



Two ESSA Bills Pass – Will be Sent to Governor

Two Empire State Subcontractors Association (ESSA) program bills have been passed in both houses of the Legislature, and will be sent to Governor Cuomo for his consideration.

The first bill awaiting action by the Governor is ESSA's "Lien on Retainage" bill, which will allow subcontractors on private projects to effectively reopen their lien rights and file a lien for unpaid retainage up to 90 days after the retainage was due to be released. This bill passed in the Assembly on May 3rd, and with about a week to go in the 2011 legislative session, finally passed in the Senate on June 13th. Currently, subcontractors performing work on most private construction projects have up to eight months after the final performance of their work or the final furnishing of materials to file a notice of lien for unpaid amounts due. Unfortunately, for many subcontractors, particularly subcontractors who complete their work in the early stages of a project (excavators, steel erectors, etc.), the 8-month statute of limitations for filing a notice of lien often expires, not only before the construction project has been completed, but long before the payment of retainage has become due under their subcontracts. This inequity will be cured by allowing subcontractors a reasonable period of time to file a lien for unpaid retainage.

The other bill on its way to the Governor was passed in the Senate on May 18th and in the Assembly on June 6th, and deals with subcontractor and supplier payment bond claims on public projects. This bill will clarify that the statute of limitations for initiating public work payment bond claims will begin on the date the project is completed and accepted by the public owner. The need for clarification arises from several recent court decisions and the interpretation of Section 137(4)(b) of the State Finance Law regarding the commencement date of the statute of limitations for commencing an action on a Section 137 payment bond. These court decisions have caused considerable confusion in the construction industry since they conflict with the language currently contained in the statute. Subcontractors and suppliers seeking to legitimately exercise their rights to file a claim against a payment bond are now uncertain as to when the

statute of limitations begins and ends. This bill will clear up the confusion, and will also make the statute of limitations trigger date for filing a claim against the payment bond consistent with that of filing a public improvement lien under Section 12 of the Lien Law.

In addition to these two bills, a third ESSA bill which would establish a 10% threshold on the amount of pending change order or change directive work that can be imposed upon a contractor or subcontractor without processing same as billable change orders, was also passed in the Senate on June 13th. As of this writing, the Assembly had not taken action on this legislation.

IRS Issues Final Regulations on 3% Tax Withholding Law

On May 6th the Internal Revenue Service (IRS) issued final regulations for the implementation of the 3% withholding law. This law will require federal, state, and larger local governments (making \$100,000,000 or more in payments for property or services annually) to deduct a 3% withholding tax from payments to contractors. Government entities mandated to withhold 3% of the contract value from contractors will be required to remit these funds to the IRS and to furnish each contractor with a 1099-MISC statement no later than January 31st of the year following the calendar year in which the payment subject to the withholding was made. While payments made by prime contractors to subcontractors are not subject to the withholding requirements under the regulations, it is likely that prime contractors will contractually seek to pass the withholding down to their subcontractors and suppliers.

One small glimmer of good news is that the regulations delay the effective date by one year, so the withholding will not apply to payments made until after December 31, 2012. Also, the regulations will not apply to payments under a contract existing on December 31, 2012, unless the contract is materially modified after December 31, 2012. Notwithstanding the delay in the implementation date, NESCA and hundreds of other business organizations will continue to fight for full repeal of this onerous law.



PRESIDENT'S MESSAGE

As NESCA begins a new year, I'd like to thank the membership for providing me the opportunity to serve during the next 12 months as president of the association. I pledge to do everything I can to promote the association and to work in the best interests of subcontractors and suppliers doing business in northeastern New York. I hope by next June I'll be able to devote my final Newsletter message to highlighting many new accomplishments for NESCA and its members.

As it turns out, two new accomplishments may be realized very soon. The lead article on the front page of this month's Newsletter reports that two pieces of legislation drafted and lobbied by NESCA's state affiliate, the Empire State Subcontractors Association, have been passed in both houses of the State Legislature and will be sent to Governor Cuomo for his consideration. These bills are similar in that they both seek to provide increased payment security for subcontractors and suppliers (one dealing with liens on

private projects and the other dealing with payment bonds on public projects), and both will significantly benefit the members of NESCA. I am hopeful that the Governor will sign both bills into law, but we're going to need your help to make sure that happens. After the bills are delivered to the Governor, he will have ten days to either sign or veto them. When they become 10-day bills, NESCA will provide members with sample support letters, and we ask that all members take the time to send your letters of support to the Governor. Remember, NESCA has long proved that while our lobbying activities may lack in financial resources, we can more than make up for that limitation through our large membership numbers. The receipt of hundreds of support letters will have a tremendous impact on the Governor's decision, so please send them out when called upon to do so.

And that gets me to the next issue, the issue of continued membership growth and development. NESCA enters our new fiscal year with 521 member companies, and while the size of our membership is envied by many other subcontractor organizations throughout the country, there are still many northeastern New York subcontractors and suppliers who are not members of our association. While NESCA has had many significant accomplishments over the years, clearly our effectiveness and clout as an organization will only increase as we add to our numbers. The more members NESCA has, the more strength and influence we will have as an advocate for subcontractors and suppliers. Simply, increased membership will improve the odds that we will get even more accomplished in the future. So

please, consider recruiting a new member this year. If for no other reason, do it so we can get more subcontractors and suppliers helping to pull the wagon and less riding in it for free. After all, many of our activities and accomplishments benefit not just NESCA members, but ALL subcontractors and suppliers doing business in New York State.

Mike O'Connor, President

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Right to Stop Work or Terminate the Subcontract May Be Subject to Strict Notice Requirements

On May 24, 2011, the Supreme Court of New York, New York County decided *Zip Systems, Inc. v. Lettire Construction Corp.* In this case Zip Systems, Inc., Plaintiff ("Zip"), as subcontractor entered into a contract with Lettire Construction Corp ("Lettire"), as contractor, to install elevators at a project located in the Bronx, New York in exchange for payment of \$268,000. Zip claimed that it performed its work under the subcontract. Lettire defaulted on its payment obligations and a balance in the amount of \$34,383 was due.

During the course of construction, Lettire made late payments to Zip, and Zip, contending that Lettire was in default of the contract, stopped work on the project in accordance with Section 4.7.1 of the subcontract which authorized work stoppage based on nonpayment, and Section 7.11 which authorized the termination of the subcontract for nonpayment. Section 4.7.1 provided:

"If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to any other available remedies, upon seven additional days' written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate adjustment be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay and remobilization."

The Court found that two letters sent by Zip to Lettire and claimed by Zip to have met the notice requirements of 4.7.1 were insufficient. The first letter made no mention of the intention to stop work and the second letter accompanied the work stoppage rather than preceding it by seven days.

The Court held that Zip also failed to terminate the Contract pursuant to Section 7.1.1 which provides:

"the Subcontractor may terminate the Subcontract for the same reasons and under the same circumstances and procedures with respect to the Contractor as the Contractor may terminate with respect to the Owner under the Prime Contractor for nonpayment of monies due under this Subcontract for 60 days or longer. In the event of such termination by the Subcontractor for any reason which is not the fault of the Subcontractor, Sub-subcontractors or their

agents or employees or other persons performing portions of the Work under contract with the Subcontractor, the Subcontractor shall be entitled to recover from the Contractor payment for Work executed and for proven loss with respect to material, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages."

Zip contended that it was terminating the contract for nonpayment of amounts due to the Subcontractor under this subcontract for 60 days or longer. The Court, however, held that Zip did not do so in accordance with the 60-day requirement.

This case exemplifies the importance of complying with strict notice requirements that are included within the right to stop work or termination provisions of the subcontract. It is imperative that Subcontractors, in order to protect their right to stop work or to terminate the contract, comply with strict notice requirements that are conditions precedent to the right to stop work and terminate the contract.

Terence J. Burke, NESCA Legal Counsel

New Smart Phone App Empowers Workers to Challenge Hours

On May 9th, the U.S. Department of Labor announced the launch of its first application for smart phones – a timesheet to help employees independently track the hours they work and determine the wages they are owed. Available in English and Spanish, employees can track regular work hours, break time and overtime hours.

The new technology is significant because, instead of relying on their employers' records, workers can now keep their own records. This information could prove invaluable during a Wage and Hour Division investigation if an employer has failed to maintain accurate employment records.

The free app is currently compatible with the iPhone and iPod Touch. The Labor Department plans to release apps compatible with other smart phone platforms, such as Android and BlackBerry. Future releases will contain other features not currently provided for tracking tips, commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials and pay for regular days of rest. For workers without a smart phone, the Wage and Hour Division has a printable work hours calendar in English and Spanish to track rate of pay, work start and stop times, and arrival and departure times.

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A. Paro Construction, LLC
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Contact: Bill Paro

The Reis Group
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Contact: Lou Casciaro

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Contact: Ed Rosen

Question of the Month

Q. I've heard there is a new notice that subcontractors are required to post on all jobsites in New York called the "Fair Play Act" poster. What's this all about?

A. Last August, former Governor David Patterson signed the "New York State Construction Industry Fair Play Act". The Fair Play Act established a new Article 25-B of the NYS Labor Law, and is intended to curb employee misclassification fraud in the construction industry and strengthen the State's authority to crack down on the misclassification of employees as independent contractors. One of the requirements of the Fair Play Act is that all contractors and subcontractors must post on all jobsites a statement that describes the responsibility of independent contractors to pay taxes required by state and federal law, and the rights of employees to workers' compensation, unemployment benefits, minimum wage, overtime and other federal and state workplace protections. The statement must also include information on protections against retaliation and the penalties if the contractor fails to properly classify an individual as an employee. According to Carmine Ruberto, Director of the Division of Labor Standards at the State Department of Labor, there has been a significantly high non-compliance rate with this new posting requirement, and DOL has been citing contractors and subcontractors for failing to post the notice on their jobsites. NESCA Members are reminded that contractors and subcontractors who violate the notice provisions are subject to a civil penalty of up to \$1,500 for a first violation, and up to \$5,000 for a subsequent violation within a 5-year period. Members may obtain a copy of the Fair Play Act notice on the Department of Labor's website at www.labor.ny.gov/formsdocs/ui/IA999.pdf.

Calendar of Events

July 28, 2011

NESCA Day at the Races
Saratoga Race Course, 11 am

August 4, 2011

Board of Directors Meeting
Century House, Latham, 6 pm

September 1, 2011

Board of Directors Meeting
Century House, Latham, 6 pm

September 12, 2011

27th Annual Golf Outing
Shaker Ridge Country Club, 11 am

OSHA Launches Recordkeeping Assistance Website

Recently, the Occupational Safety and Health Administration (OSHA) launched a website to assist employers in fulfilling their recordkeeping and reporting obligations. The OSHA Recordkeeping Advisor is intended to help employers determine:

- Whether an injury or illness (or related event) is work-related
- Whether an event or exposure at home or on travel is work-related
- Whether an exception applies to the injury or illness
- Whether a work-related injury or illness needs to be recorded
- Which provisions of the regulations apply when recording a work-related case

The tool is web-based and interactive, however, any information provided by employers while using the tool is not saved by or sent to OSHA. The OSHA Recordkeeping Advisor can be accessed at www.dol.gov/elaws/osharecordkeeping.htm.

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