CAN A GENERAL CONTRACTOR GET MORE THAN IT BARGAINED FOR?

The Risk of Subcontractors' Wage Law Violations

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In the wake of any disaster, be it a hurricane or a single house fire, one of the most immediate challenges is that of rebuilding. In normal times, there is more than enough capacity in the local construction industry to accommodate recovery from an event that affects a few houses or buildings. Federally declared disasters, on the other hand, can simply overwhelm local contractors. The construction industry depends on a number of resources in order to operate, available labor, available materials, housing for a workforce, an infrastructure of roads and utilities, functioning governmental agencies, a functioning local economy, population, and so on. After a disaster, some or all of these resources can be dramatically reduced or even absent.

The availability of labor is of particular importance after a disaster. The mandatory evacuation of New Orleans in advance of Katrina, coupled with the flooding and rescue efforts in Katrina's wake, left New Orleans with practically no population at all to begin a rebuilding process. Rather, the people who would rebuild New Orleans had to travel to New Orleans. Many were evacuees attempting to return to the area, but – especially in the initial days and weeks – much of the workforce came from outside of the area. These transplants came alone or in groups, often coordinated by contractors and subcontractors who wanted to participate in the rebuilding effort. And with them came a number of legal issues: immigration, licensing, wage and hour laws, to name a few.

Moreover, while Katrina was unique in the scope of its destruction and disruption, it was by no means unique in attracting workers to a disaster-affected region. This paper, then, is intended to present a basic primer on some of the construction industry worker-related issues that proved to be most common in the wake of disasters.

I. Introduction

In a typical reconstruction effort, the entity in charge of the project (the general contractor) usually does not employ the workers directly. From a single house to a high-rise building or an industrial plant, general contractors use subcontractors to perform many, if not all, aspects of a particular project. While a project manager might supervise the activities of subcontractors, ultimately, subcontractors perform most of the actual work. General contractors focus on doing what they do best – project management, coordination of work, and dealing with the owner. Moreover, with respect to the individual workers on a project, the general contractor can rely on subcontractors to locate them, hire and fire them, pay them, and handle other human resource functions. The location of workers can be particularly tricky following a natural disaster, where large segments of the worker pool may be displaced. Unfortunately, the distance between the general contractor and the workers, when coupled with the chaos of a post-disaster environment, can lead to conditions where violations of labor laws may occur. Sometimes, whether as the result of specific laws, or because of creative arguments raised by the plaintiffs' bar, agencies and courts look to general contractors to remedy those violations.

II. Outline of the Problem

When it comes to the construction work itself, no one would suggest that a subcontractor's quality of work is not generally supervised and ensured by the general contractor. If standards and tolerances are not met, the owner (or architect) will look to the general contractor and expect the problems remedied. In turn, the general contractor will direct the subcontractor to fix the problem or coordinate repair by another. But, what if the subcontractor's misconduct is not in the quality of work and instead in its own internal business practices, such as its payment of wages to its employees? The answer to that question is less clear and depends on the nature of the project and the specific statutory provision alleged to have been violated.

III. Wage and Hour Issues

There are a series of wage and hour laws that are impacted by the unique situations presented following a disaster. They include: (1) the Fair Labor Standards Act,[1] (2) the Davis-Bacon[2] and Service Contract Acts,[3] and (3) the Contract Work Safety and Standards Act.[4] Each is discussed below.

A. The Fair Labor Standards Act ("FLSA")

The FLSA provides several protections to workers, the most notable being the establishment of a minimum wage and the requirement that overtime be paid for all hours

[1] 29 U.S.C. §§ 201-19.

[2] 40 U.S.C. §§ 3141-48.

[3] 41 U.S.C. §§ 351-58. And, of course, many states have their own wage laws that should be considered.

[4] 40 U.S.C. §§ 3701-08.

worked in excess of forty in a week. Current wage scales mean that minimum wage concerns rarely arise on a jobsite,[5] but payment of overtime can often be a thorny issue.

1. Rights under the FLSA

Non-exempt workers (generally, workers other than executive, professional, or managerial)[6] are required to be paid "time and a half" for every hour worked over forty in a week.[7] Failure to make such payments exposes the employer not only to make the proper payment but also to a penalty equal to the amount not paid, plus attorneys' fees and costs.[8] Despite this exposure, particularly in post-disaster environments where large labor forces may be gathered from outside of the affected areas, unscrupulous subcontractors may pay workers straight time for all hours worked, while withholding overtime wages that are otherwise owed. Not only does this misconduct violate the FLSA, but state wage laws can also be implicated.

Notably, the artificial designation of a worker as an independent contractor – a common practice seen after disasters – does not obviate the need to pay overtime. Courts will look directly past such labels and focus on the true nature of the relationship with the worker. Furthermore, the FLSA does not permit overtime requirements to be circumvented by paying workers on a day or piecemeal rate. Non-exempt employees

[5] On May 25, 2007, the President signed into law raises to the current minimum wage. Although current wage scales on construction jobs are likely still higher than the increases, one must be cognizant of this issue as well.

[6] An analysis of the FLSA's exemptions from the overtime requirement is beyond the scope of this article.

[7] 29 U.S.C. § 207(a).

[8] 29 U.S.C. § 216(b).

working more than forty hours in a week are entitled to "time and a half" for such hours – regardless of the labels and wage agreements manufactured by the employer.

2. The Joint Employer Problem

The main issue facing general contractors – who are often the target of a lawsuit or investigation under the FLSA is the question of whether they can be deemed to be "employers" under the FLSA, a label that would imply that they could be found liable for overtime wages owed to subcontractors' employees, as well as statutory penalties. An "employer" is "any person acting directly or indirectly in the interest of an employee in relation to an employer. …"[9] Thus, the term "employer" is not traditionally defined to include one's direct employer alone. Instead, any entity for whom the worker works is a potential "employer" under the FLSA.

In light of the above, courts review several factors in determining whether or not an individual is considered the "employer" of a worker: (1) who provided the equipment the employee used; (2) whether the employee was economically beholden to the putative employer; (3) the level of skill employed by the workers; (4) whether the putative employer has an ownership interest in the subcontractor; (5) the degree to which the employee's efforts are supervised by the putative employer; (6) whether the employee worked predominantly for the putative employer; (7) who set the terms and conditions of the employment; and (8) who maintained the employment records regarding the employee.[10] In addition, courts consider the historical practice in the industry –

[9] 29 U.S.C. § 203(d).

[10] *Zheng v. Liberty Apparel Company, Inc.*, 355 F.3d 61, 72 (2nd Cir. 2003); *Morcon v. Air France*, 343 F.3d 1179, 1188 (9th Cir. 2003); *Watson v. Graves*, 909 F.2d 1549, 1553 (5th Cir. 1990).

obviously a significant factor in the construction industry due to its traditional use of subcontractors.[11]

Traditionally, general contractors have not been considered the "employer" of a subcontractor's workforce for purposes of the FLSA.[12] This result is based on historical use of subcontractors in the construction industry, which implies that the use of subcontractors is no mere subterfuge, as well as an analysis of all the factors outlined above. Nevertheless, of late there have been attempts to attack that conclusion.

B. Davis-Bacon and Service Contract Acts[13]

The Davis-Bacon and Service Contract Acts apply to construction contracts in which federal money is used and contracts for services to Federal agencies, respectively.[14] Any person (except persons employed in a bona fide executive, administrative, or professional capacity) who performs work called for by a contract or that portion of a contract subject to the respective Acts is considered covered by its provisions.[15] Thus, for example, a person's status as an "owner-operator" or an

[11] *Zheng*, 355 F.3d at 73.

[12] *Quintanilla v. A&R Demolition, Inc.*, 2005 WL 2095104 (S.D. Tex. August 30, 2005).

[13] Interestingly, the Service Contract Act was enacted because of a perception by Congress that, due to exemptions in the FLSA for federally-funded projects, the federal government was subsidizing subminimum wage on federal projects. *American Federation of Government Employees, Local 1668 v. Dunn*, 561 F.2d 1310, 1312 (9th Cir. 1977); *see also Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754 (1981) (Davis-Bacon Act).

[14] 40 U.S.C. § 3142 (Davis-Bacon Act); 41 U.S.C. § 351 (Service Contract Act). The distinction between a construction and services contract is seemingly apparent, but the nuances are often somewhat grey. *See, e.g.*, 29 C.F.R. § 4.116 (establishing an analysis of whether construction work in a services contract is "substantial" to determine whether the Davis-Bacon Act or Service Contract Act applies).

[15] 29 C.F.R. § 5.2 (Davis-Bacon Act); 29 C.F.R. § 4.155 (Service Contract Act).

"independent contractor" is immaterial in determining coverage under the Acts and all such persons performing the work of service employees must be compensated in accordance with the Acts' requirements.

In addition, neither the Davis-Bacon nor Service Contract Acts set a maximum hour workweek nor a requirement to pay overtime wages. Instead, each of these statutes directs the United States Department of Labor to set "prevailing wages" along with fringe benefits to be paid to all workers on covered projects.[16] The importance of ensuring that subcontractors are complying with prevailing wages and fringe benefits is of paramount importance on covered jobs.

1. Davis-Bacon and Service Contract Act Requirements

The Davis-Bacon Act requires every contract entered into by the United States to contain the following language:

> (1) The contractor or subcontractor shall pay all mechanics and laborers employed directly on the site of the work, unconditionally and at least once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics;
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> (2) The contractor will post the scale of wages to be paid in a prominent and easily accessible place at the site of the work; and
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> (3) There may be withheld from the contractor so much of accrued payments as the contracting officer considers necessary to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of

[16] 41 U.S.C. § 351(a)(1) (Service Contract Act); *see also id.* at § 357 (Service Contract Act). The specifics behind the DOL's setting of these wages is beyond the scope of this article.

> wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by the laborers and mechanics and not refunded to the contractor or subcontractors or their agents.[17]

Similarly, the Service Contract Act requires every contract entered into by the United States to contain the following:

> (1) A provision specifying the minimum monetary wages to be paid the various classes of employees during the performance of the contract or any subcontract as determined by the Secretary in accordance with the prevailing rates for such employees in the locality. (In no event shall the wages be lower than the federal minimum wage requirement under Title 29, Section 206(a)(1));
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> (2) A provision specifying the fringe benefits to be furnished the various classes of employees. Such fringe benefits shall include medical care, pensions, compensation for injuries, unemployment benefits, life insurance, vacation and holiday pay, etc., and other fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor;
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> (3) A provision that no part of the services will be performed in unsanitary or hazardous conditions;
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> (4) A provision that on the day the employee commences work, the contractor or subcontractor will deliver to the employee a notice of the compensation required under (1) and (2) or post the notice at the worksite; and,
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> (5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if Title 5, Sections 5341 and 5332 applied.[18]

Any violations of these provisions render the responsible party liable for a sum equal to the amount of any deductions, rebates, refunds or underpayment of compensation due to any employee engaged in the performance of the contract, as described below. The

[17] 40 U.S.C. § 3142(c).

[18] 41 U.S.C. § 351.

amounts owed may be withheld or, by order of the Secretary, the money owed may be paid directly to the underpaid employees.[19]

2. The Joint Employer Issue

Under the Davis-Bacon and Service Contract Acts, the "problem" of joint employer liability is not ambiguous – it is resolved by statute. Specifically, each set of statutes require a general contractor to ensure that its subcontractors are complying with the Davis-Bacon and Service Contract Acts, as applicable. These provisions are set forth in the statutes cited below, as well a comprehensive set of regulations promulgated by the United States Department of Labor.[20]

To further facilitate the payment methodology required under the Davis-Bacon Act, the general contractor is required to submit weekly certified payrolls of their subcontractors proving that prevailing wages were paid to each worker on a covered job.[21] In contrast, under the Service Contract Act, the general contractor is only obligated to maintain the records to prove compliance with the Act.[22] And, a failure to follow the paperwork requirements under either Act constitutes grounds for withholding payment, cancelling a contract, and even debarment.[23] In addition, the DOL is authorized to order

[19] 40 U.S.C. § 3144(a)(1) (Davis-Bacon Act); 41 U.S.C. § 352 (Service Contract Act).

[20] 29 C.F.R. §§ 5.1 to 5.32 (Davis-Bacon Act); 29 C.F.R. §§ 4.1 to 4.191 (Service Contract Act).

[21] 29 C.F.R. § 5.5(a)(3) (Davis-Bacon Act).

[22] 29 C.F.R. § 4.6(g) (Service Contract Act).

[23] 40 U.S.C. §§ 3143-44 (Davis-Bacon Act); 41 U.S.C. § 352 (Service Contract Act).

the contracting agency withhold payment from the general contractor and to pay any amounts owed directly to the underpaid employees.[24]

3. Davis-Bacon and Service Contract Act Enforcement

The DOL has broad authority to investigate wage and hour issues, and it has specifically enumerated authority with respect to the Davis-Bacon and Service Contract Acts.[25] Under that authority, the DOL can initiate an investigation on its own volition, although it rarely does so without being prompted into action by the complaint of a worker. Incidentally, an individual worker does not have a right of action to enforce the Davis-Bacon Act[26] or Service Contract Act.[27]

In the investigation, all wage records of the general contractor (including, generally, those unrelated to the covered job at issue), may be requested by the DOL. As a practical matter, however, the DOL will focus its efforts on the records kept of payments on the job at issue. As noted above, the failure to have maintained the records required by law to prove compliance is in itself a ground for discipline under the statutes. Further, it is not uncommon for the source of the investigation to be confidential to the employer, which can often make the respondent's ability to participate effectively

[24] 40 U.S.C. § 3144(a) (Davis-Bacon Act); 41 U.S.C. §§ 352, 354 (Service Contract Act).

[25] 40 U.S.C. § 3145 (Davis-Bacon Act); 41 U.S.C. §§ 352(b), 353 (Service Contract Act).

[26] *Grochowki v. Phoenix Const.*, 318 F.3d 80 (2nd Cir. 2003); *Grzeskowiak v. Dakota Bridge Builders*, 241 F. Supp. 2d 1062 (D. N.D. 2003); *Peatross Global Assoc.*, 849 F. Supp. 746 (D. Haw. 1994).

[27] *United States ex rel. Sutton v. Double Day Office Servs., Inc.*, 121 F.3d 531, 532 (9th Cir.1997); *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220, 1228 (D.C. Cir. 1991); *District Lodge No. 166, Intern. Assoc. of Mach. v. TWA*, 731 F.2d 711, 714-16 (11th Cir.1984); *Miscellaneous Serv. Workers, Drivers, & Helpers, Teamsters Local # 427 v. Philco-Ford Corp.*, 661 F.2d 776, 781 (9th Cir. 1981).

difficult.[28] At the conclusion of the investigation, the DOL may initiate its own action against the contractor, or it may refer the matter to the contracting agency for appropriate sanctions.[29]

In addition to potential liability of the contracting company, the failure to perform a statutory public duty under the Service Contract Act may also be attributed to each officer charged by reason of his or her corporate office while performing that duty.[30] It has been held by administrative decisions and by the courts that the "party responsible," as used in section 3(a) of the Service Contract Act, imposes personal liability for violations by corporate officers who control, or are responsible for control of, the corporate entity, as they, individually, have an obligation to assure compliance with the requirements of the Act, the regulations, and the contracts.[31] Although not widely enforced in this regard, the teeth of this provision are striking.

C. Contract Work Safety and Standards Act

The Contract Work Safety and Standards Act establishes a standard workweek consisting of forty hours.[32] Work in excess of the standard workweek is permitted, but any worker on a federally-financed project is entitled to compensation of at least one and

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[28] 29 C.F.R. § 5.6(a)(5) (Davis-Bacon Act); 29 C.F.R. § 4.191(a) (Service Contract Act).

[29] Subcontractors are also liable for their misconduct or that of their lower tier subcontractors under the Davis-Bacon and Service Contract Acts. However, in our experience, the DOL typically focuses on the contracting party – *i.e.*, the general contractor.

[30] *United States v. Sancolmar Industries, Inc.*, 347 F. Supp. 404, 408 (E.D. N.Y. 1972).

[31] 29 C.F.R. § 4.187.

[32] 40 U.S.C. § 3702(a).

one-half times the "prevailing wage" rate of pay.[33] As with the Davis-Bacon and Service Contract Acts, the rights under the CWSSA are required to be spelled out in federal contracts.

1. Rights under the CWSSA

The CWSSA requires that every covered contract include the following language:

> (1) A contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall not require or permit any laborer or mechanic, in any workweek in which the laborer or mechanic is employed on that work, to work more than 40 hours in that workweek, except as provided in this chapter; and
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> (2) When a violation of clause (1) occurs, the contractor and any subcontractor responsible for the violation are liable--
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> (A) To the affected employee for the employee's unpaid wages; and
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> (B) To the Government, the District of Columbia, or a territory for liquidated damages as provided in the contract.[34]

A contractor or subcontractor violating the protections itemized above are liable for the amounts owed, as well as liquidated damages. The liquidated damages are calculated as $10 for each calendar day on which the individual worked in excess of the standard workweek without payment of the overtime wages owed.[35] However, in

[33] 40 U.S.C. §§ 3701, 3702(a).

[34] 40 U.S.C. § 3702 (b).

[35] 40 U.S.C. § 3702.

making this calculation, fringe benefits owed under the Davis-Bacon and Service Contract Acts are not included.[36]

2. The Joint Employer Issue

As with the Davis-Bacon and Service Contract Acts, the statute imputes liability on all levels of the general contractor and subcontractor for violations of the wage and hour protections of the Act.[37]

3. Enforcement of the CWSSA

The DOL has the authority to order the withholding of money payable under the contract when it is determined that the wages owed pursuant to the CWSSA have not been paid.[38] And, as with the Davis-Bacon and Service Contract Acts, the DOL is directed to report violators of this statute to the contracting agency, which can result in the administrative consequences described above.[39]

IV. Post-Katrina Experiences

Recently, the United States Department of Labor (the administrative entity charged with enforcing the FLSA) has opened investigations in the New Orleans area and other parts of the country regarding payroll practices of construction companies. Historically, the DOL focused on direct employers (*i.e.*, subcontractors) to ensure that

[36] 40 U.S.C. § 3142(e) (Davis-Bacon Act); 41 U.S.C. § 355 (Service Contract Act).

[37] 40 U.S.C. § 3702(b).

[38] 40 U.S.C. § 3702(d).

[39] 40 U.S.C. § 3704.

workers are being paid all amounts owed by law. However, following Hurricane Katrina, the DOL began actively pursuing investigations directly against general contractors.[40]

In addition, lawsuits have been filed alleging that general construction contractors are the employers of their subcontractors' workers on jobsites. The essence of the plaintiffs' argument is that subcontractors are sufficiently dominated by the general contractor such that the general contractor is the true employer on a particular jobsite. As a result, the plaintiffs assert the general should be liable for the wage and hour violations of the subcontractors.[41] The issues raised in such cases can be quite fact-specific, with arguments predicated on the notions that general contractor supervises, governs and otherwise monitors the details of subcontractors' workers' tasks, that the general contractor controls hiring and firing practices, that the general contractor performs recordkeeping, and the like. These arguments are generally unsupported in the jurisprudence,[42] but general contractors should nonetheless be aware of their significance as the plaintiffs' bar continues to probe the boundaries of FLSA liability.

V. Appropriate Preventive Measures

Federal projects are, of course, quite common in the wake of disasters. In federal reconstruction contracts, where the United States is the owner of the project, the law

[40] This is particularly true in the area of enforcement of the Davis-Bacon and Service Contract Acts, which set wages, respectively, on certain construction and service contracts with the federal government. Those Acts are of particular importance following disasters due to the quantity of federal work. The Service Contract Act, not an Act generally encountered in a pure construction context, bears special mention because of contractors' performance of post-disaster work that is more like a "service" than "construction"; examples include post-Katrina debris removal or demolition.

[41] Of course, the plaintiffs' necessity to raise this argument arises when a subcontractor is insolvent or disappears – a likely result if unscrupulous subcontractors are involved.

[42] *See, e.g., Quintanilla v. A&R Demolition, Inc.*, 2005 WL 2095104 (S.D. Tex. August 30, 2005).

actually makes the general contractor responsible for ensuring compliance with certain wage provisions. Specifically, both the Davis-Bacon Act and the Service Contract Act would hold a general contractor liable for wage and hour violations committed by its subcontractors. Even in the absence of such definitive statutory or contractual provisions, many plaintiffs have attempted to lay responsibility for wage and hour laws at the feet of the general contractor, often under the rubric of the joint employer doctrine mentioned above. Thus, much of the incentive to monitor, and hopefully prevent, violations of this sort is placed upon the general contractors who work in post-disaster environments.

Fortunately, there are risk mitigation measures that can be implemented in advance to protect against being investigated or sued for subcontractors' violations of wage laws. In particular, a general contractor needs to preserve the line of demarcation between its own operations and the operations of the subcontractor. Doing so will help ensure that an "employment" relationship is not created. At the same time, general contractors should generally be advised to make reasonable efforts to ensure that subcontractors obey applicable wage laws.

An initial step in this process is to include and enforce audit rights in contracts with subcontractors. General contractors' standard form subcontracts already may have the right to audit subcontractor records; if so, they should not hesitate to use that right if there are suspicions of illegal payroll practices on a jobsite.[43] Nipping such a problem in the bud is the best way to avoid a later lawsuit and keep the job moving smoothly.

[43] Most commonly, a general contractor might have the right to audit in a cost-plus subcontract. The drafting of such an audit provision should be crafted to the peculiar circumstances of a given project, but in any event it is wise consider carefully wording the provision so that it is merely a right and not an obligation to audit; any obligation to audit would blur the distinction between general and subcontractor,

Another contracting tool is the inclusion of strong indemnification rights. Ideally, the general contractor should include in all of its subcontracts language that would require the subcontractor to indemnify, defend and hold harmless the general contractor from any claims or investigations arising from the subcontractor's failure to pay wages in accord with applicable law. Moreover, because subcontractors unscrupulous enough to not pay workers overtime may well disappear if problems arise, the contractor should have a strong right to offset such claims against any outstanding progress payments or against retainage. Obviously the laws of indemnity and offset, as well as the interaction between those concepts and any prompt pay provisions, vary from state to state. Nevertheless, in consultation with counsel, it is often possible to craft language that would assist the general contractor should a subcontractor fail to comply with a wage law.[44]

Once construction begins, project managers should be cognizant of their duties on this topic. A general contractor is not charged with ensuring that every subcontractor's worker is paid all amounts owed under the law. However, it is in the general contractor's best interest to respond and remedy such a concern if it is brought to a project manager's attention. Turning a blind eye to this type of practice can not only prompt an investigation or lawsuit where one otherwise would not exist, but it could be a "bad fact"

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and it could thereby backfire and make the general more likely to be deemed an "employer."

[44] The authors note that the ability of the standard AIA A401's main indemnification provision (§ 4.6.1) to cover wage violations seems questionable at best. Of course, the A401 has not permeated the industry to the extent of certain other standard forms, and many general contractors use manuscript form subcontracts with much stronger and broader indemnification language. In either event, counsel for a general contractor should consider whether a given standard subcontract is broad enough to cover the exposures discussed in this article.

in any such action as it will be made to appear that general contractor is using the subcontractor as a subterfuge to avoid its obligations.[45] Despite the above, there will be instances where the subcontractor's misconduct cannot be prevented, and it is important that a general contractor respond immediately.

VI. Appropriate Response

When notified of a payroll violation (whether by the DOL, a lawsuit, or an individual worker), it is important that the general contractor immediately document the allegation and provide the subcontractor notice of it. In addition, that notice should invoke the rights of indemnification and offset for any amounts owed and further instruct the subcontractor to provide all records related to the allegation at once. Upon review of the records, if a problem is noted, general contractors should instruct subcontractors to make payments immediately to cure any wage issues. If the subcontractor is reluctant to do so, and if allowed by law and the applicable subcontract, the general contractor should, in consultation with counsel, make the payment directly and offset it against invoices still outstanding from the subcontractor.

VII. Conclusion

With the constantly evolving workforce in all markets, and particularly in disaster areas, the problems incident to payroll practices are increasing constantly. It is important for general contractors to be aware of this issue and takes steps to avoid it. But more

[45] Although beyond the scope of this article, it also bears mentioning that unscrupulous subcontractors often hire workers who are not eligible to work in the United States. Knowingly hiring such a person is a federal crime, and Immigration and Customs Enforcement has recently stepped up efforts to enforce these laws. In simplest terms, the difference between an ICE raid that arrests only workers, and an ICE raid that arrests workers, project managers, and the officers of a general contractor, is simply whether ICE sees a pattern or practice of hiring ineligible workers.

importantly, frankly, the issue is likely to arise and, therefore, the general contractor must be in a position to respond effectively and immediately to the allegations as presented.