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# Wage Theft State Reform and Legislative Trends: New Causes of Action for Employees, Employer Penalties

Compliance in a Changing Legal Landscape as Additional States Pass Wage Theft Statutes

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TUESDAY, APRIL 21, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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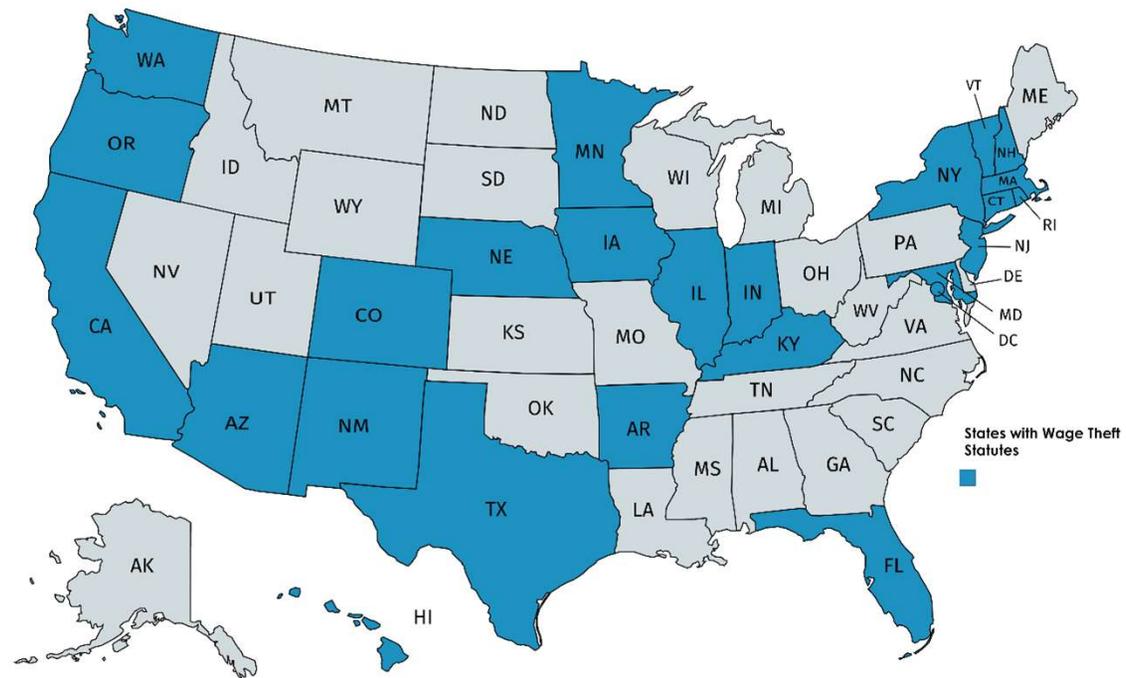
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# States with Wage Theft Statutes



# New York Wage Theft Prevention Act

Presented by Orin Kurtz, Gardy & Notis, LLP

New York, NY

# Overview of NY Wage Theft Prevention Act

- Effective in April, 2011; Modified in 2014
- Has both criminal and civil penalties
- Strengthens record keeping requirements, notification requirements at hiring, notification requirements with each pay statement, and prohibitions on retaliation
- Increases liquidated damages while lowering the threshold for obtaining liquidated damages
- Complements New York Labor Law Section 193, prohibition on unlawful deductions
- Enhanced remedies for both NY Department of Labor and employees bringing civil suits

# NYLL Section 195(1): Notification Upon Hire

- Upon hiring, requires notification in English and in employee's identified primary language if not English
- Requires notice of: the rate or rates of pay; whether paid by the hour, shift, day, week, salary, piece, commission, or other; the regular pay day designated by the employer; the name of the employer and any d/b/a names; the physical address of the employer's main office or principal place of business, and a mailing address if different; and the telephone number of the employer.
- NYSDOL provides forms that can be filled in.
- Requires written and dated affirmation of receipt by employee that must be kept for six years

# Penalties For Violation of NYLL 195(1)

- Penalty provision is NYLL Section 198(1-b)
- If notice is not provided within ten days of employment, employee may recover \$50 for each work day up to \$5,000 plus reasonable attorneys' fees and costs. Court may order injunctive or declaratory relief if it deems that appropriate
- If the DOL brings an action, it may recover \$50 per day up to \$5,000 in addition to other penalties allowed by law
- Affirmative defenses: The employer paid all wages due OR that the employer reasonably believed notice was not required.

# Section 195(1) Additional Notes

- Employer must give a new written notice if wages are being decreased, but not if wages are being increased
- Initially, employers were required to give a new pay notice once a year. This was removed; too onerous.

# NYLL Section 195(3): Pay Statements

- New York Labor Law Section 191 sets time frames at which employees must be paid
- Section 195(3) requires a statement with each payment that includes significant detail including basis of pay/number of regular and OT hours worked. Expanded significantly as part of WTPA
- Employer must give written statement setting out the basis of wage computation if requested
- Penalty for violation: set out in Section 198
- Potential pitfalls of failure to follow this statute: additional claim for class action

# NYLL Section 193: Unlawful Deductions

- Prohibits all deductions from an employee's wages unless expressly enumerated in Section 193
- Deduction must be for benefit of employee
- Prohibits not only deductions from "wages," but also deductions by "separate transaction" that are designed to get around wage deductions
- Like Section 195, this goes beyond federal law
- Not part of Wage Theft Prevention Act but it is closely related
- Tips to avoid liability: always get it in writing, analyze who benefits

# NYLL Section 215: Retaliation

- Amended as part of Wage Theft Prevention Act
- Increases liquidated damages for a violation to as much as \$20k
- Expands coverage to those who are not employers
- Expands retaliation to include threats
- Requires notice to attorney general
- Allows award for reasonable attorneys' fees and costs
- Employee may obtain injunctive relief, reinstatement, or lump sum payment instead of reinstatement
- Potential Class B misdemeanor

# NYLL Section 198: Liquidated Damages

- Liquidated damages increased from 25% to 100%
- “Willful” requirement changed to match federal law, now burden is on employer to disprove liquidated damages
- Unintended effect: Employees can no longer obtain liquidated damages under FLSA and NYLL because they serve the same purpose
- Unintended effect: could permit class action for liquidated damages in state court, which has previously been unavailable due to NY class certification provisions
- Additional question: whether prejudgment interest is available given similar purpose.

# NYLL Section 191: Interactions With WTPA

- Governs timing of employee payments
- Requires written agreement for commissioned sales people

# NYLL Revised Recordkeeping Requirements

- Additional employment records required:
  - How the employee is paid—by the shift, hour, piece, week, commission, etc
  - If pay is at piece rate, must show what rates apply and the number of pieces at each rate
  - Employer must keep records for six years
  - WTPA expressly states that records must be kept contemporaneously and not created after the fact

# Personal Liability for Wages Under LLC Act

- WTPA allows for top ten members of an LLC to be liable for wages
- Similar to requirements under NY Bus. Corp. Law
- Must give notice
- Must have unsatisfied judgment

# Miami-Dade Wage Theft Law

# Background

- Florida eliminated its department of labor in the early 2000s
- As a result, local governments have been forced to step up

# Important Provisions

- Defines “wage theft” as the failure to pay all wages due within 14 days
- Time may be extended to 30 days w/ written agreement
- Employee can recover back wages, treble liquidated damages, costs and attorneys’ fees
- Employee can bring administrative action or civil action
- Amounts eligible must be at least \$60 and no more than \$15,000
- No criminal penalty
- Other FL counties have followed suit and passed their own wage theft laws

# Tips To Avoid Wage Theft Act Problems

- Use NY Forms
- Consider indemnification agreements for LLC members/corporate investors
- It's all about disclosure and informed consent
- Consider putting exemption Info in WTPA disclosures
- Be careful with independent contractors

# Thank You

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# Wage Theft State Reform and Legislative Trends

New Causes of Action for  
Employees, Employer Penalties

April 21, 2020

# New Jersey



# New Jersey

- Last summer, New Jersey enacted law to combat concerns about “wage theft”
- Law amends existing wage laws and criminal code
  - New Jersey Wage Collection Law (WCL)
  - New Jersey Wage and Hour Law (WHL)
  - New Jersey Wage Payment Law (WPL)
  - New Jersey Criminal Code
- Current minimum wage is \$11.00 per hour and minimum wage scheduled to increase in subsequent years

# New Jersey

- Overview of “Wage Theft Prevention” Law
  - Increases statute of limitations
  - Enhances anti-retaliation protections
  - Increases administrative agency powers
  - Increases damages
  - Increases criminal liability
  - Increases exposure for joint, several, and successor liability
  - Promotes information sharing among government entities
  - Requires written notice of rights to employees

# New Jersey

- Statute of Limitations
  - Increases statute of limitations under WCL and WHL to six years
  - Statute of limitations under WPL already was six years

# New Jersey

- Enhanced Anti-Retaliation Protections
  - Presumption that employer knowingly retaliated against employee if adverse employment action within 90 days of employee filing WHL or WPL complaint
  - Presumption can be rebutted with clear and convincing evidence that adverse action taken for permissible reasons

# New Jersey

- Increased Power of New Jersey Department of Labor and Workforce Development (NJDOL)
  - Increases amount in controversy pursuant to which agency can investigate wage claims from \$30,000 to \$50,000
  - Allows agency to hear retaliation claims
  - Empowers agency to audit employer (and any successor) within 12 months of notification by attorney general or court of employer's failure to pay benefits, compensation, and/or wages

# New Jersey

- Increased Power of NJDOL (continued)
  - Requires agency to initiate wage claim if agency discovers failure to pay compensation by employer (or any successor)
  - Authorizes agency to suspend licenses held by employer (and any successor) and/or issue stop work orders against employer if audit reveals wage violations

# New Jersey

- Increased Damages
  - Liquidated damages of up to 200 percent of wages owed

# New Jersey

- Increased Damages (continued)
  - Limited exception for liquidated damages for initial violation
    - Inadvertent error made in good faith
    - Reasonable grounds for believing act/omission was not a violation
    - Acknowledgment of legal violation
    - Pay amount owed within 30 days
    - Reinstatement of individual if individual lost job due to retaliation

# New Jersey

- Other Damages and Penalties
  - Administrative penalties
  - Enhanced fines
  - Imprisonment
  - Reasonable attorney fees

# New Jersey

- Each week in any day of which any violation continues is separate and distinct offense
- Rebuttable presumption that employer owes wages if it is unable to present sufficient employment records

# New Jersey

- Increased Criminal Liability
  - Subjects employer who fails to pay benefits, compensation, and/or wages under number of laws to disorderly persons offense
    - WHL and WPL
    - New Jersey gross income tax law
    - New Jersey temporary disability benefits laws
    - New Jersey unemployment compensation law
    - New Jersey workers' compensation law

# New Jersey

- Increased Criminal Liability (continued)
  - Damages, fines, and penalties
    - Monetary liability for wages owed
    - Liquidated damages of 200 percent of wages owed
    - Reasonable costs of legal action to employee
    - Fines and penalties
  - Inference that employer is guilty of disorderly persons offense if it fails to present employment records required by covered statutes

# New Jersey

- Increased Criminal Liability (continued)
  - Subjects employer who retaliates against employee for complaints about failure to pay benefits, compensation, and/or wages to disorderly persons offense
  - Damages, fines, and penalties
    - Monetary liability for lost wages
    - Liquidated damages of 200 percent of lost wages
    - Reasonable costs of legal action to employee
    - Fines
    - Reinstatement of individual if individual lost job due to retaliation

# New Jersey

- Increased Criminal Liability (continued)
  - Third degree crime of pattern of wage nonpayment if person knowingly violates select portions of criminal code concerning wages and has, on two or more occasions, been convicted of such violation

# New Jersey

- Increased Exposure for Joint, Several, and Successor Liability before NJDOL
  - “Client employer” is jointly and severally liable and shares civil legal liability with “labor contractor” for any violation of the WHL and WPL as well as select portions of criminal code concerning wages

# New Jersey

- Increased Exposure for Joint, Several, and Successor Liability before NJDOL (continued)
  - “Client employer” is “a business entity, regardless of its form, that obtains or is provided workers, directly from a labor contractor or indirectly from a subcontractor, to perform labor or services within its usual course of business”

# New Jersey

- Increased Exposure for Joint, Several, and Successor Liability before NJDOL (continued)
  - “Labor contractor” is “any individual or entity that supplies, either with or without a contract, directly or indirectly, a client employer with workers to perform labor or services within the client employer’s usual course of business, except that ‘labor contractor’ does not include a bona fide labor organization or apprenticeship program, or a hiring hall operated pursuant to a collective bargaining agreement”

# New Jersey

- Increased Exposure for Joint, Several, and Successor Liability before NJDOL (continued)
  - Presumption employer is successor in proceedings before NJDOL if only two of several enumerated factors are met

# New Jersey

- Increased Exposure for Joint, Several, and Successor Liability before NJDOL (continued)
  - Factors to consider are whether entities:
    - Perform similar work within same geographical area
    - Occupy same premises
    - Have same telephone or fax number
    - Have same email or internet website
    - Employ substantially same workforce, administrative employees, or both
    - Utilize same tools, facilities, or equipment
    - Employ or engage services of any person or persons involved in direction or control of the other
    - List substantially same work experience

# New Jersey

- Increased Exposure for Joint, Several, and Successor Liability before NJDOL (continued)
  - Any agreement between employer and labor contractor attempting to waive joint and several liability is unenforceable and void

# New Jersey

- Promotes Information Sharing among Government Entities
  - If NJDOL issues decision finding that employee is owed wages equal to or greater than \$5,000, NJDOL must notify New Jersey Division of Taxation
  - Court or prosecutor must notify NJDOL if employer is convicted of certain wage violations

# New Jersey

- Employer must provide employees with written statement of rights under WCL, WHL, WPL, and select portions of criminal code

# New Jersey

- Employer cannot withhold or divert any portion of employee's wages except under limited circumstances
- Limited circumstances for deductions include:
  - Taxes required by New Jersey or United States law
  - Certain benefit contributions authorized in writing by employee (or collective-bargaining agreement)
  - Payments for company products purchased in accordance with periodic payment schedule contained in original purchase agreement
  - Payments for employer loans in accordance with periodic payment schedule contained in original loan agreement
  - Payments to correct payroll errors

# California



# California

- Current minimum wage for employer with 25 or less employees is \$12.00 per hour
- Current minimum wage for employer with 26 or more employees is \$13.00 per hour
- Minimum wage scheduled to increase in subsequent years
- Local laws may impose higher minimums

# California

- California recently has enacted laws to combat concerns about “wage theft”
- These laws include:
  - California Wage Theft Prevention Act, which took effect in 2012
  - California Fair Pay Act, which took effect in 2016
  - California anti-retaliation legislation, which took effect in 2014, 2016, and 2018
  - California wage statement legislation, which took effect in 2013 and 2019
  - California legislation about wages set by contract in excess of minimum wage, which took effect this year

# California

- Overview of “Wage Theft Prevention” Laws
  - Enhances anti-retaliation protections
  - Increases administrative agency powers
  - Increases recordkeeping obligations
  - Requires written notice to all non-exempt new hires about specific wage information
  - Increases damages and criminal liability
  - Increases exposure for successor liability
  - Exposes directors, managing agents, officers, and owners to individual liability

# California

- Enhanced Anti-Retaliation Protections
  - Protects individuals who complain about unpaid wages and their family members
  - Provides for injunctive relief ordering reinstatement of discharged individual pending outcome of retaliation claim upon showing of “reasonable cause” of legal violation

# California

- Increased Power of California Department of Industrial Relations
  - Authorizes agency to seek liquidated damages for failure to pay minimum wage
  - Empowers agency to issue citation to remedy failure to pay wage set by contract in excess of applicable minimum wage
  - Increases timeframe agency can require employer to post bond from six months to two years to help ensure compliance with wage laws

# California

- Increased Power of California Department of Industrial Relations
  - Requires employer that fails to satisfy judgment for unpaid wages to cease operations unless employer obtains bond and files copy with agency, and empowers agency to issue citation for non-compliance
  - Empowers court to issue order restraining employer from conducting business if employer fails to satisfy judgment for unpaid wages or has multiple wage violation convictions unless employer deposits bond with agency

# California

- Increased Power of California Department of Industrial Relations (continued)
  - Gives agency three years from date fee or penalty becomes final to collect
  - Empowers agency to issue notice of levy and create liens on personal and real property to collect on judgment

# California

- Increased Power of California Department of Industrial Relations (continued)
  - Allows agency to investigate suspicion of retaliation
  - Empowers agency to obtain injunctive relief in court for reinstatement of discharged individual pending outcome of retaliation claim upon showing of “reasonable cause” of legal violation
  - Authorizes agency to issue citation to remedy retaliation

# California

- Increased Recordkeeping Obligations
  - Employer must keep copy of employee's properly itemized wage statement and record of deductions for at least three years
  - Employer must keep payroll records for at least three years

# California

- **Written Notice Requirement**
  - Employer must provide non-exempt new hires written notice containing certain information
  - Information required includes:
    - Name, address, and telephone number of employer and employer's workers compensation insurance carrier
    - Rate of pay and basis thereof (e.g., hourly, salary, etc.)
    - Allowances claimed as part of minimum wage, if any
    - Regular payday
    - Employee's right to accrue and use sick leave, including paid sick leave
  - Employer must provide written notice of any changes within seven days

# California

- Increased Damages and Criminal Liability
  - Subjects employer who fails to pay final court judgment or agency order to misdemeanor
  - Exposes employer to fines, penalties, and/or imprisonment

# California

- Increased Exposure for Successor Liability
  - Upon receiving written notice of unsatisfied judgment for unpaid wages, successor employer faces liability if:
    - successor's employees are engaged in substantially same work under substantially same working conditions and supervisors; or
    - successor has substantially same production process or operations, produces or offers substantially same products or services, and has substantially same body of customers

# California

- Individual Liability
  - Directors, managing agents, officers, and owners can face individual liability for certain wage violations, including:
    - Violations of wage orders promulgated by agency
    - Untimely wage payments when employment terminates
    - Failure to provide properly itemized wage statements
    - Failure to provide meal, recovery, or rest periods
    - Minimum wage and overtime violations
    - Failure to reimburse employees for business expenses

# California

- Employer cannot deduct any portion of employee's wages except under limited circumstances
- Limited circumstances for deductions include:
  - Taxes required by California or United States law
  - Certain benefit contributions authorized in writing by employee (or collective-bargaining agreement)
  - Payments to cover insurance premiums authorized in writing by employee

# Questions



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# Minnesota



# Minnesota Wage Theft Statute: Criminal and Civil Components

- Criminal – took effect in August 2019
- Civil – took effect in July 2019

# Criminal Provisions

- Criminalizes “wage theft,” which is one 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;
  - 2) 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;
  - 3) Directly or indirectly demanding or receiving from any employee any rebate or refund from the wages owed to the employee; or
  - 4) Making it appear in any manner that the wages paid to any employee were greater than the amount actually paid to the employee.

# Criminal Penalties

- 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.

# Wage Notice Requirements

- Wage Notice to new employees
  - Must be signed by the employee
  - Must include translation information
  - Must include 9 categories of information
- Written changes to current employees
  - Must be provided before changes become effective
  - Does not need to be signed by the employee

# Wage Notice Required Categories of Information

- 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 Required Categories of Information (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.

# Revised Recordkeeping Requirements

- Additional employment records required:
  - The basis of pay
  - Personnel policies provided to the employee and a brief description of the policies
  - Signed copy of each employee's wage notice form
- Availability for inspection
- Maximum fine of \$5,000 for repeat violations

# Revised Earning Statements Requirements

- Additional information required on earning statements:
  - Rate(s) of pay and “basis thereof”
  - Any allowances for meals or lodging
  - The employer’s address and phone number

# New Agency Authority

- MNDOLI Commissioner may 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.
- Ability to collect evidence of potential violations and interview witnesses.

# Anti-retaliation Provisions

- Employer must not retaliate against employee for asserting rights or remedies under:
  - Minnesota Wage Theft Statute
  - MFLSA
  - Minnesota Prevailing Wage Act
  - Certain provisions of Minnesota Payment of Wages Act
- Civil penalty of \$700 to \$3,000 for each violation

# Timing of Payments

- All earnings paid at least every 31 days, and all earned commissions paid at least once every 3 months

# Cause of Action and Remedies

- Substantive right for unpaid wages
  - Previously, needed a contractual hook to bring a claim
- Remedies:
  - Unpaid wages
  - Liquidated damages
  - Attorneys' fees and costs
  - To the state: \$1,000 per employee per violation for willful or repeated conduct
  - Additional penalties:
    - To the employee: unlimited penalties after 10-day notice period and 1/15 penalty for earned but unpaid commissions after 10-day notice period
      - Previously, 15-day maximum penalty for failure to pay wages upon demand

# Colorado



# Colorado Wage Act: Criminal and Civil Components

- Criminal – took effect in January 2020
- Civil – certain provisions took effect in 2015 to 2020

# Criminal Provisions

- Criminalizes wage theft as:
  - Willfully refusing to pay wages or compensation, or
  - Falsely denying the amount of a wage claim, or the validity thereof, or that the same is due, with intent for himself, herself, or another person any discount upon such indebtedness or any underpayment of such indebtedness or with intent to annoy, harass, oppress, hinder, coerce, delay, or defraud the person to whom such indebtedness is due

# Criminal Penalties

- Potential felony when amount of unpaid wages exceeds \$2,000

# Recordkeeping Requirements

- Record retention reflecting information contained in itemized pay statements
- Availability for inspection
- Fine of up to \$250 per employee per month for violation, with maximum fine of \$7,500

# Pay Statement Requirements

- Itemized, written pay statements containing:
  - Gross wages earned,
  - All withholdings and deductions,
  - Net wages earned,
  - Inclusive dates of the pay period,
  - The name of the employee or the employee's SSN, and
  - The name and address of the employer

# Agency Authority

- Administrative procedure for Director to receive and adjudicate claims for nonpayment of wages of \$7,500 or less
  - Notice of complaint sent to employer by agency
  - Employer must respond within 14 days
  - Division issues a determination within 90 days of notice being sent (unless extension granted)
- Reduction in fines to encourage compliance
  - If employer pays the employee all wages and compensation owed within 14 days after the citation is sent to the employer, the division may waive or reduce certain fines

# Agency Enforcement Fines

- If employer cannot allege a good faith legal justification in failing to pay wages demanded pursuant to administrative enforcement proceeding, the employer pays *to the state* a fine, no more than \$50/day commencing from when such wages first became due and payable.
- Fine of \$250 for employers who fail to respond to a notice of complaint or other division notice
- Creation of Wage Theft Enforcement Fund

# Anti-retaliation Provision

- No employer shall “intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate” against any employee who has made a complaint or has testified in any related proceeding for oneself or another
- Violation: misdemeanor and fine of up to \$500

# Timing of Payments

- All earned wages or compensation paid every calendar month or thirty days (whichever is longer)

# Statute of Limitations

- Two years after cause of action accrues
- Three years if employer's conduct is willful

# Cause of Action and Remedies

- Substantive right for unpaid wages
- Remedies:
  - Unpaid wages
  - Attorneys fees and costs for minimum wage violations
  - Additional penalties:
    - To the employee: after 14 days of written demand for unpaid wages, 125% of amount of such unpaid wages or compensation up to and including \$7,500 and 50% of amount of such unpaid wages or compensation that exceed \$7,500; OR the employee's average daily earnings for each day, not to exceed 10 days

# Colorado Wage Theft Transparency Act

- Agency determinations where an employer has been found in violation of Colorado wage and hour law are public

# COMPS Order No. 36

- Changes to:
  - Employee coverage
  - Compensable time
  - Overtime exemptions
  - Salary thresholds for certain overtime exemptions
  - Rest break requirements
- Posting and recordkeeping requirements
- Criminal wage theft law incorporated

# Questions



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# Recommendations

- Assess Current Policies
- Management Training
- Ensure Proper Recordkeeping
- Create a Wage Theft Demand Procedure
- Distribute/Post Requisite Notices

# Assess Current Policies

- Create, review, and/or revise written policies to ensure they comply with law
  - Pay days, rates, and methods
  - Employee classifications (i.e., exempt or non-exempt)
  - Working time
  - Paid time off
  - Final paycheck
  - Open door policy
  - No retaliation

# Management Training

- Educate managers about law
- Ensure managers understand written policies and adhere to them in practice

# Create a Wage Theft Demand Procedure

- Penalties begin to accrue after a demand/complaint is served, so timely assessment is important
- Considerations:
  - Who will receive demands?
  - Where will demands be stored?
  - How will the company assess its exposure?

# Ensure Proper Recordkeeping

- Check each applicable state wage theft law's recordkeeping requirements
- Make records available to employees and to state/local agencies upon demand when required under each state's laws
- Penalties for non-compliance