**MN Wage Theft Law**

**Questions & Guidance**

Confusion and frustration about Minnesota’s new wage theft law generated the following questions that AGC presented to Asst. Commissioner Nicole Blissenbach (MnDLI), Phyllis Karasov (attorney with Larkin Hoffman), and Mark Mathison (attorney with Gray Plant) at the AGC event on 24 July 2019. Over 60 people attended, asking additional questions and challenging the speakers on points of ambiguity, practicality, possibility, and penalties. Solutions to many problems were discussed then and subsequently.

The following is a best attempt to document these discussions. This is not legal advice or ‘endorsed’ guidance from DLI. In addition, we have provided links at the bottom of this document to guidance published by DLI, DLI’s slides from AGC’s event, the audio recording of the AGC event, and other documents.

**Notice Generally**

* *Who is covered by the new wage theft law?*

All employees. There is no exception for executives, officers, managers, non-union, union, or other kinds of employees. It also applies to all businesses, from McDonald’s to Mortenson.

* *What is the difference between an “initial” notice and “change” notice?*

An initial notice is given at the time the employee is hired. It is a comprehensive statement of wage rate, deductions, allocations, benefits and other required information. It must be in writing and the employee must sign the notice acknowledging receipt.

A change notice tells an employee of any change to the information in the initial notice. If one thing changed, then the change notice has to explain only that one thing—you do not need to have another comprehensive notice. The change notice must be in writing but does not need to be signed or acknowledged. (Details, concerns, and examples about change notices are addressed below).

In the end, there must be two copies, real or electronic. One copy must be given or made (relatively easily) available to the employee. The employer must retain a copy in its records, which DLI could audit.

Written notice (and signatures) can be electronic. If an employee requests the notice in another language, then the employer must provide both the initial and change notices in that language.

The employer must retain records of both the initial and change notices.

* *If an employer uses the MnDLI, Building Trades or AGC-MN form, can it be comfortable that it has complied with the initial notice requirement (the notice given at the time of hiring)?*

The wage theft law is new and DLI was shy to commit to endorsing a form. DLI’s slides (posted on AGC’s website) show the specific information that the law requires to be included. The goal is to ensure that the employee has access to know this required information. This ability to know can be given by (a) listing or providing the information in the notice, or (b) providing a link or reference where the employee can access (relatively easily) the information.

The AGC-MN form should comply. We shared a copy of it with DLI before first posting and incorporated all feedback, and then revised it after the discussion at the July 24 event to reflect DLI’s evolving understanding of the wage theft law. AGC’s form is in Word for ease of use and formatting. It can be used for both office/non-union and union employees. AGC’s form also includes a link to an AGC webpage with a copy of the basic trades CBAs and wage allocations.

DLI posted a form and would be hard pressed to argue that an employer who used it correctly did not comply with the law. The limitation with the DLI form is that it is focuses on non-union employees where the employer provides each employee with specific and static information. The DLI form does not work as well for union employees or employees whose wage may change depending on the project or work.

The Building Trades form focuses on union employees and includes information that is not required by the statute. It was created in PDF as a form for ease of use.

All three forms are posted on AGC’s website.

The wage theft law also requires an employer to offer and provide translations of the notice to employees who request it. AGC’s and DLI’s forms contain the translated offer. DLI also has translated its form. A link to its forms is at the bottom of this document. It may be easiest to use DLI’s translated forms when a few translated notices are needed.

* *Why do the DLI and AGC-MN form notices include a block for both employee and employer to sign the initial notice form?*

The wage theft law requires a signature from the employee acknowledging that she/he received the notice, and the employer must retain a copy of this signed notice. (Electronic signatures are fine.) Although the wage theft law does not require an employer to countersign, other Minnesota notice laws require both signatures.

The Building Trades form does not have a space for the employer to countersign. We followed DLI’s example, agreeing that it would easier and possibly a better practice to include space for the employer to countersign so that the wage theft notice can be used to comply with other requirements.

* + *Must the employer keep an original or is an electronic/scanned copy sufficient?*

Electronic records and signatures are fine.

* + *What if it is not practical to receive acknowledgements from all employees?*

DLI requires signed acknowledgements from employees.

At the event, a member provided the common construction scenario of a supervisor meeting and hiring workers from a remote prairie crossroad. The supervisor would not know all of the information to fill in the form, and would not be able to print it. DLI responded by comparing the notice with an I-9. The supervisor processes the I-9 so it should be able to process the notice.

One solution may be to a) provide the supervisor with blank copies of the notice like the I-9, b) use a notice like AGC’s that refers to a link that contains the necessary information about wages, benefits, deductions, etcetera, and pre-populate the parts that are specific to your business, and c) have the supervisor fill-in at the prairie crossroads the few parts specific to the employee. The supervisor can then take a picture or make a copy of the notice for record retention like the I-9.

* *The scope of notice is also a concern.  For instance, in Carpenters’ agreement, subsistence for building is a paragraph because it applies in certain situations depending….  Can contractor rely on notice by reference to a CBA?*

The employer can provide a link or reference to a document or webpage that contains the information, if that link or reference is available (relatively easily) to the employee and contains the information required by the wage theft law. An employer can and should refer the employee to internal policies such as employee handbooks and CBAs that provide details how benefits accrue or are used.

There may be times when a CBA or handbook does not provide required information. In these cases, the information must be included in the initial notice.

* *What are the requirements of the initial notice?*

DLI’s presentation has lots of great information about the law and requirements, and is posted on AGC’s website. We also have links to DLI’s website with more information, including “Guidance for Employers” document that is very helpful. There also are new requirements to provide new information on earnings statements that should not be overlooked. It will be easier to look at the DLI Guidance document which lists all the information comprehensively (in 3 pages) versus restating the information here.

* *Work and pay could change daily and even within a day. As an employee moves among classifications of work or is promoted, must a notice be given for each change?*

The short answer is yes— DLI was clear that every change must have a notice. But the short answer is misleading.

First, change notices are different than initial hire notices. When an employee first is hired, the employer must provide complete notice and receive a signed acknowledgement. This is the “initial notice” form that AGC, DLI and Building Trades provided a form to do—all three are available on AGC’s website.

A change notice a) only has to include the information about the change, not all information, b) this means that you don’t have to use the initial notice form, and c) you can give an employee a more global notice in the initial notice that certain changes can occur and provide clear reference where/how the employee can find out the information. (AGC’s form provides the option for this type of notice).

Three examples may help.

First, a union employee may receive different wage rates based upon her/his experience (level of journeyperson and apprentice) and work classification. Referring to the union wage rate schedules where the employee can easily access the information can constitute sufficient notice. So when the employee’s wage rate changes due to moving up a class or performing different work, the initial notice referring the employee to the CBA or wage allocation schedule constitutes notice and no change notice is required.

Second, assume an employee works several projects in a day or week that are subject to different prevailing wage scales. The initial notice can say that wages are paid by the job and then subsequent notices (daily, weekly, etc.) would give the employee notice of the wages per job. For instance, the employer could post a job wage board at the worksite (that is clear and easily findable), a paper notice given to employees, or an electronic communication to employees. It unclear whether telling an employee to look at rates posted someplace would be sufficient. The key is to give the employee the information and to provide specific enough information so that the employee knows what wage applies to the work performed. The employer also will need to save a record of the job board pursuant to the retention requirement.

Third, on May 1, union employees receive a wage increase and new allocations. Employer must provide notice of the allocations. (If the CBA clearly explains the amount of wage increase so the employee knows what rate of pay she or he will receive, then initial notice referencing the CBA may be sufficient notice of the wage change, Allocations, however, are new and unknown before May 1, so notice is required.) The notice also must occur before the change happens. This notice can be given in writing or electronically, with employer retaining a copy.

One way to give notice may be to include a memo on the paystub alerting employees to the change in wage and allocations on May 1, and referring the employee to the allocation sheet. DLI acknowledged that a paystub memo like this would constitute written change notice.

AGC has created a webpage that you can link with the basic trades’ CBAs and wage allocations. Employers could make their own page that contains all necessary CBAs and allocations, and any other required information.

If you have a scenario that challenges these guidance ideas, please let us know. We are continuing to work with DLI to understand how an employer can easily comply with different scenarios and helping DLI to learn about these scenarios as it develops its enforcement strategies.

* *Many contractors are seasonal. What notice must be given after a seasonal layoff?*

This question was recognized as complicated. If there is a break in employment, such as collecting unemployment insurance or not all workers are recalled, then DLI considers the returning workers to be initial hires requiring the full notice. There may be exceptions when a returning worker would not be treated as an initial worker. The safe answer is to give initial notice. To explore exceptions, contact Phyllis or Mark.

* *What do I do about existing employees? Do I give an initial notice?*

The wage theft law does not require an initial notice for employees who began work before 1 July 2019. However, if a change to any term happens after, then a full (initial) notice must be given.

There is an administrative problem for existing employees—tracking existing employees to ensure that they get the full notice when the first term changes. One idea is to roll out a full notice to existing employees now, and then when a change happens, having only to provide notice of the change. Another idea is to include a full notice in annual performance reviews.

* *What are “allowances”?*

Allowances are not expense reimbursements, but money toward meals or lodging that is income.

* *What about discretionary bonuses?*

DLI has provided this guidance: A discretionary bonus, for example, an end of the year bonus, would not likely constitute a rate of pay as contemplated by the new notice requirement and is, therefore, not required in the initial written notice and will not require a written change notification. A nondiscretionary bonus, for example, additional wages earned after a certain goal is reached, is required to be identified as a rate of pay in the initial written notice and requires a written change notification if changed.

Notification can be satisfied by the congratulatory letter that accompanies the check.

**Time for notice**

* *What is the timeframe for giving the notice & receiving acknowledgement?*

Before the wages and benefits are earned at the new or changed rate.

* *When CBAs are negotiated, they don’t always get done on May 1. If completed on May 5, a negotiated increase may go into effect retroactively to May 1.*

DLI recognizes that an employer cannot go back in time to give pre-notice to a retroactive increase. The guidance seems to be as soon as possible. As discussed above, proper notice on a paystub can be sufficient to overcome the logistical problems of notifying a fleet of employees in different locations.

This is a question worth watching. Future CBA negotiations may need to conclude earlier.

* When the employer explains the terms of employment to an employee, and addresses questions/concerns, is there a risk that the employer is stepping on the union’s right to represent the employee?

No.

* + *If a union wants to participate in conversations with its members, does the difficulty in scheduling this meeting affect the timeline of when notice must be given?*

We do not anticipate the union asking to be present at these meetings. The notification is simply a notification and required by Minnesota law to be performed at the time of hire. There does not even need to be a “meeting,” but the information can be transmitted in writing as long as a signed acknowledgement is received.

**Jurisdiction re: Occasional Worker**

* *An employer in Fargo or Hudson sends an employee to work in MN.*
  + *Does the wage theft law apply to such out-of-state business?*

Yes. The Wage Theft law does not define “employer.”  The nearest definition may be Minnesota Statute §181.723, which applies to the construction industry and provides: “ an individual who performs services for a person that are in the course of the person's trade, business, profession, or occupation is an employee of that person and that person is an employer of the individual.”  This is a very broad definition that, if someone is providing a service (in the State), then that person is an employee or independent contractor.  Regardless of where the company is based, if the work is performed in Minnesota, Minnesota employment law can apply.

* + *When is notice required of the employee who works in Minnesota?*

If the employee is hired in Minnesota, then the initial notice and change notice provisions apply.

If the employee is hired outside of Minnesota and works in Minnesota, then we get into fact specific circumstances. It may make a difference whether the employee works regularly in Minnesota for a week or for a few hours.

The safest response is if there’s a risk that the statute could apply, give notice whenever the employee works in Minnesota. This may not always be practical when, for instance, an employee has an unexpected reason to come to Minnesota for a meeting or site visit, and the out-of-state employer may not be aware of this law.

A more practical business approach may analyze when the work is significant. So, an hour or two of work may not justify notice. The open question is, “What is the tipping point when the work is significant enough that notice is required?” There is no answer.

One potential answer may be to follow payroll practices (are there reciprocal agreements in place, is the temporary work short or longer term, etc.).  This idea was not discussed at the event or explored. You may need to ask your attorney. We will keep an ear if DLI provides guidance.

**Translations**

* *Who coordinates / performs translations of collective bargaining agreements?*

The law places the onus on the employer to provide notice in requested/required languages. No union or other has translated a CBA yet. If there is a provision that requires translation, then the employer will have the burden to translate it.

If this scenario comes up, please contact AGC. We can create a library of translations and work with the unions to have key provisions summarized and translated when there is enough demand.

**Record Retention**

* *What’s the skinny?*

Keep for three (3) years a copy of the notices and personnel policies given to all employees. The personnel policies must include the date the policy was given to the employee and a brief description of the policy. The brief description might be the title and a short line about the purpose of the policy.

* *Can the records be stored electronically?*

Yes, as long as you are able to provide the records to DLI in the event of an audit.

**Over-arching**

* *What do you do about situations where there could be joint employers?*

Both employers can be found responsible for fulfilling the notice requirements to each joint employee. Document and be clear, in contracts and administratively, who is responsible for and fulfills the notice requirements, and provide a right to receive copies (or automatically) of the proof of notice.

* *On a philosophical level, union workers are represented by the union who negotiates fair wages and benefits, administers (at least in part) the benefits, provides business agents to monitor and enforce the contract, and answers questions/explains the contract to the workers.  For wage increases, the workers vote on the contract and approve the increases, and so are aware before the increases are active.  These workers are in a different class than non-union workers who have no protection against wage theft.  Why can an employer not recognize the union as the employee’s agent, and coordinate with and rely upon the union’s already established communications to fulfill the statute?*

Providing a clear record of what wage applies prevents employers engaged in wage theft from later denying that it owes employees their full wage and claiming retrospectively that a different wage applies. (DLI explained at the AGC event that it is not the legislature and did not write the law. It simply owes the Constitutional duty to administer the law.)

* How does the notice provision have a logical relation to stopping wage theft on prevailing wage or union jobs?

See above answer.

* *Would it help if there was letter agreement where the unions promised to provide employees with a copy of the CBA and/or information about the employee’s wage & benefit package.*

Phyllis and Mark considered this thought a bad idea. Although it would help the administrative burden of employers, they thought it would be too difficult to implement.

DLI did not comment on whether this was a good idea, but emphasized that the law places the burden on the employer. If an employer used an outside resource or agent, including the unions, to give this notice, then the employer still is responsible if the notice was not adequate and to retain records of the notice. In short, the union would have to provide adequate notice and provide the employer with records that notice was given to each employee.

AGC is not working on creating a program for unions to assume the role in providing notice.

**Links to Additional Resources**

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| AGC Form Employee Notice | [AGC Notice](http://www.agcmn.org/download_file/view/513) |
| Audio from AGC Wage Theft Event 24 July 2019 | [Event Audio](https://www.dropbox.com/s/1xyj1xvyvyi2aoq/cmte_agc_072419_Segment_0_x264.mp4?dl=0) |
| Building Trades Form Employee Notice | [BT Notice](https://www.agcmn.org/download_file/view/486/284) |
| Mn DLI Guidance to Employers | [DLI Guidance](http://www.dli.mn.gov/sites/default/files/pdf/wage_theft_summary_employers.pdf?utm_medium=email&utm_source=govdelivery) |
| Mn DLI Form Employee Notice | [DLI Notice](https://www.dli.mn.gov/sites/default/files/doc/employee_notice_form.docx) |
| Mn DLI Translations of its Notice Form | [DLI Translated Notice](https://www.dli.mn.gov/business/employment-practices/guidance-employees-minnesotas-new-wage-theft-law) |
| Mn DLI Slide Presentation from AGC Wage Theft Event 24 July 2019 | [DLI Event Slides](https://www.agcmn.org/download_file/view/512/284) |

Feel free to email Mike Schechter ([mschechter@agcmn.org](mailto:mschechter@agcmn.org)) if you have any questions.