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SENATE BILL NO. 538

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Commerce and Energy
on February 22, 2022)

(Patron Prior to Substitute—Senator Peake)

A *BILL to amend and reenact § 11-4.6 of the Code of Virginia, relating to nonpayment of wages; defense of contractor.*

Be it enacted by the General Assembly of Virginia:

1. That § 11-4.6 of the Code of Virginia is amended and reenacted as follows:

§ 11-4.6. Liability of contractor for wages of subcontractor's employees.

A. As used in this section, unless the context requires a different meaning:

"Construction contract" means a contract between a general contractor and a subcontractor relating to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance thereto, including moving, demolition, and excavation connected therewith, or any provision contained in any contract relating to the construction of projects other than buildings.

"General contractor" and "subcontractor" have the meanings ascribed thereto in § 43-1, except that those terms shall not include persons solely furnishing materials.

B. Any construction contract, *including any prime contract between an owner and a general contractor, any subcontract between a general contractor and its subcontractor, and any lower tier subcontract*, entered into on or after July 1, 2020, shall be deemed to include a provision under which the general contractor, *its subcontractor*, and the subcontractor at any *lower tier* are jointly and severally liable to pay ~~any subcontractor's~~ *the employees of any subcontractor* at any *lower tier* the greater of (i) all wages due to a subcontractor's employees *or to the lower tier subcontractor's employees* at such rate and upon such terms as shall be provided in the employment agreement between the subcontractor and its employees or (ii) the amount of wages that the subcontractor *or any lower tier subcontractor* is required to pay to its employees under the provisions of applicable law, including the provisions of the Virginia Minimum Wage Act (§ 40.1-28.8 et seq.) and the federal Fair Labor Standards Act (29 U.S.C. § 201 et seq.).

C. A general contractor shall be deemed to be the employer of a subcontractor's employees at any tier for purposes of § 40.1-29. If the wages due to the subcontractor's employees under the terms of the employment agreement between a subcontractor and its employees are not paid, the general contractor shall be subject to all penalties, criminal and civil, to which an employer that fails or refuses to pay wages is subject under § 40.1-29. Any liability of a general contractor pursuant to § 40.1-29 shall be joint and several with the subcontractor that failed or refused to pay the wages to its employees.

D. Except as otherwise provided in a contract between the general contractor and the subcontractor, the subcontractor shall indemnify the general contractor for any wages, damages, interest, penalties, or attorney fees owed as a result of the subcontractor's failure to pay wages to the subcontractor's employees as provided in subsection B, unless the subcontractor's failure to pay the wages was due to the general contractor's failure to pay moneys due to the subcontractor in accordance with the terms of their construction contract.

E. The provisions of this section shall only apply if (i) it can be demonstrated that the general contractor knew or should have known that the subcontractor was not paying his employees all wages due, (ii) the construction contract is related to a project other than a single family residential project, and (iii) the value of the project, or an aggregate of projects under one construction contract, is greater than \$500,000. ~~As evidence a general contractor may offer a written certification, under oath, from the~~ *It shall be a valid defense if the general contractor or subcontractor, regardless of tier, obtains a written certification from its subcontractor in direct privity of contract with the general contractor or subcontractor stating that (a) the subcontractor and each of his sub-subcontractors has paid all employees all wages due for the period during which the wages are claimed for the work performed on the project and (b) to the subcontractor's knowledge all sub-subcontractors below the subcontractor, regardless of tier, have similarly paid their employees all such wages. Any person who falsely signs such certification shall be personally liable to the general contractor or subcontractor for fraud and any damages the general contractor or subcontractor may incur.*