



# OVERVIEW

Minnesota Developments in Employment Law

Minnesota Developments in Worker Classification in Construction

National Developments in Worker Classification in Construction

Trends

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C. Alden Pearson

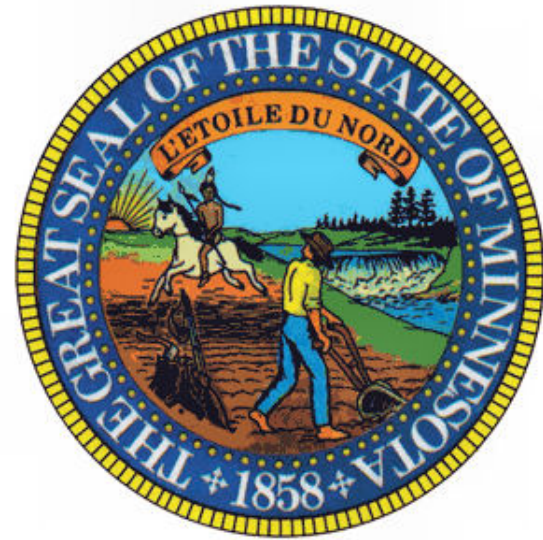
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# **Minnesota Developments on Employment Law**

## **Minnesota Wage Theft Prevention Act (2019)**



**Employee Notice**

**Earnings Statement**

**Other Employment Records**

**Payment Wages and Commissions**

**No Employer Retaliation**

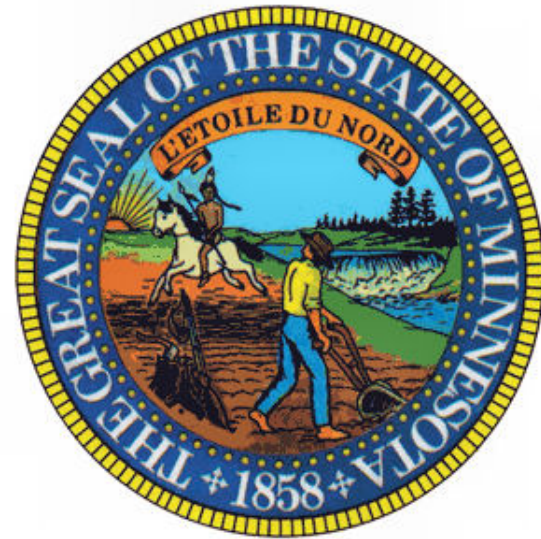
**Enforcement and Penalties**

**Wage Theft Crime**

**Responsible Contractor Law**

# **Minnesota Wage Theft Prevention Act – Employee Notice**

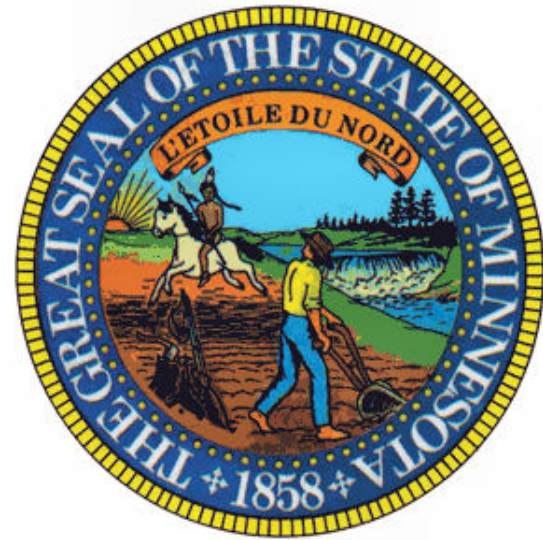
## **Required at beginning of employment**



- Employee's employment status and whether an employee is exempt from minimum wage, overtime and other state wage and hour laws, and on what basis
- Number of days in the employee's pay period and the regularly scheduled payday
- Date the employee will receive the first payment of wages earned
- Employee's rate or rates of pay and the basis thereof, including whether the employee is paid by the hour, shift, day, week, salary, piece, commission or other method and the specific application of any additional rates
- Allowances, if any, that may be claimed for permitted meals and lodging
- Provision of paid vacation, sick time or other paid time off (PTO), how the paid time off will accrue and terms for its use
- A list of deductions that may be made from the employee's pay
- Employer's legal name and the operating name, if different
- Physical address of employer's main office or principal place of business and a mailing address, if different
- Employer's telephone number.

# Minnesota Wage Theft Prevention Act – Employee Notice

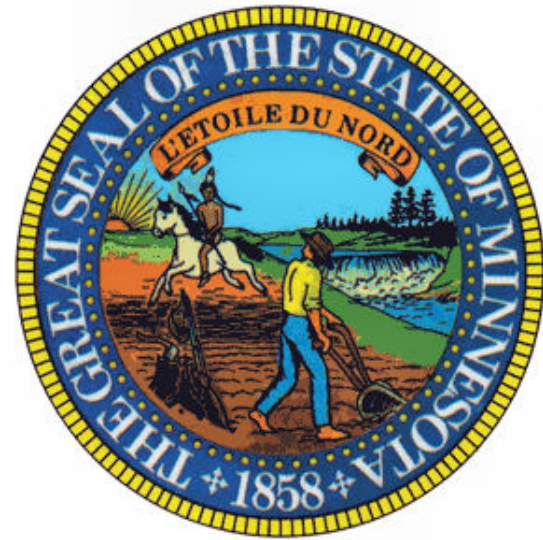
## Additional Requirements



- Employer must keep a copy
- Employee must be provided a copy
- Notice must be in English
- Notice in another language on employee request
- Employer must provide in writing to Employee any changes in the information before the change occurs
- Example notice  
[http://www.dli.mn.gov/sites/default/files/doc/employee\\_notice\\_form.docx](http://www.dli.mn.gov/sites/default/files/doc/employee_notice_form.docx)

# **Minnesota Wage Theft Prevention Act – Earnings Statement**

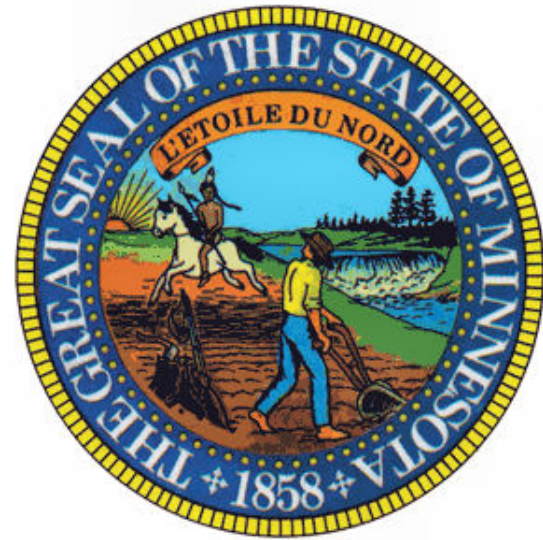
## **Paystubs Must Contain**



- Name of the employee.
- Total hours worked by the employee in the pay period
- Employee's rate or rates of pay and basis thereof, including whether the employee is paid by the hour shift, day, week, salary, piece, commission or other method
- Allowances claimed for permitted meals and lodging
- Total amount of gross pay earned by employee in the pay period
- Net amount of pay after all deductions are made
- List of deductions made from the employee's pay
- Date pay period ended
- Employer's legal and operating name
- Employer's telephone contact
- Physical address of employer's main office or principal place of business and a mailing address, if different

# Minnesota Wage Theft Prevention Act – Additional Records

## Employer Must Also Maintain Records

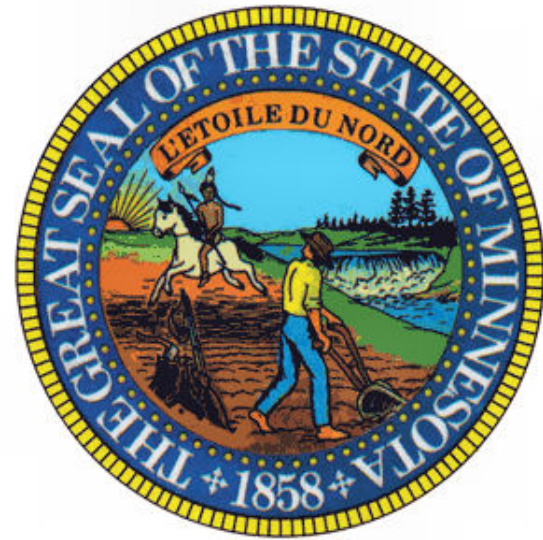


- Each employee's name, address and occupation
- Each employee's rate of pay and the amount paid each pay period
- Each employee's hours worked each day and each workweek, including, for all employees paid at piece rate, the number of pieces completed at each piece rate
- A list of personnel policies with brief descriptions of each policy that were provided to each employee, including the date the policies were given to the employee
- A copy of the new notice that is required to be provided to and signed by each employee at the start of employment and a copy of any written changes to the notice that were provided to each employee
- For each employer subject to Minn. Stat. §§ 177.41 to 177.44 (Minnesota Prevailing Wage Act), and while performing work on public works projects funded in whole or in part with state funds, the employer shall furnish under oath signed by an owner or officer of an employer to the contracting authority and the project owner every two weeks, a certified payroll report with respect to the wages and benefits paid each employee during the preceding weeks specifying for each employee: name; identifying number; prevailing wage master job classification; hours worked each day; total hours; rate of pay; gross amount earned; each deduction for taxes; total deductions; net pay for week; dollars contributed per hour for each benefit, including name and address of administrator; benefit account number; and telephone number for health and welfare, vacation or holiday, apprenticeship training, pension and other benefit programs
- Other information the commissioner finds necessary and appropriate to enforce Minn. Stat. §§ 177.21 to 177.435



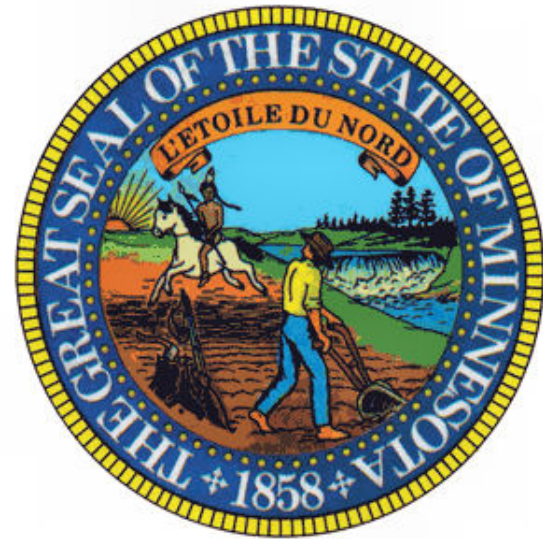
# **Minnesota Wage Theft Prevention Act – Payment of Wages and Commissions**

## **When Paid**



- Wages, salaries, earnings and gratuities must be paid at least every 31 days
- Commissions must be paid at least every 3 months

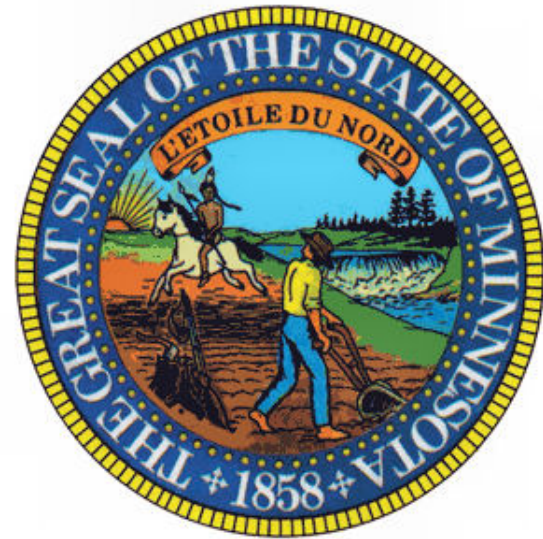
# **Minnesota Wage Theft Prevention Act – No Employer Retaliation**



- **Employees now have a statutory right to wages and commissions – Minn. Stat. § 181.101**
- **An employer is prohibited from retaliating against an employee for asserting rights or remedies under the Minnesota Fair Labor Standards Act, the Minnesota Prevailing Wage Act and certain provisions of Minn. Stat. Chapter 181, Payment of Wages Act, including filing a complaint with DLI or telling the employer of the employee's intention to file a complaint.**
- **In addition to any other remedies provided by law, an employer that retaliates is liable for a civil penalty of \$700 to \$3,000 for each violation**



# **Minnesota Wage Theft Prevention Act – No Employer Retaliation**



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# **Minnesota Wage Theft Prevention Act – Enforcement and Penalties**

## **Minnesota Department of Labor and Industry (DOLI) or Minnesota Attorney General – Powers**



- Enter and inspect places of employment without unreasonable delay to carry out purposes of Minn. Stat. Chpt. 177, 181, 181A and 184
- Apply for an inspection order in district court in the county where the place of employment is located to require employer to permit entry of the commissioner or an authorized representative if the entry has been denied
- Interview non-management employees in private regarding an investigation.

# **Minnesota Wage Theft Prevention Act – Enforcement and Penalties**

## **Minnesota Department of Labor and Industry (DOLI) or Minnesota Attorney General – Penalties**



### **For a violation, DOLI may order employer to:**

- **Pay a penalty equal to the employee's average daily earnings or 1/15 of commissions earned for each day employer fails to pay wages according to a DOLI order**
- **Pay up to \$5,000 for each repeated employer failure to provide requested employment records to DOLI**
- **Pay up to \$5,000 for each repeated employer failure to maintain the employee notice, earnings statements and other employment records presented previously**

# **Minnesota Wage Theft Prevention Act – Enforcement and Penalties**

**Minnesota Department of Labor and Industry (DOLI) or Minnesota Attorney General – Penalties**



**For a violation, DOLI may order employer to:**

- **Pay wages or commissions owed to an employee**
- **Pay an amount equal to the wages or commissions owed as liquidated damages**
- **Pay compensatory damages incurred by an employee**
- **Cease and desist in the violative practice**
- **Pay a civil penalty for repeated or willful violations**

# **Minnesota Wage Theft Prevention Act – Enforcement and Penalties**

**Minnesota Department of Labor and Industry (DOLI) or Minnesota Attorney General – Penalties**



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# **Minnesota Wage Theft Prevention Act – Enforcement and Penalties**

## **Misdemeanor**



**It is a misdemeanor to hinder or delay DOLI in enforcing:**

- **Minnesota Fair Labor Standards Act**
- **Minnesota Prevailing Wage Act**
- **Minnesota Wage Theft Prevention Act**



# **Minnesota Wage Theft Prevention Act – Enforcement and Penalties**

## **Minnesota Department of Labor and Industry (DOLI) – Disclosures**

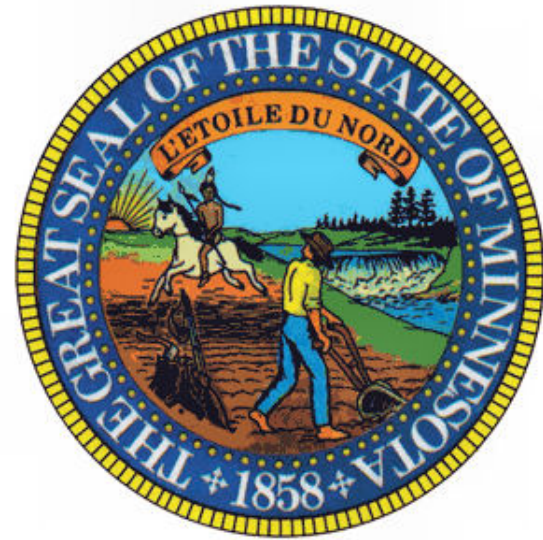


**For a violation, DOLI must disclose enforcement  
to:**

- **Employer license authority or regulator**
- **Public authorities with whom the employer contracts**
- **All employees whose interests are affected by the order**

# **Minnesota Wage Theft Prevention Act – Wage Theft Crime**

## **New Wage Theft Crime – Minn. Stat. § 609.52, sub. 2(19)**



**Crime occurs when an employer with intent to defraud:**

- **Fails to pay an employee all wages, salary, gratuities, earnings or commissions at the employee's rate or rates of pay or at the rate or rates required by law, whichever is greater**
- **Directly or indirectly causes any employee to give a receipt for wages for a greater amount than that actually paid to the employee for services rendered**
- **Directly or indirectly demands or receives from any employee any rebate or refund from the wages owed the employee under contract of employment with the employer**
- **Makes or attempts to make it appear in any manner the wages paid to any employee were greater than the amount actually paid to the employee**

# **Minnesota Wage Theft Prevention Act – Wage Theft Crime**

## **Wage Theft Penalties**



- Imprisonment for not more than 20 years, payment of a fine of not more than \$100,000 or both if the value of the wages stolen is more than \$35,000
- Imprisonment for not more than 10 years, payment of a fine of not more than \$20,000 or both if the value of the wages stolen exceeds \$5,000
- Imprisonment for not more than five years, payment of a fine of not more than \$10,000 or both if the value of wages stolen is more than \$1,000 but not more than \$5,000
- Imprisonment for not more than one year, payment of a fine of not more than \$3,000 or both if the value of the property or services stolen is more than \$500 but not more than \$1,000

# **Minnesota Wage Theft Prevention Act – Responsible Contractor Law**

## **Requirements for Public and Publicly Funded Projects**



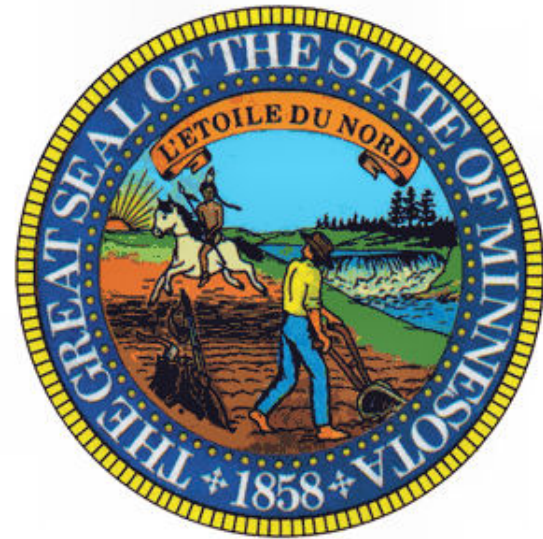
**Contractor must certify no violations in prior 3  
years of:**

- **Minnesota Minimum Wage Payment Law**
- **Minnesota Overtime Payment Law**
- **Minnesota Prevailing Wage Act**
- **Minnesota Wage Theft Prevention Act**
- **Federal Fair Labor Standards Act**
- **Federal Davis-Bacon Act**

# **Minnesota Developments in Worker Classification in Construction**

## **Contractor Registration Law**

## **Audit Standard for Construction in Minnesota**



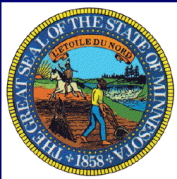
# Employee Misclassification - MN

## Contractor Registration Law

Minn. Stat. § 181.723

MINNESOTA  
DEPARTMENT OF LABOR  
AND INDUSTRY

*Construction Codes and Licensing Division*



Department of Labor and Industry. 9/08

If construction trade – registration required  
Includes business entities (LLCs, corps., etc.)

If no registration, cannot work

\$2,000 penalty each

Worker reclassification to employee



# Employee Misclassification - MN

## Contractor Registration Law

### Primary Exceptions:

Current license, certificate or registration with DOLI

Architects and engineers

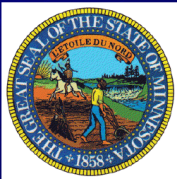
Plumbing and mechanical

Employee of any of the above

Not a construction trade

MINNESOTA  
DEPARTMENT OF LABOR  
AND INDUSTRY

*Construction Codes and Licensing Division*



Department of Labor and Industry. 9/08

# Employee Misclassification - MN

## 9-Point Test

### MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

*Construction Codes and Licensing Division*



Department of Labor and Industry 9/08

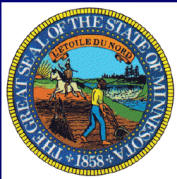
- (1) maintains a separate business with the individual's own office, equipment, materials, and other facilities;
- (2)(i) holds or has applied for a federal employer identification number or (ii) has filed business or self-employment income tax returns with the federal Internal Revenue Service if the individual has performed services in the previous year;
- (3) is operating under contract to perform the specific services for the person for specific amounts of money and under which the individual controls the means of performing the services;
- (4) is incurring the main expenses related to the services that the individual is performing for the person under the contract;

# Employee Misclassification - MN

## 9-Point Test

### MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

*Construction Codes and Licensing Division*



Department of Labor and Industry. 9/08

- (5) is responsible for the satisfactory completion of the services that the individual has contracted to perform for the person and is liable for a failure to complete the services;
- (6) receives compensation from the person for the services performed under the contract on a commission or per-job or competitive bid basis and not on any other basis;
- (7) may realize a profit or suffer a loss under the contract to perform services for the person;
- (8) has continuing or recurring business liabilities or obligations; and
- (9) the success or failure of the individual's business depends on the relationship of business receipts to expenditures.

# Employee Misclassification - MN

## Contractor Registration Law

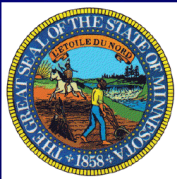
Some audit protection

Still subject to 9-point test

Audits occurring now

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DEPARTMENT OF LABOR  
AND INDUSTRY

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Department of Labor and Industry 9/08

# Employee Misclassification - MN

## Contractor Registration Law

### Registration

<https://secure.doli.state.mn.us/license/initialapp.aspx?code=IR>

### Registration look up

<https://secure.doli.state.mn.us/lookup/licensing.aspx>

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AND INDUSTRY

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# **Employee Misclassification - IRS**

## **Behavioral Control**

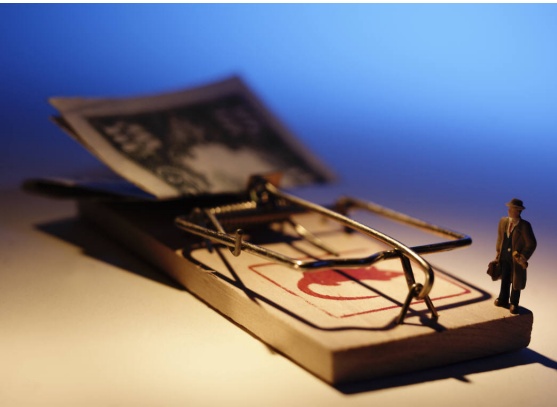
Control tools, workers, suppliers, sequencing  
Training





# Employee Misclassification - IRS

## Financial Control



Unreimbursed business expenses

Worker investment in tools and facilities

Services available to the marketplace

Paid per job, commission but generally not hourly

Profit and loss basis for income

# **Employee Misclassification - IRS**

## **Type of Relationship**

Written contract

Employee-type benefits

Permeance of relationship

Work a key aspect of hiring party's business



# **Employee Misclassification - IRS**



**Safe Harbor for local practice (Section 530)**

**<https://www.irs.gov/government-entities/worker-reclassification-section-530-relief>**

**Direct seller exception for sales representatives (IRC 3508)**

**<https://www.law.cornell.edu/uscode/text/26/3508>**

# Employee Misclassification - FLSA



Fair Labor Standards Act –  
Hourly wage and overtime

Construction laborers

[https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17p\\_construction.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17p_construction.pdf)

# **Employee Misclassification – FLSA**

## **U.S. Department of Labor FLSA Interpretation**



### **Economic Realities Factors:**

Is the work integral to the employer's business

Worker's skill affect their own profit or loss

Relative investment in the business by the worker and the employer

Any special skill involved

Definiteness of work relationship

Employer control over worker

Work for others

# ICE and worker documentation

Homeland Security

Mostly paper enforcement – some site visits

W-9 and EIN

eVerify

<b>W-9</b> Form (Rev. October 2007) Department of the Treasury Internal Revenue Service		<b>Request for Taxpayer Identification Number and Certification</b>		Give form to the requester. Do not send to the IRS.
Name (as shown on your income tax return)				
Business name, if different from above				
Check appropriate box: <input type="checkbox"/> Individual sole proprietor <input type="checkbox"/> Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> Limited liability company (enter the tax classification (S-Corporation, C-Corporation, S-partnership) in <input type="checkbox"/> exempt payee <input type="checkbox"/> other (see instructions) <input type="checkbox"/>				
Address (number, street, apt. or suite no.) Requestor's name and address (optional)				
City, state, and ZIP code				
List account number(s) here (optional)				
<b>Part I Taxpayer Identification Number (TIN)</b>				
Enter your TIN in the appropriate box. The TIN provided must match the name given on Line 1 to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see <i>How to get a TIN</i> on page 3.				
Note: If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.				
<b>Part II Certification</b>				
Under penalties of perjury, I certify that:				
1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and				
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding; and				
3. I am a U.S. citizen or other U.S. person (defined below).				
Certification instructions: You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return, for real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the Certification, but you must provide your correct TIN. See the instructions on page 4.				
Sign Here Signature of U.S. person Date				
<b>General Instructions</b>				
Section references are to the Internal Revenue Code unless otherwise noted.				
<b>Purpose of Form</b>				
A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.				
Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:				
1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),				
2. Certify that you are not subject to backup withholding, or				
3. Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.				
Note: If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.				
Definition of a U.S. person. For federal tax purposes, you are considered a U.S. person if you are:				
• An individual who is a U.S. citizen or U.S. resident alien,				
• A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States,				
• An estate (other than a foreign estate), or				
• A domestic trust (as defined in Regulations section 301.7701-7).				
Special rules for partnerships. Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.				
The person who gives Form W-9 to the partnership for purposes of establishing its U.S. status and avoiding withholding on its allocable share of net income from the partnership conducting a trade or business in the United States is in the following cases:				
• The U.S. owner of a disregarded entity and not the entity.				



# Penalties



SUTA , FUTA and FICA

Federal Withholding

State Withholding

Minimum wage and overtime claims

Contractor Registration - \$2,000.00 per violation

Licensing violation (up to \$10,000 per violation)

Undocumented workers – significant criminal penalties

Increased insurance costs

Personal injury claim

# Compliance

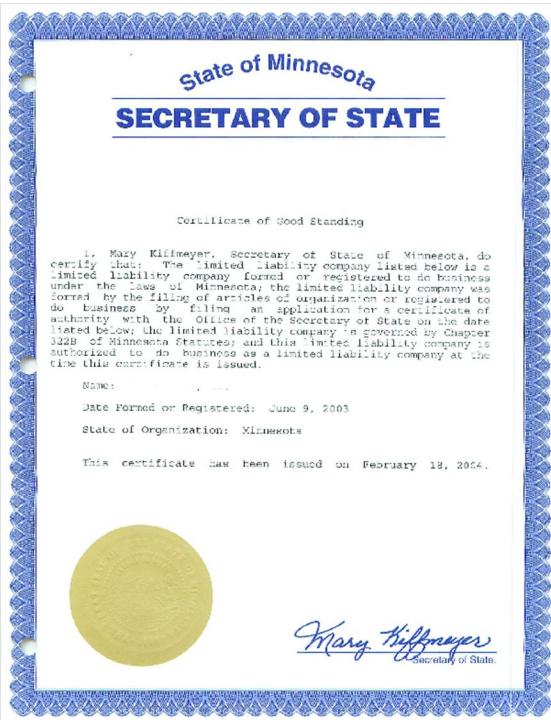
Entity Form (but can't require it)

Certificate of Good Standing

Contractor Registration or License

Assumed Name/DBA issue

Pay the registered contractor or licensee as identified  
in their documentation



# Compliance

W-9 and Federal employer identification number

Written subcontractor agreement

Annually obtain their registration

Pay on invoice

Paid by project/job

Subs have their own tools

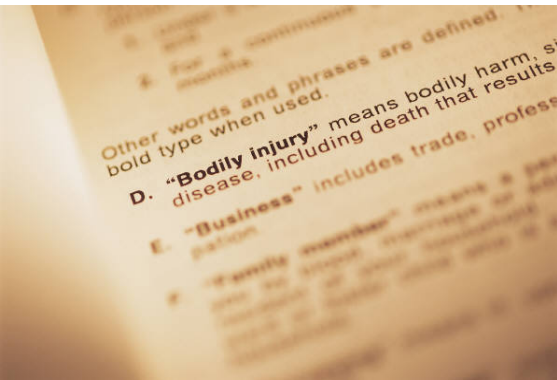
Subs work for others

Form <b>W-9</b> (Rev. October 2007) Department of the Treasury Internal Revenue Service		Request for Taxpayer Identification Number and Certification		Give form to the requester. Do not send to the IRS.
Name (as shown on your income tax return)				
Business name, if different from above				
<input type="checkbox"/> Check appropriate box: <input type="checkbox"/> Individual/sole proprietor <input type="checkbox"/> Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> Limited liability company. Enter the tax classification (S-Corporation, P-partnership) > ..... <input type="checkbox"/> Exempt <input type="checkbox"/> Other (see instructions) >				
Address (number, street, apt. or suite no.) Requester's name and address (optional)				
City, state, and ZIP code				
List account number(s) here (optional)				
<b>Part I Taxpayer Identification Number (TIN)</b>				
Enter your TIN in the appropriate box. The TIN provided must match the name given on Line 1 to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see how to get a TIN on page 3.				
Note, if the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.				
<b>Part II Certification</b>				
Under penalties of perjury, I certify that:				
1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and				
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding; and				
3. I am a U.S. citizen or other U.S. person (parties below).				
Certification instructions: You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the Certification, but you must provide your correct TIN. See the instructions on page 4.				
<b>Sign Here</b> Signature of U.S. person > Date >				
<b>General Instructions</b>				
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<b>Purpose of Form</b>				
A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.				
Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:				
1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),				
2. Certify that you are not subject to backup withholding, or				
3. Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.				
Note, if a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.				
Definition of a U.S. person. For federal tax purposes, you are considered a U.S. person if you are:				
• An individual who is a U.S. citizen or U.S. resident alien,				
• A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States,				
• An estate (other than a foreign estate), or				
• A domestic trust (as defined in Regulations section 301.7701-7).				
Special rules for partnerships. Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign party and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.				
The person who gives Form W-9 to the partnership for purposes of establishing its U.S. status and avoiding withholding on its allocable share of net income from the partnership conducting a trade or business in the United States is in the following cases:				
• The U.S. owner of a disregarded entity and not the entity.				

# Compliance

## Insurance Certificates

- Commercial General Liability (CGL)
- Worker's Compensation if "helpers"
- Commercial Auto



## **Other Legal Developments**



What regulatory workforce changes could we anticipate?

Election 2020

United States Department of Labor

National Labor Relations Board

COVID-19

Others



# Thank You

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