

545.22 Wage theft.

(a) For the purposes of this section, the following definitions apply:

(1) As used in this section, the term "employer" means any individual, partnership, association, corporation, business trust, or any entity, person or group of persons, or a successor thereof that employs another person and includes any such entity or person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee; it shall also include any individual, partnership, association, corporation, limited liability company, business trust, employment and labor placement agencies where wage payments are made directly or indirectly by the agency or business for work undertaken by employees under hire to a third party pursuant to a contract between the business or agency with the third party, but excludes the federal, state and local government and all of their agencies, divisions, and other instrumentalities.

(2) As used in this section, any individual performing any service for an employer shall be considered to be an "employee" unless:

(i) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

(ii) the service is performed outside the usual course of the business of the employer; and,

(iii) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

(3) "Pay day" means a specific day or date established by the employer on which wages are paid for hours worked during a pay period.

(4) "Payment interval" means the amount of time between established pay days. A payment interval may be daily, weekly, bi-weekly, semi-monthly or monthly.

(5) "Piece-rate" means a price paid per unit of work.

(6) "Tip" means a verifiable sum to be presented by a customer as a gift or gratuity in recognition of some service performed for the customer by the employee receiving the sum.

(7) "Wage" means compensation due to an employee by reason of 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 rules of the Director of Finance or his designee. Commissions, piece-rate, and bonuses are included in wages.

(b) No employer or employer's agent shall commit wage theft against any employee.

(c) An employer shall have committed "wage theft" if they have knowingly secured the performance of services by agreeing to provide compensation and, after the services are rendered, fail to make full and complete payment, with intent to avoid payment for services.

(d) For purposes of subsection (c) of this Section 545.22, the following circumstances may be considered prima facie evidence in determining whether the person intends to avoid payment for services are that the employer:

(1) agrees to pay the person providing the services immediately upon completion of the services, but fails to do so; or

(2) fails to pay the person at the time of an agreed-upon payday or at the end of the regular payment interval required by state and/or federal statutes; or

(3) agrees to pay the person providing the services at a specified time and place after completion of the services, but fails to appear at that time or place; or

(4) agrees to pay the person providing the services a specified amount upon completion of the services, but pays or offers a lesser amount; or

(5) pays the person providing the services with a check that is not honored by the bank or other depository upon which it is drawn because of insufficient funds or a stop-payment order; or

(6) in retaliation for asserting any claim to wages, threatens, intimidates, or takes any other adverse employment action against the person; or communicates to the person providing the services, directly or indirectly, explicitly or implicitly, the willingness to inform a government employee that the person is not lawfully in the United States; or

(7) fails to respond within fifteen days to any written communication that makes a demand for unpaid wages from the person providing the services or any other person or entity writing on that person's behalf; or

(8) fails to pay all wage and tip compensation owed to an employee on an established regular pay day at no longer than monthly payment intervals; or

(9) misclassifies an employee as an "independent contractor" or any other misclassification in order to evade provisions of local, state, or federal employment laws, provided that it is an affirmative defense if the IRS determines the classification is that of an independent contractor, or if the exceptions provided in § 545.22(a)(2)(i)-(iii) apply; or

(10) withholds funds from an employee's check and fails to remit them on the employees' behalf to the appropriate entity in the manner and time period agreed to in writing, or required or permitted by law, or court order, or trust agreement. If withheld funds were intended for an interest-bearing account, in addition to other fines and penalties allowed for in this Section 545.22, the employer will be liable for lost interest gains. Employer may not take a credit for interest losses; or

(11) illegally withholds a portion of wages for reasons not permitted under d (10) of this Section 545.22; or withholds an amount that reduces gross pay to below the state or federal minimum wage requirements unless allowed by law.

(e) Proof of any of these circumstances is not required for theft under subsection (c) of this Section 545.22 nor do any of these circumstances conclusively prove theft under subsection (c) of this Section 545.22.

(f) Whoever violates Section 545.22 shall be guilty of a misdemeanor of the first degree and shall be fined not less than two hundred fifty dollars (\$250.00) nor more than one thousand dollars (\$1,000) and shall be imprisoned not less than three days nor more than six months.

(1) The violator shall also be liable for the investigative fines and penalties in accordance with Section 796.04(e) of this code.

(2) The violator shall also be liable for the total cost of compensation owed to the employee(s) affected, plus two times that cost, to be paid to affected employee(s).

(3) The violator shall also be liable for all non-sufficient fund charges and late fees incurred if the violation was of d (5) of this section;

(g) At the discretion of the Department of Taxation or their designee, and with the consent of the affected employee(s), if the employer acts in good faith to correct the violation the employer may enter into an agreement to pay any damages, back wages, charges, and fees to the affected employee(s) and pay the applicable fine as set forth in 796.04(e) the Department of Taxation or their designee can waive the criminal charges set forth under subsection (f) of this Section 545.22.

(h) Each day during which any violation of Section 545.22 continues shall constitute a separate and distinct offense.

(i) Within 14 days after the conviction of a person of theft under subsection (b) of this Section 545.22, the Law Department shall forward to the Director of the Department of Finance a docket of the case record.

545.99. Penalty.

(EDITOR'S NOTE: See Section 501.99 for penalties applicable to any misdemeanor classification.)