

TIGHTENING THE SCREWS ON WAGE THEFT: MINNESOTA’S WAGE THEFT PREVENTION ACT¹

Beth L. LaCanne
Bassford Remele, P.A.¹

INTRODUCTION

Minnesota enacted legislation to prevent wage theft that became effective on July 1, 2019, and recently added a new provision specific to the construction industry which will be effective on August 1, 2023.² Minnesota’s Wage Theft Prevention Act (“WTPA”) is reported to be one of the most stringent in the country. Not only are employers subject to civil penalties, but they can also be charged with a crime under the WTPA.

To enforce the WTPA, the Minnesota Department of Labor and Industry (“DOLI”) hired additional staff to investigate WTPA violations and Minnesota’s Attorney General formed a unit dedicated to investigating and prosecuting wage theft. Although WTPA enforcement may have been somewhat tempered by the pandemic, the country is returning to some semblance of normalcy and employers should be prepared for stepped-up enforcement.³ This article is intended to help employers navigate the critical components of the WTPA and to understand enforcement.

Required documentation under the WTPA

1. *Statutory Written Notice Requirements*

For any employee hired on or after July 1, 2019, employers are required to provide a written notice at the time of hiring that contains nine (9) items⁴:

- (a) the rate or rates of pay and basis thereof, including whether the employee is paid by the hour, shift, day, week, salary, piece, commission, or other method, and the specific application of any additional rates;
- (b) allowances, if any, claimed pursuant to permitted meals and lodging;

¹ DISCLAIMER: NOTHING IN THIS ARTICLE IS TO BE RELIED UPON AS LEGAL ADVICE. FURTHER, NOTHING IN THIS ARTICLE CREATES AN ATTORNEY-CLIENT RELATIONSHIP BETWEEN THE READER AND BASSFORD REMELE, P.A. ADDITIONALLY, THIS ARTICLE IS NOT AN EXHAUSTIVE ANALYSIS OF THE WTPA. YOU SHOULD CONTACT YOUR ATTORNEY IF YOU HAVE SPECIFIC QUESTIONS ABOUT THE WTPA, INCLUDING ANY CHANGES TO THE WTPA IN THE FUTURE.

² Minn. Stat. §§ 181.03, 181.101, and 609.52. The new legislation is Minn. Stat. § 181.165 (effective August 1, 2023).

³ <https://www.startribune.com/fight-against-wage-theft-reignites-in-minnesota-as-complaints-rise/600257815/> (last visited March 17, 2023).

⁴ Minn. Stat. § 181.032(d).

- (c) paid vacation, sick time, or other paid time-off accruals and terms of use;
- (d) the employee's employment status and whether the employee is exempt from minimum wage, overtime, and other provisions of chapter 177, and on what basis;
- (e) a list of deductions that may be made from the employee's pay;
- (f) the number of days in the pay period, the regularly scheduled pay day, and the pay day on which the employee will receive the first payment of wages earned;
- (g) the legal name of the employer and the operating name of the employer if different from the legal name;
- (h) the physical address of the employer's main office or principal place of business, and a mailing address if different; and
- (i) the telephone number of the employer.

The notice must be signed, acknowledging the new employee's receipt, and the employer must keep a copy of the executed notice.⁵ The notice must be in English, but contain text that informs the employee they can request the notice be provided in a different language.⁶ Template forms are available on DOLI's website at <https://www.dli.mn.gov/employee-notice>, as well as forms in different languages.

For every employee, regardless of whether written notice was originally received at the time of hire, written notice must be given if or when any of the nine items listed earlier change for that employee.⁷

EXAMPLE: An employee hired in 2014 would not have received the written notice because of the date of his or her hire. But if that employee's compensation changes, a written notice must be provided to the employee, and a copy must be retained by the employer.

2. *Additional Information Required on Earnings Statements*

The WTPA requires the addition of four (4) new items on employees' earnings statements:⁸

- (a) The employee's rate of pay and basis of pay (e.g., hourly, salaried, shift, etc.);
- (b) Allowances claimed, if any, for permitted meals and lodging;
- (c) The employer's address (main office, principal place of business, mailing address); and
- (d) The employer's telephone number.

⁵ *Id.* at (e).

⁶ *Id.* at (e).

⁷ Minn. Stat. § 181.032(f).

⁸ Minn. Stat. § 181.032(b).

3. *Increased Record-keeping Requirements*

In addition to the records employers were previously required to be maintain for three years, the WTPA now requires employers to keep the following additional records:

- (a) For employees paid at piece rate, employers must keep records of hours worked and the number of pieces completed at each piece rate;
- (b) A list of the personnel policies provided to the employee, including the date the policies were given to the employee and a brief description of the policies; and
- (c) A copy of the written notice provided to and signed by each employee at the start of employment and a copy of any written changes to the notice subsequently provided.

Required Conduct under the WTPA

1. *Payment of Wages Updates*

The timing for payment of wages has been updated to explain that wages include salary, earnings, and commissions.⁹ The WTPA also sets the timing for payment of commissions to at least once every three months.

2. *Responsible Contractor Compliance Expanded*

The list of laws a contractor must verify compliance with has been expanded to include the statutory provisions regarding payment of wages¹⁰; unlawful acts related to payment of wages and anti-retaliation¹¹; and wage theft¹².

Prohibited Conduct under the WTPA

1. *Conduct that is “Wage Theft”*

The WTPA states “[w]age theft” occurs when an employer, with intent to defraud:

- (a) Fails to pay an employee all wages, salary, gratuities, earnings or commissions at the employee’s rate or rates of pay or at the rate or rates required by law, whichever is greater.
- (b) Directly or indirectly causes any employee to give a receipt for wages for a greater amount than that actually paid to the employee for services rendered.

⁹ Minn. Stat. § 181.101(a).

¹⁰ Minn. Stat. § 181.101.

¹¹ Minn. Stat. § 181.03.

¹² Minn. Stat. § 609.52.

- (c) Directly or indirectly demands or receives from any employee any rebate or refund from the wages owed the employee under contract of employment with the employer.
- (d) Makes or attempts to make it appear in any manner that the wages paid to any employee were greater than the amount actually paid to the employee.¹³

Common examples of wage theft include paying less than minimum wage, not paying tips, pooling tips or applying tips toward the employee's minimum wage, not paying overtime (more than 40 hours under federal law and more than 48 hours under Minnesota state law), uncompensated work performed off-the-clock, unauthorized deductions from paychecks, and misclassification of workers (e.g., identifying a worker as an independent contractor to avoid minimum wage and overtime laws).

3. *Retaliation Prohibited*

The WTPA has added a provision prohibiting retaliation against employees who assert their rights under the WTPA and imposes a civil penalty of \$700 up to \$3,000 per violation.¹⁴

Construction Industry-Specific Provision

Under the new provision of the WTPA, a contractor can be held liable if a subcontractor fails to pay the subcontractor's employees their wages and/or benefits. The new law also closed off any attempts to avoid or shift liability through contract language. Under the new provision, any contract language that attempts to indemnify, release, or transfer the liability of the contractor to another is invalid and, therefore, unenforceable. As with the initial WTPA, an employee has the option of filing a complaint with the DOLI, or they can sue the contractor and subcontractor directly.

The new provision provides a means for contractors to be proactive in mitigating their risk. Subcontractors must provide payroll records to a contractor if requested.¹⁵ The provision also provides some recourse if the contractor satisfies an unpaid wage claim. Specifically, the contractor may recoup actual and liquidated damages from the subcontractor who failed to pay the wages in the first place.

The new provision does not apply to work (1) where prevailing wage rates apply and (2) where the contractor and subcontractor have entered into a bona fide collective bargaining agreement ("CBA") with a building or construction trade labor organization. The CBA must have a grievance procedure for recovering unpaid wages and must provide "for the collection of unpaid contributions to fringe benefit trust funds."

¹³ Minn. Stat. § 609.52, subd. 1(13).

¹⁴ Minn. Stat. § 181.03, subd. 6.

¹⁵ Prior to producing payroll records, social security numbers should be redacted, and the payroll records must be provided within fifteen (15) days of the request.

Companion Laws to the WTPA

In addition to enforcing the WTPA, the Attorney General's Office is also responsible for enforcing the Women's Economic Security Act. The provisions of the Women's Economic Security Act relevant to employers include equal pay, parenting time, and reasonable accommodations for pregnant and nursing employees.

The City of Minneapolis also has an ordinance that addresses wage theft. The City of Minneapolis's ordinance has broad application and requires even more information in the notice to the employee. The City's ordinance applies when an employee performs at least 80 hours of work within the City's boundaries, regardless of where the employer is located. In addition to the nine items required by Minnesota's WTPA, the City's ordinance requires an employer provide sick and safe time accrual and use balances on all earnings statements and distribute a Minneapolis labor poster to all new hires.

At the federal level, the Fair Labor Standards Act contains provisions to combat wage theft. In fact, the U.S. Department of Labor recently reached a settlement with a Minnesota employer wherein the employer must pay \$1.6 million in unpaid overtime and liquidated damages.¹⁶

Enforcement Mechanisms of the WTPA

Both DOLI and the Attorney General's Office have the power to investigate and enforce the WTPA. The process will typically begin with written information requests and document requests, either by an investigator from DOLI or the Attorney General's Office. However, DOLI can show up at an employer without warning and demand access to documents.

Importantly, there are timelines for responding to information requests and document requests from any government agency. Perhaps more important is responding with sufficient completeness so that the employer is not accused of obstructing the investigation, which can lead to additional ramifications.

Generally, there are civil penalties and fines for administrative deficiencies (e.g., improper or nonexistent pre-employment notices or notices related to changes in the terms of employment). However, to give the WTPA more teeth, the legislature added criminal remedies for theft of wages. Depending on the severity of the theft, an employer can be charged with a felony, and if convicted, face up to 20 years in prison and/or fined up to \$100,000.

CONCLUSION

Shortly before the pandemic, the Attorney General's Office stated that its enforcement efforts would focus on "repeat offenders" and wage theft involving marginalized individuals, particularly migrant workers. The Attorney General's Office indicated it would focus on particular industries where wage theft was most prevalent. One of the industries identified was the construction

¹⁶ <https://www.dol.gov/newsroom/releases/whd/whd20230119> (last visited March 17, 2023).

industry. Indeed, at the recent Upper Midwest Employment Law Institute, a panel of attorneys from the U.S. Department of Labor and Industry, the Attorney General’s Office, and the Hennepin County Attorney’s Office all identified the construction industry as a target for wage-theft investigation and enforcement. As the pandemic eases, it is in the employers’ best interests to assess their compliance with Minnesota’s WTPA and companion laws or ordinances.

¹ Beth LaCanne is an attorney at the law firm Bassford Remele, P.A. Beth focuses her practice in the areas of employment litigation, advice and investigations, professional liability, and general liability. She can be reached at blacanne@bassford.com.