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## **“EMPLOYEE OR CONTRACTOR?” WHY THAT CHOICE COULD LAND YOU IN COURT”**

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Efforts to crack down on wage theft are no longer just about fines and warnings in Minnesota. Although Minnesota’s wage theft statutory scheme has long included criminal sanctions for violations, until recently, enforcement has primarily involved civil fines and penalties. The Minnesota Attorney General’s Office and county attorneys are now wielding the criminal provisions of the wage theft statutory scheme to deter wage theft.

### **WTPA Background**

In 2019, Minnesota amended existing statutes and enacted new ones to combat wage theft (the Wage Theft Protection Act (“WTPA”)). The statutes included a clarification of the term “wages”; notice requirements to employees at the outset of employment, and any time the employer changed such things as wages, paid time off accrual and usage; payroll deductions; and earning statement requirements.

Wage theft can take many forms, including the obvious failure to pay earned wages. Additionally, failing to pay the applicable minimum wage is wage theft, even if the employer pays the employee for all hours worked. Misclassifying an employee as an independent contractor may also violate the WTPA if the employee isn’t paid overtime, or if the misclassification negatively affects the employee’s right to Earned Sick and Safe Time (“ESST”).

Worker misclassification occurs when employers improperly deem employees as independent contractors to avoid paying minimum wage, overtime, and providing benefits. Worker misclassification is considered to be particularly problematic in the construction industry. To combat misclassification in the construction industry, the Minnesota legislature enacted a new law that creates a 14-factor test for the construction industry. The 14-factor test has been effective since March 1, 2025, and remains the standard unless there is an amendment to the statute, or a court concludes otherwise.

### **Challenge to Minnesota’s New Independent Contractor Test**

Trade groups have challenged Minnesota’s new Independent Contractor Test for construction workers which went into effect on March 1, 2025. *Minn. Chapter of Associated Builders and Contractors Inc., et al. v. Nicole Blissenbach, et al.*, No. CV 25-550 (JRT/JFD), 2025 WL 713608 (D. Minn. Mar. 5, 2025).

As a reminder, to be considered an independent contractor, the individual must operate as a business entity and meet all of the requirements under a 14-factor (plus subparts) test at the time the services were provided or performed instead of the previous 9-factor test. Minn. Stat. § 181.723, subd. 4. The law also provides for statutory fines and damages to the misclassified individual.

On February 12, 2025, the plaintiffs moved for a temporary restraining order, seeking to enjoin the enforcement of the statute before it took effect on March 1, 2025. The plaintiff trade groups argued that the statute is unconstitutionally vague both facially and as applied, violates the Excessive Fines Clause of the U.S. Constitution, is preempted by the National Labor Relations Act, violates procedural due process, and that they will face irreparable harm as a result. Plaintiffs argued that the new law imposes a “strict yet vague” 14-factor test to determine how workers should be classified and that an ordinary person would not be able to understand what conduct is prohibited.

The United States District Court for the District of Minnesota denied the temporary restraining order in a lengthy ruling. In doing so, the Court first rejected the plaintiffs’ contention that certain terms such as “invoice” and “main expenses and costs” are unconstitutionally vague as to support their argument that the statute will be arbitrarily enforced. Second, the Court noted that the statute was not yet in effect, thus no fines have actually been imposed and a ruling on whether the fines are excessive would be premature. Additionally, the Court noted that the fine imposed under the statute would be directly proportional to the conduct, thus the Court questioned if the fine would actually be “excessive.” The Court then disagreed with the plaintiffs’ argument that the statute is preempted by the National Labor Relations Act.

The Court continued that the statute appeared to have sufficient due process because members would be afforded criminal due process rights before any deprivation of liberty interests and administrative process rights before any deprivation of property.

The plaintiffs appealed the decision in March 2025 to the Eighth Circuit Court of Appeals where oral arguments have not yet been set. The Eighth Circuit’s ruling could significantly impact Minnesota’s new Independent Contractor Test and the construction industry. The decision may prompt calls for legislative clarification or clarification from the Minnesota Department of Labor and Industry on how it enforces the new law.

### **Criminal Wage Theft Explained**

Wage theft rises to the criminal level when the employer engages in one or more of the following, with the intent to defraud:

- Fails to 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.

- Directly or indirectly causes any employee to give a receipt for wages for a greater amount than that actually paid to the employee for services rendered.
- Directly or indirectly demands or receives from any employee any rebate or refund from the wages owed the employee under contract of employment with the employer.
- Makes or attempts to make it appear in any manner that the wages paid to any employee were greater than the amount actually paid to the employee.

The length of the prison term for violations of the wage theft statute ranges between one year and twenty years, depending on the value of the stolen wages. Moreover, the employer is still responsible for paying the unpaid wages and civil fines.

### **Caught With Their Hands in the Payroll Jar**

In April 2025, a Hennepin County judge convicted a painting contractor of felony wage theft and theft by swindle. In 2020, the contractor was awarded a contract on a publicly funded project, which required him to pay his employees a prevailing minimum wage. Instead, the contractor paid his employees well below the prevailing wage and covered up the underpayment by submitting falsified records to the general contractor. The contractor is facing up to twenty-one months in prison.

Bassford Remele previously [covered](#) a civil wage theft case brought by the Minnesota Attorney General's Office against a farming entity and its owners in Stearns County. In October 2024, the defendants settled the civil case by agreeing to pay \$250,000 to the State of Minnesota for distribution to workers, and a civil penalty of \$250,000, which did not have to be paid so long as the defendants did not violate the terms of the agreement. Just four months after resolving the civil case, the Minnesota Attorney General's Office charged one of the farm's owners with four felonies under the WTPA and felony racketeering.

Even if an employer's violation of the WTPA does not rise to the criminal level, wage theft investigations can lead to the discovery of other criminal activities or statutory violations, such as tax fraud or worker misclassification. A Stillwater-based masonry contractor found this out the hard way. In February, the masonry contractor pled guilty to felony tax fraud. Its fraudulent practices were uncovered during an investigation into wage theft complaints against the contractor, highlighting how wage theft investigations can have broad-reaching impacts.

### **Get It Right or Face Criminal Charges**

Compliance with the WTPA, including properly classifying workers, is not just an administrative detail—it's a legal obligation with significant consequences. As wage theft enforcement intensifies, employers face increased scrutiny and potential liability. The risk to companies in the construction industry is even higher in light of the new 14-factor test for worker classification. Companies must proceed with caution, ensuring their classification practices align with evolving legal standards to avoid costly penalties and possibly even jail time.

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