NESCA Northeastern Subcontractors Association
NEWSLETTER

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# 5% Retainage Clarification Passed by Senate/Assembly

Legislation pursued by NESCA and its state affiliate, the Empire State Subcontractors Association, has been passed by both houses of the NYS Legislature and will be sent to Governor Hochul for her consideration. The bill, sponsored by Senator Christopher Ryan (Syracuse) and Assemblyperson Pamela Hunter (Syracuse), was passed in the Assembly on May 22nd, and followed with passage in the Senate on June 11th.

If signed into law by the Governor, this legislation will clarify the legislative intent of Chapter 657 Laws of 2023. Chapter 657 was signed into law by Governor Hochul in 2023 and limited the withholding of retainage by owners of private commercial construction projects valued at more than $150,000 to no more than five percent (5%) of the contract sum. Unfortunately, due to language found in Section 756-a of the General Business Law, some owners and their attorneys have claimed that owners may continue to withhold retainage in amounts greater than five percent by virtue of provisions contained in the owner/contractor contract. They have interpreted the law to mean that unless a particular contractual provision is specifically prohibited in the "void and unenforceable" provisions found in Section 757 of the General Business Law, it can be superseded by the contract.

NESCA and ESSA believe the legislative intent of Chapter 657 was to limit retainage on private commercial projects to no more than five percent. The recently passed legislation will clarify that withheld retainage is indeed limited to no more than five percent and this limitation may not be superseded via the contract. Further, because the law prohibits a prime contractor from withholding a higher percentage of retainage from subcontractors than the owner is withholding from the contractor, the 5% limitation will flow down to subcontractors.

It has long been NESCA's position that excessive retainage financially penalizes all contractors and subcontractors regardless of performance, and private owners are notoriously slow in paying it back. In many cases, retainage is withheld by owners for up to six months or more after project completion. Retainage can also be abused by owners who use retained funds as leverage to induce contractors and subcontractors to accept a reduction in the amount of their final payment or to resolve claims or change orders for extra work. New and emerging construction businesses owned by minorities and women are especially hurt by the withholding of excessive retainage.

It is worth noting that a principal problem with retainage is that it is often based upon a faulty premise. That is, retainage should not be used as a warranty by another name. It is the contractor's/subcontractor's contractual warranty and manufacturers' warranties that are intended to survive contract completion. Retainage, on the other hand, is a mechanism to assure performance during the period of the contractor's or the subcontractor's work. Curiously, the withholding of retainage isn't even the most effective way to assure performance. The most effective option to induce performance or correction of faulty work is to withhold the progress payment due the contractor or subcontractor until the specific performance problems are remedied.

Retainage represents money that has been earned by the contractor or subcontractor but is not released until project completion or later. Retainage essentially requires that contractors and subcontractors incur the expense of financing a portion of the project, and the practice has persisted because it remains a form of interest-free financing for an owner. There is obviously a cost to this which prudent contractors and subcontractors price into their bids.

As more owners, both public and private, have discovered the hidden cost and relative ineffectiveness of holding excessive amounts of retainage, the trend in the construction industry nationwide has been toward reducing, eliminating or using alternatives to retainage. For example, in 2014 the State of Massachusetts enacted legislation that limited retainage on private commercial construction projects to no more than 5%. On public projects here in New York, both the Department of Transportation and the Thruway Authority have adopted zero retainage policies, and the federal government, has long had a policy of withholding no retainage.

It is NESCA's position that limiting retainage on private commercial projects to no more than 5% is a reasonable approach and will relieve contractors and subcontractors from a significant financial burden. NESCA and ESSA will now focus attention on the Governor's office and will urge Governor Hochul to sign this legislation.

## PRESIDENT'S MESSAGE

Greetings all! As I take on the role of the 2025-2026 NESCA President, I would like to thank all the members who have supported me with this honor and I in turn will do my best to support this organization. In addition to all the members, I would also like to thank my fellow colleagues on the Board and the entire NESCA staff for all their encouragement. Former NESCA President, Bryan Berry, has done a great job and I am grateful for his service and his friendship.

Sitting on the Board for the last several years has been a rewarding as well as an educational experience for me and has afforded me the opportunity to meet some great people along the way. It is interesting how we have found so much common ground. Even though we are people and companies from different backgrounds and markets, we wrestle with the same type of problems along with reaping the rewards for running a business. I am reminded that we all put our pants on one leg at a time! NESCA has provided many of us with valuable business guidance to help us on our professional journey.

I look forward to working for NESCA and my fellow members over the next year and hope to meet more of you at the upcoming functions. We encourage you to utilize the many services NESCA offers, including the free lien filing service. Opportunity awaits you at networking events such as the annual Trade Show, Young Professionals Mixers, Meet the Estimators as well as our dinner meetings.

I hope to see you all soon.

***Joe Jerkowski, President***

## DBE Program Faces Major Overhaul

Attorneys for the U.S. Department of Transportation have called the agency's disadvantaged business enterprise (DBE) program "unconstitutional" and have asked a judge to block it from setting DBE contract goals as part of a proposed settlement with two contractors suing over the program.

In *Mid-America Milling Co. LLC v. U.S. DOT*, two Indiana-based non-DBE firms challenged the constitutionality of the program's use of race and sex-based presumptions of social and economic disadvantage to determine DBE eligibility. On May 28, 2025, the DOT sided with the plaintiffs in filing a joint motion seeking to resolve the case by having the court issue a permanent injunction on the program's use of the presumption, stipulating that the presumption is unconstitutional under the Fifth Amendment's due process clause.

The plaintiffs and DOT jointly asked the court to enter a consent order resolving the case. While the court has not yet ruled on the motion, the proposed settlement has the potential to upend the DBE program and mark a major shift in how the program operates. While the DBE program is unlikely to be eliminated altogether, DOT could revise the program to eliminate race and sex-based presumptions and base eligibility on an individual showing of social and economic disadvantage.


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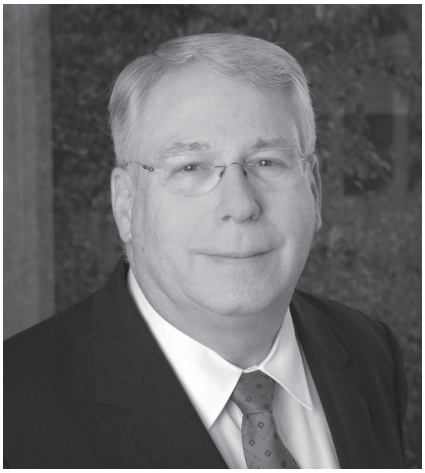

## COUNSEL'S MESSAGE

Since its enactment, the membership has been provided a great deal of information regarding the provisions of New York State's Wage Theft Act from NESCA.

The NY statute holds prime contractors responsible for the non-payment of wages and benefits by its subcontractors regardless of whether the subcontractor received its contract funds by the prime contractor or whether the subcontractor has sought relief under Bankruptcy Law.

As a result of this statute, many prime contractors began requiring evidence of subcontractor's payment of their wages and benefits by mandating furnishment of certified payrolls regardless of whether the project was public or private.

A recent Federal Court decision out of the Southern District of New York has mitigated the impact of the NYS Wage Theft Act on prime contractors.

The court held that any attempt to recover unpaid retirement benefits subject to the Federal Employee Retirement Income Security Act {ERISA) must be undertaken in Federal court against the employer responsible for those payments.

This decision provides some relief to prime contractors from liability resulting from its subcontractor's failure to pay retirement benefits of its employees to retirement funds under a collective bargaining agreement or retirement plan established by a subcontractor employer.

It is emphasized this decision **applies only to non-payment of retirement benefit funds** under the Federal mandate that enforcement of ERISA remains in Federal Court against a responsible entity established by Federal Law.

The NYS Wage Theft Act allocating payment liability for unpaid wages of a subcontractor to the prime contractor when the subcontractor undergoes a financial failure or otherwise fails to pay their employee wages is still enforceable in New York State under New York Law.

***Walter G. Breakell, NESCA Legal Counsel***

## Congressman Langworthy Introduces Scaffold Law Reform

Congressman Nick Langworthy (NY-23) has introduced the Infrastructure Expansion Act, legislation that would exempt federally funded or federally permitted projects in New York from the State's infamous Scaffold Law. If successful, the benefits of his bill will be felt across New York State.

The 140-year-old statute (sections 240 & 241 NYS Labor Law) found only in New York, imposes "absolute liability" on property owners and prime contractors for gravity-related injuries on construction sites, regardless of who's at fault. If a worker falls or is hit by a falling object, the owner and contractor are fully liable, even if the worker was clearly negligent. No other state has such a law. All other states use comparative or contributory negligence standards, which assign responsibility based on facts.

Scaffold Law claims regularly lead to inflated settlements, even in extreme cases where a worker was intoxicated or disregarded safety rules, which has led to skyrocketing insurance premiums, a hostile legal environment, and construction costs 5% to 10% higher than the national average. Across the state, these added costs make it harder to build schools, hospitals, infrastructure, and affordable housing. The Scaffold Law has also resulted in significant fraud as staged construction accident lawsuits have flooded the courts. This situation was recently documented in an ABC News national story on construction and legal fraud occurring in New York State, and particularly in New York City, due to the Scaffold Law.

Congressman Langworthy's bill would preclude state courts from applying absolute liability on any project "that receives federal financial assistance, benefits from federal tax incentives, or is subject to federal permitting requirements." The bill would direct claims arising from such projects to federal court, where judges and juries would apply the more common standard of contributory negligence, essentially weighing the extent to which plaintiffs are responsible for their own injuries.

This protection would make federal projects across the state – from transit improvements and bridge maintenance to flood mitigation and housing – more affordable. Ideally, the bill's passage would cause New York to do away with the Scaffold Law altogether.

## Welcome New Members

**RMB Heating & Cooling**
1442 Fern Avenue
Schenectady, NY 12306
518-875-9995
sue@rmbheatingcooling.com
Contact: Susan Brown

**Decker's Land Solutions**
1632 Main St
Pattersonville, NY 12137
518-779-5543
office@deckerslandsolutions.com
Contact: Nick Decker

## Calendar of Events

**July 24, 2025**
*NESCA Day at the Races*
Saratoga Race Course, 11 am

**August 7, 2025**
*Board of Directors Meeting*
Century House, Latham, 6 pm

**September 4, 2025**
*Board of Directors Meeting*
Century House, Latham, 6 pm

**September 8, 2025**
*NESCA Annual Golf Outing*
Colonie Country Club

**October 2, 2025**
*Board of Directors Meeting*
Century House, Latham, 6 pm

**October 9, 2025**
*NESCA Annual Trade Show*
*Century House, Latham, 4 pm*

## NESCA Membership Milestone Anniversaries

**Maeda Construction, Inc. – 5 Years**
**M.V.P. Construction Co., Inc. – 30 Years**
**Dutchess Overhead Doors, Inc. – 35 Years**
**Thorpe Electric Supply, Inc. – 40 Years**

## Legislature Advances Bill Requiring Prevailing Wages on Custom Fabrication

On the final day of the 2025 Legislative session, the NYS Assembly passed legislation that, if signed by Governor Hochul, will greatly expand the application of Section 220 of the Labor Law in New York State by including off-site custom fabrication as public work for purposes of payment of the prevailing wage.

Specifically, this legislation will require payment of the prevailing rate of wage for the county in which the public works project is situated for "the fabrication of exterior or interior wall panel systems, woodwork, electrical, plumbing, heating, cooling, ventilation or exhaust duct systems, rebar cages, and mechanical insulation solely and specifically designed and engineered for installation in the construction, repair or renovation of a building which is the subject of a contract to which the state, a department of the state, a board or officer in the state, a municipal corporation, a public benefit corporation or a commission appointed pursuant to law is a party".

NESCA is opposed to this legislation and will urge a veto from the Governor. It is flawed on many accounts and would result in a significant increase in costs to public construction projects. Members of NESCA who maintain fabrication shops have indicated their cost of fabrication will increase by 25% or more if this bill is enacted. This cost increase could be even more pronounced if materials fabricated in an upstate shop are shipped to a jobsite in the City of New York where the prevailing wage rates are significantly higher than upstate.

Further, many contractors and subcontractors, including those signatory to agreements with various building trades, operate fabrication shops which are essentially manufacturing plants. They may fabricate materials for their own account as well as for sale to other contractors for both public and private projects. It would be impractical, and perhaps impossible, to operate a modern fabrication/manufacturing plant and be required to maintain multiple pay rates based on the location where the fabricated material will be incorporated into a project. This bill will interfere with long-standing business practices and efficiencies within the construction marketplace and will be impossible to enforce. Also, imposing New York State's prevailing wage law on fabrication work performed in another state or even another country would likely create many complex legal issues.

In the coming weeks and months, NESCA will vigorously lobby for a veto of this legislation which will create a significant financial burden on the construction industry and taxpayers and will interfere with well-established construction industry practices.