Workshop B: Current Developments in Wage and Hour Law

Joseph A. Carello, Esq.
Wegmans Food Markets, Inc., Rochester, NY

Jessica Lukasiewicz, Esq.
Thomas & Solomon LLP, Rochester, NY

Laura G. Rodriguez, Esq.
Pechman Law Group PLLC, New York, NY

Erin S. Torcello, Esq.
Bond, Schoeneck & King, PLLC, Buffalo, NY

Recent Opinion Letters Issued by the U.S. Department of Labor
Presented by: Mike Lingle and Joseph Carello

Opinion Letter FLSA 2018-8 – Administrative Exemption (Copy included in Appendix)

I. FACTS

- The employer sells a wide range of insurance products, from personal and business insurance to professional liability insurance
- Client service managers (CSMs) are licensed insurance agents who serve as "insurance advisers and consultants" to the employer's clients
- CSMs "help the client recognize the need for insurance coverage to guard against unforeseen risk and loss," although the letter notes that the employer separate employs individuals who sell insurance products
- CSMs assist clients in developing insurance programs that will meet the client's needs and gather and pass information about the client to the underwriters
- The employer asserts that CSMs use their own discretion and independent judgment when advising clients and are not required to seek prior approval for the advice and counsel they provide

II. ADMINISTRATIVE EXEMPTION

- Salary basis test
- Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
- Notes the example of certain exempt financial services employees set forth in the regulations

III. CSMs PERFORM EXEMPT WORK

- Assume that CSMs meet salary basis test
- They perform office or non-manual work directly related to the management or general business operations of the employer's customers
- Opinion focuses on discretion and independent judgment
- Finds that CSMs use discretion and independent judgment because they advise customers on which insurance products best suits customers' needs

Recent Opinion Letters Issued by the U.S. Department of Labor
Presented by: Mike Lingle and Joseph Carello

Opinion Letter FLSA 2018-27 – Tip Credits/Dual Jobs (Copy included in Appendix)

I. TIP CREDIT REGULATION GENERALLY

- Tip credit provision allows employers to pay tipped employees minimum of $2.13 per hour and take a "tip credit" equal to the difference between the cash wage and federal minimum wage, currently $7.25 per hour
- Tip credit cannot exceed tips received
- Tipped employees are those engaged in an occupation in which they customarily and regularly receive not less than $30 per month in tips
- Employers must inform employees of the tip credit

II. DUAL JOBS

- When employees perform more than one occupation, some of which qualify for the tip credit and some of which that do not, the employer may only take a tip credit for those hours worked in the tipped job
- The Field Operations Handbook (FOH) notes that tipped employees may spend time performing work that is not tip producing, so long as such time does not exceed 20% of their work time
- Cases have come out differently on the issue. *Compare Fast v. Applebee's Int'l, Inc.*, 502 F.Supp.2d 996 (W.D. Mo. 2007) *with Pellon v. Business Representation Int'l, Inc.*, 528 F.Supp.2d 1306, *aff'd* 291 Fed. Appx. 310 (11th Cir. 2008)

III. OPINION LETTER INTERPRETATION

- "We do not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the Act are met."

- Refers to O*NET and the regulations for duties that are considered directly related to tip-producing duties
- No tip credit is allowed for tasks not contained in the O*NET task list
- FOH subsequently updated as well

IV. NEW YORK LAW DIFFERS

- Requirements are more strict

Opinion Letter FLSA 2019-2 – Optional Volunteer Program (Copy included in Appendix)

I. FACTS

- The employer provides an optional community service program for employees.
- Employees engage in certain volunteer activities that either employer sponsors or the employees themselves select.
- The employer compensates employees for the time they spend on volunteer activities during working hours or while they are required to be on premises but does not compensate for hours spent on volunteer activities outside normal working hours.
- The group of employees with the greatest community impact are given with a monetary award, and the winning group's supervisor decides how to distribute the award among the employees. In making this decision, the supervisor may consider how many hours each employee volunteered.
- The employer is considering using a mobile device application to track each participating employee's volunteer hours.

II. COMPENSABILITY OF VOLUNTEER WORK

- A person is ordinarily not an employee under the FLSA if the individual volunteers without contemplation or receipt of compensation. The volunteer must offer his or her services “freely without coercion or undue pressure,” direct or implied, from an employer.
- An employer may use an employee's time spent volunteering as a factor in calculating whether to pay the employee a bonus, without incurring an obligation to treat that time as hours worked, so long as: (1) volunteering is optional, (2) not volunteering will have no

adverse effect on the employee's working conditions or employment prospects, and (3) the employee is not guaranteed a bonus for volunteering.

III. THE VOLUNTEER WORK IS NOT COMPENSABLE

- The employer's program was charitable and voluntary.
- The employer did not direct or control the volunteer work and employees faced no adverse consequences or undue pressure for declining to participate.
- Bonus was not guaranteed for participating in volunteer work.
- Proposed use of mobile app to track hours was acceptable so long as it was not used "to direct or control the employee's activities by, for example, giving specific instructions about what volunteer work he or she should do, or how he or she should do it."

Recent Opinion Letters Issued by the U.S. Department of Labor
Presented by: Mike Lingle and Joseph Carello

Opinion Letter FLSA 2018-19 – Compensability of Fifteen-Minute Rest Breaks (Copy Included in Appendix)

I. FACTS

- Employer's nonexempt employees have provided FMLA certifications from their health care providers "stating that the employees require 15-minute breaks every hour due to their own continuing serious health conditions."
- Taking such breaks means that, "in an [8-hour] shift, these employees will perform only 6 hours of work."
- Assume the employees are eligible for protected leave under the FMLA, that they have a serious health condition, and that their recurring 15-minute breaks constitute protected leave under the FMLA.

II. COMPENSABILITY OF BREAK TIME

- The FLSA defines "employ" as including "to suffer or permit to work," 29 U.S.C. 203(g), but does not explicitly define what constitutes compensable work.
- The compensability of an employee's time depends on "[w]hether [it] is spent predominantly for the employer's benefit or for the employee's."
- Rest breaks up to 20 minutes in length are generally compensable because the breaks predominantly benefit the employer.
- In limited circumstances, short rest breaks primarily benefit the employee and therefore are not compensable.

III. THE FMLA BREAKS ARE NOT COMPENSABLE

- Because the FMLA-protected breaks were given to accommodate the employee's serious health condition, the breaks predominantly benefit the employee and are not compensable.
- The text of the FMLA confirms that FMLA-protected leave may be unpaid.

Appendix to Recent Opinion Letters Issued by the U.S. Department of Labor

Presented by: Mike Lingle and Joseph Carello

U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210

FLSA2018-8

January 5, 2018

Dear **Name***:

This letter responds to your request that the Wage and Hour Division ("WHD") reissue Opinion Letter FLSA2009-26. On January 16, 2009, then-Acting WHD Administrator Alexander J. Passantino signed the opinion letter as an official statement of WHD policy. On March 2, 2009, however, WHD withdrew the opinion letter "for further consideration" and stated that it would "provide a further response in the near future."

We have further analyzed Opinion Letter FLSA2009-26. From today forward, this letter, which is designated FLSA2018-8 and reproduces below the verbatim text of Opinion Letter FLSA2009-26, is an official statement of WHD policy and an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259.

I thank you for your inquiry.

Bryan L. Jarrett
Acting Administrator

Dear **Name***:

This is in response to your request for an opinion regarding whether client service managers (CSMs) at an insurance company qualify for the administrative exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA).* It is our opinion that the CSMs are exempt administrative employees.

Your agency sells a wide range of insurance products, from personal and business insurance to professional liability insurance, and employs CSMs who are professional, licensed insurance agents. The CSMs' primary duty is generally to serve as insurance advisers and consultants to

* Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

management or general business operations of the employer's customers. 29 C.F.R. §§ 541.201(b); 541.201(c). Therefore, we will focus on whether their primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

To qualify for the administrative exemption, an employee's primary duty must also include the exercise of discretion and independent judgment with respect to matters of significance. *See* 29 C.F.R. § 541.200(a)(3). This "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.202(a). Some factors to consider when making this determination are:

> whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives.

29 C.F.R. § 541.202(b). Federal courts generally find that employees who meet at least two or three of these factors mentioned above are exercising discretion and independent judgment, although a case-by-case analysis is required. *See* 69 Fed. Reg. 21,122, 22,143 (Apr. 23, 2004).

Based on the information provided, it appears the CSM's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. Serving as an insurance adviser and consultant to your agency's clients and helping each client select the proper insurance package involves comparing and evaluating possible courses of conduct and acting or making a decision after the various possibilities have been considered. *See* 29 C.F.R. § 541.202(a). When doing this task, the CSM analyzes the client's insurance needs and compares these needs to the insurance packages available, taking into account the level of risk and the price of the coverage. This service is a significant matter to the agency's clients. Furthermore, since the CSMs have the authority to execute insurance and finance contracts and legally bind the agency and its clients, the CSMs have the authority to commit their employer in matters that have significant financial impact and to negotiate and bind the company on significant matters. 29 C.F.R. § 541.202(b). Finally, CSMs use their own discretion and independent judgment and are free from immediate supervision when advising clients. Thus, it appears the CSMs primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Additionally, 29 C.F.R. § 541.203 includes specific examples of occupations that would generally meet the administrative duties test, including in paragraph (b) "[e]mployees in the financial services industry," who perform duties similar to the CSMs' duties. Such employees are ordinarily considered to meet the duties requirements for the administrative exemption if their duties include:

> work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs

U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2018-27

November 8, 2018

Dear **Name***:

This letter responds to your request that the Wage and Hour Division ("WHD") reissue Opinion Letter FLSA2009-23. On January 16, 2009, then-Acting WHD Administrator Alexander J. Passantino signed the opinion letter as an official statement of WHD policy. On March 2, 2009, however, WHD withdrew the opinion letter "for further consideration" and stated that it would "provide a further response in the near future."

We have further analyzed Opinion Letter FLSA2009-23. From today forward, this letter, which is designated FLSA2018-27 and reproduces below the verbatim text of Opinion Letter FLSA2009-23, is an official statement of WHD policy and an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. Please note, however, that since the letter was originally issued in 2009, (1) the applicable federal minimum wage has increased to $7.25 per hour, (2) the website cited in the letter is now available at https://www.onetonline.org/link/summary/35-3031.00, and (3) then-section 30d00(e) of the Field Operations Handbook is now section 30d00(f), and the language therein was modified.

I thank you for your inquiry.

Bryan L. Jarrett
Acting Administrator

Dear **Name***:

This is in response to your request that we clarify our Field Operations Handbook (FOH) section 30d00(e),[1] which explains the Wage and Hour regulation at 29 C.F.R. § 531.56(e) interpreting the definition of a "tipped employee" in section 3(t) of the Fair Labor Standards Act, 29 U.S.C.

[1] Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at ww.wagehour.dol.gov.

> Reg 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e. maintenance and preparatory or closing activities). For example a waiter/waitress, who spends some time cleaning and setting table, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

Section 30d00(e) attempts to ensure that employers do not evade the minimum wage requirements of the Act simply by having tipped employees perform a myriad of nontipped work that would otherwise be done by non-tipped employees. Admittedly, however, it has created some confusion. For instance, in *Fast v. Applebee's Int'l, Inc.*, 502 F.Supp.2d 996 (W.D. Mo. 2007), the court construed § 30d00(e) to not only prohibit the taking of a tip credit for duties unrelated to the tip producing occupation, but also to prohibit the taking of a tip credit for duties related to the tip producing occupation if they exceed 20 percent of the employee's working time. Moreover, the court determined that what constitutes a related and non-related duty is a jury determination.

In contrast, in *Pellon v. Business Representation Int'l, Inc.*, 528 F.Supp.2d 1306 (S.D. Fla. 2007), *aff'd*, 291 Fed. Appx. 310 (11th Cir. 2008), the court rejected the *Fast* court's reading of FOH § 30d00(e), holding, in part, that the 20 percent limitation does not apply to related duties. The court further held that under the *Fast* ruling, "nearly every person employed in a tipped occupation could claim a cause of action against his employer if the employer did not keep perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts." *Pellon*, at 1314. Such a situation benefits neither employees nor employers.

We do not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the Act are met. We also believe that guidance is necessary for an employer to determine on the front end which duties are related and unrelated to a tip-producing occupation so that it can take necessary steps to comply with the Act. Accordingly, we believe that the determination that a particular duty is part of a tipped occupation should be made based on the following principles:

- Duties listed as core or supplemental for the appropriate tip-producing occupation in the in the Tasks section of the Details report in the Occupational Information Network (O*NET) http://online.onetcenter.org or 29 C.F.R. § 531.56(e) shall be considered directly related to the tip-producing duties of that occupation.[3] No limitation shall be

[3] WHD recognizes that there will be certain unique or newly emerging occupations that qualify as tipped occupations under the Act, but for which there is no O*NET description. *See e.g.*, Wage and Hour Opinion Letter FLSA2008-18 (Dec. 19, 2009) (itamae-sushi chefs and teppanyaki chefs). For such tipped occupations for which

U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2019-2

March 14, 2019

Dear **Name***:

This letter responds to your request for an opinion concerning whether an employee's time spent participating in an employer's optional volunteer program, which awards a bonus to certain participating employees, is hours worked under the Fair Labor Standards Act (FLSA). This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

You represent that your client provides an optional community service program for its employees. Under this program, employees engage in certain volunteer activities that either your client sponsors or the employees themselves select. Your client compensates employees for the time they spend on volunteer activities during working hours or while they are required to be on your client's premises; however, many of the hours that these employees spend on volunteer activities are outside normal working hours. At the end of the year, your client rewards the group of employees with the greatest community impact with a monetary award, and the winning group's supervisor decides how to distribute the award among the employees. In making this decision, the supervisor may consider how many hours each employee volunteered. Your client does not require employees to participate in the program or direct or control their participation. Finally, your client is considering using a mobile device application to track each participating employee's volunteer hours.

GENERAL LEGAL PRINCIPLES

Congress did not intend for the FLSA "to discourage or impede volunteer activities," but rather to "prevent manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to 'volunteer' their services." 29 C.F.R. § 553.101. Indeed, the FLSA recognizes the generosity and public benefits of volunteering and allows people to freely volunteer time for religious, charitable, civic, humanitarian, or similar public services. WHD Opinion Letter FLSA2006-4, 2006 WL 561849, at *1–2 (Jan. 27, 2006). A person is ordinarily not an employee under the FLSA if the individual volunteers without contemplation or receipt of compensation. WHD Opinion Letter FLSA2018-22, 2018 WL 4562932, at *1 (Aug. 28, 2018). Of course, the volunteer must offer his or her services "freely without coercion or undue pressure," direct or implied, from an employer. *Id.* (citing WHD Opinion Letter FLSA2006-18, 2006 WL 1836646, at *1 (June 1, 2006); *Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 767 (6th Cir. 2018)); *see* WHD Opinion Letter FLSA2006-4, 2006 WL 561849, at *2 (citing 29 C.F.R. § 785.44).

Sincerely,

Keith E. Sonderling
Acting Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**

U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2018-19

April 12, 2018

Dear **Name***:

This letter responds to your request for an opinion regarding "[w]hether a non-exempt employee's 15-minute rest breaks, which are certified by a health care provider as required every hour due to the employee's serious health condition and are thus covered under the FMLA [Family and Medical Leave Act], are compensable or non-compensable time under the FLSA [Fair Labor Standards Act]." The opinion below is based exclusively on the facts you have presented. You have represented that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating, or for use in any litigation that commenced prior to your request.

BACKGROUND

In your letter, you represent that your clients are employers covered under both the FLSA and FMLA. Your letter explains that several of your clients' nonexempt employees have provided FMLA certifications from their health care providers "stating that the employees require 15-minute breaks every hour due to their own continuing serious health conditions." Taking such breaks means that, "in an [8-hour] shift, these employees will perform only 6 hours of work." For the purposes of this response, we assume the employees are eligible for protected leave under the FMLA, that they have a serious health condition, and that their recurring 15-minute breaks constitute protected leave under the FMLA. *See* 29 C.F.R. §§ 825.110, 825.113-.115, 825.200, 825.202.

GENERAL LEGAL PRINCIPLES

The FLSA, as a general matter, requires employers to compensate employees for their work. The FLSA defines "employ" as including "to suffer or permit to work," 29 U.S.C. 203(g), but does not explicitly define what constitutes compensable work. The U.S. Supreme Court has noted that the compensability of an employee's time depends on "[w]hether [it] is spent predominantly for the employer's benefit or for the employee's." *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *see also, e.g.*, *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 64 (2d Cir. 1997) (same).

Short rest breaks up to 20 minutes in length "primarily benefit[] the employer." *Sec'y of Labor v. Am. Future Sys., Inc.*, 873 F.3d 420, 430 (3d Cir. 2017); *see also* 29 C.F.R. § 785.18 (short breaks "promote the efficiency of the employee"); *Naylor v. Securiguard, Inc.*, 801 F.3d 501, 505 (5th Cir. 2015) (short breaks are "deemed to predominantly benefit the employer by giving the company a reenergized employee"). Thus, consistent with the Supreme Court's decision in *Armour*, rest breaks up to 20 minutes in length are ordinarily compensable. 29 C.F.R. § 785.18.

It is important to note, however, that employees who take FMLA-protected breaks must receive as many compensable rest breaks as their coworkers receive. *See* 29 C.F.R. § 825.220(c). For example, if an employer generally allows all of its employees to take two paid 15-minute rest breaks during an 8-hour shift, an employee needing 15-minute rest breaks every hour due to a serious health condition should likewise receive compensation for two 15-minute rest breaks during his or her 8-hour shift. *See id.*; *see also* WHD Opinion Letter FLSA-1358, 1995 WL 1032460 (Jan. 25, 1995) (when rest breaks are afforded to all employees, "it is immaterial with respect to compensability of such breaks whether the employee drinks coffee, smokes, goes to the restroom, etc.").

We trust that this letter is responsive to your inquiry.

Sincerely,

Bryan Jarrett
Acting Administrator

***Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**

Employment Rights of Undocumented Workers

By: Laura Rodríguez, Esq.*

The Pew Research Center estimates that, as of 2017, the workforce in the United States includes 7.6 million unauthorized immigrants. These workers are protected by state and federal employment laws, regardless of their immigration status.

I. Knowingly Hiring Undocumented Workers Is Illegal

The Immigration Reform and Control Act of 1986 ("IRCA") made it illegal for employers to knowingly employ undocumented workers. *See* 8 USC § 1324(a). IRCA established an employment verification system that employers must follow to verify the identity of potential employees and confirm that they are authorized to work in the United States. 8 USC § 1324(b). If an employer hires someone that is known to be undocumented, or allows an employee to continue working after learning the person is undocumented, the employer is in violation of IRCA.

In reality, many employers do not follow IRCA and continue to employ workers that they know are undocumented. This practice has persisted, in part, because employers are rarely prosecuted for employing undocumented immigrants. According to data collected and maintained by Syracuse University, over thirty employers were prosecuted under IRCA per year in 2005 and 2009. *Few Prosecuted for Illegal Employment of Immigrants*, TRAC Reports, Inc. (Sept. 6, 2019), https://trac.syr.edu/immigration/reports/559/. However, every other year of IRCA's history, less than twenty employers have been prosecuted per year. Currently available data indicates that there were eleven prosecutions during the last twelve months. *Id*. To date, no action has been taken against the employers at the Mississippi factories raided by U.S.

*Laura Rodríguez is an associate attorney at Pechman Law Group PLLC. She is also an Adjunct Professor at Fordham Law School where she teaches a seminar about wage and hour law.

Immigration and Customs Enforcement ("ICE") on August 7, 2019 where an estimated 680 workers were taken into custody due to their suspected undocumented status. Chrisine Hausner and Mihir Zaveri, *Mississippi Plants Knowingly Hired Undocumented Workers, ICE Says*, N.Y. TIMES, (Aug. 15, 2019), https://www.nytimes.com/2019/08/15/us/ ice-raids-mississippi-plants.html.

II. Undocumented Workers Are Entitled to Minimum and Overtime Wages

Although undocumented workers do not have legal work authorization, once they perform work for an employer, they are legally entitled to payment for that work. Immigration status does not impact the applicability of the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"). "When courts read New York Labor Law and the IRCA together, they do not find any inconsistencies that prevent an undocumented worker from bringing a claim under New York Labor Law." *Pineda v. Kel-Tech Const., Inc*., 15 Misc.3d 176, 185 (N.Y. Sup. Ct. 2007). The same is true of the FLSA. *Rosas v. Alice's Tea Cup, LLC*, 127 F. Supp. 3d 4, 9 (S.D.N.Y. 2015) ("[F]ederal courts have made 'clear that the protections of the FLSA are available to citizens and undocumented workers alike'"); *Colon v. Major Perry St. Corp.*, 987 F. Supp. 2d 451, 459 (S.D.N.Y. 2013) ("FLSA's mandatory language leaves no discretion for courts to alter the statute's remedial scheme based on an employee's immigration status"). As has been explained by the Second Circuit,

> [A]n order requiring an employer to pay his undocumented workers the minimum wages . . . for labor actually and already performed . . . does not itself condone that [immigration] violation or continue it. It merely ensures that the employer does not take advantage of the violation by availing himself of the benefit of undocumented workers' past labor without paying for it in accordance with minimum FLSA standards.

Madeira v. Affordable Hous. Found., 469 F.3d 219, 243 (2d Cir. 2006).

All workers are entitled to payment at or above the minimum wage, which, in

New York, currently varies between $11.10 and $15.00 per hour. Non-exempt workers, regardless of immigration status, are also entitled to overtime payment for hours worked over forty in one week. An employer cannot "assert a defense under the FLSA on the grounds of the employee's immigration status" to deny "a claim for backpay on behalf of undocumented workers who earned, but were not paid, overtime wages," because such claims "vindicate[] not only the policy underlying the FLSA but also federal immigration policy." *Solis v. Cindy's Total Care, Inc.*, No. 10 Civ. 7242, 2011 WL 6013844, at *3 (S.D.N.Y. Dec. 2, 2011). The FLSA applies to all as a way to protect against the exploitation of workers without papers, but also to protect the jobs of those who do have work authorization. Furthermore, it is meant to encourage all employers to follow the law.

> Failing to enforce FLSA because the employer raises the immigration status of his employee as a defense to compensation allows the employer to "effectively be immunized from its duty under the statute to pay earned wages, and would thereby be able to undercut law-abiding employers who hired lawful workers, as those workers would not be disabled from vindicating their FLSA rights.

Angamarca v. Da Ciro, Inc., 303 F.R.D. 445, 447 (S.D.N.Y. 2012) (quoting *Solis*, 2011 WL 6013844, at *3).

III. Immigration Status Is Not Generally Discoverable

During the litigation of wage claims, the Courts have repeatedly barred inquiries into the immigration status of a wage and hour plaintiff holding that disclosure of this information would have a chilling effect and "effectively eliminate the FLSA as a means for protecting undocumented workers from exploitation and retaliation." *Rodriguez v. Pie of Port Jefferson Corp.*, 48 F. Supp. 3d 424, 428 (E.D.N.Y. 2014) (quoting *Flores v. Amigon,* 233 F. Supp. 2d 462, 465 (E.D.N.Y.2002)); *see also Liu v. Donna Karan International, Inc.*, 207 F.Supp.2d 191, 192 (S.D.N.Y.2002) ("[C]ourts addressing the issue

of whether defendants should be allowed to discover plaintiff-workers' immigration status in cases seeking unpaid wages brought under the FLSA have found such information to be undiscoverable.").

Defendants often seek information regarding whether a plaintiff has filed taxes or has lawful immigration status. This is typically done to undermine the plaintiff's credibility and, in some cases, to discourage the plaintiff from continuing to pursue any claims. Courts view tax returns as private and of a sensitive nature, so calls for their production in wage-and-hour cases are usually barred, as are deposition questions regarding tax filings, unless the defendant shows that: (1) the returns are relevant to the subject matter of the action; and (2) there is a "compelling need for the returns because the information contained therein is not otherwise readily obtainable." *See Rosas v. Alice's Tea Cup, LLC*, 127 F. Supp. 3d 4, 12 (S.D.N.Y. 2015); *cf. Raba v. Suozzi*, No. 06 Civ. 1109, 2007 U.S. Dist. LEXIS 1567 (E.D.N.Y. Jan. 9, 2007) (finding no compelling need for production of tax returns where defendants sought tax returns to establish additional sources of income because defendants could question plaintiffs about that issue at deposition). Other tax forms, such as W-2 forms, are considered less intrusive and their production is more likely to be compelled. *See Agerbrink v. Model Serv. LLC*, No. 14 Civ. 7841, 2017 U.S. Dist. LEXIS 33249, at *20 (S.D.N.Y. Mar. 8, 2017) (finding no compelling need for discovery of tax returns where information about classification on the tax returns "may easily be obtained by interrogatory or deposition").

IV. It Is Unlawful to Retaliate Against an Undocumented Worker

Undocumented workers may assert their right to be paid in accordance with the law and employers may not retaliate or take negative action against workers for asserting these rights. Workers are protected by the anti-retaliation provisions of both the FLSA and NYLL which provide broad relief for anti-retaliation claims. *See* 29 U.S.C.

§ 216(b) ("Any employer . . . shall be liable for such legal or equitable relief as may be appropriate . . ."); N.Y. Lab. L. § 215(2)(a) ("An employee may bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated the provisions of this section. The court shall have jurisdiction…to order all appropriate relief").

Some examples of unlawful retaliation against a worker are: decreasing a worker's hours, terminating his employment, or reporting him to ICE in response to a complaint that was raised. *Valle v. Beauryne Builders LLC*, No. 17 Civ. 0274, 2018 WL 1463692, at *4 (M.D. La., 2018). Requiring a worker to complete an I-9 form in direct response to a complaint made by the worker may also constitute retaliation, as was held in *E.E.O.C. v. City of Joliet*, 239 F.R.D. 490 (N.D. Ill. 2006). An employer's counsel may also be held liable for retaliatory activity if the counsel takes action against the worker on behalf of the employer, such as by contacting ICE about an employee while an FLSA action is pending against the employer. In *Arias v. Raimondo*, 860 F.3d 1185 (9th Cir. 2017) the Court explained,

> The wage and hours provisions focus on de facto employers, but the anti-retaliation provision refers to 'any person' who retaliates. See 29 U.S.C. § 215(a)(3). In turn, section 203(d) extends this concept to "any person acting directly or indirectly in the interest of an employer in relation to an employee." See Id. § 203(d). Thus, Congress clearly means to extend section 215(a)(3)'s reach beyond actual employers.

Arias, 860 F.3d at 1191-1192. *But see Diaz v. Longcore*, 751 Fed. Appx. 755 (6th Cir. 2018) (holding that an employer's outside counsel in a FLSA action is not an "employer" who may be sued for violating the anti-retaliation provision).

a) Arrests by ICE

Undocumented immigrants may hesitate to make a claim against an employer for fear of retaliation, including being reported to ICE. There have been instances in

which ICE has arrested workers while they participated in the prosecution of their employment claims. *E.g.*, Beth Fertig, *Undocumented Restaurant Worker Is Arrested by ICE During Deposition Against His Employer*, WNYC NEWS (Aug. 16, 2019), https://www.wnyc.org/story/undocumented-restaurant-worker-arrested-ice-during-deposition-against-his-employer/. However, such situations are rare. ICE has a Memorandum of Understanding with the U.S. Department of Labor to not to detain workers that are in the process of suing an employer over workplace violations. Furthermore, ICE has limited enforcement authority in courthouses. U.S. Immigration and Customs Enforcement, FAQ on Sensitive Locations and Courthouse Arrests, https://www.ice .gov/ero/ enforcement/sensitive-loc (last visited Sept. 6, 2019). In New York State, a directive was issued April 17, 2019 specifically limiting the ability of federal immigration officials to arrest immigrants in New York State courts. "Arrests by agents of U.S. Immigration and Customs Enforcement may be executed inside a New York State courthouse only pursuant to a judicial warrant or judicial order authorizing the arrest." State of New York Unified Court System, Office of the Chief Administrative Judge, Directive Number: 1-2019 (April 17, 2019).

b) NYLL Extends Protections for Undocumented Population

Senate Bill 5791 was signed into law by Governor Cuomo on July 27, 2019 and goes into effect October 25, 2019. It extends protections for undocumented workers under the NYLL. The law currently states, in relevant part,

> No employer or his or her agent . . . shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee . . . because such employee has made a complaint to his or her employer . . . caused to be instituted or is about to institute a proceeding . . . testified . . . or otherwise exercised rights.

N.Y. Lab. L. § 215(1)(a).

As of October 25, 2019, the law is amended to add the following specifications:

> . . . to threaten, penalize, or in any other manner discriminate or retaliate against any employee includes threatening to contact or contacting United States immigration authorities or otherwise reporting or threatening to report an employee's suspected citizenship or immigration status or the suspected citizenship or immigration status of an employee's family or household member . . . to a federal, state or local agency.

Id.

V. Settlement Payments to Undocumented Workers

Undocumented workers may recover damages for unpaid wages regardless of their immigration status and despite not having a valid social security number. *Saavedra v. Mrs. Bloom's Direct, Inc*., 17 Civ. 2180, 2018 WL 2357264, at *3 (S.D.N.Y., 2018) (explaining that only an Individual Tax Identification Number need be provided for settlement purposes).

Courts are protective of plaintiffs' right to collect damages in wage cases, under both the FLSA and the NYLL.

> When plaintiffs work 'in an industry that often pays minimal amounts . . . and often employs undocumented foreigners,' refusal to pay a settlement on the basis of a plaintiff's immigration status poses a 'real danger of undercutting the protective goals of the remedial statutes under which plaintiffs have sued' and settled.

Kim v. Kum Gang, Inc., No. 12 Civ. 6344, 2014 WL 2510576, at *2 (S.D.N.Y. June 2, 2014). Furthermore,

> Defendants chose to hire Plaintiff without a USCIS I-9 form or failed to verify the underlying documentation supporting her I-9 form, they are likely estopped from using Plaintiff's purported immigration status as a shield from performing under the settlement, particularly where Defendants already "avail[ed] [themselves] of the benefit of [Plaintiff's] past labor without paying for it."

Saavedra, 2018 WL 2357264, at *3.

Appendix to Materials Submitted by Erin S. Torcello, Esq.

Senate Bill S2844B
2019-2020 Legislative Session

Relates to securing payment of wages for work already performed; creates an employee lien

DOWNLOAD BILL TEXT PDF (HTTPS://LEGISLATION.NYSENATE.GOV/PDF/BILLS/2019/S2844B)

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CURRENT BILL STATUS - PASSED SENATE & ASSEMBLY

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✓ AYE ✗ NAY

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BILL AMENDMENTS

B (ACTIVE)

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S2844B (ACTIVE) - DETAILS

See Assembly Version of this Bill:

A486 (/Legislation/Bills/2019/A486/Amendment/B)

Law Section:

Lien Law

Laws Affected:

Amd Lien L, generally; amd §§199-a & 663, Lab L; amd §§6201, 6210 & 6211, R6212, CPLR; amd §§624 & 630, BC L; amd §§609 & 1102, Lim Lil L

Versions Introduced in Other Legislative Sessions:
2013-2014: S6658 (/Legislation/Bills/2013/S6658)
2015-2016: S2232 (/Legislation/Bills/2015/S2232)
2017-2018: S579 (/Legislation/Bills/2017/S579), A628 (/Legislation/Bills/2017/A628)

S2844B (ACTIVE) - SUMMARY

Relates to securing payment of wages for work already performed; creates a lien remedy for all employees; provides grounds for attachment; relates to procedures where employees may hold shareholders of non-publicly traded corporations personally liable for wage theft... (view more)

S2844B (ACTIVE) - SPONSOR MEMO

```
BILL NUMBER: S2844B

SPONSOR: RAMOS

TITLE OF BILL:  An act to amend the lien law, in relation to employee
liens; to amend the labor law, in relation to employee complaints; to
amend the civil practice law and rules, in relation to grounds for
attachment; to amend the business corporation law, in relation to
streamlining procedures where employees may hold shareholders of non-
publicly traded corporations personally liable for wage theft; and to
amend the limited liability company law, in relation to creating a right
for victims of wage theft to hold the ten members with the largest
ownership interests in a company personally liable for wage theft


PURPOSE:

This bill amends five sections of the law (Lien Law; Labor Law; Attach-
ment under the Civil Practice Law and Rules; the Business Corporations
Law; and the Limited Liability Company Law) to strengthen current laws
to increase the likelihood that victims of "wage theft" will be able to
secure payment of unpaid wages for work already performed from their
employers.
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VIEW MORE (51 LINES)

S2844B (ACTIVE) - BILL TEXT

DOWNLOAD PDF (HTTPS://LEGISLATION.NYSENATE.GOV/PDF/BILLS/2019/S2844B)

S T A T E O F N E W Y O R K

2844--B

Cal. No. 492

2019-2020 Regular Sessions

I N S E N A T E

January 29, 2019

Introduced by Sens. RAMOS, BAILEY, BIAGGI, GIANARIS, GOUNARDES, JACKSON, KRUEGER, RIVERA, SALAZAR, SANDERS, STAVISKY -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading -- again amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the lien law, in relation to employee liens; to amend the labor law, in relation to employee complaints; to amend the civil practice law and rules, in relation to grounds for attachment; to amend the business corporation law, in relation to streamlining procedures where employees may hold shareholders of non-publicly traded corporations personally liable for wage theft; and to amend the limited liability company law, in relation to creating a right for victims of wage theft to hold the ten members with the largest ownership interests in a company personally liable for wage theft

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 2 of the lien law is amended by adding three new subdivisions 21, 22 and 23 to read as follows:

21. EMPLOYEE. THE TERM "EMPLOYEE", WHEN USED IN THIS CHAPTER, SHALL HAVE THE SAME MEANING AS "EMPLOYEE" PURSUANT TO ARTICLES ONE, SIX, NINETEEN AND NINETEEN-A OF THE LABOR LAW, AS APPLICABLE, OR THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 201 ET. SEQ., AS APPLICABLE.

22. EMPLOYER. THE TERM "EMPLOYER", WHEN USED IN THIS CHAPTER, SHALL HAVE THE SAME MEANING AS "EMPLOYER" PURSUANT TO ARTICLES ONE, SIX, NINETEEN AND NINETEEN-A OF THE LABOR LAW, AS APPLICABLE, OR THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 201 ET. SEQ., AS APPLICABLE, EXCEPT THAT THE TERM "EMPLOYER" SHALL NOT INCLUDE A GOVERNMENTAL AGENCY.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

VIEW MORE (1,062 LINES)

Mary__Lister • 3 months ago

This is a much-needed bill to ensure fair and just treatment for the workers of New York State.

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ALSO ON THE NEW YORK STATE SENATE

A7934

1 comment • 2 months ago

Michael__Otten_1 — While I admire the actions taken in January 2019, there is still much to be done to raise New York's stature as a truly democratic state, where the 3 million unaffiliated or non-members of the dominant two

A7997

2 comments • 3 months ago

Clinton_Eller — I strongly oppose A7997 because citizens who legally petition their government for a referendum on incorporation shouldn't have to worry about politicians changing laws because they don't like the potential

S6532

5 comments • 3 months ago

mary14889 — My BOE just informed that the bill is sitting on Cuomo's desk and that he has no intention of signing it. We need a petition to the governor. I'm going to work something up for the Chemung County Dem Committtee

S6279

2 comments • 3 months ago

Daniela_Elefteriadis — Many of the vaccines listed aren't communicable through air or common contact.
Why would they need a tetnus shot?

Assembly Bill A486B

2019-2020 Legislative Session

Relates to securing payment of wages for work already performed; creates an employee lien

DOWNLOAD BILL TEXT PDF (HTTPS://LEGISLATION.NYSENATE.GOV/PDF/BILLS/2019/A486B)

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CURRENT BILL STATUS VIA S2844 - PASSED SENATE & ASSEMBLY

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B (ACTIVE)

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VIEW ADDITIONAL MULTI-SPONSORS

A486B (ACTIVE) - DETAILS

See Senate Version of this Bill:

S2844 (/Legislation/Bills/2019/S2844/Amendment/B)

Law Section:

Lien Law

Laws Affected:

Amd Lien L, generally; amd §§199-a & 663, Lab L; amd §§6201, 6210 & 6211, R6212, CPLR; amd §§624 & 630, BC L; amd §§609 & 1102, Lim Lil L

Versions Introduced in Other Legislative Sessions:
2013-2014: S6658 (/Legislation/Bills/2013/S6658)
2015-2016: S2232 (/Legislation/Bills/2015/S2232)
2017-2018: A628 (/Legislation/Bills/2017/A628), S579 (/Legislation/Bills/2017/S579)

A486B (ACTIVE) - SUMMARY

Relates to securing payment of wages for work already performed; creates a lien remedy for all employees; provides grounds for attachment; relates to procedures where employees may hold shareholders of non-publicly traded corporations personally liable for wage theft... (view more)

A486B (ACTIVE) - BILL TEXT

DOWNLOAD PDF (HTTPS://LEGISLATION.NYSENATE.GOV/PDF/BILLS/2019/A486B)

S T A T E O F N E W Y O R K

486--B

Cal. No. 372

2019-2020 Regular Sessions

I N A S S E M B L Y

(PREFILED)

January 9, 2019

Introduced by M. of A. L. ROSENTHAL, MOSLEY, GOTTFRIED, OTIS, WEPRIN, ORTIZ, PERRY, DAVILA, DINOWITZ, SIMON, M. G. MILLER, LIFTON, BARRON, SEAWRIGHT, RICHARDSON, BENEDETTO, STECK, BRONSON, CRESPO, HUNTER, ROZIC, COLTON, TAYLOR, PICHARDO, EPSTEIN, REYES, DeSTEFANO, ZEBROWSKI, STIRPE, CARROLL, McMAHON, RAMOS, JAFFEE, CRUZ -- Multi-Sponsored by -- M. of A. COOK, DE LA ROSA, HEVESI, KIM, LENTOL, RIVERA -- read once and referred to the Committee on Judiciary -- reported and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported from committee, advanced to a third reading, amended and ordered reprinted, retaining its place on the order of third reading

AN ACT to amend the lien law, in relation to employee liens; to amend the labor law, in relation to employee complaints; to amend the civil practice law and rules, in relation to grounds for attachment; to amend the business corporation law, in relation to streamlining procedures where employees may hold shareholders of non-publicly traded corporations personally liable for wage theft; and to amend the limited liability company law, in relation to creating a right for victims of wage theft to hold the ten members with the largest ownership interests in a company personally liable for wage theft

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 2 of the lien law is amended by adding three new subdivisions 21, 22 and 23 to read as follows:

21. EMPLOYEE. THE TERM "EMPLOYEE", WHEN USED IN THIS CHAPTER, SHALL HAVE THE SAME MEANING AS "EMPLOYEE" PURSUANT TO ARTICLES ONE, SIX, NINETEEN AND NINETEEN-A OF THE LABOR LAW, AS APPLICABLE, OR THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 201 ET. SEQ., AS APPLICABLE.

22. EMPLOYER. THE TERM "EMPLOYER", WHEN USED IN THIS CHAPTER, SHALL HAVE THE SAME MEANING AS "EMPLOYER" PURSUANT TO ARTICLES ONE, SIX, NINE-

VIEW MORE (1,070 LINES)

STATE OF NEW YORK

2844--B

Cal. No. 492

2019-2020 Regular Sessions

IN SENATE

January 29, 2019

Introduced by Sens. RAMOS, BAILEY, BIAGGI, GIANARIS, GOUNARDES, JACKSON, KRUEGER, RIVERA, SALAZAR, SANDERS, STAVISKY -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading -- again amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the lien law, in relation to employee liens; to amend the labor law, in relation to employee complaints; to amend the civil practice law and rules, in relation to grounds for attachment; to amend the business corporation law, in relation to streamlining procedures where employees may hold shareholders of non-publicly traded corporations personally liable for wage theft; and to amend the limited liability company law, in relation to creating a right for victims of wage theft to hold the ten members with the largest ownership interests in a company personally liable for wage theft

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 2 of the lien law is amended by adding three new subdivisions 21, 22 and 23 to read as follows:

21. Employee. The term "employee", when used in this chapter, shall have the same meaning as "employee" pursuant to articles one, six, nineteen and nineteen-A of the labor law, as applicable, or the Fair Labor Standards Act, 29 U.S.C. § 201 et. seq., as applicable.

22. Employer. The term "employer", when used in this chapter, shall have the same meaning as "employer" pursuant to articles one, six, nineteen and nineteen-A of the labor law, as applicable, or the Fair Labor Standards Act, 29 U.S.C. § 201 et. seq., as applicable, except that the term "employer" shall not include a governmental agency.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD00946-05-9

23. Wage claim. The term "wage claim", when used in this chapter, means a claim that an employee has suffered a violation of sections one hundred seventy, one hundred ninety-three, one hundred ninety-six-d, six hundred fifty-two or six hundred seventy-three of the labor law or the related regulations and wage orders promulgated by the commissioner, a claim for wages due to an employee pursuant to an employment contract that were unpaid in violation of that contract, or a claim that an employee has suffered a violation of 29 U.S.C. § 206 or 207.

§ 2. Section 3 of the lien law, as amended by chapter 137 of the laws of 1985, is amended to read as follows:

§ 3. Mechanic's lien **and employee's lien** on [~~real~~] property. **1. Mechanic's lien.** A contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman or person or corporation selling fruit or ornamental trees, roses, shrubbery, vines and small fruits, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, and any trust fund to which benefits and wage supplements are due or payable for the benefit of such laborers, shall have a lien for the principal and interest, of the value, or the agreed price, of such labor, including benefits and wage supplements due or payable for the benefit of any laborer, or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter. Where the contract for an improvement is made with a husband or wife and the property belongs to the other or both, the husband or wife contracting shall also be presumed to be the agent of the other, unless such other having knowledge of the improvement shall, within ten days after learning of the contract give the contractor written notice of his or her refusal to consent to the improvement. Within the meaning of the provisions of this chapter, materials actually manufactured for but not delivered to the real property, shall also be deemed to be materials furnished.

2. Employee's lien. An employee who has a wage claim as that term is defined in subdivision twenty-three of section two of this chapter shall have a lien on his or her employer's interest in property for the value of that employee's wage claim arising out of the employment, including liquidated damages pursuant to subdivision one-a of section one hundred ninety-eight, section six hundred sixty-three or section six hundred eighty-one of the labor law, or 29 U.S.C. § 216 (b), from the time of filing a notice of such lien as prescribed in this chapter. An employee's lien based on a wage claim may be had against the employer's interest in real property and against the employer's interest in personal property that can be sufficiently described within the meaning of section 9-108 of the uniform commercial code, except that an employee's lien shall not extend to deposit accounts or goods as those terms are defined in section 9-102 of the uniform commercial code. The department of labor and the attorney general may obtain an employee's lien for the value of wage claims of the employees who are the subject of their investigations, court actions or administrative agency actions.

3. As used in this article and unless otherwise specified, a lien shall mean an employee's lien or a mechanic's lien.

§ 3. Subdivisions 1 and 2 of section 4 of the lien law, subdivision 1 as amended by chapter 515 of the laws of 1929 and subdivision 2 as added by chapter 704 of the laws of 1985, are amended to read as follows:

(1) [~~Such~~] **A mechanic's or employee's** lien **and employee's lien against real property** shall extend to the owner's right, title or interest in

the real property and improvements, existing at the time of filing the notice of lien, or thereafter acquired, except as hereinafter in this article provided. If an owner assigns his interest in such real property by a general assignment for the benefit of creditors, within thirty days prior to such filing, the lien shall extend to the interest thus assigned. If any part of the real property subjected to such lien be removed by the owner or by any other person, at any time before the discharge thereof, such removal shall not affect the rights of the lienor, either in respect to the remaining real property, or the part so removed. If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the **mechanic's** lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay by reason of all **mechanic's** liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens, except as hereinafter provided.

(2) [~~Such~~] **A mechanic's or employee's** lien shall not extend to the owner's right, title or interest in real property and improvements, existing at the time of filing the notice of lien if such lien arises from the failure of a lessee of the right to explore, develop or produce natural gas or oil, to pay for, compensate or render value for improvements made with the consent or at the request of such lessee by a contractor, subcontractor, materialman, equipment operator or owner, landscaper, nurseryman, or person or corporation who performs labor or furnishes materials for the exploration, development, or production of oil or natural gas or otherwise improves such leased property. Such **mechanic's or employee's** lien shall extend to the improvements made for the exploration, development and production of oil and natural gas, and the working interest held by a lessee of the right to explore, develop or produce oil and natural gas.

§ 4. The opening paragraph of section 4-a of the lien law, as amended by chapter 696 of the laws of 1959, is amended to read as follows:

The proceeds of any insurance which by the terms of the policy are payable to the owner of real property improved, and actually received or to be received by him because of the destruction or removal by fire or other casualty of an improvement on which lienors have performed labor or services or for which they have furnished materials, **or upon which an employee has established an employee's lien,** shall after the owner has been reimbursed therefrom for premiums paid by him, if any, for such insurance, be subject to liens provided by this act to the same extent and in the same order of priority as the real property would have been had such improvement not been so destroyed or removed.

§ 5. Subdivisions 1, 2 and 5 of section 9 of the lien law, as amended by chapter 515 of the laws of 1929, are amended to read as follows:

1. The name **of the lienor,** and **either the** residence of the lienor **or the name and business address of the lienor's attorney, if any**; and if the lienor is a partnership or a corporation, the business address of such firm, or corporation, the names of partners and principal place of business, and if a foreign corporation, its principal place of business within the state.

2. The name of the owner of the [~~real~~] property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor.

5. The amount unpaid to the lienor for such labor or materials**, or the amount of the wage claim if a wage claim is the basis for establishment of the lien, the items of the wage claim and the value thereof which make up the amount for which the lienor claims a lien**.

§ 6. Subdivision 1 of section 10 of the lien law, as amended by chapter 367 of the laws of 2011, is amended to read as follows:

1. **(a)** Notice of **mechanic's** lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished; provided, however, that where the improvement is related to real property improved or to be improved with a single family dwelling, the notice of **mechanic's** lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within four months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished; and provided further where the notice of **mechanic's** lien is for retainage, the notice of **mechanic's** lien may be filed within ninety days after the date the retainage was due to be released; except that in the case of a **mechanic's** lien by a real estate broker, the notice of **mechanic's** lien may be filed only after the performance of the brokerage services and execution of lease by both lessor and lessee and only if a copy of the alleged written agreement of employment or compensation is annexed to the notice of lien, provided that where the payment pursuant to the written agreement of employment or compensation is to be made in installments, then a notice of lien may be filed within eight months after the final payment is due, but in no event later than a date five years after the first payment was made. For purposes of this section, the term "single family dwelling" shall not include a dwelling unit which is a part of a subdivision that has been filed with a municipality in which the subdivision is located when at the time the lien is filed, such property in the subdivision is owned by the developer for purposes other than his personal residence. For purposes of this section, "developer" shall mean and include any private individual, partnership, trust or corporation which improves two or more parcels of real property with single family dwellings pursuant to a common scheme or plan. [~~The~~]

(b) Notice of employee's lien may be filed at any time not later than three years following the end of the employment giving rise to the wage claim.

(c) A notice of lien**, other than for a lien on personal property,** must be filed in the clerk's office of the county where the property is situated. If such property is situated in two or more counties, the notice of lien shall be filed in the office of the clerk of each of such counties. The county clerk of each county shall provide and keep a book to be called the "lien docket," which shall be suitably ruled in columns headed "owners," "lienors," "lienor's attorney," "property," "amount," "time of filing," "proceedings had," in each of which he shall enter the particulars of the notice, properly belonging therein. The date, hour and minute of the filing of each notice of lien shall be entered in the proper column. Except where the county clerk maintains a block index, the names of the owners shall be arranged in such book in alphabetical order. The validity of the lien and the right to file a notice thereof shall not be affected by the death of the owner before notice of the lien is filed. **A notice of employee's lien on personal property must be**

filed, together with a financing statement, in the filing office as set forth in section 9-501 of the uniform commercial code.

§ 7. Section 11 of the lien law, as amended by chapter 147 of the laws of 1996, is amended to read as follows:

§ 11. Service of copy of notice of lien. 1. Within five days before or thirty days after filing the notice of a mechanic's lien, the lienor shall serve a copy of such notice upon the owner, if a natural person, (a) by delivering the same to him personally, or if the owner cannot be found, to his agent or attorney, or (b) by leaving it at his last known place of residence in the city or town in which the real property or some part thereof is situated, with a person of suitable age and discretion, or (c) by registered or certified mail addressed to his last known place of residence, or (d) if such owner has no such residence in such city or town, or cannot be found, and he has no agent or attorney, by affixing a copy thereof conspicuously on such property, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon; if the owner be a corporation, said service shall be made (i) by delivering such copy to and leaving the same with the president, vice-president, secretary or clerk to the corporation, the cashier, treasurer or a director or managing agent thereof, personally, within the state, or (ii) if such officer cannot be found within the state by affixing a copy thereof conspicuously on such property between the hours of nine o'clock in the forenoon and four o'clock in the afternoon, or (iii) by registered or certified mail addressed to its last known place of business. Failure to file proof of such a service with the county clerk within thirty-five days after the notice of lien is filed shall terminate the notice as a lien. Until service of the notice has been made, as above provided, an owner, without knowledge of the lien, shall be protected in any payment made in good faith to any contractor or other person claiming a lien.

2. Within five days before or thirty days after filing the notice of an employee's lien, the lienor shall serve a copy of such notice upon the employer, if a natural person, (a) by delivering the same to him personally, or if the employer cannot be found, to his agent or attorney, or (b) by leaving it as his last known place of residence or business, with a person of suitable age and discretion, or (c) by registered or certified mail addressed to his last known place of residence or business, or (d) if such employer owns real property, by affixing a copy thereof conspicuously on such property, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon. The lienor also shall, within thirty days after filing the notice of employee's lien, affix a copy thereof conspicuously on the real property identified in the notice of employee's lien, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon. If the employer be a corporation, said service shall be made (i) by delivering such copy to and leaving the same with the president, vice-president, secretary or clerk to the corporation, the cashier, treasurer or a director or managing agent thereof, personally, within the state, or (ii) if such officer cannot be found within the state by affixing a copy thereof conspicuously on such property between the hours of nine o'clock in the forenoon and four o'clock in the afternoon, or (iii) by registered or certified mail addressed to its last known place of business, or (iv) by delivery to the secretary of the department of state in the same manner as required by subparagraph one of paragraph (b) of section three hundred six of the business corporation law. Failure to file proof of such a service with the county clerk within thirty-five days after the notice

of lien is filed shall terminate the notice as a lien. Until service of the notice has been made, as above provided, an owner, without knowledge of the lien, shall be protected in any payment made in good faith to any other person claiming a lien.

§ 8. Section 11-b of the lien law, as amended by chapter 147 of the laws of 1996, is amended to read as follows:

§ 11-b. Copy of notice of mechanic's lien to a contractor or subcontractor. Within five days before or thirty days after filing a notice of mechanic's lien in accordance with section ten of this chapter or the filing of an amendment of notice of mechanic's lien in accordance with section twelve-a of this [~~chapter~~] article the lienor shall serve a copy of such notice or amendment by certified mail on the contractor, subcontractor, assignee or legal representative for whom he was employed or to whom he furnished materials or if the lienor is a contractor or subcontractor to the person, firm or corporation with whom the contract was made. A lienor having a direct contractual relationship with a subcontractor or a sub-subcontractor but not with a contractor shall also serve a copy of such notice or amendment by certified mail to the contractor. Failure to file proof of such a service with the county clerk within thirty-five days after the notice of lien is filed shall terminate the notice as a lien. Any lienor, or a person acting on behalf of a lienor, who fails to serve a copy of the notice of mechanic's lien as required by this section shall be liable for reasonable attorney's fees, costs and expenses, as determined by the court, incurred in obtaining such copy.

§ 9. Subdivision 1 of section 12-a of the lien law, as amended by chapter 1048 of the laws of 1971, is amended to read as follows:

1. Within sixty days after the original filing, a lienor may amend his lien upon twenty days notice to existing lienors, mortgagees and the owner, provided that no action or proceeding to enforce or cancel the mechanics' lien or employee's lien has been brought in the interim, where the purpose of the amendment is to reduce the amount of the lien, except the question of wilful exaggeration shall survive such amendment.

§ 10. Subdivision 1 of section 13 of the lien law, as amended by chapter 878 of the laws of 1947, is amended to read as follows:

(1) [~~A~~] An employee's lien, or a lien for materials furnished or labor performed in the improvement of real property, shall have priority over a conveyance, mortgage, judgment or other claim against such property not recorded, docketed or filed at the time of the filing of the notice of such lien, except as hereinafter in this chapter provided; over advances made upon any mortgage or other encumbrance thereon after such filing, except as hereinafter in this article provided; and over the claim of a creditor who has not furnished materials or performed labor upon such property, if such property has been assigned by the owner by a general assignment for the benefit of creditors, within thirty days before the filing of either of such notices; and also over an attachment hereafter issued or a money judgment hereafter recovered upon a claim, which, in whole or in part, was not for materials furnished, labor performed or moneys advanced for the improvement of such real property; and over any claim or lien acquired in any proceedings upon such judgment. Such liens shall also have priority over advances made upon a contract by an owner for an improvement of real property which contains an option to the contractor, his successor or assigns to purchase the property, if such advances were made after the time when the labor began or the first item of material was furnished, as stated in the notice of lien. If several buildings are demolished, erected, altered or repaired,

or several pieces or parcels of real property are improved, under one contract, and there are conflicting liens thereon, each lienor shall have priority upon the particular part of the real property or upon the particular building or premises where his labor is performed or his materials are used. Persons shall have no priority on account of the time of filing their respective notices of liens, but all liens shall be on a parity except as hereinafter in section fifty-six of this chapter provided; and except that in all cases laborers for daily or weekly wages **with a mechanic's lien, and employees with an employee's lien,** shall have preference over all other claimants under this article.

§ 11. Section 17 of the lien law, as amended by chapter 324 of the laws of 2000, is amended to read as follows:

§ 17. Duration of lien. **1. (a)** No **mechanic's** lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency of such action, whether in a court of record or in a court not of record, is filed with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action, the object of the action, a brief description of the real property affected thereby, and the time of filing the notice of lien; or unless an extension to such lien, except for a lien on real property improved or to be improved with a single family dwelling, is filed with the county clerk of the county in which the notice of lien is filed within one year from the filing of the original notice of lien, continuing such lien and such lien shall be redocketed as of the date of filing such extension. Such extension shall contain the names of the lienor and the owner of the real property against whose interest therein such lien is claimed, a brief description of the real property affected by such lien, the amount of such lien, and the date of filing the notice of lien. No lien shall be continued by such extension for more than one year from the filing thereof. In the event an action is not commenced to foreclose the lien within such extended period, such lien shall be extinguished unless an order be granted by a court of record or a judge or justice thereof, continuing such lien, and such lien shall be redocketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order. A lien on real property improved or to be improved with a single family dwelling may only be extended by an order of a court of record, or a judge or justice thereof. No lien shall be continued by court order for more than one year from the granting thereof, but a new order and entry may be made in each of two successive years. If a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued. Such action shall be deemed an action to enforce the lien of such defendant lienor. The failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person. The provisions of this section in regard to continuing liens shall apply to liens discharged by deposit or by order on the filing of an undertaking. Where a lien is discharged by deposit or by order, a notice of pendency of action shall not be filed.

(b) A lien, the duration of which has been extended by the filing of a notice of the pendency of an action as above provided, shall nevertheless terminate as a lien after such notice has been canceled as provided

in section sixty-five hundred fourteen of the civil practice law and rules or has ceased to be effective as constructive notice as provided in section sixty-five hundred thirteen of the civil practice law and rules.

2. (a) No employee's lien on real property shall be a lien for a longer period than one year after the notice of lien has been filed, unless an extension to such lien is filed with the county clerk of the county in which the notice of lien is filed within one year from the filing of the original notice of lien, continuing such lien and such lien shall be redocketed as of the date of filing such extension. Such extension shall contain the names of the lienor and the owner of the real property against whose interest therein such lien is claimed, a brief description of the property affected by such lien, the amount of such lien, and the date of filing the notice of lien. No lien shall be continued by such extension for more than one year from the filing thereof. In the event an action is not commenced to obtain judgment on the wage claim or to foreclose the lien within such extended period, such lien shall be automatically extinguished unless an order be granted by a court of record or a judge or justice thereof, continuing such lien, and such lien shall be redocketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order.

(b) No employee's lien on personal property shall be a lien for a longer period than one year after the financing statement has been recorded, unless an extension to such lien, is filed with the filing office in which the financing statement is required to be filed pursuant to section 9-501 of the uniform commercial code within one year from the filing of the original financing statement, continuing such lien. Such extension shall contain the names of the lienor and the owner of the property against whose interest therein such lien is claimed, a brief description of the prior financing statement to be extended, and the date of filing the prior financing statement. No lien shall be continued by such extension for more than one year from the filing thereof. In the event an action is not commenced to obtain judgment on the wage claim or to foreclose the lien within such extended period, such lien shall be automatically extinguished unless an order be granted by a court of record or a judge or justice thereof, continuing such lien, and such lien shall be refiled as of the date of granting such order and a statement made that such lien is continued by virtue of such order.

(c) If a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued. Such action shall be deemed an action to enforce the lien of such defendant lienor. The failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person. The provisions of this section in regard to continuing liens shall apply to liens discharged by deposit or by order on the filing of an undertaking. Where a lien is discharged by deposit or by order, a notice of pendency of action shall not be filed.

(d) Notwithstanding the foregoing, if a lienor commences a foreclosure action or an action to obtain a judgment on the wage claim within one year from the filing of the notice of lien on real property or the recording of the financing statement creating lien on personal property, the lien shall be extended during the pendency of the action and for one hundred twenty days following the entry of final judgment in such

action, unless the action results in a final judgment or administrative order in the lienor's favor on the wage claims and the lienor commences a foreclosure action, in which instance the lien shall be valid during the pendency of the foreclosure action, provided, that the lien will be automatically extinguished if, after a dismissal with prejudice of the wage claims on which it is based, the lienor fails to file a notice of appeal within the prescribed period to file a notice of appeal. If a lien is extended due to the pendency of a foreclosure action or an action to obtain a judgment on the wage claim, the lienor shall file a notice of such pendency and extension with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action, the object of the action, a brief description of the property affected thereby, and the time of filing the notice of lien, or in the case of a lien on personal property shall file such notice with the office authorized to accept financing statements pursuant to section 9-501 of the uniform commercial code. For purposes of this section, an action to obtain judgment on a wage claim includes an action brought in any court of competent jurisdiction, the submission of a complaint to the department of labor or the submission of a claim to arbitration pursuant to an arbitration agreement. An action also includes an investigation of wage claims by the commissioner of labor or the attorney general of the state of New York, regardless of whether such investigation was initiated by a complaint.

(e) A lien, the duration of which has been extended by the filing of a notice of the pendency of an action as above provided, shall nevertheless terminate as a lien after such notice has been canceled as provided in section sixty-five hundred fourteen of the civil practice law and rules or has ceased to be effective as constructive notice as provided in section sixty-five hundred thirteen of the civil practice law and rules.

§ 12. Subdivisions 2 and 4 of section 19 of the lien law, subdivision 2 as amended by chapter 310 of the laws of 1962, subdivision 4 as added by chapter 582 of the laws of 2002 and paragraph a of subdivision 4 as further amended by section 104 of part A of chapter 62 of the laws of 2011, are amended to read as follows:

(2) By failure to begin an action to foreclose such lien or to secure an order continuing it, within one year from the time of filing the notice of lien, unless (i) an action be begun within the same period to foreclose a mortgage or another mechanic's lien upon the same property or any part thereof and a notice of pendency of such action is filed according to law, or (ii) an action is commenced to obtain a judgment on a wage claim pursuant to subdivision two of section seventeen of this article, but a lien, the duration of which has been extended by the filing of a notice of the pendency of an action as herein provided, shall nevertheless terminate as a lien after such notice has been cancelled or has ceased to be effective as constructive notice.

(4) Either before or after the beginning of an action by the employer, owner or contractor executing a bond or undertaking in an amount equal to one hundred ten percent of such lien conditioned for the payment of any judgment which may be rendered against the property or employer for the enforcement of the lien:

a. The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be sufficient; and where a certificate of qualification has been issued by the superintendent of financial services under the provisions of section one thousand one hundred eleven of the insurance

law, and has not been revoked, no justification or notice thereof shall be necessary. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking. Any such bond or undertaking shall be filed with the clerk of the county in which the notice of lien is filed, and a copy shall be served upon the adverse party. The undertaking is effective when so served and filed. If a certificate of qualification issued pursuant to subsections (b), (c) and (d) of section one thousand one hundred eleven of the insurance law is not filed with the undertaking, a party may except, to the sufficiency of a surety and by a written notice of exception served upon the adverse party within ten days after receipt, a copy of the undertaking. Exceptions deemed by the court to have been taken unnecessarily, or for vexation or delay, may, upon notice, be set aside, with costs. Where no exception to sureties is taken within ten days or where exceptions taken are set aside, the undertaking shall be allowed.

b. In the case of bonds or undertakings not executed pursuant to paragraph a of this subdivision, the **employer,** owner or contractor shall execute an undertaking with two or more sufficient sureties, who shall be free holders, to the clerk of the county where the premises are situated. The sureties must together justify in at least double the sum named in the undertaking. A copy of the undertaking, with notice that the sureties will justify before the court, or a judge or justice thereof, at the time and place therein mentioned, must be served upon the lienor or his attorney, not less than five days before such time. Upon the approval of the undertaking by the court, judge or justice an order shall be made by such court, judge or justice discharging such lien.

c. If the lienor cannot be found, or does not appear by attorney, service under this subsection may be made by leaving a copy of such undertaking and notice at the lienor's place of residence, or if a corporation at its principal place of business within the state as stated in the notice of lien, with a person of suitable age and discretion therein, or if the house of his abode or its place of business is not stated in said notice of lien and is not known, then in such manner as the court may direct. The premises, if any, described in the notice of lien as the lienor's residence or place of business shall be deemed to be his said residence or its place of business for the purposes of said service at the time thereof, unless it is shown affirmatively that the person servicing the papers or directing the service had knowledge to the contrary. Notwithstanding the other provisions of this subdivision relating to service of notice, in any case where the mailing address of the lienor is outside the state such service may be made by registered or certified mail, return receipt requested, to such lienor at the mailing address contained in the notice of lien.

d. Except as otherwise provided in this subdivision, the provisions of article twenty-five of the civil practice law and rules regulating undertakings is applicable to a bond or undertaking given for the discharge of a lien on account of private improvements **or of an employee's lien**.

§ 13. Section 24 of the lien law, as amended by chapter 515 of the laws of 1929, is amended to read as follows:

§ 24. Enforcement of [~~mechanic's~~] lien. **(1) Real property.** The [~~mechanics'~~] liens **on real property** specified in this article may be enforced against the property specified in the notice of lien and which

is subject thereto and against any person liable for the debt upon which the lien is founded, as prescribed in article three of this chapter.

(2) Personal property. An employee's lien on personal property specified in this article may immediately be enforced against the property through a foreclosure as prescribed in article nine of the uniform commercial code, or upon judgment obtained by the employee, commissioner of labor or attorney general of the state of New York, may be enforced in any manner available to the judgment creditor pursuant to article nine of the uniform commercial code or other applicable laws.

§ 14. Section 26 of the lien law, as amended by chapter 373 of the laws of 1977, is amended to read as follows:

§ 26. Subordination of liens after agreement with owner. In case an owner of real property shall execute to one or more persons, or a corporation, as trustee or trustees, a bond and mortgage or a note and mortgage affecting such property in whole or in part, or an assignment of the moneys due or to become due under a contract for a building loan in relation to such property, and in case such mortgage, if any, shall be recorded in the office of the register of the county where such real property is situated, or if such county has no register then in the office of the clerk of such county, and in case such assignment, if any, shall be filed in the office of the clerk of the county where such real property is situated; and in case lienors having [~~mechanics'~~] liens against said real property, notices of which have been filed up to and not later than fifteen days after the recording of such mortgage or the filing of such assignment, and which liens have not been discharged as in this article provided, shall, to the extent of at least fifty-five per centum of the aggregate amount for which such notices of liens have been so filed, approve such bond and mortgage or such note and mortgage, if any, and such assignment, if any, by an instrument or instruments in writing, duly acknowledged and filed in the office of such county clerk, then all mechanics' liens for labor performed or material furnished prior to the recording of such mortgage or filing of such assignment, whether notices thereof have been theretofore or are thereafter filed and which have not been discharged as in this article provided, shall be subordinate to the lien of such trust bond and mortgage or such trust note and mortgage to the extent of the aggregate amount of all certificates of interest therein issued by such trustee or trustees, or their successors, for moneys loaned, materials furnished, labor performed and any other indebtedness incurred after said trust mortgage shall have been recorded, and for expenses in connection with said trust mortgage, and shall also be subordinate to the lien of the bond and mortgage or note and mortgage, given to secure the amount agreed to be advanced under such contract for a building loan to the extent of the amount which shall be advanced by the holder of such bond and mortgage or such note and mortgage to the trustee or trustees, or their successors, under such assignment. The provisions of this section shall apply to all bonds and mortgages and notes and mortgages and all assignments of moneys due, or to become due under building loan contracts executed by such owner, in like manner, and recorded or filed, from time to time as hereinbefore provided. In case of an assignment to trustees under the provisions of this section, the trustees and their successors shall be the agents of the assignor to receive and receipt for any and all sums advanced by the holder of the building loan bond and mortgage or the building loan note and mortgage under the building loan contract and such assignment. No lienor shall have any priority over the bond and mortgage or note and mortgage given to secure the money agreed to be advanced under a build-

ing loan contract or over the advances made thereunder, by reason of any act preceding the making and approval of such assignment.

§ 15. Section 38 of the lien law, as amended by chapter 859 of the laws of 1930, is amended to read as follows:

§ 38. Itemized statement may be required of lienor. A lienor who has filed a notice of **mechanic's** lien shall, on demand in writing, deliver to the owner or contractor making such demand a statement in writing which shall set forth the items of labor and/or material and the value thereof which make up the amount for which he claims a lien, and which shall also set forth the terms of the contract under which such items were furnished. The statement shall be verified by the lienor or his agent in the form required for the verification of notices in section nine of this [~~chapter~~] **article**. If the lienor shall fail to comply with such a demand within five days after the same shall have been made by the owner or contractor, or if the lienor delivers an insufficient statement, the person aggrieved may petition the supreme court of this state or any justice thereof, or the county court of the county where the premises are situated, or the county judge of such county for an order directing the lienor within a time specified in the order to deliver to the petitioner the statement required by this section. Two days' notice in writing of such application shall be served upon the lienor. Such service shall be made in the manner provided by law for the personal service of a summons. The court or a justice or judge thereof shall hear the parties and upon being satisfied that the lienor has failed, neglected or refused to comply with the requirements of this section shall have an appropriate order directing such compliance. In case the lienor fails to comply with the order so made within the time specified, then upon five days' notice to the lienor, served in the manner provided by law for the personal service of a summons, the court or a justice or judge thereof may make an order cancelling the lien.

§ 16. Section 39 of the lien law, as added by chapter 859 of the laws of 1930, is amended to read as follows:

§ 39. Lien wilfully exaggerated is void. In any action or proceeding to enforce a mechanic's lien upon a private or public improvement **or an employee's lien,** or in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon. No such lienor shall have a right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this section may be vacated upon application to the court on two days' notice.

§ 17. Section 39-a of the lien law, as added by chapter 859 of the laws of 1930, is amended to read as follows:

§ 39-a. Liability of lienor where lien has been declared void on account of wilful exaggeration. Where in any action or proceeding to enforce a mechanic's lien upon a private or public improvement **or an employee's lien** the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor. The damages which said owner or contractor shall be entitled to recover, shall include the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any money deposited for the purpose of discharging the lien, reasonable attorney's fees for services in securing the discharge of the lien, and**, in an action or proceeding to enforce a mechanic's lien,** an amount equal to the difference by which the amount

claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon.

§ 18. Section 40 of the lien law, as amended by chapter 515 of the laws of 1929, is amended to read as follows:

§ 40. Construction of article. This article is to be construed in connection with article two of this chapter, and provides proceedings for the enforcement of **employee's liens on real property, as well as** liens for labor performed and materials furnished in the improvement of real property, created by virtue of such article.

§ 19. Section 41 of the lien law, as amended by chapter 807 of the laws of 1952, is amended to read as follows:

§ 41. Enforcement of mechanic's **or employee's** lien on real property. A mechanic's lien **or employee's lien** on real property may be enforced against such property, and against a person liable for the debt upon which the lien is founded, by an action, by the lienor, his assignee or legal representative, in the supreme court or in a county court otherwise having jurisdiction, regardless of the amount of such debt, or in a court which has jurisdiction in an action founded on a contract for a sum of money equivalent to the amount of such debt.

§ 20. Section 43 of the lien law, as amended by chapter 310 of the laws of 1962, is amended to read as follows:

§ 43. Action in a court of record; consolidation of actions. The provisions of the real property actions and proceedings law relating to actions for the foreclosure of a mortgage upon real property, and the sale and the distribution of the proceeds thereof apply to actions in a court of record, to enforce mechanics' liens **and employees' liens** on real property, except as otherwise provided in this article. If actions are brought by different lienors in a court of record, the court in which the first action was brought, may, upon its own motion, or upon the application of any party in any of such actions, consolidate all of such actions.

§ 21. Section 46 of the lien law, as amended by chapter 515 of the laws of 1929, is amended to read as follows:

§ 46. Action in a court not of record. If an action to enforce a mechanic's lien **or employee's lien** against real property is brought in a court not of record, it shall be commenced by the personal service upon the owner of a summons and complaint verified in the same manner as a complaint in an action in a court of record. The complaint must set forth substantially the facts contained in the notice of lien, and the substance of the agreement under which the labor was performed or the materials were furnished**, or if the lien is based upon a wage claim as defined in section two of this chapter, the basis for such wage claim**. The form and contents of the summons shall be the same as provided by law for the commencement of an action upon a contract in such court. The summons must be returnable not less than twelve nor more than twenty days after the date of the summons, or if service is made by publication, after the day of the last publication of the summons. Service must be made at least eight days before the return day.

§ 22. Section 50 of the lien law, as amended by chapter 515 of the laws of 1929, is amended to read as follows:

§ 50. Execution. Execution may be issued upon a judgment obtained in an action to enforce a mechanic's lien **or an employee's lien** against real property in a court not of record, which shall direct the officer to sell the title and interest of the owner in the premises, upon which the lien set forth in the complaint existed at the time of filing the notice of lien.

§ 23. Section 53 of the lien law, as amended by chapter 515 of the laws of 1929, is amended to read as follows:

§ 53. Costs and disbursements. If an action is brought to enforce a mechanic's lien **or an employee's lien** against real property in a court of record, the costs and disbursements shall rest in the discretion of the court, and may be awarded to the prevailing party. The judgment rendered in such an action shall include the amount of such costs and specify to whom and by whom the costs are to be paid. If such action is brought in a court not of record, they shall be the same as allowed in civil actions in such court. The expenses incurred in serving the summons by publication may be added to the amount of costs now allowed in such court.

§ 24. Section 59 of the lien law, as amended by chapter 515 of the laws of 1929, is amended to read as follows:

§ 59. Vacating of a [~~mechanic's~~] lien; cancellation of bond; return of deposit, by order of court. **1.** A mechanic's lien notice of which has been filed on real property or a bond given to discharge the same may be vacated and cancelled or a deposit made to discharge a lien pursuant to section twenty **of this chapter** may be returned, by an order of a court of record. Before such order shall be granted, a notice shall be served upon the lienor, either personally or by leaving it as his last known place of residence, with a person of suitable age, with directions to deliver it to the lienor. Such notice shall require the lienor to commence an action to enforce the lien, within a time specified in the notice, not less than thirty days from the time of service, or show cause at a special term of a court of record, or at a county court, in a county in which the property is situated, at a time and place specified therein, why the notice of lien filed or the bond given should not be vacated and cancelled, or the deposit returned, as the case may be. Proof of such service and that the lienor has not commenced the action to foreclose such lien, as directed in the notice, shall be made by affidavit, at the time of applying for such order.

2. An employee's lien notice of which has been filed on real property or a bond given to discharge the same may be vacated and cancelled or a deposit made to discharge a lien pursuant to section twenty of this chapter may be returned, by an order of a court of record. Before such order shall be granted, a notice shall be served upon the lienor, either personally or by leaving it at his last known place of residence or attorney's place of business, with a person of suitable age, with directions to deliver it to the lienor. Such notice shall require the lienor to commence an action to enforce the lien, or to commence an action to obtain judgment on the wage claim upon which the lien was established, within a time specified in the notice, not less than thirty days from the time of service, or show cause at a special term of a court of record, or at a county court, in a county in which the property is situated, at a time and place specified therein, why the notice of lien filed or the bond given should not be vacated and cancelled, or the deposit returned, as the case may be. Proof of such service and that the lienor has not commenced the action to foreclose such lien or an action to obtain judgment on the wage claim upon which the lien was established, as directed in the notice, shall be made by affidavit, at the time of applying for such order.

§ 25. Section 62 of the lien law, as amended by chapter 697 of the laws of 1934, is amended to read as follows:

§ 62. Bringing in new parties. A lienor who has filed a notice of lien after the commencement of an action in a court of record to foreclose or

enforce **an employee's lien or** a mechanic's lien against real property or a public improvement, may at any time up to and including the day preceding the day on which the trial of such action is commenced, make application upon notice to the plaintiff or his attorney in such action, to be made a party therein. Upon good cause shown, the court must order such lienor to be brought in by amendment. If the application is made by any other party in said action to make such lienor or other person a party, the court may in its discretion direct such lienor or other person to be brought in by like amendment. The order to be entered on such application shall provide the time for and manner of serving the pleading of such additional lienor or other person and shall direct that the pleadings, papers and proceedings of the other several parties in such action, shall be deemed amended, so as not to require the making or serving of papers other than said order to effectuate such amendment, and shall further provide that the allegations in the answer of such additional lienor or other person shall, for the purposes of the action, be deemed denied by the other parties therein. The action shall be so conducted by the court as not to cause substantially any delay in the trial thereof. The bringing in of such additional lienor or other person shall be without prejudice to the proceedings had, and if the action be on the calendar of the court, same shall retain its place on such calendar without the necessity of serving a new note of issue and new notices of trial.

§ 26. Subdivision 3 of section 199-a of the labor law, as amended by chapter 564 of the laws of 2010, is amended to read as follows:

3. Each employee and his or her authorized representative shall be notified in writing**, of the termination of the commissioner's investigation of the employee's complaint and the result of such investigation,** of any award and collection of back wages and civil penalties, and of any intent to seek criminal penalties. In the event that criminal penalties are sought the employee and his or her authorized representative shall be notified of the outcome of prosecution.

§ 27. Subdivision 2 of section 663 of the labor law, as amended by chapter 564 of the laws of 2010, is amended to read as follows:

2. By commissioner. On behalf of any employee paid less than the wage to which the employee is entitled under the provisions of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim, and the employer shall be required to pay the full amount of the underpayment, plus costs, and unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law, an additional amount as liquidated damages. Liquidated damages shall be calculated by the commissioner as no more than one hundred percent of the total amount of underpayments found to be due the employee. In any action brought by the commissioner in a court of competent jurisdiction, liquidated damages shall be calculated as an amount equal to one hundred percent of underpayments found to be due the employee. **Each employee or his or her authorized representative shall be notified in writing of the outcome of any legal action brought on the employee's behalf pursuant to this section.**

§ 28. Subdivision 5 of section 6201 of the civil practice law and rules, as amended by chapter 860 of the laws of 1977 and as renumbered by chapter 618 of the laws of 1992, is amended and a new subdivision 6 is added to read as follows:

5. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to

full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53[.] **of this chapter; or**

6. the cause of action is based on wage claims. "Wage claims," when used in this chapter, shall include any claims of violations of articles five, six, and nineteen of the labor law, section two hundred fifteen of the labor law, and the related regulations or wage orders promulgated by the commissioner of labor, including but not limited to any claims of unpaid, minimum, overtime, and spread-of-hours pay, unlawfully retained gratuities, unlawful deductions from wages, unpaid commissions, unpaid benefits and wage supplements, and retaliation, and any claims pursuant to 18 U.S.C. § 1595, 29 U.S.C. § 201 et seq., and/or employment contract as well as the concomitant liquidated damages and penalties authorized pursuant to the labor law, the Fair Labor Standards Act, or any employment contract.

§ 29. Section 6210 of the civil practice law and rules, as added by chapter 860 of the laws of 1977, is amended to read as follows:

§ 6210. Order of attachment on notice; temporary restraining order; contents. Upon a motion on notice for an order of attachment, the court may, without notice to the defendant, grant a temporary restraining order prohibiting the transfer of assets by a garnishee as provided in subdivision (b) of section 6214. **When attachment is sought pursuant to subdivision six of section 6201, and if the employer contests the motion, the court shall hold a hearing within ten days of when the employer's response to plaintiffs' motion for attachment is due.** The contents of the order of attachment granted pursuant to this section shall be as provided in subdivision (a) of section 6211.

§ 30. Subdivision (b) of section 6211 of the civil practice law and rules, as amended by chapter 566 of the laws of 1985, is amended to read as follows:

(b) Confirmation of order. Except where an order of attachment is granted on the ground specified in subdivision one **or six** of section 6201, an order of attachment granted without notice shall provide that within a period not to exceed five days after levy, the plaintiff shall move, on such notice as the court shall direct to the defendant, the garnishee, if any, and the sheriff, for an order confirming the order of attachment. Where an order of attachment without notice is granted on the ground specified in subdivision one **or six** of section 6201, the court shall direct that the statement required by section 6219 be served within five days, that a copy thereof be served upon the plaintiff, and the plaintiff shall move within ten days after levy for an order confirming the order of attachment. If the plaintiff upon such motion shall show that the statement has not been served and that the plaintiff will be unable to satisfy the requirement of subdivision (b) of section 6223 until the statement has been served, the court may grant one extension of the time to move for confirmation for a period not to exceed ten days. If plaintiff fails to make such motion within the required period, the order of attachment and any levy thereunder shall have no further effect and shall be vacated upon motion. Upon the motion to confirm, the provisions of subdivision (b) of section 6223 shall apply. An order of attachment granted without notice may provide that the sheriff refrain from taking any property levied upon into his actual custody, pending further order of the court.

§ 31. Subdivisions (b) and (e) of rule 6212 of the civil practice law and rules, subdivision (b) as separately amended by chapters 15 and 860

of the laws of 1977 and subdivision (e) as added by chapter 860 of the laws of 1977, are amended to read as follows:

(b) Undertaking. [~~On~~] **1. Except where an order of attachment is sought on the ground specified in subdivision six of section 6201, on** a motion for an order of attachment, the plaintiff shall give an undertaking, in a total amount fixed by the court, but not less than five hundred dollars, a specified part thereof conditioned that the plaintiff shall pay to the defendant all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, and the balance conditioned that the plaintiff shall pay to the sheriff all of his allowable fees.

2. On a motion for an attachment pursuant to subdivision six of section 6201, the court shall order that the plaintiff give an accessible undertaking of no more than five hundred dollars, or in the alternative, may waive the undertaking altogether. The attorney for the plaintiff shall not be liable to the sheriff for such fees. The surety on the undertaking shall not be discharged except upon notice to the sheriff.

(e) Damages. [~~The~~] **Except where an order of attachment is sought on the ground specified in subdivision six of section 6201, the** plaintiff shall be liable to the defendant for all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property. Plaintiff's liability shall not be limited by the amount of the undertaking.

§ 32. Paragraph (b) of section 624 of the business corporation law, as amended by chapter 449 of the laws of 1997, is amended to read as follows:

(b) Any person who shall have been a shareholder of record of a corporation**, or who is or shall have been a laborer, servant or employee,** upon at least five days' written demand shall have the right to examine in person or by agent or attorney, during usual business hours, its minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom for any purpose reasonably related to such person's interest as a shareholder**, laborer, servant or employee, provided the purpose reasonably related to a person's interest as a laborer, servant or employee shall be to obtain the names, addresses, and value of shareholders' interests in the corporation**. Holders of voting trust certificates representing shares of the corporation shall be regarded as shareholders for the purpose of this section. Any such agent or attorney shall be authorized in a writing that satisfies the requirements of a writing under paragraph (b) of section 609 (Proxies). A corporation requested to provide information pursuant to this paragraph shall make available such information in written form and in any other format in which such information is maintained by the corporation and shall not be required to provide such information in any other format. If a request made pursuant to this paragraph includes a request to furnish information regarding beneficial owners, the corporation shall make available such information in its possession regarding beneficial owners as is provided to the corporation by a registered broker or dealer or a bank, association or other entity that exercises fiduciary powers in connection with the forwarding of information to such owners. The corporation shall not be required to obtain information about beneficial owners not in its possession.

§ 33. Section 630 of the business corporation law, paragraph (a) as amended by chapter 5 of the laws of 2016, paragraph (c) as amended by chapter 746 of the laws of 1963, is amended to read as follows:

§ 630. Liability of shareholders for wages due to laborers, servants or employees.

(a) The ten largest shareholders, as determined by the fair value of their beneficial interest as of the beginning of the period during which the unpaid services referred to in this section are performed, of every domestic corporation or of any foreign corporation, when the unpaid services were performed in the state, no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation. [~~Before such laborer, servant or employee shall charge such shareholder for such services, he shall give notice in writing to such shareholder that he intends to hold him liable under this section. Such notice shall be given within one hundred and eighty days after termination of such services, except that if, within such period, the laborer, servant or employee demands an examination of the record of shareholders under paragraph (b) of section 624 (Books and records, right of inspection, prima facie evidence) of this article, such notice may be given within sixty days after he has been given the opportunity to examine the record of shareholders. An action to enforce such liability shall be commenced within ninety days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for such services.~~] The provisions of this paragraph shall not apply to an investment company registered as such under an act of congress entitled "Investment Company Act of 1940."

(b) For the purposes of this section, wages or salaries shall mean all compensation and benefits payable by an employer to or for the account of the employee for personal services rendered by such employee **including any concomitant liquidated damages, penalties, interest, attorney's fees or costs**. These shall specifically include but not be limited to salaries, overtime, vacation, holiday and severance pay; employer contributions to or payments of insurance or welfare benefits; employer contributions to pension or annuity funds; and any other moneys properly due or payable for services rendered by such employee.

(c) A shareholder who has paid more than his pro rata share under this section shall be entitled to contribution pro rata from the other shareholders liable under this section with respect to the excess so paid, over and above his pro rata share, and may sue them jointly or severally or any number of them to recover the amount due from them. Such recovery may be had in a separate action. As used in this paragraph, "pro rata" means in proportion to beneficial share interest. Before a shareholder may claim contribution from other shareholders under this paragraph, he shall[~~, unless they have been given notice by a laborer, servant or employee under paragraph (a),~~] give them notice in writing that he intends to hold them so liable to him. Such notice shall be given by him within twenty days after the date that [~~notice was given to him by~~] **he became aware that** a laborer, servant or employee **may seek to hold him liable** under paragraph (a).

§ 34. Subdivision (c) of section 609 of the limited liability company law, as added by chapter 537 of the laws of 2014, is amended to read as follows:

(c) Notwithstanding the provisions of subdivisions (a) and (b) of this section, the ten members with the largest percentage ownership interest, as determined as of the beginning of the period during which the unpaid services referred to in this section are performed, of every limited liability company, shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees, for services performed by them for such limited liability company. [~~Before such laborer, servant or employee shall charge such member for such services, he or she shall give notice in writing to such member that he or she intends to hold such member liable under this section. Such notice shall be given within one hundred eighty days after termination of such services. An action to enforce such liability shall be commenced within ninety days after the return of an execution unsatisfied against the limited liability company upon a judgment recovered against it for such services.~~] A member who has paid more than his or her pro rata share under this section shall be entitled to contribution pro rata from the other members liable under this section with respect to the excess so paid, over and above his or her pro rata share, and may sue them jointly or severally or any number of them to recover the amount due from them. Such recovery may be had in a separate action. As used in this subdivision, "pro rata" means in proportion to percentage ownership interest. Before a member may claim contribution from other members under this section, he or she shall give them notice in writing that he or she intends to hold them so liable to him or her.

§ 35. Section 1102 of the limited liability company law is amended by adding a new subdivision (e) to read as follows:

(e) Any person who is or shall have been a laborer, servant or employee of a limited liability company, upon at least five days' written demand shall have the right to examine in person or by agent or attorney, during usual business hours, records described in paragraph two of subdivision (a) of this section throughout the period of time during which such laborer, servant or employee provided services to such company. A company requested to provide information pursuant to this paragraph shall make available such records in written form and in any other format in which such information is maintained by the company and shall not be required to provide such information in any other format. Upon refusal by the company or by an officer or agent of the company to permit an inspection of the records described in this paragraph, the person making the demand for inspection may apply to the supreme court in the judicial district where the office of the company is located, upon such notice as the court may direct, for an order directing the company, its members or managers to show cause why an order should not be granted permitting such inspection by the applicant. Upon the return day of the order to show cause, the court shall hear the parties summarily, by affidavit or otherwise, and if it appears that the applicant is qualified and entitled to such inspection, the court shall grant an order compelling such inspection and awarding such further relief as to the court may seem just and proper. If the applicant is found to be qualified and entitled to such inspection, the company shall pay all reasonable attorney's fees and costs of said applicant related to the demand for inspection of the records.

§ 36. This act shall take effect on the thirtieth day after it shall have become a law. The procedures and rights created in this act may be used by employees, laborers or servants in connection with claims for liabilities that arose prior to the effective date.