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NY Passes Sweeping Employee Wage Lien Bill

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The New York State Assembly and Senate have passed a bill that would allow employees to obtain liens on their employers' personal and real property when there are allegations that the employees were underpaid, even when the employee earned well in excess of the minimum wage during the relevant time period. If signed into law by Gov. Andrew Cuomo, employees would be able to file a wage lien, similar to a mechanic's lien, that would encumber an employer's property on the basis of a mere allegation that the employer did not properly pay the employee.

The broad definition of "employer" under applicable law will cause this bill to have a significant impact on all New York employers, from *Fortune* 500 companies to small, mom-and-pop businesses, and could even entrap managers, executives and human resources personnel who have control over the terms and conditions of an individual's employment.

The bill will become effective 30 days after it is signed into law by the governor.

Key Details of the Bill

The Employee Wage Lien bill fundamentally alters the legal landscape of wage and hour as it will allow employees who allege that they were underpaid the ability to file liens on the personal and real property of their employer(s). The employee would not have to prove that he or she was underpaid in order to file the lien; rather, it can be filed on the basis of a mere allegation of underpayment. Once filed, it will be incumbent on the employer to obtain a bond in order to have the lien removed or seek court intervention in

order to secure title to its property. Specifically, the bill includes the following key provisions:

Definitions – the bill contains two key definitions that impact what wage and hour allegations are applicable to employee wage liens and whose property can be encumbered.

- **Wage Claim:** The bill allows an employee to file a lien when the employee has a wage "claim." A wage claim includes claims under the New York Labor Law and the Fair Labor Standards Act for unpaid wages, overtime, spread of hours, call-in pay, uniform maintenance pay, withheld gratuities, unlawful deductions from wages, unpaid charges that purport to be gratuities, or improperly taken meal and tip credits, as well as unpaid compensation pursuant to an employment contract or any claim that the employer violated a wage order promulgated by the Commissioner of Labor.
- **Employer:** The bill defines employer to be any person who is an "employer" under the New York Labor Law or Fair Labor Standards Act. As veterans of wage and hour litigation well know, the definition of "employer" under such statutes is extremely broad and includes not just the corporate entity that employs an individual, but could also include managers, executives, supervisors, owners, shareholders, human resources professionals and any other person or

entity who has control over employees' working conditions.

Allows employees and former employees to file liens on the property of their employer.

- Any employee (or former employee) who has a wage claim will have a lien against the property of the employee's (or former employee's) employer. Unlike a mechanic's lien, which can only be filed with respect to real property, this new employee wage lien extends to both real and personal property of any kind of an employer provided such property is located within New York state.
- The lien may be filed by the employee (or his or her representative) or by the New York Department of Labor (NYDOL) or the New York Attorney General (NYAG) if the individual has filed complaints with either governmental entity.
- Employees can only file liens on behalf of themselves; they cannot file liens on behalf of a putative class of individuals (although the NYDOL and NYAG can file liens on behalf of a class).
- The value of the lien is equal to the amount of the wage claim, inclusive of liquidated damages.
- The lien must be filed with the county clerk where the applicable property is located, and it must be filed within three years following the end of the employee's employment with the applicable employer.
- Within five (5) days before, or 30 days after the filing of the lien, the lienor (i.e., the employee) must serve a copy of the lien on the employer whose property is at issue, and file proof of same with the county clerk. If proof of service of the lien

is not filed within 35 days, the lien will automatically terminate.

- The lien is filed for one year, which can be extended by court order. Further, if the employee brings an action (whether in court, arbitration, before the NYDOL or with the NYAG) for the wage claim that forms the basis of the lien within one year after the lien is filed, the lien will be automatically extended until the final resolution of such claim.
- If the employee does not file an action for the underlying wage claim, the employee has one year to foreclose on the lien. Absent court approval, if the employee does not commence the foreclosure action within one year, the lien will automatically extinguish.
- An employer may purchase a bond to discharge the lien at any time.
- In the event the employer can prove that the employee willfully exaggerated the lien, the lien will be discharged and the employee will not be able to obtain another lien against the employer. For mechanic's lien, if the contractor or owner proves that the lien was willfully exaggerated, the contractor or owner can recover the costs, fees and expenses it incurred to discharge the invalid lien as well as recover damages for the harm it suffered as a result of such invalid lien. It is unclear whether an employer will be able to obtain such costs, fees and damages in the event an employee wage lien is willfully exaggerated.

Expands the availability of an employee to attach an employer's property during litigation.

- Related to a lien, there is a provision in New York Civil Practice Law and Rules that allows a plaintiff to obtain a

prejudgment attachment (similar to a lien) if the plaintiff can prove to a court that the defendant is fraudulently transferring assets in order to frustrate creditors and thus prevent the plaintiff from recovering monies should the plaintiff prevail. In order to obtain such prejudgment relief, the plaintiff must satisfy a very high burden. The bill keeps in place the ability of plaintiffs to obtain prejudgment attachments but substantially lowers the burden for plaintiffs with wage claims.

- The bill would allow plaintiffs with wage claims and wage and hour retaliation claims to obtain attachments during the pendency of a litigation.
- If a plaintiff with a wage claim seeks an attachment that the employer contests, the court must hold a hearing on the matter within 10 days of the employer's opposition.
- Currently, if a plaintiff seeks an attachment, the plaintiff must post a bond and would be liable for the defendant's attorneys' fees and costs if the plaintiff's motion for an attachment is unsuccessful. The bill provides that with wage claims, the bond cannot exceed \$500, which can be waived by the court. And if the plaintiff is unsuccessful, the defendant cannot obtain its attorneys' fees and costs in defending against the motion.

Access to information about corporate entities and expansion of personal liability.

- Employees and their agents (i.e., attorneys) shall have the right to review the minutes of the proceedings of shareholders meetings and records of shareholders (limited to the names, addresses and value of shareholders'

interests in the corporation) within five (5) business days of a written demand.

- The bill expands the potential liability for a non-public, New York corporation's 10 largest shareholders. Currently, such individuals are personally liable for unpaid wages in the event the corporation cannot pay. The bill expands such personal liability to include any liquidated damages, penalties, interest, attorneys' fees and costs included in a judgment for unpaid wages.

Access to information about LLCs.

- Employees and their agents (i.e., attorneys) shall have the right to review, within five (5) days of a written demand, the LLC's records to obtain a list of the full name and last known mailing address of each member of the LLC together with the contribution and the share of profits and losses of each member, or information from which such share can be readily derived. If the LLC refuses to provide such information, the employee can obtain a court order requiring the LLC to provide such information and the employee can be awarded the employee's attorneys' fees and costs incurred in seeking such court order.

How Employers Should Prepare

This bill has serious ramifications for New York employers that should not be underestimated. It permits employees to obtain liens against an employer's property on the basis of a mere allegation of underpayment of wages, even when the employee earned well in excess of the minimum wage during the relevant time period. Indeed, executives who claim that they did not receive all of their contractually required bonuses can file liens, as well as low-paid, unskilled workers who claim that they did not properly receive overtime. Further, there is no penalty or other significant consequence for an individual

who grossly exaggerates the amount he or she claims is owed. Thus, the bill provides government-sanctioned leverage to employees to extract high settlements from employers, lest the employer be subject to a lien that could encumber its property and greatly impact the employer's ability to do business.

Should the bill become law, employers must be diligent in ensuring that they continue to comply with all wage and hour laws. Businesses should work with counsel to audit their wage and hour practices to ensure compliance. In addition, if there is any doubt as to whether wages are owed or should be paid, it would be prudent for an employer to make the payments. Otherwise, it may be a costly risk to enable the employee to believe that he or she was not properly paid and spur a lien filing that could at best disrupt the employer's finances and at worst, put the employer out of business.

Employers should also review their insurance policies and contact their insurance brokers to determine what companies, if any, will provide bonds that will allow employers to discharge any liens that are filed. The prudent employer should start investigating such options now rather than after a lien has been filed when their options may be more limited.

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