

# PUBLICATION

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## **You Need to Understand the Fair Labor Standards Act *Part 5 - Protect Yourself***

**Authors: Cameron Strawbridge Hill, Sr.  
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While a contractor's responsibility for wage and hour violations can vary depending on the statute(s) involved and the factual circumstances, the FLSA and other statutes help make it clear that a general contractor has some incentive to monitor and try to prevent some of these wage and hour violations. Remember: for liability under the FLSA, you can be liable if you have shown "reckless disregard" for the law. In general, you may first protect yourself by knowing the law. Second, you can prevent some problems through your contract. Third, a general contractor needs to preserve the distinction between its operations and the operations of its subcontractors. Fourth, it is wise for general contractors to make reasonable efforts to have their subcontractors obey applicable wage and hour laws.

### **Use your audit rights.**

Many standard form subcontracts that general contractors use include the right to audit the subcontractors' records. If not, a general contractor should ask to audit them, and by all means, include the right to audit in your next contract. Do not hesitate to ask for an audit if you suspect a subcontractor of illegal payroll practices. However, be careful not to assume control over your subcontractors' books and records by making the audit provision your obligation or even a routine, standard part of your payment to subcontractors. If you do, you may be creating a "joint employer" problem.

### **Make sure your contract includes an indemnification provision.**

Ideally, your contract should include language that requires the subcontractor to indemnify, defend and hold you harmless from any claims or investigations arising from the subcontractor's failure to pay wages according to applicable law. Just in case your subcontractor does not have adequate cash flow or a healthy bank account, do not forget to give yourself the right to offset any wage and hour claims against any outstanding progress payments or against retainage that you may owe a subcontractor. You also should consider what bonding options you may have or may require of your subcontractors.

### **Pay attention to what is going on at the project.**

The FLSA does not require a general contractor to guarantee that every subcontractor's employees are paid all amounts they are owed under the law. However, if you promptly respond to and remedy a concern brought to your attention, you may avoid a debilitating project delay as the DOL investigates your subcontractor, and you at least help defend against a claim that you "recklessly disregarded" the law. Ignoring possible FLSA violations can prompt investigations or lawsuits and, even worse, FLSA violations can be construed as evidence that you used the subcontractor to avoid your own obligations. Regardless of your diligence, though, there may be situations in which you cannot prevent the subcontractor's misconduct; in these circumstances, you should respond as quickly as you can to address the problem.