



## Denver Wage Theft Ordinance

**Are your subcontractors properly paying their employees? If not, then it is now your responsibility! Denver passes wage theft ordinance with “up the chain” responsibility.**

### **Introduction:**

Effective January 12, 2023, the City and County of Denver approved an ordinance to change the City’s minimum wage laws,<sup>1</sup> and significantly, to add a wage theft law that holds employers “up the chain” of privity jointly and severally liable for penalties imposed by the ordinance. Employers commit wage theft if they, among other things, fail to pay overtime, misclassify employees, or take illegal deductions. To comply with the ordinance, employers should be aware of their duties before and after the commencement of an investigation.

### **Pre-investigation Duties:**

The ordinance requires employers to post signs at the workplace detailing the City’s minimum wage, that wage theft is a crime, that workers are entitled to recovery for theft or underpayment, and that complaints related to violations may be submitted to the City auditor. Additionally, the ordinance requires employers to keep certified payroll records including payroll records of work performed for at least three years. In addition to these procedural requirements, the ordinance requires employers to take affirmative actions to comply with investigations or pay fines if a violation occurs.

### **Post-Investigation Duties:**

#### **1. Complaints and Investigation.**

Victims of wage theft have two options, either file a private right of action in civil court against an employer or file a complaint with the City auditor. The private right of action has a three (3) year statute of limitation from the date of an alleged violation. Although the ordinance is in its earlier stages, it is expected that most complaints will be filed with the auditor. If a complaint is filed with the auditor, the burden of demonstrating to the auditor's satisfaction that a violation has occurred rests with the person making the complaint and shall be demonstrated by a preponderance of the evidence. The auditor may request employers submit a certified copy of payroll records for all workers for a three-year period. Other evidence to support a complaint or an employer’s defense can be obtained from city data, credible information from other governmental entities, employer patterns, and previous violations.

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<sup>1</sup> Council Bill No. 22-1614 amending Chapter 58 of the Denver Revised Municipal Code.



## 2. Enforcement and Penalties.

There are numerous penalties for failing to comply with the ordinance. Employers can be liable for \$1,000 fines for failing to submit payroll records upon request by the auditor, submitting false payroll records, or any other obligations under the Amendment that do not have a penalty assigned.

The auditor may also assess a \$25,000 penalty for each worker not paid full wages depending on aggravating and mitigating factors. Additionally, violators must (1) pay victims any wages due plus interest at a rate of 12 percent per year; (2) pay liquidated damages in an amount equal up to three times the amount of unpaid wages; (3) pay attorney fees and costs; (4) reinstate the employee (if applicable); and (5) locate the employee to make payment. Importantly, damages are not capped under the ordinance, however, employers will only be penalized for a minimum wage violation or a wage theft violation—not both. This means that employees who have not been paid minimum wage *and* have been subject to wage theft are precluded from seeking recovery for both violations and instead, must choose one. This is intuitive, as an employer who has not paid minimum wage is always in violation of the wage theft ordinance.

Finally, employer retaliation is strictly prohibited, with the potential imposition of a \$5,000 fine, for retaliation. For example, if an employer discovers that one of their employees has notified the auditor of a potential wage violation, and that employer subsequently fires that employee, the employer has retaliated and will be subject to the fine. Further, the employer may be required to rehire the employee that reported the wage violation.

## 3. Up the Chain Liability and Right to Cure:

Perhaps most significantly, in addition to imposing liability for wage theft on direct employers, the auditor may also collect from any person who is regularly engaged in business or commercial activity who has contracted, either directly or indirectly, with the employer or worker. This includes general contractors, clients of staffing agencies, labor brokers, or any other *beneficiary*. Since owners would seem to meet the definition of a beneficiary, they too may be liable under the ordinance. Therefore, in the context of the construction industry, contractors may be held responsible for the underpayment of wages by its subcontractors and suppliers of any tier. For example, a general contractor up the chain from a subcontractor that violated the ordinance may be forced to pay unpaid wages to the subcontractor's employees if the subcontractor is insolvent. The proponents of the ordinance claim the law will incentivize companies to contract with subcontractors that are reputable companies in order to prevent wage theft from the start and protect "high road" employers from unfair competition.

The only saving grace of the entire ordinance, is the 14-day right to cure. That is, penalties and fines, do not accrue until 14 days after the employer or other person has received notice of an alleged violation. If an employer or contractor in the chain of privity were to be notified of an alleged violation, they can pay the wages within 14 days and avoid further liability under the ordinance. The law expressly states an employer or other person may seek indemnification or recovery from third parties for penalties incurred for failure to comply with the ordinance. This relief may prove hollow if the direct employer is insolvent. Ultimately, the responsibility is likely to land with the party lowest in the chain of privity which has the funds to satisfy the back payment.



## Conclusions and Key Take Aways:

The City plans to promulgate administrative rules based on the ordinance which may address issues raised about the ordinance. A few issues remain open, including how the ordinance interacts with other federal and state wage laws, however, the ordinance states that any greater wage requirements will be controlling in the event of a conflict of laws.

The coming months will reveal more regarding the usage of this new ordinance, but it is clear the City has thrust the risk of wage theft onto the business community. To address the risk presented by the ordinance general contractors should consider following actions:

- Implement practices, such as certifications or audits, to confirm the proper payment of wages by downstream subcontractors prior to final payment.
- Act promptly and conduct any necessary investigations as soon as information is received regarding an alleged underpayment of wages on your jobsite.
- Ensure subcontracts (of all tiers) include:
  - requirements regarding the proper payment of wages, compliance with laws, maintenance of records and the right to audit, to comply with the ordinance;
  - defense, indemnification and hold harmless provisions to cover wage claims and violations of law; and
  - flow down of such requirements to all sub-subcontractors of any tier.
- Review current subcontractor prequalification requirements to determine if they should be revised including to specifically inquire about whether the subcontractor has been involved in any wage disputes by any threatened or pending administrative or civil action.
- Review current SDI and/or bonding requirements and confirm coverage of wage theft violations.

For questions regarding this new ordinance, or any other questions regarding Colorado construction law, please contact the construction law attorneys at Beltzer, Bangert & Gunnell LLP.

