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Building a Defense Against AB 1701

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A contentious new law in California is reshaping the potential liability of builders for unpaid wage claims, and contractors must be prepared. AB 1701 applies to private construction contracts that are entered into on or after January 1, 2018. The law makes general contractors liable for unpaid wages or fringe benefits that a subcontractor may owe to any worker. Under the new law, the California Labor Commissioner, unions and joint labor management cooperation committees may all bring private actions up to one year after the project's date of completion against the general contractor to collect alleged unpaid wages and fringe benefits. Notably, the law allows prevailing plaintiffs to recover their attorneys' fees and costs, which will incentivize plaintiff's attorneys to troll for these types of claims. To add insult to injury, contractors who prevail against these claims may not recover their attorneys' fees.

It is important to note that the law allows general contractors to demand payroll records from their subcontractors and to withhold payments to those subcontractors if they cannot provide evidence of payment of all wages and fringe benefits that they owe to their workforce.

AB 1701 defies logic as it takes aim at a likely faultless party: essentially, the builder could end up paying a subcontractor twice if it does not take careful steps to curb the impacts of this new law. The bulk of these preventative measures start with the contract itself.

The most obvious measure that builders should take to avoid claims from aggrieved subcontractor employees is to avoid working with subcontractors that have shady reputations. Fortunately, the new law only applies to private contracts as general contractors have more flexibility in this regard than they would on public works projects. The same legal restrictions on bid selection do not apply. Thus, the subcontractor's reputation as an employer should factor in to the selection process along with the amount of the bid. The builder might get a low bid, but the costs could manifest themselves later on when they are hit with attorney's fees from a wage claim.

Next, builders need to carefully evaluate their subcontracts to ensure that they contain strong language that requires subcontractors to defend and indemnify the builder for any claims that the subcontractor's

agents or employees may bring based on their work under the contract. Additionally, ensure sub-subcontractors defend and indemnify subcontractors by requiring subcontractors to include the same provisions in the sub-subcontracts.

General contractors should also take advantage of their ability to demand payroll records and proof of payment before remitting payment to subcontractors and work that in to the subcontract. For example, the subcontract may require weekly or monthly certified payroll reports and also allow the builder to demand the information as it deems necessary. In turn, the contract should set forth a specific timeframe within which subcontractors must provide the information.

Subcontracts should also contain provisions the specifically allow the builder to hold back the amount of any disputed wage payments and the value of any claims that may be brought against them. Likewise, the subcontract should provide that the builder can withhold payment if the subcontractor does not comply with payroll reporting requirements.

Prudent builders already understand the importance of shifting as much risk as possible to their respective subcontractors. To the extent that your company does not already have a policy of requiring a bond on your subcontracts, now is the time to put one in place. Additionally, builders should evaluate their existing bond policies to make sure that they are not leaving out a substantial number of subcontractors with larger thresholds for bonding. For example, a subcontract for \$50,000 might not exceed your company's \$100,000 threshold to require a bond, but if that subcontractor's employees file a wage claim the attorneys' fees alone could exceed the cost of that subcontractor's scope of work. It is best to be as inclusive as possible.

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