

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 2696 (Rendon)
Version: June 10, 2024
Hearing Date: July 2, 2024
Fiscal: No
Urgency: No
ID

SUBJECT

Labor-related liabilities: direct contractor and subcontractor

DIGEST

This bill provides a joint labor-management cooperation committee the ability to bring an action against a direct contractor of a private construction project for wage violations, as specified.

EXECUTIVE SUMMARY

Violations of California's labor laws are a major issue throughout the state. Despite California's strong labor laws that protect the rights and dignity of workers, enforcement of those laws through the current enforcement agency cannot meet the need for actions redressing wrongs and preventing further violations. In this context, violations of workers' rights and theft of their wages is rampant in the construction industry. To address this issue, the California Legislature has, in recent years, enacted laws to extend liability to general contractors for wage violations committed by subcontractors. The Legislature has also provided joint labor-management cooperation committees, entities created through the federal Labor Management Cooperation Act of 1978, with authority to enforce this liability upon general contractors. However, joint labor-management cooperation committees do not have authority to enforce liability upon contractors on construction projects when those contractors hire workers directly and fail to pay them. AB 2696 closes this loophole by providing joint labor-management cooperation committees with authority to bring suits against direct contractors for wage violations they commit against employees. AB 2696 is sponsored by the California Conference of Carpenters, and is supported by the Western States Regional Council of Carpenters. It is opposed by the Housing Contractors of California, the Associated General Contractors of California, and the Western Electrical Contractors Association. AB 2696 passed out of the Senate Labor, Public Employment and Retirement Committee by a vote of 4 to 0.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Permits, pursuant to the Labor Management Cooperation Act of 1978, the establishment of plant, area, and industry-wide joint labor management committees, which are organized jointly by employers and labor organizations representing employees in that plant, area, or industry, as specified. (29 U.S.C. § 175a.)
- 2) Establishes labor management committees for the purpose of improving labor management relationships, job security, organizational effectiveness, enhancing economic development, or involving workers in decisions affecting their jobs. (29 U.S.C. § 175a.)

Existing state law:

- 1) Establishes within the Department of Industrial Relations (DIR) the Division of Labor Standards Enforcement (DLSE) under the direction of the Labor Commissioner (LC), and empowers the LC to ensure a just day's pay in every work place and to promote justice through the robust enforcement of labor laws. (Lab. Code § 79 et seq.)
- 1) Specifies certain requirements relating to an employee's compensation, allowable hours of work, overtime work and pay, required rest breaks and days off, and guaranteed time off. (Lab. Code §§ 200-2699.8.)
- 2) Requires, for contracts entered into on or after January 1, 2022, a direct contractor making or taking a contract for the erection, construction, alteration, or repair of a building, structure, or other private work, to assume, and be liable 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. (Lab. Code § 218.8(a)(1).)
- 3) Extends the direct contractor's liability to penalties, liquidated damages, and interest owed by the subcontractor on account of the performance of the labor covered by the contract, unless specified requirements are met. (Lab. Code § 218.8(a)(2).)
- 4) Provides that, if a worker employed by a subcontractor on a private construction project is not paid the wage, fringe or other benefit payment or contribution owed by the subcontractor, the direct contractor of the project is not liable for any associated penalties or liquidated damages unless the direct contractor had knowledge of the subcontractor's failure to pay the specified wage, fringe or other

benefit payment or contribution, or the direct contractor fails to comply with all of the following requirements:

- a) the contractor monitors the payment by the subcontractor of wage, fringe or other benefit payment or contribution to the employees or the labor trust fund, by periodic review of the subcontractor's payroll records, as specified;
 - b) upon becoming aware of the failure of the subcontractor to pay wages, the contractor diligently takes corrective action to halt or rectify the failure;
 - c) prior to making final payment to the subcontractor, the contractor must obtain an affidavit from the subcontractor affirming that all workers have been properly paid. (Lab. Code § 218.8(a)(3).)
- 5) Permits a Joint Labor-Management Committee established pursuant to the federal Labor Management Cooperation Act of 1978 to bring an action in any court of competent jurisdiction against a direct contractor or subcontractor at any tier to enforce liability for any unpaid wage, fringe or other benefit payment or contribution, and for corresponding penalties or liquidated damages, and interest owed by the subcontractor on account for a worker's labor on a private work. (Section 218.8(b)(3).)
- a) Requires a court to award a prevailing plaintiff its reasonable attorney's fees and costs, including expert witness fees, for claims brought by a JLMC, as specified. (Lab. Code § 818.8(b)(3).)

This bill:

- 1) Provides that a joint labor-management cooperation committee pursuant to the federal Labor Management Cooperation Act of 1978 may bring an action in any court of competent jurisdiction against a direct contractor to enforce liability for any unpaid wage, fringe or other benefit payment or contribution, penalties or liquidated damages, and interest owed by the direct contractor to a worker for their labor on a private work project.
- 2) Specifies that, in any claim brought pursuant to (1), the court must award a prevailing plaintiff reasonable attorney's fees and costs, including expert witness fees.

COMMENTS

1. Author's statement

According to the author:

General contractors shouldn't be off the hook for wage law violations when they use their own workforce instead of subcontracting the work out. AB 2696 will close this loophole, and ensure general contractors are being held accountable by

labor-management committees, regardless of whether they use their own workforce or not.

2. Wage theft is a significant problem

Many of California's labor laws aim to protect the state's workers and ensure they are paid fairly and adequately for their work. These laws are of significant importance, as they ensure that workers can meet their basic needs and protect their right to just compensation for their labor. However, wage theft, in which an employer does not pay a worker the amount the worker is due, or does not pay the worker for all of their working hours, is the largest form of theft in the nation.¹ Reports state that workers lost at least 338 million dollars to wage theft in 2021, and one of the top industries for wage theft was construction.² Between 2017 and 2020, over \$221 million in unpaid wages were recovered in actions by both the Division of Labor Standards Enforcement (DLSE) of the Department of Industrial Relations (DIR) and the Office of the Attorney General (AG).³

Despite these serious and pervasive violations of labor law, employees and the public have limited options to ensure compliance. DLSE, the main public enforcement agency for the labor code, is chronically backlogged with cases. The Labor Commissioner, which is the head of DLSE that hears and adjudicates labor law violations, received 19,000 complaints in 2021 alone, and has been continually dealing with staffing and funding shortages.⁴ In light of those issues, cases typically take on average 505 days to be adjudicated. With such long processing times, many simply give up and withdraw their claims.

Non-enforcement causes serious harm. When an employer violates labor law, it places law-abiding employers at a disadvantage, and if violations are not enforced, it incentivizes a race to the bottom as employers try to compete with their competitors in the market. Moreover, those employees wronged by violations or who have their wages stolen lose thousands of dollars every year, hurting their pocketbooks and livelihoods. Thus, enforcement is essential to ensuring California's strong labor laws actually protect workers and society from harm.

¹ Brady Meixell & Ross Eisenbrey, Wage theft is a much bigger problem than other forms of theft – but workers remain mostly unprotected, Economic Policy Institute (Sept. 18, 2014), available at <https://www.epi.org/publication/wage-theft-bigger-problem-forms-theft-workers/>.

² Alejandro Lazo et al, When employers steal wages from workers, CalMatters (Jul. 25, 2022), available at <https://calmatters.org/explainers/when-employers-steal-wages-from-workers/?series=unpaid-wages-california-workers>.

³ (Ilhna Mangundayao et al, "More than 3 billion in stolen wages recovered for workers between 2017 and 2020" Economic Policy Institute 7 (Dec. 22, 2021), available at <https://files.epi.org/uploads/240542.pdf>.

⁴ Jeanne Kuang, "Agency battling wage theft in California is too short-staffed to do its job," CalMatters (Oct. 17, 2022), available at <https://calmatters.org/california-divide/2022/10/agency-battling-wage-theft/?series=unpaid-wages-california-workers>.

3. California's attempts to ensure enforcement of labor laws in the construction industry

In light of this crisis, the Legislature has taken various steps to try to increase enforcement of the state's labor laws. In 2017, the Legislature enacted AB 1701 (Thurmond, Ch. 804, Stats. 2017) to tackle a recurrent issue in which employers utilize subcontractors to hire workers for a construction project in order to avoid responsibility for ensuring workers are paid fairly. Contractors could engage the services of a subcontractor that would violate its workers' labor rights, and when the enforcement agency or worker tried to go after the subcontractor, the subcontractor would fold up shop and the worker would be out of luck. The contractor who hired the subcontractor would escape responsibility, only to engage another subcontractor on their next project and again be immunized from responsibility for ensuring the workers on their projects were fully paid.

AB 1701 attempted to disrupt this system by establishing that a direct contractor on a private construction project is jointly liable with the subcontractor for all of the wages and fringe benefits and contributions owed any worker on its project. However, AB 1701 limited the direct contractor's liability to the underlying labor code violations, and did not extend that liability to any statutory penalties or liquidated damages. AB 1701 also authorized the Labor Commissioner or a joint labor-management committee (JLMC) to bring an action to enforce this liability. JLMC's are entities created under the federal Labor Management Cooperation Act of 1978 (P.L. 94-524 (1978)) to improve communications and working relationships between labor and management. In 2021, the Legislature extended the liability created under AB 1701 to include statutory penalties and liquidated damages associated with labor violations by subcontractors. (SB 727 (Leyva, Ch. 338, Stats. 2021.)) AB 727 also created a "safe harbor" provision by which a contractor could avoid liability for these penalties and liquidated damages if they did not know of the labor violations, or conducted monitoring, diligently corrected any failure by a subcontractor to pay its workers of which the contractor became aware, and obtained an affidavit from the subcontractor upon the completion of the work stating that the subcontractor paid all due wages to its workers. (Lab. Code § 218.8(a)(3).)

4. AB 2696 attempts to hold contractors liable for labor law violations against direct employees

However, the authority provided by AB 1701 to JLMC's to enforce violations of labor laws against a contractor only applied in the context in which the contractor utilized a subcontractor for its labor needs. If a contractor on a construction project instead elects to directly hire workers for a project, JLMC's have no authority to enforce labor law violations. Instead, a worker would need to bring a suit on their own, or rely on the under-resourced Labor Commissioner. According to the author, general contractors have been directly hiring workers for projects and committing labor law violations

against their employees. In such circumstances, JLMC's are unable to pursue claims for these violations directly.

AB 2696 addresses and corrects this loophole by specifying that a JLMC may bring an action against a direct contractor to enforce liability for any unpaid wages, fringe benefits, other benefit payment or contribution, for statutory penalties and liquidated damages associated with those violations, and for interest owed by the direct contractor to the worker. AB 2696 specifies that, as it can for an action against a contractor for a violation by a subcontractor, a prevailing JLMC must be awarded reasonable attorney's fees and costs, including expert witness fees, for an action against a direct contractor.

5. Arguments in support

According to the California Conference of Carpenters, which is the sponsor of AB 2696:

This bill will close an inadvertent enforcement loophole resulting from the passage of AB 1701 (Thurmond, 2017, LC 218.7) and SB 727 (Leyva, 2021, LC 218.8). Clarifying amendments requested by California Building Industry Association have been accepted since 61-0 passage on the Assembly Floor.

AB 1701 and SB 727 established joint liability for General Contractors for wages violations committed by their subcontractors. That joint liability covers "any unpaid wage, fringe or other benefit payment or contribution, penalties or liquidated damages, and interest owed by the subcontractor on account of the performance of the labor." Passage of these statutes clearly recognized the need for greater wage theft enforcement. Consequently, the bills also provided direct enforcement authority for federally certified joint Labor-Management Committees (LMC's).

Unfortunately, unscrupulous General Contractors have found a way to avoid this enhanced LMC enforcement. They are increasingly self-performing work through the direct hire of workers to do a portion of the construction project that previously could or would have been subcontracted out. Since there is no subcontractor to share "joint" liability, our LMC's lose their authority to enforce violations directly on self-performing General Contractors.

AB 2696 will simply allow federally certified Labor-Management Committees to apply their enforcement authority directly to General Contractors who are violating already existing wage laws.

6. Arguments in opposition

According to the Housing Contractors of California, which opposes AB 2696:

Housing Contractors of California has long supported fair and effective enforcement against underground employers. These underground employers compete unfairly, and exploit the public and workers. We believe there are already sufficient safeguards for enforcement by state and local agencies. The employer workers' compensation surcharge to fund the California Division of Labor Standards Enforcement has increased from \$53 Million in 2010 to \$192 Million this year. This is sufficient funding for the state to provide effective enforcement activities.

[...]

The state does not need to deputize Labor-Management Cooperation Committees further than already authorized, to help with this enforcement.

SUPPORT

California Conference of Carpenters (sponsor)
Western States Regional Council of Carpenters

OPPOSITION

Associated General Contractors of California
Housing Contractors of California
Western Electrical Contractors Association

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 727 (Leyva, Ch. 338, Stats. 2021) extended direct contractor liability to penalties, liquidated damages, and interest owed to a subcontractor's employees for the performance of a private work, and established specified safe harbor provisions by which the contractor may not be liable.

AB 1701 (Thurmond, Ch. 804, Stats. 2017) established direct contractor liability for the wages, fringe benefits, or contributions of all workers on a private construction project, in the event that the subcontractor directly employing the workers fails to pay them.

AB 1897 (Hernández, Ch. 728, Stats. 2014) required a client employer, defined as "a business entity that obtains or is provided workers to perform labor within the usual course of business from a labor contractor," to share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor for the payment of wages and the failure to obtain valid workers' compensation coverage.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 4, Noes 0)

Assembly Floor (Ayes 69, Noes 0)

Assembly Appropriations Committee (Ayes 14, Noes 1)

Assembly Judiciary Committee (Ayes 11, Noes 1)

Assembly Labor and Employment Committee (Ayes 7, Noes 0)
