

Denver Auditor's Office Adopts New Civil Wage Theft Rules

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In January 2023, Denver Mayor Michael Hancock [approved an ordinance](#) (File No. 22-1614) passed by the Denver City Council that provided new avenues for workers in the City and County of Denver to pursue claims for wage theft. In addition to filing a complaint under the Colorado Wage Act (CWA) with the Colorado Division of Labor Standards and Statistics, an aggrieved worker or other individual harmed by an employer's violation of the law may file a complaint with the city auditor or a lawsuit in court within three years of the date of the alleged ordinance violation. The ordinance vested responsibility for implementation and enforcement with the Denver Auditor's Office.

Denver Labor, a division of the Auditor's Office, recently adopted [rules](#) regarding enforcement of the new ordinance, providing important clarification on several aspects of the ordinance, including the following:

The ordinance applies to all persons who "work in Denver."

Individuals "work in Denver" if they spend "approximately 20% or more" of their work time in Denver in a pay period or "customarily spend at least 50% of their work time in Denver." The ordinance applies to all hours of work performed within Denver, regardless of an employer's location.

The location of an employee's work is essential to the application of the ordinance. For example, the ordinance does not apply to employers whose employees work outside Denver only, even if those employers have offices or principal places of business in Denver. The ordinance *does* apply to employers of workers who perform any work in Denver, including remote work, even if the employers' offices or principal places of business are outside Denver.

Investigations need not be limited to individual complainants.

Once Denver Labor begins an investigation, the investigation may exceed the scope of the initial complaint and extend beyond the initiating complainant to multiple job sites. Denver Labor reserves the right to investigate compliance relating to all of an employer's workers performing work in Denver.

When an affected worker is not a complainant, Denver Labor will communicate the following to any worker whose contact information is "reasonably available":

• a determination of any underpayment;

- a determination that the worker's employer and/or "one or more upstream parties" must pay the worker restitution;
- an appeal of a determination affecting the worker; and/or
- in cases where the worker is owed unpaid wages, damages, or penalties, the forwarding of a judgment or complaint to a third party for collections.

Denver Labor reserves the right to refer complaints, party statements, and evidence to other government agencies involved in wage and labor enforcement.

The ordinance applies to all time worked.

The ordinance's wage and hour protections apply to all time worked, as defined by state statutes and rules, including:

- travel time, including "from a business location to a worksite or between worksites where the destination worksite is in Denver";
- "all paid breaks, vacation time, sick leave, statutorily-required employer pay for jury service";
- "other forms of paid leave that qualify as 'wages' under city, state, or federal law," including paid time off for holidays, floating holidays, birthdays, and similar occasions; and
- when a worker's presence is required at a Denver business or worksite.

The ordinance does not apply to normal commutes, unless the commute time "would be compensable under state or federal law." Nor does it apply to on-call workers, workers on standby off-site, or workers who are allowed to sleep on-site (unless the on-call, standby, or sleep time "would be compensable under state or federal law").

Upstream parties bear the burden of demonstrating that deductions from wages are permitted by law.

Not only the employer, but any entity that has directly or indirectly contracted for labor and is the beneficiary of such labor, including general contractors, clients of staffing agencies, and labor brokers—even if they are not in a direct contractual relationship with the worker—must ensure that "deductions from wages comport with all requirements under Colorado and federal law." Such entities may be required to provide documentation to support any claimed deductions to Denver Labor, including proof of payments made to third parties.

Complaints must be credible.

Before initiating an investigation, Denver Labor will assess the credibility of the complaint. The credibility burden is minimal and rests with the complainant. Denver Labor will presume the accuracy and truthfulness of all facts asserted in the complaint during the initial credibility review. Denver Labor will request additional information if it determines that the complaint is not credible.

To be considered credible, a complaint must plausibly allege that one or more individuals worked in Denver and were paid less than they were entitled to within the last three years, as well as provide sufficient initiating information, including the name of the subject employer, "what wages were promised and paid," and "how the wages were promised."

Failure to maintain or produce records is a presumed wage violation.

An employer may rebut this presumption by producing the documents that Denver Labor requests “or other clear and convincing evidence” demonstrating compliance.

An employer or upstream party bears the burden of establishing exceptions to the Denver minimum wage.

Exceptions to the Denver minimum wage include workers performing work outside Denver, workers performing less than four hours of work in Denver per week, workers merely traveling through Denver as part of their work, unemancipated minors performing work pursuant to a city-certified youth employment program, and bona fide independent contractors. A tip credit is available as an offset for actual tips received by food and beverage workers only.

Penalties include treble damages and interest.

“Denver Labor will normally impose damages of up to three times unpaid wages,” which “will be paid to injured workers.” Denver Labor will also impose a 12 percent annual interest rate on any unpaid wages.

After first attempting to collect unpaid wages, interest, damages, and penalties from direct employers, Denver Labor will then “make efforts to collect up the chain of contracting, moving sequentially.”

Ogletree Deakins' [Denver office](#) will continue to report on developments with respect to the Denver civil wage theft rules on the [Colorado](#) and [Wage and Hour](#) blogs as additional information becomes available. Important information for employers is also available via the firm's [webinar](#) and [podcast](#) programs.