

Wage and Hour in 2022: Overtime, Recordkeeping and Wage Theft



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Where Are We Headed?

1. Exempt vs. Non-Exempt
2. MN Wage Theft Statute
3. MPLS Wage Theft





Common Misconceptions

- *“If I pay an employee a salary, then he’s exempt.”*
- *“This employee’s job title is ‘manager,’ ‘supervisor,’ or ‘administrator,’ so he’s exempt.”*
- *“This employee is performing sales work from home, so he’s exempt.”*
- *“This employee doesn’t want to punch a clock, so we’re going to pay him a salary and he’s exempt.”*
- *“I don’t let my employees work overtime, so it doesn’t matter how I classify them.”*

What are the “White Collar” Exemptions?

- Executive Exemption
- Administrative Exemption
- Professional Exemption
 - Learned & Creative Professionals
- Computer Employee Exemption
- Outside Sales Exemption
- Highly-Compensated Employees

White Collar Exemptions (cont.)

- Three part test:
 - 1) Salary level
 - 2) Salary basis
 - 3) Duties test



Test #1 – Salary Level

- From 2004 to 2020, \$455 per week (or \$23,660 annually).
- Effective January 1, 2020, increased to **\$684 per week** (\$35,568 annually).
- No salary level required for outside salespersons, teachers, lawyers, or doctors.



DOL's New Salary Level

- Final Rule announced on September 24, 2019
- Effective: January 1, 2020
- **Major changes:**
 - **Increases** salary threshold for minimum wage and overtime exemption **from \$455 to \$684** per week (or **from \$23,660 to \$35,568** annually) for executive, administrative, and professional employees (the “white collar exemptions.”)



New Salary Level (cont.)

- **Major changes continued:**
 - Permits employers to now use discretionary bonuses and incentive payments, including commissions, to satisfy up to 10% of the new salary level.
 - Increases the total annual compensation for “highly compensated employees” from \$100,000 to **\$107,432.**

Test #2 – Salary Basis

- Must receive *full salary* (i.e., \$684 per week) in any week where work is performed.
- Cannot be reduced based on quality or quantity of work.
- Exception for full-day absences for “personal reasons,” disciplinary suspensions, and pursuant to bona fide PTO plan.



Test #3 – Duties Test

- An employee who meets the salary level tests and the salary basis tests is exempt only if the employee also performs exempt job duties.
- “Primary duty” (principal, main, major or most important duty) of employee must fall under category of exempt duties.



| Exemption | Salary Level | Salary Basis | Duties Test |
|------------------|---|---|---|
| Executive | At least \$684 per week (\$35,568 per year) | At least 90% of the salary level (\$616 per week) must be paid on a “salary basis” Up to 10% (\$68 per week) may be satisfied with nondiscretionary bonuses or incentive payments. | The employee’s “primary duty” must be that of an exempt executive employee. |



| Exemption | Salary Level | Salary Basis | Duties Test |
|------------------|---|---|--|
| Administrative | At least \$684 per week (\$35,568 per year) | At least 90% of the salary level (\$616 per week) must be paid on a “salary basis” Up to 10% (\$68 per week) may be satisfied with nondiscretionary bonuses or incentive payments. | The employee’s “primary duty” must be that of an exempt administrative employee. |



| Exemption | Salary Level | Salary Basis | Duties Test |
|--------------|--|--|--|
| Professional | At least \$684 per week (\$35,568 per year) Does NOT apply to doctors, lawyers, or teachers | At least 90% of the salary level (\$616 per week) must be paid on a “salary basis” Up to 10% (\$68 per week) may be satisfied with nondiscretionary bonuses or incentive payments. Does NOT apply to doctors, lawyers, or teachers | The employee’s “primary duty” must be that of an exempt professional employee. |

| Exemption | Salary Level | Salary Basis | Duties Test |
|---------------|----------------|----------------|---|
| Outside Sales | Not applicable | Not applicable | The employee's "primary duty" must be that of an exempt outside sales employee. |



| Exemption | Salary Level | Salary Basis | Duties Test |
|---------------------------|--|--|--|
| <p>Highly-Compensated</p> | <p>\$107,432 per year in total compensation</p> <p>AND</p> <p>Payment of at least \$684 per week</p> | <p>100% of the salary level (\$616 per week) must be paid on a “salary basis” or “fee basis”</p> <p>The remainder of the total annual compensation requirement may be paid in nondiscretionary bonuses or incentive payments (including commissions)</p> | <p>The employee’s “primary duty” must be office or non-manual work.</p> <p>Must “customarily and regularly” perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee.</p> |

Basics of FLSA Audits

- Who conducts an audit?
- What is the scope of the audit?
 - Employees vs. Non-Employees
 - Exempt vs. Non-Exempt
 - Compensable Time / Off-the-Clock Work
 - Regular Rate and Overtime Calculation
 - Recordkeeping
- How to protecting the audit from discovery?

Who Conducts the Audit?

- Potential Auditors
 - Managers / Supervisors
 - HR
 - In-house Counsel
 - Outside Counsel
- Utilizing counsel is recommended because:
 - (1) Protecting results from discovery;
 - (2) Legal opinions can show “good faith.”



Scope of the Audit

- Key Areas of Focus:
 - Employees vs. Non-Employees
 - Exempt vs. Non-Exempt
 - Compensable Time / Off-the-Clock Work
 - Regular Rate and Overtime Calculation
 - Recordkeeping



Who is an “Employee”?

- FLSA defines employee as “any individual employed by an employer.”
- Covered employment includes arrangements in which one party “suffers or permits” another person to work.
- **“Economic Reality Test”** – whether the worker is, as a matter of “economic reality,” dependent upon the putative “employer.”

Economic Realities Test

- 1) Degree of control over the manner in which the work is performed;
- 2) Worker's opportunity for profit or loss;
- 3) Worker's investment (equipment, materials, or assistants);
- 4) Whether the service requires a special skill;
- 5) Degree of permanence; and
- 6) Whether the service is "integral" to employer's business.

Who is Exempt?

- For most of the white-collar exemptions, there is a three-part test:
 - 1) Salary level
 - 2) Salary basis
 - 3) Duties test
- Be mindful that there are ***other*** exemptions that may apply.



What Does “Exempt” Mean?

- No minimum wage or overtime pay requirements for employees who perform certain duties and receive a qualifying salary.
- No time records need to be kept.



What Does “Salary Basis” Mean?

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced by improper wage deductions.
- Must be paid the full salary for any week in which the employee performs any work.
- Need not be paid for any workweek when no work is performed.



Salary Basis (cont.)

- **Impermissible Wage Deductions:**
 - Performance
 - Discipline
 - Partial Day absence
 - Work is unavailable for employee
- **Safe Harbor Rule:**
 - If an inadvertent deduction is made, the 29 C.F.R. 541.603 pay save the exempt status if employee is promptly reimbursed.



Salary Basis (cont.)

- **Permissible Wage Deductions:**
 - No work performed during an entire week (and not on paid leave or paid vacation)
 - Violations of safety rules resulting in suspension (written policy required)
 - First or Last week of employment
 - Missing work under the FMLA.



What Is the “Duties Test”?

- Employee needs to be performing “exempt work” as defined by the DOL regulations.
- Look at day-to-day job tasks.
- A good job title (or job description) is not sufficient.



Are Assistant Managers Exempt?

- Typical FLSA Problems:
 - They do not spend most of their time managing the business (instead, they are generally required to perform the same amount of work as other, non-salaried employees);
 - They do not regularly supervise two or more full-time employees; or
 - They do not have the power to hire or fire employees.

Do Other Exemptions Apply?

- There are less-common exemptions that may apply to the employees at issue.
- Does the employee drive a vehicle that weighs more than 10,000 pounds across state lines?
 - Motor Carrier Exemption.
- Does the work in a retail establishment and receive commissions?
 - Retail Sales Exemption.



What Is “Overtime”?

- Employees must be paid an overtime rate of not less than 1.5 times an employee’s “regular rate” of pay after 40 hours.
- Overtime is calculated on actual time worked (not time paid but not actually worked – e.g., sick leave, holiday pay, etc.).
- Some states have overtime laws which differ from federal requirements (e.g., California requires OT after 8 hours).

Overtime (cont.)

- “Regular Rate” Calculations
 - Divide total earnings in the workweek by the total number of hours worked in the workweek.
- Exclusions:
 - Sums paid as gifts;
 - Payments for time not worked (e.g., PTO, sick leave, vacation);
 - Reimbursement for expenses;
 - ***Discretionary*** bonuses;

Overtime (cont.)

- Exclusions: (cont.)
 - Profit sharing plans
 - Contributions to retirement and health insurance plans;
 - Overtime premium payments; and
 - Stock options.



Overtime (cont.)

- Typically *included* in the “Regular Rate”
 - Commissions;
 - Attendance bonuses;
 - Productivity bonuses;
 - Bonuses for quality or accuracy of work;
 - Shift differentials (such as premiums paid for hazardous work or night work);
 - Commissions;
 - Longevity pay;



Overtime (cont.)

- Typically **included** (cont.):
 - Bonuses or other payments made pursuant to a contract, agreement, or promise (e.g., handbook or personnel policy);
 - Value of non-monetary awards (i.e., cost to employer);
 - Voluntary overtime premiums (if that premium was less than 1.5 times regular rate); and
 - On-call pay, even if the employee does not work while on call.

“Regular Rate” Calculation

- **Step 1**
 - Total Straight Time Earnings (Minus Statutory Exclusions) ÷ Total Hours Worked = Regular Rate
- **Step 2**
 - Regular Rate x .5 = Half Time Premium
- **Step 3**
 - Half-Time Premium x Overtime Hours = Total Overtime Premium Due



DOL's New "Regular Rate" Rule

- Announced on December 16, 2019
- Effective **January 15, 2020**
- Designed to clarify calculation of "Regular Rate" under the FLSA.
 - Regular rate is defined as "all remuneration for employment paid to, or on behalf of, the employee," subject to several statutory exclusions.
 - Includes more than just the employee's hourly rate (e.g., nondiscretionary bonuses, on-call pay, etc.)
 - Unless the payment fits into one of the statutory exclusions, it must be included in the regular rate calculation.



“Regular Rate” Rule (cont.)

- Rule *confirms* or *clarifies* the following:
 - That the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services may be **excluded** from an employee’s regular rate of pay.
 - That payments for unused paid leave, including paid sick leave, may be **excluded** from an employee’s regular rate of pay.
 - That reimbursed expenses need not be incurred “solely” for the employer’s benefit for the reimbursements to be **excludable** from an employee’s regular rate.



“Regular Rate” Rule (cont.)

- Rule *confirms* or *clarifies* the following:
 - That employers do not need a prior formal contract or agreement with the employee(s) to **exclude** certain overtime premiums described in sections 7(e)(5) and (6) of the FLSA.
 - That pay for time that would not otherwise qualify as “hours worked,” including bona fide meal periods, may be **excluded** from an employee’s regular rate unless an agreement or established practice indicates that the parties have treated the time as hours worked.

Wage Theft





Minnesota Wage Theft Law

- In May 2019, the Wage Theft Law was passed as part of 100+ page omnibus bill during a special session over Memorial Day weekend.
- Main Provisions:
 - 1) Criminalizes “wage theft.”
 - 2) Revises recordkeeping requirements.
 - 3) Creates new “wage notice.”
 - 4) Adds DOLI and Attorney General enforcement.



“Wage Theft” is a Crime

- Minn. Stat. § 609.52, subd. 2(19) makes “wage theft” a crime punishable by prison.
 - If the value of the wage theft exceeds \$35,000, a violator may be sentenced to prison for up to 20 years, receive a fine of up to \$100,000, or both.
- Minn. Stat. § 609.52, subd. 1(13) defines “wage theft” which includes any of the following actions by an employer “with intent to defraud:”
 - (1) Failing to pay an employee all wages, salary, gratuities, earnings, or commissions as required by federal, state, or local law;



“Wage Theft” (cont.)

- (3) Directly or indirectly causing an employee to give a receipt for wages for an amount greater than the amount actually paid to the employee for services rendered;
- (4) Directly or indirectly demanding or receiving from any employee any rebate or refund from the wages owed to the employee; or
- (5) Making it appear in any manner that the wages paid to any employee were greater than the amount actually paid to the employee.



DOLI FAQs

23. Regarding "intent to defraud" in the criminal wage theft provision: Is there any definition or something similar that explains what this means in a practical or plain-language sense? Are there any examples?

The Department of Labor and Industry is not the enforcement authority for the criminal provisions of the Wage Theft Prevention Act. The criminal wage theft provisions would be investigated by law enforcement agencies with criminal law enforcement authority and prosecuted by city attorneys, county attorneys or the state attorney general's office when requested by a county attorney.

24. Who specifically in the company would be convicted of the felony under this law?

The Department of Labor and Industry is not the enforcement authority for the criminal provisions of the Wage Theft Prevention Act. The criminal wage theft provisions would be investigated by law enforcement agencies with criminal law enforcement authority and prosecuted by city attorneys, county attorneys and the state attorney general's office when requested by a county attorney.

“Wage Notice” Form

- Employers must provide a “Wage Notice” to new employees at the start of their employment.
 - Form must be ***signed*** by the employee.
 - Form must include translation information developed by MN-DOLI.
- Additionally, employer must provide employees with any written changes to the information contained in the wage notice ***before*** the changes become effective.
 - Second notice does ***not*** need to be signed.

New “Wage Notice” Form



Employee notice

| | | | |
|---|--|--------------------|------|
| 1. Employee: | Address: | | |
| Phone number: | Email address: | | |
| Date employment began: | | | |
| 2. Legal name of employer: | Main office/principal place of business address: | | |
| Phone number: | Email address: | | |
| Operating name of employer (if different): | | | |
| Mailing address (if different): | | | |
| 3. Employment status (exempt or non-exempt): | | | |
| <input type="checkbox"/> Employee is exempt from: <input type="checkbox"/> minimum wage <input type="checkbox"/> overtime <input type="checkbox"/> other provisions of Minnesota Statutes 177 | | | |
| Legal basis for exemption: | | | |
| <input type="checkbox"/> Employee is non-exempt (entitled to overtime, minimum wage, other protections under Minn. Stat. 177) | | | |
| 4. Rate or rates of pay | | | |
| Paid by: Hour <input type="checkbox"/> Shift <input type="checkbox"/> Day <input type="checkbox"/> Week <input type="checkbox"/> Salary <input type="checkbox"/> Piece <input type="checkbox"/> Commission <input type="checkbox"/> Other method <input type="checkbox"/> | | | |
| Overtime is owed after: _____ hours | | | |
| Allowances claimed: | | | |
| \$ _____ per meal for meal allowance (max = 60% of one hour of adult minimum wage per meal) | | | |
| \$ _____ per day for lodging allowance (max = 75% of one hour of adult minimum wage per day) (or fair market value) | | | |
| 5. Leave benefits available: | | | |
| <input type="checkbox"/> Sick leave <input type="checkbox"/> Paid vacation <input type="checkbox"/> Other paid time off | | | |
| How benefits are accrued: Number of hours _____ or days _____ | | | |
| per <input type="checkbox"/> year <input type="checkbox"/> month <input type="checkbox"/> per pay period <input type="checkbox"/> per hours worked | | | |
| Terms of use: | | | |
| 6. Deductions that may be made from employee's pay and amounts: | | | |
| 7. Number of days in the pay period: | Regularly scheduled payday: | | |
| Date employee will receive first payment of wages earned: | | | |
| 8. Other information relevant to this position: | | | |
| I, the employee, have received a copy of this notice: <input type="checkbox"/> Yes <input type="checkbox"/> No | | | |
| Employer signature | Date | Employee signature | Date |

This document contains important information about your employment. Check the box at left to receive this information in this language.

| | |
|---------------------|---|
| Spanish/Español | Este documento contiene información importante sobre su empleo. Marque la casilla a la izquierda para recibir esta información en este idioma. |
| Hmong/Hmoob | Daim ntawv no muaj cov xov tseem ceeb hais txog thaum koj ua hauj lwj. Khib lub npau ntawm sab laug yog koj xav tau cov xov tseem ceeb no thais ua lus Hmoob. |
| Vietnamese/Việt ngữ | Tài liệu này chứa thông tin quan trọng về việc làm của quý vị. Đánh dấu vào ô bên trái để nhận thông tin này bằng Việt ngữ. |
| Simp. Chinese/简体中文 | 本文件包含与您的雇用相关的重要信息。勾选左边的方格将接收以这种语言提供的信息。 |
| Russian/русский | Данный документ содержит важную информацию о вашем трудоустройстве. Отметьте галочкой квадрат слева для получения этой информации на данном языке. |
| Somali/Soomaali | Dukumentigan waxaa ku qoran macluumaad muhiim ah oo ku saabsan shaqadaada. Calaamadi sanduuqaan haddii aad rabto inaad macluumaadkan ku hesho luqadadan. |
| Laotian/ລາວ | ສາມາດນີ້ມີຂໍ້ມູນທີ່ສຳຄັນກ່ຽວກັບການຈ້ຽງງານຂອງທ່ານ. ກວດເບິ່ງເບັກສ່ວນທີ່ເຊື່ອມຕໍ່ກັບຂໍ້ມູນໃນພາສາລາວ. |
| Korean/한국어 | 이 문서에는 귀하의 고용 형태에 관련된 중요한 정보가 담겨있습니다. 이 언어로 이 정보를 받기를 원하시면 왼쪽 상자에 체크하여 주세요. |
| Tagalog/Tagalog | Ang dokumentong ito ay nagtataglay ng mahalagang impormasyon tungkol sa iyong pagtatrabaho. Lagyan ng tsek ang kahon sa kaliwa upang matanggap ang impormasyon ito sa wikang Ito. |
| Oromo/Oromoo | Waraqaan kun waayee hojji keetii odeeffannoo barbaachisoo ta'an qabatee jira. Saaxinnii karaa bitaatti argamu kana irratti mallattoo godhi yoo afaan Kanaan barreeffama argachuu barbaa'dde. |
| Amharic/አማርኛ | ይህ ደብዳቤ ለአዎንታዊ ስሜዎች ለሥራ ላይ ማሳተፍ የሚያስፈልገውን ስሜት ይህንን ደብዳቤ በቀጠለው ስልጠና ላይ ተተርጉሞ ለሥራዎች ለሥራ ስሜት ስለሚያስፈልግ ስለሆነ ስሜት ይጠቀሙ ይኸውን ደብዳቤ ይጠቀሙ |
| Karen / ကရင်ဘာသာ | မိမိတို့၏အလုပ်အကိုင်အခြေအနေအထားအပေါ်တွင်အရေးကြီးသောအချက်အလက်များကိုအကျဉ်းချုပ်ဖော်ပြထားပါသည်။ မိမိတို့အားအလုပ်အကိုင်အခြေအနေအထားအပေါ်တွင်အရေးကြီးသောအချက်အလက်များကိုအကျဉ်းချုပ်ဖော်ပြထားပါသည်။ |
| Arabic/ العربية | يحتوي هذا المستند على معلومات مهمة حول عملك. ضع علامة في المربع على اليمين للحصول على هذه المعلومات في هذه اللغة. |

Translation providers approved by the Minnesota Department of Administration

| | | |
|--|--|---|
| Betmar Languages, Inc. 6260 Hwy. 65 N.E. Minneapolis, MN 55432 763-572-9711 best@betmar.com | The Bridge World Language Center, Inc. 110 Second Street S., #308 Waite Park, MN 56387 320-259-9239 mini@bridgelanguage.com | Fox Translation Services 1152 Mae Street, #122 Hummelstown, PA 17033 866-369-1646 or 407-733-3720 dina@foxcasemanagement.com |
| Global Translation and Interpreter 913 E. Franklin Ave., #206 Minneapolis, MN 55404 612-722-1244 sandor@globaltranslations.com | Latin American Translators Network, Inc. 1720 Peachtree Street N.W., #532 Atlanta, GA 30309 800-943-5286, ext. 8641, translations@latn.com 800-943-5286, ext. 8620, idenis@latn.com | Latitude Prime, LLC 80 S. Eighth Street, #900 Minneapolis, MN 55402 888-341-9080, ext. 501 elle@latitude.com |
| Lingualinx Language Solutions, Inc. 433 River Street, #6001 Troy, NY 12180 518-388-9000 abartlett@lingualinx.com | Prisma International, Inc. 1128 Harmon Place, #310 Minneapolis, MN 55403 612-349-3111 jromano@prisma.com | Swits, LTD 110 S. Third Street Delavan, WI 53115 262-740-2590 translations@swits.us |



“Wage Notice” Form (cont.)

The wage notice form must include 9 elements:

- (1) 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;
- (2) allowances, if any, claimed pursuant to permitted meals and lodging;
- (3) paid vacation, sick time, or other paid time-off accruals and terms of use;
- (4) 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***;



“Wage Notice” Form (cont.)

- (5) a list of deductions that may be made from the employee’s pay;
- (6) 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;
- (7) the legal name of the employer and the operating name of the employer if different from the legal name;
- (8) the physical address of the employer’s main office or principal place of business, and a mailing address if different; and
- (9) the telephone number of the employer.



DOLI FAQs

3. What does "on what basis" mean in Minn. Stat. 181.032(d)(4)?

"On what basis" means the employer must include in the written notice provided to an employee the legal basis for the exemption from minimum wage, overtime and other provisions of Minn. Stat., Chapter 177.

4. Can an employer meet employee notice obligations by providing or referring to a collective bargaining agreement, handbook or policy?

The initial written notice does not need to be provided by the employer in a specific format or on a specific form. In fact, the reference to and provision of an applicable collective bargaining agreement, policy or handbook may be used to satisfy the information required in the initial employee notice or written change notice if the contract, policy or handbook being provided includes enough specifics for the employee to determine the information required to be in the notice as applied to them. Here are a few examples of this in practice:



DOLI FAQs

11. Should management employees be given the written notice required by the Wage Theft Prevention Act or would they be excluded under the executive/professional /administrative employee designation? Who is covered by these requirements, which types of "employees"?

The Wage Theft Prevention Act requires that employers provide the written notice to all employees.

15. Is emailing the initial written notice to an employee sufficient to meet the signature requirement?

No, the Wage Theft Prevention Act requires the written notice be signed by an employee acknowledging receipt of the written notice.



DOLI FAQs

33. What is the consequence to employers if employees receive changes to the employee written notice after the changes have gone into effect?

This will depend on the facts of the situation and the consequences for employees who were not provided the written notice before the changes went into effect. Employers who violate the employee notice and recordkeeping requirements may be issued a Commissioner Order to Comply that imposes remedies provided for in Minn. Stat. section 177.27 and civil recordkeeping penalties. Employees may also bring a private civil action seeking similar remedies and penalties.

34. The employee notice must include "a list of deductions that may be made from the employee's pay." How comprehensive does this information need to be? Does the exact dollar amount of the deductions need to be listed?

The written notice should identify all of the deductions that may be made by the employer from an employee's pay. The amount of each deduction does not need to be indicated in the written notice. A list of deductions, including the amount of the deduction, is required in the statement of earnings that must be provided to the employee by the employer at the end of each pay period.



Revised Recordkeeping Requirements

- Employers must now keep additional employment records, including:
 - The basis of pay (hourly, salary, piece rate, etc.);
 - Personnel policies provided to the employee (including the date the policies were given to the employee) and a brief description of the policies; and
 - A signed copy of each employee's wage notice form.



DOLI FAQs

16. What are the requirements for keeping "personnel policies provided to the employee, including date the policies were given to the employee and a brief description of the policies"?

This is a new recordkeeping requirement for employers. It requires employers to keep a list of the personnel policies provided to an employee, including the date the policies were given to the employee and a brief description of the policies. This applies to all employees, not just new employees. Records must be kept by an employer for at least three years.

29. Can an employer provide links on the written notice template that point to policies, such as the policies around time-off plans or payroll schedules, instead of including that information on the employee notice?

Yes, the initial written notice does not need to be provided by the employer in a specific format or on a specific form. In fact, the reference to and provision of an applicable collective bargaining agreement, policy or handbook may be used to satisfy the information required in the employee notice or change notice if the contract, policy or handbook being provided includes enough specifics for the employee to determine the information required to be in the notice as applied to them. See also the answer to question 4.



Revised Recordkeeping (cont.)

- The law requires that all records be available for inspection and must be kept in a place where employees are working or kept in a manner that allows the employer to comply with a demand for inspection within 72 hours.
- New maximum fine of \$5,000 for repeat violations of recordkeeping requirements.
- Prohibition on retaliation:
 - The law provides additional retaliation protections for employees who assert rights under the MFLSA and Minn. Stat. §§ 181.01 to 181.723, or 181.79.



New MN-DOLI Authority

- The law allows the MNDOLI Commissioner to enter an employer's place of business, during working hours, to investigate violations of various Minnesota statutes related to labor standards and wages, employment, child labor, and employment agencies.
- Authority includes the ability to collect evidence of potential violations and interview witnesses.



Revised Earning Statements

- New information required on an employee's earning statement, which must be provided to each employee at the end of a pay period:
 - Rate or rates of pay and “***basis thereof***” (hourly, salary, piece rate, etc.);
 - Any allowances for meals or lodging; and
 - The employer's address and phone number.



Hull v. ConvergeOne, Inc.,

2021 WL 5180189 (D. Minn. Nov. 8, 2021)

- Hull, a Utah resident, was hired by CovergeOne as a salesperson.
- Hull was subject to commissions plans in 2017 and 2019.
- Hull alleged that ConvergeOne deliberately underpaid him millions of dollars in commissions.
- Hull sued under Minn. Stat. § 181.032 (earnings statements), § 181.03 (failing to pay commissions), § 181.101 (retaliation).
- ConvergeOne moved to dismiss.



Hull, (cont.)

- Court first denied ConvergeOne's motion on the basis that Hull's employment was not covered by Minnesota law.
- Court noted that Hull alleged that "he attended a four-day mandatory training session in Minnesota, that he receive[d] ongoing guidance, supervision, and direction from his Minnesota supervisors, and that he regularly attend[ed] virtual meetings and conference calls with colleagues in Minnesota."
- Court noted that, like the MHRA, the MPWA "contains no express provision extending its application beyond the borders of the state."
- Citing Wilson v. CFMOTO Powersports, Inc. (D. Minn. 2016), court noted that these contacts could be sufficient.



Hull, (cont.)

- Court denied ConvergeOne’s motion to dismiss § 181.032 claim.
- Court rejected ConvergeOne’s argument that § 181.032 only requires an employer to provide an earnings statement that indicates the general “**basis**,” or foundation, of an employee's pay.
- The Court found that that “basis,” as used in § 181.032, is unclear.
 - It could refer only to the general type of payment, i.e., hourly pay, salary, commissions, etc.,
 - It could also refer to the formula used to determine commissions or pay.
- Held that Hull’s allegations – that ConvergeOne failed to explain the basis for his commissions – “fall within the scope of the statute.”

Timing of Payment and Commissions

- All earnings – including salary and gratuities – must be paid at least every 31 days.
- All earned commissions must be paid at least once every three months.
- New law removes the 15-day maximum penalty for an employer's failure to pay wages upon an employee's demand.
 - Potentially ***unlimited*** penalties after a 10-day notice period, and 1/15 penalty for earned but unpaid commissions after 10-day notice period.



2019 Minn. Law 1st Sp., ch. 7

181.101 WAGES; HOW OFTEN PAID.

(a) Except as provided in paragraph (b), every employer must pay all wages, including salary, earnings, and gratuities earned by an employee at least once every 31 days and all commissions earned by an employee at least once every three months, on a regular payday designated in advance by the employer regardless of whether the employee requests payment at longer intervals. Unless paid earlier, the wages earned during the first half of the first 31-day pay period become due on the first regular payday following the first day of work. If wages or commissions earned are not paid, the commissioner of labor and industry or the commissioner's representative may serve a demand for payment on behalf of an employee. In addition to other remedies under section 177.27, if payment of wages is not made within ten days of service of the demand, the commissioner may charge and collect the wages earned at the employee's rate or rates of pay or at the rate or rates required by law, including any applicable statute, regulation, rule, ordinance, government resolution or policy, contract, or other legal authority, whichever rate of pay is greater, and a penalty in the amount of the employee's average daily earnings at the same rate agreed upon in the contract of employment, not exceeding 15 days in all, or rates for each day beyond the ten-day limit following the demand. If payment of commissions is not made within ten days of service of the demand, the commissioner may charge and collect the commissions earned and a penalty equal to 1/15 of the commissions earned but unpaid for each day beyond the ten-day limit. Money collected by the commissioner must be paid to the employee concerned. This section does not prevent an employee from prosecuting a claim for wages. This section does not prevent a school district, other public school entity, or other school, as defined under section 120A.22, from paying any wages earned by its employees during a school year on regular paydays in the manner provided by an applicable contract or collective bargaining agreement, or a personnel policy adopted by the governing board. For purposes of this section, "employee" includes a person who performs agricultural labor as defined in section 181.85, subdivision 2. For purposes of this section, wages are earned on the day an employee works. This section provides a substantive right for employees to the payment of wages, including salary, earnings, and gratuities, as well as commissions, in addition to the right to be paid at certain times.



Hull, (cont.)

- Court denied ConvergeOne's motion to dismiss § 181.101 claim.
- Court noted that § 181.101 provides “a ***substantive right*** for employees to the payment of wages, including salary, earnings, and gratuities, as well as commissions, in addition to the right to be paid at certain times.”
- ConvergeOne argued that Hull's claim failed because Hull “fail[ed] to allege the DLI made a claim for payment that went unpaid.”
- Court rejected the argument, noting that “the statute clearly gives employees a substantive right to bring a private action in response to a wage dispute, regardless of any action or inaction by the DLI.”



Hull, (cont.)

- Court noted that enforcing the waiting-time “penalty” may be limited to DLI enforcement:
 - “While *the ability to enforce a penalty is limited to the DLI*, with any collected funds going to the employee, id., Hull does not allege that he is entitled to collect a penalty.”
- Minn. Stat. § 181.171 provides:
 - “A person may bring a civil action seeking redress for violations of sections . . . 181.03, . . . **181.032**, . . . **181.101** . . . 181.13, 181.14, 181.145 . . . directly to district court. An employer who is found to have violated the above sections is liable to the aggrieved party for the *civil penalties* or *damages* provided for in the section violated. . . .”
 - Also liable for “*compensatory damages*” and “*attorneys fees.*”

New Attorney General Authority

- Wage Theft Act gave the Attorney General authority to enforce Minn. Stat. ch. 177 and 181 under Minn. Stat. § 8.31.

181.1721 ATTORNEY GENERAL ENFORCEMENT.

In addition to the enforcement of this chapter by the department, the attorney general may enforce this chapter under section [8.31](#).

History: [1Sp2019 c 7 art 3 s 13](#)

177.45 ATTORNEY GENERAL ENFORCEMENT.

In addition to the enforcement of this chapter by the department, the attorney general may enforce this chapter under section [8.31](#).

History: [1Sp2019 c 7 art 3 s 7](#)

Attorney General Authority (cont.)

- Minn. Stat. § 8.31
 - Attorney general has the power to investigate violations of law when it has “a reasonable ground to believe that any person has violated, or is about to violate, any of the laws of this state” referenced in the statute.
 - Able to issue a Civil Investigative Demand (CID) without initiating a lawsuit.



§ Subd. 2. **Attorney general to assist in discovery and punishment of illegal practices.** When the attorney general has information providing a reasonable ground to believe that any person has violated, or is about to violate, any of the laws of this state referred to in subdivision 1, the attorney general shall have power to investigate those violations, or suspected violations, and to take such steps as are necessary to cause the arrest and prosecution of all persons violating any of the statutes specifically mentioned in subdivision 1 or any other laws respecting unfair, discriminatory, or other unlawful practices in business, commerce, or trade. In connection with investigation under this section the attorney general upon specifying the nature of the violation or suspected violation may obtain discovery from any person regarding any matter, fact or circumstance, not privileged, which is relevant to the subject matter involved in the pending investigation, in accordance with the provisions of this subdivision. The discovery may be obtained without commencement of a civil action and without leave of court, except as expressly required by the provisions of subdivision 2a. The applicable protective provisions of rules [26.02](#), [26.03](#), and [30.04](#) of the Rules of Civil Procedure for the district courts shall apply to any discovery procedures instituted pursuant to this section. The attorney general or any person to whom discovery is directed may apply to and obtain leave of the district court in order to reduce or extend the time requirements of this subdivision, and upon a showing of good cause the district court shall order such a reduction or extension. In order to obtain discovery, the attorney general may:

- (a) Serve written interrogatories on any person. Within 20 days after service of interrogatories, separate written answers and objections to each interrogatory shall be mailed to the attorney general.
- (b) Upon reasonable written notice of no less than 15 days, require any person to produce for inspection and copying any documents, papers, books, accounts, letters, photographs, objects, or tangible things which are in the possession, custody, or control of that person.
- (c) Upon reasonable written notice of no less than 15 days, take the testimony of any person by deposition as to any fact or opinion relevant to the subject matter involved in the pending investigation.

For the purposes of this subdivision the term "person" has the meaning specified in section [325F.68](#).

New Attorney General Authority

Wage Theft



The Office of the
Minnesota Attorney General
helping people afford their lives and live with dignity and respect

What Is Wage Theft?

Wage theft occurs any time an employer does not pay an employee everything the employee is owed by law.

Nationally, employees are underpaid by as much as \$50 billion dollars each year due to wage theft. No group of workers is immune from wage theft, but low-wage workers are particularly vulnerable. Wage theft can take as much as 10% of a low-wage worker's annual earnings.

Unauthorized Deductions from Paychecks

Sometimes, an employer may deduct wages from an employee's paycheck for lost, damaged, or stolen property or for some other claimed indebtedness. This practice is wage theft unless the worker has authorized, in writing, their employer to make that deduction.

Worker Misclassification

Some employers attempt to avoid legal obligations to workers by classifying them as independent contractors.



Madison Equities v. Office of Attorney General,

2021 WL 79337 (Minn. Ct. App. Jan. 11, 2021)

- Security Guards alleged that they were instructed to work at different facilities when they approached 40 hours, but were not paid overtime.
- Attorney General commenced an investigation under Minn. Stat. § 8.31 and sought data from Madison Equities.
 - Attorney general has the power to investigate violations of law when it has “a reasonable ground to believe that any person has violated, or is about to violate, any of the laws of this state”
- Madison Equities moved for a protective order.



Madison Equities, (cont.)

- District Court granted the motion to compel.
 - Concluded that the security guards' complaints “provide a reasonable basis to believe the [Madison Group] may have violated the law” and that “the request is sufficiently tailored for the level of pre-complaint discovery that the Legislature contemplated.”
 - Ordered Madison Equities to respond to requests relating to 30 “related companies.”



Madison Equities , (cont.)

- Court of appeals affirmed in part and reversed in part:
 - 1) The attorney general may obtain information related to the following entities: Madison Equities, First Bank Building LLC, Alliance Center LLC, and U.S. Bank Center LLC.
 - 2) The attorney general may obtain information related only to those individuals who were or are employed by Madison Equities as security guards.
 - 3) The attorney general may obtain information dating back three years from the filing of the CID.
- Madison Equities petitioned the Minnesota Supreme Court for review, which was granted.



Madison Equities v. Office of Attorney General, 967 N.W.2d 667 (Minn. 2021)

- Held that Section 8.31 sets two parameters for a valid civil investigative demand:
 - (1) The AG must have a reasonable basis to believe that a law has been or will be violated; and
 - (2) The information sought must be “reasonably relevant to the subject matter involved in the alleged violation”
- Held that the court of appeals “erred when it limited the civil investigative demand to just the four named companies that paid security guards.”
- Remanded for additional findings regarding the 30 Madison Equity related entities.



Madison Equities , (cont.)

- Held that the definition of “worker” is limited to non-exempt worker, but reversed the court of appeals regarding limiting the investigation to security officers.
 - “Because section 8.31 empowers the Attorney General to seek information that is relevant to the subject matter of the investigation, not just information about harm to specific complainants, the court of appeals erred in limiting the definition of ‘worker’ to just security guards.”
 - “[W]hile we agree that the definition of worker must be narrowed, we reverse the court of appeals in part and hold that, for purposes of the Demand, the definition of ‘worker’ should be limited to hourly employees.”



Madison Equities, (cont.)

- Despite the remand, the court ordered that Madison Equities to produce the rest of the records “promptly” (i.e., 15 days for requests for documents and 20 days for interrogatories).

MPLS “Wage Theft” Ordinance





Minneapolis Wage Theft Ordinance

- The City of Minneapolis's wage theft ordinance went into effect on ***January 1, 2020.***
- Applies to any employee who works for an employer for at least 80 hours per year within the geographic boundaries of the City of Minneapolis.
- Enforced by the Minneapolis Civil Rights Department, Labor Standards Division.

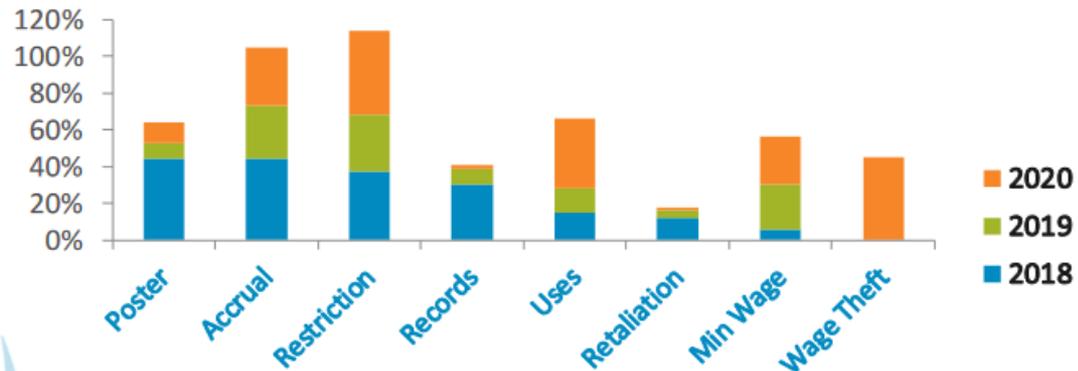
MPLS Labor Standards Statistics



MPLS Stats (cont.)

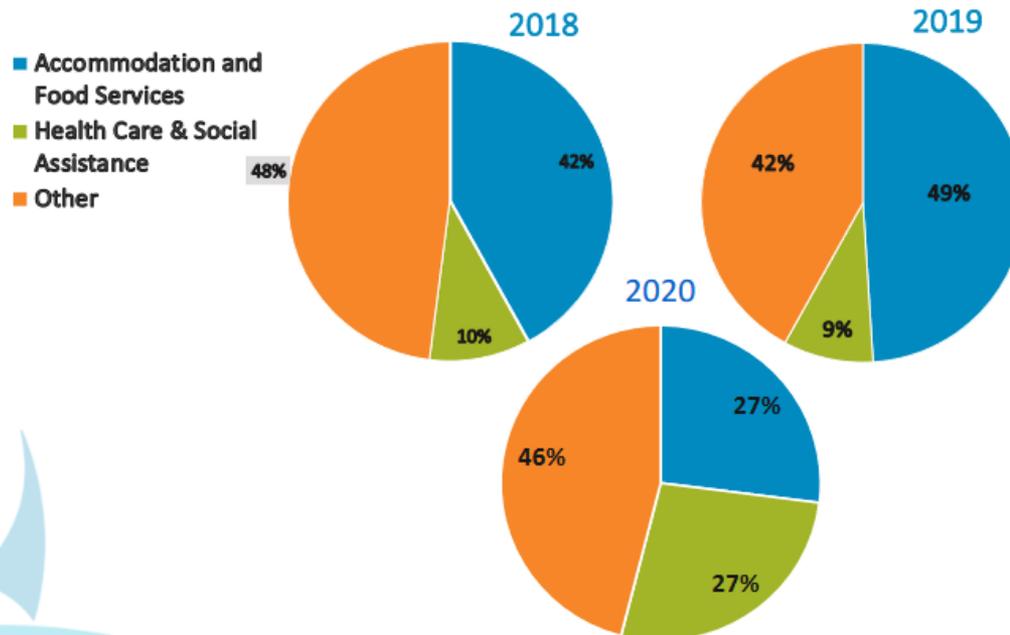
Enforcement: Investigations filed

Types of allegations



MPLS Stats (cont.)

Enforcement: by Industry





MPLS Stats (cont.)

Looking Forward

- Collaborative Enforcement
- Federal and MN Departments of Labor, AG's Office, and City of St. Paul
- Wage Theft
- Minneapolis Workplace Advisory Committee





MPLS Wage Theft Ordinance

- Similar to the Minnesota Wage Theft law:
 - (1) Prohibits “wage theft”;
 - (2) Requires employers to provide “pre-hire” notices and “supplemental” notices; and
 - (3) Requires employers to provide “statement of earnings” at the end of each pay period.



MPLS Wage Theft (cont.)

- MPLS “Pre-Hire” Notices must include:
 - All information required by state law.
 - Date on which employment is to begin (unless cannot be determined ahead of time despite reasonable diligence).
 - For non-exempt employees, number of hours for overtime to apply and applicable rate.
 - Statement that tip sharing is voluntary, per state law.



MPLS Wage Theft (cont.)

- MPLS “Pre-Hire” Notices must include:
 - Rights under Minneapolis SST (or info regarding other sick or PTO policy used to comply with SST), which must include the following elements:
 - (1) the method of accrual;
 - (2) the date of use, and
 - (3) the benefit year.
- Must be **signed** (or e-signed) by the employee.



MPLS Wage Theft (cont.)

- Unlike the Minnesota statute, the Minneapolis ordinance requires that employers provide the same notice to ***all current employees on or before the first pay period of 2020.***
- The only exception is if the employer previously provided the employee with “all of the information contained in the prehire notice.”



Q: Are employers required to provide current employees with the prehire notice?

A: Yes, current employees are covered by the ordinance as of its effective date of January 1, 2020. Any current employee, as of January 1, 2020, who did not previously receive all the required information (including notice of the employer's sick leave, paid time off, or other time off policy which meets Sick and Safe Time ordinance requirements) ***must be provided with a pre-hire notice no later than during the first full pay period of 2020***. Current employees who were ***already provided with all of the information required by the prehire notice*** (even if it was not all provided in a single notice) do ***not*** need to receive the information a second time.



MPLS Wage Theft (cont.)

- MPLS “Supplemental” Notices
 - Like state law, the Minneapolis ordinance requires an employer to provide notice of “any changes to the information contained” in the original pre-hire notice.
- Unlike state law, supplemental notices must be **signed** (can be e-signed) by employee.
 - The only exception is for a wage increase if, in advance of the increase, the employee received notice of the amount and date of the increase.



MPLS Wage Theft (cont.)

- Notice Poster
 - In addition to physically posting the notice, the employer must provide each new employee with a copy of the city's notice poster.
 - FAQs provide that new employees must receive a copy of the notice in “in electronic or printed form . . . no later than the first date on which the employee begins performing work for the employer.”

CITY OF MINNEAPOLIS NOTICE TO EMPLOYEES

Minneapolis Labor and Employment Rights

Minimum Wage Scheduled Increases

| | 100 or Fewer Employees Small Business | More than 100 Employees Large Business |
|--------------|--|---|
| Jan. 1, 2018 | — | \$10.00 |
| July 1, 2018 | \$10.25 | \$11.25 |
| July 1, 2019 | \$11.00 | \$12.25 |
| July 1, 2020 | \$11.75 | \$13.25 |
| July 1, 2021 | \$12.50 | \$14.25 |
| July 1, 2022 | \$13.50 | \$15.00* |
| July 1, 2023 | \$14.50 | |
| July 1, 2024 | Equal to Large* Business | |

*Increases to account for inflation, every subsequent January 1st.

Sick and Safe Time

- Sick and Safe Time is access to time off work for Sick and Safe Time purposes.
- All types of employees, including part-time, qualify.
- One hour accrues for every 30 worked, capped at 48 per year and 80 overall (yearly and overall caps operate simultaneously).
- Employers must compensate for use at employees' base rate, except if they employ fewer than 6 employees.
- Hours begin accruing on 1st day of work and may be used on the 90th day of employment.



Sick Time

- Illness
- Injury
- Medical rest
- Recuperation
- Appointment



Safe Time

Time off for an appointment to address domestic violence or sexual assault



Sick or Safe Time Care of a Family Member



Family Member Place-of-care Closure
Due to inclement weather or unexpected emergency



Working. Thriving. Together.

Help make Minneapolis a healthier, more secure, and more productive community.

Report Violations

Please report information about exploitation of workers in Minneapolis:

Dial 311, file online at minimumwage.minneapolismn.gov or sicktimeinfo.minneapolismn.gov, or visit 350 S. Fifth St. (City Hall) Rm. 239

Retaliation Prohibited

It is unlawful for an employer to restrain, prevent, or deny the exercise of any right protected under the Minneapolis Minimum Wage or Sick and Safe Time Ordinances.



MPLS Wage Theft (cont.)

- MPLS Statement of Earnings
 - In addition to the information that is required by state law, the Minneapolis ordinance also requires that employers provide “the number of hours of Sick and Safe Time accrued and used by the employee.”
 - If using PTO, employer should list both the balance and the number of PTO hours used for the year.



MPLS Wage Theft (cont.)

- Employers may provide the pre-hire notices, the supplemental notices, and the earning statements ***electronically***.
- But, employees have the right to request them in writing.



MPLS Wage Theft (cont.)

- Ordinance also incorporates state overtime, meal break, and rest break standards.
- This means that the city may pursue relief for employees on its own instead of turning the case over to state officials.



MPLS Wage Theft (cont.)

- Ordinance provides for the publication of a list of entities with “outstanding wage obligations,” including unpaid relief to employees or fines.
- Entities on the list will be barred from entering into contracts or bonds with the city and are risk of losing their city license.

Freelance Worker Ordinance

- Effective January 1, 2021.
- Requires businesses to enter into written agreements with particular requirements with most “freelance workers.”
- Applies to “commercial hiring parties” and “individual hiring parties.”
- “Freelancer” is defined to 1099 workers and sole proprietors.



Hospitality Worker Right to Recall

- Effective May 1, 2021.
 - Expires 1 year after expiration of Gov.'s peacetime emergency and local public health emergency.
- Requires covered hospitality industry employers to hire qualified employees who were laid off first, unless those employees reject that position or fail to respond.
- Is it preempted by a CBA?



What parts of the hospitality industry are covered?

Under the ordinance, only hotels and event centers located within the City of Minneapolis that are covered if they meet the following criteria:

- Large hotels (offering more than 50 guest rooms)
- Event centers (offering 50,000 rentable square feet or 2,000 seats)

Who is protected under the ordinance?

Any employee who meets all three of the following conditions for the same covered employer is protected:

- Performed work for at least 6 months from March 13th, 2019 to March 13th, 2020 (at least 80 of which were in the city);
- Last day of work was *after* March 13th 2020.; and
- Was separated from employment due to a economic, non-discretionary reason. 



QUESTIONS?

Thank you.