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March 2024

Governor Proposes End to COVID Paid Sick Leave (But Other New Employer Obligations May be on the Way)

New York, the last state in the country still requiring employers to provide COVID-specific sick leave for employees, could end the practice in July. Governor Kathy Hochul's 2025 Executive Budget proposal includes language that would end the state's COVID Sick Leave on July 31, 2024.

Enacted at the start of the pandemic in March 2020, the COVID Sick Leave Law requires five (5) or fourteen (14) paid sick days (depending on employer size) during an employee's COVID isolation. Employees working for employers with less than 100 employees can subsequently take PFL/DBL benefits if their isolation period extends beyond their allotted COVID sick days. Unfortunately, this law did not come with a "sunset" date, which means it will remain in effect until such time as the NYS Legislature repeals it.

As the Governor's support memorandum notes, New York already has "nation-leading paid sick leave laws" for employees regardless of illness, and "as the federal COVID-19 state of emergency has concluded, it would be prudent for this COVID-19 sick leave initiative to conclude as well."

If the State Budget is passed with the Governor's repeal language left intact, employers' COVID leave obligations will fall more in line with other illnesses, such as the flu. Businesses are still required to provide paid leave for other illnesses under New York's *other* paid sick leave law, which requires up to 40 or 56 hours of paid sick leave per year, depending on employer size.

Other proposals in the Governor's Executive Budget which, if enacted, would have a significant impact on New York employers include:

Paid Prenatal Leave - Another significant proposal in the Governor's Budget would amend the NY Paid Family Leave Law to provide up to 40 hours of paid leave for pregnant employees per calendar year to attend prenatal healthcare appointments. This law would be the first of its kind in the nation. The leave would be in addition to the current allotment of 12 weeks of PFL or 26 weeks of disability leave. The benefits would be available in hourly increments, and employees would have up to 30 days following the leave to provide written proof of the need for the time off. If enacted, this law would take effect January 1, 2025.

Paid Breaks for Breast Milk Expression - Another "paid time off" proposal found in the Executive Budget is paid break time for employees to express breast milk in the workplace. New York already requires employers to provide unpaid break time for employees for this purpose. The Governor's proposal would amend the Labor Law to require paid breaks for up to 20 minutes. If passed, the law would take effect 60 days after enactment.

Increased Statutory DBL Benefits - The Governor's budget also contains a proposal to increase statutory disability benefits, which haven't been increased in 35 years. The proposal would incrementally increase the amount from the current \$170 per week maximum to two-thirds of the employee's average weekly wage capped at two-thirds of the Statewide Average Weekly Wage for the first 12 weeks of disability, and then capped at \$280 weekly for the remainder of the 26 weeks as follows:

- 2025, 2026, 2027: 50% of the AWW up to 50% of the SAWW
- 2028: 60% of the AWW up to 60% of the SAWW
- 2029: 67% of the AWW up to 67% of the SAWW

If enacted, the new rates would apply to all DBL policies issued or renewed on or after January 1, 2025.

NESCA Membership Meeting

March 14, 2024

Century House – 6:00 p.m.

- 6:00 Open Bar/Registration
- 6:30 Dinner: Herb Butter Steak Tips
- 7:15 Business Announcements
- 7:30 Program: "Northeast Construction Trades Workforce Coalition"

Presented by

Doug Ford, Curtis Lumber Co.

Pam Stott, Curtis Lumber Co.

Scott Lawler, LeChase Construction Services

Reception, Dinner, Tax & Gratuities - \$65



PRESIDENT'S MESSAGE

One of the most pressing issues in the construction industry today is the aging workforce. The more and more I discuss issues with company owners and management teams, what keeps them up at night is their aging workforce. Many have been blessed by loyal and hardworking employees for the last 30 or even 40 years and those people are almost impossible to replace. At a recent NESCA Board of Directors meeting, the Board unanimously agreed that the number one challenge being faced by construction businesses is finding good skilled labor. Therefore, at NESCA's March 14th membership meeting, we will hear a presentation from the founding members of the Northeast Construction Trades Workforce Coalition. The Coalition was formed to address the labor shortage in the construction industry. The Coalition, which includes participation by construction businesses, associations and school districts, is engaging with school districts and their students to help them understand the pathways into the construction industry. I encourage you to come to the March 14th meeting to hear

more about the activities of the Coalition and how your business can get involved.

At NESCA's February 8th membership event we held a construction industry mixer at Brown's Brewing Co. and it was a huge success. We had a record 240 NESCA members and representatives from the general contracting community attend. The food and atmosphere were outstanding.

NESCA will be hosting another great networking event on April 11th at our annual "Meet the Estimators/Purchasing Team" event at the Century House. We expect 30 or more general contractors will be represented at this event, which will provide an opportunity for NESCA members to visit with their estimating and purchasing staff. This event is always popular and very well attended so please mark your calendars to attend.

Don't forget to submit your entry form, which was sent to members in January, for a NESCA safety award. Our awards ceremony will be held on May 9th at the Century House.

In last month's Newsletter, I mentioned that NESCA's Young Professionals Committee has been working with our Education Committee to structure a series of professional development seminars specifically targeting NESCA, AGC and ECA young professionals. I'm pleased to announce that these professional development seminars are set to begin on April 2nd and will be held every two weeks through June 11th. Please be on the lookout for registration materials soon to come.

Since it's tax season for me, I'll use this platform to put out some recent industry news. I've fielded a lot of questions asking if I have seen more IRS audits on my clients. The answer is we have seen an uptick with some of our higher net income individuals. The IRS

seems to be concentrating on Schedule C and Schedule E losses as well as individuals claiming to be real estate professionals. Also, we expect to see a large number of Employee Retention Credit (ERC) recipients receiving audits or at least information requests to back up the credits received, so don't be surprised if you see those ERC audits showing up this winter.

Robert L. Kind, President

NESCA NEWSLETTER

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COUNSEL'S MESSAGE

In the construction industry, timely performance of the parties' contract responsibilities represents a critical component of a successful project. Unfortunately, there exist multiple circumstances during the contract relationship which can undermine the opportunity for parties to work as an integrated team. The contract formation is the first step in accomplishing that goal.

If one party retains superior bargaining power during the contract negotiation phase, it is not unusual to encounter egregious, unilateral, and patently unfair contract provisions which places one party at a significant disadvantage to the other.

It is not surprising that project schedule, preceding work activities, time duration and timing of work performance are critical elements of the subcontract. Combine this fact with one-sided subcontract provisions allowing a prime contractor to withhold large sums of contract funds due to projected, not actual, delay damages (for which the contract does

not allow a subcontractor to claim) and a recipe for financial disaster exists.

It is important to recognize that defenses to various schedule problems may exist, but it is likely that contract funds will be held, thereby placing a stranglehold on the ability to pay bills, wages, and benefits. It is highly likely that a dispute resolution proceeding will be required to recover contract funds owed. The subcontractor may financially be unable to sustain its business while all these events occur.

Analyzing and evaluating a proposed project schedule must be an integral part of subcontract discussions prior to commencing work. It is important to mitigate unilateral dictatorial schedule modifications.

Delete contract provisions authorizing directives to work out of sequence. Require that all precedent trade work be timely performed as scheduled, for the original scheduled time duration and time periods prior to agreeing your scope of work will be performed in accordance with the project schedule and be responsible for damages.

If the schedule slips it is critical the prime contractor be immediately placed on written notice, and job minutes should reflect a contract time extension is required and has been requested. If the owner or prime contractor retains responsibility for project delay, which is concurrent with the subcontractor's alleged delay, the prime contractor and owner are not entitled to damages.

It is also important to note, unless the contract is carefully scrutinized the prime contractor may incorporate contract provisions which remove defenses and benefits to which you would ordinarily be entitled.

The frequency of which prime contractors have used the project schedule as a weapon, both by requiring unreasonable performance times and punitive terms for non-performance, supports a recommendation that a thorough pre-contract analysis of a project schedule be undertaken by a skilled schedule consultant as part of contract negotiations, and language deleted from the subcontract granting "sole discretion" power to the prime contractor to implement schedule changes with or without time extension or compensation.

Walter G. Breakell, NESCA Legal Counsel

Governor Proposes to End Frequency of Pay Claims

Governor Kathy Hochul's 2025 Executive Budget proposal includes an amendment to the Labor Law that could put an end to pay frequency claims. Her proposed amendment would clarify that an employee is not entitled to liquidated damages for pay frequency violations "where the employee was paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly."

New York's Labor Law has long required "manual workers" to be paid on a weekly basis. Prior to 2019, frequency of payment claims against an employer were brought by the NYS Department of Labor and if DOL found that an employer violated the frequency of pay law, it typically issued a civil penalty ranging from \$1,000 to \$3,000. That changed after a 2019 Appellate Division, First Department decision which found that a private cause of action for employees existed in frequency of pay violations, and employers were liable for liquidated damages when manual workers were paid on other than a weekly basis. This led to a flood of class action litigation by employees and former employees for their "late" wages paid, that is, wages that were paid in full but on a bi-weekly or semi-monthly basis. If passed, this legislation will take effect 60 days after enactment.

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Contact: Vinnie Greco

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Evolution Construction Services, LLC – 5 Years

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Thermal Foams Syracuse – 10 Years

Total Facility Solutions – 10 Years

CKM Electrical Services, Inc. – 15 Years

Syrstone – 15 Years

B & L Control Service, Inc. – 35 Years

D and M Tile Corporation – 45 Years

Calendar of Events

Feb. 29 & March 1, 2024

OSHA 10-Hour Course

116 Railroad Ave., Albany, 9 am

March 6, 2024

Seminar: The Last Planner System
Building Industry Center, 9 am

March 7, 2024

*STP Unit #2 Begins:
Communication*

Building Industry Center, 6 pm

March 14, 2024

Board of Directors Meeting
Century House, Latham, 5 pm

March 14, 2024

NESCA Membership Meeting
Century House, Latham, 6 pm

April 4, 2024

Board of Directors Meeting
Century House, Latham, 6 pm

April 11, 2024

Meet the Estimators Event
Century House, Latham 6 pm

Question of the Month

Q. At a recent NESCA meeting, you informed us that retainage on contracts was to be reduced to 5%. When was that effective? Is there a contract amount for which this is applicable?

A. The new law amended Section 756-c of the NYS General Business Law. The law applies to private commercial/industrial construction contracts where the aggregate cost of the construction project including all labor, services, materials and equipment to be furnished, equals or exceeds one hundred fifty thousand dollars (\$150,000). The law does not apply to public work contracts nor to most residential projects.

The amendment limited the amount of retainage a private owner may withhold from the prime contractor to no more than five percent (5%). Previously, the law provided that the owner could hold a “reasonable amount” of retainage, but “reasonable amount” was not defined in the law. The amendment will also benefit subcontractors because Section 756-c prohibits prime contractors from withholding a higher percentage of retainage from their subcontractors than the owner is withholding from the prime contractor.

The amendment took effect on November 17, 2023 and applies to prime contracts entered into on or after that date.

Mark Your Calendar!

2024 Meet the Estimators

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*Meet and Visit with the Estimators/Purchasing Teams from the
Leading General Contractors in Northeastern New York*

April 11, 2024 – 6:00 pm

Century House, Latham



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