

Wage and Hour Issues for Minnesota Small Businesses

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Topics

- Minimum Wage
- Tips
- Overtime
- Prevailing Wages
- Deductions
- Mandatory Posting / Necessary Records
- Enforcement of Wage Laws
- Best Practices



Minimum Wages in Minnesota

- Determined by the Minnesota Fair Labor Standards Act (MFLSA)
- Amended in 2014 to set incremental increases from 2014-2016
 - Minimum wage will be indexed by inflation in 2018
- Federal government and municipalities can set their own minimum wages
 - Higher minimum wage in a given area applies
- Minimum wages are split into different categories or tiers
 - Use the lower wage tier if multiple tiers apply
- Applies to employees, not independent contractors
 - Employee v. independent contractors is a complex determination involving numerous factors
 - Misclassification carries possible exposure to significant penalties



Categories of Wages

- **Large Employers:** Applies to employers with annual gross dollar volume of sales of \$500,000 or more
- **Small Employers:** Applies to employers with annual gross dollar volume of sales of less than \$500,000
- **Training Wage:** Applies to employees younger than 20 years in first 90 consecutive days of employment
- **Youth Rate:** Applies to employees younger than 18 years of age
- **J-1 Visa Rate:** Applies to employees of hotels, motels, etc. working under authority of a summer work, travel Exchange Visitor non-immigrant visa



Minimum Wages as of August 1st, 2016

- **Large employers:** \$9.50 per hour
- **Small employers:** \$7.75 per hour
- **Training rate:** \$7.75 per hour
- **Youth rate:** \$7.75 per hour
- **J-1 Visa rate:** \$7.75 per hour



Future Changes to Minimum Wages

- Will be indexed to inflation in 2018
 - Will rely on the implicit price deflator as calculated by the U.S. Dept. of Commerce
 - Increase is capped at 2.5%

- Commissioner of Department of Labor and Industry has option to suspend annual minimum wage increases



Local Rules on Wages

- Minneapolis Sick Leave
 - On May 27, 2016, Minneapolis City Council mandated sick leave for employees
 - Applies to employers with 6 or more employees
 - Goes in effect in July 2017

- MSP airport board approved minimum wage increase to \$10 on May 11, 2015
 - Went into effect on August 1, 2015



Possible changes to Minimum Wage Laws

- Not clear if the municipality has the authority to impose its own minimum wage under state law
- “One State – One Rule” change proposed during 2016 legislative session would have prevented municipalities from enacting separate labor laws
 - Passed in the House but did not make it to the Senate before the close of the legislative session



Employees Exempt from Minimum Wage Laws

- Younger agricultural employees
- Salespersons who conduct no more than 20% of sales on premises of the employer
- Volunteers for **nonprofit organizations**
 - Be careful when it comes to internships
- Taxi drivers
- Babysitting as a sole practitioner
- Individual employed on a seasonal basis in a carnival, circus, fair, or ski facility
 - Minimum wage applies but overtime wages do not



Tips

- No tip setoffs for the purposes of paying minimum wage

- Tip sharing may only be required between direct service employees
 - Does not include bussers, cooks, dishwashers or “server assistants”

- Tip sharing with non-direct service employees can be done voluntarily, but the employer should do nothing more than facilitate an agreement between employees.



Overtime

- Applies to businesses making \$500,000 *gross* in annual sales
- Employees must receive overtime pay (no less than 1.5 times regular rate) for all hours worked over 40 in a work week
- Not determined by form of payment (i.e. salary / hourly)
- Not determined by title



Exemptions for Overtime Pay

- White Collar Exemption
 - Salary of \$455 per week/\$23,660 per year
 - Salary not subject to reduction based on quality or quantity of work
 - Must involve kind of work associated with executive, administrative, or professional employees (“standard duties test”)

- Highly Compensated Employee
 - Currently at \$100,000 annually
 - Threshold to show exempt status much lower



Standard Duties Test

- Executive Exemption
- Administrative Exemption
- Professional Exemption
 - Learned Professional
 - Creative Professional
- Computer Employee Exemption
- Outside Sales Exemption



Executive Exemption

- Primary duty must be managing the business, or a recognized department or subdivision;
- Must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- Must have the authority to hire or fire other employees, or their suggestions regarding hiring and firing given particular weight.



Administrative Exemption

- The employee's primary duty must be the performance of office or non-manual work
- Work must be directly related to the management or general business operations of the employer or the employer's customers; and
- Can exercise discretion and independent judgment on significant matters



Learned Professional

- Primary duty must be the performance of work requiring advanced knowledge
 - Work which is predominantly intellectual in character and requires the consistent exercise of discretion and judgment;

- Advanced knowledge must be in a field of science or learning; and

- Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction



Creative Professional

- Primary duty must be the performance of work requiring invention, imagination, originality or talent
- Must be in a recognized field of artistic or creative endeavor



Recent Developments

- On November 22nd, 2016, Judge Amos Mazzant, of the Eastern District of Texas issued Preliminary Injunction
- Not a final decision on the rule, but a good indicator of the result
- Federal government appealed this ruling
- Briefs were originally due on March 2, 2017, but DOL has extended this deadline to June 30, 2017



Possible Outcomes

- Department of Labor Can Consider Rule Change
 - Requires Notice and Comment Period

- Executive action by President Trump

- Trump could instruct Department of Labor to ignore rule

- ~~Congress can utilize Congressional Review Act to overrule Department of Labor (TOO LATE)~~



Employer Requirements

- Must have some system in place to track hours
- Must track employee's wages on a quarterly basis



General Principles of Prevailing Wages

- Contractors must pay wages comparable to those paid for similar work in the community as a whole for any “Projects” involving any state or federal funding
 - “Projects” is a highly defined term
- Typically covers:
 - Laborers
 - Power equipment operators
 - Truck Drivers
 - Special Equipment
 - Special Crafts



General Principles of Prevailing Wages (cont.)

- Amount of Prevailing Wage for the State of Minnesota is published by DOLI
 - Defined by category of work
 - Split between “base” and “fringe”
- Prevailing wage applies to all employees of subcontractors. Minn. Stat. § 177.43, subd. 1
- General contractor will be held liable if subcontractors do not pay prevailing wage
- Consult an attorney if you are working on a state or federal project for the first time.



Deductions

- Employers may not make deductions based on tips

- Following are deductions that cannot be made if it brings an employee below the minimum wage:
 - Purchased or rented uniforms
 - Purchased or rented equipment
 - Does not apply to “tools of a trade”
 - Consumable supplies required in course of employment
 - Travel expenses



Deductions (cont.)

- Employers may not make deductions for damage, lost or stolen property or indebtedness, regardless of minimum wages:
 - Deductions can be made to these categories if an employee provides written authorization; or
 - If employee is found liable in civil court for those amounts



Mandatory Postings

- Employers are required to post information regarding minimum wages, among other things.
- Posters can be found at <http://www.di.mn.gov/LS/Posters.asp>
- DOLI will print a packet of posters for free.



Necessary Records

- Employer must keep records of each employee
 - Name
 - Address
 - Occupation
 - Rate of Pay
 - Amount paid each pay period
 - Hours worked each day and each workweek

- Additional records requirements for employees performing public work

- Records must be kept for three years in or near the premises where the employee worked

- Employee Handbook



Enforcement of Wage Laws

- Employee can make complaint to the Department of Labor and Industry (DOLI)
- DOLI will conduct its own investigation
- Commissioner may then issue a compliance order
 - Commissioner *must* issue a compliance order if the violation is “repeated.”
- Employer has 15 days to file written objection



Enforcement of Wage Laws (cont.)

- Commissioner may also start an action in District Court to enforce compliance with orders
- Employee may bring a civil action directly
- Even if DOLI finds there was no violation, the employee can appeal to the court
- DOLI communicates with other government agencies



Penalties

- Employer must pay back pay, gratuities and any compensatory damages.

- Repeated or willful violations may entail a civil penalty of up to \$1,000 for each violation for each employee

- Employer could also be convicted of a misdemeanor for, among other things:
 - Not paying minimum wage
 - Failing to keep proper records,
 - Hinders or delays DOLI Commissioner (e.g. you can't come in)



Penalties (cont.)

- If handled by DOLI, Commissioner may order employer to reimburse DOLI and the attorney general for all litigation costs
 - Exception exists for “extreme financial hardship”

- If handled in district court, the employer could be made to pay employee’s attorney fees
 - Financial hardship exception does not exist if the action is brought in district court.

- Employer who makes an unlawful deduction (e.g. for loss or theft) may be liable for twice the amount of the deduction.

- Commissioner may fine an employer up to \$1,000 for each failure to maintain records



Retaliation

- Employer could be found guilty of a misdemeanor for firing an employee for reporting a minimum wage violation
 - Fine between \$700 and \$3,000 if convicted
- Other potential civil liabilities, which includes provisions for attorney fees



Risk Management

- Do not retaliate against an employee!!
- Do not talk to the employee directly about a wage complaint.
- Do not talk to an enforcement agency without conferring with an attorney.
- Maintain records, including an Employee Handbook.
- Make sure you have limited liability protection and that you are observing corporate formalities.



Steps if there is a reported violation

1. Do not panic.
2. Call an attorney immediately.
3. Remember that you *can* fight City Hall, though you shouldn't do so on your own.

Questions?



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We hope to see you at these upcoming events:

- **MORE-B: MetroIBA Owners' Roundtable for Excellence in Business**
 - Tue May 16, 3:30 - 5:00pm, Members Only
- **Small Business Series: Transition and Succession Planning**
 - Thur May 25, 7:30 - 9:00am
 - Seminar Series co-hosted with Hellmuth & Johnson, breakfast provided
- **1st Tuesday Networking Event**
 - Tue June 6, 4:30 - 6:30pm
 - Guests welcome - no RSVP needed

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