

Wage Theft: Law and Enforcement

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1

Agenda

- Wage Theft Overview
- Construction Worker Wage Protection Act
- DLI Enforcement
- Compliance: Best Practices
- Verifico
- Questions

2

Wage Theft Overview

3

Wage Theft: What is it?

- When an employer fails to fully and timely 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.
- Common forms of wage theft include:
 - Minimum wage violations
 - Failure to pay overtime
 - Requiring work "off-the-clock"
 - Withholding final paychecks
 - Unauthorized deductions
 - Stealing tips
 - Misclassifying employment to avoid legal obligations

4

Wage Theft: Why is it important

- Wage theft can have severe economic consequences for workers and their families.
- No group of workers is immune from wage theft, but low-wage workers, young workers, women, people of color, and immigrant workers are more likely to be victims of wage theft.
- Wage theft substantially reduces government tax revenues both for payroll tax and federal and state income taxes.
- It allows unfair business advantages for companies who commit wage theft to lower their labor costs illegally.
- It hurts other workers in affected industries by putting downward pressure on wages.



5

2019 Wage Theft Prevention Act

In 2019, the Minnesota Legislature passed a wage theft law strengthening Minnesota's legal protection for workers. The law included:

- Notice requirements: Employers must give additional information to employees in a written notice when they start work. Employers must provide employees written notice of changes to how they are paid.
- Criminal protections: Wage theft is now a crime when an employer intentionally fails to pay an employee wages.
- Increased penalties and enforcement authority: The application of remedies under existing law was clarified and penalty amounts were increased for repeated violations of the recordkeeping laws. DLI's enforcement authority was also clarified and expanded.



6

2023 Construction Worker Wage Protection Act

7

Wage Theft Law – What?

- “A **contractor** entering into a **construction contract** shall assume and **is liable** for any unpaid wages, fringe benefits, penalties, and resulting liquidated damages owed to a **claimant** or third party acting on the claimant’s behalf by a **subcontractor** at any tier acting under, by, or for the contractor or its subcontractors for the claimant’s performance of labor.”
- Contractor’s liability cannot be transferred contractually
 - “A contractor . . . shall not evade or commit any act that negates the requirements of this section. No agreement by an employee or subcontractor to indemnify a contractor or otherwise release or transfer liability assigned to a contractor under this section shall be valid. However, if a contractor has satisfied unpaid wage claims of an employee an incurred fees and costs in doing so, such contractor may then pursue actual and liquidated damages from any subcontractor who caused the contractor to incur those damages.”
 - Contractor cannot evade liability by claiming the claimant is an “independent contractor” rather than an “employee” of the subcontractor, unless the person meets the criteria required by section 181.723, subd. 4.

8

Wage Theft Law – Definitions

- “Contractor”
 - Means construction manager, general or prime contractor that enters into a construction contract with an Owner.
 - Means an “Owner” if an Owner enters into a construction contract with **“more than one”** contractor or subcontractor on any construction site.”
- “Owner”
 - Means person “with an ownership interest” whether in “fee, as vendee under a contract to purchase, as lessee or another interest or estate less than fee” that **“causes”** a building, structure, or improvement, to be constructed, remodeled, repaired, maintained, moved or demolished or that causes land to be excavated or otherwise developed or improved.
 - Likely includes: landlords, tenants, sub-tenants, home-owner’s associations, trusts, easement holder (utility)
 - May not include: squatter, business invitee, guests, lender

9

Wage Theft Law – Definitions

- “Subcontractor”
 - Means person that is “party to a contract with a contractor” or the “contractor’s subcontractor at any tier” to perform **“any portion of work within the scope of the contractor’s construction contract”** with the owner” – even where there is not direct privity of contract. “When the owner is deemed a contractor, subcontractor also includes the owner’s contractor.”
- “Claimant”
 - Means any person claiming unpaid wages, fringe benefits, penalties, or resulting liquidated damages that are owed as required by law, including any applicable statute, regulation, rule, ordinance, government resolution or policy, contract, or other legal authority.”
 - NOTE – doesn’t appear to be limited to the worker.

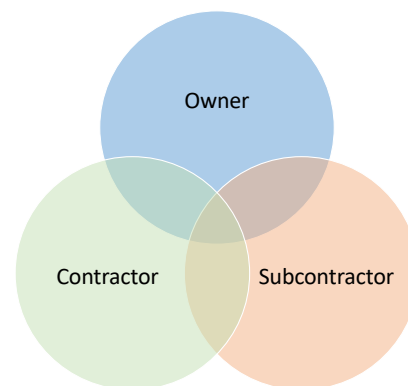
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Wage Theft Law - Definitions

- “Construction Contract”
 - Means “written or **oral** agreement” for the construction, reconstruction, erection, remodeling, repair, maintenance, moving, or demo of building.
 - EXCEPTION – “shall not include a home improvement contract for the performance of home improvement between a home improvement contractor and the owner of an owner-occupied dwelling, and a home construction contract or contracts results in the construction of more than ten one or two family owner-occupied dwellings at one project site annually.”

11

Wage Theft Law – Who has Liability?



12

Wage Theft Law - Exemptions

- (a) Does not diminish “rights, privileges, or remedies of any employee under any collective bargaining agreement”
 - Does not apply “to any contractor or subcontractor that is a signatory to a bona fide collective bargaining agreement with a building and construction trade labor organization that: (1) contains a grievance procedure that may be used to recover unpaid wages on behalf of employees covered by the agreement; and (2) provides for collection of unpaid contributions to fringe benefit trust funds established pursuant to” U.S.C. title 29, section 186(c)(5)-(6)
- (b) Does not apply to work for which “prevailing wage rates apply under sections 177.41 to 177.44”

13

Wage Theft Law – Owner Payment Dilemma

- “Nothing in this section shall alter the owner’s obligation to pay a contractor, or a contractor’s obligation to pay a subcontractor as set forth in section 337.10, except as expressly permitted by this section.”
 - NOTE: § 337.10
 - Progress payments monthly, unless contract provides otherwise
 - Retainage released no later than 60 days after substantial completion
 - Does not have to pay for “a portion of a contract that is not complete” or for which an invoice has not been submitted.

14

Wage Theft Law - Compliance Data

- Within 15 days of a request “by a contractor” or subcontractor, the subcontractor has to submit “payroll records, which as a minimum, contain all lawfully required information for all workers providing labor on the project.”
 - Payroll records to include “sufficient information to apprise the contractor or subcontractor of such subcontractor’s payment of wages and fringe benefit contributions to a third party on the workers’ behalf”.
 - SSNs to be redacted to “prevent disclosure”
- Within 15 days of a request “by a contractor” or subcontractor, subcontractor to provide:
 - Names of all employees and independent contractors
 - Anticipated start date
 - Scheduled duration of work
 - “when applicable, local unions with which such subcontractor is a signatory contractor”
 - Name and phone number of a contact for the subcontractor.

15

Wage Theft Law - Enforcement

- Complaint with commissioner
- Complaint in civil court
 - If an action is against the subcontractor, the “contractor shall be jointly and severally liable for any unpaid wages, benefits, penalties, and any other remedies available pursuant to this section”
- 3-year statute of limitation

16

Wage Theft Law - Consequences

- Contractor and subcontractor have to pay “employees reasonable costs, disbursement, witness fees, and attorney fees” if found to have violated the act. Minn. Stat. § 177.27, subd. 10.
- Commissioner can issue compliance orders. Minn. Stat. § 177.27, subd. 4.
- Commissioner can examine employers records and may “enter during reasonable office hours” the employer’s place of business or “upon request”
- Responsible Contractor Act – Minn. Stat. § 16C.285,
 - subd. 3(2)(ii) final order to comply renders contractor non-responsible
 - Subd. 3(2)(vi) liability for underpayment of wages renders contractor non-responsible

17

Department of Labor and Industry Enforcement

18

DLI investigative authority

- Enter and inspect places of employment without unreasonable delay during normal working hours as commissioner deems appropriate to enforce the laws within the commissioner's jurisdiction. (Minnesota Statutes 175.20)
- Issue subpoenas, collect evidence, interview witnesses, take testimony and compel the attendance of witnesses. (Minn. Stat. 175.20)
- Require certified reports from employers. (Minn. Stat. 175.24)
- Enter and inspect the place of business or employment of any employer to examine and inspect records that relate to wages, hours and other conditions of employment of any employees. The commissioner may transcribe the records and may question employees to ascertain compliance with Minn. Stat. 177.21 to 177.435. (Minn. Stat. 177.27, subdivision 1)
- Commissioner can require the submission of employment records, including full and correct statements in writing, including sworn statements by the employer, containing information relating to wages, hours, names, addresses and any other information pertaining to the conditions of employment. (Minn. Stat. 177.27)



19

DLI enforcement authority

- The commissioner may make a determination of wages due based on available evidence and mediate a settlement with an employee.
- The commissioner may issue an order requiring an employer to comply with certain identified statutes.
- The commissioner may bring an action in district court to enforce or require compliance with compliance orders.
- The commissioner's compliance orders must:
 - order an employer to cease and desist a violative practice.
 - order an employer to pay backpay, gratuities and compensatory damages, and for additional equal amount in liquidated damages.



20

DLI enforcement authority, cont.

- The commissioner may order the employer to reimburse DLI and the Attorney General's Office for all appropriate litigation and hearing costs associated with a contested case hearing.
- The commissioner may serve a demand for payment on behalf of an employee and, in addition to other remedies, if the payment of wages is not made within 10 days, the commissioner may charge and collect the wages earned and a penalty in the amount of the employee's average daily earnings for each day beyond the 10-day limit following the demand.

21

DLI penalty authority

Failure to submit records penalty	177.27, subd. 2	Up to \$10,000
Repeat or willful failure to comply penalty	177.27, subd. 7	Up to \$10,000
Employer retaliation penalty	181.03, subd. 6	\$700 to \$3,000
Failure to maintain records	177.30(b)	\$1,000
Failure to maintain records – repeat offense	177.30(b)	\$5,000
Failure to post laws and rules	177.31	\$200

22

Compliance: Best Practices

23

Wage Theft – New Reality

- AIA A201 (2017) – 9.6.4 “The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and suppliers amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors and suppliers to ascertain whether they have been properly paid. **Neither the Owner nor Architect shall have an obligation to pay, or to see to the payment of money to, a Subcontractor or supplier, except as may otherwise be required by law.**”
- Now, Owner has liability to claimants (employees of subcontractors) if they are not paid. AIA A201 9.6.4, and clauses like 9.6.4 will not provide protection to Owner.

24

Wage Theft – New Reality

- NOTE – the following compliance ideas need to be fully vetted, and best practices will be developed over time.
- Idea 1: Daily certification at sign in:
 - Daily job sign in log for “labor” or electronic badging/check in every day. All entering the job site must certify they are current with wages as a condition of entry. If they can’t certify, no entry until responsible employer cleans up.
 - Same process as used during COVID19 for employers who required certifications from guests.
 - Compliance cost can be charged by GC or CM to Owner at % markup similar to insurance or fee.
 - Subcontracts to be updated so subcontractors have to agree to this process.

25

Wage Theft – New Reality

- Idea 2: lien waivers
 - Require subs to list all “claimants” on schedule of values provided with pay app, and provide lien waivers executed by each and every employee.
 - NOTE:
 - Minn. Stat. § 514.01 states that laborers have lien rights
 - Minn. Stat. § 514.02, subd. 1 says “proceeds of payment” received by a person are to be held in trust for the benefit of those persons providing labor. Failure to use the funds knowing the person has not been paid constitutes theft of proceeds.
 - So, requiring “claimant” lien waivers appears to be an option that would satisfy the wage-theft law as well.
 - Cost of job accounting will be higher, so additional payroll specialists and accounting controls will be necessary, will cause higher prices.

26

Wage Theft – New Reality

- Idea 3: Insurance
 - Update contract insurance provisions in contract to require fidelity/theft insurance
 - While the liability cannot be transferred contractually to an employee or subcontractor, nothing says liability insurance cannot be purchased.
 - Insuring against liability is not “evading” liability
 - Check with insurers for possible insurance solutions
- More ideas will be generated by the industry.

27

Verifico

28



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29

The Problem – Wage Theft

\$50B in lost wages – \$Millions in losses for companies

CLC Department of Industrial Relations
STATE OF CALIFORNIA
NEWS RELEASE
Release Number: 2023-124 Date: October 10, 2023
California Labor Commissioner Cites Construction Company \$1.7 Million for Wage Theft Violations

Wage theft now a larceny
September 10, 2023 4:42 am

Unions hail New York law that cracks down on wage theft
Construction unions pushed for change that could mean stiffer penalties for offenders

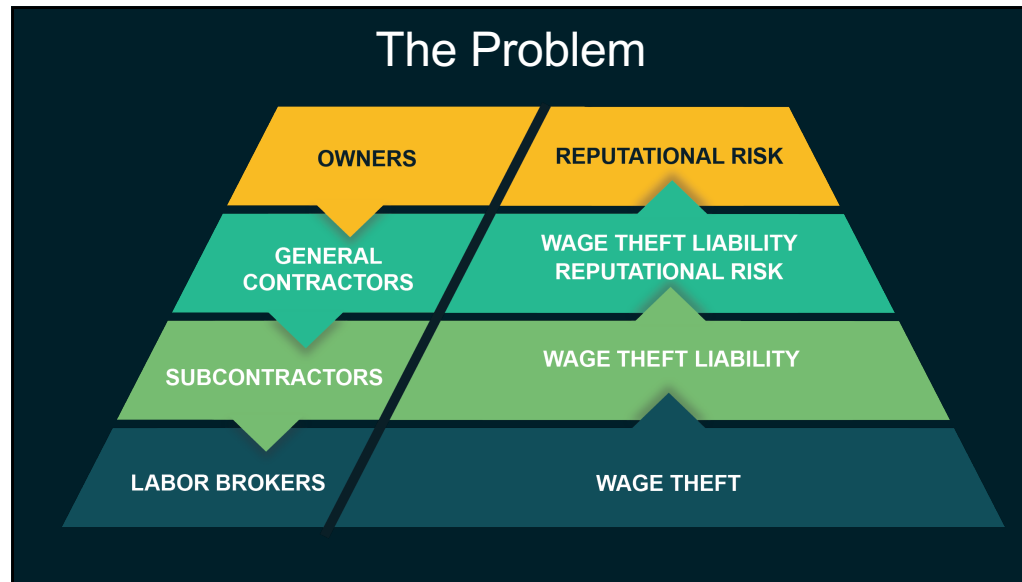
Federal case sheds light on payroll fraud, wage theft and worker misclassification
By ERIC GUNN | SEPTEMBER 14, 2023 5:45 AM

StarTribune
Minnesota seeking \$2.4M from Viking Lakes subcontractors accused of wage theft
The state is asking an administrative law judge to endorse its findings, which include wrongdoing at the Eagan site and 18 others.
By Dee DePass Star Tribune | DECEMBER 19, 2023 - 3:46 PM

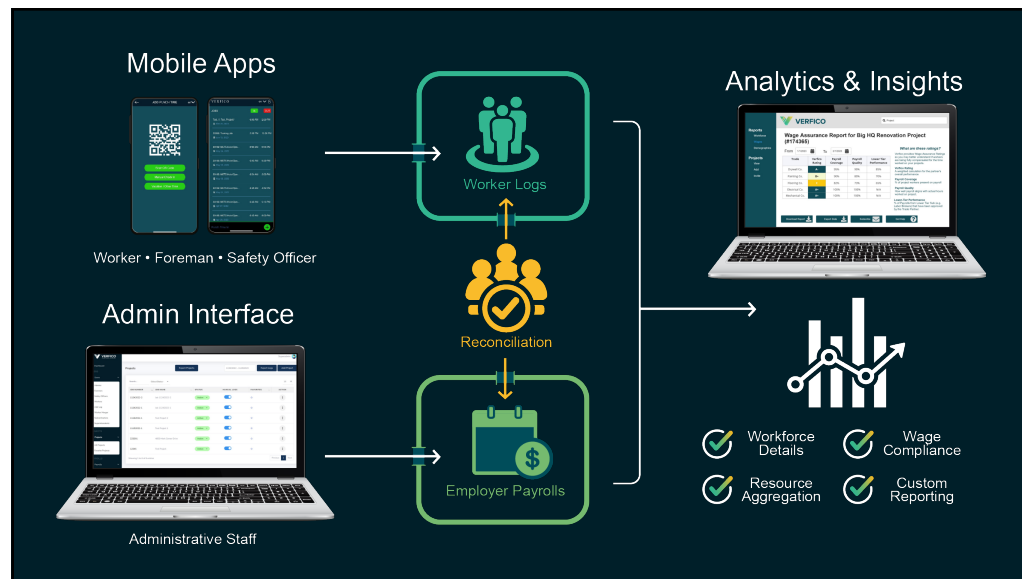
North Carolina construction company pays \$1.6M following DOL misclassification lawsuit
R&B Construction Maintenance of North Carolina misclassified the employees as independent contractors, violating the FLSA, the agency said.

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30



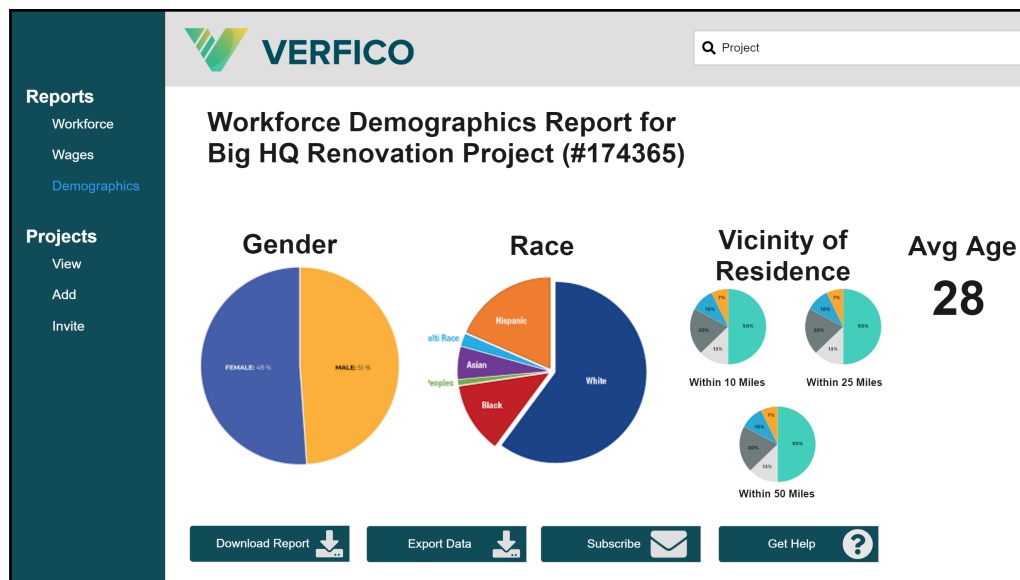
31



32



33





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35

Questions

36

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