**Information and Ideas**

**Re: Wage Theft and Worker Misclassification**

**Minnesota’s Wage Theft Statutes**

Minnesota’s wage theft statutes (1) criminalize the failure to pay an employee’s wage with an intent to defraud and (2) make upstream contractors civilly liable for wage theft committed by downstream contractors without a showing of intent or knowledge.

“Wages” is defined broadly to include all earned monies, benefits and fringe benefits, paid time off, allowances, and per diem. 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.

*Minnesota’s Criminal Statute*

The criminal 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 helps 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 stilts facts unfairly, there might be a risk that a prosecutor tries to implicate an innocent company in the criminal activities of a subcontractor or vendor. In other words, a prosecutor could try to show intent to defraud directly or constructively with circumstantial evidence.

*Minnesota’s Civil Statute*

In addition to the criminal statute, Minnesota makes many upstream contractors civilly liable for wage theft committed by downstream contractors. This law is problematic, complicated, and difficult. For instance, the employee of a fifth-tier subcontractor could claim, months after a job was completed, that she was not paid full wages. The upstream contractor may have limited or no information to defend itself, or even verify that the person worked on the job.

**Ideas of Steps to Reduce Risks**

Below are four general ideas that may help a firm think about 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 to increase awareness.** Possible examples:
	1. Define wage theft so that your staff understands what it includes.
	2. Establish a person or team to be the lead if wage theft is discovered, and to be a resource or answer questions.
	3. Establish communications to ensure that information known within the organization is shared with the appropriate persons.
		1. 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.
		2. Note that the results of investigation may not necessarily be shared.
	4. Training
		1. For employees who lead the program to understand the policy and compliance efforts; and
		2. 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:
	1. Be aware of risks related to the industry.
	2. Assess risks of subcontractors and vendors, e.g.:
		1. 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.
		2. 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.
		3. 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:
	1. Proof of worker’s compensation & unemployment insurance;
	2. Attestation that subcontractor will pass through obligations to comply with wage theft laws and cooperate in any inquiry at the subcontractor’s expense.
	3. Subcontractor will cooperate with any investigation, or investigate and report back to firm.
	4. A credit report or bonding report.
	5. Certified payroll.
	6. Software programs or applications to help monitor payment of wages are being developed as wage theft legislation expands.
4. **Monitor.** Possible examples:
	1. Document and report to senior leadership on a regular basis any trainings, reports filed, result of reports.
	2. 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. 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. A firm that does not have legal counsel may contact AGC for referrals.

**Add Terms in Contracts**

Language specific to wage theft should be inserted into construction agreements to help clarify a subcontractor’s responsibilities and to provide protections for upstream contractors. AGC-MN’s contracts committee has developed terms that define wage theft, provide for audit rights, and help protect upstream contractors from unknown abuses by subcontractors. The hope is that this language never is needed because no party would commit wage theft, but the language also provides some help should hindsight reveal a misplaced trust or mistake. AGC’s licensed form contracts can be downloaded at https://www.agcmn.org/construction-resources/contract-forms.