

New York Employee Lien Bill Advances As Debate Continues

By **Max Kutner**

Law360 (May 11, 2022, 7:17 PM EDT) -- The New York State Senate is expected to vote soon on a bill that would enable workers to file liens against employers they are accusing of wage theft, legislation workers' attorneys said would help recover pay and employers' attorneys said raises due process concerns.

The legislation, referred to as the Securing Wages Earned Against Theft, or SWEAT, bill, would amend New York state law by enabling workers to put "employee liens," or temporary holds, on the assets of employers and company shareholders when filing wage theft claims. This would expand an existing law under which mechanics can file liens.



A bill that would allow workers making wage theft claims to file liens on their employers is making its way through the New York State Senate. Proponents herald it as a much-needed safeguard for workers, while critics worry it would impede due process in wage suits. (AP Photo/Hans Pennink)

On Tuesday, the New York State Senate Judiciary Committee voted in favor of advancing the bill, S2762; the state Assembly passed its version, A766, in March. An earlier version passed in both chambers but was vetoed by then-Gov. Andrew Cuomo, a Democrat.

"Wage theft has been rampant in New York state for a long time," state Sen. Jessica Ramos, D-District 13, who sponsored the Senate bill, told Law360 on Wednesday. "As we're crawling out of this pandemic,

unfortunately it's been even more rampant across various industries."

State Assemblymember Linda Rosenthal, D-District 67, who sponsored the version in the other chamber, said wage theft has continued since she initially brought forward a version of the legislation several years ago.

"Nothing has changed from when I first introduced it," Rosenthal told Law360 on Wednesday. "The same games and tricks are being perpetrated by companies, people who want to evade a court judgment."

As the state Senate bill approaches a vote, which Ramos expected for later in May, Law360 looks at the debate over the legislation.

Following at Least 10 States

At least 10 states have wage lien laws, which are generally modeled off of laws for mechanic's liens that are on the books in every state.

The National Employment Law Project has pointed to Wisconsin's 1993 wage lien law as the earliest one. Alaska, Idaho, Indiana, Kentucky, Maryland, New Hampshire, Tennessee, Texas and Washington also have such laws, some more expansive than others.

Worker advocates have pointed to the impact of the Wisconsin law. There, 80% of suits to enforce wage liens resulted in payments to workers, and workers recovered 25% of wages owed in cases where wage liens were used, 1.5 times the amount in California, which does not have a wage lien law, according to a 2013 NELP report.

Without wage lien laws, employers often dissolve companies to avoid paying money they owe, worker advocates have said. In California, employers abandoned, transferred or sold businesses before state Division of Labor Standards Enforcement hearings ended in nearly a quarter of cases in which there was a final judgment, according to NELP.

New York lawmakers considered a wage lien bill as early as 2013. A version Rosenthal introduced that year came after restaurant delivery workers won millions of dollars in a lawsuit against Saigon Grill in New York City but were unable to recover the money.

"The owner, he got sent to jail, but he sold the property to someone else who kept it open for a little bit and then shut it down," Rosenthal said. "As a result, many of the workers won in court and lost in real life because they did not get the money that the court ordered be paid to them."

The 2013 bill did not advance, and more versions followed. In 2019, the state Senate and Assembly both passed versions, but that December, Cuomo vetoed it, citing concerns over due process and an expansive definition of "employer."

Employers Can't Disappear

The current New York legislation is meant to keep employers from disappearing before they can pay workers money they owe, plaintiff-side attorneys said.

"Companies may change names, they may file for bankruptcy, they may generally just refuse to pay the judgment," said Najah Farley, a senior staff attorney at NELP. "A bill like this is to make it easier for people to try and get the money after they have the judgment because they already have a lien against them."

Richard Blum, a staff attorney at the Legal Aid Society, said wage theft is widespread and that liens help with enforcement against such theft.

"There are sectors of the economy where wage theft is actually a business practice or a business model," said Blum, who in the past was involved with the SWEAT Coalition behind the New York legislation. "We need to have a mechanism which makes enforcement much more likely."

Employers that pay properly shouldn't fear the legislation, Rosenthal said.

"If you're not doing anything wrong, why are you so scared?" she said. "If you do everything by the book, you should have no problem."

Handcuffing Employers

Employers' attorneys said wage liens unfairly freeze employers' assets on allegations, and that employers rarely disappear to get out of paying.

"It allows employees to put liens on the personal or company property merely based on a claim of wage and hour violations, rather than after a finding of liability," said Jessica Schild of management-side firm Ogletree Deakins Nash Smoak & Stewart PC. "Banks may not extend credit to these businesses, investors may fear investing and employees may have unfair advantages."

Christopher Maugans of management-side firm Goldberg Segalla LLP called the New York legislation "terrifying" and said it "puts handcuffs on employers."

"I see a lot of complaints ... that are baseless and they don't have any merit to them, and that's ultimately proven through the litigation," Maugans said. "Under these circumstances, an employee, even if they file an action or there's an investigation, where they merely make an allegation of a wage and hour claim, they can get this lien."

Previous concerns about due process and the definition of "employer" remain, management-side attorneys said.

"The definition of 'employer' can basically be anyone who has control over the terms and conditions of an individual's employment," Glenn Grindlinger of management-side firm Fox Rothschild LLP said about the legislation. That could include low-level managers who make "less than the person who is asserting the wage claim," Grindlinger said.

Supporters of the Empire State legislation said it doesn't violate due process.

"There is recourse for employers actually to be able to take the liens off of their assets in case they're being wrongly accused of impropriety," Ramos said. "But what's important here is that the workers themselves don't have to fear that a lag in paying these liens will result in, for example, an LLC changing hands to a spouse or a cousin, which is so often the case."

The Legal Aid Society's Blum pointed to the New York State Supreme Court, Appellate Division's 1977 ruling in **Carl A. Morse Inc. v. Rentar Industrial Development Corp.** that said the state's mechanic's lien law did not violate due process.

But Grindlinger said the New York legislation goes beyond a mechanic's lien, because the latter applies only to the real property on which the mechanic performed the work, and for other reasons.

"Unlike a mechanic's lien, there is inherently in wage cases an issue of fact, and the lien stays pretty much in place until that issue is litigated to the end, which can take years," Grindlinger said.

Court Challenges Seem Likely

If New York Gov. Kathy Hochul, a Democrat, signs the legislation into law, employers could file in court to block it, management-side attorneys said.

Hochul hasn't said what she'll do. A spokesperson for the governor said by email Tuesday that the governor "will review the legislation if it passes both houses."

Earlier this legislative session, Hochul signed into law wage theft legislation that Ramos sponsored. Senate Bill S2766C/Assembly Bill A3350A, which went into effect in January, amended the state's wage theft law **to require that** general contractors assume joint liability for debt related to wage claims against subcontractors.

Employers' attorneys pointed to a lack of difference between the vetoed wage lien legislation and the current version as an indication that the measure could be vetoed again.

But the legislation's supporters see the change in governor as an opportunity for a different outcome.

"It is a different governor," Rosenthal said. "I think she does consider this an important issue."

--Editing by Bruce Goldman.

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