

## Employers Must Be Mindful of Pay Practices, As Criminal Charges for Underpayment of Workers Becomes Increasingly Common

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In 2015, speaking at a Labor Day campaign event, former Presidential candidate Hillary Clinton told a crowd, “I’m going to make sure that some employers go to jail for wage theft.” “Clinton: I’ll jail some employers for wage theft,” CNN (Sept. 8, 2015; <https://cnn.it/3sDyUjp>). Her statement was shocking to some at the time, raising the possibility of incarceration for employment-related failures that had traditionally been viewed as primarily the province of private civil litigation or regulatory enforcement. Jailing an employer for, say, failing to provide sufficient fringe benefits on a government-funded job was, to many, an alarming prospect.

Clinton’s statement was a nod to a movement, then in its early stages, to

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treat employers’ failures to appropriately compensate workers as criminal rather than civil or regulatory failures. Where prevailing wage violations were previously handled primarily via audits by the Department of Labor or their state equivalent, and usually resulted in employers being required to pay back wages, this movement saw such violations as equivalent to traditional theft, and favored using the tools of criminal justice to address them. This movement has grown, and has recently gained momentum. Today, prosecutors across the country increasingly seek criminal fines and jail time for what were previously seen as non-criminal labor violations. For more information about corporate criminal liability, *see*, Carolyn Kendall, “Corporate Criminal Liability in the COVID-19 Era,” *Business Crimes Bulletin* (June 2020; <https://bit.ly/3ne98kL>).

### A BREAKTHROUGH IN CALIFORNIA

When Clinton called for jailing employers for “wage theft,” that term was just gaining wide usage. Then-California Labor Commissioner Julie Su had recently launched a “Wage Theft Is a Crime” public awareness campaign and the hashtag #wagetheftisacrime had recently appeared on Twitter for the first time. *See*, Stephanie Overman, “Waging War on Wage

Theft,” *Salon* (Mar. 30, 2019; <https://bit.ly/3xhNDEv>). Commissioner Su’s campaign sought to raise awareness that California’s workers had legal recourse if they were not paid fairly; importantly, the campaign also emphasized that “the Labor Commissioner’s Office can partner with other law enforcement agencies to criminally prosecute employers that engage in wage theft.” California Labor Commissioner’s Office ([wagetheftisacrime.com](http://wagetheftisacrime.com)).

And criminally prosecute employers it did. In 2016, Su’s office, having received wage claims from workers at Antique Thai Cuisine two years prior — and having assessed \$22,000 in resulting civil penalties — partnered with the San Diego District Attorney’s Office to charge the restaurant’s owner with, *inter alia*, “grand theft.” The government alleged that the owner paid some kitchen staff as little as \$4 an hour, promised servers wages but paid them only in tips, confiscated some of those tips, required workers to work through their breaks, charged workers \$5 a shift for “glass breakage,” and charged servers for customers’ meals when they left before the food was served. PR Newswire, “Labor Commissioner’s Restaurant Wage Theft Case Results in Landmark Criminal Conviction” (Dec. 12, 2016; <https://prn.to/3dDKZ3P>). The owner was convicted by a jury and sentenced to two years in prison. *Id.*

The *Antique Thai* case was viewed as a breakthrough, being one of the first to secure significant jail time for an employer who underpaid her workers. Like other early criminal wage cases, it focused on some of the most egregious wage-denying conduct and utilized a novel legal theory: the District Attorney's Office called it the first case in the state to result in a conviction by a jury under a theory of "felony grand wage theft by false pretenses." Dana Littlefield, "Labor Commissioner's Restaurant Wage Theft Case Results in Landmark Criminal Conviction," *Chicago Tribune* (Dec. 12, 2016; <https://bit.ly/3dFMQ8l>). But unlike many earlier criminal underpayment cases, there was nothing more to the defendant's crime than her willful underpayment of her staff.

#### **EARLIER CRIMINAL CASES: CULPABILITY 'PLUS FACTORS'**

Before *Antique Thai*, criminal cases involving so-called "wage theft" tended to involve culpability-enhancing "plus factors," beyond unadorned underpayment of workers. In a 2011 Illinois case, for example, the defendant construction foreman intercepted payroll checks, forged employees' signatures and deposited the checks into his own account, then cut smaller checks for the employees, ultimately pocketing almost \$270,000. Illinois Attorney General's Office, "Madigan: Subcontractor Guilty In Scheme to Cheat Carpenters' Wages on O'Hare Construction Project" (Mar. 19, 2012; <https://bit.ly/32zS5jR>). The foreman pled guilty to 10 counts of forgery and was sentenced to 12 months' probation. *Id.*

And when, in 2015, New York Attorney General Eric Schneiderman brought a headline-grabbing prosecution against the franchisee of nine New York City pizzerias who failed to pay his workers earned overtime, it was probably the defendant's accompanying scheme of flagrant and

elaborate obstruction of a Federal Department of Labor investigation that bought him a criminal prosecution. Andrew Cohen, "Schneiderman: U.S. Department Of Labor Announce Criminal Charges And Civil Settlement Against Papa John's Franchisee For Wage Theft," newsLI (July 15, 2015; <https://bit.ly/3vguJMt>). The defendant admitted that, after learning that he was under DOL investigation, he attempted to hide his misconduct by booking his workers' overtime hours in fictitious employees' names, paying cash for overtime to mask the payments' recipients, keeping a separate set of paper books, and filing state tax returns that fraudulently omitted the cash payments made under fictitious names. *Id.*

Ultimately, the defendant settled civilly with DOL and *also* pled guilty to wage-related crimes. Josh Kosman, "Papa John's owner jailed, fined for stiffing workers amid probe," *New York Post* (Nov. 16, 2015; <https://bit.ly/3dFN7Ip>). At the time, the idea of an employer going to jail for failure to pay overtime — even when combined with other egregious conduct — was a surprise: in the press, a franchise expert commented: "This is very, very rare. ... I've not heard of anyone going to jail for pay issues." *Id.* Indeed, as if to underscore the uniqueness of the case, the month prior, AG Schneiderman had announced his 29th civil settlement of the year over labor violations by pizzeria franchisees. Josh Kosman, "AG to announce Papa John's settlements for labor violations," *New York Post* (Oct. 24, 2015; <https://bit.ly/3dDd6QI>). Those settlements, which involved civil payments of back wages and fines, fit the more traditional mold of civil enforcement for worker underpayment — but that mold was beginning to crack.

#### **A RISING TIDE: LEGISLATION AND TASK FORCES**

In the New York case, the pizzeria franchise owner pled guilty to one

count each of three charges: (a) felony Offering a False Instrument for Filing; (b) felony Falsifying Business Records; and (c) the unclassified misdemeanor of Failure to Pay Wages, under NY Labor Law §198-a(1). *See*, Plea Agreement, Abdul Jamil Khokhar, <https://bit.ly/2QqA5FQ>.

New York Labor Law §198-a(1) makes it a crime punishable by up to one year in prison for an officer of an employer to "knowingly permit the [employer] to violate this chapter by failing to pay the wages of any of its employees in accordance with the provisions thereof." The law is an example of the kind of statutes that were already on the books in many states at the beginning of the wage prosecution wave, but which were rarely invoked criminally. *See, e.g.*, CT Gen Stat §31-69 (2012); D.C. Code Ann. §32-1307(a). In recent years, many state legislatures, heeding the call for criminal penalties for employers who underpay their workers, have drafted their own criminal "wage theft" statutes, which echo those already in existence in New York, Connecticut, DC and elsewhere, and which can be extraordinarily harsh. A Minnesota law that went into effect in 2019, for example, holds that an employer who, "with intent to defraud," underpays an employee in any way, can be imprisoned for up to *20 years* if the value of the underpayment is more than \$35,000. *See*, Minn. Stat. §609.52 subd. 1(13), 2(19), 3(1) (emphasis added).

State and local prosecutors have joined the movement too, with initiatives dedicated to criminally prosecuting employers' wage violations springing up across the country. In Virginia, which in 2020 passed a law creating new criminal penalties for nonpayment of wages, Va. Code Ann. §40.1-29(E), the Attorney General recently announced the creation of a "Worker Protection Unit" run by a criminal prosecutor and dedicated to enforcing Virginia's wage protection laws. Virginia Office of the Attorney

General, “Herring Creates Virginia’s First Attorney General’s Worker Protection Unit” (March 3, 2021; <https://bit.ly/2QqVm2d>). In New York, a city-state “Wage Theft Initiative” partnership led to high-profile criminal charges against Parkside Construction and its principals for allegedly altering time cards so as to underpay workers. *See*, Manhattan DA, “DA Vance, Partners Announce Criminal Charges in Multimillion Dollar Wage Theft and Insurance Fraud Case” (May 16, 2018; <https://bit.ly/3ejwj9u>). And in 2019, Philadelphia District Attorney Larry Krasner launched his office’s Worker Protection Unit, dedicated to investigating and prosecuting “crimes against workers.” *See*, Juliana Feliciano Reyes, “Philly DA’s Office launches a unit to prosecute employers for crimes against workers,” *Philadelphia Inquirer* (Oct. 8, 2019 <https://bit.ly/3gulumEt>).

### THE WAVE CRESTS IN PENNSYLVANIA

The Philadelphia District Attorney’s unit appears to have been a harbinger of a wave of wage prosecutions in Pennsylvania. The unit brought its first charges in January 2021, against the owner of a plumbing contractor who allegedly never paid over to his workers’ union some \$110,000 in dues that the employees had authorized him to pay. *See*, Philadelphia District Attorney’s Office, “DAO Worker Protection Unit Charges Plumbing Contractor for Misappropriating Union Fees” (Jan. 25, 2021; <https://bit.ly/2QJ96VW>). Unlike many earlier criminal wage cases — but consistent with the trend set in California’s *Antique Thai* case — this prosecution appears to involve a simple failure to pay appropriate wages, unaccompanied by any “plus factor.”

On April 8, 2021, Pennsylvania’s Attorney General announced what he called “the largest prevailing wage criminal case on record,” state or federal, against a contractor who allegedly failed to set aside sufficient

funds for prevailing wage employees’ fringe benefits. *See*, Pennsylvania Attorney General’s Office, “AG Shapiro Announces Multi-Million Dollar Theft Charges Against State College Contractor” (Apr. 8, 2021; <https://bit.ly/3xhPNng>).

Those charges came shortly after another Pennsylvania County’s District Attorney secured a guilty plea under what appears to be the first use of a decade-old law aimed at criminalizing misclassifying employers as independent contractors. *See*, Alex Rose, “Boss pleads guilty to worker-misclassification,” *Delco Times* (Feb. 11, 2021; <https://bit.ly/3n7K5Qv>). That law, the Construction Workplace Misclassification Act, 43 P.S. §933.4(a), 933.5(a), makes it a crime to fail to properly classify an individual as an employee for unemployment insurance and workers’ compensation purposes. The defendant, a drywall contractor, admitted that he intentionally misclassified some 30 workers as independent contractors to avoid paying taxes on their wages. *Id.*

### WHAT EMPLOYERS NEED TO KNOW

This trend of criminal wage theft prosecutions shows no signs of abating, particularly in areas with notably progressive prosecutors. Prosecutors are motivated, have dedicated resources, and are trying legal theories new and old to punish underpayment — even seemingly garden-variety misclassification or underfunding of fringe benefits — criminally. Most importantly, they have had a taste of success. Employers should consider doing what they can now to ensure they do not land on the wrong side of the trend.

Employers should consider analyzing their wage-related compliance now, and using outside counsel to do so. Obviously, such an audit can be valuable in identifying problems that need addressing. But additionally, in the unfortunate event that the

employer should find itself under investigation, an opinion from a third-party lawyer that it is compliant can go a long way toward neutralizing theories of criminal liability that require culpable intent.

Toward that end, an employer following this route should:

- a. Consider formally documenting the lawyers’ conclusions;
- b. Consider at the outset the possibility that it may one day want to waive privilege as to the subject matter of the lawyers’ investigation, and guide itself accordingly; and
- c. Most critically, follow the lawyers’ advice, should they conclude something needs to be changed — not doing so could put the employer in a particularly bad position.

Employers should also consider whether they have written policies and procedures governing things like payroll, worker classification, and the like, whether the appropriate individuals are effectively trained on those policies, and whether they are consistently followed. If the answer to any of these questions is no, it may be a good time to revisit them.

Although Clinton did not become president, her wish that “some employers go to jail for wage theft” has come true. Companies and their officers that take a careful look at their compliance now, with help from their lawyers, should be confident that they will avoid that fate.

