Labor Law Compliance on Virginia Public Works Contracts

2021 Report as required by Chapter 56, 2020 Acts of Assembly &

Chapter 552, 2021 Acts of Assembly

Submitted by Dr. Megan Healy, Virginia Secretary of Labor

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I. Executive Summary

The Commonwealth's Secretary of Labor (previously the Commonwealth's Chief Workforce Advisor to the Governor) is submitting this report pursuant to Chapter 56 of the 2020 Acts of Assembly and Chapter 552 of the 2021 Acts of Assembly. The 2020 legislative mandate directed the Secretary to convene a workgroup to review the Commonwealth's public works payment process to contractor employees to determine whether misclassification, payroll fraud, and other forms of wage theft are prevalent problems on Virginia public works contracts. In finding that they were, the workgroup was also tasked with identifying potential policies and process improvements to correct such issues.

The Secretary is required to submit the final report on potential strategies to combat labor law violations on state contracts to the Chairs of the House Appropriations Committee and Senate Finance and Appropriations Committee no later than October 1, 2021.

The workgroup was composed of representatives from the House Appropriations and Senate Finance and Appropriations Committees, Virginia public colleges and universities, labor organizations representing affected workers, the general contractor and subcontractor business community, and the relevant state regulatory and enforcement agencies. Additional subject matter experts were consulted as needed. The group met four times in total to review the Commonwealth's public works payment process, analyze strategies for potential implementation, and discuss their impacts on relevant stakeholders.

The Secretary also solicited public comment through an online survey that received 57 responses on behalf of relevant state regulatory and enforcement agencies, industry associations, and worker advocacy organizations. A summary of the responses is provided in Appendix C.

In addition, the Secretary commissioned a study from George Mason University (GMU) of applicable labor laws across 11 states to identify statutes in both law and regulation that could inform this report's recommendations. A summary of the findings are outlined in Section III, and the full multi-state survey is provided in Appendix D.

The following recommendations were developed based on feedback from the workgroup, public comment, and external research. Each is associated with several policies that the Virginia Governor and General Assembly may consider to prevent the violation of labor laws related to wage theft and misclassification on

state public works projects. Implementation considerations and budgetary implications are outlined where applicable.

Recommendations

1. **The Commonwealth should take full advantage of debarment as a tool for preventing individuals or firms that willfully and repeatedly violate state labor laws from participating on future public works projects.** Policies for consideration include: A) expanded grounds for debarment, B) federal debarment reciprocity, and C) the extension of debarment to other relevant entities.

2. **The Commonwealth should establish processes and mechanisms for more strategic enforcement of labor law violations on state public works projects.** Policies for consideration include: A) an interagency advisory council, B) enhanced data sharing, C) enforcement of Virginia's labor laws through the Virginia Fraud Against Taxpayers Act, D) a centralized repository for subcontractor information, and E) proactive auditing of contractor data.

3. **The Commonwealth should require firms to certify compliance with relevant labor laws as a minimum standard for contracting with the state.** Policies for consideration include: A) a monthly certified payroll requirement, and B) required compliance with state and federal labor laws.

4. **The Commonwealth should bolster its complaint-based enforcement model by ensuring that workers know their rights and are more easily able to submit a complaint.** Policies for consideration include: A) an online reporting method for worker complaints, and B) an outreach campaign to workers and employers.

5. **The Commonwealth should develop standards for the use of independent contractors on state job sites to prevent misclassification before it occurs.** Policies for consideration include: A) an independent contractor waiver requirement and B) an independent contractor registration requirement.

6. **Policies requiring further research and consideration** are outlined at the conclusion of Section IV.

II. Background

Labor Law Violations in the Commonwealth

The negative effects of labor law violations such as worker misclassification and wage theft reverberate across the economy. While hard-working Virginians are defrauded of the pay and benefits that they rely on to provide for their families, employers playing by the rules are left at a disadvantage. This results in less tax revenue for the state while non-compliant businesses enjoy significant payroll cost savings. In the case of misclassification, for example, research shows that a Virginia employer in the construction industry stands to save an estimated 26 percent over law-abiding competitors by engaging in this illegal practice.[1]

The Virginia General Assembly first acknowledged the importance of these issues in 2011 when it adopted Senate Joint Resolution 345, which directed the Joint Legislative Audit and Review Commission (JLARC) to examine the prevalence and effects of misclassification in the Commonwealth. The resulting report served as the basis for later efforts by the Virginia Governor, legislators, and policy leaders to address this and other forms of wage theft head on. The Inter-Agency Taskforce on Worker Misclassification and Payroll Fraud, established by Governor Northam's Executive Order 38 and led by the Governor's Secretaries of Labor and of Commerce and Trade, released 11 recommendations in 2019 to support Virginia workers in receiving the pay, workplace protections, and benefits they have rightly earned.

Governor Northam and Virginia General Assembly members have since worked diligently to strengthen the laws that protect the Commonwealth's workers from wage theft. Below is an overview of the expanded protections that were established during the 2020 legislative session as a result of the Governor's Interagency Taskforce Report.[2] Information on Tax and DOLI's enforcement of these laws to date can be found in Appendix B.

HB 123 and SB 838: The Wage Theft Law, signed by Governor Northam on April 12, 2020, allows employees to either individually or collectively sue their employers for unpaid wages, a private right of action not previously available under Virginia law. Following its enactment on July 1st, 2020, DOLI received

[1] Joint Legislative Audit and Review Commission (VA), 2012, *Review of Employee Misclassification in Virginia*, Commonwealth of Virginia, Pg. iii, http://jlarc.virginia.gov/pdfs/reports/Rpt427.pdf.
[2] Inter-Agency Taskforce on Misclassification and Payroll Fraud (VA), 2019, *Report for Executive Order 38 (EO38)*, https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Final_Worker-Misclassification-Report.pdf.

enhanced authority that allows the agency to investigate suspected wage theft cases that are uncovered in unrelated investigations.

In addition to owed wages and interest, a worker found to have been the victim of wage theft is now entitled to compensation for reasonable attorney's fees. In cases where wage theft was committed knowingly, employees can recover up to triple damages, and employers can face criminal charges up to a felony depending on the scale of the offense. General contractors operating in the construction industry are now also held jointly and severally liable for wage theft claims made against their subcontractors.

HB 1407 and SB 744 Misclassification Omnibus: Effective January 1, 2021, HB 1407 states that an individual performing services for an employer for remuneration is assumed to be an employee of the party that pays them unless it has been demonstrated that the individual is an independent contractor. To further protect Virginians, the law also prohibits employers from requesting that workers sign an agreement embracing a misclassified status or otherwise inaccurately reflecting the employment relationship.

The Department of Taxation is responsible for making determinations around independent contractor status in conformance with the guidelines laid out by the Internal Revenue Service. All occurrences of misclassification by the same employer within 72 hours will be treated as a single offense. If found to be in violation, employers will be subject to an escalating set of penalties.

Under the new law, a finding of misclassification is particularly impactful for contractors competing for public dollars. Following repeated determinations of noncompliance by the Department of Taxation, all public bodies will be prohibited from awarding a contract to violating employers for up to one year for a second offense and up to three years for subsequent offenses.

HB 1199 and SB 662 Retaliation: Effective July 1, 2020, the signing of HB 1199 protects employees and independent contractors who report misclassification from professional retribution. Workers facing illegal retaliation may file a complaint with the Commissioner of DOLI, who can institute remedies including reinstatement and lost wages following an administrative process.

SB 894 and HB 984 Misclassification Cause of Action: Effective July 1, 2020, an individual who has not been properly classified as an employee may bring civil action for damages against his or her employer for failing to properly classify the employee if the employer had knowledge of the individual's misclassification.

The court may award damages in the amount of any wages, salary, employment benefits, including expenses incurred by the employee that would otherwise have been covered by insurance or other compensation lost to the individual, a reasonable attorney fee, and the costs incurred by the employee to bring action. The measure provides that an individual who performs services for a person for remuneration shall be presumed to be an employee unless it is shown that the individual is an independent contractor as determined under the Internal Revenue Service guidelines.

HB 1646 Board of Contractors Requirements: Effective July 1, 2020, this bill provides that the Board for Contractors shall require a contractor to appropriately classify all workers as employees or independent contractors, pursuant to law. Any contractor who is found to have intentionally misclassified any worker is subject to sanction by the Board of Contractors.

SB 48 and HB337 Wage Theft Discrimination: Effective July 1, 2020, an employer is prohibited from discharging or otherwise discriminating against an employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding, testified, or is about to testify in any proceeding related to nonpayment of wages.

SB 49 and HB 336 Wage Theft Investigations: Effective July 1, 2020, the Commissioner of DOLI is authorized to investigate whether an employer has failed or refused to make a required payment of wages to an employee who has filed a complaint. The bill also includes employees under the same accused employer who may have not filed a complaint but who it is reasonable to believe are experiencing wage theft. After initial complaints, written complaints or written and signed consent is not needed to institute proceedings on behalf of any employee against his or her employer for nonpayment of wages.

Labor Law Violations on Virginia Public Works Contracts

While the legislation outlined above has significantly strengthened the protections available to Virginia's workers, enforcement and prevention of violations continue to be key. Nowhere is this more obvious than on state public works projects, where evidence suggests wage theft and misclassification continue to harm workers despite the myriad rules in place to prevent them. Earlier this year, for example, a state investigation found that contractors working on the new Virginia General Assembly building had misclassified dozens of workers and thereby defrauded them of overtime pay and benefits including workers' compensation and unemployment

insurance.[3] As a top buyer of goods and services across the state, the Commonwealth must ensure that these occurrences are not commonplace and that the public sector serves as a model for the private sector.

The Virginia General Assembly acknowledged the importance of ensuring compliance with labor laws on public works projects during the 2020 Special Session, when Delegate Carr introduced a budget amendment directing the Governor's Secretary of Labor to review the issue. The language is as follows:

"E.1. The Commonwealth's Chief Workforce Advisor to the Governor shall convene a workgroup to review the Commonwealth's state public works payment process to contractor employees to identify whether misclassification of workers is a prevalent problem. If the findings reveal such misclassification, the workgroup shall identify and make process improvement recommendations to correct any identified issues."

The resulting workgroup affirmed the reality of labor law violations on state contracts and the importance of addressing this issue for the benefit of workers, law-abiding contractors, and Virginia taxpayers. Members of the workgroup and other subject matter experts raised a variety of concerns with the public works bidding and payment process that served as the basis for the final policy considerations. Their consensus was that as both a major market participant and protector of the public interest, the Commonwealth must ensure the highest standards of legal conformity are met on both publicly and privately supported job sites. Virginia is well positioned to serve as a model of good business practice for private and local public employers to follow by more effectively enforcing its labor laws on state publicly funded job sites, incentivizing good business practices, and supporting a culture of compliance.

[3] Martz, Michael, March 5, 2021, *State probe finds worker misclassification in construction of new General Assembly building*, Richmond-Times Dispatch, https://richmond.com/news/state-and-regional/govt-and-politics/state-probe-finds-worker-misclassification-in-construction-of-new-general-assembly-building/article_e5ba1226-d97b-560e-8052-ff227b5cc784.html.

III. Multi-State Survey of Relevant Labor Laws

While federal statutes such as the Fair Labor Standards Act (FLSA) and Davis-Bacon Act have far-reaching impacts on United States labor laws, individual states also have significant leeway to shape and enhance their realization. As Justice Louis Brandeis said in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932): states serve as critical "laboratories of democracy" by searching for their own unique solutions to difficult problems.

For this reason, the Virginia Secretary of Labor, in collaboration with the Virginia Department of Labor and Industry (DOLI), commissioned a study from George Mason University (GMU) of applicable labor laws across the following 11 states: Maryland, Pennsylvania, New Jersey, New York, Connecticut, Illinois, Minnesota, Nebraska, Montana, Oregon, and Washington. GMU was tasked with identifying statutes in both law and regulation that:

- address wage theft, by that name or otherwise;
- require or authorize state agencies to share information and coordinate actions regarding employers found to have engaged in wage and hour violations, especially in the field of employee misclassification;
- prescribe standards or principles by which employee/independent classification decisions are made;
- address exempt/nonexempt standards for considering alleged wage and hour violations;
- address payroll fraud perpetrated by government contractors specifically;
- impose payroll certification requirements as part of a public project prevailing wage statute; and
- provide civil or criminal sanctions for "labor trafficking."

There are several areas where the analysis of other states reveals potential challenges, opportunities, and uncharted territory for the Commonwealth as it works to ensure compliance with labor laws on state contracts. The following observations in particular have informed the policy considerations that will follow in this report. For additional information, GMU's full analysis is available in Appendix D.

Inter-agency Information Sharing: Three observations arise on this topic: (a) most of the surveyed states have not yet taken steps to require or even encourage information sharing across agencies where labor law

violations have occurred; (b) that seems likely to change in the short term, as a number of states (e.g. New York, Oregon) have empaneled groups of experts and stakeholders with the goal of improving cross-agency communications; and (c) some states have established information-sharing mandates that require relevant enforcement agencies to collaborate. Beyond information sharing, some states have also authorized cross-agency agreements regarding prosecution or enforcement of possible labor law violators.

Payroll Fraud By Government Contractors: Few states among those studied have independent criminal or civil statutes addressing this issue. This appears to be likely because other, less specific statutory schemes address the subject adequately. Most states have a "little False Claims Act," patterned to one degree or another on the federal statute of that name. These statutes usually (although not always) act as "private attorney general" statutes that encourage civilians aware of fraud against the government to alert state officials and either share in the damages that flow from government prosecution of a civil case or allow the individual to prosecute the action on his or her own. Even where no state False Claims Act exists, criminal sanctions are available against one who attempts to defraud the government.

Payroll Certification As to Prevailing Wage Compliance: Just as many states have their own FLSA-type statutory regimes and "little False Claims Act" statutes, many have their own "little Davis-Bacon" prevailing wage statutes. In the prevailing wage area, however, the states stray further from the federal design. The GMU report focused specifically on the question of whether the studied states have a requirement that a contractor or subcontractor (or the former on behalf of the latter) must certify that they have been paying, or have paid, the prevailing wage on their projects. Some require an oath and affirmation both on the front end (in the contract), during (in periodic bi-monthly or monthly payroll statements), and on the back end (before the project is finally accepted by the agency). Others require what is called a "certification," but without the explicit requirement that it be under oath. Others require no statement at all until the matter has been drawn into question by an allegation of wrongdoing. Finally, the consequences of a failure to certify or pay the prevailing wage vary considerably, in some cases leading to long-term debarment.

For additional information, GMU's full analysis is available in Appendix D.

IV. Policy Considerations

The five recommendations outlined in this section were developed through external research, discussions with workgroup members, and feedback from public comment. Each recommendation is associated with several policies for consideration that fall into one or more of the following categories: Legislative (including budget amendments), Agency, and/or Executive Branch. Budget implications are outlined where applicable.

It is important to note that while many of the following recommendations refer broadly to state contracting and enforcement agencies, there are many other categories of organizations engaged in the procurement of goods and services across the Commonwealth. All initiatives should be developed with this in mind by incorporating covered institutions and local governments where possible.

Recommendations

1. (Page 13) **The Commonwealth should take full advantage of debarment as a tool for preventing individuals or firms that willfully and repeatedly violate state labor laws from participating on future public works projects.** Policies for consideration include: A) expanded grounds for debarment, B) federal debarment reciprocity, and C) the extension of debarment to other relevant entities.

2. (Page 15) **The Commonwealth should establish processes and mechanisms for more strategic enforcement of labor law violations on state public works projects.** Policies for consideration include: A) an interagency advisory council, B) enhanced data sharing, C) enforcement of Virginia's labor laws through the Virginia Fraud Against Taxpayers Act, D) a centralized repository for subcontractor information, and E) proactive auditing of contractor data.

3. (Page 18) **The Commonwealth should require firms to certify compliance with relevant labor laws as a minimum standard for contracting with the state.** Policies for consideration include: A) a monthly certified payroll requirement, and B) required compliance with state and federal labor laws.

4. (Page 21) **The Commonwealth should bolster its complaint-based enforcement model by ensuring that workers know their rights and are more easily able to submit a complaint.** Policies for

consideration include: A) an online reporting method for worker complaints, B) an outreach campaign to workers and employers, and C) certification and professional development requirements for contractors.

5. **(Page 24) The Commonwealth should develop standards for the use of independent contractors on state job sites to prevent misclassification before it occurs.** Policies for consideration include: A) an independent contractor waiver requirement and B) an independent contractor registration requirement.

Several policies were submitted during the public comment period but require additional research before implementation. These are listed under Additional Considerations.

Recommendation 1. The Commonwealth should take full advantage of debarment as a tool for preventing individuals or firms that willfully and repeatedly violate state labor laws from participating on future public works projects.

In the event that a contractor is found to have violated certain state or local laws, the Virginia Public Procurement Act (VPPA) authorizes debarment of the business "from contracting for particular types of supplies, services, insurance or construction, for specified periods of time."[4] Entities can be debarred for a variety of reasons including a breach of contract with a state agency, bribery of a procurement official, or the violation of anti-discrimination provisions.[5] This is a powerful tool for ensuring that the state avoids doing business with non-responsible contractors and thereby decreases the likelihood of future illegal activity on state public works projects.

While the Virginia Code generally allows for debarment for "any cause indicating that the individual or firm lacks the moral and business integrity and reliability that will assure good faith performance[6]," additional clarity is needed on the specific labor law violations that would constitute grounds for debarment in the Commonwealth. At the federal level, for example, the Secretary of Labor is explicitly authorized to debar contractors under the Walsh-Healey Act (41 U.S.C. § 37), the Davis-Bacon Act (40 U.S.C.§ 3144), and the Clean Water Act (33 U.S.C. § 1368), among others.[7] The Commonwealth should evaluate where an expansion of its own debarment authority beyond misclassification[8] would be warranted in order to cover more instances of noncompliance with local, state, and/or federal labor laws.

Policies for Consideration

A. **Expanded Grounds for Debarment (Legislative):** Virginia could prevent all public bodies and covered institutions from awarding a contract to any employer who is found to have willfully and repeatedly violated state labor laws. In parity with the existing penalty for misclassification, this would entail debarment for a

[4] VA. Code §§ 2.2-4300 to -4377, https://law.lis.virginia.gov/vacodefull/title2.2/chapter43/.
Note that certain entities and procurements are exempt from the Virginia Public Procurement Act.
[5] Division of Purchases and Supply, Department of General Services, (VA), 2019, *A Vendor's Guide on How to do Business with the Commonwealth of Virginia*, Commonwealth of Virginia, pg. 54, section 7-20, https://dgs.virginia.gov/globalassets/business-units/dps/documents/vendorsmanual/vendorsmanual_2019_final.pdf.
[6] VA. Code §2.2-4300 to -4377.
[7] Congressional Research Service, *Debarment and Suspension of Government Contractors: An Overview of the Law Including recently Enacted and proposed Amendments* (RL34753), Prepared by Kate M. Manuel, 2008, https://sgp.fas.org/crs/misc/RL34753.pdf.
[8] VA. Code § 58.1-1902. https://law.lis.virginia.gov/vacode/58.1-1902/.

period of up to one year from the date of the notice for a second offense and for a period of up to three years for a third or subsequent offense. In line with states such as New Jersey and Pennsylvania, Virginia labor laws for which a violation would constitute grounds for debarment could include those governing overtime wages, minimum wage standards, prevailing wage standards, discrimination in wages, occupational safety, and child labor. DOLI or other relevant enforcement authority would be responsible for notifying all public bodies and covered institutions of the name of the employer in the event of a violation.

B. **Federal Debarment Reciprocity (Legislative):** Virginia could establish a reciprocal statute that prevents any contractor debarred by the federal government from being awarded a Virginia public works contract unless the relevant state agency or authority determines that it is in the best interest of the Commonwealth, pursuant to the authority's written debarment policy[9]. In New York, agencies and/or authorities refer to the federal System for Award Management at the following link to determine if a bidder has been federally debarred: https://sam.gov/content/home/. Further research is needed to determine if a reciprocal statute for debarment in other U.S. states is feasible.

C. **Extension of Debarment to Other Relevant Entities (Legislative):** The Commonwealth could codify the ability of contracting agencies to extend its debarment to other entities that have a common ownership relationship with the debarred contractor in order to limit a business owner's ability to hide under another entity. NJ Rev Stat § 34:11-56.38 (2013) may serve as an example.[10] While this is already practiced by DGS, additional consideration is needed into how this might be extended to other contracting bodies in the Commonwealth.

[9] Department of Transportation (VA), n.d., *Debarment and/or Suspension Policy*, https://www.virginiadot.org/projects/resources/Exhibit_D_debarment_procedures.pdf.
[10] N.J. Code § 34:11 - 56.38, https://law.justia.com/codes/new-jersey/2013/title-34/section-34-11-56.38/.

Recommendation 2. The Commonwealth should establish processes and mechanisms for more strategic enforcement of labor law violations on state public works projects.

For the purposes of this report, "strategic enforcement" is defined as an approach that uses state agencies' limited enforcement resources in a data-driven and deliberate manner in order to enhance their overall impact on employer behavior. This can include using data to map out geographic or industry trends across labor law violations, going beyond complaints to conduct audits and proactive investigations in high-risk sectors, and collaborating with businesses at the top of their industry that have a strong history of compliance. Research has shown that while complaint-based enforcement is more likely to reveal a violation, strategic enforcement has greater ripple effects on compliance across the industry.[11] Additional research is needed, but the following policies represent the beginnings of a more strategic enforcement infrastructure for the Commonwealth.

Policies for Consideration

A. **Interagency Advisory Council for Ongoing Coordination (Legislative, Executive Branch, Agency):** In a manner similar to New York, Virginia could establish a permanent interagency council to combat wage theft and misclassification on both state public works projects and within the private sector[12]. The Interagency Advisory Council Against Worker Exploitation would be responsible for regularly monitoring data on labor law compliance on state contracts, analyzing strategic enforcement strategies for potential implementation, gathering input from the public, and developing ongoing recommendations to the Virginia General Assembly and Governor. This group could also be responsible for evaluating the strategies within this report that have been flagged as needing further research.

B. **Enhanced Data Sharing (Legislative, Agency):** The Commonwealth could establish a legislative mandate that all relevant regulatory and contracting agencies cooperate to share information on confirmed labor law violations to better streamline statewide enforcement activities.

   Currently, the Virginia Department of Taxation is required to refer information on employers determined to have misclassified their employees to regulating agencies such as the Virginia Department of Labor and Industry, Virginia Employment Commission, and Department of Small Business and Supplier Diversity.

[11] Weil, David, 2010, *Improving Workplace Conditions Through Strategic Enforcement*, Boston University, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/strategicEnforcement.pdf.
[12] N.Y. Executive Order 2016-159, July 20, 2016, https://www.governor.ny.gov/sites/default/files/atoms/files/EO_159.pdf.

VOSH will also refer contractors that are found to be unlicensed on state job sites to DPOR/VEC. The data sharing mandate would expand this activity among the members of the aforementioned interagency council and include a requirement that agencies develop common data standards and a data-sharing agreement.

C. **Enforcement of Virginia Labor Laws through the Virginia Fraud Against Taxpayers Act (Executive, Agency):** The Office of the Governor and relevant regulatory agencies could collaborate with the Office of the Attorney General to establish a process for the prosecution of unlawful contractors on state projects through the Virginia Fraud Against Taxpayers Act. [13] Other states such as Massachusetts and Illinois have taken advantage of their false claims statute to target contractors who have falsely certified information to the state with regards to prevailing wage, wage theft, and misclassification.[14] This approach, with more substantial penalties than those in existing labor law, could be strategically employed against instances of willful and egregious misclassification or wage theft.

D. **Centralized Repository for Subcontractor Information (Agency):** The Public Body Procurement Workgroup, established through a 2021 budget amendment and led by DGS, was tasked with providing best practices associated with oversight of subcontracts to include reporting requirements for payroll records, contracts, and payments to other businesses.[15] In alignment with this group's recommendations, the Commonwealth should consider instituting a process whereby prime contractors, state agencies, and covered institutions provide awarded capital outlay contracts above $3 million in a centralized reporting system. This would provide the state with greater visibility into the presence and activity of subcontractors on state public works projects.

Prime contractors would be required to gather the information from their subcontractors for entry into this system. Information requirements to achieve SWaM and oversight goals through centralized reporting would be determined by the audit and enforcement agencies within the aforementioned interagency council. Consideration is needed into the specific data elements that will be gathered, particularly if the state adopted a monthly certified payroll requirement as outlined under Recommendation 3. If developed, this method

[13] VA. Code § 5.01-216.3, https://law.lis.virginia.gov/vacode/title8.01/chapter3/section8.01-216.3/.
[14] Ortiz, Nicholas F. (2016). "Prevailing Wage and False Claims Acts," *Massachusetts Wage Law*, https://masswagelaw.com/prevailing-wage-false-claims-act/.
[15] VA. H.B. 1800, Item 82 #1h, 2021 Special Session I, 2021, https://budget.lis.virginia.gov/amendment/2021/2/HB1800/Introduced/FA/82/1h/

should be efficient and effective for state agencies, covered institutions, and contractors, which may include building interfaces between purchasing systems.

Preliminary Fiscal Impact: It is anticipated that the aforementioned audit and enforcement agencies will require additional investigators to audit subcontractor data. There will also be a cost for centralized reporting that involves linking the state's existing procurement system (eVA) with those of six higher education, or "covered", institutions. Additional information is needed before the fiscal impact can be determined.

E. **Proactive Auditing of Contractor Data (Agency):** Audit and enforcement agencies with authority to ensure compliance and oversight could perform an audit of selected contractor data. The selection of contractors to be audited would be done in a manner prescribed and/or facilitated by the audit agency and in collaboration with the aforementioned interagency council. Final audit findings, as determined by the audit agency, should be communicated to the owner agency, DGS or appropriate covered institution, and to the interagency council.

Preliminary Fiscal Impact: Depending on the number of audits being executed, agencies will likely require additional staff to review the pay records and documentation of employers onsite. DOLI estimates the need for two additional compliance officers, each at $99,070 per year, to perform audits of selected contractor data. The Department of Taxation, which has an existing audit program for misclassification, has also requested additional auditors and an audit team lead to conduct investigations.

Recommendation 3. The Commonwealth should require firms to certify compliance with relevant labor laws as a minimum standard for contracting with the state.

The strategy of requiring contractors to certify relevant information to the state, often employed at the federal level, allows non-compliance to be identified more promptly and establishes a paper trail for enforcement authorities to later follow. It could also potentially preempt violations of the law by ensuring that prospective bidders are educated on their minimum contractual obligations.

Policies for Consideration

A. **Monthly Certified Payroll Requirement (Legislative, Agency):** Virginia could establish a monthly payroll certification requirement for contracting employers to ensure that they are meeting their prevailing wage obligations, including both hourly pay and fringe benefits, throughout the length of the contract.

   In line with comparable states such as Maryland and New Jersey, DOLI would need an online system to receive the certified payroll submissions and sufficient staff to monitor and conduct audits based on complaints and/or inconsistencies flagged within the data. Per input from workgroup members, it is recommended that Virginia use similar technology systems and/or processes to those that are required at the federal level, making them more easily incorporated into many contractors' existing business processes.

   Additionally, while employers are currently required to maintain records of wages and provide them to the Commissioner upon request, there is no penalty for a failure to do so. Several states surveyed by George Mason University for this report have instituted penalties for a failure to provide records, and for a failure to certify payroll where required. Alongside the institution of a monthly certified payroll requirement, the Commonwealth should also establish either a set fine or a per day, per employee penalty for non-compliance.[16]

   Preliminary Fiscal Impact: It is estimated that this policy would have a general fund expenditure impact on DOLI, which would be responsible for administering the monthly certified payroll program. DOLI anticipates that start-up costs will be $1.1 million in FY 2023 and ongoing operational costs will be $542,063 annually.

[16] See Appendix D. Pg. 56, multi-state survey

Fiscal Year	$ Dollars	Positions	Fund
2022	N/A	0	N/A
2023	$1,098,063	5.0	GF
Recurring (2023 -)	$542,063	5.0	GF

DOLI anticipates that five additional staff (FTEs), including four labor law compliance officers and one financial services specialist, would be needed to monitor data and conduct audits. Most of the investigations will require regular onsite visits but some may involve inquiries into more complex fiscal dealings involving the fringe benefits that are part of most prevailing wage determinations. Maryland, which received 154,000 certified payrolls per year, has five employees to monitor the system. New Jersey estimates that four of their labor law investigators have been needed. The estimated recurring cost for these five additional staff is $498,063.

In addition to staffing, DOLI estimates that it would require start-up costs of approximately $600,000 in order to upgrade its payment of wage computer system to a more modern and responsive program. This upgrade would include a portal for employers to submit their monthly certified payroll information as well as an online complaint form as described under Recommendation 4. Recurring expenses would include a yearly licensing fee of $24,000 for the payment of wage system and an ongoing VITA security scan for $20,000 that is conducted to ensure personally identifiable information remains protected.

B. **Required Compliance with State and Federal Labor Laws (Legislative):** Within the state's process for competitive sealed bidding or competitive negotiation under the Virginia Public Procurement Act (VPPA), public bodies could be required to include in every written contract a provision that prospective contractors must be in compliance with the labor laws of the Commonwealth, other U.S. states, and/or the federal government, and that they are not currently debarred in any of these jurisdictions. Labor laws for certification could include those governing overtime wages, minimum wage standards, prevailing wage standards, discrimination in wages, occupational safety, and child labor. The written contracts should include language and an overview of the applicable laws to support the education of the prospective contractor, to be developed by DGS in collaboration with the relevant labor agencies.

This provision would allow DGS to immediately institute debarment proceedings if they find, based on information provided from an enforcement agency such as DOLI, that a contractor has falsely certified theri compliance with labor laws. An additional penalty, such as a fine or Class 1 misdemeanor, could also be established for violations of this rule but should be administered by the enforcement agency rather than the contracting entity.

Recommendation 4. The Commonwealth should bolster its complaint-based enforcement model by ensuring that workers know their rights and are more easily able to submit a complaint.

While an important component of federal, state, and local enforcement infrastructure, the approach of requiring workers to complain to the relevant agency when they suspect that their labor rights have been violated has significant limitations. Research shows that the number of worker complaints regarding minimum wage, for example, is often significantly lower than the number of violations occurring in a given industry.[17] This demonstrates the importance of educating workers on their rights and removing barriers to the complaint process to increase the likelihood that victims access protection.

Policies for Consideration

A. **Online Reporting Method for Worker Complaints (Legislative, Agency):** Virginia could require that DOLI establish a central online form for workers, including those employed by state contractors, to submit payment of wage, minimum wage, and overtime complaints electronically. This tool should be prominently displayed on the agency's website alongside existing electronic forms and other methods of complaint for labor law violations such as misclassification, occupational safety, etc., all of which should be available in multiple languages.

   Currently, Virginians may only submit a claim for unpaid wages by U.S. postal mail.[18] Taxpayers must contact the Department of Taxation's Customer Service Unit regarding instances of potential misclassification. The Commonwealth would be following the example set by states such as Kentucky, Colorado, and Idaho by removing these barriers to an already difficult process for workers.

   Preliminary Fiscal Impact: It is estimated that this policy would have a general fund expenditure impact on DOLI, which would be responsible for developing the form and responding to complaints. DOLI anticipates that costs will be $472,202 annually, beginning in FY 2023.

[17] Weil, David & Pyles, Amanda, 2005. Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace. *Comparative Labor Law & Policy Journal*, 27(59). https://hctar.seas.harvard.edu/files/hctar/files/hr08.pdf.
[18] Department of Labor and Industry (VA). (n.d.). *Labor and Employment Law Forms.* Labor & Employment Law. https://www.doli.virginia.gov/labor-law/claim-for-unpaid-wages-form/.

Fiscal Year	$ Dollars	Positions	Fund
2022	N/A	0	N/A
2023	$472,202	5.0	GF
Recurring (2023 -)	$472,202	5.0	GF

DOLI anticipates five staff (FTEs), including three labor law compliance officers and two assistance compliance officers, will be needed to process the additional complaints resulting from an online form. DOLI previously established an online system for the receipt of child labor work permits and began receiving double the number of permit applications, likely due to the ease of submission. These submissions are often incomplete and require significant staff time for follow-up. Five employees are now dedicated to the processing of child labor permit submittals. Based on this experience, as well as the fact that recent legislation has added minimum wage and overtime wage claims to those processed by DOLI, the agency estimates that five additional staff are needed at a recurring cost of $472,202.

The online form will require a technology solution in addition to staffing. The development of this form is included in the estimate for technology previously outlined under Recommendation 3.

B. **Outreach Campaign to Workers and Employers (Executive, Agency):** State enforcement agencies such as DOLI and Tax could jointly launch an education and outreach campaign in multiple languages that targets employees on state contracts with information about their rights and employers with their obligations. This would include close collaboration with labor unions, immigrant advocacy organizations, and employment attorneys who already have strong relationships with workers and employers. The approach could also serve as a pilot for a potential statewide approach to workers' education beyond state contracts.

C. **Certification and Professional Development for Contracting (Agency):** Any state employee who oversees capital outlay construction contracts with a value as defined by the applicable Appropriations Act could be required to take an online or face to face certification course by 2023. Information about new labor

laws specific to construction projects would also need to be integrated into any procurement officer annual training.

Recommendation 5. The Commonwealth should develop standards for the use of independent contractors on state job sites in order to prevent misclassification before it occurs.

As outlined in Governor Northam's 2020 Report from the Inter-Agency Taskforce on Misclassification and Payroll Fraud, "the misclassification of actual employees as independent contractors creates a competitive disadvantage for Virginia businesses that follow the law, deprives the Commonwealth of millions of dollars in tax revenues, and prevents workers from receiving protections and benefits to which they legally are entitled."[19] The negative impacts are compounded when this practice occurs on state public works contracts, thereby limiting Virginia's ability to serve as a model employer for the private sector.

Recent Virginia legislation instituted significant penalties for misclassification, including debarment, as well as a private cause of action for victims. However, many states have gone further to establish standards and processes that proactively limit opportunities for contractors to misclassify workers. Additional research is needed, but the Commonwealth should consider one or more of the following approaches to prevent this damaging practice on state job sites.

Policies for Consideration

A. **Independent Contractor Waiver Requirement (Legislative):** Building on previously proposed legislation such as Senator McPike's SB 1305, the Commonwealth could establish an independent contractor waiver requirement whereby contractors on state public works projects may only permit the use of independent contractors by their subcontractors if they have received approval from the relevant contracting authority.[20] Versions of this model have been established in the Commonwealth for the Amazon, Inc. headquarters project in Northern Virginia[21] and University of Virginia capital outlay projects, among others.

   In alignment with SB 1305, the requirement would apply to all public bodies in a locality with a population in excess of 25,000 and covered institutions executing construction contracts of more than $500,000. However, the mandate should not limit contractors' use of subcontractors given the concerns of several

[19] The Inter-Agency Taskforce on Misclassification and Payroll Fraud (VA), 2019, *Report for Executive Order 38 (EO38)*, https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Final_Worker-Misclassification-Report.pdf.
[20] VA. S.B. 1305, 2021 Regular Session, 2021, https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+SB1305.
[21] Sullivan, Patricia, December 14, 2019, *Amazon gets final approval for its new HQ in Arlington County, despite protest by organized labor*, The Washington Post, https://www.washingtonpost.com/local/virginia-politics/amazon-gets-final-okay-for-its-new-hq-in-arlington-despite-organized-labor-protest/2019/12/14/40b37760-1c90-11ea-b4c1-fd0d91b60d9e_story.html.

workgroup members that this would pose a significant barrier to their ability to complete projects. It is also recommended that the provision apply to all independent contractors, rather than just those representing over 10% of the cost of the project. Additional consideration is needed into the appropriate grounds for a waiver.

B. **Independent Contractor Registration (Legislative, Agency):** Virginia could require any independent contractor seeking to work on a publicly procured project to register through the Department of Professional and Occupational Regulation (DPOR) by 2023. This process would support independent contractors in knowing their employment rights, ensure that they have accurate information about misclassification, payroll fraud, and wage theft, and help employers identify independent contractors on the job.

   A potential pitfall of this approach is the risk that employers will coerce workers, particularly those who are undocumented, into registering as independent contractors erroneously. In this case, a worker's registration would not have legal standing but could serve as a disincentive to speak up about misclassification if they are not aware of their rights. For this reason, it is critical that any registration process strike a balance between being accessible and requiring sufficient documentation from the worker to assert that an independent contractor status is accurate for their situation. Such documentation could include proof of liability insurance or workers' compensation.

   An alternate version of this strategy could require registration by all independent contractors, regardless of their work in the private or public sector. Additional research is needed into the efficacy of this approach in Montana and the strategies for ensuring that registered independent contractors are not vulnerable to coercion or miseducation through the registration process.[22]

[22] Department of Labor and Industry (MT), (n.d.), Rule: 24.35.101, *Independent Contractor Exemption Certificate*, https://rules.mt.gov/gateway/RuleNo.asp?RN=24%2E35%2E101.

Additional Considerations

The following policies were submitted during the public comment period but require additional research before implementation. These may be areas for future study by the aforementioned Interagency Taskforce Against Worker Exploitation.

- Higher Education Procurement: Examine the existing procurement practices of higher education institutions and evaluate if any of the policies/procedures outlined in this report should be incorporated into their Memoranda of Understanding with the state.
- Wage and Hour Complaint Hotline: Establish a phone hotline as an easier means for workers to submit wage and hour complaints. DOLI currently has a phone number where individuals may receive assistance with filing, but the agency does not have a dedicated staff person available during all business hours and can only take one call at a time. A system upgrade and additional staff would be required.
- VDOT Prequalification Criteria: Amend VDOT's prequalification criteria to include more stringent scoring for violations of wage-and-hour, licensing, or safety laws.
- Ban on Bid Shopping: Explicitly prohibit practices that encourage bid shopping on public works projects.
- Construction-Specific Independent Contractor Criteria: As in New York, establish a separate standard for determining whether a worker is an independent contractor in the construction industry specifically.
- Expansion of Public Posting Requirements: Ensure that employers are required to publicly post all relevant information on employees' labor rights on state job sites.
- Public Works Registration Database: Require all contractors, subcontractors, and lower tier subcontractors to register with the state before bidding on or engaging in the performance of any work on which the payment of prevailing wage is required.
- Ensure Accurate Prevailing Wage Rates: Establish robust processes for the supplementation of Davis Bacon information by industry.

Bibliography

Congressional Research Service, *Debarment and Suspension of Government Contractors: An Overview of the Law Including recently Enacted and proposed Amendments* (RL34753), Prepared by Kate M. Manuel, 2008, https://sgp.fas.org/crs/misc/RL34753.pdf.

Department of Labor and Industry (MT), (n.d.), Rule: 24.35.101, *Independent Contractor Exemption Certificate*, https://rules.mt.gov/gateway/RuleNo.asp?RN=24%2E35%2E101.

Department of Labor and Industry (VA). (n.d.). *Labor and Employment Law Forms.* Labor & Employment Law. https://www.doli.virginia.gov/labor-law/claim-for-unpaid-wages-form/.

Department of Transportation (VA), n.d., *Debarment and/or Suspension Policy*, https://www.virginiadot.org/projects/resources/Exhibit_D_debarment_procedures.pdf.

Division of Purchases and Supply, Department of General Services, (VA), 2019, *A Vendor's Guide on How to do Business with the Commonwealth of Virginia*, Commonwealth of Virginia, pg. 54, section 7-20, https://dgs.virginia.gov/globalassets/business-units/dps/documents/vendorsmanual/vendorsmanual_2019_final.pdf.

Inter-Agency Taskforce on Misclassification and Payroll Fraud (VA), 2019, *Report for Executive Order 38 (EO38)*, https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Final_Worker-Misclassification-Report.pdf.

Joint Legislative Audit and Review Commission (VA), 2012, *Review of Employee Misclassification in Virginia*, Commonwealth of Virginia, Pg. iii, http://jlarc.virginia.gov/pdfs/reports/Rpt427.pdf.

Martz, Michael, March 5, 2021, *State probe finds worker misclassification in construction of new General Assembly building*, Richmond-Times Dispatch, https://richmond.com/news/state-and-regional/govt-and-politics/state-probe-finds-worker-misclassification-in-construction-of-new-general-assembly-building/article_e5ba1226-d97b-560e-8052-ff227b5cc784.html.

N.J. Code § 34:11 - 56.38, https://law.justia.com/codes/new-jersey/2013/title-34/section-34-11-56.38/.

N.Y. Executive Order 2016-159, July 20, 2016, https://www.governor.ny.gov/sites/default/files/atoms/files/EO_159.pdf.

Ortiz, Nicholas F. (2016). "Prevailing Wage and False Claims Acts," *Massachusetts Wage Law*, https://masswagelaw.com/prevailing-wage-false-claims-act/.

Sullivan, Patricia, December 14, 2019, *Amazon gets final approval for its new HQ in Arlington County, despite protest by organized labor*, The Washington Post, https://www.washingtonpost.com/local/virginia-politics/amazon-gets-final-okay-for-its-new-hq-in-arlington-despite-organized-labor-protest/2019/12/14/40b37760-1c90-11ea-b4c1-fd0d91b60d9e_story.html.

VA. Code § 2.2-4300 to -4377, https://law.lis.virginia.gov/vacodefull/title2.2/chapter43/.

VA. Code § 58.1-1902. https://law.lis.virginia.gov/vacode/58.1-1902/.

VA. Code § 58.1-1900, https://law.lis.virginia.gov/vacodefull/title58.1/chapter19/.

VA. Code § 5.01-216.3, https://law.lis.virginia.gov/vacode/title8.01/chapter3/section8.01-216.3/.

VA. H.B. 1800, Item 82 #1h, 2021 Special Session I, 2021, https://budget.lis.virginia.gov/amendment/2021/2/HB1800/Introduced/FA/82/1h/

VA. S.B. 1305, 2021 Regular Session, 2021, https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+SB1305.

Weil, David, 2010, *Improving Workplace Conditions Through Strategic Enforcement*, Boston University, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/strategicEnforcement.pdf.

Weil, David & Pyles, Amanda, 2005. Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace. *Comparative Labor Law & Policy Journal*, 27(59). https://hctar.seas.harvard.edu/files/hctar/files/hr08.pdf.

Overview of Appendices

Appendix A: Workgroup Members & Contributors

Appendix B: Workgroup Presentations

Appendix C: Results of Public Comment Survey

Appendix D: Multi-State Survey of Relevant Labor Laws

Appendix A: Workgroup Members & Contributors

Budget language directed the Secretary to convene a workgroup of stakeholders including relevant state enforcement and contracting agencies, the business community, labor organizations, and public colleges and universities. The Secretary consulted additional subject matter experts as needed, who are listed below alongside members of the workgroup.

Greg Akerman - Northern Virginia Director, Baltimore/DC-Metro Building Trades

Brian Ball - Secretary of Commerce and Trade, Office of Governor Northam *(with designee John Begala, Assistant Secretary of Commerce and Trade)*

David Bailey - CEO, David Bailey Associates

Bernie Brill - Executive Director, SMACNA Mid-Atlantic Chapter

Craig Burns - Commissioner, Virginia Department of Taxation

Ernie Caldwell - President, G. J. Hopkins, Inc.

The Honorable Betsy B. Carr - Delegate, Virginia House of Delegates

Ike Casey - American Subcontractors Association

Fred H. Codding - Attorney at Law

W. Mike Coppa - Director, Bureau of Capital Outlay Management, Virginia Department of General Services

Joseph Damico - Director, Virginia Department of General Services

Ray Davenport - Commissioner, Virginia Department of Labor and Industry

Robert Field - Hearing and Legal Services Officer, Virginia Department of Labor and Industry

Joe Flores - Secretary of Finance, Office of Governor Northam *(with designee June Jennings, Deputy Secretary of Finance)*

Sandra Gill - Deputy Director, Virginia Department of General Services

Arleen Green - Assistant Commissioner, Office of Compliance, Virginia Department of Taxation

James R. Harvey - Partner, Vandeventer Black LLP

Mary Helmick - Director of Procurement, Virginia Tech

Grindly Johnson - Secretary of Administration, Office of Governor Northam *(with designee Asif Bhavnagri, Assistant Secretary of Administration)*

The Honorable Paul E. Krizek - Delegate, Virginia House of Delegates

Victoria Leonard - Director of Policy and Strategic Communications, Liuna Mid-Atlantic Chapter

Tony Maggio - Legislative Fiscal Analyst, Virginia House of Delegates Appropriations Committee

John McHugh - Director of Procurement Services, Virginia Commonwealth University

Kimberly McKay - Legislative Fiscal Analyst, Virginia House of Delegates Appropriations Committee

Jason Parker - President, Virginia State Building & Construction Trades

Catherine Pasqualoni - Eastern Atlantic States Regional Council of Carpenters

Brandon Robinson - CEO, Associated General Contractors of Virginia

J. Adam Rosatelli - Legislative Fiscal Analyst, Virginia Senate Finance and Appropriations Committee

Felix Schapiro – Assistant Secretary of Labor, Office of Governor Northam

Anthony Smith - Vice President, Service Contracting of Va, Inc.

Jay Stoda - Business Unit Leader, DPR Construction

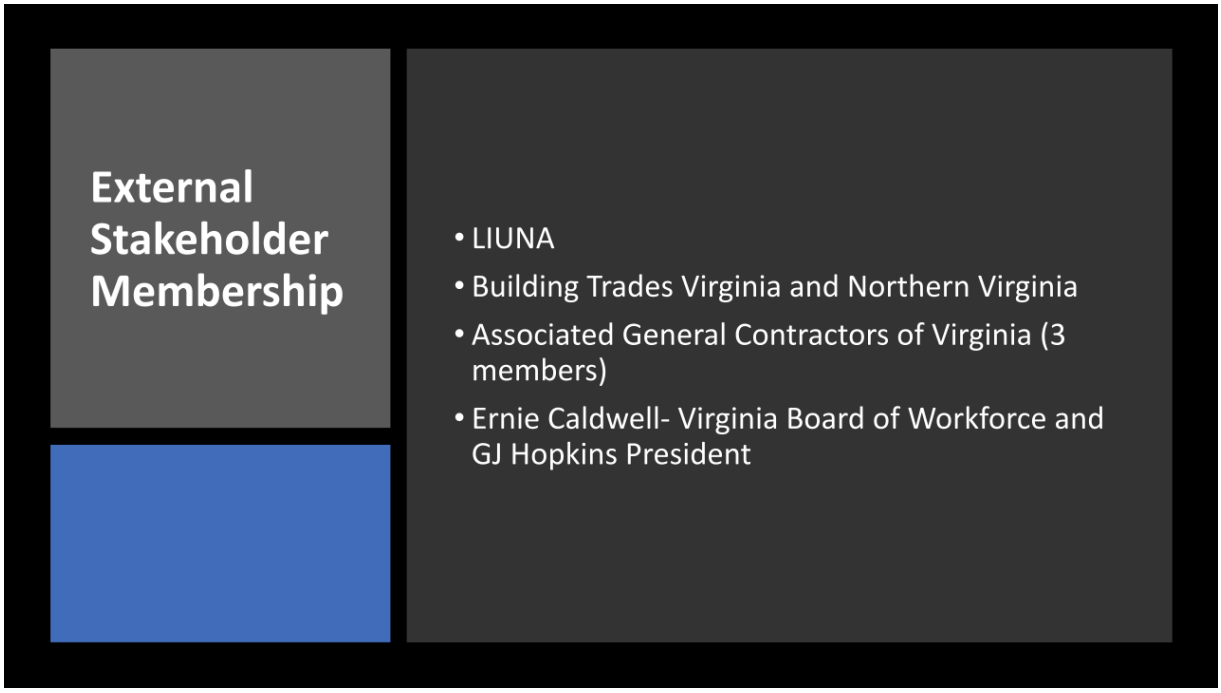
Donald Sundgren - Associate Vice President and Chief Facilities Officer, University of Virginia

JT Thomas - Executive Director, Washington D.C. Chapter, National Electrical Contractors Association

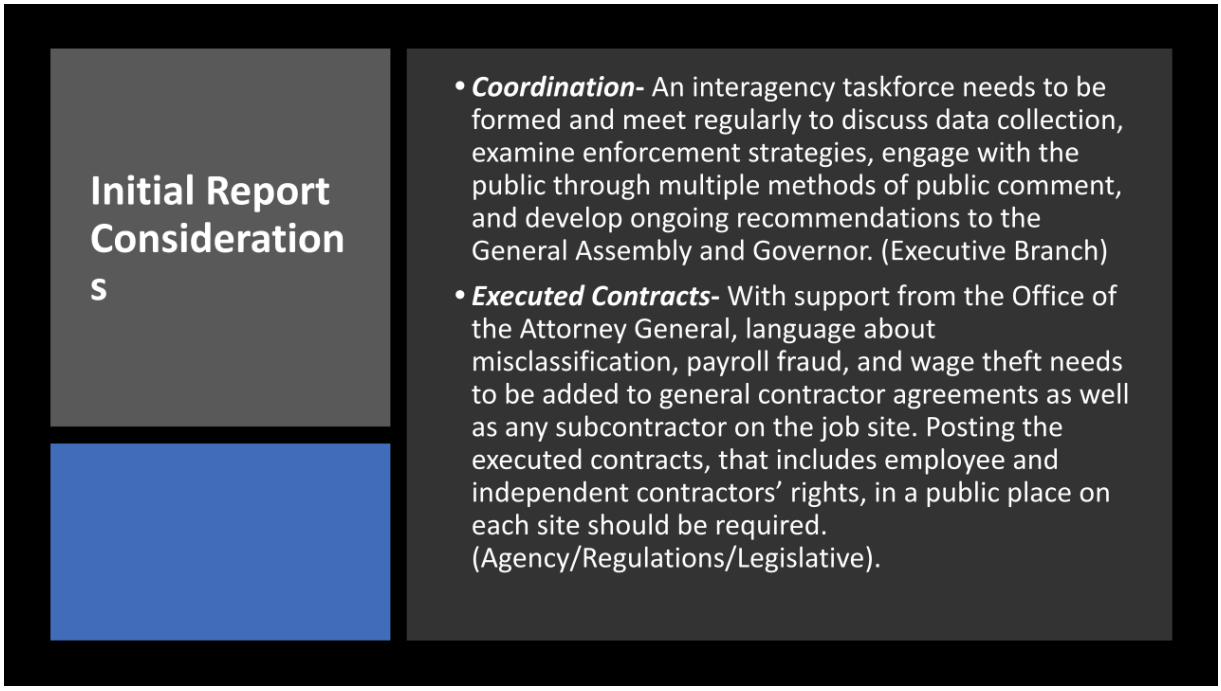
Lawrence Wilder - Senior Policy Advisor, Virginia Department of Small Business and Supplier Diversity

*Report drafted by Meaghan Green, Policy & Communications Advisor to the Virginia Secretary of Labor

Appendix B: Workgroup Presentations

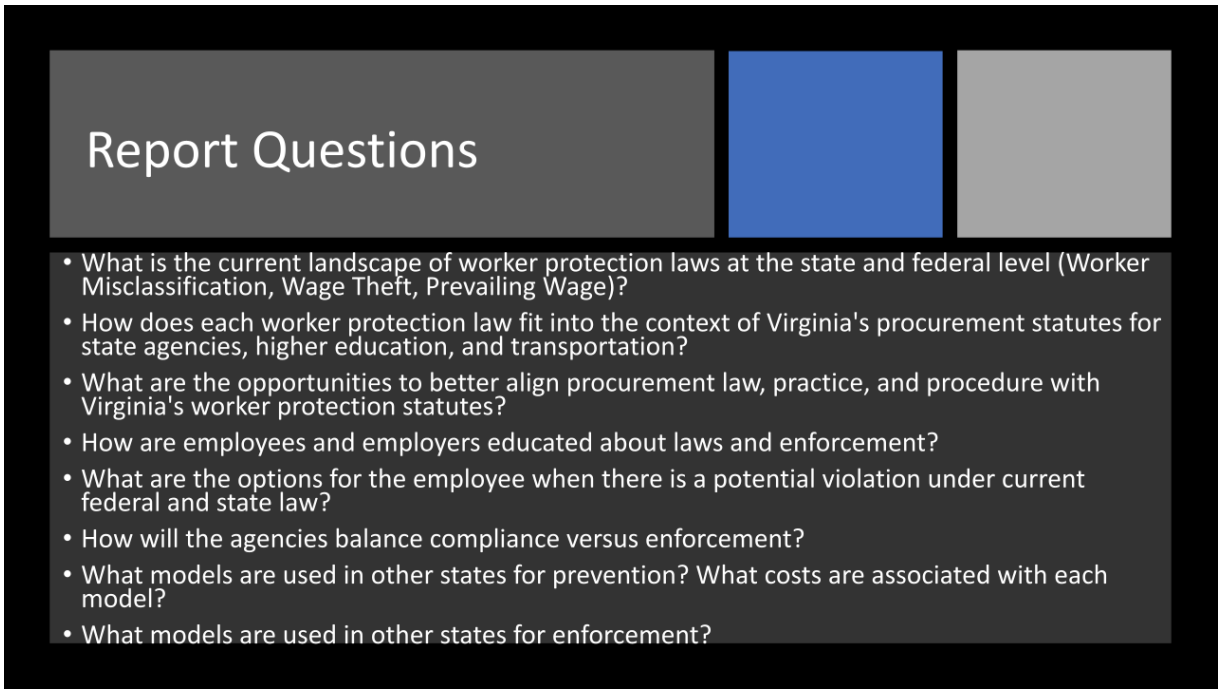

External Stakeholder Membership
• LIUNA
• Building Trades Virginia and Northern Virginia
• Associated General Contractors of Virginia (3 members)
• Ernie Caldwell- Virginia Board of Workforce and GJ Hopkins President


Initial Report Considerations
• ***Data and Technology Solution-*** With the enactment of new worker laws, agencies need to work together to develop data collection standards with similar fields to help support the sharing of data amongst enforcement agencies. A Data Sharing Agreement or MOU should be signed to share information of employers who are currently being investigated or found guilty of unlawful business practices. A new technology solution might be needed to help share information and communicate amongst the agencies. (Executive Branch/Agencies)


Initial Report Considerations
• Coordination- An interagency taskforce needs to be formed and meet regularly to discuss data collection, examine enforcement strategies, engage with the public through multiple methods of public comment, and develop ongoing recommendations to the General Assembly and Governor. (Executive Branch)
• Executed Contracts- With support from the Office of the Attorney General, language about misclassification, payroll fraud, and wage theft needs to be added to general contractor agreements as well as any subcontractor on the job site. Posting the executed contracts, that includes employee and independent contractors' rights, in a public place on each site should be required. (Agency/Regulations/Legislative).


Initial Report Considerations
• Certification and Professional Development- Any state employee who oversees large capital outlay construction contracts with a value defined by the applicable appropriation, must take an online or face to face course to be certified by 2022. Information about new labor laws specifically to construction projects will be integrated into any procurement officer annual training. Ongoing professional development will be needed for recertification and of best practices. (Agency)
• Independent Contractor Registration- Any independent contractor who works on a publicly procured project must be registered through the Department of Professional and Occupational Regulations by 2023. This registration will help independent contractors know their rights, provide better education around misclassification, payroll fraud, and wage theft as well as help employers identify independent contractors on the job. (Agency/Legislative)


Initial Considerations
• Competitive Bid Process- The competitive bid process will be examined to see how the state can support general contractors who exhibit good business practices while making sure small and minority owned businesses are equally competitive, as well as identify general contractors who comply with contract terms.
• Future Research and Stakeholder Engagement- More research needs to be done on other states' solutions to the workers who have been mistreated on state government projects. Also, additional stakeholders such as agency procurement officers and project managers, general contractors, and workers need to be interviewed for the final report.

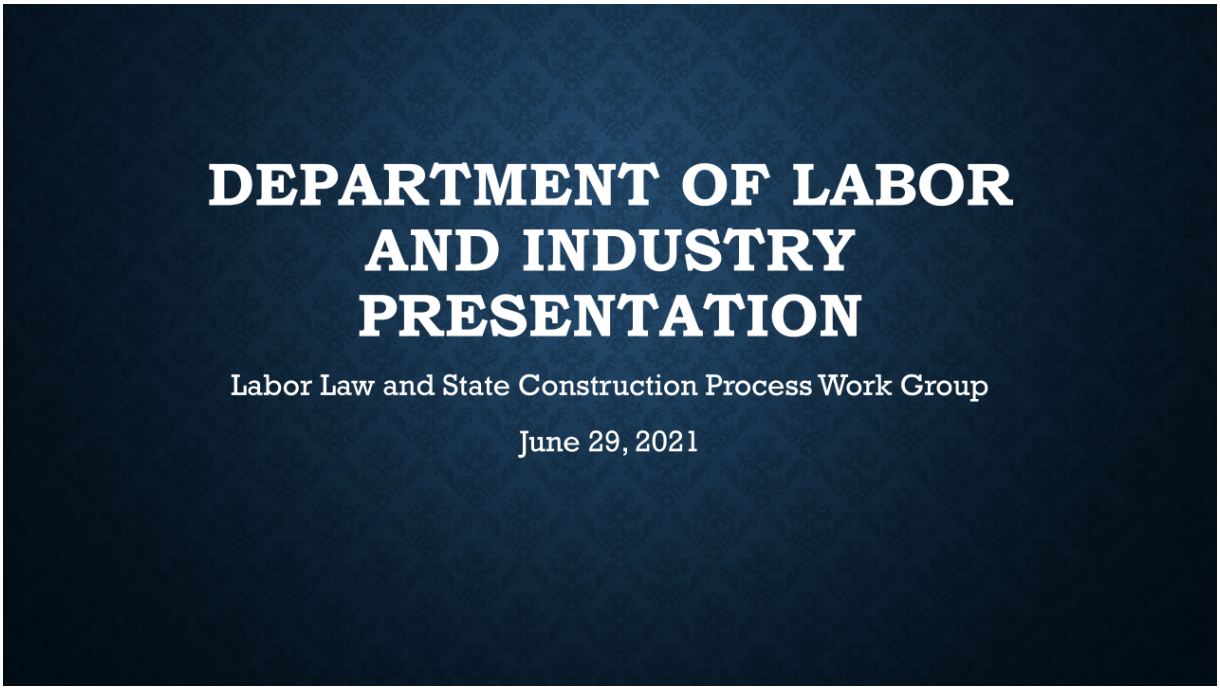

Report Questions
• What is the current landscape of worker protection laws at the state and federal level (Worker Misclassification, Wage Theft, Prevailing Wage)?
• How does each worker protection law fit into the context of Virginia's procurement statutes for state agencies, higher education, and transportation?
• What are the opportunities to better align procurement law, practice, and procedure with Virginia's worker protection statutes?
• How are employees and employers educated about laws and enforcement?
• What are the options for the employee when there is a potential violation under current federal and state law?
• How will the agencies balance compliance versus enforcement?
• What models are used in other states for prevention? What costs are associated with each model?
• What models are used in other states for enforcement?

Report Questions

- What are the legal consequences for businesses who do not follow certain labor laws?
- What are the gaps in the current law that lead labor brokering? How do you close gaps? Advocates believe transparency measures will close those gaps
- What contractors need to submit certified payrolls? When does that happen now? Under what statutes? When do investigations take place? Who has the authority to do it now?
- How does higher education and transportation fit into a potential remedy each with differing procurement statutes? Should all state agencies have the same regulations when it comes to labor laws?
- How do potential changes to Virginia's procurement law impact the vendor pool available to participate on state contracts? What are the budgetary implications of limiting the vendor pool?
- What are long term and short-term solutions?
- What is root of the issues? Funding? Low bid contracts?

Timeline

- May-Procure services and hire project manager
- June- Meeting, Presentation by Tax and DOLI on enforcement
- July- Draft recommendations and research other states
- August- Town Halls, Focus Groups, Public Comment
- September- Finalize recommendations
- October- Report due
- November- Draft legislation and budget amendments


DEPARTMENT OF LABOR AND INDUSTRY PRESENTATION
Labor Law and State Construction Process Work Group
June 29, 2021


DOLI PROGRAMS ON WAGE THEFT AND MISCLASSIFICATION
•Labor and Employment Law Division
•Occupational Safety and Health Enforcement

LABOR LAW STATUTES - DOLI

- § 40.1-29 – Payment of Wage
- § 40.1-28.10 – Minimum Wage – May 1, 2021
- § 40.1-29.1 – Expanding Payment of Wage Inspections – July 1, 2020
- § 40.1-29.2 – Overtime Wage – July 1, 2021
- § 40.1-33.1 – Anti-Retaliation – Misclassification – July 1, 2020
- § 40.1-33.2 – Anti-Retaliation – Payment of Wage – July 1, 2020

LABOR LAW STATUTES - EMPLOYEE

- § 40.1-27.3 – Anti-Retaliation – Employee Enforced
- § 40.1-28.7:7 – Misclassification of Workers
- § 40.1-29.J – Private Right of Action

PAYMENT OF WAGE

Year	Wages Due	Wages Collected	Orders Entered	Civil Penalties
Current	$203,156	$151,156	$72,000	$20,000
2020	$272,029	$235,363	$81,835	$35,950
2019	$456,985	$303,181	$180,491	$42,850
2018	$347,567	$270,485	$77,082	$29,300
2017	$325,787	$263,557	$91,530	$29,300

LABOR LAW EXPANDED INSPECTIONS

- Expanded five inspections so far.
- As few as four employees affected and up to 147 employees
- Others under consideration for expansion

LABOR LAW
MINIMUM WAGE AND OVERTIME

Minimum Wage in effect since May 1 with no complaints

Overtime Wage not in effect yet.

LABOR LAW
ANTI-RETALIATION STATUTES

Receive six complaints about retaliation in payment of wage cases

No complaints about retaliation in misclassification cases yet

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH

VOSH

VOSH ENFORCEMENT

- Misclassification not primary focus of inspections
- Investigations look into who is working at the site to determine who is the responsible employer and how many employers should have inspections opened
- As part of the questions for inspections on construction sites we ask each contractor on site about DPOR licensure
- Enforcement Policy on Misclassification in place since July 2015

REFERRALS MADE

- In the last year VOSH has made 44 referrals to DPOR
- VOSH made 20 referrals to VEC
- Between July 2015 and December 2019, 173 cases were reported to DPOR
  - 115 resulted in violations
  - $75,000 in penalties

ENFORCEMENT WHEN UNLICENSED CONTRACTORS ONSITE

- VOSH refers the contractor that hired the unlicensed contractors to do work to DPOR
- VOSH refers the unlicensed contractor to DPOR
- VOSH makes referrals to VEC when the contract value of the unlicensed subcontractors work is less than $1,000
- Employers that hire unlicensed subcontractor are not given reductions for size and good faith

Virginia Tax Worker Misclassification Program

June 29, 2021

Virginia Tax

Virginia Tax's Role in Misclassification of Workers

Virginia Tax

Worker Misclassification: Virginia Tax's Role 3

Worker Misclassification Legislation (2020 HB 1407/SB 744)

- Provides that if an individual performs services for an employer for remuneration, they shall be considered an employee for Virginia tax purposes unless demonstrated to be an independent contractor
- Virginia Tax is required to use the IRS guidelines to determine whether a worker is an employee or independent contractor

Virginia Tax

Worker Misclassification: Virginia Tax's Role 4

Worker Misclassification Legislation (2020 HB 1407/SB 744)

- Imposes a civil penalty for misclassification in the following amounts:
  - Up to $1,000 per misclassified individual for the first offense
  - Up to $2,500 per misclassified individual for the second offense
  - Up to $5,000 per misclassified individual for the third offense or any subsequent offenses
- Prohibits all public bodies and covered institutions from awarding a contract to an employer that misclassifies for the following time periods:
  - Up to one year from the date of the notice for a second offense
  - Up to three years from the date of notice for a third or subsequent offense

Virginia Tax

Worker Misclassification: Virginia Tax's Role 5

Worker Misclassification Legislation (2020 HB 1407/SB 744)

- Provides Tax Commissioner with the authority to share information
  - Department of Labor and Industry (DoLI)
  - Virginia Employment Commission (VEC)
  - Department of Small Business and Supplier Diversity
  - Department of General Services (DGS)
  - Workers' Compensation Commission
  - Department of Professional and Occupational Regulation (DPOR)
- Provides authority to these agencies to share any information with Virginia Tax that can assist in proper classification of employees

Virginia Tax

Worker Misclassification: Virginia Tax's Role 6

Worker Misclassification: Annual Report

- Virginia Tax is required to report annually on enforcement of this bill to the Governor and General Assembly
- The report must cover items including:
  - The number of investigated reports of worker misclassification and the findings of such reports
  - The amount of combined tax, interest, and fines collected
  - The number of referrals to DoLI, VEC, the Department of Small Business and Supplier Diversity, the Workers' Compensation Commission, and DPOR

Virginia Tax

Misclassification Audit Program

Virginia Tax

Worker Misclassification: Audit Program 8

Audit Program Resourcing

- Funding provided to create a misclassification audit program with nine staff
  - One misclassification audit manager
  - Three misclassification auditors
  - Two tax examiners
    - Withholding tax focus
  - Three support staff:
    - Business analyst, training and field education specialist, and wage administrative staff
- Pandemic impacted original staff hiring and training timeline

Virginia Tax

Worker Misclassification: Audit Program 9

Audit Program Implementation

- First pass of about 30 businesses to program for audits identified by February 1 and developed using:
  - Data reported to Virginia Tax
    - W-2, 1099, withholding data
  - North American Industry Classification System (NAICS) codes
  - Referrals from other agencies
  - Auditor recommendations
- Auditing for misclassification issues and withholding tax compliance
  - Senior auditors are working closely with new auditors doing onsite audits

Virginia Tax

Worker Misclassification: Audit Program 10

IRS Guidelines Required to Make Determination

- Traditionally, the IRS guidelines used to help make a determination of employee vs. contractor comprised 20 factors
- In 2020, 20 factors essentially condensed into three broad categories
  - Behavioral control, financial control, and relationship of the parties
- Generally, IRS requires consideration of all information in a case that helps decide the extent to which the taxpayer does or does not retain the right to control the worker
  - Not all factors may be relevant in each case and some may be more relevant than others

Virginia Tax

Worker Misclassification: Audit Program 11

Virginia Tax Administrative Appeals Process

- Legislation adopted in 2020 also provides taxpayers subject to a misclassification penalty the right to
  - Appeal action to the Tax Commissioner within 90 days of assessment
  - Apply to circuit court for relief
    - Three years from date of assessment or final determination
    - One year from date administrative appeal concluded
- Collections/debarment placed on hold until appeal or court action complete
- Same process available to taxpayers for all taxes administered by Virginia Tax

Virginia Tax

Worker Misclassification: Audit Program 12

Virginia Tax Administrative Appeals Process

- Completed appeals published on agency website in Laws, Rules, and Decisions section and available to all interested parties
  - Used by practitioners, taxpayers and agency audit staff
- Recent appeals addressing worker misclassification:

Document	Topic
PD 21-56	Discusses and adopts new IRS criteria for evaluating/determining worker misclassification
PD 20-170	Issuance of Form 1099 instead of W-2 not sufficient evidence to determine worker misclassification
PD 18-107	Information provided by VEC not sufficient to make a determination concerning worker misclassification

Virginia Tax

Worker Misclassification Program Communications Strategy

Virginia Tax

Worker Misclassification: Communications Strategy 14

Communications Strategy: Focus on Outreach

- Drive education & awareness
  - Prevent vs. punish
  - Define terms, share resources
  - Make both “presented” and “self-service” content accessible
    - Presented – speaker for industry meetings, online webinars
    - Self-service – web page, video, social media

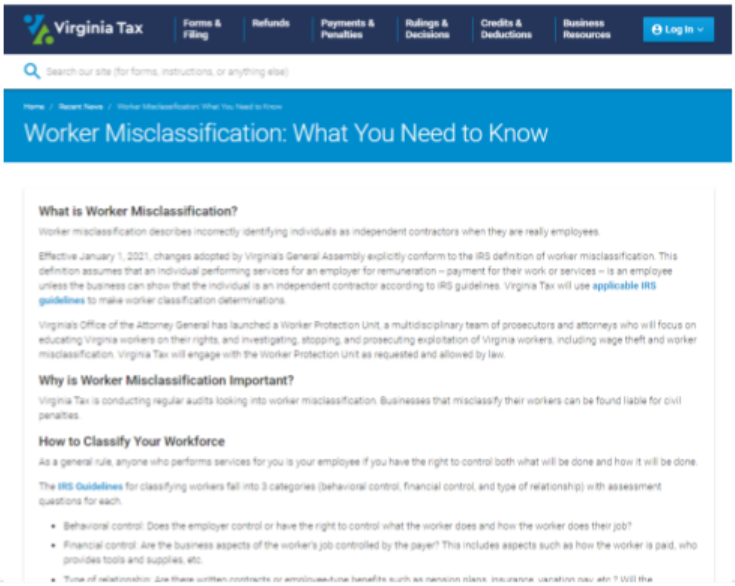
Virginia Tax

Worker Misclassification: On Our Website 15

Worker Misclassification: What You Need to Know

Worker misclassification describes incorrectly identifying individuals as independent contractors when they are really employees.

Read More



Virginia Tax

Worker Misclassification: Media Interest 16

taxnotes

Virginia Tax Department Explains Worker Misclassification

Undated

Full text Published By Tax Analysts

What is Worker Misclassification?

Worker misclassification describes incorrectly identifying individuals as independent contractors when they are really employees.

Effective January 1, 2021, changes adopted by Virginia's General Assembly explicitly conform to the IRS definition of worker misclassification. This definition assumes that an individual performing services for an employer for remuneration — payment for their work or services — is an employee unless the business can show that the individual is an independent contractor according to IRS guidelines. Virginia Tax will use applicable IRS guidelines (https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation) to make worker classification determinations.

Virginia's Office of the Attorney General has launched a Worker Protection Unit, a multidisciplinary team of prosecutors and attorneys who will focus on educating Virginia workers on their rights, and investigating, stopping, and prosecuting exploitation of Virginia workers, including wage theft and worker misclassification. Virginia Tax will engage with the Worker Protection Unit as requested and allowed by law.

Virginia Tax

Worker Misclassification: Communications Strategy 17

Communications Strategy: Focus on Outreach

- Solicit input for our frequently asked questions (FAQs)
  - Reach out to business and industry groups to hear their constituents' questions about worker misclassification
  - Answer those questions in an FAQ format
    - Post FAQs on tax.virginia.gov/worker-misclassification
    - Share answers via social media posts
    - Add FAQs to slides for presented content

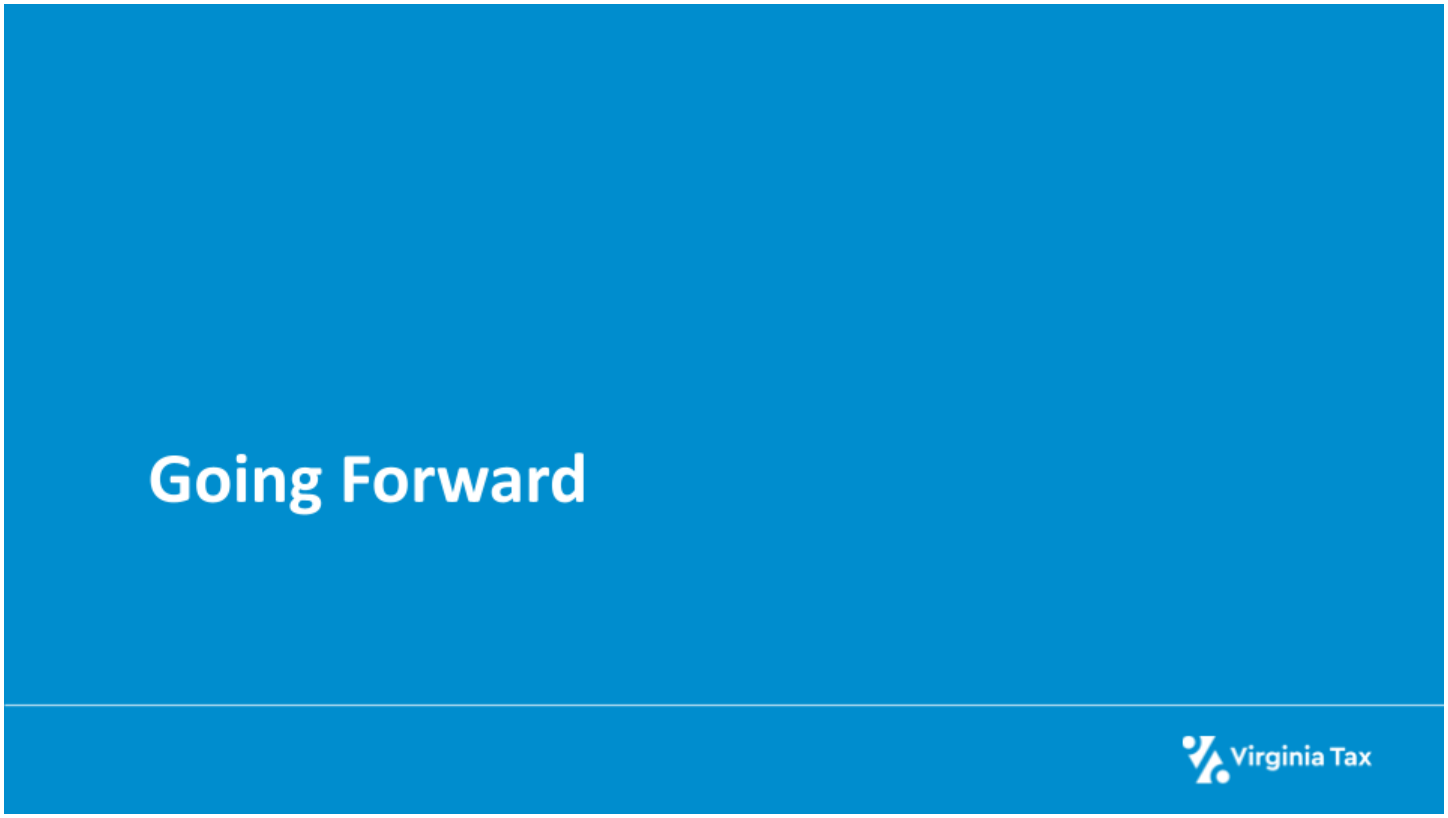
Virginia Tax

Worker Misclassification: Communications Strategy 18

Communications Development and Distribution – Planned Tactics

Audience	Key Messages	Channels
Public/all taxpayers	• Overview of worker misclassification • Awareness content re: audit practices	• Website content • Social media posts
Business community	• Overview of worker misclassification • Awareness content re: audit practices • How-to for determining worker classification	• News release for general business publications • Authored content for specific industry publications • Website content • Social media posts
Professional organizations for target industries	• Overview of worker misclassification • Awareness content re: audit practices • How-to for determining worker classification	• Self-service presentation on housed website • Video/virtual speaker for professional development events

Virginia Tax


Going Forward
Virginia Tax

Worker Misclassification: Going Forward 20

Next Steps and Lessons Learned

- Continue to identify categories of business/industries for potential audits
  - Refine data needs and availability
- Communicate with IRS regarding availability of any federal worker misclassification data
- Continue rollout of worker misclassification communications program
- Complete worker misclassification guidelines

Virginia Tax

Worker Misclassification: Going Forward 21

Next Steps and Lessons Learned

- Expand/enhance technology and data analytics
  - Increases audit viability and improves sustainability of audit findings
- Appropriate placement in Office of Compliance
- Additional staff needs:
  - Program Director
  - Data analyst or dedicated programmer/developer
  - Auditors and audit team lead to conduct additional audits

Virginia Tax

Appendix C: Results of Public Comment Survey

Respondents

57 responses to the public comment survey were received on behalf of the following organizations representing contracting employers, public works employees, independent contractors, and state regulatory and enforcement agencies:

- Associated General Contractors Of Virginia
- Mid-Atlantic LECET
- IBEW
- LiUNA!
- Independence Excavating, Inc
- Operating Engineers
- Eastern Millwright Regional Council
- Chewning & Wilmer, Inc.
- Eastern Atlantic States Regional Council of Carpenters
- Iron Workers Local Union 79
- MAROC
- IAM&AW LL10
- RJATC
- Pile Drivers/Divers Local 474
- International Brotherhood of Electrical Workers Local 666
- Sprinkler Fitters Local 669
- Virginia Department of Small Business and Supplier Diversity
- Iron Workers Employers Association of Washington, D. C. (IWEA)
- BAC Local 8 SE.
- Branch Civil
- United Food and Commercial Workers Local 400
- Richmond Electricians JATC
- Mid-Atlantic Pipe Trades
- Ironworkers International
- Service Contracting of Virginia Inc
- University of Virginia
- Vandeventer Black LLP
- ATU Local 1177
- UA Local Union 110
- VA Building Trades
- Virginia Tech Procurement
- CWA Virginia State Council
- UAW Local 2069
- Folkes Electric
- IUPAT DC 51
- Virginia Office of Emergency Medical Services
- Virginia Commonwealth University
- Virginia Department of General Services
- ASA of Metro Washington
- Foundation for Fair Contracting - Mid-Atlantic Region
- Virginia Department of Labor and Industry
- Alliance for Construction Excellence (ACE)
- Construction Contractors Council
- CWA Local 2204
- Virginia Department of Taxation
- Baltimore Washington Laborers' District Council

Survey Questions

Respondents were asked to indicate their support for the following nine strategies for combating the mistreatment of workers on state public works projects. These do not represent a comprehensive list of those ultimately included in this report.

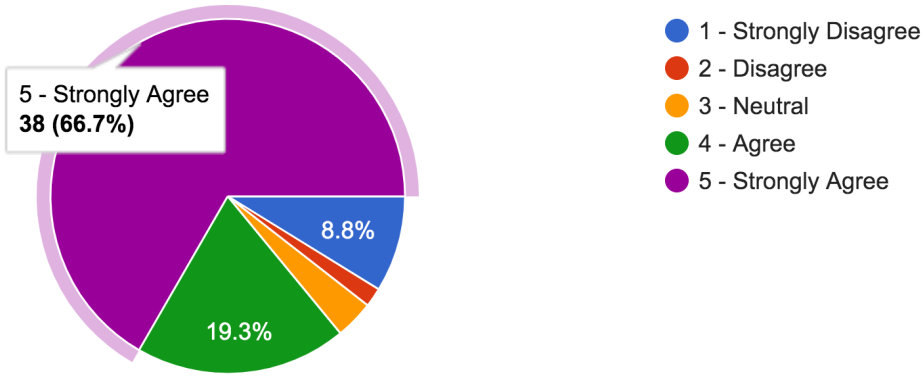
1. Virginia employers found to have violated state wage laws should be debarred from bidding on and receiving awards for public works contracts, in alignment with existing penalties for misclassification.
2. Virginia should establish a monthly payroll certification requirement for contracting employers to ensure that they are meeting their prevailing wage (i.e. Little Davis Bacon Act) obligations throughout the length of their state contract.
3. An interagency task force should be formed to analyze strategic labor law enforcement strategies for potential implementation in Virginia and develop ongoing recommendations to the General Assembly and the Governor. For the purposes of this survey, "strategic enforcement" is defined as an approach that uses limited agency resources in a strategic and data-driven manner in order to enhance the overall impact of state labor law enforcement on employer behavior.
4. Virginia should require enforcement and contracting agencies to establish data collection standards and a data-sharing agreement to share information on employers who have been found guilty of labor law violations.
5. Virginia should work to enhance data collection on and monitoring of subcontractors to ensure that the state has sufficient information about all actors working on state projects.
6. Virginia should establish a reciprocal debarment statute that ensures any contractor debarred by the U.S. Department of Labor for labor law violations is also debarred from working on Virginia public works projects.
7. Virginia should establish a requirement that any independent contractor who works on a publicly procured project must register through the Department of Professional and Occupational Regulation (DPOR) by 2023.

8. The Virginia Department of Labor (DOLI) should establish an online form for all Virginia workers, including those employed by state contractors, to electronically submit complaints of potential wage theft in addition to by mail.
9. Virginia should coordinate with state enforcement agencies to create an education and outreach campaign targeting employees on state contracts about their rights under the law. This would include close collaboration with organizations that already have strong relationships with workers and could serve as a pilot for a potential statewide approach to workers' education (beyond state contracts).

Results

1. Virginia employers found to have violated state wage laws should be debarred from bidding on and receiving awards for public works contracts, in ...ment with existing penalties for misclassification.

57 responses



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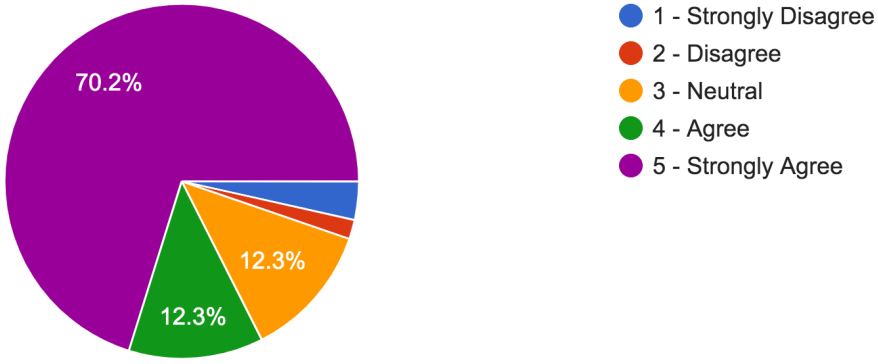
57 responses



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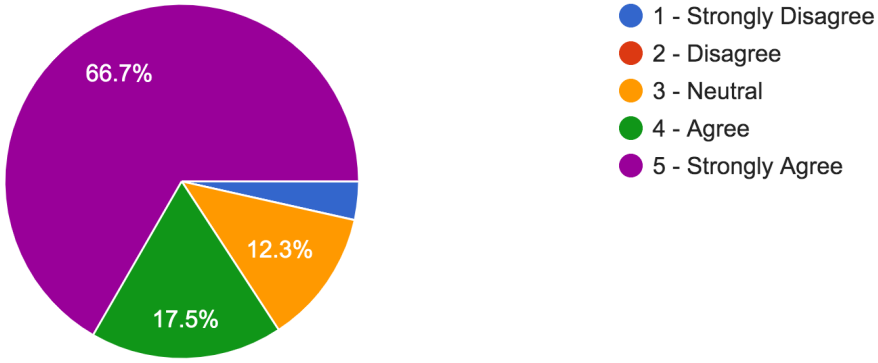

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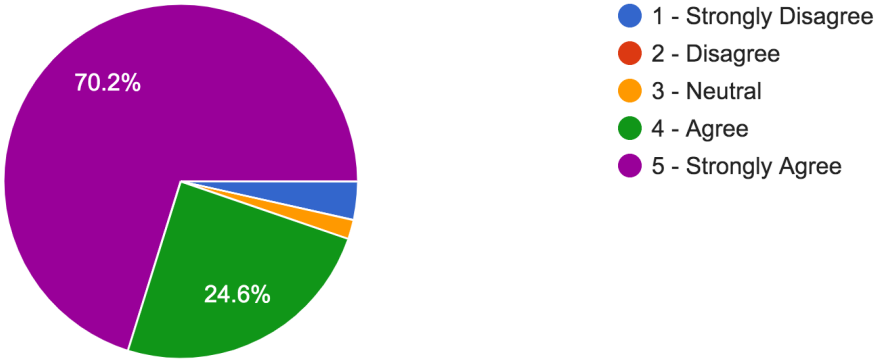
57 responses



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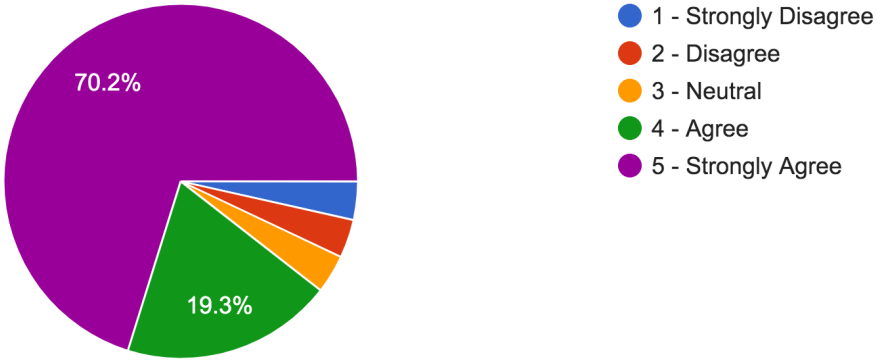
57 responses



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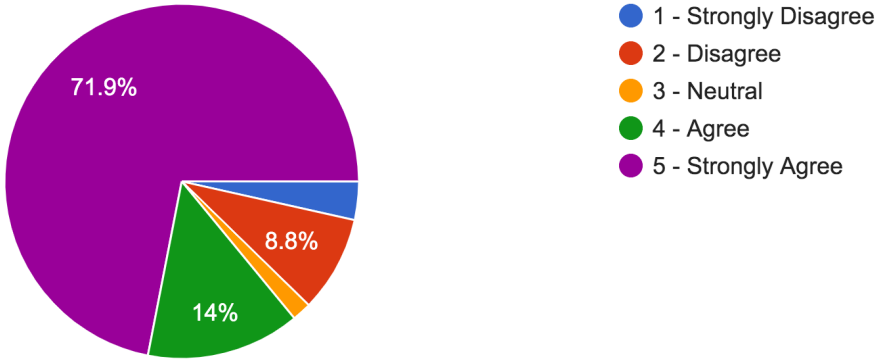
57 responses



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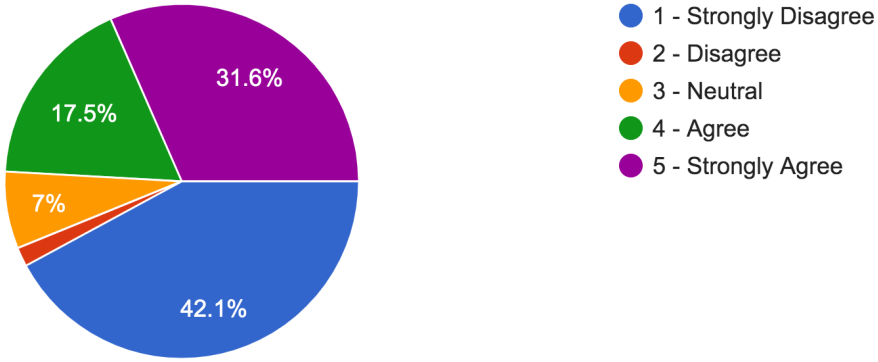
57 responses



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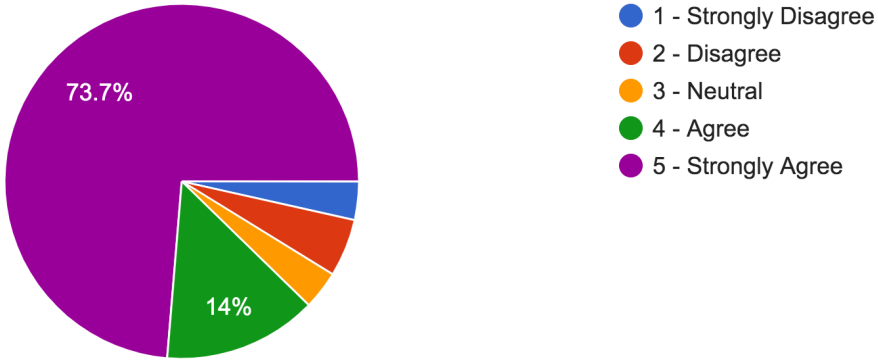

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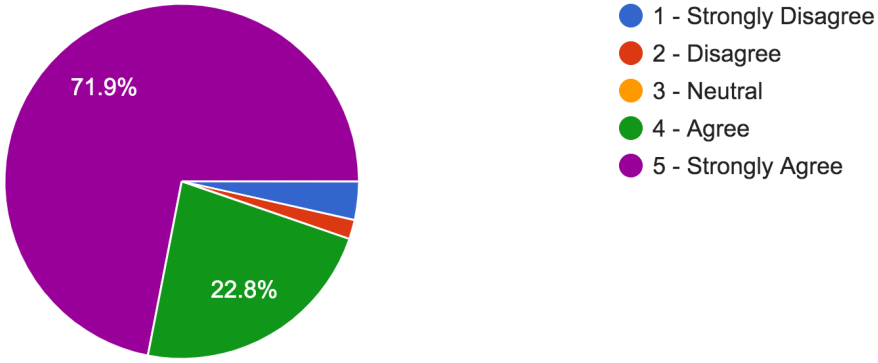

Appendix D: Multi-State Survey of Relevant Labor Laws

The report that follows responds to a request from Secretary Healy to survey certain wage and hour-related statutes in 11 states (Connecticut, Illinois, Maryland, Minnesota, Montana, Nebraska, New Jersey, New York, Pennsylvania, Oregon, and Washington), with a focus on wage theft, worker classification, and prevailing wages issues.[23] More specifically, our team was asked to identify statutes in these 11 states that:

- address wage theft, by that name or otherwise;
- require or authorize state agencies to share information and coordinate actions regarding employers found to have engaged in wage and hour violations, especially in the field of employee misclassification;
- prescribe standards or principles by which employee/independent classification decisions are made;
- address exempt/nonexempt standards for considering alleged wage and hour violations;
- specifically address payroll fraud by government contractors;
- impose payroll certification requirements as part of a public project prevailing wage statute; and
- provide civil or criminal sanctions for "labor trafficking."

We hope this report is useful in considering "next steps" in the Commonwealth's efforts to strengthen wage and hour and procurement compliance by its contractors, and more broadly, to provide its citizens with an assurance that employers are complying with their statutory obligations and that their tax money is well spent. It has been an honor to help advance that important policy goal.

[23] The GMU team was assigned research and reporting tasks. The information contained in this report is provided for informational purposes, and should not be construed as legal advice on any subject or to create an attorney-client relationship.

Connecticut

I. Wage Theft

A. Minimum Wage Violations

1. Normative Standards

Connecticut's minimum wage is currently $13 per hour and will increase annually, and incrementally, to $15 per hour by 2023. CONN. GEN. STAT. ANN. § 31-58(i)(1). After that, the minimum wage will be adjusted yearly based on the U.S. Department of Labor's Employment Cost Index. *Id.*

Every employer must inform each employee, in writing at the time that he or she is hired, of the applicable wage rate, hours of employment, and payment schedule. CONN. GEN. STAT. ANN. § 31-71f. Thereafter, each employer must also inform its employees, either in writing or by conspicuous posting in the workplace, of any changes in the employer's policy regarding wages, vacation pay, sick leave, and other benefits. *Id.*

Employers must keep records of all hours worked by, and wages paid to, employees for at least three years. CONN. GEN. STAT. ANN. § 31-66. Hours must be recorded to the nearest unit of, at most, fifteen minutes. CONN. ADMIN. REGS. § 31-60-11(a). When the amount of wages to be paid is disputed, the employer must still pay, within the normal pay cycle, all wages that are conceded by the employer to be due. CONN. GEN. STAT. ANN. § 31-71d.

2. Claim Administration

Employees may file civil suits against employers that do not pay them their required wages. CONN. GEN. STAT. ANN. § 31-68(a). Employees may also file wage claims with the Connecticut Department of Labor, and the Labor Commissioner has the authority to investigate

the allegations and file suit on the employee's behalf. CONN. GEN. STAT. ANN. § 31-59; CONN. GEN. STAT. ANN. § 31-68(a)(4); CONN. GEN. STAT. ANN. § 31-76a. As part of the investigation, the Labor Commissioner, the director of the Wage and Workplace Standards Department, or their designees may enter the employer's workplace, examine payroll records, interview employees, call hearings, administer oaths, and take testimony and depositions. CONN. GEN. STAT. ANN. § 31-76a(a).

An employer faces fines between $100 and $250 for each day it refuses to comply with an investigation by the Director or the Labor Commissioner. CONN. GEN. STAT. ANN. § 31-76a(b).

The Labor Commissioner may adopt regulations as are necessary to carry out the purposes of the labor statutes. CONN. GEN. STAT. ANN. § 31-60(b).

3. Statute of Limitations

The statute of limitations for all unpaid wage claims in Connecticut is two years. CONN. GEN. STAT. ANN. § 52-596. However, this period of limitation is tolled while any wage complaint is pending with the Labor Commissioner. *Id.*

4. Remedies

In addition to restitution of wages unpaid (as well as costs and attorneys' fees), employees may recover double the wages owed unless the employer proves a good faith belief that the underpayment was lawful. CONN. GEN. STAT. ANN. § 31-68(a)(1).

The Connecticut Department of Labor may assess additional civil penalties of $300 for each wage and hour violation. CONN. GEN. STAT. ANN. § 31-69a(a). The Labor Commissioner may assess civil penalties for each wage and hour violation. CONN. GEN. STAT. ANN. § 31-69a(a). The Labor Commissioner must send the employer notice of the violation and advise the

employer of its right to request a hearing to show why the penalty should not be assessed. CONN. ADMIN. REGS. § 31-71h-3. After a hearing, or after the employer has waived its right to a hearing, the Labor Commissioner may uphold or modify the penalty. CONN. ADMIN. REGS. § 31-71h-6. Upon complaint from the Labor Commissioner, the Connecticut Attorney General may institute civil actions to recover these penalties. CONN. GEN. STAT. ANN. § 31-69a(c).

Employers may also face criminal penalties, including fines, imprisonment, or both, for paying or agreeing to pay an employee less than the minimum wage. CONN. GEN. STAT. ANN. § 31-69(b). The available penalties vary depending on the amount owed by the employer, but Connecticut classifies the failure to pay wages due as a Class D felony. *Id.* The same section also makes it a criminal offense to not keep or furnish records as required. CONN. GEN. STAT. ANN. § 31-69(c).

B. Overtime Violations

1. Normative Standards

Employers must pay employees 1.5 times their regular pay rate for each hour worked in excess of forty hours per week, CONN. GEN. STAT. ANN. § 31-76c, unless they are made exempt from the overtime requirement by CONN. GEN. STAT. ANN. § 31-58. The exemptions are similar to, but not nearly as extensive as, the ones found in the federal Fair Labor Standards Act (FLSA). The exemptions include the so-called "white collar" exemptions (bona fide executive, administrative, or professional employees), certain domestic workers, outside salespersons, and individuals employed by a nonprofit theater. *Id.*

"Hours worked" is defined in line with the definitions in the FLSA, and in fact expressly references the FLSA's definitions in multiple places. "Hours worked" include:

> (1) time during which an employee is required by the employer to be on the employer's premises or to be on duty, or to be at the prescribed work place;
> (2) all time during which an employee is employed or permitted to work, whether or not required to do so, provided time allowed for meals shall be excluded unless the employee is required or permitted to work;
> (3) time during which an employee is required to be on call for emergency service at a location designated by the employer; and
> (4) time when an employee is required to wait on the premises while no work is provided by the employer.

CONN. GEN. STAT. ANN. § 31-76b. If an employer uses a timecard system or other device to record an employee's work time, the system must use a clock that is easily visible to the employee. CONN. GEN. STAT. ANN. § 31-13(b).

2. Claim Administration

Same as minimum wage violations. *See* A.2 above.

3. Statute of Limitations

Same as minimum wage violations. *See* A.3 above.

4. Remedies

Same as minimum wage violations. *See* A.4 above.

C. Off-the-clock Violations

1. Normative Standards

As noted above, every covered employee must be compensated for all "hours worked," which includes all time during which an employee is required to be on the employer's premises or to be on duty. CONN. ADMIN. REGS. § 31-60-11(a).

Any employee who works a shift of at least 7.5 hours must have the option to take a meal break of at least thirty consecutive minutes. CONN. GEN. STAT. ANN. § 31-51ii(a). The meal break must occur after the first two hours of the shift and before the last two hours. *Id*. Some

situations are excepted from this rule, such as if adherence would adversely affect public safety or if the employer employs fewer than five employees at a single location. CONN. GEN. STAT. ANN. § 31-51ii(c). If the employee is excepted from the meal break requirement, this time must be included in the employee's hours worked. CONN. ADMIN. REGS. § 31-60-11(a).

2. Claim Administration

Same as minimum wage violations. *See* A.2 above.

3. Statute of Limitations

Same as minimum wage violations. *See* A.3 above.

4. Remedies

Same as minimum wage violations. *See* A.4 above.

D. Illegal Deductions

1. Normative Standards

Unless the employer obtains the employee's consent, it may not make any deduction from an employee's pay unless authorized to do so by Connecticut or federal law. CONN. GEN. STAT. ANN. § 31-71e. Neither may an employer withhold the wages of an employee because of an agreement requiring notice before leaving the employment (*i.e.*, "giving two weeks' notice"), CONN. GEN. STAT. ANN. § 31-70, or withhold or require the return of any wages from an employee as a condition of or requirement for employment. CONN. GEN. STAT. ANN. § 31-73(b).

Any payment from an employer to an employee of less than the wage set forth in a written wage agreement, or any repayment of any wages received in the absence of a written debt instrument, is *prima facie* evidence of a violation of law. *Id.*

An employer may not deduct from its employee's wages if the employer pays the wages at an earlier than usual time. CONN. GEN. STAT. ANN. § 31-74.

2. Claim Administration

Same as minimum wage violations. *See* A.2 above.

3. Statute of Limitations

Same as minimum wage violations. *See* A.3 above.

4. Remedies

Both civil remedies and criminal sanctions exist for unlawful deductions. Any employee who has had money unlawfully deducted from his wages has a civil action for the full amount of the compensation owed, plus costs and attorney's as may be allowed by the court. If the employer fails to show that the deduction was made in the good faith belief that the underpayment of wages was in compliance with law, the employee is entitled to double damages as well as fees and costs. CONN. GEN. STAT. ANN. § 31-72.

Moreover, criminal responsibility can exist for both the employer and for "any officer or agent of an employer or any other person authorized by an employer to pay wages" on the employer's behalf. CONN. GEN. STAT. ANN. § 31-71g. Violation constitutes a class D felony, with the sanctions being scaled to the size of the under-payment. *Id*. An employer that withholds or requires the return of wages from an employee as a condition of or requirement for employment faces fines or imprisonment. CONN. GEN. STAT. ANN. § 31-73(d). An employer violating this provision is liable for a fine of not more than $100 (a figure that has not changed since the statute was passed in 1949). CONN. GEN. STAT. ANN. § 31-74.

E. Paystub Provisions

1. Normative Standards

Employers must issue wage statements with each payment of wages. CONN. GEN. STAT. ANN. § 31-13a(a). These statements must include the hours worked, gross earnings with regular and overtime pay shown separately (unless exempt), itemized deductions, and net earnings. *Id.*

If the employee consents, the wage statement may be issued electronically; in the absence of consent, it must be in writing. CONN. GEN. STAT. ANN. § 31-13a(a). If the statement is issued electronically, the employer must provide a secure, private, and convenient means for the employee to access and print the statement. CONN. GEN. STAT. ANN. § 31-13a(b).

2. Claim Administration

None specified.

3. Statute of Limitations

None specified.

4. Remedies

None specified.

F. Interagency Information Sharing

No statutory information sharing requirement exists with respect to minimum wage or overtime violations specifically, but as described below and II.A.5, an information sharing regime exists for misclassification violations.

II. Employee Misclassification

A. Independent Contractor/Employee Classification

1. Normative Standards

To determine whether a worker is an employee or an independent contractor, Connecticut uses different tests depending on the context. For the purposes of wage claims, Connecticut uses

what it calls a three-factor "common law" test. CONN. GEN. STAT. ANN. § 31-222(a)(1)(B)(ii). The three factors are (1) the degree to which the employer has a right to control the details and means by which the worker performs the required labor; (2) the degree of financial control that the worker has over his or her work; and (3) whether the parties intended to form an employer/employee relationship. *Id.*; *Worker/Employee Misclassification FAQs*, Conn. Dept. of Labor, https://www.ctdol.state.ct.us/wgwkstnd/jec/JEC-FAQs.htm.

For unemployment compensation claim purposes, the relationship between worker and employer is assumed to be an employment relationship unless the employer can satisfy each of the three prongs of Connecticut's "ABC test." CONN. GEN. STAT. ANN. § 31-222(a)(1)(B)(ii). The first prong asks whether the worker performs his or her service free from control and direction both under contract and in fact. *Id*. The second prong asks whether the worker's service is outside the usual course of business for the employer. *Id.* The third prong asks whether the worker is engaged in an independently established trade of the same nature as the service being performed for the employer. *Id.*

2. Claim Administration

Employees may file civil suits or complaints with the Labor Commissioner to recover wages against employers that underpay them as a result of misclassification. CONN. GEN. STAT. ANN. § 31-68(a).

The Labor Commissioner acts as administrator for unemployment compensation. CONN. GEN. STAT. ANN. § 31-222(c). Employees may file claims with the Labor Commissioner to recover benefits owed to them. CONN. GEN. STAT. ANN. § 31-240; CONN. GEN. STAT. ANN. §

31-241(a). The Labor Commissioner is responsible for determining the validity of the claims and, if valid, the amount of benefits owed. CONN. GEN. STAT. ANN. § 31-241(a).

3. Statute of Limitations

The statute of limitations for unpaid wage claims as a result of misclassification is two years, the same as for other claims for unpaid wages. CONN. GEN. STAT. ANN. § 52-596.

4. Remedies

See section I.A.4. Unpaid wage claims arising from misclassification are also subject to double damages unless the employer can show a good faith belief that it was complying with the law. CONN. GEN. STAT. ANN. § 31-68(a)(1). An employer that misclassifies its employee is also subject to civil penalties of $300 per violation per day assessed by the Labor Commissioner. CONN. GEN. STAT. ANN. § 31-69a(a).

5. Interagency Information Sharing

The Labor Commissioner, the Commissioner of Revenue Services, the Insurance Commissioner, the Commissioner of Consumer Protection, the chairperson of the Workers' Compensation Commission, the Attorney General, and the Chief State's Attorney together comprise the Joint Enforcement Commission on Employee Misclassification. CONN. GEN. STAT. ANN. § 31-57h(a). The Joint Commission must meet at least four times per year and coordinate the civil prosecution of violations of state and federal laws as a result of employee misclassification. CONN. GEN. STAT. ANN. § 31-57h(b).

If the Labor Commissioner collects a fine or penalty as a result of a violation originally reported by a municipal official, the Commissioner must remit half of the amount collected to the municipality. CONN. GEN. STAT. ANN. § 31-76m.

B. Exempt/Non-Exempt Classification

1. Normative Standards

Connecticut exempts a variety of occupations from its overtime pay requirements; these largely follow those found in the FLSA. CONN. GEN. STAT. ANN. § 31-76i. They range from the exceptionally narrow (taxicab drivers, radio announcers, and mortgage loan originators) to the broadly applicable (executive, administrative, and professional employees). *Id.*

2. Claim Administration

See I.A.4. Employees who believe they have been improperly denied overtime as a result of misclassification can bring a lawsuit or file a complaint with the Labor Commissioner to recover unpaid overtime wages. CONN. GEN. STAT. ANN. § 31-68(a)(1).

3. Statute of Limitations

Same as minimum wage violations. *See* I.A.3 above.

4. Remedies

Same as minimum wage violations. *See* I.A.4 above.

5. Interagency Information Sharing

See supra at II.A.5.

III. Payroll Fraud on State Government by Government Contractors

A. Normative Standards

Connecticut has enacted a statute patterned after the federal False Claims Act, but it addresses only those who "knowingly present, or cause to be presented, a false or fraudulent

claim for payment or approval under a state-administered health or human services program." Conn. Gen. Stat. § 4-275(1). No state civil statute more broadly proscribes fraud by government contractors.

Connecticut's criminal code, however, addresses "defrauding [a] public community." CONN. GEN. STAT. ANN. § 53a-119(6). The offense is defined as "authoriz[ing], certif[ying], attest[ing] or fil[ing] a claim for benefits or reimbursement from a local, state or federal agency which he knows is false; or (B) knowingly accepts the benefits from a claim he knows is false; or (C) as an officer or agent of any public community, with intent to prejudice it, appropriates its property to the use of any person or draws any order upon its treasury or presents or aids in procuring to be allowed any fraudulent claim against such community." *Id.*

B. Claim Administration

Violations of CONN. GEN. STAT. ANN. § 53a-119 are prosecuted as are all other criminal offenses in the state.

C. Statute of Limitations

The Connecticut statute of limitations for class D felonies runs after five years. CONN. GEN. STAT. ANN. § 54-193(c).

D. Remedies

Defrauding a public community under CONN. GEN. STAT. ANN. § 53a-119(6) is defined as a felony, larceny in the first degree, and, when the amount is greater than $20,000, is punishable with from one to 20 years of imprisonment and up to $15,000 in fines.

IV. Certification of Prevailing Wage Compliance

A. Normative Standards

Connecticut law requires that each government contract for construction or repair of public works contain a prevailing wage compliance provision. CONN. GEN. STAT. ANN. § 31-53(a). Specifically, the wage rate must be equal to the customary/prevailing rate for the same work in the locality of the project. *Id.* Each contract must also contain a provision that no employee may work more than eight hours per day or forty hours per week on any of the contract work. CONN. GEN. STAT. ANN. § 31-57.

The Labor Commissioner must predetermine the prevailing wage rate wherever a public works contract will be completed. CONN. GEN. STAT. ANN. § 31-53(d). To do this, the Labor Commissioner may either hold a hearing in the area or adopt the applicable prevailing wage rate as determined by the U.S. Secretary of Labor under the Davis-Bacon Act. *Id.*

The contractor must submit a certified payroll every month to the contracting agency or the Department of Economic and Community Development. *Id.* This payroll certification must include complete records of the wages earned and hours worked by each employee and a schedule of each worker's occupation. *Id.* The certified payroll must also include a statement that the employer is aware that knowingly filing a false certified payroll is a class D felony. *Id*.

Every contractor or subcontractor performing a contract for the state must post the prevailing wages in prominent places either at the work site or the place where the employees are paid. CONN. GEN. STAT. ANN. § 31-55.

Each contractor must maintain records of the wages paid and hours worked of each employee on the project. CONN. GEN. STAT. ANN. § 31-53(f). A contractor must maintain the books and records related to the contract for at least three years after the final payment under the

contract. CONN. GEN. STAT. ANN. § 4e-30(a). The state contracting agency may audit these books and records to the extent that they relate to the performance of the contract. *Id.*

B. Claim Administration

If demands for compliance by the agent contracting on behalf of the state or its political subdivision are not satisfied within a week, the agent can institute a civil action to recover as liquidated damages for the violation of the contract an amount equal to the underpayment and the costs of suit, including reasonable attorney's fees, and is required by statute to notify the office of the state's attorney in the judicial district for the area in which such work was performed so that appropriate criminal action may be instituted against the alleged violator. CONN. GEN. STAT. ANN. § 31-52.

The Labor Commissioner may also submit complaints to the "proper prosecuting authorities" for prevailing wage violations. CONN. GEN. STAT. ANN. § 31-53(c).

Any contractor who is required to pay as a result of a subcontractor's failure to pay the prevailing wage to its employees may bring a civil action to recover the cost of the payment plus reasonable costs and attorneys' fees. CONN. GEN. STAT. ANN. § 31-53(g).

C. Statute of Limitations

Actions for payment of remuneration for employment payable periodically must be brought within two years after the right of action accrues, except that this limitation is tolled upon the filing with the Labor Commissioner. CONN. GEN. STAT. ANN. § 52-596.

D. Remedies

As noted above, the contracting agency has a civil cause of action for actual and liquidated damages based on violations of the prevailing wage act. *See supra* at IV.B.

In addition, any contractor who knowingly or willfully pays its employees below the prevailing rate faces fines between $2,500 and $5,000 for each offense. CONN. GEN. STAT. ANN. § 31-53(b).

After the first violation, the contractor is also disqualified from bidding on more government contracts until six months after it makes the last payment of back wages owed to its employees. *Id.* After additional violations, the contractor is disqualified from bidding on contracts until two years after it makes the last owed wage payment. *Id.* The contract of any contractor who fails to pay prevailing wages may be terminated by the Labor Commissioner, and that contractor can be debarred for a period of three years. CONN. GEN. STAT. ANN. §§ 31-53a(a)-(b).

As outlined above, knowingly filing a false certified payroll is a class D felony, punishable by fines of up to $5,000 and/or imprisonment up to five years. CONN. GEN. STAT. ANN. § 53a-157a(b). Failing to file a certified payroll is also a class D felony and carries the same potential punishments. CONN. GEN. STAT. ANN. § 31-53(f).

V. Labor Trafficking

A. Normative Standards

Connecticut's "trafficking in persons" statute makes it a class A felony in Connecticut for any person to compel another person by means of the use or threat of force, fraud, or coercion to provide labor that that person has a right to refrain from doing. CONN. GEN. STAT. ANN. § 53a-192a.

B. Claim Administration

Connecticut law permits victims of trafficking in persons to sue their traffickers. CONN. GEN. STAT. ANN. § 52-571i.

Additionally, the Labor Commissioner may request that the Attorney General file suit against any employer who employs workers who it knows are being coerced to work. CONN. GEN. STAT. ANN. § 31-51vv.

C. Statute of Limitations

The statute of limitations for trafficking in persons runs after five years. CONN. GEN. STAT. ANN. § 54-193(c).

D. Remedies

Trafficking in persons, a class A felony, is punishable by ten to twenty-five years in prison and/or fines of up to $20,000. CONN. GEN. STAT. ANN. § 53a-192a. Connecticut also maintains a civil forfeiture procedure to seize funds obtained by human trafficking. CONN. GEN. STAT. ANN. § 54-36p.

In a civil suit, traffickers are liable for either actual damages or statutory damages of up to $1,000 for each day that they were coerced to work. CONN. GEN. STAT. ANN. § 52-571i.

An employer sued by the attorney general for employing coerced workers is subject to fines of up to $10,000 for each violation. CONN. GEN. STAT. ANN. § 31-51v.

Illinois

I. Wage Theft

A. Minimum Wage Violations

1. Normative Standards

The minimum wage in Illinois for workers over eighteen years of age is currently set at $11.00 per hour. 820 ILL. COMP. STAT. 105/4(a)(1). The wage rate will adjust annually through 2025 (when it will reach $15 per hour). *Id.*

In those occupations where "gratuities have customarily and usually constituted and have been recognized as part of the remuneration," *id.* at 105/4(a)(3)(c), tips can help make up the minimum wage paid, up to 40% of the applicable wage rate. Any employer claiming that gratuities are a component of the minimum wage paid must "provide substantial evidence that the amount claimed . . . was received by the employee in the period for which the claim of exemption is made. . . ." *Id.*

It is a violation of the Illinois' Private Employment Agency Act for an employment agency to refer an individual for employment at a rate of less than the minimum wage, and if the employment agency knowingly does so, and the referral results in an individual actually receiving less than the minimum wage, the employment agency is jointly liable for the underpayment and statutory damages as described below. 225 ILL. COMP. STAT. 515/12.3.

2. Claim Administration

The Director of Labor, through the Illinois Department of Labor (DOL), has the right and responsibility to oversee all wage theft disputes, minimum wage claims included. In carrying out its enforcement responsibilities, the DOL has the power to issue subpoenas, call forth witnesses,

and administer oaths. 820 ILL. COMP. STAT. 115/11(a). The DOL further has the authority to take on assignments to represent employees financially incapable of representing themselves, individually or collectively, in actions for the collection of wages against employers. 820 ILL. COMP. STAT. 115/11(b). The DOL collects no compensation or fees for these assignments from the party they represent, except fees obtained from the employer in a successful proceeding after the employee has been fully compensated. *Id.* Finally, the DOL has the authority to adjudicate and reach final decisions on any claims filed with the DOL. 820 ILL. COMP. STAT. 115/11(d).

The DOL's authority to proceed on the employee's behalf, however, is not exclusive and does not impede the individual's private right of action. *See* 820 ILL. COMP. STAT. 115/11(a). Any employee aggrieved by a violation of the Wage Payment and Collection Act (WPCA) (which covers minimum wage claims, permissible deductions, pay periods and other wage and hour details) is authorized to file suit in circuit court in the county where the alleged violation occurred or where any employee who is party to the action resides, without regard to exhaustion of any alternative administrative remedies. *Id.* Class actions are expressly allowed. *Id.*

3. Statute of Limitations

Any claim that an employer has failed to pay the required minimum wage "shall be brought within 3 years from the date of the underpayment." 820 ILL. COMP. STAT. 105/12.

4. Remedies

If any employee is paid less than required by the WPCA, he or she may recover treble the amount of any underpayments, along with costs and such reasonable attorney's fees as may be allowed by the Court, as well as damages of five percent of the nominal value of the

underpayments for each month following the date of payment during which such underpayments remain outstanding. 820 ILL. COMP. STAT. 105/12(b).

There are administrative costs to be paid as well. Any employer found liable for a minimum wage violation (and any other form of wage theft), must pay an administrative fee to the DOL of:

> (a) $250 fee if unpaid wages are less than or equal to $3,000;
> (b) $500 fee if unpaid wages are between $3,001–$9,999; or
> (c) $1,000 fee if unpaid wages are $10,000 or greater.

820 ILL. COMP. STAT. 115/14(b).

There are criminal sanctions as well. Any employer that is able to pay wages due but willfully fails to do so or falsely denies the amount or validity of the employee's claim to the wages is guilty of:

> (1) for unpaid wages, final compensation or wage supplements in the amount of $5,000 or less, a Class B misdemeanor; or
> (2) for unpaid wages, final compensation or wage supplements in the amount of more than $5,000, a Class A misdemeanor.

820 ILL. COMP. STAT. ANN. 115/14. Each day during which any violation of the Act continues is considered a separate and distinct offense. *Id.* Subsequent offenses within a two-year period are treated as felonies. *Id.*

If an employment agency knowingly refers an individual for employment at a rate less than the minimum wage, the agency is jointly liable for the underpayment and statutory damages as described below, as well as jointly liable to pay to the DOL a $1,500 fine plus twenty percent of the difference between the employee's actual wage received and the minimum wage. 225 ILL. COMP. STAT. 525/12.3(a).

B. Overtime Violations

1. Normative Standards

With certain exceptions (for example, for individuals "impaired by age, or physical or mental incapacity," or receiving "remedial" education), all nonexempt employees are generally entitled to overtime pay for work in excess of forty hours in a workweek at a rate of at least 1.5 times their regular rate of pay. 820 ILL. COMP. STAT. 105/4a(1). Illinois law not only follows the general pattern of the FLSA in defining the overtime obligation and the scope of those exempted from the law's requirements, but it incorporates by reference the federal definitions and rules interpreting the latter's most often applied exemptions (the so-called white collar exemptions for those acting in an executive, administrative, or professional capacity). *Id.*

With certain exceptions delineated in the statute, no employer can require an employee to work for more than 10 hours in excess of 40 hours during any workweek. 820 ILL. COMP. STAT. 105/4a. Indeed, Illinois prescribes "eight hours of labor between the rising and the setting of the sun, in all mechanical trades, arts and employments, and other cases of labor and service [to] constitute and be a legal day's work." 820 ILL. COMP. STAT. 145/1. Notwithstanding this provision, it is not unlawful for the employee to work as many hours of overtime as he or she may agree to work. 820 ILL. COMP. STAT. 145/2. Illinois also requires employers to give each employee at least 24 hours of rest in every calendar week. 820 ILL. COMP. STAT. 140/2.

Certain public sector employers are permitted to provide compensatory time to employees working in excess of 40 hours in a work week instead of overtime pay. 820 ILL. COMP. STAT. 105/4a(4). Private sector employers do not have this option.

Illinois exempts many occupations from the overtime requirements of the Wage Payment and Collection Act. A non-exhaustive list of these exemptions includes: tractor trailer drivers,

employees of non-profit educational and child care institutions, automobile salespersons and mechanics, agricultural laborers, towing vessels operators in the Great Lakes and other waterways contained within or adjacent to Illinois, administrative officials, executives, legal professionals, and any other individuals exempt under the Federal Fair Labor Standards Act. 820 ILL. COMP. STAT. 105/4a.

Most employers have to obtain a permit to allow employees to voluntarily work seven days in a workweek. 56 ILL. ADM. CODE 220.200. An employer does not need to provide justification for the permits for the first 8 weeks of seven-day work. After the 8th week, an employer needs to justify the request. *Id.*

2. Claim Administration

Overtime claims are administered using the same DOL procedures as minimum wage claims discussed in section A above. The Director of DOL or his or her designee has full authority to assist in collection of wages. 820 ILL. COMP. STAT. 115/6-7. Although the WPCA does not explicitly so provide, Illinois courts have held that a private right of action exists for employees to secure unpaid wages directly in court. *See*, *e.g.*, *Miller v. Kiefer Specialty Flooring*, Inc., 317 Ill. App. 3d 370, 376, 739 N.E.2d 982, 988 (2000).

3. Statute of Limitations

Complaints must be filed within one year after the wages, final compensation, or wage supplements were due. 820 ILL. COMP. STAT. 115/11.

4. Remedies

Any employee who is not paid his or her overtime as earned is entitled to recover through the DOL's administrative procedure or in a civil action the amount of the employer's

underpayments as well as damages of five percent of the amount of any such underpayments for each month following the date of payment during which such underpayments remain unpaid. If the recovery occurs in court, the employee is also entitled to recover costs and all reasonable attorney's fees. 820 ILL. COMP. STAT. 115/14(a). That section also provides for administrative fees owed by the underpaying employer.

Section 115/14a also provides for criminal sanctions. First offenses are treated as misdemeanors, with a schedule of penalties depending on the amount involved, but second offenses occurring within two years of a prior conviction under section 115/14a constitutes a felony.

C. Off-the-clock Violations

1. Normative Standards

Illinois law does not separately address "off-the-clock" violations; it requires that employees receive pay (and overtime pay, as required) for all hours worked. For these purposes, Illinois adopts the federal law on what that means: '"Hours worked" means all the time an employee is required to be on duty, or on the employer's premises, or at other prescribed places of work, and any additional time he or she is required or permitted to work for the employer." 56 ILL. ADMIN. CODE § 210.110 (expressly adopting certain federal regulations on work time).

2. Claim Administration

Claims administration follows the same procedures as overtime violations, as outlined in section I.B.2 above.

3. Statute of Limitations

Complaints must be filed within one year after the wages, final compensation, or wage supplements were due. 820 ILL. COMP. STAT. 115/11.

4. Remedies

Overtime remedies are the same outlined above in section I.B.4 above.

D. Illegal Deductions

1. Normative Standards

Under the WPCA, no deduction from pay is permissible unless the deduction is:

> (i) required by law;
> (ii) to the benefit of the employee;
> (iii) in response to a valid wage assignment or wage deduction order;
> (iv) made with the express written consent of the employee, given freely at the time the deduction is made; or
> (v) to pay a debt owed to certain specified governmental bodies.

820 ILL. COMP. STAT. 115/9. An employer cannot withhold or deduct a sum from wages pending the return of uniforms, tools, pagers, or any other employer owned equipment. 56 ILL. ADM. CODE § 300.830.

Except for those deductions required by law, any deductions from final pay on termination of employment are limited to those evidenced by the written and express consent of the employee or according to a consensual repayment schedule, and may not exceed fifteen percent of the employee's final paycheck, or twenty-five percent if the party placing the lien is a public body given express authority under statute. 56 ILL. ADMIN. CODE § 300.760-800.

As with minimum wage violations, employment agencies can be accountable for the actions of the employers with whom they contract. "It is a violation . . . for an employment agency to facilitate illegal deductions from wages or nonpayment of wages by an employer[.]

An employment agency that facilitates illegal deduction of wages or nonpayment of wages is jointly liable for statutory damages." 225 ILL. COMP. STAT. 515/12.3(b).

2. Claim Administration

Claims for impermissible deductions arise under the WPCA and the procedures discussed above at section I.A.2 apply. In any proceeding regarding an allegedly improper deduction, the employer bears the burden of establishing the applicability of any claimed exception. 56 ILL. ADMIN. CODE § 300.710.

3. Statute of Limitations

Complaints regarding impermissible deductions must be filed within one year. 820 ILL. COMP. STAT. 115/11.

4. Remedies

Claims for impermissible deductions arise under the WPCA and the civil remedies discussed above at section I.A.4 apply.

E. Paystub Provisions

1. Normative Standards

Employers are required to notify employees, at the time of hiring, of their payday and the rate at which they will be paid. 820 ILL. COMP. STAT. 115/10. "Whenever possible," that notification is supposed to be in writing and "acknowledged" by both parties. *Id*. In addition, the employer must provide a wage statement or pay stub every payday that includes the employee's hours worked, rate of pay, overtime hours and pay, gross wages, an itemized statement of any deductions each pay period. *Id.*; 56 ILL. ADMIN. CODE § 300.600(a), 630(c).

2. Claim Administration, Statute of Limitations, and Remedies

Because the requirement to provide a detailed pay stub is part of the WPCA, the procedures, limitations period, and remedies discussed above in sections I.A.2-4 apply.

F. Interagency Information Sharing

No provision in the Illinois code requires (or addresses) information sharing among agencies on wage and hour matters generally, *but see* discussion at II.A.5 below regarding information sharing on misclassification issues.

II. Employee Misclassification

A. Independent Contractor/Employee Classification

1. Normative Standards

Illinois has no statute of general application regarding independent contractor misclassification issues, but the Employee Classification Act was a direct industry-specific response to the issue of employees being misclassified as independent contractors in the construction industry. 820 ILL. COMP. STAT. 185/3 *et seq*. The act provides that "an individual performing services for a contractor is deemed to be an employee of the employer" unless the individual is someone who:

> (1) is and will continue to be free from control or direction over his or her performance of the service, both as stated under contract and in fact;
> (2) provides a service outside of the typical services provided by the employer or primary contractor;
> (3) is independently engaged in an established trade, occupation, business, or industry; or
> (4) is a legitimate sole proprietor or partnership under Illinois law.

820 ILL. COMP. STAT. 185/10(b). The statute provides a separate test for determining whether a "sole proprietor or partnership performing services for a contractor as a subcontractor is deemed legitimate . . . ." 820 ILL. COMP. STAT. 185/10(c). That test has twelve factors:

> (1) the sole proprietor or partnership is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the contractor for whom the service is provided to specify the desired result;
> (2) the sole proprietor or partnership is not subject to cancellation or destruction upon severance of the relationship with the contractor;
> (3) the sole proprietor or partnership has a substantial investment of capital in the sole proprietorship or partnership beyond ordinary tools and equipment and a personal vehicle;
> (4) the sole proprietor or partnership owns the capital goods and gains the profits and bears the losses of the sole proprietorship or partnership;
> (5) the sole proprietor or partnership makes its services available to the general public or the business community on a continuing basis;
> (6) the sole proprietor or partnership includes services rendered on a Federal Income Tax Schedule as an independent business or profession;
> (7) the sole proprietor or partnership performs services for the contractor under the sole proprietorship's or partnership's name;
> (8) when the services being provided require a license or permit, the sole proprietor or partnership obtains and pays for the license or permit in the sole proprietorship's or partnership's name;
> (9) the sole proprietor or partnership furnishes the tools and equipment necessary to provide the service;
> (10) if necessary, the sole proprietor or partnership hires its own employees without contractor approval, pays the employees without reimbursement from the contractor and reports the employees' income to the Internal Revenue Service;
> (11) the contractor does not represent the sole proprietorship or partnership as an employee of the contractor to its customers; and
> (12) the sole proprietor or partnership has the right to perform similar services for others on whatever basis and whenever it chooses.

Id.

2. Claim Administration

Outside the construction context, a failure to properly classify an individual as an employee would result in wages unpaid, which could be pursued under the WPCA as outlined above in sections I.A.2-4 or the overtime procedures outlined in I.B.2-4, depending on the consequences of the misclassification.

Any "interested party" can file a complaint under the Employee Classification Act with the Department of Labor against an entity or employer covered under this Act if there is a "reasonable belief that the entity or employer is in violation of this Act." Once such a complaint is filed, DOL has a duty to investigate. 820 ILL. COMP. STAT. 185/25. If the investigation leads DOL to believe that the act has been violated, the "Department may: (i) issue and cause to be served on any party an order to cease and desist from further violation of the Act, (ii) take affirmative or other action as deemed reasonable to eliminate the effect of the violation, (iii) collect the amount of any wages, salary, employment benefits, or other compensation denied or lost to the individual, and (iv) assess any civil penalty allowed by this Act." *Id.*

The statute also provides a private right of action. Any interested party or person aggrieved can file suit in circuit court without exhausting the administrative remedies provided by the Act. Actions may be brought individually or on behalf of all persons similarly situated. 820 ILL. COMP. STAT. 185/60.

3. Statute of Limitations

Cases outside of the construction industry (and therefore outside the purview of the Classification Act) would have the limitations period from the WPCA, as discussed *supra* in section I.A.3 or the one-year limitations period found at 820 ILL. COMP. STAT. 115/11, depending on the nature of the violation. The statute of limitations under the Classification Act is 3 years from the final date of performing services to the employer or entity. This limitations period is tolled if an employer or entity has deterred a person's exercise of rights under this Act. 820 ILL. COMP. STAT. 185/60.

4. Remedies

Cases outside of the construction industry (and therefore outside the purview of the Classification Act) would have the remedies available in the WPCA, as discussed *supra* in section I.A.3 or those discussed in I.B.3 for overtime violations, depending on the nature of the violation.

Under the Classification Act, an employer is in violation of the Employee Classification Act for each day it has failed to properly designate a laborer as an employee. A person whose rights have been violated under this Act by an employer or entity is entitled to collect:

> (1) the amount of any wages, salary, employment benefits, or other compensation denied or lost to the person by reason of the violation, plus an equal amount in liquidated damages;
> (2) compensatory damages and an amount up to $500 for each violation of this Act or any rule adopted under this Act;
> (3) in the case of unlawful retaliation, all legal or equitable relief as may be appropriate; and
> (4) attorney's fees and costs.

In Classification Act matters pursued by the DOL, the employer is subject to a civil penalty not to exceed $1,000 for each violation found in the first audit by the Department. Following a first audit, an employer or entity will be subject to a civil penalty not to exceed $2,000 for each repeat violation found by the Department within a five-year period. For purposes of the Act, each violation for each person and for each day the violation continues constitutes a separate and distinct violation. In determining the amount of a penalty, the Director is obligated to consider the appropriateness of the penalty to the employer or entity charged considering the gravity of the violations.

Once the penalty is collected, the Department distributes to all affected employees ten percent of the civil penalty recovered, whether as a result of any administrative proceeding or civil action brought by the Department. The remaining ninety percent of the amount recovered is

submitted to the Director of Labor. Even when the case proceeds as a private right of action, the circuit court awards the interested party ten percent of the amount recovered and the rest goes to the Director of Labor. 820 ILL. COMP. STAT. 185/40. If the violation is willful, the employer is liable for punitive damages in an amount equal to the foregoing penalties. 820 ILL. COMP. STAT. 185/45.

Finally, when an employer is found guilty of a second (or subsequent) Classification Act violation within five years of an earlier violation, the employer's name goes on a DOL debarment list, and the employer is precluded from obtaining any state contract until four years have elapsed from the date of the last violation. 820 ILL. COMP. STAT. 185/42. There are additional criminal penalties associated with willful misconduct. *See*, *e.g.*, 820 ILL. COMP. STAT. 185/45.

5. Information Sharing

Although not contained in (or referencing) the Illinois statutes directly relevant to wages or wage theft, the Illinois Worker Compensation Act provides that the "Department of Labor, the Department of Employment Security, the Department of Revenue, the Office of the State Comptroller, and the Illinois Workers' Compensation Commission shall cooperate under the Employee Classification Act by sharing information concerning any suspected misclassification by an employer or entity, as defined in the Employee Classification Act, of one or more employees as independent contractors." 820 ILL. COMP. STAT. 305/26.1.

B. Exempt/Non-Exempt Classification

1. Normative Standards

As noted above at I.B.1, Illinois generally follows the exempt/nonexempt classifications found in the federal FLSA. Illinois law does provide exemptions beyond those found in federal law (vehicle, trailer, boat, and aircraft salespersons and mechanics, employees who exchange hours through a workplace exchange agreement, educational or residential childcare employees, certain agricultural labor, and towing vessel crewmen). 820 ILL. COMP. STAT. 105/4a(2).

In addition to specific occupations, certain institutions are not covered by Illinois wage law. Among those not covered are "corporations, community chest, fund, or foundations, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals [where] no part of the net earnings . . . benefit of any private shareholder or individual, [does not substantially engage in] propaganda or otherwise attempting to influence legislation." 820 ILL. COMP. STAT. 405/221.

2. Claim Administration

Overtime claims based on misclassification of employees are litigated under the procedures discussed above in section I.B.2, and the Employment Compensation Act, discussed above at II.A.

3. Statute of Limitations

Overtime claims based on misclassification of employees are litigated under, and have the limitations provided by, the procedures discussed above in section I.B.2, and the Employment Compensation Act, discussed above at II.A.

4. Remedies

Overtime claims based on misclassification of employees are litigated under the procedures, and provide the remedies in, the Wage Payment Act, discussed above in section I.B.2, and the Employment Compensation Act, discussed above at II.A.

III. Payroll Fraud on State Government by Government Contractors

A. Normative Standards

The Illinois Whistleblower Reward and Protection Act ("IWRPA") provides that any person who:

> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
> (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
> (D) has possession, custody, or control of property or money used, or to be used, by the State and knowingly delivers, or causes to be delivered, less than all the money or property;
> (E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the State and, intending to defraud the State, makes or delivers the receipt without completely knowing that the information on the receipt is true;
> (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the State, or a member of the Guard, who lawfully may not sell or pledge property; or
> (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the State, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the State,

is liable to the state for a civil penalty of not less than the minimum amount and not more than the maximum amount allowed for a civil penalty for a violation of the federal False Claims Act, plus three times the amount of damages that the state sustains because of the act of that person. 740 ILL. COMP. STAT. 175/3. The person found liable is also responsible for the costs and fees

incurred in the enforcement action. *See* ILL. COMP. STAT. ANN. § 175.740; ILL. COMP. STAT. § 175. No proof of specific intent to defraud is required. *Id.*

Unfair methods of competition or deceptive practices, including fraud, are unlawful. 815 ILL. COMP. STAT. 505/2.

B. Claim Administration

Actions under the Act are akin to those brought under the federal False Claims Act. An action under the IWRPA can be brought under seal by a private citizen in the name of the state. 740 ILL. COMP. STAT. 175/4. The state's attorney general then has 60 days to consider whether to intervene in the action; if he or she does, the government runs the litigation with the individual plaintiff as a party as well. If not, the action proceeds as a private action in the name of the state. *Id.* Actions may also be filed as an initial matter by the attorney general on the state's behalf.

C. Statute of Limitations

A civil action for a false claim may not be brought:

> (1) more than 6 years after the date on which the violation of Section 3 is committed, or
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the State charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last. 740 ILL. COMP. STAT. 175/5.

D. Remedies

The recovery of an individual bringing a false claim action ranges from 15-30% of the amount recovered, depending on the individual's role in bringing the misconduct to light and whether the government intervenes. 740 ILL. COMP. STAT. 175/4(d)(1). The defendant is also liable to the State for a civil penalty of not less than $5,500 and not more than $11,000 plus three

times the amount of damages which the State sustains because of the act of the defendant. *Id.* Penalties may be reduced if the person cooperates with the fraud investigation. *See* 740 ILL. COMP. STAT. § 175.

IV. Certification by Government Contractors of Prevailing Wage Compliance

A. Normative Standards

In the Prevailing Wage Act, 820 ILL. COMP. STAT. 130.0.01 *et seq.* (PWA), Illinois requires contractors and subcontractors working on public construction and demolition projects to pay "[n]ot less than the general prevailing rate of hourly wages for work of a similar character on public works in the locality in which the work is performed . . . ." 820 ILL. COMP. STAT. 130/3. Each contractor and subcontractor must individually maintain records, for the purpose of addressing inconsistencies in the case of an audit, of at least the worker's:

> (i) name,
> (ii) address,
> (iii) telephone number,
> (iv) the last 4 digits of the worker's social security number,
> (v) gender,
> (vi) race,
> (vii) ethnicity,
> (viii) veteran status; and unless the worker qualifies for a minority of cases involving jointly maintaining a fringe benefit fund with other employers/organizations:
> (ix) classification/profession (ex–carpenter),
> (x) gross and net wages paid in each pay period,
> (xi) number of hours worked each day,
> (xii) starting and ending times of work each day,
> (xiii) hourly wage rate,
> (xiv) hourly overtime wage rate,
> (xv) hourly fringe benefit rates,
> (xvi) the name and address of each fringe benefit fund,
> (xvii) the plan sponsor of each fringe benefit, if applicable, and
> (xviii) the plan administrator of each fringe benefit, if applicable.

Id.

Payroll certification is expressly required. 820 ILL. COMP. STAT. 130/5. No later than the fifteenth day of each calendar month, each contractor and subcontractor on a covered project has to file a certified payroll for the immediately preceding month with the public body in charge of the project (or upload it to the DOL database created for that purpose). The certified payroll information must be accompanied by a signed acknowledgement certifying that the records are accurate, that the wage paid to the worker meets the minimum requirements of the prevailing wage, and that the individual signing the certification understands that submitting false or misleading information is a Class A misdemeanor. 820 ILL. COMP. STAT. 130/5. Contractors and subcontractors are required to retaining payroll certification information for five years. 820 ILL. COMP. STAT. 130/11.

B. Claim Administration

The PWA can be enforced either by DOL or by private right of action. 820 ILL. COMP. STAT. 130/11. The Department has a right of action on behalf of any individual who has a right of action under the Act. *Id.* An action brought by DOL is deemed to be a suit for wages, and any entered in such a case has the same force and effect as other judgments for wages. At the request of any laborer, workman or mechanic employed by the contractor or by any subcontractor under him who is paid less than the prevailing wage rate required by this Act, the Department of Labor may take an assignment of such wage claim in trust for the assigning laborer, workman or mechanic and may bring any legal action necessary to collect such claim, and the contractor or subcontractor is required to pay the costs incurred in collecting such claim. 820 ILL. COMP. STAT. 130/11.

"Any laborer, worker or mechanic employed by the contractor or by any sub-contractor" who is paid less than the prevailing wage has a private right of action for the difference between the amount paid and the amount due and reasonable attorney's fees. 820 ILL. COMP. STAT. 130/11.

C. Statute of Limitations

An action must be brought within five years from the date of the failure to pay the prevailing wage rate.

D. Remedies

Restitution of underpaid wages is the basic remedy under the Act, but even where the case proceeds as a private cause of action by underpaid employees, the contractor or subcontractor remains liable to DOL for twenty percent of such underpayments, as well as being liable to the laborer, worker or mechanic for punitive damages in the amount of two percent of the amount of the amount paid to the state for each month following the date of payment during which such underpayments remain unpaid, in addition to underpayments. 820 ILL. COMP. STAT. 130/11. Where a second or subsequent violation occurs involving the same contractor or subcontractor, the penalty in favor of DOL escalates to fifty percent of the underpayments payable, and the defendant is also liable for five percent of the amount of any such penalty to the State for underpayments for each month following the date of payment during which the underpayments remain unpaid. *Id.*

A contractor that violates either the payroll certification requirement or that fails to pay the prevailing wage is subject to an automatic and immediate debarment, prohibiting the violator from participating in any public works project for 4 years, with no right to a hearing. 820 ILL. COMP. STAT. 130/11a.

V. Labor Trafficking

A. Normative Standards

No Illinois statute addresses labor brokers specifically, and the code addresses labor trafficking only as a feature of its prohibition of human trafficking and involuntary servitude. The Illinois Trafficking Victims Protection Act (IWTPA) provides that it is a felony to knowingly: (1) recruit, entice, harbor, transport, provide, or obtain by any means, or attempts to recruit, entice, harbor, transport, provide, or obtain by any means, another person, intending or knowing that the person will be subjected to involuntary servitude; or (2) benefit, financially or by receiving anything of value, from participation in a venture that has engaged in an act of involuntary servitude or involuntary sexual servitude of a minor. A company commits trafficking in persons when the company knowingly benefits, financially or by receiving anything of value, from participation in a venture that has engaged in an act of involuntary servitude or involuntary sexual servitude of a minor. 720 ILL. COMP. STAT. 5/10-9.

B. Claim Administration

The IWTPA's criminal provisions are enforced through prosecution by the state. The act also creates a civil cause of action. 740 ILL. COMP. STAT. 128/15. A victim of the sex trade, involuntary servitude, or human trafficking can bring an action in civil court by him or herself or through a legal guardian, agent, court appointee, or, with the express written consent of the victim, organization that represents the interests of or serves victims may bring a cause of action on behalf of a victim. The proper defendant in such a case would be, *inter alia*, any person or entity who: recruits, profits from, or maintains the victim in any sex trade act; intentionally abuses or causes bodily harm to a victim of the sex trade; or knowingly advertises or publishes advertisements for purposes of recruitment into sex trade activity. 740 ILL. COMP. STAT. 128/15.

C. Statute of Limitations

The statute of limitations under the IWPTA is ten years from the time the victim is initially trafficked or from the time they are freed from their trafficker, whichever is later. If the victim is a minor at the time of trafficking, the ten-year statute of limitations period does not begin until the victim has reached the age of 18.

D. Remedies

The IWTPA does not itself specify any civil remedies.

Maryland

I. Wage Theft

A. Minimum Wage Violations

1. Normative Standards

Under the Maryland Wage and Hour Law (MWHL), a Maryland employee is currently entitled to a $11.75 minimum wage. MD. CODE ANN., LAB. & EMPL. § 3-413(c)(1)(iv). That minimum wage will steadily increase through 2025. *Id*. If the employee is under the age of 18, he or she is only entitled to 85% of the minimum wage. MD. CODE ANN., LAB. & EMPL. § 3-413(d). The MWHL also prohibits retaliatory actions by employers, MD. CODE ANN., LAB. & EMPL. § 3-428(b)(2)(iv), and groundless or malicious complaints by employees. MD. CODE ANN., LAB. & EMPL. § 3-428(c)(1).

2. Claim Administration

Under the MWHL, an employee may bring a private cause of action. An aggrieved individual can also file a complaint in the circuit court. MD. CODE ANN., LAB. & EMPL. § 3-426. On the written request of an employee, the Commissioner may: "(1) take an assignment of the claim in trust for the employee; (2) ask the Attorney General to bring an action in accordance with this section on behalf of the employee; and (3) consolidate 2 or more claims against an employer." MD. CODE ANN., LAB. & EMPL. § 3-427(b).

The Commissioner also has enforcement powers. To begin an investigation, the Commissioner must try to negotiate with the employer to obtain evidence that is needed to determine whether a violation exists. MD. CODE ANN., LAB. & EMPL. § 3-408(b)(1). If the Commission cannot obtain evidence through negotiation, the Commissioner may issue a

subpoena. MD. CODE ANN., LAB. & EMPL. § 3-408(b)(2). The Commissioner (or the Commissioner's designee) may enter a place of employment to inspect wage records and question employees about the employer's compliance with labor laws. MD. CODE ANN., LAB. & EMPL. § 3-425(a).

Lastly, an employee may seek a lien for unpaid wages. MD. CODE ANN., LAB. & EMPL. § 3-1102. An employer may file a complaint to dispute a lien for unpaid wages and may request an evidentiary hearing. MD. CODE ANN., LAB. & EMPL. § 3-1103(a), (c). A lien for unpaid wages is established after a circuit court issues an order or after the employer does not dispute the complaint within 30 days after a notice is served. MD. CODE ANN., LAB. & EMPL. § 3-1104.

3. Statute of Limitations

The MWHL does not specify a period of limitations. Maryland's residual limitations period is three years from the date the cause of action accrues. MD. CODE ANN., CTS. & JUD. PROC. § 5-101.

4. Remedies

An employee pursuing an MWHL claim may recover "(1) the difference between the wage paid to the employee and the wage required under this subtitle; (2) an additional amount equal to the difference between the wage paid to the employee and the wage required under this subtitle as liquidated damages; and (3) counsel fees and other costs." MD. CODE ANN., LAB. & EMPL. § 3-427. The court can refuse to allow recovery of liquidated damages, or reduce them, if the "employer shows to the satisfaction of the court that the employer acted in good faith and reasonably believed that the wages paid to the employee were not less than the wage required." Md. Code Ann., Lab. & Empl. § 3-427.

B. Overtime Violations

1. Normative Standards

For overtime under the MWHL, an employer shall pay an overtime wage of at least 1.5 times the usual hourly wage. MD. CODE ANN., LAB. & EMPL. § 3-415(a). With some exceptions, overtime is each hour over 40 hours in a week. MD. CODE ANN., LAB. & EMPL. § 3-420; *see also* MD. CODE REGS. 09.12.41.14; *compare* MD. CODE ANN., LAB. & EMPL. § 3-401 (specifying special overtime standards for identified industries, such as agricultural work, bowling alleys, and the "music or theater craft or trade").

Maryland regulations specify that "hours of work" means the time during a workweek that an individual employed by an employer is required by the employer to be on the employer's premises, on duty, or at a prescribed workplace. MD. CODE REGS. 09.12.41.10. Meal periods are included in computing hours of work if the individual is required to perform any duties during the meal period. *Id.* Travel time is included in computing hours of work if the individual:

(1) Travels during regular work hours;
(2) Travels from one worksite to another; or
(3) Is called out after work hours in emergency situations.

Id. For example, the time construction workers were required to ride a shuttle bus to and from the construction site was not compensable under the MWHL. *Amaya v. DGS Constr., LLC*, 246 A.3d 616 (Md. 2021), *cert. granted* 2021 WL 2943961 (2021) (No. 58, Sept. Term). Also, by

regulation, Maryland requires that all hours worked by an employee be included, even though the employee may perform work in two or more unrelated jobs. MD. CODE REGS. 09.12.41.14.

2. Claim Administration

See I.A.2.

3. Statute of Limitations

See I.A.3.

4. Remedies

See I.A.4.

C. Off-the-clock Violations

1. Normative Standards

The MWHL defines "wage" to include "all compensation that is due to an employee for employment." MD. CODE ANN., LAB. & EMPL. § 3-401(d). The definition of "hours work" set out above applies to off-the-clock claims as well. An employer thus may not ask an employee to perform work unless the time spent is included in the "hours worked" calculation both for base pay and overtime pay.

2. Claim Administration

See I.A.2.

3. Statute of Limitations

See I.A.3.

4. Remedies

See I.A.4.

D. Illegal Deductions

1. Normative Standards

As set out in the Maryland Wage Payment and Collection Law (WPCL), the only permissible deductions an employer may make from pay are those:

> (1) ordered by a court of competent jurisdiction;
> (2) authorized expressly in writing by the employee;
> (3) allowed by the Commissioner because the employee has received full consideration for the deduction; or
> (4) otherwise made in accordance with any law or any rule or regulation issued by a governmental unit.

MD. CODE ANN., LAB. & EMPL. § 3-503.

2. Claim Administration

The WPCL can be enforced either through an administrative process, MD. CODE ANN., LAB. & EMPL. § 3-507.1, or through a private cause of action. For a complaint of unpaid wages not exceeding $5,000, the Commissioner shall "send a copy of the complaint to the employer alleged to have failed to pay wages" and "require a written response to the complaint within 15 days." *Id.* The Commissioner may investigate the claim and either issue an order to pay wages or dismiss the claim. *Id.* If the employer does not request an administrative hearing within 30 days after an order, the order to pay wages becomes the final order of the Commissioner, which can then be enforced in the relevant district court. *Id.*

Alternatively, if the Commissioner determines that an employer failed to pay wages as required, he or she can enforce the WPCL through MD. CODE ANN., LAB. & EMPL. § 3-507(a). That section gives the Commissioner authorization to attempt to solve the issue through informal mediation; ask the Attorney General to bring an action on behalf of the employee; or may bring an action on behalf of an employee in the county court.

A failure to pay wages may also be enforced through a private cause of action. Two weeks after an employer is required to pay wages, an employee may bring an action under Md. Code Ann., Lab. & Empl. § 3-507.2 to recover the unpaid wages.

Finally, the WPCL provides that "a general contractor on a project for construction services is jointly and severally liable for a violation … that is committed by a subcontractor, regardless of whether the subcontractor is in a direct contractual relationship with the general contractor." MD. CODE ANN., LAB. & EMPL. § 3-507.2(c)(2).

3. Statute of Limitations

See I.A.3.

4. Remedies

If an employer violates the WPCL, a "court may award the employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs." MD. CODE ANN., LAB. & EMPL. § 3-507.2(b).

E. Paystub Provisions

1. Normative Standards

Under the WPCL, an employer must set regular pay periods, and must pay each employee at least once every 2 weeks or twice in each month unless the employee is an administrative, executive, or professional employee. MD. CODE ANN., LAB. & EMPL. § 3-502. Additionally, an employer must pay each terminating employee all of the wages he or she is due for work performed *before* the termination on or before the day on which the employee would have been paid the wages had the employment not been terminated. MD. CODE ANN., LAB. & EMPL. § 3-505.

The MWHL requires employers to provide employees certain specified information when they are hired: the rate at which the employee will be paid, the "regular payday" established by the employer, and the "leave benefits" to which the employee will be entitled. *See* MD. CODE ANN., LAB. & EMPL. § 3-504(a)(1)(i)-(iii). For each pay period thereafter, the Act requires that the employer provide the employee with a statement that includes the gross earnings of the employee for the pay period and specifies any deductions made from those gross earnings. The employer is also required by the Act to provide notice of any change in the employee's wages or in the employer's regular payday. *Id.* at § 3-504(a)(2)-(3). Increases in pay, however, can be granted without prior notice. *Id.*

2. Claim Administration

See I.D.2 for claim administration under the WPCL. *See* I.A.2 for claim administration under the MWHL.

3. Statute of Limitations

See I.A.3.

4. Remedies

See I.D.4.

F. Interagency Information Sharing

Maryland has no statutory provisions requiring or providing for interagency information sharing in the wage theft context. However, interagency information sharing provisions in the Workplace Fraud Act are discussed below.

II. Employee Misclassification

A. Independent Contractor/Employee Classification

1. Normative Standards

The Workplace Fraud Act (WFA) prohibits employers from treating employees as if they were independent contractors if they work in two specific industries—construction services and landscaping services, MD. CODE ANN., LAB. & EMPL. § 3-902, and creates a presumption that individuals performing work in those fields are, in fact, employees and not independent contractors. MD. CODE ANN., LAB. & EMPL. § 3-903(c)(1). Knowingly treating employees in these fields as independent contractors is classified as "workplace fraud." MD. CODE ANN., LAB. & EMPL. § 3-904.

To overcome the statutory presumption and demonstrate that an individual is, in fact, an independent contractor and not an employee, the employer must show that:

(1) the individual "is free from control and direction" over the performance of the work, "both in fact and under the contract";
(2) the individual "customarily is engaged in an independent business or occupation of the same nature as that involved in the work"; and
(3) the work is:
> (a) outside of the usual course of business of the person for whom the work is performed; or
> (b) performed outside of any place of business of the person for whom the work is performed.

MD. CODE ANN., LAB. & EMPL. § 3-903(c)(1)(ii).

As to whether the work is "outside the usual course" of the employer's business, the statute considers whether:

> (i) the individual performs the work off the employer's premises;
> (ii) the individual performs work that is not integrated into the employer's operation; or
> (iii) the work performed is unrelated to the employer's business's last of these factors—work performed "outside the place of business.

MD. CODE ANN., LAB. & EMPL. § 3-903(c)(2).

The presumption created by § 3-903 can also be overcome if the employer both notifies each individual classified as an independent contractor to that effect and produces specific documents for inspection by the Commissioner. MD. CODE ANN., LAB. & EMPL. § 3-903.1. The documents include: a written contract that (a) describes the nature of the work to be performed by the business entity; (b) describes the remuneration to be paid for the work performed by the business entity; and (c) includes an acknowledgment by the business entity of the business entity's obligations under the WFA to withhold, report, and remit payroll taxes on behalf of all employees working for the business entity, to pay unemployment insurance taxes for all employees working for the business entity; and requires the business entity to maintain workers' compensation insurance. MD. CODE ANN. LAB. & EMPL. § 3-903.1(1).

Evidence that a misclassification was not willful includes evidence that the employer, before any complaint was made:

> (i) sought and obtained evidence that the individual:
> 1. is an exempt person; or
> 2. as an independent contractor:
> A. withholds, reports, and remits payroll taxes on behalf of all individuals working for the independent contractor;
> B. pays unemployment insurance taxes for all individuals working for the independent contractor; and
> C. maintains workers' compensation insurance; and
> (ii) provided to the exempt person or independent contractor a written notice as required by § 3-914 of this subtitle; or
> (2) the employer:
> 1. classifies all workers who perform the same or substantially the same tasks for the employer as independent contractors; and
> 2. reports the income of the workers to the Internal Revenue Service as required by federal law; and
> (ii) has received a determination from the Internal Revenue Service that the individual or a worker who performs the same or substantially the same task as the individual is an independent contractor.

MD. CODE ANN., LAB. & EMPL. § 3-904(c). Both the WFA and regulations thereunder require that an employer keep records for each independent contractor and exempt person hired. MD. CODE ANN., LAB. & EMPL. § 3-914; *see also* MD. CODE REGS. 09.12.40.03.

2. Claim Administration

The Commissioner may issue a citation after an investigation. MD. CODE ANN., LAB. & EMPL. § 3-906(a). An employer may request an administrative hearing after receiving a citation. MD. CODE ANN., LAB. & EMPL. § 3-906(d). Any party aggrieved by a final order may seek judicial review and appeal. MD. CODE ANN., LAB. & EMPL. § 3-906(j).

If a final order of an administrative unit or of a court has not previously been issued, an individual may bring a civil action against the employer. MD. CODE ANN., LAB. & EMPL. § 3-911(a).

3. Statute of Limitations

Under the WFA, an action "shall be filed within three years after the date the cause of action accrues." MD. CODE ANN., LAB. & EMPL. § 3-911(b).

4. Remedies

The Commissioner may issue a citation with a civil penalty. MD. CODE ANN., LAB. & EMPL. § 3-906(b)(3). Aggrieved parties can seek judicial review. *Id.* at § 3-906(j).

An employer that comes into timely compliance with all applicable labor laws *may* not be assessed a civil penalty (although the phrase "timely compliance" is undefined). MD. CODE ANN., LAB. & EMPL. § 3-908(a). However, an employer that does not come into timely compliance "shall be assessed a civil penalty of up to $1,000 for each employee for whom the employer is not in compliance." MD. CODE ANN., LAB. & EMPL. § 3-908(b)(1).

An employer that has knowingly misclassified workers can be assessed a civil penalty of up to $5,000 for each misclassified employee. MD. CODE ANN., LAB. & EMPL. § 3-909(a). In determining the civil penalty, the Commissioner shall consider "(1) the gravity of the violation, (2) the size of the employer's business, (3) the employer's good faith, (4) the employer's history of violations . . ." and (5) whether the employer "deprived the employee of any rights" or "has made restitution and come into compliance" with labor laws "with respect to the employee." MD. CODE ANN., LAB. & EMPL. § 3-909(b).

In a civil action against an employer, the court may award each individual the damages owed as well as "an additional amount up to three times the amount of any such damages, if the employer knowingly failed to properly classify the individual." MD. CODE ANN., LAB. & EMPL. § 3-911. The court can also award counsel fees and costs. *Id*.

B. Exempt/Non-Exempt Classification

1. Normative Standards

Following the pattern established by the federal Fair Labor Standards Act (FLSA), the MWHL exempts employees in a number of occupations, including those working in an administrative, executive, or professional capacity. MD. CODE ANN., LAB. & EMPL. § 3-403(1). For all three of these classifications, the state Commissioner of Labor and Industry (Commissioner) applies the federal definitions. *See* MD. CODE REGS. 09.12.41.01; MD. CODE REGS 09.12.41.05; MD. CODE REGS 09.12.41.17. However, Maryland also includes exemptions not found in the FLSA, such as:

(1) Employees under 16, working 20 or fewer hours per week.
(2) Commissioned employees.
(3) An employer's children, parents, spouse, or other immediate family members.
(4) Employees of drive-in theaters.

> (5) Employees enrolled as part of the training in public school special education programs.
> (6) Employees of certain food and drink establishments that have gross annual sales of $400,000 or less.
> (7) Employees covered under the Secure Maryland Wage Act.

MD. CODE ANN., LAB. & EMPL. § 3-403 *as amended by* 2021 Maryland Laws Ch. 671 (H.B. 685).

2. Claim Administration

See I.A.2.

3. Statute of Limitations

See I.A.3.

4. Remedies

See I.A.4.

C. Interagency Information Sharing

The WFA also addresses interagency information sharing. First, after the Commissioner issues a citation, he or she must "notify the Comptroller, the Office of Unemployment Insurance, the Insurance Administration, and the Workers' Compensation Commission to enable these agencies to assure an employer's compliance with their laws, utilizing their own definitions, standards, and procedures." MD. CODE ANN., LAB. & EMPL. § 3-907(a). Second, state agencies are required to "cooperate and share information concerning any suspected failure to properly classify an individual as an employee." MD. CODE ANN., LAB. & EMPL. § 3-910.

III. Payroll Fraud on State Government by Government Contractors

A. Normative Standards

Maryland has adopted its own version of the federal False Claims Act, which in its most basic prohibition provides that a person may not knowingly present or cause to be presented "a

false or fraudulent claim [to state, local, or county governments] for payment or approval" or "make, use, or cause to be made or used a false record or statement material to a false or fraudulent claim." MD. GEN. PROVIS. § 8-102(b).

B. Claim Administration

As with the federal False Claims Act, a claim under the MFCA can be filed either by a private citizen or the affected governmental entity. If the suit is initially filed by a private citizen, the complaint is filed *in camera*; the plaintiff must provide notice to the governmental entity, which then can choose whether to intervene and prosecute the action for itself, with the individual filing the action denominated as a co-plaintiff. MD. GEN. PROVIS. § 8-103(a).

C. Statute of Limitations

The limitations period applicable to a MFCA claim is either six years from the date of the underlying violation or three years "after the date when facts material to the right of action are known or reasonably should have been known by the person [or governmental entity] initiating the action . . . but in no event more than 10 years after the date" of the underlying violation. MD. GEN. PROVIS. § 8-108(a).

D. Remedies

A person that has violated this Act is liable to the governmental entity for any damages arising from the violation as well as (a) a civil penalty of not more than $10,000 for each violation; and (b) an additional amount of not more than three times the amount of damages that the governmental entity has sustained. MD. GEN. PROVIS. § 8-102(c)(1).

If the affected governmental entity intervenes in a suit filed by a private individual, the private plaintiff initiating the claim can recover an amount between 15% and 25% of the

proceeds of the action or settlement of the claim. The private plaintiff's recovery is to be proportional to the amount of time and effort that he or she contributed to the final resolution of the civil action. MD. GEN. PROVIS. § 8-105(a)(i)-(ii). In addition, the person who initiates the action can recover reasonable attorney's fees and costs. MD. GEN. PROVIS. § 8-105(4)(i). However, a court may award attorney's fees and expenses to a defendant and against the person initiating the action if the defendant prevails or the person initiating the action acted in bad faith. MD. GEN. PROVIS. § 8-105(c).

E. Interagency Information Sharing

A governmental entity is required to make "all reasonable efforts" to coordinate investigations with the federal government involving the same violation to avoid unnecessary duplication. MD. GEN. PROVIS. § 8-109(b).

IV. Certification by Government Contractors of Prevailing Wage Compliance

A. Normative Standards

The Maryland Prevailing Wage Law (MPWL) requires the Commissioner of Labor and Industry (or his or her designee) to establish for each public works project within the statute's purview a prevailing wage rate (both "straight" time and overtime) for each "classification of worker engaged in work of the same or a similar character." MD. CODE ANN., STATE FIN. & PROC. § 17-208.

Employers are then required to pay this prevailing wage; the employer may not "violate the wage provisions of a public work contract" or "allow or require an employee to work for less than the applicable prevailing wage rate." MD. CODE ANN., STATE FIN. & PROC. § 17-225(a)(1)-(2). The prevailing overtime rate must be paid for each hour worked in "excess of

10 hours in any single calendar day," in excess of 40 hours for a given work week, and on Sunday or any legal holiday. MD. CODE ANN., STATE FIN. & PROC. § 17-214(b).

In addition to paying the applicable rate, the employing contractor is required to "post a clearly legible statement of each prevailing wage rate to be paid under the public work contract" and keep it posted throughout the project. MD. CODE ANN., STATE FIN. & PROC. § 17-219.

The act also requires the contracting employer to submit to the contracting entity and the Commissioner of Labor and Industry both its own payroll records and, "for work performed at the work site, [the payroll records of its] subcontractors in the form that the Commissioner specifies by regulation." MD. CODE ANN., STATE FIN. & PROC. § 17-220(b)(1). The contractor is required to include with the submission a "statement that is signed by the contractor or, for the subcontractor's records, by the subcontractor [that] indicates that:

> (1) the payroll records are correct;
> (2) the wage rates paid are not less than those established by the Commissioner as set forth in the public work contract;
> (3) the classification set forth for each employee conforms with the work performed by that employee; and
> (4) the contractor or subcontractor has complied with each requirement of this subtitle.
>
> (i) the public body; and
> (ii) the Commissioner."

MD. CODE ANN., STATE FIN. & PROC. § 17-220(c)(1)-(4).

B. Claim Administration

An employee who claims to have been paid less than the prevailing wage rate can either file a lawsuit of his or her own in court or can file a complaint with the Commissioner of Labor and Industry. MD. CODE ANN., STATE FIN. & PROC. § 17-224(a)(1)-(4). A failure of the employee

claiming a violation to protest to the employer orally or in writing about the payment of a wage is not a bar to recovery. MD. CODE ANN., STATE FIN. & PROC. § 17-224(d)(1).

If the Commissioner issues an order requiring restitution and the employer fails to do so, either the Commissioner or the employee may bring a civil action to enforce the order in the circuit court in the county. MD. CODE ANN., STATE FIN. & PROC. § 17-224(a)(5).

The Commissioner may inspect payroll records at any reasonable time and as often as necessary. MD. CODE ANN., STATE FIN. & PROC. § 17-220(a).

C. Statute of Limitations

The statute of limitations for claims under the MPWL is three years from "the date the affected employee knew or should have known of the violation." MD. CODE ANN., STATE FIN. & PROC. § 17-224(c)(3).

D. Remedies

An employer that violates the MPWL is liable to both the individual denied the prevailing wage and to the contracting governmental entity. First, the employer owes "restitution" to the harmed employee, calculated to be the difference between the wage paid and the prevailing wage owed. MD. CODE ANN., STATE FIN. & PROC. §§ 17-222(b)(2), 17-224(e)(1).

In addition, the court can order double or treble damages to the employee if the court finds that the employer "withheld wages or fringe benefits willfully and knowingly or with deliberate ignorance or reckless disregard of the employer's obligations under this subtitle." The prevailing plaintiff is also entitled to reasonable counsel fees and costs." MD. CODE ANN., STATE FIN. & PROC. § 17-224(e)(3)-(4).

Second, the employer found to have violated the Act is liable to the public body for liquidated damages. If the violation is unintended, the liquidated damages amount to $20 for each affected laborer or other employee for each day of the violation. If an employer deliberately failed or refused to pay the prevailing wage rate, however, the employer is liable to the public body for $250 for each laborer or other employee for each day. MD. CODE ANN., STATE FIN. & PROC. § 17-222(1)-(2).

A person found to have made a false statement or fraudulent representation (through deliberate ignorance or reckless disregard) is liable for a civil penalty of $1,000 for each falsified record. MD. CODE ANN., STATE FIN. & PROC. § 17-224(g).

If an employee submits a false or fraudulent prevailing wage claim, the court may order the employee to pay the employer's reasonable counsel fees and costs. MD. CODE ANN., STATE FIN. & PROC. § 17-224(e)(5).

If the contractor fails to provide, or is late in providing, the necessary certified records, the contracting entity "may postpone the processing of partial payment estimates under the public work contract pending receipt of the copies; and . . . the contractor shall be liable to the public body for liquidated damages of $10 for each calendar day the records are late." MD. CODE ANN., STATE FIN. & PROC. § 17-220(d).

V. Labor Trafficking

A. Normative Standards

Maryland has a criminal code provision applicable to labor trafficking. Specifically, "[a] person may not knowingly: (1) take, place, harbor, persuade, induce, or entice another by force, fraud, or coercion to provide services or labor; or (2) receive a benefit or thing of value from the

provision of services or labor by another that was induced by force, fraud, or coercion." MD. CODE ANN., CRIM. LAW § 3-1202(a)(1)-(2).

B. Claim Administration

"A State's Attorney or the Attorney General may investigate and prosecute a violation of this subtitle or a violation of any crime based on the act establishing a violation of this subtitle." MD. CODE ANN., CRIM. LAW § 3-1203(a).

C. Statute of Limitations

In Maryland, a felony criminal case has no statute of limitations. *See Smallwood v. State*, 443 A.2d 1003, 1006 (Md. 1982).

D. Remedies

"A person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 25 years or a fine not exceeding $15,000 or both." MD. CODE ANN., CRIM. LAW § 3-1202(c).

Minnesota

I. Wage Theft

A. Minimum Wage Violations

1. Normative Standards

The Minnesota Fair Labor Standards Act (MFLSA), Minnesota's primary wage and hour law, is largely patterned after the FLSA. MINN. STAT. § 177.21-177.35. The avowed purposes of the MFLSA are to:

> (a) establish minimum wage and overtime compensation standards that maintain workers' health;
> (b) safeguard existing minimum wage and overtime compensation standards that maintain workers' health; and
> (c) sustain purchasing power and increases employment opportunities.

MINN. STAT. § 177.22.

Minnesota's wage and hour statutory regime also includes the Minnesota Prevailing Wage Act and the Minnesota Payment of Wages Act ("PWA").

The MFLSA outlines what the state requires employers to do, and what the state prohibits employers from doing regarding minimum wage and overtime requirements. The MFLSA divides employers into two groups for purposes of the minimum wage, large and small. Large employers are defined as any enterprise whose annual gross volume of sales made or business done is *not less* than $500,000. MINN. STAT. § 177.24, subd. 1(a*)*. Small employers are defined as any enterprise whose annual gross volume of sales made or business done is *less* than $500,000. *Id.* Effective August 1, 2016, every large employer was required to pay a minimum wage of $9.50 per hour and every small employer a minimum wage of $7.75 per hour. MINN. STAT. § 177.24, subd. 1(b) (2020). Beginning on January 1, 2018, the state minimum wages

increased on an annual basis based on inflation. MINN. STAT. § 177.24, subd. 1(f) (2020). On Jan. 1, 2022, the minimum wage will increase to $10.33 an hour for large employers and $8.42 an hour for small employers. Both large and small employers are prohibited from applying gratuities towards the calculation of wages for the purposes of meeting minimum wage requirements. *Id.*

The MFLSA exempts individuals working in a number of occupations from its minimum wage requirements, just as the FLSA does. Most of the exemptions under state law mirror those under federal law, but some are unique to the state and highly specific. For example, MINN. STAT. § 177.23, exempts "individual[s] under 18 who [are] employed as a corn detasseler[s]." *Id.*, subd. 7(4).

Apart from these employment-related standards, Minnesota has directly addressed the crime of "wage theft." Under Minnesota Statute section 609.52, subdivision 1(13)(i), wage theft occurs when the employer, 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 rates required by law, whichever is greater." "Wage theft" has also been added to the criminal definition of "theft" under Minnesota Statute section 609.52, subdivision 2(19).

2. Claim Administration

The MFLSA is enforced by the Minnesota Department of Industry and Commerce, Division of Labor Standards. Under Minnesota law, the Commissioner of the Department of Industry and Commerce (Commissioner) can investigate alleged violations of the MFLSA, making findings, and, where violations are found, issue orders remedying those violations. MINN. STAT. § 177.27, subd. 4. The Commissioner's remedial orders can direct the employer to

cease and desist its unlawful practices, and to take affirmative steps to fulfill the purposes of the statute by paying compensatory and liquidated damages. *Id*. The Commissioner may also bring an action in the district court where an employer resides or where the Commissioner maintains an office to enforce or require the compliance orders for minimum wage violations. *Id.* at subd. 5.

Like the FLSA, an employee is authorized to commence a lawsuit directly in district court without having to file an administrative charge for violations of minimum wage requirements. *Id*. at subd. 8; *Burt v. Rackner, Inc.,* 902 N.W.2d 448, 455-57 (Minn. 2017).

3. Statute of Limitations

The wage theft statutes (Minn. Stat. Ann. § 181.03 and 609.52, subd. 1(13)) do not specify a statute of limitations period, and the Minnesota courts have not addressed the issue. However, Minnesota courts have held that the statute of limitations for wage claims generally is two years, and extends to three years if the violation is willful. MINN. STAT. § 541.07(5) and *Worwa v. Solz Enters., Inc.*, 238 N.W.2d 628, 631 (Minn. 1976).

4. Remedies

The remedies for an employee under the MFLSA for a violation of minimum wage statutes are also comparable to the remedies under the FLSA. Those include: unpaid wages or overtime pay, liquidated (double) damages for willful violations, other affirmative injunctive relief as warranted, disbursements, witness fees, and attorneys' fees and costs. MINN. STAT. § 177.27, subds. 2, 4, 7, 10; 177.30(c); 177.31; 177.43, subd. 6(a); 177.45.

Any employer who is found by the Commissioner to have repeatedly or willfully violated the minimum wage provision is subject to a civil penalty of up to $1,000 for each violation of

each employee. MINN. STAT. § 177.32, subd 7. In determining the amount of the civil penalty, Minnesota looks at both the size of the employer's business and the gravity of the violation to determine the amount. *Id.*

In all proceedings brought by the Commissioner, he or she may order the employer to reimburse the department and the attorney general for all litigation and hearing costs unless the payment of costs would impose "extreme hardship" on the employer. MINN. STAT. ANN. § 177.27, subd. 7. Minnesota also imposes additional fines if an employer retaliates against an employee due to a proceeding or a complaint regarding the minimum wage statute (ranging anywhere from $700 to $3,000 per violation). MINN. STAT. ANN. § 177.32, subd. 2; § 181.03, subd. 6.

In addition, if an employer pays or agrees to pay wages at a rate less than the rate required under MFLSA for minimum wage, the employer is guilty of a misdemeanor. MINN. STAT. ANN. § 177.32, subd. 1(7). As stated in the introduction, the violation of the minimum wage requirement in Minnesota can also cause criminal sanctions for an employer under "wage theft." The criminal sanctions vary based on the value of the wages stolen, ranging from a one-year prison sentence and a $3,000 fine to a 20-year prison sentence and $100,000 fine. MINN. STAT. § 609.52, subd. 2(19).

B. Overtime Violations

1. Normative Standards

As previously stated, the MFLSA is patterned after the FLSA. The major difference with respect to overtime pay is that in Minnesota, an individual must work *48 hours* in a week to be entitled to overtime. MINN. STAT. § 177.25, subd. 1 (emphasis added). Every hour worked in

excess of 48 hours per work week must be compensated at a rate of at least 1.5 hours. *Id.* In lieu of monetary compensation, the state and its political subdivisions can give its employees time off at the rate of 1-1/2 hours for each hour worked more than 48 hours in lieu of overtime pay; this "comp time" alternative is not available to private sector employers. *Id.* Minnesota separately prohibits employers from entering into agreements that would violate the overtime law. MINN. STAT. ANN. § 177.25.

Minnesota Statutes section 177.25, subdivisions 2-5 and section 177.23, subdivision 7 list categories of employees to whom the overtime statute does not apply; these include various agriculture workers, health care workers, motor vehicle salespeople, and air carrier employees.

Under Minnesota Administrative Rule 5200.0150 ("Overtime Pay"), overtime pay must be paid no later than the payday immediately following the regular payday for the pay period in which it was earned. Minnesota section 181.01 requires employers to pay employees all wages, including salaries, earnings, and gratuity at least once every 31 days (regardless of whether the employee requests to be paid later). MINN. STAT. § 181.01. If the work is of a transitory nature, such as construction, paving, repair of roads, etc., the employer is then required to pay the wages at intervals of no more than 15 days. MINN. STAT. §181.10.

2. Claim Administration

As with the minimum wage violations, claims may be brought by affected employees in court or by the Commissioner. MINN. STAT. ANN. § 177.27, subds. 7-8.

3. Statute of Limitations

In Minnesota an action for the recovery of wages must be commenced within two years. If the nonpayment of overtime pay is *willful* and not due to a mistake, the state of limitations is three years. MINN. STAT. ANN. § 541.07(5) (emphasis added).

4. Remedies

An employer who pays an employee less than the overtime compensation to which the employee is entitled under section 177.25 is liable to the employee for the full amount of the overtime compensation, less any amount the employer can show was actually paid to the employee, and for an additional equivalent amount as liquidated damages. MINN. STAT. ANN. § 177.27, subd. 8. This applies only to a lawsuit brough by the Commissioner. *Id.* The employee can seek damages and any other relief in court provided by subdivision 7 (such as compensatory damages, gratuities, etc.). An employer who is found to have willfully or repeatedly violated the overtime pay section of the statute is subject to a civil penalty of up to $1,000 for each violation for each employee. Attorneys' fees, witness fees, and other expenses of the proceeding for overtime pay violations will fall on the employer. MINN. STAT. § 177.27, subds. 7, 10.

The violation of Minnesota's overtime pay requirement can also result in criminal sanctions for an employer as "wage theft." MINN. STAT. § 609.52, subd. 2(19). The criminal sanctions vary based on the value of the wages stolen. *Id.*; *see* discussion *supra* at I.A.4.

Failing to pay wages based on a faulty claim that the employee is "exempt" can also be a form of wage theft, allowing for the Commissioner or an individual action to seek redress. Under Minnesota Statute section 609.52, subdivision 3 whoever commits theft (including "wage theft") can be liable for both prison time and fines.

C. Off-the-clock Violations

1. Normative Standards

Minnesota has not directly addressed "off the clock" work by statute, but it has promulgated rules regarding what constitutes "hours worked" and thus what must be paid. Under Administrative Rule 5200.0120, subpart 1, "hours worked" includes as all training time, on-call time, cleaning time, waiting time, or any other time when the employee must either be on the premises of the employer or involved in the performance of duties with employment. The remainder of this regulation section defines the terms "on-call," "off duty," and specifies that bona fide meal periods are not hours worked. MINN. R. 5200.0120, subps. 2-4. In Minnesota (as under the FLSA), to be considered "off duty" time, the employee must be completely relieved from any work responsibilities while eating his or her meal; otherwise, the meal period must be considered as hours worked. *Id*. Minnesota law prohibits deducting rest periods of less than 20 minutes from total hours worked. MINN. R. 5200.0120, subp. 1. If employees are working on their meal breaks, then that time must be paid and cannot be illegally deducted. MINN. R. 5200.0120, subp. 4.

2. Claim Administration

"Off the clock" violations are pursued in the same fashion as other wage and hour violations as explained above. It is clear that a knowing failure to pay for compensable time is wage theft, allowing for a Commissioner or an individual action seeking redress. It is equally clear that under Minnesota Statute section 609.52, subdivision 3 "Sentence," whoever commits theft (which would be the case under 13(i) "wage theft") can be liable for prosecution and would face prison time and fines.

3. Statute of Limitations

An employer's failure to pay for time worked would be subject to the general two-year period of limitation, unless it is *willful* and not due to a mistake, in which case the statute of limitations is three years. MINN. STAT. ANN. § 541.07(5) (emphasis added).

4. Remedies/Punishments

The civil remedies available for off-the-clock violations are the same as those described above for other wage violations. As a form of wage theft, criminal sanctions are available under MINN. STAT. § 609.52, subd. 2(19).

D. Illegal Deductions

1. Normative Standards

The Minnesota Payment of Wages Act (MPWA) prohibits deductions by employers from the wages of employees without prior written authorization. Certain types of deductions are not permitted at all: an employer can never deduct from an employee's wages for breaks, cash shortages, tools or uniforms. Minnesota Statute section 181.79 expressly prohibits employers from deducting sums allegedly due to faulty workmanship, employer's loss, theft, or damage when the employee is not an independent contractor. MINN. STAT. ANN. § 181.79, subd. 1(a). The statute also makes void any agreement between an employer and an employee that goes against this statute. *Id* at 1(c). A written contract may be entered into between employer and employee to authorize payroll deductions for union dues, and for premiums of any life insurance, health insurance, etc. MINN. STAT. ANN. § 181.06, subd. 2.

Minnesota section 177.24, subdivisions 4 and 5 address deductions for unreimbursed expenses. Deductions for up to the full cost of a uniform or equipment for the job may not exceed $50 (independent of pay period). This section also prohibits any deduction from pay that would reduce the pay below minimum wage (such as purchased or rented uniforms, equipment, supplies required in employment, etc.). MINN. STAT. ANN. § 177.24, subd. 4. At the time of an employee's termination, the employer must reimburse the full amount deducted for these items, and the employee must surrender the items. *Id* at subd. 5.

2. Claim Administration

If the employer makes deductions from an employee's wage that draw the employee below minimum wage (§ 177.24, subdivision 4 and 5), the claim would be administered as listed above under the section "Minimum Wage Violations."

If an employer violates section 181.79 and illegally deducts from one's paycheck for faulty workmanship, loss, theft, or damage, the employee brings a civil action against the employer. MINN. STAT. ANN. § 181.79, subd. 2.

3. Statute of Limitations

In Minnesota, an action for the recovery of wages must be commenced within two years. If the nonpayment (in this instance, of rightful compensation that was illegally deducted) is *willful* and not due to a mistake, the state of limitations is three years. MINN. STAT. ANN. § 541.07(5) (emphasis added).

4. Remedies

An employer who makes illegal deductions in violation of section 181.79 is liable in a civil action brought by the employee for twice the amount of the deduction or credit that was taken. MINN. STAT. ANN. § 181.79, subd. 2.

If the claim constitutes "wage theft" for failing to pay an employee all wages required by law, Minnesota can extend criminal sanctions. The criminal sanctions vary based on the value of the wages stolen. MINN. STAT. § 609.52, subd. 2(19).

E. Pay Stub Provisions

1. Normative Standards

In Minnesota, employers are required to provide each employee with an "earning statement" (paystub) at the end of each pay period. State law requires that earning statements be provided either in writing or by electronic means, and if an employee requests earnings statement in written form, the employer must comply on an ongoing basis with that request. MINN. STAT. ANN. § 181.032. Earning statements must contain very specific information as specified in section 181.032(b)(1)-(11). This information includes:

(1) The name of the employee
(2) The rate or rates of pay and the basis—is this employee salary, hourly, etc.?
(3) Allowances claimed pursuant to permitted meals and lodging
(4) The total number of hours worked by the employee
(5) The total amount of gross pay
(6) A list of deductions made from the employee's pay
(7) The net amount of pay after all deductions
(8) The date on which the pay period ends
(9) The legal name of the employer
(10) The physical address of the employer's main office or principal place of business
(11) The telephone number of the employer

Under Minnesota Statute section 181.032, employers must provide notice to each employee at the time of hire regarding whether the employee is exempt from minimum wage, overtime and other state wage and hour laws, and on what basis.

2. Claim Administration

A civil action alleging a violation of earning statement requirements can be brought either by an affected employee or by the Commissioner. MINN. STAT. ANN. § 181.171, subds. 1 and 3.

3. Statute of Limitations

The statute does not specify a limitations period for paystub violations, but Minnesota courts have held that the statute of limitations for wage claims is two years. The limitations period may be extended to three years if the violation is willful. MINN. STAT. ANN. § 541.07(5) and *Worwa,* 238 N.W.2d at 631.

4. Remedies

For violating section 181.032, there are various remedies and punishments available. First, Minnesota Department of Labor and Industry (MDLI) remedies include: (1) an administrative compliance order from the Commissioner, (2) a cease and desist order, (3) compensatory damages and an equal amount as liquidated damages, (4) litigation and hearings costs, and (5) a civil penalty up to $1,000 per violation for each employee for repeat or willful violations. MINN. STAT. ANN. § 177.27, subds. 4 and 7.

For a civil action, an employee can seek (1) compensatory damages, (2) injunctive relief, (3) other relief the court deems appropriate, (4) and reasonable attorneys' fees and costs. MINN. STAT. ANN. § 181.171, subds. 1 and 3.

F. Interagency Information Sharing

1. Normative Standards

Minnesota's wage theft statutes and regulations address interagency cooperation regarding wage and hour violations in only one other context. As discussed *infra*, the Commissioner is obligated by statute to report findings regarding misclassification of employees as independent contractors to relevant state and federal agencies, including the Commissioner of Commerce, the Commissioner of Employment and Economic Development, the Commissioner of Revenue, the federal Internal Revenue Service, and the United States Department of Labor. MINN. STAT. ANN. § 181.722, subd. 5

II. Employee Misclassification

A. Independent Contractor/Employee Classification

1. Normative Standards

Under Minnesota Statute section 177.23, subdivision 7, "employee" is defined tautologically, as any individual employed by an employer. The 19 subsections that follow in Minnesota Statute section 177.23 outline various exceptions to the definition and lists who is *not* considered to be an "employee." Minnesota Rules also explain the difference between employee, emergency employee, permanent employee, provisional employee, and temporary employee. MINN. R. 9575.0010, subp. 17-18, 22, 30, 32, 46.

Minnesota expressly prohibits misrepresentations regarding the nature of employment relationships in its dealings with any federal, state, or local government entity, to other employers, or to its employees. MINN. STAT. ANN. § 181.722. That statute also prohibits employers from requiring or requesting employees to enter into any agreement or sign any

document that misclassifies the employee as an independent contractor or does not accurately reflect the employment relationship. MINN. STAT. ANN. § 181.722, subd. 2.

In deciding whether an individual is in fact an independent contractor for wage purposes, Minnesota has adopted the federal FLSA's "economics realities" test; that is, all of the available facts and circumstances must be considered to determine whether the worker is *economically dependent* upon the business to which the worker provides their services. MINN. R. 5200.0221. The most important factor in determining whether a person is an independent contractor is the *degree of control* exercised by the supposed "employer" and the method of performing the contracted work. MINN. R. 5224.0330, subp. 1.

Specialized and more detailed rules apply in the construction field. For those in that field, state law provides that someone is an independent contractor "only if the individual:

> (1) maintains a separate business with the individual's own office, equipment, materials, and other facilities;
> (2)(i) holds or has applied for a federal employer identification number or (ii) has filed business or self-employment income tax returns with the federal Internal Revenue Service if the individual has performed services in the previous year;
> (3) is operating under contract to perform the specific services for the person for specific amounts of money and under which the individual controls the means of performing the services;
> (4) is incurring the main expenses related to the services that the individual is performing for the person under the contract;
> (5) is responsible for the satisfactory completion of the services that the individual has contracted to perform for the person and is liable for a failure to complete the services;
> (6) receives compensation from the person for the services performed under the contract on a commission or per-job or competitive bid basis and not on any other basis;
> (7) may realize a profit or suffer a loss under the contract to perform services for the person;
> (8) has continuing or recurring business liabilities or obligations; and
> (9) the success or failure of the individual's business depends on the relationship of business receipts to expenditures."

MINN. STAT. ANN. § 181.723.

2. Claim Administration

Minnesota law provides a specific remedy for construction workers who are not independent contractors but are misclassified as such; they may bring a civil action for damages against the violator. MINN. STAT. ANN. § 181.722, subd. 4. If the construction worker is in fact an employee but has been injured due to a violation of this section (be it misrepresenting the nature of employment, requiring an agreement that misclassifies the employment relationship, etc.), the employee's representative, as defined in section 179.01, subdivision 5, may bring a civil action for damages on behalf of the employee.

Claims of misclassification for other purposes (wage payment, worker compensation etc.) would be pursued under those procedures applicable to those statutory schemes.

3. Statute of Limitations

The independent contractor and employee statute sections do not contain a specific statute of limitations for this type of violation. However, in Minnesota, the limitations period for an action for the recovery of wages is two years. If the nonpayment (in this instance, of a minimum wage requirement under "employee" status, an overtime wage, or some other owed wages due to employee misclassification) is *willful* and not due to a mistake, the state of limitations is three years. MINN. STAT. ANN. § 541.07(5) (emphasis added).

4. Remedies

For wage purposes (outside of the construction context) a worker claiming to have been misclassified could bring an action under the MFLSA or other applicable statute. Independent contractor misclassification is wage theft, so all remedies available for minimum wage and other categories of wage theft apply to independent contractor misclassification as well, such as possible liquidated double damages, equitable relief, and witness fees. MINN. STAT. § 177.27, subds. 7, 10.

Construction workers have a specific procedure applicable only to them. A construction worker who is not an independent contractor but who has been classified as such has a civil remedy at law in Minnesota. MINN. STAT. § 181.722, subd. 4. The court may award attorney fees, costs, and disbursements to a construction worker who is recovering thereunder.

The violation of employee misclassification in Minnesota may also result in criminal sanctions for an employer under "wage theft." The criminal sanctions vary based on the value of the wages stolen. MINN. STAT. § 609.52, subd. 2(19).

5. Information Sharing

A court that finds a violation of section 181.722 regarding employee misclassification, whether in the construction industry or not, must transmit a copy if its findings to the Commissioner of Labor and Industry. MINN. STAT. ANN. § 181.722, subd. 5. The Commissioner is then obligated to report the finding to relevant state and federal agencies, including the Commissioner of Commerce, the Commissioner of Employment and Economic Development, the Commissioner of Revenue, the federal Internal Revenue Service, and the United States Department of Labor.

B. Exempt/Non-exempt Classification

1. Normative Standards

Both the FLSA and MFLSA exempt certain employees from minimum wage and overtime requirements. The MFLSA lists more than 20 types of workers that are exempt, including elected officials, outside salespersons, nonprofit volunteers, and bona fide executive, administrative, and professional employees. MINN. STAT. ANN. § 177.23, subd. 7. Minnesota's employee notice law requires employers to state on the employee earning statement the basis for designating an employee as exempt. MINN. STAT. § 181.032(d)(4).

Positions under an executive, administrative, and professional exemptions must be paid a minimum salary and meet certain duty requirements specified in Minnesota Rule 5200.0180. In determining exempt and nonexempt work under executive, administrative, and professional work in Minnesota, one should consult Minnesota Rules, part 5200.0180, subpart 5.

A mistaken classification of a worker as exempt would fall under section 181.722, which specifically addresses "misrepresentation of employment relationship prohibited." Subdivision 1 declares that no employer "shall misrepresent the nature of the employment relationship," and subdivision 2 prohibits employers from allowing employees to enter into any agreement that "*does not accurately reflect* the employment relationship with the employer." MINN. STAT. ANN. § 181.722, subd. 2 (emphasis added).

2. Claim Administration

Knowingly evading the obligation to pay overtime wages through a false exempt status classification is a form of wage theft, allowing for a commissioner or an individual to seek redress. Minnesota Statute section 609.52, subdivision 3 explains that whoever commits theft (which would be the case under 13(i) "wage theft") can be liable for specified prison time and fines.

3. Statute of Limitations

In Minnesota, an action for the recovery of wages is two years. If the nonpayment (in this instance, of an overtime owed due to an exempt misclassification) is *willful* and not due to a mistake, the state of limitations is three years. MINN. STAT. ANN. § 541.07(5) (emphasis added). A specific state of limitations is not set for the statute stating exempt employees.

4. Remedies

All remedies available for minimum wage and other categories of wage theft apply to exempt misclassification as well, such as possible liquidated double damages, equitable relief, and witness fees. MINN. STAT. § 177.27, subds. 7, 10.

Avoiding wage obligations through misclassification may be a form of wage theft, allowing for a commissioner or an individual to seek redress. Minnesota Statute section 609.52, subdivision 3 explains that whoever commits theft (which would be the case under 13(i) "wage theft") can be liable for prison time and fines.

III. Payroll Fraud on State Government by Government Contractors

1. Normative Standards

Minnesota law makes it unlawful to knowingly present, or cause to be presented, any false or fraudulent claim for payment or approval by an agent of the state or a political subdivision. MINN. STAT. ANN. § 15C.02. This prohibition is part of the state's own "false claims act," which is largely patterned after the federal False Claims Act. In fact, the state act expressly

makes those presenting false claims "liable to the state or the political subdivision for a civil penalty in the amounts set forth in the federal False Claims Act." MINN. STAT. ANN. § 15C.02(a).

2. Claim Administration

For possible violations of Minnesota Statute section 15C.02, a prosecuting attorney may investigate. If a prosecuting attorney finds that a person has violated 15C.02, he or she may bring a civil action. MINN. STAT. §15C.04, subd. 1. According to Minnesota Statute section 15C.05, a private citizen may also bring an action (1) on the individual's own account and that of the state; (2) the person's own account and that of a political subdivision; or (3) on the person's own account and that of both the state and political subdivision. MINN. STAT. § 15C.05(a).

3. Statute of Limitations

A state False Claims Act case may not be commenced more than three years after the date of discovery of the fraudulent activity by the prosecuting attorney or more than six years after the fraudulent activity occurred, whichever occurs later, but in no event more than ten years after the date on which the violation is committed.

4. Remedies

Where the government intervenes in an action initially brought by a private citizen, the person is entitled to receive not less than 15% or more than 25% of any recovery of the civil penalty and damages or settlement, depending on the extent to which the person substantially contributed to the conduct of the action. Where the government does not intervene, and the action is prosecuted by the private citizen, the person is entitled to receive not less than 25% or more than 30% of any recovery of the civil penalty and damages, or settlement, as the court determines is reasonable.

IV. Certification by Government Contractors of Prevailing Wage Compliance

1. Normative Standards

Minnesota has a comprehensive "prevailing wage" statutory scheme for projects involving the "erection, construction, remodeling, or repairing of a public building or other public work financed in whole or part by state funds." MINN. STAT. ANN. § 177.42, subd. 2. The statutory scheme imposes various requirements on government contractors to ensure that they pay the "prevailing wage" for work done on certain government contracts. MINN. STAT. ANN. §§ 177.41-177.45. To ensure that the employer is complying with its prevailing wage requirements, the Department of Labor and Industry employs investigators to perform on-site project reviews, the DLI receives and investigates allegations regarding violations of this section, and conducts training to contractors for public work projects financed with state funds. *Id*. at 6.

Employers performing government construction contracts on covered projects have an explicit certification requirement:

> "while performing work on public works projects funded in whole or in part with state funds, the [covered] employer [must] furnish under oath signed by an owner or officer of an employer to the contracting authority and the project owner every two weeks, a certified payroll report with respect to the wages and benefits paid each employee during the preceding weeks specifying for each employee: name; identifying number; prevailing wage master job classification; hours worked each day; total hours; rate of pay; gross amount earned; each deduction for taxes; total deductions; net pay for week; dollars contributed per hour for each benefit, including name and address of administrator; benefit account number; and telephone number for health and welfare, vacation or holiday, apprenticeship training, pension, and other benefit programs."

MINN. STAT. ANN. § 177.30(a)(6).

Moreover, each covered government contract "must . . . provide that the contracting agency shall demand, and the contractor and subcontractor shall furnish to the contracting

agency, copies of any or all payrolls not more than 14 days after the end of each pay period. MINN. STAT. ANN. § 177.43, subd. 3.

2. Claim Administration

Minnesota's prevailing wage statutory scheme is primarily enforced by the Commissioner of Labor and Industry (although the Attorney General has concurrent enforcement jurisdiction, *see* MINN. STAT. ANN. § 177.45). As alluded to above, there are record keeping requirements and mechanisms for investigation and enforcement by the State. When the Commissioner finds a violation and issues a compliance order to an employer for violation of the Act, the Commissioner is required to:

> "issue a withholding order to the contracting authority [requiring that the] contracting authority . . . withhold payment of sufficient sum to the prime or general contractor on the project to satisfy the back wages assessed or otherwise cure the violation, and the contracting authority must withhold the sum ordered until the compliance order has become a final order of the Commissioner and has been fully paid or otherwise resolved by the employer."

MINN. STAT. ANN. § 177.43, subd. 6a.

Even while the investigation is continuing, and no final compliance order has issued, if the Commissioner "reasonably" concludes that he or she will "likely" find a violation, "the commissioner may notify the contracting authority of the determination and the amount expected to be assessed"; in that event, the contracting authority is required to "give the Commissioner 90 days' prior notice of the date the contracting authority intends to make final payment." *Id.*

No explicit private right of action is created by the Act. *See Dicks v. Minnesota Dep't of Admin.*, 627 N.W.2d 334, 336 (Minn. Ct. App. 2001) ("Minnesota's Prevailing Wage Act does not provide an explicit private right of action for any employees, whether employees of the state or a private contractor"). Criminal penalties also exist for state contracts that violate prevailing

wages. A misdemeanor is punishable by either or both: (1) a fine up to $700; and (2) imprisonment for up to 90 days. MINN. STAT. ANN. § 177.43, subd. 5. A misdemeanor for permitting a contractor to pay less than the prevailing wage rate or give up compensation entitled under the contract is punishable by either or both: (1) a fine up to $40; and (2) imprisonment up to 30 days. MINN. STAT. ANN. § 177.44, subd. 5.

3. Statute of Limitations

For violation of prevailing wages, the statute does not specify a limitations period, but Minnesota courts have held what is stated above (two years for recovery of wages, and it is three years if the nonpayment is willful). MINN. STAT. ANN. § 541.07(5).

4. Remedies

It is a misdemeanor for an officer or an employee of the state to execute a contract for a project without complying with 177.43, or for any person to be employed on the state project for less than the prevailing wage. This is punishable by a fine of no more than $700, or imprisonment for no more than 90 days, or both.

V. Labor Trafficking

1. Normative Standards

Minnesota explicitly prohibits "labor trafficking," which it defines as:

> (1) the recruitment, transportation, transfer, harboring, enticement, provision, obtaining, or receipt of a person by any means, for the purpose of:
> (i) debt bondage or forced labor or services;
> (ii) slavery or practices similar to slavery; or
> (iii) the removal of organs through the use of coercion or intimidation; or
> (2) receiving profit or anything of value, knowing or having reason to know it is derived from an act described in clause (1).

MINN. STAT. ANN. § 609.281.

2. Claim Administration

As this is a criminal statute, cases of labor trafficking are prosecuted by the state in court.

3. Statute of Limitations

A statute of limitations is not specified in the statute on labor trafficking. The residual statute of limitations is six years. MINN. STAT. § 541.05 (2020).

4. Remedies

Anyone who engages in these activities is guilty of a felony; if the victim is under the age of 18, the defendant is subject to imprisonment for not more than 20 years or to payment of a fine of not more than $40,000, or both. If the victim is an adult, the defendant is subject to a maximum period of incarceration of 15 years and a fine of not more than $30,000. MINN. STAT. 609.282, subds. 1-2 (2020). There are also provisions for those who aid in labor trafficking and imposing criminal penalties on corporations that are involved in the crime. No reference is made in the statutes to labor cartels or labor brokers.

Montana

I. Wage Theft

A. Minimum Wage Violations

1. Normative Standards

The minimum wage in Montana is the greater of either the federal minimum wage or the state minimum, excluding the value of tips received by the employee. MONT. CODE ANN. § 39-3-409. A new minimum wage rate is calculated each year based on changes to the cost of living as measured by the Consumer Price Index. *Id*. The current minimum wage for most employers is $8.75 according to the Department of Labor and Industry's website. *See* Montana DOL website, https://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/state-minimum-wage (last accessed on August 25, 2021). For businesses with gross annual sales of less than $110,000 per year (and are not covered under the federal Fair Labor Standards Act (FLSA), the minimum wage is $4. MONT. CODE ANN. § 39-3-409.

Montana exempts many occupations from its minimum wage and overtime requirements; these exemptions largely track federal law. *Compare* MONT. CODE ANN. § 39-3-406(1) *and* 29 U.S.C.S. § 213(a). Some state exemptions, however, are not found under the FLSA; for example, Montana law categorically exempts foster parents and foster care providers; seasonal religious or education conference workers; and employees of the United States government. The full list of exclusions is set out in MONT. CODE ANN. § 39-3-406(1) and discussed at MONT. ADMIN. R. 24.16.211.

2. Claim Administration

An employee may file an administrative claim with the Department of Labor and Industry if he or she has not received wages that are due, using a form provided by the agency. MONT. ADMIN. R. 24.16.752. The form requires information including the employee and employer's names and addresses, the period of employment, the employee's rate of pay, the period of claim, and the amount claimed. *See* Montana DOL website, https://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/filing-a-wage-claim (last accessed on August 22, 2021).

The Commissioner has the power to investigate any potential wage violations, even if no complaint has been filed, by inspecting payroll and personnel records and conducting interviews. MONT. ADMIN. R. 24.16.7519. The Commissioner may also institute actions for the collection of unpaid wages and for penalties. MONT. CODE ANN. § 39-3-209. If the Commissioner determines that the claim is valid and is asked to do so by the complaining employee, the Commissioner can take an assignment of the claim and maintain any reasonable proceeding to enforce the claim. MONT. CODE ANN. § 39-3-211. If the Department finds for the employee on the wage claim and the employer does not appeal the determination, the Department may enter an order against the employer for the amount of wages due, and that order can be enforced in court. MONT. CODE ANN. § 39-3-212; § 39-3-216(1).

Although it might be argued that no private right of action is provided by statute itself, the state Supreme Court has held that an employee can sue his or her employer directly in district court for unpaid wages under MONT. CODE ANN. §§ 39-3-206 and 39-3-208. *Stanley v. Holms*, 883 P.2d 837, 839 (Mont. 1994). However, the Supreme Court of Montana has also said that an employee is precluded from simultaneously pursuing both administrative and court remedies

under the "cumulative remedies" provision of MONT. CODE ANN. § 39-3-408. *Von Petersdorff v. Kenyon Noble Lumber Co.*, 103 P.3d 1082, 1085 (Mont. 2004).

3. Statute of Limitations

An employee must file an administrative or court complaint within 180 days of a default or delay in the payment of wages. MONT. CODE ANN. § 39-3-207(1). An employee can recover unpaid wages for two years from the date of filing if the employee is still employed by the employer, or two years from the employee's last day of work. *Id*. at (2). If an employer has engaged in repeated violations, an employee can recover unpaid wages for three years from the date of filing if the employee is still employed by the employer, or otherwise three years from the employee's last day of work. *Id*. at (3). As explained below, failure to pay wages may also be a misdemeanor; prosecution must be commenced within one year of the offense. MONT. CODE ANN. § 45-1-205(2)(b).

4. Remedies

An employer who underpays an employee is guilty of a misdemeanor. MONT. CODE ANN. § 39-3-206(1). The punishment for such a misdemeanor is imprisonment for up to 6 months, a fine of up to $500, or both. MONT. CODE ANN. § 46-18-212.

If an employer is guilty of a misdemeanor, the employer must also pay a penalty of up to 110% the amount of unpaid wages. MONT. CODE ANN. § 39-3-206(1). If an employee brings an action directly and wins, the judgment must include attorneys' fees and other reasonable costs,

but if an action is maintained by the Commissioner, costs and fees are not required to be paid. MONT. CODE ANN. § 39-3-214.

The following conduct by an employer justifies imposition of the maximum civil penalty:

> (1) failure to provide information requested by the department and/or not cooperating in the department's investigation of the wage claim;
> (2) there is substantial credible evidence that the employer's payroll records are falsified or intentionally misleading;
> (3) previous violation of similar wage and hour statutes within three years prior to the date of filing of the wage claim; or
> (4) issuing an insufficient funds paycheck.

MONT. ADMIN. R. 24.16.7556(1).

If any of these has occurred, the maximum penalty must be imposed and can only be reduced upon written mutual agreement of the parties and the department. *Id*. at (2)-(3).

B. Overtime Violations

1. Normative Standard

An employer must pay an employee 1.5 times the hourly wage for any hours worked beyond 40 hours per workweek, with several exemptions. MONT. CODE ANN. § 39-3-405; MONT. CODE ANN. 39-3-406. Many of the exemptions under Montana law also exist under the FLSA, but there is not complete overlap. *Compare* MONT. CODE ANN. § 39-3-406(2) *and* 29 U.S.C.S. § 213(b). The workers exempted from overtime provisions under Montana law, but not the FLSA, include employees of the state legislative branch and public safety departments. *See* MONT. CODE ANN. § 39-3-406(2).

2. Claim Administration

The procedures used to press an overtime claim are the same as those described *supra* for minimum wage violations. *See* I.A.2.

3. Statute of Limitations

The statute of limitations for overtime claims is the same as described *supra* for minimum wage violations. *See* I.A.3.

4. Remedies

The remedies available for an overtime claim are the same as those described *supra* for minimum wage violations. *See* I.A.4.

C. Off-the-clock Violations

1. Normative Standards

Employees in Montana must be paid for all of the hours worked. The phrase "hours worked" includes all of the time an employee is required to be on duty, on the employer's premises, or at a prescribed workplace, and all time during which he or she is permitted to work for the employer. MONT. ADMIN. R. 24.16.1002. Donning and doffing of clothing is included if the clothing is indispensable to the performance of the primary activity (such as protective gear). MONT. ADMIN. R. 24.16.1008. Short rest periods of five to 20 minutes are considered worktime, but meal periods of 30 minutes or more are not worktime. MONT. ADMIN. R. 24.16.1006. Whether time spent waiting qualifies as worktime depends on the circumstances, considering the agreement made by the parties, the nature of the primary service, and its relation to waiting time. MONT. ADMIN. R. 24.16.1005. Lectures, meetings, and training do not qualify as time spent working if it occurs outside normal working hours, has voluntary attendance, is not directly related to the employee's job, and the employee does not perform productive work while attending. MONT. ADMIN. R. 24.16.1009.

2. Claim Administration

The procedures used to press an off-the-clock claim are the same as those described *supra* for minimum wage violations. *See* I.A.2.

3. Statute of Limitations

The statute of limitations for an off-the-clock claim is the same as described *supra* for minimum wage violations. *See* I.A.3.

4. Remedies

The remedies available for an off-the-clock claim are the same as those described *supra* for minimum wage violations. *See* I.A.4.

D. Illegal Deductions

1. Normative Standard

The deductions allowed by Montana law are listed in MONT. CODE ANN. § 39-3-204. They are:

(1) deductions for board, room, and other incidentals supplied by the employer,
(2) deductions specified as conditions of employment, and
(3) other deductions provided by law, such as child support,
(4) income tax, and
(5) Social Security.

MONT. CODE ANN. § 40-5-315; MONT. CODE ANN. § 15-30-2502; MONT. CODE ANN. § 19-1-705.

2. Claim Administration

The procedures used to press a claim of unlawful deductions are the same as those described *supra* for minimum wage violations. *See* I.A.2.

3. Statute of Limitations

The limitations period for a claim of unlawful deductions is the same as those described *supra* for minimum wage violations. *See* I.A.3.

4. Remedies

The remedies available for a claim of unlawful deductions are the same as those described *supra* for minimum wage violations. *See* I.A.4.

E. Paystub Provisions

1. Normative Standards

Montana allows employers to make "reasonable deductions [from an employee's pay] for board, room, and other incidentals supplied by the employer, whenever the deductions are a part of the conditions of employment, or as otherwise provided for by law." MONT. CODE ANN. § 39-3-204. With each payment of wages, employers must provide a statement specifying deductions made for state and federal income taxes, social security, and any other lawful deductions, including the amount of each deduction. MONT. CODE ANN. § 39-3-101. If no deductions have been made, the employer shall give the employee a statement that the payment does not include any deductions. *Id*. Upon written demand, an employer shall, before commencement of work, notify each employee as to the rate of wages to be paid, and date of paydays. MONT. CODE ANN. § 39-3-203.

2. Claim Administration

While not explicitly codified, there is at least one reported case in which an employee filed a claim for illegal deductions, and it is generally accepted that an aggrieved employee can file a claim for illegal deductions in a court of competent jurisdiction. *Christiansen v. Taylor Bros.*, 732 P.2d 841, 842 (Mont. 1987). In addition, the Department of Labor and Industry is

empowered to enforce all labor laws, although there is no specific provision giving the Department or the Commissioner power to investigate or assess remedies for illegal deduction claims. MONT. CODE ANN. § 39-3-102.

3. Statute of Limitations

The statute of limitations is not specified in the statute, but the general statute of limitations for civil actions is five years. MONT. CODE ANN. § 27-2-231.

4. Remedies

The penalty for a pay stub violation is not clearly defined. It is possible the penalty is the same as for other forms of wage theft, but this is not explicitly stated.

F. Interagency Information Sharing

There are no laws in Montana addressing coordination or interagency communications among state agencies on wage theft issues. There is, however, a provision authorizing the Montana Department of Labor & Industry to assist and cooperate with the federal Department of Labor in enforcing the Fair Labor Standards Act in Montana. MONT. CODE ANN. § 39-1-104.

II. Employee Misclassification

A. Independent Contractor/Employee Classification

1. Normative Standards and Claim Administration

Montana statutorily addresses the independent contractor/employee classification question in only one context—worker's compensation—although the consequences of a determination under that statute can have much broader implications, as explained below. The state's worker compensation scheme allows any person to apply to the Department of Labor and

Industry for an independent contractor exemption certificate. MONT. CODE ANN. § 39-71-417. The exemption lasts for two years. MONT. CODE ANN. § 39-71-417(8); *see also* MONT. ADMIN. R. 24.35.121. A person with an exemption certificate is not required to obtain a personal workers' compensation insurance policy. MONT. CODE ANN. § 39-71-417. Montana's Department of Labor and Industry has an Independent Contractor Central Unit (ICCU), which has the authority to grant, revoke, or suspend exemption certificates. MONT. CODE ANN. § 39-71-418.

ICCU decisions are binding on all parties with respect to all employment status issues under the jurisdiction of the Department of Labor and Industry. MONT. ADMIN. R. 24.35.205. As a result, these "decisions may affect a party's liability in matters related to unemployment insurance, the Uninsured Employer's Fund, wage and hour issues, human rights, and state income tax withholding." *Id.*

Indeed, when a worker is required to have an exemption certificate and does not, "the worker is conclusively determined to be an employee for purposes of wage and hour, unemployment insurance, workers' compensation, and income tax." MONT. ADMIN. R. 24.35.203. Similarly, "when the department approves an application for an independent contractor exemption certificate and the person is working under the independent contractor exemption certificate, the person's status is conclusively presumed to be that of an independent contractor." MONT. CODE ANN. § 39-71-417(7)(a). By regulation an independent contractor is not an employee and therefore is not subject to wage and hour provisions. MONT. ADMIN. R. 24.16.7520(4).

To be determined to be an independent contractor, an individual must first file an application with the Department. *See* MONT. ADMIN. R. 24.35.203; *see also* MONT. CODE ANN. §

39-71-419(1)(a). A person who regularly and customarily performs services at a location other than the person's own fixed business location must apply to the department for an independent contractor exemption certificate unless the person has elected to be bound personally and individually by the provisions of one of three compensation plans adopted by the state. MONT. CODE ANN. § 39-71-417.

Once an application is submitted, the Department uses a two-step test to determine whether a person is an independent contractor. MONT. ADMIN. R. 24.35.202. First, the Department ensures "that the applicant has been and will continue to be free from control or direction over the performance of the person's own services, both under contract and in fact." MONT. CODE ANN. § 39-71-417(4)(a)(i). Second, the Department examines whether "the applicant is engaged in an independently established trade, occupation, profession, or business and will provide sufficient documentation of that fact to the [D]epartment." MONT. CODE ANN. § 39-71-417(4)(a)(ii); *see also* MONT. ADMIN. R. 24.35.202.

To determine whether an employer exerts control over an individual, the Department evaluates: "(a) direct evidence of right or exercise of control; (b) method of payment; (c) furnishing of equipment; and (d) right to fire." MONT. ADMIN. R. 24.35.202(2).

The Department details 17 factors for what constitutes control for an exemption certificate; the factors are "weighed and evaluated depending on the circumstances of each case." MONT. ADMIN. R. 24.35.302(1) and (2). The Department lists 13 factors for what constitutes an independently established business; again, the factors are evaluated and weighed on a case-by-case basis. MONT. ADMIN. R. 24.35.303(1) and (2).

After an investigation, the Department may issue a determination on whether an individual is an independent contractor, but any aggrieved person may request investigation and a decision by the ICCU within 10 days of notice of the determination. MONT. ADMIN. R. 24.11.2407.

A dispute involving an employer, a worker, or the Department involving whether a worker is an independent contractor, but not involving workers' compensation benefits, must be brought before the ICCU. MONT. CODE ANN. § 39-71-415(2)(a). A decision by the ICCU is final unless a dissatisfied party requests mediation. MONT. CODE ANN. § 39-71-415(2)(b)(i).

A party who has received an adverse decision may request an appeal to the district court. MONT. ADMIN. R. 24.17.847(1). The appeal must be made in 30 days. MONT. ADMIN. R. 24.17.847(2).

2. Statute of Limitations

No statute of limitations for independent contractor issues is specifically provided by Montana law, but the general limitations period for worker compensation matters is 12 months. MONT. CODE ANN. § 39-71-601.

3. Remedies

A person is subject to a fine assessed by the department of up to $1,000 for each violation. 2021 Montana Laws Ch. 345 (S.B. 367). A violation includes: "Performing work without an ICEC; Performing work with a revoked or suspended ICEC; Transferring their ICEC to another person; or Misrepresentation of the independent contractor status." *See* Montana Department of Labor and Industry website,

https://erd.dli.mt.gov/work-comp-regulations/montana-contractor/independent-contractor (last accessed August 25, 2021).

B. Exempt/Non-Exempt Classification

1. Normative Standards

As explained *supra*, an employee is entitled to overtime pay for hours worked in excess of 40 hours per week unless the employee is exempt from the overtime requirement set out at MONT. CODE ANN. § 39-3-405. As most states do, Montana exempts many of the same occupational categories as the FLSA (including the so-called "white collar" exemptions for bona fide executive, administrative, and professional employees), as well as a number of state-specific categories, including, for example, "students participating in a distributive education program established under the auspices of an accredited educational agency," and "retired or semiretired persons performing part-time incidental work as a condition of their residence on a farm or ranch." MONT. CODE ANN. § 39-3-406.

2. Claim Administration

Misclassification issues arise as sub-issues in many wage and hour contexts. Those claims follow the same procedures as those described *supra* for minimum wage violations. *See* I.A.2.

3. Statute of Limitations

The limitations period for wage and hour claims based on misclassification is the same as those described *supra* for minimum wage violations. *See* I.A.3.

4. Remedies

The remedies available for a claim of misclassification in a wage and hour context are the same as those described *supra* for minimum wage violations. *See* I.A.4.

III. Payroll Fraud on State Government by Government Contractors

A. Normative Standards

Montana's own False Claims Act prohibits *inter alia* any person from knowingly presenting a false or fraudulent claim for payment or approval to the State of Montana. MONT. CODE ANN. § 17-8-403.

B. Claim Administration

As is typical of false claims statutory regimes, a claim can be filed either by the government, MONT. CODE ANN. § 17-8-405, or by a private citizen on behalf of him or herself and the defrauded governmental entity in the name of that entity. MONT. CODE ANN. § 17-8-406. If the suit is begun by a private citizen, it begins as a sealed case. While the complaint remains sealed, the plaintiff must give the government all of the evidence he or she has of the fraud, and the government thereafter has the option of intervening, in which case it takes over management of the litigation. MONT. CODE ANN. § 17-8-406(1)-(2). If the governmental entity does not do so, the person who initiated the action has the same right to conduct the action as the government attorney would have had with intervention, including the right to inspect government records and interview officers and employees of the governmental entity. MONT. CODE ANN. § 17-8-406(9).

C. Statute of Limitations

A complaint or civil action must be brought either six years after the violation was committed or three years after the date of when facts are known or reasonably should have been

known. MONT. CODE ANN. § 17-8-404(1)-(2). However, an action may not be brought more than 10 years after the date on which the violation was committed in any event. *Id*.

D. Remedies

If the government intervenes, the individual initially filing the case must receive at least 15% but not more than 25% of the proceeds recovered and collected, depending on the extent to which the person substantially contributed to the prosecution of the action. MONT. CODE ANN. § 17-8-410(1). The person must also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney fees and costs. *Id.* at § 17-8-410(3). The expenses, fees, and costs must be awarded against the defendant. *Id.*

If the government does not intervene, the person bringing the action receives an amount that the court decides is reasonable for collecting the civil penalty and damages on behalf of the government. MONT. CODE ANN. § 17-8-410(4). The amount may not be less than 25% or more than 30% of the proceeds recovered and must be paid out of the proceeds. *Id.*

The governmental entity is entitled to any damages and civil penalty not awarded to the person. MONT. CODE ANN. § 17-8-410(6). Any damages and civil penalties that remain after the distribution to the person "must be distributed first to fully reimburse any losses suffered by the governmental entity . . . and the remainder of the damages and any civil penalty must be deposited in the general fund of the governmental entity." *Id.*

In addition, any individual who violates the act is liable to the government for a civil penalty of not less than $5,500 and not more than $11,000, plus three times the amount of damages that a governmental entity sustains, along with expenses, costs, and attorney fees. MONT. CODE ANN. § 17-8-403(1).

IV. Certification by Government Contractors of Prevailing Wage Compliance

A. Normative Standards

All public works contracts must contain: (1) a provision stating the standard prevailing wage rate; (2) a provision requiring an employer to maintain payroll records "in a manner readily capable of being certified for submission"; and (3) a provision requiring each contractor to post a statement of all wages and fringe benefits. MONT. CODE ANN. § 18-2-422. A "public works contract" is a contract with a total cost in excess of $25,000 let by the state, county, municipality, school district, or political subdivision. MONT. CODE ANN. § 18-2-401(11)(a).

The Commissioner may determine the standard prevailing rate of wages. MONT. CODE ANN. § 18-2-402. The department shall conduct an annual survey to calculate the standard prevailing rate of wages for building construction services. MONT. CODE ANN. § 18-2-413.

No provision of Montana's prevailing wage law affirmatively requires a routine certification or sworn statement of compliance, but if a complaint is filed with the Department alleging noncompliance, the Department may then require the project to submit to it certified copies of the payroll records for workers employed on that project. MONT. CODE ANN. § 18-2-423. The certifying statement must be executed by the contractor, subcontractor, employer or by an authorized officer or employee of the contractor, subcontractor or employer who supervises the payment of wages; it must certify the payroll records as provided are true and accurate and reflect all payments and deductions made for employees employed on the public works project for each week. MONT. ADMIN. R. 24.17.307. If payroll records are not submitted, the commissioner may issue subpoenas. MONT. CODE ANN. § 18-2-424.

B. Claim Administration

The prevailing wage statute is administered by the Department of Labor and Industry, which has the authority to inspect (and if necessary, subpoena) payroll records, hold hearings, take evidence, administer oaths, and make determinations regarding compliance, and has authority to make necessary rules to enforce the act. *See generally* MONT. CODE ANN. § 39-3-210; MONT. CODE ANN. § 18-2-431; MONT. CODE ANN. § 18-2-423.

C. Statute of Limitations

The commissioner has the authority to file an action within 90 days after the filing of notice of completion of the project and its acceptance by the contracting agency in district court to recover all penalties and forfeitures due. MONT. CODE ANN. § 18-2-407. It is unclear whether this 90-day limitation period would govern an action by employees who are denied prevailing wages.

D. Remedies

An employer that does not pay the prevailing wage "shall forfeit to the [D]epartment a penalty at a rate of up to 20% of the delinquent wages plus fringe benefits, attorney fees, audit fees, and court costs." MONT. CODE ANN. § 18-2-407. An employer "shall also forfeit to the employee the amount of wages owed plus $25 a day for each day that the employee was underpaid." MONT. CODE ANN. § 18-2-407.

If a person fails to comply, the government shall retain $1,000 of the contract price. MONT. CODE ANN. § 18-2-432. If a person fails to comply due to gross negligence, the government may retain up to $10,000 above the original $1,000. MONT. CODE ANN. § 18-2-432.

Whenever a contractor or subcontractor is found by the Commissioner to have aggravatedly or willfully violated the prevailing wage act (including its certification obligations

as described above), the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest is ineligible, for a period not to exceed three years after the date of the final judgment, to receive any public works contracts or subcontracts that are subject to the provisions of this chapter. MONT. CODE ANN. § 18-2-432.

Injunctive relief is available too. The court in which an action is pending is authorized to issue an injunction to restrain the person, firm, or corporation from proceeding with a public works contract with the state, county, municipality, school district, or political subdivision, pending the final determination of the instituted action. MONT. CODE ANN. § 18-2-432.

V. Labor Trafficking

A. Normative Standards

Montana has a criminal statute that addresses the trafficking of persons. MONT. CODE ANN. § 45-5-702. It provides as follows:

> (1) a person commits the offense of trafficking of persons if the person purposely or knowingly:
>
> (a) recruits, transports, transfers, harbors, receives, provides, obtains, isolates, maintains, or entices another person intending or knowing that the person will be subjected to involuntary servitude or sexual servitude; or
>
> (b) benefits, financially or by receiving anything of value, from facilitating any conduct described in subsection (1)(a) or from participation in a venture that has subjected another person to involuntary servitude or sexual servitude.
>
> (2) (a) Except as provided in subsections (2)(b) and (2)(c), a person convicted of the offense of trafficking of persons shall be imprisoned in the state prison for a term of not more than 15 years, fined an amount not to exceed $50,000, or both.
>
> (b) A person convicted of the offense of trafficking of persons shall be imprisoned in the state prison for a term of not more than 50 years, fined an amount not to exceed $100,000, or both, if the victim was a child.
>
> (c) A person convicted of the offense of trafficking of persons shall be imprisoned in the state prison for a term of not more than 25 years, fined an amount not to exceed $75,000, or both, if the violation involves aggravated kidnapping, aggravated sexual intercourse without consent, or deliberate homicide.

B. Claim Administration

As a criminal statute, MONT. CODE ANN. § 45-5-702 is administered through prosecution by the state.

C. Statute of Limitations

A prosecution for this felony must be commenced within 5 years after it is committed. MONT. CODE ANN. § 45-1-201.

D. Remedies

Any person convicted under § 45-5-702 is guilty of a felony and, depending on the circumstances of the offense, may be imprisoned in the state prison for a term of not more than 25 years, fined an amount not to exceed $75,000, or both. MONT. CODE ANN. § 45-5-702.

Nebraska

I. Wage Theft

A. Minimum wage violations

1. Normative Standards

The current minimum wage in Nebraska is $9 per hour. NEB. REV. ST. § 48-1203(1)(c). Tipped employees have a minimum of $2.13 per hour, but the sum of the hourly wage and gratuities received must equal or exceed the full minimum wage. NEB. REV. ST. § 48-1203(2). Student-learners taking part in a vocational training program must be paid at a rate of at least 75% of minimum wage. NEB. REV. ST. §§ 48-1203(3);48-1203.01.

2. Claim Administration

An action to recover unpaid minimum wages may be maintained in any court of competent jurisdiction, or an employee or employees may designate an agent or representative to maintain the action for all of the employees similarly situated. NEB. REV. ST. §§ 48-1206(5); 48-1231.

Alternatively, an employee with a wage claim can file a complaint with the Nebraska Department of Labor. NEB. REV. ST. § 48-1233. The Commissioner of Labor has the authority to subpoena records and witnesses. The Commissioner or his or her agent may inspect all related records and gather testimony on any matter relative to the enforcement of the Wage and Hour Act. *Id.* §§ 48-1206(1) and 48-1233.

3. Statute of Limitations

A civil action to collect wages due falls under the residual limitations period for actions based on statutory liabilities, which is four years. NEB. REV. STAT. ANN. § 25-206; *see Phillips v. Pearson's Painting, Inc.*, No. 8:13CV211, 2015 WL 5671397, at *6 (D. Neb. Sept. 25, 2015).

4. Remedies

A successful plaintiff on an action for unpaid minimum wages is entitled to: (1) an amount equal to the unpaid wages owed; or (2) if the nonpayment of wages is found to be willful, an amount equal to two times the amount of unpaid wages. NEB. REV. ST. § 48-1206(5). Plaintiffs are also entitled to the costs of the action and reasonable attorney's fees. NEB. REV. ST. § 48-1206(5). Any employer who violates any of the provisions of the minimum wage provision is guilty of a Class IV misdemeanor. NEB. REV. STAT. ANN. § 48-1206.

B. Overtime violations

Nebraska does not have any laws related to overtime requirements for private employers. Employees in the state are left with their remedies under the federal Fair Labor Standards Act.

C. Off-the-clock violations

Nebraska does not have any laws related to off-the-clock violations. Employees in the state are left with their remedies under the federal Fair Labor Standards Act.

D. Illegal deductions

1. Normative Standards

> "An employer may deduct, withhold, or divert a portion of an employee's wages only when the employer is required to or may do so by state or federal law or by order of a court of competent jurisdiction or the employer has a written agreement with the employee to deduct, withhold, or divert."

NEB. REV. ST. § 48-1230(1).

2. Claim Administration

Violations are administered by the Nebraska Department of Labor. NEB. REV. ST. § 48-1233. An employee may maintain an action under the Nebraska Wage Payment and Collection Act to redress unlawful deductions. *Malone v. Am. Bus. Info.*, 262 Neb. 733, 738, 634 N.W.2d 788, 792 (2001).

3. Statute of Limitations

A civil action to collect wages due falls under the residual limitations period for actions based on statutory liabilities, which is four years. NEB. REV. STAT. ANN. § 25-206; *see Phillips v. Pearson's Painting, Inc.*, No. 8:13CV211, 2015 WL 5671397, at *6 (D. Neb. Sept. 25, 2015).

4. Remedies

If successful in a civil action, a plaintiff can recover the amount unlawfully deducted, fees, and costs. *Malone v. Am. Bus. Info.*, 262 Neb. 733, 738, 634 N.W.2d 788, 792 (2001). An amount equal to the unpaid wages, or an amount equal to two times the unpaid wages in the event of willful nonpayment, may be recovered and placed in a fund distributed to the schools of the state. *Id.*

The Commissioner of Labor must issue a citation to an employer when an investigation reveals that the employer may have violated the Nebraska Wage Payment and Collection Act by not paying his or her employees for the appropriate wage period. NEB. REV. ST. § 48-1234(1). This citation may consist include an administrative penalty of not more than $500 for the first violation, and not more than $5000 for subsequent violations. NEB. REV. ST. § 48-1234(2). If an employee has filed suit against his or her employer for a wage payment violation, any citation by the Commissioner shall be entered into the evidence. NEB. REV. ST. § 48-1234(4).

E. Pay Stub provisions

1. Normative Standards

Nebraska requires that each employer establish a regular pay day, and give employees 30 days advance notice before the established pay day can be altered, but does not specify how often employees must be paid. NEB. REV. ST. § 48-1230(1).

For each payday, a covered employer must "deliver or make available to each employee, by mail or electronically," a wage statement showing:

> (a) The employee's identity;
> (b) The hours worked (unless the employee is exempt under the federal Fair Labor Standards Act);
> (c) the wages earned; and
> (d) the deductions made.

NEB. REV. ST. § 48-1230(2).

An employer may only "withhold, or divert a portion of an employee's wages" sums it is either required or permitted to withhold by state or federal law or by court order or the employer has a written agreement with the employee to do so. *Id.* at § 48-1230(1).

2. Claim Administration

The wage statement requirement is part of the Wage Payment and Collection Act, and is governed by the procedures specified in I.A.2 above.

3. Statute of Limitations

The wage statement requirement is part of the Wage Payment and Collection Act, and is governed by the period of limitations specified in I.A.3 above.

4. Remedies

The wage statement requirement is part of the Wage Payment and Collection Act, and provides the remedies specified in I.A.4 above.

F. Interagency Information Sharing

Nebraska requires interagency information sharing on wage and hour topics both directly and indirectly. First, the Employee Classification Act (which creates a presumption of employee status in the construction industry) requires the Commissioner of Labor to share any violations of the Act "with the Department of Revenue for analysis of violations of the Nebraska Revenue Act of 1967 and with the Nebraska Workers' Compensation Court." NEB. REV. STAT. ANN. § 48-2908. Thereafter, the Department of Revenue is required to "investigate and, if appropriate, proceed with the collection of any income tax not withheld plus interest and penalties." *Id.* In addition, the Commissioner of Labor, the Department of Revenue, and the Nebraska Workers' Compensation Court are required to "refer any violation reasonably believed to be a civil or criminal violation of the Employment Security Law, the Nebraska Revenue Act of 1967, the Nebraska Workers' Compensation Act, or another law to the appropriate prosecuting authority for appropriate action." *Id.*

Second, under Neb. Rev. St. § 48-1236, every year, the Department of Labor is required to post information on its web site regarding compliance with and enforcement of the Nebraska Wage Payment and Collection Act, as well as provide notice to the Legislature that the information has been posted. The posted information must include:

> (a) the total number of reports of unpaid wages filed with the department in the prior calendar year;
> (b) the total number of reports investigated in the prior calendar year;
> (c) the results of all investigations completed in the prior calendar year, including, but not limited to, the number of cases in which wages were found to be owed to an employee, the number of cases in which the employer paid wages owed to the employee during the course of the investigation, and the number of cases in which it was found that no wages were owed to an employee;
> (d) the number of citations issued regarding failure to properly pay employees (pursuant to Wage Payment and Collection section Neb. Rev. St. § 48-1234) in the prior calendar year;

> (e) the total amount of wages owed to employees according to the citations issued in the prior calendar year;
> (f) the number of employers with more than two citations in the previous five years; and
> (g) the number and names of employers with at least one unpaid citation from the previous five years.

II. Employee Misclassification

A. Independent Contractor/Employee Classification

1. Normative Standards

Two statutory schemes address the independent contractor/employee classification issue. First, Nebraska addresses the issue directly in the construction industry in the Employee Classification Act of 2010, which was directed at misclassification as it impacts tax withholding, unemployment insurance and workers' compensation insurance benefits. NEB. REV. STAT. ANN. § 48-2903. That statute creates a presumption that any "individual performing construction labor services for a contractor is . . . an employee and not an independent contractor" for those purposes unless:

> (a) the individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact;
> (b) the service rendered is either outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed;
> (c) the individual is customarily engaged in an independently established trade, occupation, profession, or business;
> (d) the individual has been registered as a contractor pursuant to the Contractor Registration Act prior to commencing construction work for the contractor; and
> (e) the individual has been assigned a combined tax rate pursuant to sections 48-649 to 48-649.04 or is exempted from unemployment insurance coverage.

NEB. REV. STAT. ANN. § 48-2903

Second, for purposes of the Nebraska Wage Payment and Collection Act (and outside the construction industry), the term "employee" is defined to mean any individual permitted to work by an employer pursuant to an employment relationship or who has contracted to sell the goods or services of an employer and to be compensated by commission. NEB. REV. ST. § 48-1229(1). The WPCA also creates a presumption that a remunerative relationship is an employment relationship and not one with an independent contractor. It can be overcome if it is shown that:

> (a) the individual alleged to be an independent contractor has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact,
> (b) the service the individual provides is either outside the usual course of business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed, and
> (c) the individual is customarily engaged in an independently established trade, occupation, profession, or business.

2. Claim Administration

For Wage Collection and Payment Act purposes, the procedures outlined in I.A.2 apply. Unemployment compensation benefits are administered according to an extensive administrative process described at Neb. Rev. Stat. Ann. §§ 48-631 *et seq.*

3. Statute of Limitations

For Wage Collection and Payment Act purposes, the limitations outlined in I.A.3 apply.

4. Remedies

For Wage Collection and Payment Act purposes, the remedies outlined in I.A.4 apply.

B. Exempt/Non-Exempt Classification

1. Normative Standards

Nebraska law does not contain an overtime requirement, and thus there are no state statutory provisions specifying who might be exempt from them. Employees in Nebraska are limited to claims brought under the federal Fair Labor Standards Act

III. Payroll Fraud on State Government by Government Contractors

Outside of the Medicaid area, Nebraska has no state False Claims Act, or any other statute that explicitly deals with fraudulent claims made to the state or its political subdivisions. More generally, fraud in contracts is dealt with under Neb. Rev. St. U.C.C. § 2-721.

IV. Certification by Government Contractors of Prevailing Wage Compliance

1. Normative Standards

Nebraska created the Commission of Industrial Relations, among other things, to establish the prevailing rates of pay and conditions of employment for public works projects. NEB. REV. ST. § 48-818(1). To do so, the commission takes into consideration the overall compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employees. NEB. REV. ST. § 48-818(1). The prevailing wage statute does not expressly create any payroll certification requirement.

2. Claim Administration

Any public employer, public employee, or labor organization, or the Attorney General of Nebraska on his or her own initiative or by order of the Governor, may file a petition with the commission. NEB. REV. ST. § 48-811.

3. Remedies

Orders, temporary or final, entered by the Commission of Industrial Relations shall be binding on all parties involved therein and shall be deemed to be of the same force and effect as like orders entered by a district court and shall be enforceable in appropriate proceedings in the courts of this state. Failure on the part of any person to obey any order, decree or judgment of the Commission of Industrial Relations, either temporary or final, shall constitute a contempt of such tribunal in all cases where a similar failure to obey a similar order, decree or judgment of a district court would constitute a contempt of such tribunal, and upon application to the appropriate district court of the state shall be dealt with as would a similar contempt of the said district court. NEB. REV. ST. § 48-819

After the hearing and any investigation, the commission shall make all findings, findings of fact, recommended decisions and orders, and decisions and orders in writing, which findings, findings of fact, recommended decisions and orders, and decisions and orders shall be entered of record. NEB. REV. ST. § 48-817.

V. Labor Trafficking

1. Normative Standards

Nebraska has a criminal statute aimed directly at human trafficking, labor trafficking, sex trafficking, labor trafficking of a minor or sex trafficking of a minor. NEB. REV. ST. § 28-831. No comparable or parallel civil statute exists. For criminal purposes, labor trafficking means "knowingly recruiting, enticing, harboring, transporting, providing, or obtaining by any means or attempting to recruit, entice, harbor, transport, provide, or obtain by any means a person eighteen years of age or older intending or knowing that the person will be subjected to forced labor or services." NEB. REV. ST. § 28-831.

2. Claim Administration

Criminal cases of labor trafficking are prosecuted by the state in court.

3. Statute of Limitations

Neb. Rev. St. § 29-110(4) provides a statute of limitations of 7 years.

4. Remedies

Any person who engages in labor trafficking or sex trafficking is guilty of a Class II felony. NEB. REV. ST. § 28-831(2). Any person, other than a trafficking victim, who knowingly benefits from or participates in a venture which has, as part of the venture, an act that is in violation of this section is guilty of a Class IIA felony. NEB. REV. ST. § 28-831(3).

New Jersey

I. Wage Theft

A. Minimum Wage Violations

1. Normative Standards

Employers in New Jersey must pay nonexempt employees at least the minimum wage, which is currently $12 per hour. N.J. STAT. ANN. § 34:11-56a. That figure will increase each year based on the consumer price index for all urban wage earners and clerical workers, with a minimum of $1 per year increase until 2024, up to $15 per hour. *Id*. If the federal minimum wage rises higher than the then-current state minimum, the federal minimum applies. *Id.* at § 34:11-56a4(a). Specific provisions are provided for tipped employees, training (and supervision/enforcement of training provisions), seasonal employees and employees working for a small employer, farm laborers, truckers, and long-term care facility staff. N.J. STAT. ANN. § 34:11-56a4(c)-(g), (i).

New Jersey's definition of the term "employee" is circular ("any individual employed by an employer"), and it adopts the federal Fair Labor Standards Act's definition of "employ," which includes any activity "suffered or permitted" by an employer. N.J. STAT. ANN. §§ 34:11-56a1(f)-(h). The following are not "employees" as defined by New Jersey minimum wage law, and are thus exempted from the statutory minimum wage rate:

> (1) Full time students employed by university or college, who are paid at least 85% of the minimum wage.
> (2) Part time employees primarily engaged in the care and tending of children in the employer's home.
> (3) Outside salesman and salesmen of motor vehicles.
> (4) Minors under 18 years of age.
> (i) Unless employed in certain fields that are required to be paid minimum wage, including: processing of farm products, Hotel and motels, Restaurants, Mercantile, Beauty, culture and Laundry, cleaning, and dyeing jobs;

> (5) Employees at summer camps, conferences, and retreats operated by nonprofit or religious cooperation, during months of June, July, August, and September.

N.J. STAT. ANN. § 34:11-56a4(b)(3) (full time students); N.J. STAT. ANN. §34:11-56a4(a) (part time employees, outside salesmen, and minors); N.J. ADMIN. CODE § 12:56-11.2 (farm product exceptions); N.J. ADMIN. CODE § 12:56-13.2 (hotel and motel); N.J. ADMIN. CODE §§ 12:57-3.3, 4.3, 5.3 (mercantile, beauty, and cleaning); N.J. ADMIN. CODE § 12:56-3.2(6) (summer camp employees); N.J. ADMIN. CODE § 12:56-11.2.

2. Claim Administration

Employees can file a civil action for unpaid wages or wages lost due to retaliation. N.J. STAT. ANN. § 34:11-4.10(c). Employees can also file a wage claim with the New Jersey Department of Labor (NJDOL). N.J. STAT. ANN. § 12:56-11.2, N.J. STAT. ANN. 34:11-4.9; N.J. STAT. ANN. § 34:11-56a24. The Commissioner of the NJDOL is authorized to investigate any claim for unpaid wages and wage theft, and make a decision and an award, but only when the sum does not exceed $50,000. N.J. STAT. ANN. § 2C:40A-2; N.J. STAT. ANN. § 34:11-58(c). The Commissioner is authorized to supervise the payment of amounts due to employees, and the employer may be required to pay the damages to a special account in trust overseen by the Commissioner for the employees. The employer must also pay to the Commissioner an administrative fee of between 10%-25% of any wage payment ordered. N.J. STAT. ANN. §34:11-58(e). When the sum exceeds $50,000, the Commissioner cannot investigate on behalf of the employee.

The Commissioner is also authorized to investigate occupation, rather than specific individual wage payment failures in order to ascertain whether a substantial number of employees in the occupation are receiving less than a fair wage. He may do this on his or her

own motion, but *must* do so upon a petition of 50 or more residents of the state requesting such an investigation. N.J. STAT. ANN. § 34:11-56a7. These procedures are further described below. *See infra* at I.B.2.

When a dispute over wages arises, the employer is required to pay without condition and within the time set all wages conceded by the employer to be due, leaving to the employee all remedies to which he might otherwise be entitled. N.J. STAT. ANN. § 34:11-4.8(a). The employee does not release any claim he or she might have by accepting such a payment, and any release required by an employer as a condition to payment shall be in violation of this act. N.J. STAT. ANN. § 34:11-58(f); N.J. STAT. ANN. 34:11-4.8(b).

3. Statute of Limitations

The statute of limitations on wage claims in six years. N.J. STAT. ANN. § 34:11-58(a).

4. Remedies

If an employer fails to pay the full amount owed, the employee may recover the full amount of any wages lost, plus not more than 200% liquidated damages together with cost and reasonable attorney fees. N.J. STAT. ANN. § 34:11-4.10(a). Liquidated damages are "not required" for a first violation by an employer if the employer shows to the satisfaction of the court that the non-payment arose out of an inadvertent error made in good faith, the employer had reasonable grounds for believing that the act or omission was not a violation, and the employer acknowledges that it violated the law and pays the amount owed within 30 days of notice of the violation. N.J. STAT. ANN. § 34:11-4.10(c).

In addition to the civil remedies available, an employer that knowingly fails to pay an employee the minimum wage or has retaliated against employees who have made complaints to

the Commissioner, the employer's employer, or its authorized representative regarding failure to pay full wages or because the employee will be or has initiated proceedings against the employer is guilty of disorderly persons offense and is punished by a fine of at least $500 and maximum of $1000 for the first offense, or by imprisonment of 10–90 days, or both fine and imprisonment, and upon subsequent convictions will be fined between $1000-2000 or 10-100 days or both. In cases of a retaliatory discharge related to a wage dispute, the employer will additionally be required to rehire the employee and correct the retaliatory action, and pay all lost wages caused by the unlawful discharge. N.J. STAT. ANN. § 34:11-4.10(b).

B. Overtime Violations

1. Normative Standards

A nonexempt employee working more than 40 hours in any workweek, must be paid overtime at a rate of 1.5 times his hourly wage. N.J. STAT. ANN. §§ 34:11-56a4(b)(1); N.J. STAT. ANN. § 12:56-6.1. The statutory overtime pay requirements do not apply to any individual employed in a bona fide executive, administrative, or professional capacity; or to employees engaged to labor on a farm or employed in a hotel; or to an employee of a common carrier of passengers by motor bus; or to a limousine driver who is an employee of an employer engaged in the business of operating limousines; or to employees engaged in labor relative to the raising or care of livestock. N.J. STAT. ANN. § 34:11-56a4(b)(1).

Overtime is not required for those working more than eight hours a day or for work on Saturdays, Sundays, holidays, or other regular days of rest. N.J. ADMIN. CODE § 12:56-6.4(b). Hours may not be averaged over two or more workweeks to eliminate the requirement to pay

overtime wages for hours worked in excess of 40 in a given workweek. N.J. ADMIN. CODE §§ 12:56-6.1, 6.2.

2. Claim Administration

In addition to the procedures outlined for minimum wage violations in sections I.A.2-4 above, New Jersey provides a procedure for empaneling a Wage Board to investigate unfair wages in any occupation or occupations:

Upon a petition by 50 or more residents of New Jersey, the Commissioner can, if of the opinion that a substantial number of employees in any occupation or occupations are receiving a less than fair wage, appoint a wage board to report upon the establishment of a minimum fair wage for employees in such occupation(s). N.J. STAT. ANN. § 34:11-56a; N.J. STAT. ANN. § 34:11-56a8. The wage board can investigate minimum wage or overtime hours issues. N.J. STAT. ANN. § 34:11-56a10. A wage board is composed of not more than three representatives of the employers in the occupation, an equal number of representatives of the employees, and not more than 3 disinterested persons representing the public. The members shall serve without pay but may be reimbursed for all necessary expenses. N.J. STAT. ANN. § 34:11-56a8. The wage board has the powers to subpoena and require the attendance and testimony of witnesses, as well as the production of all records related to the matters under investigation. N.J. STAT. ANN. § 34:11-56a10.

After investigation, the Wage Board can recommend through submission of its report to the Commissioner minimum fair wage rates, on an hourly, daily, or weekly basis for the

employees in the occupation or occupations for which the wage board was appointed. The wage board can also recommend, among other things, a change to the number of hours per week after which the overtime rate should apply and can recommend an overtime rate. N.J. STAT. ANN. § 34:11-56a13. The Commissioner then decides whether to accept or reject the wage board decision. If rejected, then the matter is resubmitted to either the same or a new wage board. If accepted, it is published, and a public hearing is held. N.J. STAT. ANN. § 34:11-56a15.

If the report is approved after a hearing, the commissioner enters a wage order, which thereafter defines minimum fair wage rates in the occupation or occupations as recommended in the report of the wage board. N.J. STAT. ANN. § 34:11-56a16.

3. Statute of Limitations

The statute of limitations on wage claims is six years. N.J. STAT. ANN. § 34:11-58(a).

4. Remedies

The remedies for overtime violations are the same as those described above at I.A.4 for minimum wage violations.

C. Off-the-clock Violations

1. Normative Standards

Employees are entitled to pay for all hours of work, which includes all time that the employee is required to be at his place of work or on duty. N.J. ADMIN. CODE §12:56-5.1; N.J. ADMIN. CODE §12:56-5.2. Time spent waiting on-call is not considered hours worked unless the employee is not free to use the on-call time for his or her own benefit. N.J. ADMIN. CODE §12:56-5.6. An employee who must stay at home to receive calls from customers while the office is closed may be compensated under reasonable agreement for determining hours worked.

N.J. ADMIN. CODE §12:56-5.7. New Jersey law does not require meal and rest breaks other than for minors. N.J. STAT. ANN. §34:2-21.4.

2. Claim Administration, Statute of Limitations, and Remedies

The procedures, periods of limitation and remedies used in litigating off-the-clock violations are the same as those described in sections I.A.2-4 above for minimum wage claims.

D. Illegal Deductions

1. Normative Standards

No employer may withhold or divert any portion of an employee's wage unless:

(1) The employer is required to do so under state or federal law; or
(2) The amounts withheld or diverted are for:
> (i) Contributions for welfare, insurance, hospitalization, medical or surgical, pension, retirement, and profit-sharing plans, under authorization by employee in writing or under collective bargaining agreement and to plans establishing individual retirement annuities on a group or individual basis, or individual retirement accounts at any State or federally chartered bank, saving banks, or saving and loan associations for the employee, spouse, or both;
> (ii) Contributions authorized in writing or under collective bargaining agreements for payment into company operated thrift plans, or security option, or security purchase plans to buy securities of the employing corporation, affiliated corporation, or other corporations at market price or less, provide the securities are listed on a stock exchange or are marketable over the counter;
> (iii) Payments authorized into employee personal savings account, such as payments to a credit union, saving fund society, savings and loan or building and loan associations, and payments to banks fir Christmas, vacation, or other savings funds, provided al such deductions are approved by the employer; or
> (iv) To pay for company products, in accordance with a periodic payment schedule, payments for employer loans to employees, payments to correct payroll errors, and payment of costs and related to replacement of employee identifications for airline employees, provided all such deductions are approved by the employer.

N.J. STAT. ANN. § 34:11-4.4.

2. Claim Administration

The procedures used in litigating off-the-clock violations are the same as those described in section I.A.2 above for minimum wage claims.

3. Statute of Limitations

The statute of limitations is six years. N.J. STAT. ANN. § 34:11-58(a).

4. Remedies

The remedies available in off-the-clock cases are the same as those described in section I.A.4 above for minimum wage claims.

E. Paystub Provisions

1. Normative Standards

Every employer is obligated to notify each employee at the time he or she is hired of the applicable rate of pay and the regular payday designated by the employer, which must be at least twice a month (unless the employee is a bona fide executive, supervisory, or other special classifications, in which case the payday must be at least monthly) and must thereafter notify its employees of any changes in the pay rates. For each pay period, the employer must also furnish the employee with a statement which includes:

(1) Gross wages
(2) Net wages
(3) Rate of pay
(4) If relevant to the wage calculation, the number of hours worked by the employee during the pay period.

N.J. STAT. ANN. § 34:11-4.6. An employer may provide this statement electronically, unless the employee requests that the statement be provided in a paper format. *Id.*

2. Claim Administration, Statute of Limitations, and Remedies

New Jersey does not specifically provide a personal right of action for enforcing the pay statement requirements.

F. Interagency Information Sharing

New Jersey has a number of information-sharing and joint operation statutes that may implicate employment-related matters.

Whenever the Commissioner issues a decision that an employer has violated New Jersey wage laws and the amount owed is equal to or greater than $5,000, the Commissioner must inform the Division of Taxation in the Department of the Treasury of the decision and may recommend completing a taxation audit of the employer and any successor firms. N.J. STAT. ANN. § 34:11-58(f).

The Attorney General must direct the Office of the Insurance Fraud Prosecutor to confer from time to time with Departments or other units of State Government which have units that investigate fraud, in order to coordinate activities, share information, and provide any assistance necessary to any State agency in overseeing enforcement activities. N.J. STAT. ANN. § 17:33A-24.

The Center for Occupational Employment Information and the State Employment and Training Commission are authorized to access the files and records of other State agencies which administer or distribute State job training funds or federal job training funds or issue license necessary for an individual to work in a specific occupation. N.J. STAT. ANN. § 34:1A-88.

II. Employee Misclassification

A. Independent Contractor/Employee Classification

1. Normative Standards

New Jersey has not codified broadly applicable standards for distinguishing between employees and independent contractors. The state has, however, determined that misclassification is of particular concern in the construction industry, N.J. ADMIN. CODE § 34:20-2, and has industry-specific, legislated standards for making those distinctions. Those "making . . . improvements to real property . . . for remuneration paid by an employer shall be deemed to be employment unless:

> (1) The individual has been and will continue to be free from control or direction over the performance of that service, both under his contract of service and in fact; and
> (2) The services are either outside the usual course of the business for which the service is performed, or the service is performed outside of all the places of business of the employer for which the service is performed; and
> (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business.
> (4) The failure to withhold federal or State income taxes or to pay unemployment compensation contributions or workers' compensation premiums with respect to an individual's wages shall not be considered in making a determination under this section.

N.J. STAT. ANN. § 34:20-4. Employers in the construction industry are not permitted to require or request that any individual enter into an agreement or sign a document which results in the misclassification of the individual as an independent contractor or otherwise does not accurately reflect the employment relationship with the employer. N.J. STAT. ANN. § 34:20-8(a).

2. Claim Administration

An individual employed as a construction worker who has not been properly classified as an employee may bring a civil action for damages against the employer or subcontractor for failing to properly classify the employee. An individual representative, including a labor organization, may bring the action on behalf of the individual or as a class action. N.J. STAT. ANN. § 34:20-8(b).

3. Statute of Limitations

The statute of limitations to pursue misclassification under N.J. STAT. ANN. § 34:20-8(b) is six years.

4. Remedies

An employer who fails to properly classify an individual as an employee in the construction industry is guilty of a disorderly persons offense, and shall be fined not less than $100 nor more than $1000 or be imprisoned for not less than 10 nor more than 90 days, or both. Each week the misclassified employee works is a separate offense. N.J. STAT. ANN. § 34:20-5(a)(1). If the misclassification is knowing, the employer is charged with a crime of varying degrees depending on the contract amount. N.J. STAT. ANN. § 34:20-5(a)(2). An employer that misclassifies employees is deemed to have caused loss to the employees in any amount by which the employees were underpaid in connection with the misclassification and is subject to fines and must pay restitution to the victims. N.J. STAT. ANN. §34:20-5(a). The court may award attorney's fees and other costs of the action in addition to damages to an individual or class of individuals who have not been properly classified as employees in accordance with section 4 of this act. N.J. STAT. ANN. § 34:20-8(b).

When the Commissioner of Labor and Workforce Development finds that an employer in the construction industry has misclassified employees as prohibited, the Commissioner is authorized to assess and collect administrative penalties, up to a maximum of $2,500 for a first violation and up to a maximum of $5,000 for each subsequent violation, specified in a published schedule of penalties. N.J. STAT. ANN. § 34:20-5. The factors in determining the amount of the administrative penalties are:

(1) the history of previous violations by the employer;

(2) the seriousness of the violation;
(3) the good faith of the employer; and
(4) the size of the employer's business.

Id. Any sum collected as a penalty by the Commissioner in such a proceeding will be applied toward enforcement and administration costs of the Division of Workplace Standards in the Department of Labor and Workforce Development. N.J. STAT. ANN. § 34:20-5(b).

Further, the Commissioner can refer the matter to the Attorney General or his designee for investigation and prosecution. N.J. STAT. ANN. § 34:20-5. The Commissioner may also issue a stop-work order against the employer requiring cessation of all business operations of the employer at the specific place of business or employment in which the violation exists. N.J. STAT. ANN. § 34:20-7.1(c)(1). An employer who is subject to a stop-work order shall have the right to appeal to the commissioner. N.J. STAT. ANN. § 34:20-7.1(c)(2).

Employers in the industry that are found to have violated the employee classification rules can be placed by the Commissioner on a list of employers who are prohibited from contracting, directly or indirectly, with any public body for the construction of any public building or other public work projects, or from performing any work on the same, for a period of three years. The commissioner has to give notice by mail of that list to any public body who requests it. N.J. STAT. ANN. § 34:20-6. The contractor then is afforded an opportunity to contest the suspension. N.J. STAT. ANN. § 34:20-7.

Misclassified employees working in other industries can pursue wage and hour claims under the same procedures, and obtain the same remedies, discussed *supra* for minimum wage and overtime violations, as the case may be.

B. Exempt/Non-Exempt Classification

1. Normative Standards

As with the federal Fair Labor Standards Act, the primary exemptions available under New Jersey law from the state overtime requirements are executive, administrative, professional, and outside sales employees. N.J. STAT. ANN. § 34:11-56a4. Additional exemptions include farm laborers, hotel employees, employees of common carrier buses, employees of limousine driving companies, and employees employed for livestock raising, N.J. STAT. ANN. § 34:11-56a4(b)(1), and part-time caregivers working in the employer's home, ignore without vocational work licenses, and motor vehicle salesmen. N.J. STAT. ANN. § 34:11-56a4(a). Full time students working for their school or university may be paid only 85% of the minimum wage. N.J. STAT. ANN. § 34:11-56a4(b)(3).

2. Claim Administration, Statute of Limitations, and Remedies

The procedures and periods of limitation used, and the remedies available, in litigating off-the-clock violations are the same as those described in sections I.A.2-4 above for minimum wage claims.

III. Payroll Fraud on State Government by Government Contractors

A. Normative Standards

The New Jersey False Claims Act ("NJFCA") makes it unlawful for any person to: (1) knowingly present, or cause to be presented, a false or fraudulent claim for payment or approval; (2) knowingly make, use, or cause to be made or used, a false record or statement material to a false or fraudulent claim; (3) knowingly make, use, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to a government entity, or knowingly conceal or knowingly and improperly avoid or decrease an obligation to pay or transmit money or property to a government entity. *See* N.J. STAT. ANN. § 2A:32C-3.

B. Claim Administration

The New Jersey Attorney General is responsible for investigating suspected violations of the NJFCA and may bring a civil action against a person that has violated the NJFCA. An individual may also bring a private civil action on behalf of the individual and the State. If the New Jersey Attorney General proceeds with a *qui tam* action (intervening in and assuming control of the private plaintiff's action), the private plaintiff may receive a percentage of the funds recovered. *See* N.J. STAT. ANN. § 2A:32C-7.

C. Statute of Limitations

A civil action under the NJFCA may not be brought: more than six years after the date on which the violation of the act is committed; or more than three years after the date when facts material to the right of action are known or reasonably should have been known by the state official charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last. N.J. STAT. ANN. § 2A:32C-11. Employees have two years from the date of the event to file a protest in writing to the Commissioner objecting to the amount paid. N.J. STAT. ANN. § 34:11-56.34(b).

D. Remedies

When the Attorney General proceeds in a NJFCA case initially brought by a private individual, the individual is entitled to an award of at least 15% but not more than 25% of the proceeds recovered under any judgment obtained by the Attorney General or of the proceeds of any settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. N.J. STAT. ANN. § 2A:32C-7.

If the case proceeds without the Attorney General, the person bringing the action or settling the claim receives an amount the court determines is reasonable, but not less than 25% and not more than 30% of the proceeds of the action or settlement. N.J. STAT. ANN. § 2A:32C-7

A violator of the NJFCA is also liable to the state under N.J. STAT. ANN. § 2A:32C-3 for three times the amount of actual damages sustained by the State and attributable to the violator, if the person commits any of the following acts:

> (a) Knowingly presents or causes to be presented to an employee, officer or agent of the State, or to any contractor, grantee, or other recipient of State funds, a false or fraudulent claim for payment or approval;
> (b) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the State;
> (c) Conspires to defraud the State by getting a false or fraudulent claim allowed or paid by the State;
> (d) Has possession, custody, or control of public property or money used or to be used by the State and knowingly delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt;
> (e) Is authorized to make or deliver a document certifying receipt of property used or to be used by the State and, intending to defraud the entity, makes or delivers a receipt without completely knowing that the information on the receipt is true;
> (f) Knowingly buys, or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property; or
> (g) Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the State.

Certain violator liabilities may be reduced if the violator furnishes the New Jersey Attorney General with all information known to the violator within 30 days of receiving such information, provided that the violator does not have knowledge of an investigation at the time the violator furnishes such information. N.J. STAT. ANN. § 2A:32C-4.

Criminal responsibility for payroll fraud is also available. Under the New Jersey prevailing wage statute, a person commits a crime if he or she knowingly submits to the government any claim for payment for performance of a government contract knowing such

claim to be false, fictitious, or fraudulent. N.J. STAT. ANN. § 34:11-56.35; *see* discussion of prevailing wages immediately below.

Should the Commissioner be made aware of the failure to properly pay employees prior to full payment to the contractor by the public body, the Commissioner may order the payment diverted and paid to the employees directly. N.J. STAT. ANN. § 34:11-56.33(b). The New Jersey Attorney General is required to investigate suspected violations of the NJFCA and may bring a civil action against a person that has violated the NJFCA. An individual may also bring a private civil action on behalf of the individual and the State. If the New Jersey Attorney General proceeds with a qui tam action, the private plaintiff may receive a percentage of the funds recovered. N.J. STAT. ANN. § 2A:32C-7.

IV. Certification by Government Contractors of Prevailing Wage Compliance

A. Normative Standards

The New Jersey State Prevailing Wage Act requires the Commissioner to determine what the prevailing wage rate applicable to each construction or public works project let by the State of New Jersey or any of its political subdivisions. N.J. STAT. ANN. § 34:11-56.30. Every contract must contain a provision stating the prevailing wage rate to the workers employed and a stipulation that the workers shall be paid not less than the prevailing wage rate. N.J. STAT. ANN. § 34:11-56.27.

An accurate record showing name, craft, and actual hourly rate of wages paid to each worker must be kept and preserved for two years from date of payment. The record has to be

made available at all reasonable hours to inspection by the public body and to the Commissioner. N.J. STAT. ANN. § 34:11-56.29.

Before any final payment is made on a public works contract, the treasurer of the public body is obligated to require the contractor(s) and subcontractor(s) working on the project to file written and sworn statements with the public body in form satisfactory to the Commissioner certifying to the wages then due from the contractor and subcontractor to any of their workers. N.J. STAT. ANN. § 34:11-56.37(b). The written statement has to set forth the names of the persons whose wages are unpaid and the amount due to each respectively. *Id.* The contractor or subcontractor making the sworn statement must verify explicitly that (s)he has read the statement, knows its contents, and that the statement is true of his or her own knowledge. *Id.*

B. Claim Administration

Any worker denied the prevailing wage on a covered public works project can file a lawsuit in state court to recoup the wages owed. N.J. STAT. ANN. § 34:11-56.40. A prevailing plaintiff can also recover attorney's fees and costs. *Id.* The Commissioner can also investigate and remedy violations of the Prevailing Wage Act, as described in Remedies below.

C. Statute of Limitations

Workers have two years to file a protest in writing with the Commissioner objecting to the amount of wages paid for service performed by him on a public work as being less than the prevailing wages for such services. N.J. STAT. ANN. § 34:11-56.34(b).

D. Remedies

A contractor who fails to comply with the Prevailing Wage Act is guilty of a disorderly persons offense and upon conviction will be fined not less than $100.00 nor more than $1,000 or

be imprisoned for not less than 10 nor more than 90 days, or both. Each week in any day of which each worker is paid less than the applicable rate constitutes a separate offense. N.J. STAT. ANN. § 34:11-56.64.

Alternatively, the Commissioner is authorized to assess and collect administrative penalties, up to a maximum of $2,500 for a first violation and up to a maximum of $5,000 for each subsequent violation. *Id.* The Commissioner can also refer the matter to the Attorney General or his designee for investigation and prosecution. N.J. STAT. ANN. § 34:11-56.35. Although debarment is a remedy for failure to pay the required prevailing wage, it does not appear to be a remedy available under the Prevailing Wage Act for failure to certify compliance.

V. Labor Trafficking

A. Normative Standards

No New Jersey statute directly addresses labor cartels or brokers specifically. However, New Jersey law makes it a felony when an individual:

> (1) knowingly holds, recruits, lures, entices, harbors, transports, provides or obtains, by any means, another, to engage in sexual activity . or to provide labor or services:
>
> (a) by causing or threatening to cause serious bodily harm or physical restraint against the person or any other person;
> (b) by means of any scheme, plan, or pattern intended to cause the person to believe that the person or any other person would suffer serious bodily harm or physical restraint;
> (c) by engaging in criminal coercion against the person;
> (d) by destroying, concealing, removing, confiscating, or possessing any passport, immigration-related document, or other document issued by a governmental agency to any person which could be used as a means of verifying the person's identity or age or any other personal identifying information;
> (e) by means of the abuse or threatened abuse of the law or legal process;
> (f) by means of fraud, deceit, or misrepresentation against the person; or
> (g) by facilitating access to a controlled dangerous substance or controlled substance analog as set forth in chapter 35 of Title 2C of the New Jersey Statutes; or

> (2) receives anything of value from participation as an organizer, supervisor, financier or manager in a scheme or course of conduct to do the foregoing; or
> (3) knowingly holds, recruits, lures, entices, harbors, transports, provides or obtains, by any means, a child under 18 years of age, to engage in certain specified forms of sexual activity, whether or not the actor mistakenly believed that the child was 18 years of age or older, even if that mistaken belief was reasonable.

N.J. STAT. ANN. § 2C:13-5.

B. Claim Administration

Although New Jersey's human trafficking statute is primarily a criminal statute, it also provides a civil remedy for victims. Specifically, any person injured by an actor who committed a human trafficking offense may bring a civil action in any court of competent jurisdiction against the actor and all those acting in concert with that actor. N.J. STAT. ANN. § 2C:13-8.1.

C. Statute of Limitations

Criminal charges have a statute of limitations of 5 years. N.J. STAT. ANN. § 2C:1-6. The statute of limitations on wage claims in six years. N.J. STAT. ANN. § 34:11-58(a).

D. Remedies

In any civil action brought pursuant to this section, the court must, in addition to any other appropriate legal or equitable relief, including damages for pain and suffering, recovery of reasonable costs for necessary medical, dental, and psychological services and punitive damages, award damages in an amount that is the greater of:

> (1) the gross income or value to the defendant of the injured party's labor or services; or
> (2) the value of the injured party's labor or services as determined by the "New Jersey Prevailing Wage Act," the "New Jersey State Wage and Hour Law," or any other wage act in NJ.

In addition to any damages, penalty, injunction, or other appropriate relief awarded in an action brought under the human trafficking statute, the court may award to the injured person bringing suit reasonable attorney's fees and costs. Damages in such an action would include all "appropriate legal or equitable relief, including damages for pain and suffering, recovery of reasonable costs for necessary medical, dental, and psychological services and punitive damages, award damages in an amount that is the greater of:

> (1) the gross income or value to the defendant of the injured party's labor or services; or
> (2) the value of the injured party's labor or services."

N.J. STAT. ANN. § 2C:13-8.1(b). The perpetrator may also be guilty of a criminal charge of human trafficking of the second degree. N.J. STAT. ANN.. § 2C:13-9.

New York

I. Wage Theft

A. Minimum Wage Violations

1. Normative Standard

New York's statutory scheme uses geography and employer size to establish minimum wages across the state. N.Y. LAB. LAW § 652. For example, employers in New York City must pay a wage of at least $15.00 per hour regardless of size, *see id.* at (1)(a)(i)-(ii), whereas even "large" employers (11 or more employees) outside of New York City, Nassau, Suffolk, and Westchester need only pay a minimum of $12.50 per hour. Food service workers receiving tips must receive an hourly wage of at least two-thirds of the current minimum wage provided that their tips combined with their wage equal or exceed the minimum wage. *See id.* at (4).

Each October, the Commissioner of Labor publishes the annual increases in these rates based on determinations made by the Director of the Budget. *See id.* at (1)(c). Every January, until the minimum wage reaches $15 throughout the entire state, the Division of Budget analyzes the economy in each region to determine whether there should be a temporary delay in scheduled increases. *See id.* at (6). New York City, Nassau, Suffolk, and Westchester have already increased their minimum wage to $15 per hour. Areas outside of these regions are still increasing their minimum wage until they reach the $15 threshold. *See id*. Industry-specific minimum wage levels can also be established through the state's "wage board" process, as described below. *See* N.Y. LAB. LAW § 657; https://dol.ny.gov/system/files/documents/2021/06/cr142.pdf.

2. Claims Administration

Minimum wage violations can be addressed through civil, criminal, or administrative processes in New York. Civil minimum wage violation claims in the state of New York may be brought in court by the underpaid employee or by the Commissioner on behalf of the underpaid employee. N.Y. LAB. LAW §§ 663(1), (2). The Commissioner also has the authority to bring any action necessary, including administrative action, to collect unpaid wages. N.Y. LAB. LAW § 663(2).

Failure to pay lawfully required wages can also constitute a crime. An employer, employer's agent, or any officer or agent of a corporation, partnership, or LLC who pays or agrees to pay an employee less than minimum wage is guilty of a misdemeanor. N.Y. LAB. LAW § 662(1). If the wrongdoer commits a second or subsequent offense within six years of the date of conviction for the prior offense, the second offense is a felony. *Id.* Each payment during the span of one week that is less than the minimum wage constitutes a separate offense. *Id*.

Apart from proceedings spurred by an individual complaint about their own circumstances, the Commissioner has the power to investigate whether the minimum wage is insufficient in any particular occupation. N.Y. LAB. LAW § 653(1). The minimum wage statute also has a "citizen action" component: the Commissioner must investigate alleged wage violations if fifty or more "residents of the state" or employees in the occupation at issue petition him or her to do so. *See id.* If, after investigation, the Commissioner believes that the minimum wage is inadequate in that particular occupation, he or she must appoint a wage board to investigate further and make recommendations. *See id.* For example, a wage board established in 2015 to study the minimum wage in the fast-food industry recommended a statewide increase

to $15, which was subsequently adopted and implemented in July of this year. *See* https://dol.ny.gov/system/files/documents/2021/07/p716.pdf.

3. Statute of Limitations

Civil actions for minimum wage violations must commence within six years. N.Y. LAB. LAW § 663(3). The statute of limitations is tolled when an employee files a complaint with the Commissioner or when the Commissioner begins an investigation, whichever is earlier. *See id*. Investigation by the Commissioner is not required as a precondition to a complaint in court. *Id*.

4. Remedies

When an employee brings a civil action, he or she can recover any underpayments, attorney's fees, prejudgment interest, and liquidated damages if the employer fails to show that it acted in good faith. N.Y. LAB. LAW § 663(1). Agreements between the employer and employee to work for a lower wage than required by law are not a defense to the action. *See id*.

The Commissioner can bring civil or administrative actions in which the employer is required to pay the full amount of underpayment, costs, and liquidated damages if the violation is found not to be in good faith. *Id*. The Commissioner calculates liquidated damages as no more than 100% of the total underpayment due to the employee. *Id*.

Criminal sanctions also exist. First, an employer, employer's agent, or any officer or agent of a corporation, partnership, or LLC is guilty of a misdemeanor if it fails to keep minimum wage records, fails to furnish records, hinders or delays enforcement of the minimum wage article, falsifies records or refuses to make records accessible, or refuses to furnish a sworn

statement of its records or any other information required for the enforcement the minimum wage law. N.Y. LAB. LAW § 662(2). Every day minimum wage records are not kept or furnished constitutes a separate offense. *See id*.

For the first minimum wage violation, the guilty party is fined not less than $500 and not more than $20,000 or imprisoned for one year or less. N.Y. LAB. LAW § 662(1). For subsequent offenses, the guilty party is charged with a felony. *See id.* They face the same fines levied for the first offense or imprisonment not to exceed one year and one day or punishment by both fine and imprisonment. *See id*. For record-keeping violations, the guilty party is fined not less than $500 and not more than $5,000 or imprisoned for one year or less. N.Y. LAB. LAW § 662(2). For each subsequent offense, the guilty party is charged with a felony and fined not less than $500 and not more than $20,000 or imprisonment not to exceed one year and one day or punishment by both a fine and imprisonment. *See id*.

B. Overtime Violations

1. Normative Standard

New York has no independent, generally applicable statutory requirement to pay overtime. Rather, it has numerous industry-specific overtime regulations, and extensive more generally applicable regulations that incorporate by reference, expand upon and explain application of the federal Fair Labor Standards Act's overtime requirements. 12 NYCRR § 142-2.2 ("Overtime rate"). Under those regulations, employers must pay employees an overtime rate of 1.5 times the employee's regular rate for all hours worked. *Id.* 12 NYCRR § 142-2.2. Nonresidential employees qualify for overtime if they work over 40 hours per week and

residential employees qualify if they work over 44 hours per week. The overtime rate is only paid for "working time" over the hourly maximum.

"Working time" is defined as "time worked or time permitted attendance, including waiting time, whether or not work duties are assigned, or time an employee is required to be available for work" in a specific area authorized by an employer "such that the employee is unable to use the time productively" for personal matters. 12 NYCRR § 146-3.6. Time spent traveling as part of employee duties is also considered "working time." *See id*. New York has promulgated extensive regulations that give specific guidance for overtime in certain industries. *See e.g.*, 12 NYCRR § 146-1.4; 12 NYCRR § 141-1.1.

2. Claim Administration

There are two ways to bring claims for overtime violations in New York. First, the underpaid employee can bring a civil action to recover unpaid wages, attorney's fees, and liquidated damages up to 100% of total wages due where the violation was willful. N.Y. LAB. LAW § 198(1-a). Second, the Department of Labor can conduct an investigation or audit. N.Y. LAB. LAW § 196. The Commissioner of Labor has the authority to conduct investigations and to commence civil and criminal proceedings to determine whether an overtime violation has occurred. *See id.*

3. Statute of Limitations

The statute of limitations for overtime violations is the same that applies to minimum wage violations described above in section I.A(4). N.Y. LAB. LAW § 663(3).

4. Remedies

Civil and criminal penalties for overtime violations are the same that apply to minimum wage violations described above in section I.A(4). N.Y. LAB. LAW § 662.

C. Off-the-clock Violations

New York has no specific off-the-clock legislation or regulations. Employers are required to pay their employees for "time worked." 12 NYCRR § 146-3.6. Because an employer requiring off-the-clock work is refusing to pay an employee for all time worked, violations would fall under provisions for minimum wage violations or overtime violations if the employee qualifies for overtime. *See id*; N.Y. LAB. LAW § 198; N.Y. LAB. LAW § 198-A; N.Y. LAB. LAW § 197; 12 NYCRR § 142. The procedures, periods of limitation, and remedies discussed above for minimum wage claims would apply for off-the-clock claims as well. *See supra* I.A.(2)-(4).

D. Illegal Deductions

1. Normative Standards

New York currently prohibits employers from deducting any sum from an employee's wage except: (a) those made in accordance with any law or regulation, including instances of overpayment due to clerical error or repayment of advances of salary or wages; and (b) those made for the benefit and with consent of the employee such as those for collective bargaining dues or fee payments. N.Y. LAB. LAW § 193(1)(a)-(b). Section 193(b) lists allowable deductions with respect to collective bargaining.

In November 2022, revisions to this law will go into effect. Under these revisions, no employer will be able to make any deduction from an employee's wages except: those in accordance with laws and regulations and those expressly authorized in writing by the employee

that are for the benefit of the employee. N.Y. LAB. LAW § 193(1)(effective 2022). These authorized deductions will be limited to payments for insurance premiums, pensions or health and welfare benefits, contributions to charitable organizations, payments for U.S. bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee. *See id.* In addition, with the exception of deductions authorized by a collective bargaining agreement, an employee's authorization for any deductions may be revoked in writing at any time. *See id.* at (3)(c)(effective 2022).

2. Claim Administration

Claims regarding illegal deductions may be brought through civil, criminal, and administrative actions. N.Y. LAB. LAW § 198-a; N.Y. LAB. LAW § 197. An employee or someone acting on his or her behalf may file a complaint with the Commissioner regarding illegal deductions. N.Y. LAB. LAW § 196-a. The commissioner may bring any legal action, including administrative actions, on behalf of the underpaid employee. N.Y. LAB. LAW § 198(1-a). Underpaid employees may bring civil actions on their own behalf. N.Y. LAB. LAW § 197.

3. Statute of Limitations

Actions to recover for underpaid wages due to illegal deductions must commence within 6 years. N.Y. LAB. LAW § 198(3). The statute of limitations is tolled when an employee files a complaint with the Commissioner or when the commissioner begins an investigation, whichever is earlier. *See id*. Investigation by the Commissioner is not required nor does it bar a person from bringing a civil action under this article. *Id*.

4. Remedies

If an employee brings a civil action and prevails, the court must allow for the full recovery of all underpayments, attorney's fees, prejudgment interest, and liquidated damages for willful violations. N.Y. LAB. LAW § 198(1-a).

In an administrative proceeding, the Commissioner must assess the full amount of underpayment and, unless the employer shows that it was acting in good faith, liquidated damages. N.Y. LAB. LAW § 198(1-a). Liquidated damages are calculated as no more than 100% of the total wages due. *See id*.

Upon conviction for making an unlawful deduction, the individual is guilty of a misdemeanor for the first offense and is punishable by a fine not more than $500 and not to exceed $20,000 or imprisonment for one more than one year. N.Y. LAB. LAW § 198-a. For a second or subsequent offense, the guilty party is fined not less than $500 and may be imprisoned for a period not to exceed one year and one day, or punishable by both fine and imprisonment. *See id*.

E. Pay Stub Provisions

1. Normative Standards

New York requires all pay stubs (or wage statements) to list the following: dates of work, name of the employee, name of employee, address and phone number of the employer, rate of pay, manner in which the employee was paid such as hourly or by shift, gross wages; deductions, any allowances, benefits information if applicable, prevailing wage supplements if applicable, and net wages. N.Y. LAB. LAW § 195(3). For employees not exempt from overtime compensation, the wage statement must include the regular hourly rate of pay, overtime rate of pay, the number of regular hours worked, and the number of overtime hours worked. *Id*. For

employees who are paid a "piece rate," employers must include the applicable piece rate of pay and number of pieces completed at each rate. *Id*. Railroad corporations must furnish employees with a wage statement listing accrued total earnings and taxes as well as a separate listing of his or her daily wages and how they were computed. N.Y. LAB. LAW § 195(3-a). Employers must establish, maintain, and preserve this wage statement information for 6 years at a minimum.

When an employee is promised a particular wage rate, or is entitled to the prevailing wage rate, it is unlawful for any person to request, demand, or receive a return, donation, or contribution of the employee's wages, salary, or supplements, or other thing of value with the understanding that failure to comply will prevent the employee from gaining or retaining employment. N.Y. LAB. LAW § 198-b(2). This provision does not apply to labor organizations in their collection of dues. *See id.* at (4).

2. Claim Administration

An employee who is not provided a wage statement can bring a civil action to recover statutorily prescribed liquidated damages. N.Y. LAB. LAW § 198(1-d). The Commissioner can also bring "any legal action necessary, including administrative action" on behalf of any employee who has not received adequate statements of wages from his or her employer. *Id*.

3. Statute of Limitations

Actions to recover for wage statement violations must commence within 6 years. *Id.* at (3). The statute of limitations is tolled when an employee files a complaint with the Commissioner or when the commissioner begins an investigation, whichever is earlier. *See id*. Investigation by the Commissioner is not required not does it bar a person from bringing a civil action under this article. *Id*.

4. Remedies

If an employer fails to provide wage statement(s) to an employee as required in N.Y. Labor Law § 195(3), the employee can recover $250 for each work day the violations occurred or continue to occur. N.Y. LAB. LAW § 198(1-d). The total amount recoverable cannot exceed $5,000 together with costs and attorney's fees. *See id*. The court may award further relief at its discretion, including injunctive and declaratory relief. *Id*.

When an employer violates these wage statement provisions, the Commissioner has the power to post a notice summarizing the violation in an area visible to employees for up to a year. N.Y. LAB. LAW § 219-c(1). If the violation is willful, the Commissioner has the power to post a notice summarizing the violation in an area visible to the public for up to ninety days. *See id.* at (2). Anyone who removes or tampers with the notice is guilty of a misdemeanor. *Id.* The Commissioner may also may assess damages upon the employer of up to $250 per day, per employee. N.Y. LAB. LAW § 198(1-d). This amount cannot exceed $5,000 in total. *Id*. The statute allows for affirmative defenses including if the employer reasonably believed in good faith that notice under this provision was not required. *See id*. The remedies outlined above may be enforced consecutively or simultaneously. *Id.* at (2). The employee or Commissioner has the right to collect attorney's fees and costs during a civil action when enforcing any court judgment. *Id.* at (4). A violation of N.Y. Labor Law section 198-b, the kick-back provision, is a misdemeanor. N.Y. LAB. LAW § 219-c(2).

F. Interagency Information Sharing

New York has created a Joint Enforcement Task Force on Employee Misclassification to foster interagency information sharing. 9 NYCRR § 6.17. Task force members include "the Commissioner of Labor, the Attorney General, the Commissioner of Taxation and Finance, the

Chair of the Workers' Compensation Board, the Workers' Compensation Fraud Inspector General, and the Comptroller of New York." *Id.* at (2). It is charged with: facilitating information sharing among members relating to suspected employee misclassification violation; pooling investigative and enforcement resources; assessing whether prevention mechanisms in New York and other jurisdictions improve prevention and enforcement efforts; identifying significant cases that should be investigated jointly; forming joint enforcement teams to utilize the capabilities of members; soliciting the cooperation and participation of local officials and other agencies to establish procedures for referring cases for prosecution; working cooperatively with federal to local social services agencies to aide vulnerable populations exploited by employee misclassification. *Id.* at (4).

All agencies, departments, offices, divisions, and public authorities are required to cooperate with the task force and provide information and assistance as the task force determines is "reasonably necessary" to accomplish its purposes. *Id.* at (6). The task force is also required to report back to the governor once a year. *Id.* at (5). The task force's annual reports are available here: https://dol.ny.gov/employer-misclassification-workers.

II. Employee Misclassification

A. Independent Contractor/Employee Classification

1. Normative Standards

New York defines an employee as a "worker who performs services for compensation under the supervision, direction and control of an employer." The state has several context-specific laws and regulations relating to employee misclassification. *See*, *e.g.*, N.Y. LAB.

LAW § 862-b (addressing commercial goods transportation services); N.Y. LAB. LAW § 861-e (addressing construction workers).

For example, the Commercial Goods Transportation Industry Fair Play Act creates a presumption that an individual "performing commercial goods transportation services for a commercial goods transportation contractor [is] an employee" and not an independent contractor. N.Y. LAB. LAW § 862-b. Under this statute, an individual performing industry functions for a contractor must be classified as an employee unless their wages are reported on a Federal Income Tax form 1099 and they are a separate business entity which, for purposes of this section, is defined as any sole proprietor, partnership, firm, corporation, limited liability company, association, or other legal entity that may also be a commercial goods transportation contractor. *Id*. If they are not a separate business entity, they must meet the following criteria in order to be considered an independent contractor: they must have the ability to perform their job with little direction or oversight, their service must be performed outside of the usual scope of the business for which it is being performed, and they must be engaged in an independently established sector that is similar to the service they are providing. *Id.*

As noted above, Executive Order No. 17 established the Joint Enforcement Task Force on Employee Misclassification. 9 NYCRR § 6.17. It targets the improper classification of employees as "independent contractors." *Id*. The duties and powers of the task force include: facilitating sharing among task force members relating to employee misclassification; pooling, focusing, and targeting investigative and enforcement resources; facilitating filing of complaints and identifying potential violators; identifying cases for investigation; establishing protocols through which agencies can investigate jointly; and soliciting the cooperation of local district

attorneys and other relevant agencies. *Id.* at (4). The task force is required to report to the governor once a year to describe its records and accomplishments; identify legal barriers; propose appropriate legislative, administrative, or regulatory changes; and identify mechanisms to prevent employee misclassification. *Id.* at (5).

2. Claim Administration

The question whether someone is an employee or an independent contractor arises in a host of employment law contexts, and it would be litigated within those contexts. For example, a claim that someone is an independent contractor and thus is not entitled to the minimum wage (which applies only to employees) would be litigated in the context of a wage claim under New York's minimum wage law, and administered in the manner described *supra* at I.A.2-4.

A commercial goods transportation contractor who willfully misclassifies an employee may face civil and criminal penalties. N.Y. LAB. LAW § 862-d (1). Any penalties imposed by the commissioner may be appealed to the industrial board of appeals. *Id.* at (9). Any penalties imposed by the workers' compensation board or commissioner of taxation and finance may be appealed in the same manner as the underlying violation. *Id.*

3. Statute of Limitations

There is no statute of limitations specific to the Commercial Goods Transportation Industry Fair Play Act.

4. Remedies

A commercial goods transportation contractor who willfully misclassifies an employee is subject to a fine up to $2,500 for the first violation per misclassified employee. N.Y. LAB. LAW § 862-d(3). For each subsequent violation within a five-year period, a contractor is subject to a

fine up to $5,000 per misclassified employee. *See id*. Additionally, a contractor is guilty of a misdemeanor for the first offense and subject to imprisonment up to thirty days or fined up to $25,000. *See id.* at (4). For each subsequent offense, a contractor is subject to imprisonment up to sixty days or fined up to $50,000. *Id*. Some officers, shareholders, and affiliates are subject to these penalties as well. *See id.* at (5), (9).

Any commercial goods transportation contractor subject to civil penalties under this section is also subject to tax penalties. *See id.* at (6). Failure to pay unemployment insurance tax will result in penalties imposed by N.Y. Labor Law section 570(3) including paying interest for the deficiency. *See id.* at (6)(a). If failure to pay was due to fraud, the contractor will owe 50% of the total amount of the deficiency plus the deficiency itself. N.Y. LAB. LAW § 570(4).

For "intentional and material understatement or concealment of payroll or failure to secure workers' compensation insurance, contractors will face the penalties imposed by N.Y. CLS Work Comp section 52(d). Failure to keep true and accurate records will result in penalties under N.Y. CLS Work Comp section 131. Lastly, failure to pay business corporate, or personal income tax will result in penalties under New York tax law sections 685 and 1085. N.Y. CLS TAX § 685, 1085; N.Y. LAB. LAW § 862-d(6)(c).

Acts of retaliation by an employer are subject to civil penalties under N.Y. Labor Law section 862(d), through a private cause of action, or both. N.Y. LAB. LAW § 862-e(2).

B. Exempt and Non-Exempt Classification

1. Normative Standards

New York law adopts and expands upon the FLSA's exemptions from its overtime pay requirement, which itself is an adaptation of federal law. New York exempts those employed in a "bona fide executive, administrative, or professional capacity," *id.* at § 651(5)(b), as well as:

> (a) a baby sitter working on a casual basis;
> (b) outside salespeople, such as door-to-door salespeople;
> (c) taxi drivers;
> (d) volunteers, learners, and apprentices;
> (e) members of religious organizations, such as pastors;
> (f) incidental work for religious organizations;
> (g) work done for religious, educational, and charitable institutions if the worker is a student;
> (h) work done for religious, educational, and charitable institutions if the worker's earning capacity of such individual is impaired by age, physical, or mental deficiency;
> (i) summer camp workers for religious, education, or charitable institutions working for less than three months;
> (j) staff counselors at children's camps;
> (k) some university or university organization workers if the worker is a student;
> (l) federal, state, and municipal government workers;
> (m) some volunteers at recreational and amusement events given that the even lasts no longer than eight consecutive days; and
> (n) newspaper delivery workers.

See id.

2. Claim Administration

Employers may face civil and criminal penalties for failing to pay employees under their exempt or non-exempt classification. N.Y. LAB. LAW § 198-a; N.Y. LAB. LAW § 197. These procedures are described *supra* at I.A.2.

3. Statute of Limitations

The statute of limitations for failing to pay the proper wage under exempt and non-exempt classifications is the same that applies to minimum wage violations described in section A(4). N.Y. LAB. LAW § 662.

4. Remedies

Civil and criminal penalties for failing to pay the proper wage under exempt and non-exempt classifications are the same that apply to minimum wage violations described in section A(4). N.Y. LAB. LAW § 662(1). These remedies are described *supra* at I.A.4.

III. Payroll Fraud on State Government by Government Contractors

1. Normative Standards

New York's False Claims Act prohibits any person from knowingly presenting a false or fraudulent claim for payment or approval to the State; to knowingly make, use, or cause to be made or used, a false record or statement material to a false or fraudulent claim; to knowingly make, use, or cause to be made or used, a false record or statement material to an obligation to pay or transmit money or property to a government entity, or knowingly conceal or knowingly and improperly avoid or decrease an obligation to pay or transmit money or property to a government entity; or to conspire to commit one or more of the above listed violations. N.Y. STATE FIN. LAW § 189.

2. Claim Administration

The New York Attorney General investigates suspected violations of the Act, and may bring a civil action against any person or entity he or she believes has violated the Act. An individual may also bring a private civil action on behalf of the individual and the State, and in

the event that this "*qui tam*" action is successful, the individual may be awarded a percentage of the funds recovered. N.Y. STATE FIN. LAW § 190.

3. Statute of Limitations

A civil action brought under this section must commence no later than 10 years after the date on which the violation occurred. N.Y. STATE FIN. LAW § 192(1). An action is commenced when a complaint is filed. *See id.*

4. Remedies

If found guilty of making a false or fraudulent claim, the court will assess a civil penalty of at least $6,000 not to exceed $12,000 plus three times the amount of all damages which the state or local government sustains because of the claim. N.Y. STATE FIN. LAW § 191. If the court finds that (a) the person committing the violation turned over their information to authorities; (b) fully cooperated with the investigation; and (c) at the time they turned over their information regarding the violation, no legal or administrative action had commenced and they had no knowledge of an investigation into the violation; the court may not assess more than two times the amount of damages sustained. *See id*.

IV. Certification by Government Contractors of Prevailing Wage Compliance

1. Normative Standards

Article 8 of the New York Labor Law requires that "laborers, workmen or mechanics" be paid at least the prevailing rate of wages on public works projects. N.Y. LAB. LAW § 220(2). The fiscal officer must determine the wages to be paid to workers for public work prior to advertisement for bids. N.Y. LAB. LAW § 220(3)(c). The contractor or subcontractor must then

prominently display the wages to be paid at the worksite. *See id.* at (ii). They must also notify all workers in writing of the prevailing rates of wages and supplements. *Id*.

This notification must also be provided "upon hire, with their first pay stub and every pay stub thereafter." *Id*. Additionally, the contractor or subcontractor must provide the worker with the phone number and address for the state's fiscal officer and also notify the worker of their right to contact the fiscal officer if they do not receive the proper prevailing wage rate. *Id*.

Contractors are required to keep original payrolls accompanied by a copy of each required notice mentioned previously. *See id* at (iii). In certain circumstances, if a contractor has no regular place of business in the state, payrolls should be kept at the worksite. *Id*. Those with a regular place of business must be ready to produce these payroll documents at the worksite within 5 days if ordered by the commissioner. *Id*. Contractors should also submit payroll transcripts to the state Department of Jurisdiction within 30 days of its first payroll and every 30 days thereafter. *Id*. The Department of Jurisdiction is required to collect and maintain these payroll record transcripts for 5 years. *Id.* at (iv). The fiscal officer may also require any person or corporation performing public work to turn over payroll records. *Id.* at (c).

After receiving a copy of the schedule of wages and supplements specified in the public improvement contract, a subcontractor is required to provide their contractor or subcontractor with a verified statement attesting that it has received and reviewed the schedule and agrees it will pay the prevailing wages and any specified supplements. N.Y. LAB. LAW § 220-a(1). Before any payment is made by the government, the state comptroller or applicable financial officer must require the contractor to file every one of these verified statements. *See id.* at (2). These statements must also include the amounts known by the contractor to be due and owing from

each subcontractor or certify that the contractor has no knowledge of these amounts. *Id.* If the Commissioner determines that the wages for the employees of the subcontractor have not yet been paid, the contractor is responsible for the payment of these wages and supplements. *Id.* This contractor must verify that he or she has read the statement and knows its contents. *Id.*

Article 9 of the New York Labor Law addresses the prevailing wage for building service employees. It requires contractors to pay these employees at least the prevailing wage in that locality for the "craft, trade, or occupation" of the employee. N.Y. LAB. LAW § 231(1). Building service contracts must contain a schedule of wages for all employees and must also include a provision obligating the employer to pay at least the prevailing wage specified. *Id*. at (3). The public agency preparing or directing the building service work must retain the employee classifications and file them with a fiscal officer along with a statement of work to be performed. *Id*. at (4). The fiscal officer must then determine the "crafts, trades and occupations" for such work and make a determination of the wages required under the contract. *Id*. This schedule of wages must be included in the contract prior to its advertisement and any bids. *Id*. The contractor must then prominently display the wages to be paid at the worksite by the first day of work performed under the contract. *Id*. at (6).

The verified statement requirements outlined above for the general prevailing wage statute (N.Y. LAB. LAW § 220-a) are mirrored in the special-purpose building service prevailing wage statute; contractors and subcontractors are required to provide verified statements of compliance, and before any payment is made by the government, the state comptroller or applicable financial officer must require the contractor to file every one of these verified statements. N.Y. LAB. LAW § 237.

2. Claim Administration

Civil and criminal claims may be brought against those who fail to pay the prevailing wage. N.Y. LAB. LAW § 220(8); § 238.

3. Statute of Limitations

After the fiscal officer files an order with a final determination of a violation, the complainant or any other person affected has six months after the service of notice of the filing to bring an action against the person found in violation. N.Y. LAB. LAW § 220(8).

4. Remedies

For prevailing wage violations for building service employees, the contractor or subcontractor guilty of failing to pay adequate wages is guilty of a misdemeanor and faces a fine of $500, imprisonment not to exceed 30 days, or both. N.Y. LAB. LAW § 238. For a second or subsequent offense, guilty parties face a fine of $1000 and are barred from receiving funds from the contract. *See id*.

Any contractor or subcontractor that participates in a public works project and willfully fails to pay the prevailing rate of wage or supplement will be subject to the following penalties:

> a. Class A misdemeanor: If the failure results in underpayments, which in the aggregate for all workers, results in an amount less than $25,000;
> b. Class E felony: If the failure results in underpayments, which in the aggregate for all workers, results in an amount greater than $25,000;
> c. Class D felony: If the failure results in underpayments, which in the aggregate for all workers, results in an amount greater than $100,000;
> d. Class C felony: If the failure results in underpayments, which in the aggregate for all workers, results in an amount greater than $500,000.

Any contractor or subcontractor convicted of a second offense under the previously mentioned penalties within 5 years are barred from receiving payments due on the contract. N.Y. LAB. LAW § 220(3)(d)(iii).

For civil actions, the complainant may receive the difference between the sum actually paid and the amount which should have been paid together with interest. N.Y. LAB. LAW § 220(8).

When a contractor or subcontractor is found to have twice knowingly participated in a violation of the prevailing wage law, the contractor (or its subcontractors and any closely affiliated entities) can be declared ineligible to submit a bid on or be awarded any public work contract or subcontract with the state, any municipal corporation or public body for a period of five years. But if the violation involves either the falsification of payroll records or the kickback of wages or supplements, the contractor or subcontractor is ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for five years from the first violation. N.Y. LAB. LAW § 220-b(2)(b)(1).

When a contractor or subcontractor is debarred for having disregarded obligations to employees under the federal prevailing wage statute (the Davis-Bacon Act, 40 U.S.C. § 3144), the contractor or subcontractor, and any substantially owned-affiliated entity becomes ineligible to submit a bid on or be awarded any public works contract with the state, any municipal corporation, public benefit corporation or public body. 2017 N.Y. SESS. LAWS 461 (McKinney).

V. Labor Trafficking

1. Normative Standards

In New York, an individual is guilty of labor trafficking if he or she compels or induces someone to take part in labor or "…recruits, entices, harbors, or transports such other person by means of intentionally" requiring that labor be performed to pay a debt, withholding important documents, or by using force or instilling fear. N.Y. CLS PENAL § 135.35.

2. Claim Administration

Labor trafficking is a criminal issue in New York, and violations of N.Y. CLS Penal section 135.35 are prosecuted by the state.

3. Statute of Limitations

There is no specified statute of limitations for labor trafficking. N.Y. CRIM. PROC. 30.10(2).

4. Remedies

Labor trafficking is a class D felony and imprisonment must not exceed seven years. N.Y. CLS PENAL § 135.35; N.Y. CLS PENAL § 70.00. There is currently no civil right of action; however, some monetary relief is available for victims of labor trafficking through civil forfeiture. N.Y. C.P.L.R. § 1311.

Oregon

I. Wage Theft

A. Minimum Wage Violations

1. Normative Standards

With limited occupational exceptions, *see* OR. REV. STAT. ANN. § 653.020, Oregon law establishes a minimum wage applicable in each year through 2023, and then establishes a mechanism for the amount to be adjusted annually thereafter to account for inflation. OR. REV. STAT. ANN. § 653.025. The current minimum wage is $12.75. *Id.* An employer cannot employ or agree to employ an individual at rates lower than the statutory minimum wage. OR. REV. STAT. ANN. § 653.025(1). Tips may not be included in determining the required minimum wage. OR. REV. STAT. ANN. § 653.035(3). The minimum wage requirement applies to all employers regardless of size. OR. REV. STAT. ANN. § 653.010(3). For "student learners," the Commissioner of the Bureau of Labor and Industries (Commissioner) has the power to specify a wage rate lower than the otherwise applicable minimum wage when requiring the employer to pay the minimum wage would substantially curtail employment. OR. REV. STAT. ANN. § 653.030.

2. Claim Administration

An individual aggrieved by a violation of Oregon's minimum wage laws can file an action in court, or pursue a complaint before the Commissioner. OR. REV. STAT. ANN. § 653.055. If the individual chooses the latter approach, the Commissioner may initiate suits against the employer to recover damages for the individual and to prevent future violations. *Id.* Multiple complaints may be addressed in a single proceeding. OR. REV. STAT. ANN. § 653.055(3).

3. Statute of Limitations

No limitations period is expressly specified for wage claims in Oregon. The applicable residual limitations period is six years from the date on which the wages were due. *See* OR. REV. STAT. ANN. § 12.080(4); *see also Fullerton v. Lamm*, 177 Or. 655, 163 P.2d 941 (1945).

4. Remedies

Where the statute has been violated, the employer is liable for the full amount of wages owed, civil penalties, and reasonable attorney's fees. OR. REV. STAT. ANN. § 653.055; OR. REV. STAT. ANN. § 652.200(2). If an employer willfully fails to pay wages to an employee whose employment has ended, then, as a penalty, the employee wages "continue from the due date . . . at the same hourly rate . . . until paid or until action therefore is commenced." OR. REV. STAT. ANN. § 652.150(1). A violation may also be punished as a misdemeanor. OR. REV. STAT. ANN. § 653.991. In addition, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed $1,000 against any person that willfully violates the statute or any rule promulgated thereunder. OR. REV. STAT. ANN. § 653.256.

B. Overtime Violations

1. Normative Standards

Oregon declares that the state's public policy is served by ensuring that individuals do not work…"for longer hours or days of service than is consistent with the person's health and physical well-being[.]" OR. REV. STAT. ANN. § 652.010. Thus, the law specifies certain maximum hours an employee might work in manufacturing and industrial settings. *See, e.g.*, *id.*;

OR. REV. STAT ANN. § 652.020 (establishing, with exceptions, certain maximum hours in manufacturing plants, planing mills, shingle mills, and logging camps).

For occupations outside these industrial settings, Oregon allows the Commissioner to adopt rules prescribing "minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per workweek; however, after 40 hours of work in one workweek overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of the employees when computed without benefit of commissions, overrides, spiffs and similar benefits." OR. REV. STAT. ANN. § 653.261; *see also* OR. REV. STAT. ANN. § 652.020. The Commissioner has done so in regulations that largely parallel the Fair Labor Standards Act (FLSA). *See* OR. ADMIN. R. 839-020-0030.

When employed by a contractor for a state project, the worker may not work more than ten hours in one day or forty hours in one week unless absolutely required by public policy. OR. REV. STAT. ANN. § 279C.540(1). This requirement does not apply when an exemption from the FLSA applies. OR. ADMIN. R. 839-020-0125(3).

2. Claim Administration

To address a violation, an employee may file a complaint with the Commissioner or bring a civil action. OR. REV. STAT. ANN. § 652.035(1). Upon receiving a complaint, the Commissioner must investigate, provide for an administrative proceeding, and (if warranted) make a complaint in criminal court. OR. REV. STAT. ANN. § 652.330. The worker filing a complaint with the Commissioner is not a party to any court action brought by the Commissioner. OR. REV. STAT. ANN. § 652.330.

In an administrative proceeding, the Commissioner may join any number of wage claims by the same employer. OR. REV. STAT. ANN. § 652.332(1). The Commissioner may also reassign a wage claim to the labor bureau of another state if the employee has moved to that state and consents to the reassignment. OR. REV. STAT. ANN. § 652.430.

3. Statute of Limitations

Oregon explicitly distinguishes between "overtime or premium pay" cases and minimum wage cases for limitations purposes. As noted above, minimum wage cases are governed by the state's six year residual limitations period. *See* OR. REV. STAT. ANN. § 12.080(4). Overtime cases are expressly governed by the two year limitations period in OR. REV. STAT. ANN. § 12.110(3).

If employed by the state through a contractor, a worker is foreclosed from pursuing an overtime violation unless the claim is filed with the contractor within ninety days from the completion of the contract, so long as the contractor has posted a circular in a prominent place alongside the door of the timekeepers office or similarly obvious location identifying the relevant Oregon code sections. OR. REV. STAT. ANN. § 279C.545.

4. Remedies

Whether before the Commission or in court, a worker who proves an overtime violation is entitled to "the full amount of the wages" less wages actually paid and up to a 100% penalty. OR. REV. STAT. ANN. § 653.055(1); OR. REV. STAT. ANN. § 652.150. The Commissioner may also assess an additional civil penalty of one thousand dollars. OR. REV. STAT. ANN. § 652.035(2); *see also* OR. REV. STAT. ANN. § 652.900(1). Fifty percent of the penalty is waived if the employer pays the full remedy within fourteen days of the order. OR. REV. STAT. ANN. § 652.035(3). Upon a court judgment, an employee may also recover costs and reasonable attorney's fees. OR. REV.

STAT. ANN. § 652.560. All sums collected as penalties by the state shall be applied to recovering costs. OR. REV. STAT. ANN. § 652.900(3). Any remainder is paid into the State Treasury and may be used for general governmental expenses. OR. REV. STAT. ANN. § 652.900(3). Lastly, a violation is a Class A misdemeanor. OR. REV. STAT. ANN. § 652.990(3).

C. Off-the-clock Violations

1. Normative Standards

An employer must compensate each employee for all hours worked, which includes both time actually worked and time of authorized attendance. OR. REV. STAT. ANN. § 653.010(11); OR. ADMIN. R. 839-020-0040(19). "Hours worked" includes all hours for which an employee is on the employer's premises, on duty, or at a prescribed workplace. OR. ADMIN. R. 839-020-0040. Furthermore, an employer must pay for employee attendance at lectures, trainings, and meetings unless four criteria are met:

(1) attendance is outside of the employer's regular working hours
(2) attendance is voluntary
(3) the lecture, course, or meeting is not directly related to the employer's job, and
(4) the employee does not perform any productive work while in attendance.

OR. ADMIN. R. 839-020-0040(1). If these criteria are not met, an employer must compensate an employee's attendance at lectures, trainings, and meetings. Time worked may include travel, although travel between home and work is excluded. OR. ADMIN. R. 839-020-0045.

In addition, Oregon requires employers to provide employees with at least 30 minutes of uninterrupted break time for each six hours worked, during which the employee must be relieved of all duties. If an employee is not fully removed from his or her duties during this break period, the employer must pay for the meal period. OR. ADMIN. R. 839-020-0050. As with the Fair

Labor Standards Act, preparatory and concluding activities that are integral to the employee's work are also included in time worked. OR. ADMIN. R. 839-020-0043. Waiting time must also be compensated if it is integral to the employee's work. OR. ADMIN. R. 839-020-0041.

2. Claim Administration, Statute of Limitations, and Remedies

As with a minimum wage claim, an individual with an overtime claim can file an action in court or pursue the remedies specified above at I.A.2,4. The action follows the same judicial procedures as a minimum wage claim. Overtime claims are governed by the limitations period discussed in I.B.2.

D. Illegal Deductions

1. Normative Standards

An employer is not permitted to withhold or deduct money from an employee's wages unless required to do so by law or authorized by the employee. OR. REV. STAT. ANN. § 652.610(3)(a)-(b). When an employer deducts a sum from an employee's wages with authorization, the employer shall pay the deducted amount to the authorized recipient within seven days. OR. REV. STAT. ANN. § 652.610(4). Failure to pay as required renders the deduction unlawful. OR. REV. STAT. ANN. § 652.610(4). Oregon further specifies that deductions from employee wages shall not benefit the employer. OR. REV. STAT. ANN. § 652.720(1). For example, an employer cannot apply retained wages to the cost of employee medical care addressing injuries sustained during the course of employment. OR. REV. STAT. ANN. § 652.720(2). Funds can be deducted from retained wages and placed in a trust to provide medical care. OR. REV. STAT. ANN. § 652.710(1). A violation of these prohibitions is a Class C misdemeanor. OR. REV. STAT. ANN. § 652.990.

2. Claim Administration, Statute of Limitations, and Remedies

A deduction claim follows the same administrative and judicial procedures, limitations period, and remedies discussed for minimum wage violations. *See supra* at sections I.A.2-4.

E. Paystub Provisions

1. Normative Standards

All employers must provide their employees with an itemized statement of wages. OR. REV. STAT. ANN. § 652.620(1)(a). The statement must show the date of payment, dates worked, rates of pay, gross and net wages, and the amount and purpose of each deduction. OR. REV. STAT. ANN. § 652.610(1)(b). Further required information includes the employee's name, the company's name, the employer's phone number and address, allowances, and overtime information. *See also* OR. ADMIN. R. 839-020-0012.

2. Claim Administration and Remedies

The Commissioner addresses potential violations of this requirement. OR. REV. STAT. ANN. § 652.900. The Commissioner may calculate a civil penalty for violations. OR. REV. STAT. ANN. § 652.900.

An employee may also bring a civil action. OR. REV. STAT. ANN. § 652.615. If successful in such an action, the employee receives "actual damages" or $200, whichever is greater. OR. REV. STAT. ANN. § 652.615. The court may also award costs and reasonable attorney's fees. OR. REV. STAT. ANN. § 652.615.

F. Interagency Information Sharing

Oregon has established an Interagency Compliance Network by statute. OR. REV. STAT. ANN. § 670.700. The purpose is to establish consistent classification of workers and ensure compliance with wage and hour standards. *Id*. The member agencies have to prepare a report

every two years. OR. REV. STAT. ANN. § 670.705. The Network's website has extensive explanations of various topics of study, including the distinction between independent contractors and employees, discussed immediately below. These Network documents are accessible at https://www.oregon.gov/ic/Support-and-Resources/Pages/About.aspx.

II. Employee Misclassification

A. Independent Contractor/Employee Classification

1. Normative Standards

Oregon uses a variety of tests for determining who is a contractor and who is an employee, depending on the statutory regime at issue. For purposes of state employment discrimination laws for example, Oregon uses a right-to-control test to determine if workers are employees. OR. REV. STAT. ANN. § 659A.001(4)(a) ("'Employer' means any person who in this state, directly or through an agent, engages or uses the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed").

Oregon state courts are divided over whether this test applies in the context of wage and hour claims. *Compare Dinicola v. State, Dep't of Revenue*, 246 Or. App. 526, 544, 268 P.3d 632, 642 (2011) (Oregon courts "use[] the common-law right of control test in deciding whether a putative employee is in fact an independent contractor and thus exempt from the coverage of the Oregon statutes"); *with Cejas Com. Interiors, Inc. v. Torres-Lizama*, 260 Or. App. 87, 100, 316

P.3d 389, 396 (2013) (rejecting the right-to-control test, and instead have adopted the FLSA's "economic realities" test). *Id.* Courts refusing to apply the right-to-control test apply the FLSA's "economic realities" test. *Cejas Com. Interiors, Inc*, *supra*. Under that test, the court "determine[s] whether, "as a matter of economic reality, [the worker] is dependent on the [putative employer]." *Id.* at 397-98. The court focuses on the relative "integration of the workers into the employer's production process and the lack of any independent workers' business organization." *Id.* at 398.

The test for determining "independent contractor" status for purposes of the Department of Revenue, the Employment Department, the Construction Contractors Board, and the Landscape Contractors Board is found at OR. REV. STAT. ANN. § 670.600. Under this test, an independent contractor is a person who provides services for remuneration and meets four statutory requirements. OR. REV. STAT. ANN. § 670.600(2); OR. REV. STAT. ANN. § 657.040. The requirements are that the worker (1) is free from direction and control over the means of providing service, (2) is customarily engaged in independent business, (3) if the provided service requires a license, is licensed, and (4) is responsible for obtaining additional licenses to provide the service. OR. REV. STAT. ANN. § 670.600(2). For these purposes, a person is considered to be customarily engaged in an independently established business if any three of the following requirements are met:

> (a) The person maintains a business location:
>
> (A) That is separate from the business or work location of the person for whom the services are provided; or
>
> (B) That is in a portion of the person's residence and that portion is used primarily for the business.
>
> (b) The person bears the risk of loss related to the business or the provision of services as shown by factors such as:
>
> (A) The person enters into fixed-price contracts;
>
> (B) The person is required to correct defective work;

> (C) The person warrants the services provided; or
> (D) The person negotiates indemnification agreements or purchases liability insurance, performance bonds or errors and omissions insurance. and
> (c) The person provides contracted services for two or more different persons within a 12-month period, or the person routinely engages in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.

OR. REV. STAT. ANN. § 670.600.

2. Claim Administration

A claim that an individual has been improperly classified as an independent contractor may be entertained in court or before the Commissioner in an administrative proceeding, or both, depending on the statutory context in which the issue arises.

3. Statute of Limitations

For wage and hour claims, the limitations period will be either the minimum wage period discussed *supra* at I.A.3, or the overtime period discussed at I.B.3.

With respect to state employment discrimination laws, a complaint must be filed with the Commissioner "no later than one year after the alleged unlawful practice." OR. REV. STAT. ANN. § 659A.820(2). A complaint alleging discrimination of a protected class "must be filed no later than five years after the occurrence of the alleged unlawful employment practice." OR. REV. STAT. ANN. § 659A.820(3).

In relation to unemployment insurance, claims must "be filed in accordance with such regulations as the Director of the Employment Department may prescribe." OR. REV. STAT. ANN. § 657.260(1).

For worker's compensation, a claim of civil negligence due to a worker's compensation claim being denied "must be commenced within the later of two years from the date of injury or 180 days from the date the order affirming that the claim is not compensable . . . becomes final." OR. REV. STAT. ANN. § 656.019(2)(a).

4. Remedies

There is no penalty for misclassification alone, but there will be consequences under various statutory schemes. There may be, for example, penalties for failure to pay all employment taxes as a result of the misclassification, OR. REV. STAT. ANN. § 657.457(1), or for an employer skirting wage and hour requirements on the false pretense that the individual involved is not an employee. In the latter context, the remedies are the same as those discussed above for minimum wage and overtime violations, as discussed *supra*. An employer is also liable for back taxes and late fees when the employer fails to withhold taxes as a result of a misclassification. OR. REV. STAT. ANN. § 316.197.

B. Exempt/Non-Exempt Classification

1. Normative Standards

As with most states, Oregon exempts a wide and disparate collection of occupations from overtime coverage, including certain agricultural workers, domestic service workers, outside sales people, and taxicab operators. The most important (or most frequently relied-upon) exemptions, however, are for those employed in a bona fide executive, administrative, or professional capacity. OR. REV. STAT. ANN. § 653.020(3), (6). An individual is an executive employee if he or she manages a recognized department, directs the work of other employees, and has discretion to hire and fire other employees. OR. ADMIN. R. 839-020-0005(1)(a)-(c). The

test for an administrative employee looks at the employee's administrative functions, discretion to use independent judgment, and salary. OR. ADMIN. R. 839-020-0005(2)(a)-(d). An individual is an exempt "professional" employee if his or her work requires "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study." OR. ADMIN. R. 839-020-0005(3).

2. Claim Administration, Statute of Limitations, and Remedies.

An individual with a misclassification claim would have to follow the procedures, abide the limitations period, and seek the remedies applicable under the statutory scheme underlying the claim. *See supra* sections I.A and I.B.

III. Payroll Fraud on State Government by Government Contractors

A. Normative Standards

A person commits the crime of "public investment fraud" if he or she knowingly makes a false statement with the purpose of "influencing in any way the action of the State Treasury." OR. REV. STAT. ANN. § 162.117(1). The crime is a Class B felony. OR. REV. STAT. ANN. § 162.117(2).

Similarly, the Oregon False Claims Act, OR. REV. STAT. ANN. § 180.755, makes it unlawful to present to the state or any government agency for payment or approval, or cause to be presented for payment or approval, a claim that the person knows is a false claim.

B. Claim Administration

Unlike the federal False Claims Act, Oregon False Claims Act cases can only be brought by the Attorney General. In such an action, the fact that a public agency has not paid any amounts to a person as a result of a violation of the Act or has not suffered any injury by reason of a violation is not a defense in an action under this section. *Id.*, § 180.760(3). Unlike the federal False Claims Act, the Oregon Act does not have a *qui tam* provision or provide private plaintiffs with a mechanism to sue for false claims.

C. Statute of Limitations

A False Claims Act claim must be brought by the Attorney General within three years of discovering the violation, but in no event more than ten years after the date on which the violation is committed. OR. REV. STAT. ANN. § 180.765.

D. Remedies

The court is required to state all damages arising from a Oregon False Claims Act violation. In addition, the court awards the state a penalty equal to the greater of $10,000 for each violation or an amount equal to twice the amount of damages incurred for each violation. The court is entitled to mitigate the size of the penalty based on any fine or penalty already assessed against the defendant for substantially the same acts or omissions in a case filed under the federal False Claims Act, 31 U.S.C. 3729, *et seq.* OR. REV. STAT. ANN. § 180.760.

IV. Certification by Government Contractors of Prevailing Wage Compliance

A. Normative Standards

Contractors and subcontractors are obligated to pay the "prevailing rate" of pay on every "public works" project. *See* OR LEGIS 104 (2021), 2021 Oregon Laws Ch. 104 (S.B. 493); *see also* OR. REV. STAT. ANN. § 279C.815. Every contractor and subcontractor must file a certified

statement with the public entity involved in the project showing that it has paid the prevailing wage to each employee working on the project. OR. REV. STAT. ANN. § 279C.845(1); OR. REV. STAT. ANN. § 658.440(1)(i). The certified statements must completely reflect the contractor's payroll records. OR. REV. STAT. ANN. § 279C.845(3). Each contractor is also required to preserve the certified statements for three years. OR. REV. STAT. ANN. § 279C.845(5).

If the Commissioner finds evidence suggesting a prevailing wage violation, the affected contractor or subcontractor must send a certified copy of the payroll to the Commissioner. OR. REV. STAT. ANN. § 297C.860(5). If a subcontractor does not file certified statements, the contractor is required to keep twenty-five percent of the subcontractor's earnings until the certified statements have been filed. OR. REV. STAT. ANN. § 279C.845(8).

B. Claim Administration

The prevailing wage law is administered by the Commissioner. To determine whether the prevailing wage is being paid, the Commissioner may enter a contractor's office and gather information. OR. REV. STAT. ANN. § 279C.850(1). Every contractor or subcontractor performing work on public works shall make payroll and other records available to the Commissioner. OR. REV. STAT. ANN. § 279C.850(2). If there is a failure to pay the prevailing wage, the Commissioner may initiate legal proceedings. OR. REV. STAT. ANN. § 279C.850(4). Prevailing wage rate violations by employers are wage claims subject to civil wage processes discussed above and can be initiated by employees. OR. REV. STAT. ANN. § 279C.870.

C. Statute of Limitations

Prevailing wage rate violations by employers are subject to wage claims initiated by employees for up to six years from the date of the violation. OR. REV. STAT. ANN. 12.080(1).

D. Remedies

A contractor or subcontractor or contractor's or subcontractor's surety that violates the provisions of OR. REV. STAT. ANN. § 279C.840 is liable to the workers affected in the amount of the workers' unpaid minimum wages, including all fringe benefits, and in an additional amount equal to the unpaid wages as liquidated damages. OR. REV. STAT. ANN. § 279C.855.

If the contractor or subcontractor intentionally failed to pay the prevailing wage, the contractor or subcontractor may not receive a public works contract for three years. OR. REV. STAT. ANN. § 297C.860(1)(a). The Commissioner is obligated to debar any contractor or subcontractor for a period of three years if he or she finds:

> (1) That contractor or subcontractor intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works;
> (2) The contractor failed to pay to the contractor's employees amounts required and a surety or another person paid the amounts on the contractor's behalf;
> (3) The subcontractor failed to pay to the subcontractor's employees amounts required and the contractor, a surety or another person paid the amounts on the subcontractor's behalf;
> (4) The contractor or subcontractor intentionally failed or refused to post the prevailing rates of wage as required; or
> (4) The contractor or subcontractor intentionally falsified information in the certified statements the contractor or subcontractor.

OR. REV. STAT. ANN. § 279C.860.

This penalty may also be imposed if the contractor or subcontractor falsified information in the certified statements. OR. REV. STAT. ANN. § 279C.860(1)(e). For good cause, the Commissioner may remove a contractor's ineligibility for public works contracts. OR. REV. STAT. ANN. § 297C.860(4). Lastly, the Commissioner may recover the costs for initiating a legal proceeding. OR. REV. STAT. ANN. § 279C.850(4). On public contracts, employees of a contractor who commits a willful violation due to a willful falsification of payroll records, a contractor is

liable for the unpaid wages and twice the amount of unpaid wages as damages. OR. REV. STAT. ANN. § 279C.540(9).

V. Labor Trafficking

Apart from the state's statute on involuntary servitude, Oregon has no statutes dealing with labor trafficking. In 2020, however, the State Attorney General announced the formation of a task force to study the problem and propose new legislation. *See* https://www.doj.state.or.us/crime-victims/advisory-committees-task-forces/trafficking-intervention-advisory-committee/.

Pennsylvania

I. Wage Theft

A. Minimum Wage Violations

1. Normative Standards

Currently, the minimum wage in Pennsylvania is set at $7.25/hour. 43 PA. STAT. ANN. § 333.104. Pennsylvania also provides that if the minimum wage set forth in the Fair Labor Standards Act (FLSA) is increased above the minimum wage specified by § 333.104, even for employees not otherwise covered by Pennsylvania law, the higher federal amount prevails. *Id.*

The caveats are that employees who make at least $30/month in tips can be paid a wage of $2.83/hour plus a "tip credit" of a maximum $4.42/hour, so employees make at least $7.25/hour. Employees whose earning capacity is impaired by physical or mental deficiency or injury may be paid less than the minimum wage if the employer receives a license specifying an appropriate wage rate from either the state's Secretary of Labor or from the federal Secretary of Labor. 43 PA. STAT. ANN. § 333.104(d).

Regular paydays must be designated in advance by employers. All wages (other than fringe benefits and wage supplements), earned in any pay period shall be due and payable

> (1) within the number of days after the expiration of [the] pay period as provided in a written contract of employment…;
> (2) if not so specified, within the standard time lapse customary in the trade; or
> (3) within 15 days from the end of such pay period.

43 PA. STAT. ANN. § 260.3(a).

Pennsylvania law exempts many types of workers from its minimum wage and overtime provisions. Most of these exemptions mirror the FLSA, but there are some exemptions under

Pennsylvania law that do not exist under the FLSA, and some exemptions exist under the FLSA but not under Pennsylvania law. *Compare* 29 U.S.C.S. § 213(a) *and* 43 PA. STAT. ANN. § 333.105(a). For example, Pennsylvania minimum wage and overtime exempts:

> (1) Educational, charitable, religious, or nonprofit organization workers;
> (2) Employees not subject to civil service laws who hold elective office or who work for someone who does; and
> (3) Those who work in connection with the publication of small, local, weekly, semiweekly, or daily newspapers.

43 PA. STAT. ANN. § 333.105(a).

2. Claim Administration

Any employee or group of employees, labor organization or any party to whom any type of wages is payable may institute and maintain an action in any court of competent jurisdiction. 43 PA. STAT. ANN. § 260.9a(a)-(b).

Alternatively, an employee or group of employees may inform the Secretary of Labor and Industry of a claim for unpaid wages, and the Secretary, in his or her discretion, can then bring a claim for these unpaid wages on behalf of the employee(s). 43 PA. STAT. ANN. § 260.8.

If the Secretary determines that wages have not been paid, he or she must, on the request of the employee, labor organization, or other party involved, take an assignment in trust of the claim. The Secretary then has the power (but not the obligation) to settle and adjust any unpaid wage claim to the same extent as might the assigning party. 43 PA. STAT. ANN. § 260.9a(c)-(e).

If an employee or group of employees informs the Secretary of an unpaid wage claim, the Secretary must inform the employer by certified mail, unless the claim appears to be frivolous. If the employer (or former employer) does not pay the claim or provide a satisfactory explanation for failure to pay the claim within 10 days, the employer is liable for a penalty of

10% of the unpaid wages found to be due, to be paid to the Secretary. The Secretary then has a cause of action for this penalty, which may or may not be brought independently of the unpaid wages claim. 43 PA. STAT. ANN. § 260.9a(c).

3. Statute of Limitations

The limitations period on wage claims is three years from the day wages were due and payable for all actions, whether the action is brought by the Secretary or by private party. 43 PA. STAT. ANN. § 260.9a(g).

4. Remedies

If an employer pays or agrees to pay an employee less than the applicable minimum wage and is convicted in summary proceeding, (whether through the Secretary or independently), the employer must pay a fine of $75-$300, be imprisoned for 10-60 days, or both. Each week in which an employee is underpaid is considered a separate offense. 43 PA. STAT. ANN. § 333.112(b). In addition, any employer that does not pay all wages due to its employees on regular paydays is guilty of a summary offense and, upon conviction, shall be punished by a fine of up to $300 or by imprisonment for up to 90 days, or both. 43 PA. STAT. ANN. § 260.11a(b).

If an employee has not received compensation as required by the statute, he or she can recover the minimum wage minus the amount actually paid, plus costs and reasonable attorney's fees as determined by the court, regardless of whether the claim goes through the Secretary. 43 PA. STAT. ANN. § 260.9a(f), 43 PA. STAT. ANN. § 333.113. Where wages remain unpaid for thirty days beyond the regularly scheduled payday, or, in the case where no regularly scheduled payday is applicable, for sixty days beyond the filing by the employee of a proper claim, or where the shortage exceeds 5% of the gross wages payable on any two regularly scheduled paydays in the

same calendar quarter, and no good faith contest or dispute of any wage claim including the good faith assertion of a right of set-off or counter-claim exists accounting for such non-payment, the employee is entitled to recover as liquidated damages an amount equal 25% of the total amount of wages due, or $500, whichever is greater. 43 PA. STAT. ANN. § 260.10.

B. Overtime Violations

1. Normative Standards

Employees must be paid 1.5 times their regular rate for hours worked beyond 40 hours per week. Pennsylvania law adopts the FLSA's definition of "regular rate" (excluding gifts, paid vacation, retirement contributions, etc.), with the exception that stock options and stock appreciation rights are not excluded from employee pay under Pennsylvania law, but are under the FLSA. *Compare* 29 U.S.C.S. § 207(e) *and* 34 PA. CODE § 231.43.

In addition to the previously discussed exemptions which apply to both minimum wage and overtime provisions, Pennsylvania law specifies some exemptions that only apply to overtime law. These include seamen; salesmen, partsmen, and mechanics primarily engaged in selling and servicing automobiles, trailers, trucks, farm implements, or aircraft; taxicab drivers; and employees in movie theaters.

All of Pennsylvania's overtime exemptions are also exemptions under the FLSA, but the converse is not true; there are several types of workers exempted under the FLSA who are not exempted under Pennsylvania law. These include but are not limited to those involved in catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life; criminal investigators; Border Patrol agents; and minor league baseball players.

2. Claim Administration

Any employee or group of employees, labor organization or party to whom any type of wages is payable may institute and maintain an action in any court of competent jurisdiction. 43 PA. STAT. ANN. § 260.9a(a)-(b). Alternatively, an employee or group of employees may inform the Secretary of Labor and Industry of a claim for unpaid wages. The Secretary has the right to investigate claims of unpaid wages and, if he or she determines that they have not been paid, he or she is required, after a request by the employee, labor organization, or other party making the claim, take an assignment in trust of the claim. The Secretary then has the power to settle and adjust any unpaid wage claim to the same extent as might the assigning party. 43 PA. STAT. ANN. § 260.8; 43 PA. STAT. ANN. 260.9a(c)-(e). If an employee or group of employees informs the Secretary of an unpaid wage claim, the Secretary must inform the employer by certified mail, unless the claim appears to be frivolous. If the employer (or former employer) does not pay the claim or provide a satisfactory explanation for failure to pay the claim within 10 days, the employer is liable for a penalty of 10% of the claim found to be due. The Secretary then has a cause of action for this penalty, which may or may not be brought independently of the unpaid wages claim. 43 PA. STAT. ANN. § 260.9a(c).

3. Statute of Limitations

The limitation period is three years from the day wages were due and payable. 43 PA. STAT. ANN. § 260.9a(g).

4. Remedies

If an employer is convicted of paying or agreeing to pay an employee less than the applicable rate, the employer will be fined $75-$300, be imprisoned for 10-60 days, or both. Each week in which an employee is underpaid is considered a separate offense. 43 PA. STAT.

ANN. § 333.112(b). In addition, any employer who fails to pay all wages due on the regularly established payday is guilty of a summary offense and, upon conviction, will be punished by a fine of up to $300 or by imprisonment for up to 90 days, or both. 43 PA. STAT. ANN. § 260.11a(b).

If an employee has been underpaid, he or she can recover the amount of wages due, plus costs and reasonable attorney's fees (as determined by the court), regardless of whether the claim is brought by the Secretary or by the underpaid employee, labor organization, or other party. 43 PA. STAT. ANN. § 260.9a(b), (e)-(f), 43 PA. STAT. ANN. § 333.113.

If wages remain unpaid for 30 days beyond payday (or 60 days after filing a claim, if no payday applies), or if the shortage in wages exceeds 5% of gross wages due in two paydays in the same quarter, and there is no good-faith dispute about the amount due, an employee is entitled to liquidated damages of 25% the amount of wages due or $500, whichever is greater. 43 PA. STAT. ANN. § 260.10.

C. Off-the-clock Violations

1. Normative Standards

Pennsylvania law requires that all "hours worked" be compensated, 34 PA. CODE §231.21, and defines that phrase to mean "time during which an employee is required by the employer to be on the premises of the employer, to be on duty or to be at the prescribed work place, time spent in traveling as part of the duties of the employee during normal working hours and time during which an employee is employed or permitted to work. . . ." 34 PA. CODE §§ 231.1(b). Work time, however, excludes meal times, unless the employee is required or permitted to work during that time. *Id.* According to a Pennsylvania Superior Court case, compensated time can

include time spent donning, doffing, and sanitizing equipment. *Lugo v. Farmers Pride, Inc.*, 2009 Pa. Super. 5, 967 A.2d 963, 977. Time spent on the premises for an employee's convenience is also not included. 34 PA. CODE §§ 231.1.

2. Claim Administration

Any employee or group of employees, labor organization or party to whom any type of wages is payable (including for off-the-clock violations) may institute and maintain an action in any court of competent jurisdiction. 43 PA. STAT. ANN. § 260.9a(a)-(b).

Alternatively, an employee or group of employees may inform the Secretary of Labor and Industry of a claim for unpaid wages. The Secretary has the right to investigate claims of unpaid wages and, if he or she determines that due wages have not been paid, he or she must, on the request of the employee, labor organization, or other party involved, take an assignment in trust of the claim. The Secretary then has the power to settle and adjust the unpaid wage claim to the same extent as might the assigning party. 43 PA. STAT. ANN. § 260.8, 260.9a(c)-(e). If an employee or group of employees informs the Secretary of an unpaid wage claim, the Secretary must inform the employer by certified mail, unless the claim appears to be frivolous. If the employer (or former employer) does not pay the claim or provide a satisfactory explanation for failure to pay the claim within 10 days, the employer is liable for a penalty of 10% of the claim found to be due. The Secretary then has a cause of action for this penalty, which may or may not be brought independently of the unpaid wages claim. 43 PA. STAT. ANN. § 260.9a(c). 34 PA. CODE §§ 231.1, 231.21.

3. Statute of Limitations

The limitations period is three years from the day the wages were due. 43 PA. STAT. ANN. § 260.9a(g).

4. Remedies

Any employer that is convicted of committing an off-the-clock violation must pay a fine of $100-$500. Each day of noncompliance is a separate offense. 34 PA. CODE § 231.21; 43 PA. STAT. ANN. § 333.112(c). In addition to this, any employer who does not pay all wages due to his employees on regular paydays is guilty of a summary offense and, upon conviction, shall be punished by a fine of up to $300 or by imprisonment for up to 90 days, or both. 43 PA. STAT. ANN. § 260.11a(b).

If an employee has been unpaid for hours worked, they can recover minimum wage for the time worked, plus costs and reasonable attorney's fees as determined by the court, regardless of whether the claim goes through the Secretary or not. 43 PA. STAT. ANN. § 260.9a(b), (e)-(f); 43 PA. STAT. ANN. § 333.113.

If wages remain unpaid for 30 days beyond payday (or 60 days after filing a claim, if no payday applies), or if shortages in wages exceed 5% gross wages in two paydays in the same quarter, and there is no good-faith dispute, an employee is entitled to liquidated damages of 25% the amount of wages due or $500, whichever is greater. 43 PA. STAT. ANN. § 260.10.

D. Illegal Deductions

1. Normative Standards

Rather than specifying unauthorized deductions, Pennsylvania law provides a list of authorized deductions and states that any other deductions are illegal. 34 PA. CODE § 9.1. The authorized deductions are:

(1) Contributions to and recovery of overpayment under employee welfare and pension plans subject to Federal Welfare and Pension Plans Disclosure Act;
(2) Contributions authorized in writing or by collective bargaining agreement for employee welfare and pension plans not subject to Federal Welfare and Pension Plans Disclosure Act;
(3) Deductions authorized in writing for the recovery of overpayments to employee welfare and pension plans not subject to the Federal Welfare and Pension Plans Disclosure Act;
(4) Deductions authorized in writing or by collective bargaining agreement for company-operated thrift plans or stock option purchase plans;
(5) Deductions authorized in writing for payment into employee personal savings accounts, like payments to a credit union or purchase of US Government bonds;
(6) Contributions authorized in writing for charitable purposes
Contributions authorized in writing for local area development projects;
(7) Deductions provided by law, including for Social Security, withholding for taxes and court orders;
(8) Labor organization charges, as authorized by law;
(9) Deductions for repayment to the employer of loans;
(10) Deductions for purchase or replacement by employer of goods, wares, merchandise, etc. if authorized by employee in writing or in collective bargaining agreement;
(11) Deductions for purchases by employee for his convenience of goods, wares, merchandise, etc. if authorized by employee in writing;
(12) Other deductions authorized in writing by employee if deemed proper by Department of Labor and Industry;
(13) Deductions for lodging are allowed, but only if the lodging provides reasonable space, privacy, sanitation, heat, light, and ventilation; and
(14) Deductions for expenses or charges required or authorized by an employer "in connection with the employee's performance of the duties assigned by the employer," but not if they would reduce the employee's wages to below minimum wage.

34 PA. CODE § 232.22; 34 PA. CODE § 9.2.

2. Claim Administration

Any employee or group of employees, labor organization or party to whom any type of wages is payable, including for illegal deductions, may institute and maintain an action in any court of competent jurisdiction. 43 PA. STAT. ANN. § 260.9a(a)-(b); 34 PA. CODE § 9.3.

Alternately, an employee or group of employees may inform the Secretary of Labor and Industry of a claim for unpaid wages, including for illegal deductions. If the Secretary determines that due wages have not been paid, he or she shall, upon the request of the employee, labor organization, or other party involved take an assignment in trust of the claim. The Secretary then has the power to settle and adjust any unpaid wage claim to the same extent as might the assigning party. 43 PA. STAT. ANN. § 260.9a(c)-(e); 34 PA. CODE § 9.3.

If an employee or group of employees informs the Secretary of an unpaid wage claim, the Secretary must inform the employer by certified mail, unless the claim appears to be frivolous. If the employer (or former employer) does not pay the claim or provide a satisfactory explanation for failure to pay the claim within 10 days, the employer is liable for a penalty of 10% of the claim found to be due. The Secretary then has a cause of action for this penalty, which may or may not be brought independently of the unpaid wages claim. 43 PA. STAT. ANN. § 260.9a(c).

3. Statute of Limitations

The limitations period is three years. 43 PA. STAT. ANN. § 260.9a(g).

4. Remedies

If an employee has lost wages due to illegal deductions, they can recover the amount lost, plus costs and reasonable attorney's fees as determined by the court, regardless of whether the claim goes through the Secretary or not. 43 PA. STAT. ANN. § 260.9a(b), (e)-(f). No criminal penalties exist for making unlawful deductions. If wages remain unpaid for 30 days beyond payday (or 60 days after filing a claim, if no payday applies), or if shortages in wages exceed 5% gross wages in two paydays in the same quarter, and there is no good-faith dispute, an employee

is entitled to liquidated damages of 25% the amount of wages due or $500, whichever is greater. 43 PA. STAT. ANN. § 260.10.

E. Paystub Provisions

1. Normative Standards

With every payment of wages, employers must include a statement of: hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions, and net wages. 34 PA. CODE § 231.36.

2. Claim Administration

Only the Secretary of Labor and Industry can bring an action in court to enforce these requirements; no private cause of action exists.

3. Statute of Limitations

No limitations period is specified in the statute. Pennsylvania's residual limitations period is 2 years. 42 PA. STAT. ANN. § 5552.

4. Remedies

Upon conviction, an employer who violates pay stub regulations shall be sentenced to pay a fine of $100-$500. Each day of noncompliance constitutes a separate offense. 34 PA. CODE § 231.12; 43 PA. STAT. ANN. § 333.112(c).

F. Interagency Information Sharing

There are no provisions expressly requiring interagency information sharing on wage theft. The Wage Payment and Collection Law, which specifies the procedure for recovering unpaid wages, imposes on the Secretary of Labor and Industry the duty, but not the exclusive

right, to enforce and administer the Act, which suggests that other agencies could enforce this Act, although that is not explicitly stated. 43 PA. STAT. ANN. § 260.8.

II. Employee Misclassification

A. Independent Contractor/Employee Classification

1. Normative Standards

Pennsylvania law provides no single, overarching standard for independent contractor classification. Nor is there any general statutory mechanism for enforcing independent contractor misclassification. As described below, however, in the Construction Workplace Misclassification Act (CWMA), Pennsylvania does specify standards for independent contractor determinations in the construction industry.

For purposes of workers' compensation, unemployment compensation and improper classification of employees in the construction industry, an individual is considered an independent contractor if he or she has a written contract to perform such services, is free from control or direction over performance of such services both under the contract of service and in fact; and, as to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business. 43 PA. STAT. ANN. § 933.3.

Amplifying these standards, the CWMA specifies a rather lengthy and detailed set of conditions an individual must satisfy in order to be considered an independent contractor. All of the conditions must be me. The individual must possess the essential tools, equipment and other assets necessary to perform the services independent of the person for whom the services are performed; the individual will "realize a profit or suffer a loss as a result of performing the services"; the individual performs his or her services through a business in which he or she has a

proprietary interest; the individual has a business location separate from the location where the services will be performed; The individual maintains specified liability insurance; and the individual:

> (i) either has previously performed the same or similar services for another person while free from direction or control over performance of the services, both under the contract of service and in fact; or
> (ii) holds himself out to other persons as available and able, and in fact is available and able, to perform the same or similar services while free from direction or control over performance of the services.

Id. For these purposes, "construction" refers to "erection, reconstruction, demolition, alteration, modification, custom fabrication, building, assembling, site preparation and repair work done on any real property or premises under contract, whether or not the work is for a public body and paid for from public funds." 43 PA. STAT. ANN. § 933.2.

An employer violates the CWMA if it fails to properly classify a worker as an employee under the Workers' Compensation Act and fails to provide the required coverage under the Workers' Compensation Act or if it fails to properly classify a worker as an employee under the Unemployment Compensation Law and fails to provide contributions, reimbursements, or other amounts to be paid under the Unemployment Compensation Law. 43 PA. STAT. ANN. § 933.4(a).

2. Claim Administration

If the Secretary of Labor and Industry receives information that any person has violated the CWPA, he or she may then investigate the claim and issue an order to the employer to show cause why it has not violated classification law; the burden of proof rests with the employer to show "employee" status. The employer has 30 days to show cause. If it does not, the Secretary may petition a court to issue a stop-work order or immediately assess penalties. 43 PA. STAT.

ANN. § 933.4(c). Each misclassified individual is a separate offense. 43 PA. STAT. ANN. § 933.4(b).

3. Statute of Limitations

The CWMA does not specify a limitations period. Pennsylvania's residual limitations period is 2 years. 42 PA. STAT. ANN. § 5524(5).

4. Remedies

If the Secretary finds an employer guilty of misclassification, he or she may impose a fine of up to $1000 for the first violation, and up to $2500 for subsequent violations. 43 PA. STAT. ANN. § 933.6(a). Requiring a worker to enter into an agreement that results in improper classification is a violation of the CWMA and is punishable by an administrative fine of $1000-$2500. 43 PA. STAT. ANN. § 933.9. An employer's good faith belief that a worker qualified as an independent contractor is a complete defense to a classification violation. 43 PA. STAT. ANN. § 933.4(f).

If an employer fails to show that it has not violated classification law within 30 days, the Secretary can petition a court to issue a stop-work order. 43 PA. STAT. ANN. § 933.4(c)(3)(i). A stop-work order forces misclassified employees to cease work within 24 hours of issuance, or all operations cease if the majority of workers are misclassified. The order remains in effect until a court releases the stop-work order or it is found that there are no violations. 43 PA. STAT. ANN. § 933.7(a). The court must assess a $1000 penalty for each day an employer conducts business in violation of a stop-work order. 43 PA. STAT. ANN. § 933.7(c).

Intentional misclassification is a first-degree misdemeanor the first time, and a second-degree misdemeanor subsequent times. 43 PA. STAT. ANN. § 933.5(a). The Attorney

General and the county District Attorney have concurrent prosecutorial jurisdiction. 43 PA. STAT. ANN. § 933.5(c). Negligent misclassification under the Workers' Compensation Act or the Unemployment Compensation Law which results in failure to provide appropriate coverage or failure to pay required contributions is a summary offense (the lowest level of criminal offense) and, upon conviction, brings a fine of up to $1000. 43 PA. STAT. ANN. § 933.5(b).

In October 2020, Pennsylvania created a Joint Task Force on Misclassification of Employees to study the independent contractor misclassification issue more broadly. 71 PA. STAT. ANN. § 569.4. The Task Force is composed of the Attorney General, the Secretary of Labor and Industry, the Secretary of Revenue, and a handful of private citizens with expertise in the field. Public meetings are schedule through the end of this year. Some of the powers and duties of the task force include evaluating existing misclassification enforcement identifying barriers to information sharing among agencies regarding employee misclassification working with business, labor and community groups to increase public awareness of the illegality of employee misclassification and undertaking efforts to reduce its occurrence.

For purposes of the Task Force's work, the statute defines misclassification to mean independent contractor misclassification in the context of construction, workers' compensation, unemployment compensation, and income tax. 71 PA. STAT. ANN. § 569.4.

B. Exempt/Non-Exempt Classification

There is no separate Pennsylvania state law addressing non-exempt employee misclassification. Any employee who is denied overtime wages to which they are entitled to can bring an action as described in the "Overtime" section. Similarly, an employee who is illegally paid less than the minimum wage can recover unpaid wages as described in the "Minimum

Wage" section. There is no additional penalty or different administration system for misclassification of non-exempt employees.

III. Payroll Fraud on State Government by Government Contractors

A. Normative Standards

No Pennsylvania statutes mention "payroll fraud" by name, and Pennsylvania's equivalent to the federal False Claims Act applies only to Medicaid or health care fraud. A few state statutes, however, address various potential forms of payroll fraud.

The "Deceptive or Fraudulent Business Practices," 18 PA. STAT. ANN. § 4107(6) states that it is an offense if someone "makes or induces others to rely on a false or misleading written statement for the purpose of obtaining property or credit." In context, this seems to refer to false advertising, but it arguably could apply to payroll fraud. 18 PA. STAT. ANN. § 4107(a)(6). No research has been performed into cases applying the provision; that research lies beyond the scope of this project.

It is a first-degree misdemeanor for a person to falsify, destroy, remove or conceal any writing or record with intent to deceive or injure anyone or to conceal wrongdoing. 18 PA. STAT. ANN. § 4104. This arguably could apply to timesheet falsification and some other types of payroll fraud. No research has been performed into cases applying the provision; that research lies beyond the scope of this project.

It is a second-degree misdemeanor for a person to cause another to execute any instrument affecting or purporting to affect or likely to affect the pecuniary interest of any person by deception. This arguably could cover falsified timesheets or false bonuses or even false insurance payments, if executed by another person. 18 PA. STAT. ANN. § 4114.

B. Claim Administration

These are all criminal statutes, and no special procedure is specified for any of them, so administration proceeds like with all criminal offenses: a person is subject to arrest, arraignment, and bail, the person pleads guilty or not guilty, plea bargains can be arranged. If the person pleads not guilty, a trial occurs. If the trial has a jury, the jury hears evidence, then gives a unanimous verdict. The judge then gives a sentence. If there is no jury, a judge hears evidence, determines guilt, and gives a sentence. *See generally* Pa. R. Crim. P. 515, 519-20, 590, 620-21, 640-49, 704-06. We have not endeavored to determine whether Pennsylvania courts have been willing to imply a civil cause of action based on any of these provisions.

C. Statute of Limitations

For 18 PA. STAT. ANN. § 4107 (deceptive or fraudulent business practices), five years. 42 PA. STAT. ANN. § 5552(b)(1). For §§ 4104, 4114 (tampering with records or identification & securing execution of documents by deception), two years. 42 PA. STAT. ANN. § 5552(a).

D. Remedies

Judges exercise discretion in criminal sentencing, so all specified punishments may be altered. *See generally* Pa. R. Crim. P. 702-705. Deceptive or Fraudulent Business Practices, 18 PA. STAT. ANN. § 4107: If the amount involved exceeds $2,000, it is a third-degree felony. If the amount involved is $200-$2000, it is a first-degree misdemeanor. If the amount involved is less than $200, it is a second-degree misdemeanor. 18 PA. STAT. ANN. § 4107(a.1). The sentence for a third-degree felony is a fine of up to $15,000 or imprisonment for up to 7 years. 18 PA. STAT. ANN. § 1101; 18 PA. STAT. ANN. § 1103. For a first-degree misdemeanor, punishment is a fine of up to $10,000 or imprisonment for up to 5 years. 18 PA. STAT. ANN. § 1101; 18 PA. STAT. ANN. §

1104. For a second-degree misdemeanor, punishment is a fine of up to $5000 or imprisonment for up to 2 years. *Id.*

IV. Certification by Government Contractors of Prevailing Wage Compliance

A. Normative Standards

The Pennsylvania Prevailing Wage Act, which applies to any contract for public works where a public body is a party, the public body is required to request the Secretary of Labor & Industry to determine the prevailing minimum wage in the locality where the public work will occur for each craft or classification needed to perform the public work. In determining a prevailing wage, the Secretary considers any relevant collective-bargaining agreements and can also consider provisions of Federal acts on contracts for public works, the number of skilled, competent, and experienced workmen within the locality available for work, and statements by contractors and subcontractors showing wage rates paid on past projects within the locality.

Within 10 days of publication of a prevailing wage determination, any prospective bidder, representative of construction employers, representative of craftsmen, or representative of the public may file a petition for review of the prevailing wage rates. Within 20 days of this filing, the Secretary must investigate and hold a public hearing on the rates. Within 10 days of that, the Secretary will publish final prevailing minimum wage rates. If a petition is filed, bidding for the project will be extended.

The governmental officer responsible for disbursement of public funds for a public work contract must require the contractor and subcontractor to file a statement, under oath, each week (as well as a final statement at the end of the project) certifying that workmen have been paid wages in strict conformity with the contract and prevailing wage regulations or, if wages remain

unpaid, to set forth the amount of wages due and owing to each workman respectively. 43 PA. STAT. ANN. § 165-10; 34 PA. CODE § 9.110(a).

B. Claim Administration

Pennsylvania provides an extensive administration system for addressing the failure to pay prevailing wages. 43 PA. STAT. ANN. §§ 165-11-165-12; 34 PA. CODE § 9.111. For the failure to certify payment of prevailing wages, the civil administration system is not defined. The Appeals Board within the Department of Labor and Industry has the power and duty to hear any grievances arising out of the Prevailing Wage Act, so presumably the Appeals Board can hear certification issues. 43 PA. STAT. ANN. § 165-2.2(e)(1).

C. Statute of Limitations

The Prevailing Wage Act does not specify a limitations period. Pennsylvania's residual limitations period is 2 years. 42 PA. STAT. ANN. § 5552(a).

D. Remedies

A contractor or subcontractor who verifies statements he knows to be false is guilty of a misdemeanor. Upon conviction, he shall be sentenced to pay a fine of up to $ 2,500 or be imprisoned for up to 5 years, or both. 43 PA. STAT. ANN. § 165-10(c); 34 PA. CODE § 9.110(c).

V. Labor Trafficking

Pennsylvania has an extensive statutory regime intended to fight human trafficking, but it does not address the subject of labor cartels or labor trafficking directly. It does make it a felony for any person to recruit, entice, solicit, advertise, harbor, transport, provide, obtain or maintain an individual if the person knows or recklessly disregards that the individual will be subject to labor servitude. 18 PA. STAT. ANN. § 3011. It also makes it unlawful for any person to knowingly

benefit financially or receive anything of value from any of those acts. 18 PA. STAT. ANN. § 3011. Finally, it makes it unlawful for any business, in connection with, as a part of, or in addition to engaging in human trafficking, to willfully or with intent to defraud, to fail or refuse to pay wages for, or otherwise causes financial harm to, any individual in connection with labor services rendered. 18 PA. STAT. ANN. § 3015.

Washington

I. Wage Theft

A. Minimum Wage Violations

1. Normative Standards

Washington has several statutory provisions that directly address the minimum wage an employer must pay. The first, the Minimum Wage Act, codifies a specified minimum wage applicable for each year through 2020, and thereafter requires the Department of Labor and Industries (Department) to establish a new minimum wage yearly, calculated "to maintain employee purchasing power." WASH. REV. CODE. ANN. § 49.46.020(2)(a). To do so, the Department adjusts the minimum wage to account for inflation as reflected in "the consumer price index for urban wage earners and clerical workers." WASH. REV. CODE ANN. § 49.46.020(2)(b). Tips, gratuities, and service charges do not count towards satisfying the minimum wage. WASH. REV. CODE ANN. § 49.46.020(3).

By separate statute, Washington also provides that "it shall be unlawful to employ workers in any industry within the state of Washington at wages which are not adequate for their maintenance." WASH. REV. CODE ANN. § 49.12.020. It does not appear as though this provision has been interpreted to establish a baseline wage requirement separate from that established in the Minimum Wage Act itself.

With certain industry-specific exceptions, all wages due on "account of…employment shall be paid…at the end of the established pay period" determined by the employer. WASH.

REV. CODE ANN. § 49.48.010. Private employers must pay wages "on an established regular pay day at no longer than monthly payment intervals." WASH. ADMIN. CODE § 296-126-023(3).

Washington specifies that "state officers and [state] employees shall be paid for services rendered from the first day of the month through the fifteenth day of the month and for services rendered from the sixteenth day of the month through the last calendar day of the month." WASH. REV. CODE ANN. § 42.16.010(1). The director of financial management establishes the date for these established pay periods. *Id.*

Washington also requires employers of fifteen or more employees to provide information to new employees about the minimum wage and the applicable wage rate for the position into which the employee has been hired. WASH. REV. CODE ANN. § 49.58.110.

2. Claim Administration

To address a wage violation, an employee may file a lawsuit, *Wingert v. Yellow Freight Sys., Inc.*, 146 Wash. 2d 841, 850, 50 P.3d 256, 261 (2002) (private right of action for wage claim implied) or may file an administrative complaint with the Department. When an employee chooses the administrative route, the Department is required to investigate no later than sixty days after receiving the complaint. WASH. REV. CODE ANN. § 49.48.083(1). During the investigation, the Department may order the payment of wages, prosecute actions, and issue subpoenas. WASH. REV. CODE ANN. § 49.48.040. This investigatory authority does not apply to employees directly employed by any county, municipal corporation, or state. WASH. REV. CODE ANN. § 49.48.080.

Upon a decision by the Department, a person, firm, or corporation may appeal the decision to the Department director. The director then assigns the appeal to an administrative

law judge. WASH. REV. CODE ANN. § 49.48.084. The employee who filed a complaint may terminate the administrative action. WASH. REV. CODE ANN. § 49.48.085(1).

3. Statute of Limitations

The Department may not investigate a claim that occurred "more than three years before the date that the employee filed the wage complaint." WASH. REV. CODE ANN. § 49.48.083(1). The Washington Supreme Court has held the three-year limitations period applicable to implied contract claims applies to wage claims as well. *Seattle Pro. Eng'g Emps. Ass'n v. Boeing Co.*, 139 Wash. 2d 824, 935, 991 P.2d 1126, 1132, *corrected op.*, 1 P.3d 578 (Wash. 2000) (*en banc*).

4. Remedies

If the Department determines that there has been a violation, it may order the employer to pay the employee all wages owed. WASH. REV. CODE ANN. § 49.48.083(2). The amount of wages owed includes interest of one percent per month. WASH. REV. CODE ANN. § 49.48.083(2). The employer "shall" also be punished with a fine of between twenty-five and one thousand dollars. WASH. REV. CODE ANN. § 49.12.170. The employer may also be responsible for costs and reasonable attorney's fees. WASH. REV. CODE ANN. § 49.46.090(1); *see also* WASH. REV. CODE ANN. § 49.48.030; WASH. REV. CODE ANN. § 49.12.150. Department costs, actual damages, statutory damages equal to actual damages or five thousand dollars, injunctive relief, and any other appropriate relief are permitted. WASH. REV. CODE ANN. § 49.58.060; WASH. REV. CODE ANN. § 49.58.070.

In addition, if the employer is shown to have willfully "deprive[d] the employee of any part of his or her wages, [or has paid] any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract," it is liable for double damages. WASH. REV. CODE ANN. § 49.52.070. These damages are also available in a cause of action brought in court by an employee. *Id.*; *Wingert v. Yellow Freight Sys., Inc.*, 146 Wash. 2d 841, 849, 50 P.3d 256, 261 (2002).

If the Department finds a willful violation in an administrative proceeding, the Department may also order the employer to pay a civil penalty. WASH. REV. CODE ANN. § 49.48.083(3). Repeat willful violators must pay a civil penalty of "not less than one thousand dollars or an amount equal to ten percent of the total amount of unpaid wages…." WASH. REV. CODE ANN. § 49.48.125(1). The maximum penalty is twenty-thousand dollars. WASH. REV. CODE ANN. § 49.48.125(1). The Department may waive or reduce the penalty if all owed wages have been paid. WASH. REV. CODE ANN. § 49.48.125(2). Finally, the failure to pay the minimum wage is a misdemeanor. WASH. ADMIN. CODE § 296-126-226.

B. Overtime Violations

1. Normative Standards

A nonexempt employee must receive at least 1.5 times the regular pay for all hours past the forty-hour workweek. WASH. REV. CODE ANN. § 49.46.130(1). A workweek is defined as a fixed, regularly recurring period of 168 hours or seven consecutive 24-hour periods. WASH. ADMIN. CODE § 296-128-015(1). The requirement includes employees who are paid on a piece rate basis, on commission, or a non-discretionary bonus. WASH. ADMIN. CODE § 296-128-550. As with the Federal Fair Labor Standards Act, Washington has codified numerous industry- and

occupation-specific exemptions to the overtime requirement and specify variations on the general rule that account for different pay schemes (such as commissioned salespersons). WASH. REV. CODE ANN. § 49.46.130(2)-(9).

2. Claim Administration, Statute of Limitations, and Remedies

Overtime violations are administered according to the same scheme, have the same limitations period, and have the same available remedies as discussed *supra* at I.A.2-4 for minimum wage violations.

C. Off-the-clock Violations

1. Normative Standards

An employee must be compensated for all hours worked, and the failure to do so can be treated as a violation of the minimum wage requirement, the overtime pay requirement, and a breach of express of implied contract of employment. "Hours worked" includes all hours an employer requires an employee to be on duty either (1) on the employer's premises, or (2) at a prescribed workplace. *See* WASH. ADMIN. CODE § 296-126-002(8); WASH. ADMIN. CODE § 296-128-600(9). Travel time may be considered hours worked. WASH. ADMIN. CODE § 296-126-002(8); WASH. ADMIN. CODE § 296-128-600(9). If an employer requires an employee to remain on duty during the employee's meal period, then the meal period must be compensated as work time. WASH. ADMIN. CODE § 296-126-092.

2. Claim Administration, Statute of Limitations, and Remedies

There are no statutory provisions specifically addressing claim administration or remedies for off-the-clock violations. The procedures and remedies discussed *supra* at I.A.2-4 for minimum wage violations would apply to off-the-clock situations as well.

D. Illegal Deductions

1. Normative Standards

An employer is prohibited from deducting any portion of the employee's wages unless the deduction is required by law, specifically agreed upon by the employee, or for "medical, surgical, or hospital care or service, pursuant to any rule of regulation…." WASH. REV. CODE ANN. § 49.48.010. An employee agreement to allow any deductions must be explicit and in writing in advance of the employer withholding wages. WASH. REV. CODE ANN. § 49.52.060.

2. Claim Administration, Statute of Limitations, and Remedies

Claims arising out of allegedly unlawful deductions are treated as wage claims and are generally subject to the same procedures and remedies as described above for minimum wage violations. *See supra* I.A.2-4. As noted above, all wage complaints must be filed within three years of the alleged violation. WASH. REV. CODE ANN. § 4.16.080(3).

E. Paystub Provisions

1. Normative Standards

For each pay period, an employer must provide each employee with an itemized statement showing the employee's pay in hours or days worked, the pay rate, the gross pay, and all deductions. WASH. ADMIN. CODE 296-126-040; WASH. REV. CODE ANN. § 49.30.020(2). This itemized statement must be a written statement separate from the paycheck and must be issued on payday. WASH. ADMIN. CODE § 296-126-040(2). The statement may be provided electronically. WASH. ADMIN. CODE § 296-126-040(3). The employer is also required to create and keep employee records that mimic the paystub information. WASH. REV. CODE ANN. § 49.46.070; *see also* WASH. ADMIN. CODE § 296-126-040(1).

2. Claim Administration

The Department investigates and pursues claims that the wage statement requirement has been violated. WASH. ADMIN. CODE 296-126-226.

3. Statute of Limitations and Remedies

A violation of the wage statement requirement is a misdemeanor. WASH. REV. CODE ANN. § 49.12.170. The Washington state code does not specify civil remedies applicable to the wage statement requirement.

F. Interagency Information Sharing

In legislation enacted just this year, Washington has provided that:

> (1) Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state with similar powers so long as laws of such other state or of the United States permit such joint exercise or enjoyment.
> (2) Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency; and
> (3) With certain limitations and prerequisites applicable to education service districts and/or school districts, any two or more public agencies may enter into an agreement with one another for joint or cooperative action, so long as they are authorized by the "governing bodies of the participating public agencies."

WA LEGIS 176 (2021), 2021 Wash. Legis. Serv. Ch. 176 (S.S.B. 5034). Otherwise, Washington does not have an information sharing scheme applicable to violations of wage and hour laws.

II. Employee Misclassification

A. Independent Contractor/Employee Classification

1. Normative Standards

Washington law has no overarching test for determining whether a worker is an independent contractor or an employee; rather, Washington has certain context-specific tests. For example, under the Industrial Insurance Act (IIA) (which covers worker's compensation), individuals working under an "independent contract" are sometimes covered. WASH. REV. CODE ANN. § 51.08.180; WASH. REV. CODE ANN. § 51.08.195. Specifically, an individual's services will not be considered "employment" for worker's compensation purposes if it is shown that:

> (1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact;
> (2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed;
> (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes;
> (4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting;
> (5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and
> (6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

WASH. REV. CODE. ANN. § 51.08.195. For purposes of unemployment compensation benefits, the Employment Security Act (ESA) uses a slightly different multi-factor test to determine whether a worker is an independent contractor. WASH. REV. CODE ANN. § 50.04.140(2); WASH. ADMIN.

CODE § 296-126-002(2)(c). The statute provides two slightly different tests, each of which indicate that services performed by an individual for remuneration are not employment if it is shown that:

> (1) The individual providing the services has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; and
> (2) The service provided is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and
> (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service.

WASH. REV. CODE ANN. § 50.04.140. A similar, but more condensed version of this test is used for determining independent contractor status in determining eligibility for family and medical leave. WASH. REV. CODE ANN. § 50A.05.010(8)(b)(iii)(A)-(B).

Yet another slightly altered version of the IIA test set out above is employed to determine when an individual on a public works project is an independent contractor for prevailing wage purposes (also discussed *infra*). WASH. REV. CODE ANN. § 39.12.100. For those purposes, the test adds the requirements that the contractor register with the state as such and maintain separate accounting books. WASH. REV. CODE ANN. § 39.12.100(5)-(6).

2. Claim Administration

Wage claims based on misclassification would be administered according to the same scheme discussed *supra* at I.A.2 for minimum wage violations. With respect to workers' compensation and prevailing wage, the Department has the power to inspect any pertinent books, records, and payrolls to determine the correctness of the payroll, the person employed, and any other information necessary to ensure compliance with the IIA. WASH. REV. CODE ANN. §

51.48.040(1). There is an investigation unit within the Department tasked with detecting, investigating, and prosecuting any acts prohibited by the IIA. WASH. REV. CODE ANN. § 51.04.024(1). This unit and the director are authorized to receive criminal history information for the purposes of investigating violations of the IIA. *Id.* at (2). There is no private cause of action.

With respect to the unemployment compensation and family and medical leave, claims can be brought to the Commissioner of the Employment Security Office, who administers the ESA by adopting, amending, and rescinding rules and regulations as he or she deems necessary to administer the ESA. WASH. REV. CODE ANN. § 50.12.010(1). Within the Employment Security Office, there is a unit created to detect and investigate fraud. *Id.* at (2). The commissioner is authorized to receive criminal history information for the purpose of investigating fraud. *Id.* at (3). The commissioner or his or her authorized representative has the power to inspect and copy any employer's work records at any reasonable time. WASH. REV. CODE ANN. § 50.12.070. The Employment Security Department can also audit employers to ensure compliance with unemployment law. WASH. ADMIN. CODE § 192-340-010. Disputes regarding unemployment compensation are conducted within the department. Members of the department have the power to administer oaths, take depositions, certify official acts, and issue subpoenas. WASH. REV. CODE ANN. § 50.12.130(1). Employers can appeal an order or notice of assessment by filing a petition in writing within thirty days. WASH. REV. CODE. ANN. § 50.32.030.

For a violation to be charged, prevailing wage, public works claims must be filed with the Department within sixty days from the acceptance of the public works project. WASH. REV.

CODE. ANN. § 39.12.065(1). An investigation may be conducted within two years of the acceptance of a public works contract. *Id.*

3. Statute of Limitations

The limitations for wage-related claims is discussed *supra* at section I.A.3.

The IIA does not specify its own statute of limitations. The residual state of limitations is based on the type of offense. For a gross misdemeanor, the statute of limitations is two years. WASH. REV. CODE ANN. § 9A.04.080(1)(j). For a misdemeanor, the statute of limitations is one year. *Id.* at (1)(k). Felonies must generally be brought within three years. *Id.* at (1)(i). Civil actions based on statutes involving forfeiture or penalty to the state, like civil actions brought under the IIA, have a statute of limitations of two years. WASH. REV. CODE ANN. § 4.16.100(b).

The ESA specifies that actions for the collection of contributions, interest, penalties, and benefit overpayments must be commenced within three years. WASH. REV. CODE ANN. § 50.24.190. Claims involving false or fraudulent returns with intent to evade contributions may be commenced at any time. *Id.*

4. Remedies

The civil remedies available for wage claims based on misclassification are the same as those discussed *supra* at section I.A.4 for minimum wage claims.

Under either the IIA or ESA, misclassification does not in and of itself carry a penalty. With respect to the IIA, misclassification may result in a failure to pay workers' compensations premiums, which is punishable by a maximum penalty of one thousand dollars or double the amount of unpaid premiums, whichever is greater, going to the medical aid fund. WASH. REV.

CODE ANN. § 51.48.010. Additionally, if misclassification involves an employer knowingly or intentionally providing false information or concealing facts material to workers' compensation claims, it is a class C felony, punishable by a fine of up to twenty-five thousand dollars. WASH. REV. CODE ANN. § 51.48.270. Alternatively, if recommended by the prosecutor and agreed to by the offender, the court may order such an employer to pay double the value gained by the employer because of his or her deceit to the victim, though it is unclear whether the victim would be the misclassified employee or the insurer. WASH. REV. CODE ANN. § 9A.20.030

Under the ESA, misclassification can result in a failure to provide complete and correct unemployment tax reports or a misrepresentation of the amount of payroll used to calculate unemployment taxes, both of which result in civil penalties. Failure to provide complete and correct unemployment tax reports first results in a warning. WASH. REV. CODE ANN. § 50.12.220(2). When contributions are due, the second failure gives a penalty of ten percent, but this amount must be between $75 and $250. A third failure has a penalty of ten percent, but this amount must be between $150 and $250. A fourth failure and any further failures give a penalty of $250. *Id.* at (2)(a). If contributions are not due, a second failure has a penalty of $75, a third failure has a penalty of $150, and a fourth failure and subsequent failures give a penalty of $250. *Id.* at (2)(b). Knowingly misrepresenting payroll values makes an employer liable for ten times the amount of unpaid contributions. *Id.* at (3).

Knowingly giving false information or knowingly withholding information relevant to unemployment compensation is a misdemeanor, punishable by a fine between $20 and $250, or by imprisonment for up to ninety days. WASH. REV. CODE ANN. § 50.26.010(1)-(2). Falsifying books, documents, or records, making a false statement relating to unemployment compensation

while under oath, or willfully attempting to evade or defeat unemployment contribution requirements is a gross misdemeanor, punishable by a fine of up to $5,000, imprisonment for up to 364 days, or both. *Id.* at (3).

B. Exempt/Non-Exempt Classification

1. Normative Standards

The general rule in Washington is that employees are entitled to "no less than one and one-half times the regular rate at which he or she is employed." WASH. REV. CODE ANN. § 49.46.130. Washington, however, classifies certain employees as exempt from the state's overtime pay requirements. Those exemptions largely follow the federal pattern, for example exempting employees working in an executive, administrative, or professional capacity. WASH. REV. CODE ANN. § 49.46.010(3)(c); *see also* WASH. ADMIN. CODE § 296-128-500(2). If an individual meets the requirements of one of these exemptions and is paid on a salary basis, the individual is an exempt employee. *See* WASH. ADMIN. CODE § 296-128-532(1). Most of the statutory exemptions identify narrow slices of the economy for special treatment (for example, seasonal employees employed at concessions and recreational establishments at agricultural fairs). WASH. REV. CODE ANN. § 49.46.130. In May of this year, Washington eliminated the exemption for certain previously exempt agricultural workers paid on a piece-work basis. *See* Wash. SB 5172 – 2021-22.

Even if an employee otherwise meets the duties-related requirements of an exemption, he or she must still be compensated on a salary basis at a specified level above the minimum wage; the amount of the required pay depends on the size of the employer's workforce and adjusts each year. *See* WASH. ADMIN. CODE § 296-128-545.

2. Claim Administration, Statute of Limitations, and Remedies

The state's overtime requirements are part of the Minimum Wage Act and claims for overtime pay follow the same administrative and judicial procedures and remedies for that Act, discussed *supra* at section I.A.2-3.

III. Payroll Fraud on State Government by Government Contractors

A. Normative Standards

Outside the Medicaid fraud arena, Washington has no statute that specifically addresses fraud against the state government or its agencies by government contractors. It does, however, have statutes that address fraud more generally, making it unlawful to "[e]mploy any device, scheme, or artifice to defraud" or "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." WASH. REV. CODE ANN. § 19.110.120(1)(b)-(c).

B. Claim Administration

This type of fraud leads to criminal prosecution in the ordinary course. A common law civil tort remedy for fraud may be available as well.

C. Statute of Limitations

No felony indictment may be brought "more than five years after the alleged violation." WASH. REV. CODE ANN. § 19.110.075(3).

IV. Certification by Government Contractors of Prevailing Wage Compliance

A. Normative Standards

Washington requires that employees engaged in "all public works and under all public building service maintenance contracts of the state or any county, municipality or political subdivision created by its laws [must receive] not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality within the state where such labor is performed." WASH. REV. CODE ANN. § 39.12.020. This requirement must be part of every contract for the construction, reconstruction, maintenance, or repair of any public work of the state or its political subdivisions. WASH. REV. CODE ANN. § 39.12.030.

Before any payment is made on such a contract, the officer or person charged with the disbursement of public funds must require the contractor and every subcontractor to submit a "Statement of Intent to Pay Prevailing Wages." WASH. REV. CODE ANN. § 39.12.040. Moreover, following the final acceptance of a public works project, the officer has to require the contractor and its subcontractor to submit an affidavit searing that the prevailing wages were actually paid before the funds retained for the project are released. WASH. REV. CODE ANN. § 39.12.040. If there are no retained funds on the project, the affidavit of wages paid must be submitted prior to final acceptance of the public works project.

Intentionally filing a false affidavit subjects the filer to the same penalties as are provided in WASH. REV. CODE ANN. 39.12.050. Each affidavit of wages paid must be certified by the industrial statistician of the Department before it is submitted to the disbursing officer. Contractors must also keep payroll records and may be asked to file a certified copy for review. WASH. ADMIN. CODE § 296-127-320.

B. Claim Administration, Statute of Limitations, and Remedies

If a dispute arises about a contractor's compliance, the matter is referred to the Department director for arbitration. WASH. REV. CODE ANN. § 39.12.060; *see also* WASH. ADMIN. CODE § 296-127-060. Complaints to the Department director also start an investigation into whether there is a violation. WASH. REV. CODE ANN. § 39.12.065(1). A complaint of nonpayment of prevailing wage must be filed with the Department no later than sixty days from when the public works project was accepted. WASH. REV. CODE ANN. § 2939.12.065(1). The Department may not charge a contractor with a violation when a complaint is received after this sixty-day period concludes, but the Department may investigate and recover unpaid wages within two years from the acceptance of the public work. WASH. REV. CODE ANN. § 39.12.065(1).

A violation may result in a civil penalty and the contractor is not permitted to bid on public works until the penalty is paid. WASH. REV. CODE ANN. § 39.12.050(1). If there is a second violation within five years, the contractor may not bid on public works for two years. WASH. REV. CODE ANN. § 39.12.065(3). Civil penalties shall not be less than five thousand dollars or an amount equal to fifty percent of the wage violation. WASH. REV. CODE ANN. § 39.12.065(3). The Department director may waive the penalty if the Department concludes there was a reporting error. WASH. REV. CODE ANN. § 39.12.065(4).

The most draconian penalty for non-compliance is found at WASH. REV. CODE ANN. § 49.28.050. That statute provides that

> All contracts for work for the state of Washington, or any political subdivision created by its laws, shall provide that they may be canceled by the officers or agents authorized to contract for or supervise the execution of such work, in case such work is not performed in accordance with the policy of the state relating to such work .

Courts instead appear simply to require the payment of the prevailing wage. *See Superior Asphalt v. Labor & Indus.*, 112 Wash. App. 291, 303, 49 P.3d 135, 142 (Wash. Ct. App. 2002); *Heller v. McClure & Sons, Inc.*, 92 Wash. App. 333, 342, 963 P.2d 923, 928 (Wash. Ct. App. 1998).

In addition to cancelation, violators can be debarred for a period of up to three years, based on consideration of a lengthy list of aggravating and mitigating circumstances. WASH. REV. CODE ANN. § 39.26.200.

Finally, Washington law provides that if a contractor or a subcontractor doing public work uses employee withholdings for personal use, the contractor or subcontractor is guilty of a gross misdemeanor. WASH. REV. CODE ANN. § 49.52.090. Furthermore, if an employer willfully fails to record deductions, an employer or agent of the employer is guilty of a misdemeanor. WASH. REV. CODE ANN. § 49.52.050(4). If an employer does not record deductions, there is a presumption that the violation is willful. WASH. REV. CODE ANN. § 49.52.080.

V. Labor Trafficking

A. Normative Standards

Washington has established a state clearinghouse on human trafficking to coordinate efforts against the trafficking of persons, including labor trafficking. WASH. REV. CODE ANN. § 7.68.370(2). The statute creates an "office of crime victims advocacy" in addition to the clearinghouse, requires the clearinghouse to publish findings and legislative reports of statewide task forces relating to the trafficking of persons; to provide a comprehensive directory of resources for victims of trafficking; and collect and disseminate up-to-date information regarding the trafficking of persons, including news and legislative efforts, both state and federal.

Washington also has a statutory framework for addressing "human trafficking," which includes "forced labor," *i.e.*, "all work exacted from a person under the threat of penalty and to which the person has not voluntarily offered to perform." WASH. REV. CODE ANN. § 19.320.010(3). The scheme requires employers of "domestic employers of foreign workers and international labor recruitment agencies" to provide statements to workers, in their first language, disclosing, among other things, that they are protected by Washington's employment and wage and hour laws, specifying permissible deductions from their pay, that they are entitled to control their own identification and travel documents, and providing a "hot line" number for the employee to use. WASH. REV. CODE ANN. § 19.320.010(3).

B. Claim Administration, Statute of Limitations, and Remedies

Employees who succeed in a claim under the statutory scheme are entitled to actual damages or between $250 and $500, whichever is greater, as well as fees and court costs. WASH. REV. CODE. ANN. § 19.320.040.