



WAGE THEFT AND MPRC 1.13

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MINNESOTA'S WAGE THEFT LAW

- Passed in 2019, the Wage Theft Law had three main parts:
 - Criminal Wage Theft added to Minn. Stat. § 609.52
 - Increased Notice Provisions for Employees
 - Civil Enforcement Authority for the Minnesota Attorney General

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What is Criminal Wage Theft?

- When
 - 1) an employer;
 - 2) with intent to defraud
 - 3) either
 - Fails to pay an employee all wages owed; OR
 - Claims to have paid an employee more than they received; OR
 - Requires a rebate or refund from the employee from wages paid.

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Who Is An Employer?

- An “employer” is more than just the entity on the W-2. It can also be:
 - An individual making decisions for the employing entity;
 - “Person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee.”
- This provision creates potentially broad criminal liability for whatever individual person is facilitating wage theft for a specific employer.

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Who is an Employee?

- An “employee” is any individual employed by an employer.
- In the construction context, look to Minn. Stat. § 181.723, subd. 4
- Widespread issue in the construction industry that people who SHOULD be employees are being classified as “independent contractors.”

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9-Factor Test

- Maintains a separate business, *including office, equipment, materials*
- Has EIN or has filed business or self-employment income taxes *in the previous year*
- Operating under a specific contract; *not* being paid hourly
- Worker is incurring expenses for services performed

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9-Factor Test (Continued)

- Liable for failure to perform services
- May realize a profit or suffer loss due to performance
- Has continued/recurring business liabilities/obligations
- Success or failure of the worker's business relies on business receipts to expenditures
- BOTTOM LINE: Most workers on a construction site are someone's employees

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Worker Misclassification

- Independent contractor misclassification is:
 - Wage Theft, but it is also:
 - Insurance fraud
 - Tax fraud
- Examples
 - Ricardo Batres case (Hennepin County)
 - Merit Drywall (Hennepin County)

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MPRC 1.13

- Lawyer's duty is to the *organization*, not to individuals (constituents) within the organization. MPRC 1.13(a).
 - Organizations cannot act on their own. They are made up of constituents: officers, directors, shareholders, employees, and other constituents.
 - Depending on the circumstances, a lawyer *may* represent both the organization and constituent. The lawyer may *not* represent both if their interests are adverse.

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MPRC 1.13(b)

- If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in . . . a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.
- BY: Referring "the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law."

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MPRC 1.13(b) (continued)

- Comment 3: A lawyer cannot ignore the obvious. Knowledge can be inferred from the circumstances.
- When can a lawyer ethically avoid referring the matter to a higher authority within the organization?
 - Comment 4: Innocent misunderstanding where the client accepts the lawyer's advice and changes course
- NOTE: This rule can apply when a lawyer knows client's subcontractors are breaking the law.
 - Remember: criminal wage theft liability attaches if an individual is acting "directly OR indirectly" in the interest of the employer

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MPRC 1.13(c)

- What if the highest members of the organization refuse to alter conduct?
 - Comment 6: A lawyer may reveal confidential information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law.
 - MPRC 1.13(c) & 1.16(b): Lawyer may withdraw if the organization persists with illegal conduct. BUT:
 - MPRC 1.16(a): The lawyer MUST withdraw if the representation will result in violation of the Rules of Professional Conduct or other law.

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MPRC 1.13(e)

- Duty to disclose
 - Lawyer must inform individuals that the lawyer's duty is to the organization.
 - It is NEVER in the organization's legal interest to act criminally
 - Comment 9: When the organization's interests are adverse to those of a constituent, the lawyer should advise the constituent, that the lawyer cannot represent the constituent, and that such person may wish to obtain independent representation. Once this conflict exists, discussions between the lawyer for the organization and the individual constituent may not be privileged.

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MPRC 1.13 Reporting Steps

- 1) Lawyer becomes aware of a potential violation of the law by an organization's constituent. REMEMBER: a lawyer cannot turn a blind eye.
- 2) Lawyer advises the constituent of the potential violation. BUT constituent ignores lawyer's advice.
- 3) Lawyer alerts a higher authority (up to the *highest* authority) within the organization of the issue. BUT no action is taken.
- 4) Lawyer may reveal confidential information and may be required to end representation.

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Criminal Wage Theft and MPRC 1.13

- A lawyer who knows the client is misclassifying construction employees as independent contractors and acts in furtherance of that conduct may be a “person . . . acting directly or indirectly in the interest of an employer in relation to an employee”
- The lawyer’s knowledge of the law and advice to the client on how to misclassify an employee could be subject to the crime-fraud exception. *See State ex. rel Humphrey vs. Philip Morris*, 606 N.W.2d 676, 691 (Minn. Ct. App. 2000) (crime-fraud exception applies to attorney-client communications made in furtherance of fraud that are closely related to the fraud).

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Criminal Wage Theft and MPRC 1.13 (continued)

- How is it applicable to lawyers?
- Hypo:
 - Commerce Fraud Bureau investigates construction contractor for work comp fraud, UI fraud, and wage theft.
 - Contractor claims misclassification wasn’t fraudulent because it was sanctioned by a lawyer.
 - Lawyer, as the agent for the employer and the individual most responsible for perpetrating the fraud, now potentially liable for criminal wage theft.

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Takeaways

- An organizational lawyer's duty is to the organization.
- *Never* in the organization's legal interest to break the law or act criminally.
- An organizational lawyer has a duty to make the highest representatives of an organization aware of illegal conduct.
- An organizational lawyer **MUST** withdraw from representation if the organization is using the lawyer to break the law.
- If a lawyer does not comply with MPRC 1.13 & 1.16, the lawyer could also be criminally liable for wage theft and professional discipline.
- A lawyer's advice to a client to evade the law could put the lawyer at risk.

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Resources

- Minnesota Board of Professional Responsibility:
(651) 296-3952 or (800) 657-3601
- Ethics Line Advisory Opinion Requests:
<http://lprb.mncourts.gov/LawyerResources/Pages/AdvisoryOpinionRequestForm.aspx>
- The Minnesota Attorney General's Office: (651) 296-3353 or (800) 657-3787 or
<https://www.ag.state.mn.us/Office/Forms/FraudReport.asp>

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