

## **WAGE THEFT OVERVIEW**

### **WHAT IS WAGE THEFT?**

Wage theft is, quite simply, a failure of an employer to pay a worker what the worker is owed for work completed. It may seem amazing that this occurs. A worker shows up for work, exhibits good faith by diligently completing assigned tasks. The normal expectation is that the worker will get paid the wage owed for the work that was completed. A worker does not expect to not get paid. A worker does not expect to have their wages stolen.

This gets to a basic moral and ethical value that we as a culture hold dear: one does not steal from another.

And yet, wage theft happens all the time. Each year, billions of dollars of wages are stolen from millions of workers. According to a 2014 study from the Economic Policy Institute, \$280 billion is stolen from American workers every year.

What makes wage theft especially egregious is that the victims tend to be lower income workers. Thus, women and minority workers tend to be disproportionately affected.

### **WHAT ARE THE TYPES OF WAGE THEFT?**

- Workers simply not being paid. This is especially common with immigrant workers who get threatened with deportation if they complain.
- Workers paid with a check that bounces.
- Workers paid below Federal or Wisconsin minimum wage of \$7.25 per hour.
- Workers paid below the rate of pay the employer promised.
- Workers not paid for overtime.
- Workers cheated out of overtime because overtime hours were average over a two-week period. Overtime should be paid for any hours in excess of 40 hours per week.
- Time clock rounding. Workers get nickel and dined by the employer who rounds down instead of rounding up.
- Illegal deductions.
- Vacation hours not paid, if the employment agreement includes paid vacation time.
- Workers not paid for mileage, i.e. if the worker is required to show up at headquarters and then drive their own vehicle to a remote work site.
- Servers not receiving all their tips. Restaurant management is not allowed to force servers to share tips with other workers.
- Donning and doffing. Workers are supposed to be paid for time required to prepare wardrobe necessary to do their job. For instance, if a worker is required to take a shower

then put on sanitary coveralls, they must be paid for the time it takes to complete these tasks.

- Deduction of time for a break less than 30 minutes.
- Misclassification that occurs when the employer claims a worker is an independent contractor or exempt from overtime.
- Workers paid less than what a “prevailing wage” for that specific type of work, assuming that particular state or municipality pays a prevailing wage. It should be noted that the State of Wisconsin recently prohibited local governments from paying prevailing wages in most situations.
- Workers who get paid with debit cards, which may result in fees to use the debit card.
- Workers paid in something other than actual money. If the worker does not agree to such an arrangement, it is wage theft.
- In a Workers’ Compensation claim, the employer falsely reports the number of hours worked, which adversely affects the worker’s claim.
- Overtime does not include a calculation for all types of pay. For instance, if those overtime hours included some kind of shift differential, the differential needs to be included in the overtime calculation.
- Workers not paid for an overnight stay that is a required condition of employment.
- Gender pay gap.

#### **WHERE DOES WAGE THEFT OCCUR?**

- Restaurants—19 percent
- Janitorial—15 percent
- Manufacturing and warehouse—14 percent
- Retail/Service—11 percent
- Agricultural Labor—9 percent
- Construction—8 percent
- Healthcare (hospitals, nursing homes, medical clinics)—4 percent
- Clerical and white collar—4 percent
- Food production/meat packing—3 percent
- Childcare/education—3 percent
- Hotels—3 percent
- Transportation—1 percent

In south/central Wisconsin, 48.5 percent of reported wage theft occurs in the City of Madison. Suburban Dane County accounts for 25.7 percent of reported wage theft. 21 percent of reported wage theft occurs outside of Dane County.

The average wage earned by victims of wage theft is \$12.19 per hour. The median wage earned by victims of wage theft is \$9.50 per hour.

**WHO ARE VICTIMS OF WAGE THEFT?**

- Gender: Women, 50.3 percent. Men, 49.7 percent.
- Language: Spanish, 56 percent. English, 42 percent. Other, 2 percent.
- Race/Ethnicity: Latino, 62.9 percent. White, 18.2 percent. African American, 10.4 percent. Asian, .5 percent.

**What means of redress exist for victims of wage theft?****State and Federal Agencies**

If wage theft occurs in a unionized workplace, the worker should file a grievance through the union. However, we have seen a severe erosion of unionized workplaces in Wisconsin and around the country. Sadly, such redress is less and less common. Most wage theft occurs in non-unionized workplaces. Fortunately, alternatives do exist.

Depending on the type of wage theft, a worker may file a complaint with either the State of Wisconsin or the Federal government. State law may cover areas not covered by federal law, or federal law may cover areas not covered by state law.

In Wisconsin, a victim of wage theft should file a Wisconsin Labor Standards complaint form with the Wisconsin Department of Workforce Development. The complaint must be filed within two years of the date of when the theft occurred and must not be filed until the worker requests payment from the employer. If payment is not received within six days, the worker may then file the complaint. A worker may not file a complaint if they have already filed a lawsuit against the employer.

Wisconsin allows claims to be filed for overtime, child labor, unpaid hours of work, violations of one day of rest for each seven days, medical exams, street trades, deductions from wages, severance pay, commission, bonus pay, and vacation/holiday/sick pay. Independent contractors are not eligible to file complaints with WI DWD.

Once the claim is filed, an investigator will first review the form to make sure that it is properly filled out. If not, the claim may be dismissed or more information may be requested. Once the claim is accepted, the employer is notified. The employer may respond by either sending a check for wages owed or documents disputing the claim. The investigator will conduct fact-finding and then will issue a determination. The DWD may assess up to 100 percent of the wages due along with additional damages ranging from 50-100 percent of unpaid wages. If the employer refuses to honor the determination, the DWD may request collection from the county district attorney.

The Wage & Hour Division of the United States Department of Labor handles Federal wage theft claims and can conduct an investigation under any one or more of laws enforced by the WHD. Like Wisconsin, there is a two-year statute of limitations on wage theft complaints. The deadline is three years if it can be determined that the wage theft was willful.

Once the claim is accepted, the investigator will examine records to see which laws apply. After this determination is made, the investigator will conduct fact-finding by examining payroll and time records, interviewing employees at the workplace, and meeting with employer. The investigator will present findings. At this point, the employer may either pay the wages due or dispute the findings by presenting additional evidence.

WHD may award back pay along with damages. WHD may also order the employer to pay a fine to the Federal government and may even mete out criminal penalties in the event of willful wage theft.

WHD may also file a lawsuit in Federal court on behalf of the worker, if the employer refuses to comply with the investigator's determination.

### **Litigation**

Another option for a victim of wage theft is to file a lawsuit. However, it should be noted that a worker cannot file a state or Federal wage theft complaint if they have already filed a lawsuit. Another important point is that a worker is not likely to prevail in a lawsuit without hiring an attorney. The attorney will probably insist on some form of cash retainer unless there is the possibility of a large class-action suit that could result in an award of millions of dollars.

Like Wisconsin and Federal agency complaints, the statute of limitations for filing a lawsuit is two years unless it can be proven that the violation was willful. In such an instance, the statute of limitations is three years.

One nice aspect of wage theft lawsuits is that the recovery of attorney fees and court costs may be awarded to the worker. Often in the American legal system, such a recovery is not permitted. Also, there is not necessarily a limit on the awarding of back pay and damages. Such awards are determined by a jury or through negotiation. The worker does have to share any awards with the attorney.

### **Pros and Cons**

The major advantage of filing a complaint with either the WDWD or WHD is that it costs the worker nothing. These agencies are supported with our tax dollars to work on our behalf. And in the case of WHD, if they find in favor of the worker, but the employer refuses to pay, they may file a lawsuit on behalf of the worker.

It should also be noted that in terms of enforcement options, the WHD has more teeth than its Wisconsin counterpart. On the other hand, WHD has tended to be under-staffed and has not placed a high priority on wage theft issues. Workers may have better luck filing a wage theft complaint with WDWD, but not necessarily. It should also be noted that government agencies tend to be affected by the political winds.

The primary advantage of litigation is that the worker is represented by an attorney who is acting as an advocate for that worker. The attorney will fight for their client's rights, as opposed to a civil servant who has no vested interest in the outcome of the case. However, attorneys generally do not work for free, so if a worker wants to pursue litigation, they will have to pay an attorney to represent them, unless they are part of a significant class action lawsuit involving numerous wage theft victims.

Another disadvantage of litigation is that judges often are reluctant to overturn decisions made through the administrative process. So if a complaint filed with a state or federal agency does not result in a favorable decision, it tends to be unlikely that litigation will reverse the outcome.

Lastly, it needs to be noted that be it litigation or filing a complaint with a governmental agency, the process takes a long time. Complaints may drag on for months or even years, which does little to alleviate current hardship.

### **Direct Action: Another Path**

Direct action offers an alternative to legalistic or bureaucratic approaches that is more flexible and often more effective. Certainly, direct action can provide far more rapid relief for a worker.

Worker centers, such as Worker Justice Wisconsin, offer front line defense against wage theft and possess a wealth of experience in direct action tactics and strategy. Worker centers offer tremendous resources including experienced advocates, access to attorneys, and information about wage laws and policies. Worker centers can analyze evidence to help determine if wage theft has occurred. Once such a determination is made, worker center advocates can help a worker file a complaint or set a course of direct action.

Worker centers have learned through extensive experience that perhaps the fastest way to recover a worker's wages is to confront the employer directly. This may result in immediate relief or it may not. If the employer refuses to pay the worker what the worker is owed, the worker center may initiate a direct action campaign to pressure the employer into compliance. Such tactics may include contacting the employer's customers to let them know that wage theft is occurring. It may include various means to apply public pressure to force the employer to return stolen wages.

Such a campaign may involve pickets or even occupations. It generally involves getting the word out to the public to call or write letters to the employer. The idea is to hit the employer in the pocketbook. A loss of revenue tends to be a great motivator to compel employers to return stolen wages.

What is especially important about direct action is that it is collective in nature. Think of the symbolism of the Solidarity Fist. When a hand forms into a fist, the fingers are protected from injury and the hand becomes greater than the sum of the parts of four fingers and a thumb.

A direct action campaign will involve not only the worker and the worker center advocates, but also members of the general public along with the worker's fellow workers. In terms of wage theft, where there's smoke, there's fire. Therefore, in a particular workplace, if one worker is not being paid properly, probably many or all the workers are not being paid what they are owed. In larger workplaces, the process may be systematic, so nobody is getting paid properly.

Such collective action involving many if not all the workers in a particular workplace becomes extremely important given the shortage of unionized workplaces and the fact that wage theft is common in non-union workplaces.

What are the pros and cons of direct action? On the downside, direct action does not involve a legally binding process involving an order from a judge or government official. An employer may give in to demands and then turn around and break promises to pay back what is owed and stop engaging in wage theft.

On the other hand, direct action may bring about a satisfactory result considerably more quickly than legalistic approaches. Such relief might not include penalties or additional damages, but getting paid and getting paid quickly tends to be what is most important to victims of wage theft. Again, wage theft tends to occur more frequently in lower paying jobs where workers often live from paycheck to paycheck. Therefore, a quick resolution is extremely important to workers in order to avoid or minimize hardship.