



INFORMATION AND IDEAS

Re: Wage Theft and Worker Misclassification

Minnesota's Criminal Wage Theft Statute

Minnesota's wage theft statute criminalizes the failure to pay an employee's wage with an intent to defraud. "Wages" is defined broadly to include all earned monies, benefits and fringe benefits, paid time off, allowances, and per diem. Intent to defraud might be shown directly or constructively. Constructive intent might be proven with circumstantial evidence.

Examples of wage theft include (a) paying a worker less than the rate of pay required by contract and legal authority (e.g. statute, rule, ordinance, policy), except for appropriate deductions, garnishments or withholdings; (b) overstating paid wages on receipts or other records; (c) requiring rebates or refunds from workers; and (d) misclassifying workers as independent contractors.

In sum, the statute means that an organization cannot refuse to pay a worker's wages with an intent to defraud the worker or conspire with another organization to do so. A troubling question is what happens when a subcontractor or vendor commits wage theft— might the firm that hired the subcontractor be responsible?

The intent to defraud is an important element that should prevent innocent firms from being held responsible for wage theft committed by others, such as subcontractors or vendors. A firm should be able to rely on a subcontractor's duty to be lawful and language in a subcontract requiring the subcontractor to comply with the law. Plus, it simply may be impossible to know or monitor every subcontractor. On the other hand, because wage theft might be proven circumstantially and hindsight sometimes stunts facts unfairly, there might be a risk that a prosecutor tries to implicate an innocent firm in the criminal activities of a subcontractor or vendor. Even if the firm ultimately shows that it was not responsible for the wage theft or perhaps did not even know about it, the cost of being accused and defending itself may be big. This scenario has not happened yet in Minnesota.

To manage the uncertain risks of being wrongfully included in an accusation of wage theft, below are four ideas borrowed from other disciplines that may help show that there was no intention to defraud a worker from the worker's wages and a few examples to illustrate those ideas. Understanding the risks hopefully will help a firm begin an informed conversation with its attorneys should a need arise. AGC also is available as a resource.

Ideas of Steps to Reduce Risks

As mentioned above, in other realms, there are four general ideas that may help a firm reduce its risks: communicate and train staff about the problem, assess the risk, request information as appropriate, and monitor. If or how much a firm does with respect to any idea depends on the risks in the industry, timing of concerns, risks on that project, facts known versus speculated facts or gossip, other policies of the firm, advice of legal counsel, and other factors. There is no "right" answer or "best" practice. It is relative. This is why these ideas should be considered brainstorming aids and, should a concern arise, help in conversations with counsel.

1. Communicate with staff. Possible examples:

- a. Define wage theft so that your staff understands what it includes.
- b. Establish a person or team to be the lead if wage theft is discovered, and to be a resource or answer questions.
- c. Establish communications to ensure that information known within the organization is shared with the appropriate persons.



- i. Inform employees how to report concerns of wage theft and remind employees that they will not be subject to retaliation for reports made in good faith.
 - ii. Note that the results of investigation may not necessarily be shared.
 - d. Training
 - i. For employees who lead the program to understand the policy and compliance efforts; and
 - ii. For all employees to understand the problem, company's interest in reporting and preventing wage theft, how to report concerns, and confirm that report not be sanctioned.
- 2. Assess risks.** Possible examples:
 - a. Be aware of risks related to the industry.
 - b. Assess risks of subcontractors and vendors, e.g.:
 - i. Whether a subcontractor currently is in compliance with and/or has cured past violations of legal standards. For instance, the firm might have the subcontractor certify in its contract that it is in compliance with the following:
 - 1. Responsible contractor act (Minnesota Statute 16C.285).
 - 2. Other statutes regarding employee protection such as wage theft, OSHA, worker compensation, and unemployment insurance laws.
 - 3. Registered with applicable governmental authorities, including the Secretary of State (has certificate of authority to transact business in Minnesota), Department of Revenue, and Department of Employment and Economic Development.
 - ii. Whether subcontractor is willing to agree that, if a concern or question is raised, the subcontractor will conduct an investigation and report to the firm, or will cooperate and provide records to the firm that may be helpful to review, investigate or audit the subcontractor.
 - iii. Whether the project's requirements or subcontractor's policies might reduce the risk of wage theft, such as whether the project requires certified payroll be submitted to a government agency or whether workers are represented by a union.
- 3. Request Information.** Possible examples include requesting:
 - a. Proof of worker's compensation & unemployment insurance;
 - b. Attestation that subcontractor will pass through obligations to comply with wage theft laws and cooperate in any inquiry at the subcontractor's expense.
 - c. Subcontractor will cooperate with any investigation, or investigate and report back to firm.
 - d. A credit report or bonding report.
- 4. Monitor.** Possible examples:
 - a. Document and report to senior leadership on a regular basis any trainings, reports filed, result of reports.
 - b. Subcontractor reports back to any inquiry of its subcontractors or cooperate with any investigating.

Again, each circumstance is unique and the law may vary among the states. For states that could hold prime contractors liable for wage theft committed by subcontractors, the prime contractor might also consider including an option in its subcontract agreement for certified payroll. In sum, whether or what ideas to consider will depend on the circumstances. If a firm becomes worried that a subcontractor or vendor may be



committing wage theft, it should contact its attorney for advice regarding what to do. AGC will continue to monitor legislation and developments. A firm that does not have legal counsel may contact AGC for referrals.

Language from AGC-MN Contracts Committee

Language specific to wage theft could be inserted into subcontract agreements requiring subcontractors of all tiers to affirm that they are not engaged in worker misclassification, wage theft, or tax fraud agreeing to cooperate and provide appropriate information to allay suspicions and permitting termination for cause when violations occur. The following is an example of such language from AGC's Contracts Committee:

The Parties agree as follows to deter wage theft. Wage is defined broadly to include all earned monies, benefits and fringe benefits, paid time off, allowances, and per diem. "Wage Theft" is illegally, generally defined as when an employer fails to pay a worker Wages with an intent to defraud or by willful blindness. Examples include (i) paying a worker less than the rate of pay required by contract or legal authority, except for appropriate deductions, garnishments or withholdings; (ii) overstating paid Wages on receipts or other records; (iii) requiring rebates or refunds from workers; or (iv) misclassifying workers as independent contractors. Subcontractor agrees that knowledge of Wage Theft by its field supervisors, leads, or subcontractors could be imputed to Subcontractor. Upon a good faith belief that Wage Theft has occurred on a Project and is related to Subcontractor, or if Contractor is responding to or defending a third-party allegation, then Contractor may investigate or audit Subcontractor. Subcontractor will cooperate with the investigation or audit at its expense by, among other things, (i) providing Contractor with information, records, and interviews that may include business ownership and incorporation, banking, workers' compensation and unemployment insurance, payments to workers and its subcontractors, relationship with subcontractors suspected of brokering labor, and commitment to protect workers' rights; and (ii) attesting in writing that it reasonably monitors its subcontractors of all tiers for compliance and has no good faith basis to believe Wage Theft has occurred by Subcontractor or Subcontractor's subcontractors of any tier. If Subcontractor refuses to cooperate, or if Contractor concludes in good faith that (i) Subcontractor directly or through its subcontractors has engaged in Wage Theft, (ii) the violation is not a de minimus mistake that has been remediated, and (iii) Subcontractor knew or should have known of the violation, then Contractor may terminate without opportunity to cure some or all relationships with Subcontractor for Subcontractor's material breach and/or refer the matter to government authorities. Information provided by Subcontractor to Contractor is deemed not privileged. Subcontractor should report to Contractor any good faith suspicion of violation by any other provider of labor on the jobsite and agrees to cooperate in an investigation or audit of another of Contractor's subcontractor. Subcontractor will indemnify and defend Contractor against any and all allegations relating to wage theft of employees of Subcontractor or its subcontractors, and for any and all damages including penalties.