investigator may grant then the BPW may issue a notice to the public owner of the project in question requiring that it withhold up to $100,000 from any payments due under the contract until the demanded documents have been furnished. § 220(3-a)(c).

In such proceedings liability for wage underpayments falls not only on the offending employer but also, if the offender is a subcontractor, upon the prime contractor as well. Labor Law §220-C and §223. Liability may also be extended to certain affiliates, successors and principals of any contractor that may be found to be liable. §220-C. In this regard, potentially liable affiliates include a "parent company," meaning an entity that directly controls the contractor, a "subsidiary," meaning an entity that is controlled directly or indirectly by the contractor's parent company, any entity in which the contractor's parent owns more than 50% of the voting stock or any entity in which one or more of the contractor's top five

shareholders also owns a controlling share, as well as any other entity "which exhibits any other indicia of control over the contractor . . . or over which the contractor . . . exhibits control, regardless of whether or not the controlling party or parties have any identifiable or documents ownership interest. Labor Law § 220(5)(g), (i) and (j). Any entity for which there is "substantial continuity of operation" with an offending contractor may be held liable for underpayments as a "successor." *Id.* (k). Finally, liability may be assessed against any partner or a top five shareholder of the employer contractor or any officer thereof, who "knowingly participated" in the violation found. Labor Law § 220-B(2).

A prevailing wage investigation may go back three years from the earlier of the date a complaint was received or an investigation was opened. §220-B(2)(c). This creates problems for contractors who pay their subcontractors in full, without knowledge of any prevailing wage issues, only to learn much later of substantial underpayments, interest and penalties for which BPW looks to the contractor. Although §220 directs that such prevailing wage investigations be completed within six months, that period has been held to be "directory" only and therefore unenforceable against the BPW as a practical matter. *Nelson's Lamp Lighters, Inc. v. New York State Dept. of Labor*, 267 AD2d 937 (4th Dept., 1999). Similarly, when a hearing is required (as discussed below), §220(8) requires that it be held expeditiously. Nevertheless, unreasonable delay may not be raised as a defense, absent prejudice shown. It may, however, result in a suspension of the running of interest. *M. Passucci General Const. Co., Inc. v. Hudacs*, 221 AD2d 987 (4th Dept., 1995).

Meanwhile, Labor Law § 220-b directs the wage investigator, upon receipt of a complaint or other evidence that underpaid wages or supplements "appear to be due," to serve a Withholding Notice upon the public owner of the project in issue, requiring that it

immediately withhold from the contractor an amount sufficient to cover the "apparent" underpayments plus interest at 16% plus a 25% civil penalty, all pending a final determination by the commissioner of whether or not such amounts are due. Furthermore, if the amount due on the contract in question is insufficient to cover the alleged underpayment with interest and penalty, the wage investigator is directed to send a similar Withholding Notice to the public owner of any other pending public works contract with the contractor or subcontractor under investigation, or with any entity or person affiliated with that contractor or subcontractor. Unlike a mechanic's lien, a BPW Withholding Notice cannot be discharged by a filing a bond or otherwise without the BPW's consent. Meanwhile the Withholding Notices remain in place until the BPW investigation has been concluded, including any administrative hearing and court challenge to which the accused contractor may be entitled, as discussed below.

Typically, the wage investigation concludes with an audit report listing each employee alleged to have been underpaid, the hours underpaid, the work classification, wage rate and supplement rates that should have been paid versus the wages and supplements actually paid by the employer. The audit also includes an automatic calculation of 16% interest and a civil penalty equal to 25% of the total underpayments found. The audit is typically presented with a proposed stipulation for the contractor, agreeing to promptly pay the amounts found as underpaid plus interest and penalty, together with a stipulation that the underpayments were either willful or non-willful. This is because §220 (7-a) requires BPW "to make an inquiry as to the willfulness of the alleged violation," and in the event of a hearing the Commissioner must make a finding that a violation was willful or not. In some cases the BPW will negotiate lower interest rates and penalties, and even a proposed finding of willfulness, particularly for

a contractor whose liability is strictly secondary to that of its subcontractor or a sub-subcontractor.

To the extent that agreement cannot be reached with all parties, though, the local wage investigator will forward his or her findings to BPW's Albany office which will, in due course, generate and serve a Notice of Hearing based upon the wage investigator's audit and findings. §220(8), §220-B(4)(c). A default in responding results in a Commissioner's Order to pay the underpayments, interest and penalties as recommended and, likely, finding the defaulter's violation was willful. A respondent wishing to challenge any aspect of the charged underpayments (whether as to the hours worked, the proper classification of the workers or the amount of interest and penalty) may file an answer and then proceed to a hearing before a Hearing Officer employed by the BPW, pursuant to the procedural rules set forth at 12 NYCRR Part 700 and the State Administrative Procedure Act.

The result of the hearing is a recommended order for the Commissioner's signature to which the answering contractor may file its objections. In due course, the Commissioner will either adopt the Hearing Officer's proposed order or prepare one of her own. Once filed, it becomes subject to review in the Appellate Division, Third Department, pursuant to CPLR Article 78. The time in which to file such a challenge is 30 days. §220(8). In such a case the standard of review is whether or not substantial evidence supports the Commissioner's order, and except in matters of pure statutory interpretation the Commissioner's factual findings receive substantial deference. Once final, the Commissioner's order may be filed in the office of any County Clerk and may be enforced in the same manner as a judgement, against any respondent named in the order.

As noted, the order must include a final determination of whether or not a contractor, subcontractor, affiliate, successor or principal "willfully" underpaid prevailing wages or supplements. "Willful" means simply that the person or entity knew or should have known that an employee was being underpaid. *Central City Roofing Co., Inc. v. Musolino*, 136 AD3d 1186 (3rd Dept., 2016). Two findings of a willful violation within a six-year period results in debarment from performing pubic work for a period of five years from the second determination. §220-B(3)(b). A single determination of willfulness involving the falsification of payroll records or wage kickbacks results in such debarment as well. *Id*. A five-year debarment also results from conviction of any of several enumerated felony offenses. *Id*.

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