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SB-727 Labor-related liabilities: direct contractor. (2021-2022)

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Senate Bill No. 727

CHAPTER 338

An act to amend Section 218.7 of, and to add Section 218.8 to, the Labor Code, relating to employment.

[Approved by Governor September 27, 2021. Filed with Secretary of State September 27, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

SB 727, Leyva. Labor-related liabilities: direct contractor.

Existing law requires, for contracts entered into on or after January 1, 2018, a direct contractor, as defined, making or taking a contract in the state 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 original contract.

Existing law limits the direct contractor's liability under those provisions to extend only to any unpaid wage, fringe or other benefit payment or contribution, including interest owed and provides that liability does not extend to penalties or liquidated damages.

This bill would extend, for contracts entered into on or after January 1, 2022, the direct contractor's liability to penalties, liquidated damages, and interest owed by the subcontractor on account of the performance of the labor, except as provided.

Existing law authorizes the Labor Commissioner to enforce against a direct contractor the liability for unpaid wages pursuant to specified provisions, or through a civil action, and limits the direct contractor's liability to unpaid wages, including any interest owed.

This bill would require the Labor Commissioner to notify, as specified, the direct contractor and subcontractor at any tier on a private works project at least 30 days prior to taking certain actions for the failure of a subcontractor on that private works project to pay the specified wage, fringe, or other benefit due to workers. The bill would remove, for contracts entered into on or after January 1, 2022, the limitation of liability.

Existing law requires, prior to commencement of an action against a direct contractor, a joint labor-management cooperation committee to provide the direct contractor and subcontractor that employed the wage claimant with at least 30 days' notice, as provided.

This bill would, for contracts entered into on or after January 1, 2022, require the notice to include the project name and name of the employer and provide that any liquidated damages awarded by the Labor Commissioner or the court shall be payable to the aggrieved employee. The bill would make conforming changes.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 218.7 of the Labor Code is amended to read:

218.7. (a) (1) For contracts entered into between January 1, 2018, and December 31, 2021, inclusive, a direct contractor making or taking a contract in the state for the erection, construction, alteration, or repair of a building, structure, or other private work, shall assume, and is 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.

(2) The direct contractor's liability under this section shall extend only to any unpaid wage, fringe or other benefit payment or contribution, including interest owed but shall not extend to penalties or liquidated damages.

(3) A direct contractor or any other person shall not evade, or commit any act that negates, the requirements of this section. This section does not prohibit a direct contractor or subcontractor at any tier from establishing by contract or enforcing any otherwise lawful remedies against a subcontractor it hires for liability created by the nonpayment of wages, fringe or other benefit payments, or contributions by that subcontractor or by a subcontractor at any tier working under that subcontractor.

(b) (1) The Labor Commissioner may enforce against a direct contractor the liability for unpaid wages created by subdivision (a) pursuant to Section 98 or 1197.1, or through a civil action. The direct contractor's liability shall be limited to unpaid wages, including any interest owed.

(2) A third party owed fringe or other benefit payments or contributions on a wage claimant's behalf may bring a civil action against a direct contractor to enforce the liability created by subdivision (a). The court shall award a prevailing plaintiff in such an action its reasonable attorney's fees and costs, including expert witness fees.

(3) A joint labor-management cooperation committee established pursuant to the federal Labor Management Cooperation Act of 1978 (29 U.S.C. Sec. 175a) may bring an action in any court of competent jurisdiction against a direct contractor or subcontractor at any tier for unpaid wages owed to a wage claimant by the direct contractor or subcontractor for the performance of private work, including unpaid wages owed by the direct contractor, pursuant to subdivision (a). The court shall award a prevailing plaintiff in such an action its reasonable attorney's fees and costs, including expert witness fees. Prior to commencement of an action against a direct contractor to enforce the liability created by subdivision (a), the committee shall provide the direct contractor and subcontractor that employed the wage claimant with at least 30 days' notice by first-class mail. The notice need only describe the general nature of the claim and shall not limit the liability of the direct contractor or preclude subsequent amendments of an action to encompass additional wage claimants employed by the subcontractor.

(4) No other party may bring an action against a direct contractor to enforce the liability created by subdivision (a).

(c) Unless otherwise provided by law, property of the direct contractor may be attached, after trial, for the payment of any judgment received pursuant to this section.

(d) An action brought pursuant to this section shall be filed within one year of the earliest of the following:

(1) Recordation of the notice of completion of the direct contract, pursuant to Section 8182 of the Civil Code.

(2) Recordation of a notice of cessation of the work covered by the direct contract, pursuant to Section 8188 of the Civil Code.

(3) Actual completion of the work covered by the direct contract.

(e) This section does not apply to work performed by an employee of the state, a special district, a city, a county, a city and county, or any political subdivision of the state.

(f) (1) Upon request by a direct contractor to a subcontractor, the subcontractor and any lower tier subcontractors under contract to the subcontractor shall provide payroll records, which, at a minimum, contain the information set forth in subdivision (a) of Section 226, and which are payroll records as contemplated by Section 1174, of its employees who are providing labor on a private work, which payroll records shall be marked or obliterated only to prevent disclosure of an individual's full social security number, but shall provide the last four digits of the social security number. The payroll records must contain information sufficient to apprise the requesting party of the subcontractor's payment status in making fringe or other benefit payments or contributions to a third party on the employee's behalf.

(2) Upon request of a direct contractor to a subcontractor, the subcontractor and any lower tier subcontractors under contract to the subcontractor shall provide the direct contractor award information that includes the project name, name and address of the subcontractor, contractor with whom the subcontractor is under contract, anticipated start date, duration, and estimated journeymen and apprentice hours, and contact information for its subcontractors on the project.

(3) A subcontractor's failure to comply with this subdivision shall not relieve a direct contractor from any of the obligations contained in this section.

(g) For purposes of this section, "direct contractor" and "subcontractor" have the same meanings as provided in Sections 8018 and 8046, respectively, of the Civil Code.

(h) Nothing in this section shall alter the owner's obligation to timely pay a direct contractor as set forth in Sections 8800 and 8812 of the Civil Code, or a direct contractor's obligation to timely pay a subcontractor as set forth in Section 7108.5 of the Business and Professions Code and Section 8814 of the Civil Code, or the penalties for failing to do so as set forth in Sections 8800 and 8818 of the Civil Code and Section 7108.5 of the Business and Professions Code, except that the direct contractor may withhold as "disputed" all sums owed if a subcontractor does not timely provide the information requested under paragraphs (1) and (2) of subdivision (f), until that information is provided.

(i) For any contract entered into on or after January 1, 2019, in order to withhold payments as disputed pursuant to subdivision (h), the direct contractor must specify, in its contract with the subcontractor, the specific documents and information that the direct contractor will require that the subcontractor provide under paragraphs (1) and (2) of subdivision (f). Subcontractors may include the same requirements in their contracts with lower tiered subcontractors and may withhold as disputed all sums owed if a lower tiered subcontractor does not provide the information requested under paragraphs (1) and (2) of subdivision (f), until that information is provided.

(j) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 2. Section 218.8 is added to the Labor Code, to read:

218.8. (a) (1) For contracts entered into on or after January 1, 2022, a direct contractor making or taking a contract in the state for the erection, construction, alteration, or repair of a building, structure, or other private work, shall assume, and is 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.

(2) Subject to paragraph (3), the direct contractor's liability under this section shall extend to 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.

(3) The direct contractor's liability under this section shall extend to penalties and liquidated damages only as follows:

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 on account of the worker's performance of labor on that project, the direct contractor of the project is not liable for any associated penalties or liquidated damages under paragraph (2) 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 shall monitor 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 which, at a minimum, contain the information set forth in subdivision (a) of Section 226, and which are payroll records as contemplated by Section 1174.

(B) Upon becoming aware of the failure of the subcontractor to pay the wage, fringe or other benefit payment or contribution to the employees or the labor trust fund, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the private construction project.

(C) Prior to making final payment to the subcontractor for work performed on the private construction project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the wage, fringe or other benefit payment or contribution due to the employees or the labor trust fund for all work performed on the private construction project.

(4) The Division of Labor Standards Enforcement shall notify the contractor and subcontractor on a private works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that private works project to pay the specified wage, fringe, or other benefit due to workers.

(5) A direct contractor or any other person shall not evade, or commit any act that negates, the requirements of this section. This section does not prohibit a direct contractor or subcontractor at any tier from establishing by contract or enforcing any otherwise lawful remedies against a subcontractor it hires for liability created by the nonpayment of wages, fringe or other

benefit payments, or contributions by that subcontractor or by a subcontractor at any tier working under that subcontractor, including liability for associated penalties and liquidated damages.

(b) (1) (A) The Labor Commissioner may enforce against a direct contractor the liability for unpaid wages, liquidated damages, interest, and penalties created by subdivision (a) pursuant to Section 98 or 1197.1, or through a civil action.

(B) The Labor Commissioner shall notify the direct contractor and subcontractor at any tier on a private works project at least 30 days prior to a hearing held on an administrative complaint pursuant to Section 98, prior to issuance of a citation pursuant to Section 1197.1, or prior to filing a civil action, for the failure of a subcontractor on that private works project to pay the specified wage, fringe, or other benefit due to workers. The notice need only describe the general nature of the claim, the project name or address, and the name of the employer. The notice shall not preclude subsequent amendments of an action to encompass additional contractors or wage claimants employed by the subcontractor.

(2) A third party owed fringe or other benefit payments or contributions on a wage claimant's behalf may bring a civil action against a direct contractor to enforce the liability for 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 pursuant to subdivision (a). The court shall award a prevailing plaintiff in such an action its reasonable attorney's fees and costs, including expert witness fees.

(3) A joint labor-management cooperation committee established pursuant to the federal Labor Management Cooperation Act of 1978 (29 U.S.C. Sec. 175a) may 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, penalties or liquidated damages, and interest owed by the subcontractor on account of the performance of the labor on a private work pursuant to subdivision (a). The court shall award a prevailing plaintiff in such an action its reasonable attorney's fees and costs, including expert witness fees. Prior to commencement of an action against a direct contractor to enforce the liability created by subdivision (a), the committee shall provide the direct contractor and subcontractor that employed the wage claimant with at least 30 days' notice by first-class mail. The notice need only describe the general nature of the claim, the project name and the name of the employer, and shall not limit the liability of the direct contractor or preclude subsequent amendments of an action to encompass additional wage claimants employed by the subcontractor.

(4) No other party may bring an action against a direct contractor to enforce the liability created by subdivision (a).

(5) Any liquidated damages awarded by the Labor Commissioner or the court shall be payable to the aggrieved employee.

(c) Unless otherwise provided by law, property of the direct contractor may be attached, after trial, for the payment of any judgment received pursuant to this section.

(d) An action brought pursuant to this section shall be filed within one year of the earliest of the following:

(1) Recordation of the notice of completion of the direct contract, pursuant to Section 8182 of the Civil Code.

(2) Recordation of a notice of cessation of the work covered by the direct contract, pursuant to Section 8188 of the Civil Code.

(3) Actual completion of the work covered by the direct contract.

(e) This section does not apply to work performed by an employee of the state, a special district, a city, a county, a city and county, or any political subdivision of the state.

(f) (1) Upon request by a direct contractor to a subcontractor, the subcontractor and any lower tier subcontractors under contract to the subcontractor shall provide payroll records, which, at a minimum, contain the information set forth in subdivision (a) of Section 226, and which are payroll records as contemplated by Section 1174, of its employees who are providing labor on a private work, which payroll records shall be marked or obliterated only to prevent disclosure of an individual's full social security number, but shall provide the last four digits of the social security number. The payroll records must contain information sufficient to apprise the requesting party of the subcontractor's payment status in making fringe or other benefit payments or contributions to a third party on the employee's behalf.

(2) Upon request of a direct contractor to a subcontractor, the subcontractor and any lower tier subcontractors under contract to the subcontractor shall provide the direct contractor award information that includes the project name, name and address of the subcontractor, the contractor with whom the subcontractor is under contract, anticipated start date, duration, and estimated journeymen and apprentice hours, and contact information for its subcontractors on the project.

(3) A subcontractor's failure to comply with this subdivision shall not relieve a direct contractor from any of the obligations contained in this section.

(g) For purposes of this section, "direct contractor" and "subcontractor" have the same meanings as provided in Sections 8018 and 8046, respectively, of the Civil Code.

(h) Nothing in this section shall alter the owner's obligation to timely pay a direct contractor as set forth in Sections 8800 and 8812 of the Civil Code, or a direct contractor's obligation to timely pay a subcontractor as set forth in Section 7108.5 of the Business and Professions Code and Section 8814 of the Civil Code, or the penalties for failing to do so as set forth in Sections 8800 and 8818 of the Civil Code and Section 7108.5 of the Business and Professions Code, except that the direct contractor may withhold as "disputed" all sums owed if a subcontractor does not timely provide the information requested under paragraphs (1) and (2) of subdivision (f), until that information is provided.

(i) For any contract entered into on or after January 1, 2022, in order to withhold payments as disputed pursuant to subdivision (h), the direct contractor must specify, in its contract with the subcontractor, the specific documents and information that the direct contractor will require that the subcontractor provide under paragraphs (1) and (2) of subdivision (f). Subcontractors may include the same requirements in their contracts with lower tiered subcontractors and may withhold as disputed all sums owed if a lower tiered subcontractor does not provide the information requested under paragraphs (1) and (2) of subdivision (f), until that information is provided.

(j) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.