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HOUSE BILL 1736

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State of Washington                      52nd Legislature                      1991 Regular Session

By Representatives O'Brien, Fuhrman and R. King.

Read first time February 7, 1991. Referred to Committee on Commerce & Labor.

1            AN ACT Relating to payment for work of improvement on real  
2 property; adding a new chapter to Title 60 RCW; prescribing penalties;  
3 and providing an effective date.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5            NEW SECTION.    **Sec. 1.**    DEFINITIONS.            (1)            "Professional  
6 services" means surveying, establishing or marking the boundaries of,  
7 preparing maps, plans, or specifications for, or inspecting, testing,  
8 or otherwise performing any other architectural or engineering services  
9 for the improvement of real property.

10            (2) "Retainage" means funds which are due a retainee but are being  
11 withheld or retained by an owner, contractor, or subcontractor as  
12 security for, until, or conditioned upon completion of the work of  
13 improvement. The retainage is considered conditionally earned by and  
14 owed to the retainee and is held in trust by the retainor.

1 (3) "Retainee" means a contractor, subcontractor, material  
2 supplier, equipment, or professional services provider who has  
3 performed all or part of a work of improvement and who has had some  
4 portion of sums due under a contract withheld by the retainor.

5 (4) "Retainor" means any person or entity, excluding those persons  
6 loaning or advancing funds pursuant to interim or construction  
7 financing as defined in RCW 60.04.200, that withholds retainage.

8 (5)(a) "Substantial completion" means the date upon which the work  
9 of improvement has been completed as specified under the contract, the  
10 date upon which the improvement becomes usable or fit for the purposes  
11 for which it was intended, the date of issuance of a certificate of  
12 occupancy, or the date of occupation or use of the improvement by the  
13 owner or an agent of the owner.

14 (b) "Substantial completion" occurs on the earliest occurrence of  
15 any of the events under (a) of this subsection.

16 (6) "Work of improvement" means work performed or provided,  
17 including labor, materials, equipment, and professional services, which  
18 has led to the improvement of real property. Work of improvement  
19 includes incremental improvements which are in themselves complete but  
20 do not necessarily bring a property improvement to a state of  
21 substantial completion.

22 NEW SECTION. **Sec. 2.** MONEYS TO BE HELD IN TRUST--  
23 COMMINGLING. (1) Any moneys released to or obtained by an owner,  
24 developer, prime contractor, subcontractor, or person in charge of a  
25 construction project in connection with a work of improvement, shall be  
26 regarded and held in trust for the benefit of those persons making the  
27 payment and those who provided the labor or furnished materials,  
28 equipment, or professional services in connection with the work of  
29 improvement giving rise to the receipt of the moneys.

1 (2) Nothing contained in this section shall be construed as  
2 requiring moneys held in trust by an owner, contractor, or  
3 subcontractor under subsection (1) of this section to be placed in a  
4 separate account. If an owner, contractor, or subcontractor commingles  
5 moneys held in trust under this section with other moneys, the mere  
6 commingling of the moneys does not constitute a violation of this  
7 chapter.

8 (3)(a) The use of trust moneys for any other purpose than to first  
9 pay when due those persons for whom the funds are held in trust, shall  
10 be prima facie evidence of a trust violation and an intent to defraud  
11 in a civil action.

12 (b) The mishandling of work of improvement trust moneys is a matter  
13 affecting the public interest for the purpose of applying chapter 19.86  
14 RCW. The failure to use the money as intended is not reasonable in  
15 relation to the development and preservation of business. A violation  
16 of this section constitutes an unfair or deceptive act or practice in  
17 trade or commerce for the purpose of applying chapter 19.86 RCW.

18 NEW SECTION. **Sec. 3.** PROMPT PAY. (1) The owner shall pay  
19 amounts due the prime contractor, and the prime contractor shall pay  
20 the amounts due subcontractors and suppliers, and the subcontractors  
21 shall pay amounts due other contractors and suppliers, no later than  
22 ten days after receipt of draws, loan disbursements, progress payments,  
23 final payments, or receipt, possession, or availability, regardless of  
24 its source, of construction funds, based on a work of improvement.

25 (2) In the event that there is a good faith dispute over all or any  
26 portion of the amount due from the owner to the prime contractor, prime  
27 contractor to a subcontractor, subcontractor to a subcontractor, or  
28 contractor to a supplier, then the owner, prime contractor, or

1 subcontractor may withhold no more than one hundred fifty percent of  
2 the disputed amount.

3 NEW SECTION. **Sec. 4.** PORTION OF CONTRACT PRICE RETAINED. (1)

4 Except for improvements made on an existing owner-occupied single  
5 family residential property, retainage shall be regarded as held in  
6 trust by the retainor and shall be treated as the property of the  
7 retaineer.

8 (2) Except as permitted in subsection (3) of this section,  
9 retainage shall be released no later than ninety days from the date of  
10 substantial completion of the work of improvement.

11 (3) In the event there is a good faith dispute over the release of  
12 all or any portion of the retainage, the retainor may not withhold an  
13 amount in excess of one hundred fifty percent of the estimated value of  
14 the issue in dispute. Others not party to a dispute are entitled to  
15 full and prompt payment of their portion of the retained amount.

16 NEW SECTION. **Sec. 5.** REMEDIES. In addition to all other  
17 remedies either civil, administrative, or criminal, any person from  
18 whom funds have been withheld in violation of this chapter shall be  
19 entitled to receive from the person wrongfully withholding the funds,  
20 for every month and portion thereof that payment including retainage is  
21 not made, interest of twelve percent per annum or as established under  
22 RCW 19.52.025, whichever is greater, plus an additional charge of one  
23 and one-half percent per month. In any action for the collection of  
24 funds withheld, the prevailing party shall be entitled to costs of suit  
25 and his or her reasonable attorneys' fees.

1        NEW SECTION.    **Sec. 6.**    APPLICATION--CONSTRUCTION.    (1)    It    is  
2    against public policy for any party to require any other party to waive  
3    any provision of this chapter.

4        (2) It is against public policy to enforce a contract provision  
5    which requires the receipt of construction funds by the owner, prime  
6    contractor, or subcontractor, as a condition that must be fulfilled  
7    before the owner, prime contractor, or subcontractor has any financial  
8    obligation to those who provided improvements to real property.

9        (3) This chapter is to be liberally construed to provide security  
10    for all parties intended to be protected by its provisions.

11       NEW SECTION.    **Sec. 7.**    EFFECTIVE DATE.        This act shall take  
12    effect September 1, 1991, and is applicable to all contracts entered  
13    into on or after September 1, 1991, relating to the construction of any  
14    private work of improvement.

15       NEW SECTION.    **Sec. 8.**    SHORT TITLE.                This chapter may be known  
16    and cited as the fair pay act.

17       NEW SECTION.    **Sec. 9.**    CAPTIONS NOT LAW.            Section headings as  
18    used in this chapter do not constitute any part of the law.

19       NEW SECTION.    **Sec. 10.**        Sections 1 through 9 of this act shall  
20    constitute a new chapter in Title 60 RCW.