

Insight

IN-DEPTH DISCUSSION

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Philadelphia's New Wage Theft Ordinance: What Employers Need to Know

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On July 1, 2016, the Philadelphia Wage Theft Ordinance went into effect. The Ordinance creates a new avenue for complaints alleging nonpayment of wages or "wage theft," and the position of "Wage Theft Coordinator" to facilitate enforcement.

While the Ordinance establishes new notice and posting obligations, increases employer penalties, establishes a separate administrative process for filing wage theft complaints in Philadelphia, provides for a three-year statute of limitations, and creates a private right of action for a court filing, the City Council wryly noted that the Ordinance does not expand upon the wage payment laws with which employers must comply.

Who and What Is Covered

The Ordinance retains the definitions of "wage," "employer," and "employee" under the Pennsylvania Minimum Wage Act.¹ However, the Ordinance supplies a broad definition of "wage theft."

Under the Ordinance, "wage theft" is the violation of the Pennsylvania Wage Payment and Collection Law ("WPCL"), the Pennsylvania Minimum Wage Act ("PMWA"), and any other federal or state law regulating the payment of wages "where the work is performed in Philadelphia or the employment contract underlying the violation is made in Philadelphia." This is noteworthy because an employee who works, for example, in New Jersey or New York could presumably bring a wage complaint based upon

¹ "Wages" mean compensation due to any employee by reason of his or her employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges or allowances as may be permitted by regulations of the secretary under section 9... 'Employer' includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting, directly or indirectly, in the interest of an employer in relation to any employee... 'Employee' includes any individual employed by an employer..." 43 Pa. Stat. Ann. § 333.103.

those state's wage and hour laws under the Ordinance if that employee's contract was "made in Philadelphia"²

Additionally, the Ordinance provides that both employees and "authorized organizations" (defined to include labor unions, any group of employees, or anyone acting on behalf of an employee) may file complaints for wage theft under the Ordinance. This provision creates an opportunity for a labor union to pursue an action outside the traditional grievance and arbitration procedure of a collective bargaining agreement, and gives the union standing to pursue wage and hour claims, which does not exist under the FLSA.

The Ordinance specifically provides for minimum (\$100) and maximum (\$10,000) limitations on claims. All claims below the minimum or above the maximum must be brought pursuant to other laws. The Ordinance specifies that determining whether the threshold amount is proper is a purely "ministerial act" that is not based upon further investigation or independent judgment. In other words, the Wage Theft Coordinator will be required to proceed on the plain language allegation of the complaint. Although the Ordinance specifically provides that each week in which any wages are unpaid is a separate violation, it is silent on whether claims covering weeks, months, or years must be filed together (likely exceeding the maximum threshold), or can each be filed separately so that they remain subject to the Ordinance.

The Ordinance establishes a three-year statute of limitations for all claims. While this is consistent with the statute of limitations that applies to state PMWA and WPCL claims,³ the federal Fair Labor Standards Act ("FLSA") has a two-year year statute of limitations, and only allows three years where a violation can be proven to be willful.⁴ Further, once a complaint is filed, the Ordinance purports to toll the applicable statute of limitations for any action in state or federal court concerning the same set of facts and circumstances.⁵

The Complaint Process

To initiate a complaint, a party must provide a signed complaint to the Wage Theft Coordinator to review and issue it to the employer. The Coordinator does not evaluate the legitimacy of the complaint at the processing stage, but rather ensures the elements of the Ordinance are met. The employer has 30 days to answer, producing "all available records." The Coordinator is expressly empowered to subpoena documents from employers.

The initial burden is on the complainant to present "sufficient evidence" to show what wages are due, and the employer may negate reasonable inferences of the evidence by producing records of time worked and payments made. Significantly, the process does not provide for any form of hearing or sworn testimony.

Within 60 days of receiving the employer's response, or within 110 days of the complaint being filed, whichever is earlier, the Coordinator will issue written findings of fact and conclusions of law. Upon a finding that payment is due, the Coordinator may order payment and issue penalties to the employer to be paid to the complainant. Further, the Ordinance establishes that joint and several liability may attach, although the total amount awarded shall not exceed the amount owed to the complainant. A final decision by the Coordinator may be appealed in court within 30 days.

2 Although individual cases must be evaluated, employees working outside Philadelphia and companies located outside Philadelphia but contracting for work performed within Philadelphia may be covered by these provisions.

3 See, e.g., *Cerutti v. Frito Lay, Inc.*, 777 F. Supp. 2d 920 (W.D. Pa. 2011); *Cauci v. Prison Health Servs.*, 153 F. Supp. 2d 605, 610 (E.D. Pa. 2001); *Friedrich v. U.S. Computer Serv., Inc.*, 833 F. Supp. 470, 477 (E.D. Pa. 1993); 43 Pa. Stat. Ann. § 260.9a.

4 29 U.S.C. § 255.

5 Presumably the Ordinance only tolls the statute of limitations for claims made in court under its terms, as the Philadelphia City Council has no authority to establish tolling under the MWPA, WPCL, or FLSA.

Separate from the administrative process, the Ordinance creates a private right of action for employees or any authorized organization alleging violations of any wage payment law. This private right of action does **not** require exhaustion of administrative remedies and can result in award of wages due, costs, reasonable attorneys' fees, and penalties.

Penalties

In addition to payment of back wages and attorneys' fees, the Philadelphia Wage Theft Ordinance carries substantial penalties. Each week in which any wages are unpaid is a separate violation of the Ordinance. The Ordinance also provides that an employer will be subject to penalties up to \$2,300 for *each violation* where no "good faith contest of the wages owed exists." Thus, employers could be subject to multiple \$2,300 fines for a single employee's complaint for unpaid wages if the complaint spans multiple weeks. Because the amount of penalties will not be known at the time the complaint is filed, they will presumably be awarded on top of the \$10,000 maximum threshold amount.

In addition to monetary damages, Philadelphia may deny, revoke, or suspend any license or permits issued to an employer who has admitted liability or been found liable for violating the Ordinance or any other state or federal wage and hour law in the three years prior to the date that the employer applied for a license or permit. Thus, an employer who was found to have violated the Ordinance in 2016 could have its license revoked anytime in the following three years. The Ordinance also provides that any license or permit issued by Philadelphia may be revoked or suspended if the license or permit holder violated the Ordinance or any other federal or state wage payment law and failed to satisfy the judgment entered against him or her within the lawful period. Once a license or permit has been revoked or suspended, the license or permit holder or the "person who is the principal of a license or permit" will not be able to obtain any license or permit from the City for one year. However, employers will be able to appeal any license suspension, revocation, or denial through an established Philadelphia appeal process.⁶

Anti-Retaliation Provision

The Ordinance prohibits employers from retaliating against any employee who files a complaint for wage theft. Further, the Ordinance provides that the Coordinator "may keep a complainant's name confidential until the validity of a complaint can be verified if the complainant alleges that there is a substantial risk of retaliation by the employer." There is currently no guidance regarding when a situation may present a "substantial risk of retaliation."

Notice and Posting Requirements

Employers must give notice to employees through a workplace poster and include a provision in their handbooks that informs employees they are entitled to file complaints for unpaid wages under the Ordinance. The notice must also inform employees that employers may not retaliate against them for filing complaints. Importantly, the Ordinance requires that this notice be published in "the first language spoken by at least 5% of the employer's workforce..."

As of July 1, 2016, any employer that applies for a commercial activity license "or any other license or permit related to a business enterprise" will receive a copy of the Ordinance and must certify that they have not been found guilty, liable, or responsible for violating any wage payment law in the previous three years.

⁶ Section 9-103 of the Philadelphia Code provides, "...any person aggrieved by any order of any agency may appeal to the Board of License and Inspection Review for a review of the order in accordance with procedures prescribed by the Board. He shall upon request be furnished with a written statement of the reasons for the agency order, and shall be afforded hearing thereon by the Board. The hearing shall be conducted according to the regulations of the Board. The Board may affirm, modify, reverse, vacate or revoke the order from which the appeal was taken, and it shall make findings and render a decision in writing."

However, this provision applies only to wage violations that occur after July 1, 2016. Thus, an employer applying for a license on July 6, 2016 would not have to report a wage violation that occurred on June 30, 2016.

Practical Implications and Difficulties for Philadelphia Employers

The publicity surrounding these new provisions and the postings in the workplace, along with standing granted to labor unions, may cause a significant number of claims to be filed under the Ordinance. Further, as noted above, the potential for multiple claims for each separate week, combined with attorneys' fees and penalties, increase the likelihood of awards that exceed \$10,000, either singly or in the aggregate.

Employers will need to carefully evaluate the legal issues and recognize that any information or response filed with the Wage Theft Coordinator could be separately used in individual or class and collective action lawsuits in state or federal court. Unfortunately, because the Wage Theft Coordinator has subpoena power and issues a written adjudication without a hearing, employers cannot afford to choose not to respond or to ignore these proceedings. No response should be filed without careful review by counsel familiar with these laws.

The Ordinance does not formally provide for any means of settlement or resolution of claims other than the Wage Theft Coordinator ordering payment. It is similarly silent on whether claims may be subject to settlement and binding waiver without approval of the Wage Theft Coordinator. By contrast, federal wage and hour claims cannot be settled and released without formal inclusion and approval of the Department of Labor. Therefore, it is unclear whether any settlement would be binding on the Wage Theft Coordinator, and would certainly not release potential federal wage claims. All of these factors and uncertainties combine to warrant very careful consideration in any attempt at resolution.

Finally, employers should carefully review their pay practices to ensure they are meeting all PMWA, WPCL, and FLSA obligations.