

Publications

Labor and Employment Alert: Dirty Laundry and Scarlet Letters: Columbus' New Wage Theft and Enforcement Ordinance Impacts Anyone Contracting with the City or Seeking Development Incentives

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In September 2020, the City of Columbus enacted its “Wage Theft Prevention and Enforcement Ordinance” (Chapter 377 of the city code). Effective January 1, 2021, the ordinance broadly emphasizes investigating and penalizing “wage theft,” “payroll fraud,” and employee misclassification. The ordinance applies to: (1) **all** city contracts for goods and services; (2) **any** business that registers with the city as a vendor to the city; and (3) **all** “financial incentive agreements” with the city, including tax incentives, tax abatements, tax credits, and other financial incentives, and commercial loans or grants or land conveyances for less than fair market value. Key provisions of the ordinance are summarized below.

Coverage

The ordinance applies to “covered entities.” These are broadly defined, and include an individual or entity that requests, bids for, applies for, or receives from the city or is party to a financial incentive agreement, contract, or vendor registration with the city – together with any entity that is the parent of, has a direct or indirect majority ownership interest in, or has direct or indirect management and control of the entity. A “covered entity” further includes contractors and subcontractors that intend to or do perform work or render services (1) pursuant to, related to, or in furtherance of a financial incentive agreement either on-site or off-site for a development location covered by a financial incentive agreement; or (2) pursuant to or in satisfaction of a city contract.

Application

The trigger for the ordinance’s investigation, hearing, and penalties provisions lies in whether there has been an “adverse determination” against a covered entity. An “adverse determination” is a determination that an entity has: (1) committed “payroll fraud”; (2) committed “wage theft”; or (3) violated any obligation under the Ordinance. An adverse determination includes an administrative merit determination,

arbitration award or decision, civil judgment, or criminal conviction made in or through a court proceeding, administrative hearing, or any other governmental body, including the new Columbus Wage Theft Prevention and Enforcement Commission. It does not include settlements.

“Payroll fraud” includes concealing an entity’s true tax or financial liability to a government agency, misclassifying employees, and failing to report or underreporting wages. “Wage theft” means a violation of Ohio’s wage-hour laws, including the Minimum Fair Wage Standards Act and the Prevailing Wage Law, and any federal, state, or local law that is “substantially equivalent” to Ohio law or to the city’s wage requirements.

Obligations of Covered Entities

A covered entity must self-report any adverse determinations within the past three years, both when initially seeking to contract with the city and on a continuing basis. Similarly, a covered entity registering or applying for renewal as a city vendor must disclose any adverse determination within the past three years.

The ramifications of reporting an adverse determination cannot be understated. Once an entity so discloses, it is placed on a “list.” A covered entity on the list cannot contract with the city. Moreover, the ordinance **prohibits** covered entities from entering into a contract or agreement for the performance of work or services pursuant to, related to, or in furtherance of financial incentive agreement or under a city contract with any entity on the “list.”

The ordinance further requires that a covered entity permit access to its payroll records, cooperate with investigations, notify its workers and contractors of the entity’s obligations under the ordinance, and post a notice concerning the ordinance.

Use of Independent Contractors

A covered entity utilizing independent contractors to perform work or services pursuant to, related to, or in furtherance of a financial incentive agreement or under a city contract must provide extensive information to the commission, all of which is specified in the ordinance. Essentially, this information relates to the amount of control the covered entity exercises over the independent contractor.

If the commission staff reasonably determines that a worker may have been misclassified as an independent contractor, the commission may refer the worker to the United States Department of Labor, the Ohio Department of Commerce, or any other appropriate entity. There is no express provision in the ordinance for any notice or hearing to afford the covered entity an opportunity to be heard before this “referral” occurs.

Enforcement

The commission receives and investigates complaints concerning non-compliance, determines whether to issue an adverse determination for violations, recommends penalties to the city, and publishes a list of covered entities with adverse determinations. The commission may also refer the workers and/or matters to the Department of Labor, the Department of Commerce, or any other appropriate entity.

The city may pursue a wide range of remedies. These include unilaterally terminating or modifying the financial incentive agreement; unilaterally reducing any tax abatement or tax credit by up to 100%; recapturing any subsidy benefits by up to 100%; suspending or revoking city grants; and temporary or permanent debarment from city contracts and financial incentive agreements. The city may also issue stop work orders and revoke building permits.

Conclusion

The ordinance affects any entity that contracts or has a financial incentive agreement with the city. Contact Nelson Cary, Mike Griffaton or your Vorys lawyer if you have questions about the ordinance's applicability and impact.