Season 3 | Episode 73

How The Wage Theft Protection Act Could Impact Your Business

Gene Marks
CPA, Columnist, and Host

Phil Ross
CPA, Anchin, Block & Anchin

Brian Sanvidge
Certified Inspector General and Certified Fraud Examiner, Anchin, Block & Anchin

Announcer:
Welcome to THRIVE, a Paychex Business Podcast, where you'll hear timely insights to help you navigate marketplace dynamics and propel your business forward. Here's your host Gene Marks.

Gene Marks:
All right, so Phil and Brian, thank you very much for joining me. I'm really happy to have you here.

Phil Ross:
Hi Gene. Nice to be here. Thank you very much for having us.

Brian Sanvidge:
Hello, Gene. Thank you so much for the invitation.

Gene Marks:
I just want to make sure. So both you, Phil, and Brian... Phil, you're a CPA, correct?

Phil Ross:
Correct.

Gene Marks:
And Brian, you're a CPA?

Brian Sanvidge:
I am not. No, I'm a certified inspector general and a certified fraud examiner.

Gene Marks:
Got it. Okay, good. Because you'll be the more interesting one here, because I'm the CPA. No offense Phil. For some reason I thought there were like three CPAs on this call and we were going to lose our entire audience in the first minute, but I'm glad to hear we're going to have Brian carry the heavy lifting here, Phil, just to keep everybody interested. But listen, I'm glad that you both joined us. First of all, we're talking about the Wage Theft Protection Act. And before we dig into that, let me just get both of your backgrounds. Why

you know this so well where you come. So Phil, I'm going to start with you. Tell us a little bit about yourself and a little bit about Anchin Block & Anchin.

Phil Ross:
Sure. Absolutely. So Anchin, Block & Anchin is a public accounting firm. We've been around for almost a hundred years now. And we've always been involved in the construction industry. Our first client was a contractor and we continue to be involved in anything connected with construction over there. So, because of that, we just automatically are involved in whatever the issues are that our clients are facing. And we get involved to really become advisors to our clients. And this is one of the important issues that we are starting to discuss with our clients and have sent advice out. I'm a partner with the firm. I started with the firm right out of school like a lot of us did and stayed and grew to become a partner. I actually head up our construction industry group and that makes up a really sizable portion of the firm. So myself and my partners and the rest of the group really get involved with their clients. And Brian will introduce himself but Brian's been a real welcome addition to the firm and to our construction group because of the special expertise that he brings.

Gene Marks:
And what is that expertise, Brian? Let's hear your background.

Brian Sanvidge:
Sure. Thanks, Gene. Well, prior to joining Anchin and being in the consulting arena, I did a career in government the last 12 years in my role. I was the Inspector General for the New York State Labor Department. So, I have direct knowledge of the oversight and the mission from where DOL will be coming at it. Now on the compliance side, we really see the risk out there in the industry that so often the industry's not even going to be aware of it because it's going to roll up to them.

Gene Marks:
Okay. I mean, so we've established the fact that you guys, you have a lot of experience both on the government side and also with the construction industry. So, let's dive in. The Wage Theft Protection Act. I mean, Phil, I'll start with you first and Brian, if you want to jump in, feel free. But just assume we're a complete luddite, that I know nothing about this. Let's just start from square one. What exactly is it? When did it start? How does it impact businesses, particularly in the construction industry?

Phil Ross:
So, maybe a good way to understand it and why it's even so important is to just understand what's going on in the industry right now. The industry's coming off of and still involved with COVID, coming off of all the issues with COVID, with jobs slow-downs, with bidding slow-downs, with the slow-down and work being awarded, even after it's been awarded and starting and everything. So, you do have a number of companies out there that have gone through a lot of issues, material price increases, labor shortages, escalations, ability to get materials, and supply chain issues. So right now, it becomes even more important because you really need to know who you're doing business with and who you could potentially have to worry if they're making the payments to their employees. And if they're making the right payments at the right prevailing wages at the right amounts.

Phil Ross:
So, if we were five years ago or 10 years ago, this would still be an issue but maybe not as much of an issue. But now since you do have companies out there who could be suffering potentially financially because of this, the burden even falls more on the general contractors and then the subcontractors who are employing those other subcontractors over there. Very quickly. And Brian will jump in.

Phil Ross:
Wage Theft Protection Act means the employee is supposed to get paid the right wage, on time, and at the right rate. So, if any company doesn't pay their employee the right rate, if they don't pay them for the right number of hours, if they don't pay them for overtime when they qualify for overtime, it's not only that company's responsibility but it can go all the way up the chain to whatever companies have employed them, and then who's ever employed the companies that have subcontracted to work out to them. It can go all the way up line to the general contractor and potentially to the construction manager there. So, Brian can go into some more details but overall, that's why we see this as a big issue because of what the industry's going through. And then obviously, what it means not just to the company who's employing those workers but to the ones who are actually subbing the work out to those companies as well.

Gene Marks:
Got it. Brian, Phil mentions about paying your employees at the right rate, what does that mean exactly?

Brian Sanvidge:
Well, you got to look at it a couple different ways. So, there's public there's Davis-Bacon, federally funded there's public work in New York state that set up in the constitution. So, then there's rate schedules assigned for each one of those titles that ultimately has to be paid for the work that they're performing. On the Wage Theft Prevention Act, that also gets into all of the labor laws and wages and hour laws. So, now we're not only dealing with minimum wage and overtime issues and timeliness of payments. So, Phil talked about where we are as an industry coming out of COVID. You know, now with inflation issues, workforce issues, not having enough workforce there, job starting and stopping which affects profitability on jobs. So, then you take those industry pressures and then you put in now the Department of Labor's review of this.

Brian Sanvidge:
We first started out with their thorough analysis of classification, were employers treating people as independent contractors versus an employee, the 1099 versus the W-2. We get into the Wage Theft and the DOL's position on that. So, one of the concerns becomes that then rolls up. So, you have a small subcontractor working on a job for a prime and that sub, he or she does not pay the proper rates, pay on time, pay the overtime. Ultimately, the contractor that they're working for can be held liable under the act for those unpaid wages. And if that contractor, either through bonding or having their own financial wherewithal. Phil mentioned the financial pressure in the industry. It then continues to roll up. So, I mean, the way the law was designed is they're looking for the deepest pockets for someone ultimately to pay these workers if they have not been paid what they're entitled to, and the timetable that they were entitled to be paid.

Gene Marks:
Got it. Phil, your firm is located in New York, but this is a federal issue, correct? I mean, our audience are across the entire country, so there's state rules and there's federal rules. So, first of all, I want to be just be clear that the Wage Theft Protection Act is something that applies to all states. Is that correct?

Phil Ross:
That is. That is. The Davis-Bacon and these are all federal laws.

Gene Marks:
Right. But you might be in a state where the laws themselves might be different than the Wage Theft Protection Act. So, how do you know which law to follow? Is it the state law or is it the federal law? What would be your guidance there, Phil?

Phil Ross:
Well, first of all, I'd say you really should be consulting with your attorney and make sure your attorney's involved in something like this and have your attorney give an opinion. And it's also very important based on that to make sure what the contracts say because contracts can refer back to state laws, can refer back to federal laws if there's an inconsistency over there. So, really the contract language is really important, not just the contract language with your client but the contract language that an upper-tier sub or the GC, General Contractor, would have with their subs. Really important to pay attention to that because obviously if something goes wrong, that contracts can really be what governs at that point.

Gene Marks:
Fair enough. Brian, you had mentioned earlier about the government going after the big fish. So, the issue that I would have if I'm a small or mid-size firm in the construction industry, in particular, and I'm using even smaller subcontractors, like you had said, I could be liable if those smaller subcontractors are not paying their people the right wages. So, how do you recommend that I go about protecting myself against that? What do I do?

Brian Sanvidge:
So, Gene, first, it's not that you may be liable, you will be liable if the sub can't pay. So, it's rolling up and you're now on the hook for it. And it's a considerable amount of money when you look at the liquidated damages -- damages and interest -- that are put to those unpaid wages. So, to your question, how do you protect yourself? One of the ways is you want to make sure that you have internal control, so you know that your subcontractors are paying what they're supposed to be paying. You're on the site. You see what's going on but you have to, as Phil had mentioned, making sure that your contracts address these issues. You want to make sure that you have an audit clause in your contract that you can review what subs are ultimately paying.

Brian Sanvidge:
If it's a Davis-Bacon or a prevailing rate job, you'd have certified payrolls. Here, there's not a need for a certified payroll. This can be at any type of construction that's out there, but you want to make sure that you, as the contractor, are comfortable, that anybody working below you that those are ultimately getting paid. And then if it's a public works job where you may have four prime contractors and a program manager, you want to make sure that everybody has that language built into their contracts because ultimately, it continues to roll up until the workforce is paid.

Gene Marks:
It seems to me, and this is for you, Phil, if I'm going to be hiring subcontractors and a subcontractor provides me with a quote or a proposal to do work for me. And their costs are a lot lower than maybe some of their competition, to me, I guess one of the first sort of red flags would be if something seems too good to be true, it probably is. In other words, their cost could be lower because they're not paying their employees the right wages. Does that make sense to you?

Phil Ross:
It makes a lot of sense. There's the old saying you get what you pay for. And yes, some companies could be more efficient. Some companies could do value engineering. If there's a significant difference, there is the potential issue that could come up over there. And we really recommend to our clients, whoever you're doing business with, get their financial information, get copies of their financial statements. If the financial statements are a little old, if you're going to bid something in October and the most recent thing they have is a year-end statement going back to December, try to get some updated information. You really have to protect yourself now so that you really understand the financial wherewithal of who you're doing business

with. And it's not even just how I've done business -- you know, I've done business with Brian for the last 15 years and Brian, I know is good and he'll get the work done.

Phil Ross:
You don't know if Brian went through some issues so that's why...don't take for granted someone that you've always done business with will still continue to be good. They could go through some issues that you don't know, and maybe financially, they're not the best risk over there. In addition to some of the things Brian mentioned, we recommend to take attendance sometimes. Do it at least on random take attendance at job sites. So, we make sure that if Brian was at the job site, we know he was there for 40 hours, and then we'd go to see that Brian got paid for 40 hours, not that Brian was only paid for 32.

Phil Ross:
We know he was there for 40, that becomes your responsibility then if that sub doesn't make that payment, or if that we know Brian's level. If Brian's a supervisor, he shouldn't get paid as a journeyman then. That's, again, another potential item that is a way to check. Make sure those certified payrolls agree. Make sure that you really have the confidence because whether it's a lot or a little, it could really snowball, and as Brian said, if you owe a dollar, it's not just a dollar, it could go up to 4, 5, 6 times that dollar that you really owe.

Gene Marks:
And I guess one of the lessons, Phil that you have for your clients is that, I mean, all these costs... I mean, you're talking about auditing your subcontractors, which means there's going to be time involved to do that. And these are costs that you need to be included in your overall quote to your end customer because this is all part of doing the job, correct?

Phil Ross:
Yes. Listen, some companies are doing some of this already, just because of [inaudible 00:13:57] industry, some companies are doing this. They're qualifying their subs financially. They are doing maybe an overall check as to how many people are there every day and how long they're there for, but you're right. This could bring some additional costs in it for you. So, it's really good to plan it, but if you really don't plan for it, you may be lucky and you deal with companies that are fine and never run into these issues. But those one or two times you do, it could cost you a lot more than what those extra costs are for making sure things are done the right way.

Gene Marks:
Brian, you had mentioned...we threw around the terms about paying people under the Davis-Bacon Act or the right prevailing rates. I kind of associate those things with the construction industry. So, is this Wage Theft Protection Act, does it only apply to people in the construction industry? I'm a service business, we're a technology firm. We do a lot of, and I sub out work to subcontractors to do development work, for example, on software projects. And frankly, I don't know what they're paying their people. I don't know if it's... Am I exposed to this as well, or is it just companies that are in the construction industry?

Brian Sanvidge:
Gene, this was designed strictly for the industry. And what it was designed to do is to move past what we have on prevailing rate and Davis-Bacon to also go into other areas of construction. When Phil was talking about knowing your subs and, Gene, you had mentioned red flags. For the most part, contractors have similar costs. Wages are similar for their workforce. Materials are similar. There's some economies of scale. There's some overhead that may be disproportionately higher on a smaller company or something like that. But those are small issues when you look at it. So therefore, if someone's price is significantly less, you have

to do your due diligence as to why that is, how are they doing it? Do they have the proper workers' comp insurance? Are they listed with workers' comp that they're doing roofing or demolition, or did they list them under workers' comp at something else?

Brian Sanvidge:
So, that whole classification issue is tremendous because it drives significant cost on what your workers' comp insurances would be. Here on the Wage Theft side of it, if someone is cutting corners in any area and they're not paying...one of the areas you'll see a lot of it is in overtime. When does overtime kick in? And what are the rules for overtime? The current economy, it's not so much that it's a minimum wage issue because the workforce is being paid considerably higher than that but if it's not a rate job that there's a specific rate dictated for it, did they get minimum wage? Did they ultimately get time and a half if they met the qualifications for overtime, and were they paid in a timely manner? And if they weren't the penalties can be substantial for it.

Brian Sanvidge:
And then the issue then becomes here that starts to roll up. So, an employee's boss, their employer didn't pay them. So, they're going to-- who awarded that contract and then start working it up. We don't see this as much as we do on the prevailing rate side, Davis-Bacon, we see it where someone may use a wrong wage rate but here it's where those wages are not being paid on time for the correct amount to include the benefits and overtime that are prescribed.

Gene Marks:
Okay. So, Brian, let me ask you know, say there are people listening to this that are aware of this. I'm sure there are people listening to this or watching this that are not aware of this. So, if I'm running a construction firm right now and I'm hearing you guys talk and I'm like, "Oh my God, I'm not sure I've ever... This is not something I've been even thinking about," Brian, what would you recommend me to do right now? What would be some of the steps I should be taking?

Brian Sanvidge:
So, if you're in that position right now, you've got subcontractors that are working for you. You want to review them. What is your subcontractor agreement with them? Do you have the ability to audit them? I would raise the concern with your subcontractors that here's the law, we want to make sure you're complying with it because otherwise there could be a liability that rolls up for it. And we recommend, ask for proof of payment, show us -- if it was a public rate job, you're going to have certified payrolls, show us the payroll that you're doing this. Ultimately, so the proof is there that the individuals were classified correctly, compensated at the appropriate level, and you have the proof for it that all happened in a timely manner because then the issue is as that contractor, if you find where there is an instance of a problem, you want to get it corrected as soon as possible.

Brian Sanvidge:
First of all, to stop the interest charges and then to deal with liquidated damages and damages that are out there if it was an innocent mistake. You're in a much stronger position to deal with those if you moved quickly to rectify the situation as soon as you were made aware of it. But if you're a contractor, you clearly want to... Who's working for you? Who's working on these jobs? Where do the jurisdictions? And then start to say, Gene, you had mentioned the whole red flag, was that person's number just off? Why was that contractor substantially different to do it? And we see whether it's the current marketplace or need for specialization that there's subcontractor relationships are forced to list. Not to mention, if there's public funding in the projects...now you have MWBE goals where potentially you're dealing with smaller

companies, and you want to make sure that everyone is paying their employees the correct amount on time.

Gene Marks:
Brian, what do you do if you find a problem with a subcontractor? I mean, ultimately, you could walk away and say, I just, I'm not going to use you obviously, but is there any other options? I mean, is there any protection that I could have as a contractor to say "Listen, we've told the subcontractor, these are the problems that they have, we've warned them. They still haven't fixed them." Is that any defense for me if there's any issues? And number two is, do I have a responsibility to report that subcontractor to the Department of Labor if I just discover that they are not paying the right wages?

Brian Sanvidge:
So, a couple different things. The first thing you want to be able to do is if you find out that there is a problem, you have to withhold payment from that contractor until the issue gets resolved. That's your real strength, dealing with it is going to be on the payment application side of it. Because also, if the contractor doesn't, you will be on or someone's going to be on the hook for those wages for those employees, and there is a notification back to the Department of Labor if you're willfully aware of under-payment of wages. So here under-

Gene Marks:
So, you say there is a notification I would have to notify the Department of Labor if I become aware of that?

Brian Sanvidge:
If you ultimately become aware of it and you know that there is workforce that's not being paid, depending on now you get into what are the funding sources of the jobs that you're doing but there are circumstances that would require mandatory reporting. But the issue is you want to first try to get that resolved with the contractor. The contractor has to realize it's not something they can just walk away from. We're also talking about wages. These are not dischargeable in bankruptcy. So, that subcontractor has to take care of this and if they don't, someone else is going to.

Gene Marks:
I guess the other takeaway there, I'm just thinking about if I was in this business, when you think of all the headaches that can happen, it's so important to do the right kind of reference checking and checking in advance of the people you're going to work for. And Phil, to what you said, you might have known Brian all of your life but that doesn't necessarily mean that things are going well over the past couple of years, or there might not be stuff that you know, so it still shouldn't stop you from doing your due diligence, getting references, asking for financial information just to be sure that they're in good shape.

Gene Marks:
Phil, I'm going to wrap this conversation up but I do want to ask you know specifically because the firm covers so much the construction industry. Has the landscape itself, has it changed much particularly over the past couple years? We have an administration in Washington, that's very pro-worker you know now, and pro-union. Do you see that there's a little bit more pressure being put on your clients to make sure that they are doing this correctly as opposed to years before?

Phil Ross:
It definitely is more pressure. When you look at the bidding and the bids that come in on work, everybody's looking to build up backlog. If you might have had 20 bidders on a project before, you might have 40 or 50 bidders or more on a project now. So, it's definitely more pressure that way. The Infrastructure Bill is something that the industry really liked, but as of now, it hasn't come out as much. There hasn't been as much new work as everyone would've anticipated. And there's even a trickle-down effect for that. The

more of that that comes out, then you have less bidders for each project, you have less companies inclined to try to bid on something different just because their backlog is down and maybe it's not their expertise but they want to go ahead and try to bid on something to get work.

Phil Ross:
The profit margins get compressed over there. So, whenever there's a hiccup, whether it's material price increases or it's something like this, whenever there's a hiccup, it's tougher for the company to really make sure they could absorb it into their profit margin because they're not dealing with necessarily the same volume that they had before, and potentially, not necessarily the same profit margins, especially, Gene, as you mentioned, there are some additional costs to what they have to do nowadays at instituting these additional controls.

Phil Ross:
So, I think the industry is cautiously optimistic. The nice thing is this Infrastructure Bill was not a mandate to spend immediately. So, it's not like they're just going to be throwing money to fund projects. It will hopefully be projects that are really needed and really useful and beneficial. And hopefully, companies will be able to plan as the work comes out to decide the real projects they want to work on and see this continue for... I think this goes for three years or four years that they get to spend the money. So, that could be much more of a prolonged effect, maybe not as much as a quick rush but a prolonged effect, which I think is healthier overall for the industry.

Gene Marks:
Phil Ross and Brian Sanvidge are both partners at Anchin Block & Anchin in New York specializing in the construction industry. Phil, Brian, thank you so much for joining me.

Brian Sanvidge:
Thank you.

Phil Ross:
Thank you, Gene. We've really enjoyed being here. Thank you for having us.

Gene Marks:
Again, thank you. You guys have been listening to the Paychex THRIVE podcast. My name is Gene Marks. If you have any suggestions, ideas, or topics you'd like to send in to us, join us at payx.me/thrivetopics. That's P-A-Y-X.me/thrivetopics. Thanks so much for listening and watching. We'll see you again next time. Take care.

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