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Martha M. Ertman

University of Maryland School of Law, mertman@law.umaryland.edu

Doris N. Weil

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Maryland's New Remedy for Wage Theft

By Martha M. Ertman and Doris N. Weil

Counsel for any company with employees – and the employees themselves – should know that a 2013 Maryland statute gives employees a new self-help remedy for wage theft. Md. Code Ann. Lab., & Empl. § § 3-1101 to -1110 (West 2013); Md. Code Regs. 9.12.39.01 et seq. (2014). The Maryland Wage Lien Law (“WLL”) allows employees to place a lien on their employers’

property when they have not been compensated for work they have performed. Any cheated employee can use it, from a doctor pursuing her medical practice to collect \$104,000 in unpaid salary to a short order cook seeking \$104 in overtime pay from a restaurant. See e.g., *Gastro Center of Maryland v. Tignor*, 2017 WL 2829298 (Md. Ct. Spec. App. June 30, 2017).

The design of the WLL makes it more accessible to employees who lack funds to hire counsel. An employer can serve a Notice on the employee rather than file a full-fledged complaint, which could help pro se employees such as young doctors or lawyers saddled with student loans, short order cooks, or hotel maids. That accessibility and the relatively swift procedural timelines are crucial for people barely making ends meet, for whom a single missed paycheck can translate into losing an apartment, a car, or groceries.

This tool provides needed relief to Marylanders. According to the Economic Policy Institute, wage theft is “epidemic,” with U.S. employees getting cheated out of as much as \$50 billion annually. That amount translates to a \$2600 loss per a year for the average construction worker, house cleaner, waiter, or anyone else who qualifies as the working poor. While state and federal statutes provide remedies for those employees, many employees’ claims are too small for a lawyer to take, even with double or treble damages and attorney’s fees provisions, because those fees are largely discretionary. Even middle-class employees with larger claims have trouble because attorney time on even a mid-range case can be costly and too risky in light of the uncertainty of a full fee award. Compounding this issue, some employers render employees’ hard-won judgments virtually worthless by transferring or hiding their assets, or even filing bankruptcy. To fill that gap, Maryland,—following the lead of Wisconsin, Alaska, and other states that allow for employees to obtain liens on employer property—provided a quicker, simpler pre-judgment remedy. See, e.g., Wis. Stat. § 109.09 (2017). The wage lien law gives victims of wage theft a security interest in their debtor’s property, a tool that has long been a staple of debt collection in other contexts.

Maryland’s Lien for Unpaid Wages is a hybrid of an artisan’s lien and a UCC Article 9 security interest. It is modeled on the Contract Lien Act,

which gives condominium associations a lien on condos so that they can collect condo dues from recalcitrant homeowners. Md. Code Ann., Real Prop. § § 14-201 to -206 (West 2013). Like Article 9 remedies, the wage lien also extends to personal property. Because the innovative nature of this new remedy required fine-tuning, the Maryland Standing Committee on Rules of Practice and Procedure adopted new court rules, which went into effect January 1, 2018. See Rules Order (Oct. 10, 2017), <https://mdcourts.gov/sites/default/files/rules/order/ro194.pdf>.

There are three steps that trigger the wage lien (including procedures for an employer to contest lien claims), as well as methods for employees to enforce a lien. The statute, regulations, and new procedures address due process concerns and fairly balance employers and employees’ interests.

Three-Step Procedure to Create the Lien

The WLL entitles employees to put a lien on employers’ personal and real property. It can be used on its own or concurrently with other remedies such as the federal Fair Labor Standards Act, Maryland’s Wage and Hour Law, and Wage Payment and Collection Law. The three-step process is short and simple, providing two ways to encumber the employer’s property, either by operation of law or through a circuit court order.

Step 1: Notice to Employer

The employee serves the employer with a Notice to Employer of Intent to Claim Lien for Unpaid Wages (“Notice”), which includes basic information such as the employee’s name and address, the employer’s name, the dates of employment, the money claimed, and the property that the employee seeks to encumber with a lien to secure payment of the stolen wages. To increase access by pro se employees, the Department of Labor, Licensing and Regulation website provides forms at <https://www.dllr.state.md.us/labor/wages/essunpaidwageslien.shtml>.

[md.us/labor/wages/essunpaidwageslien.shtml](https://www.dllr.state.md.us/labor/wages/essunpaidwageslien.shtml).

Step 2: Employer Response

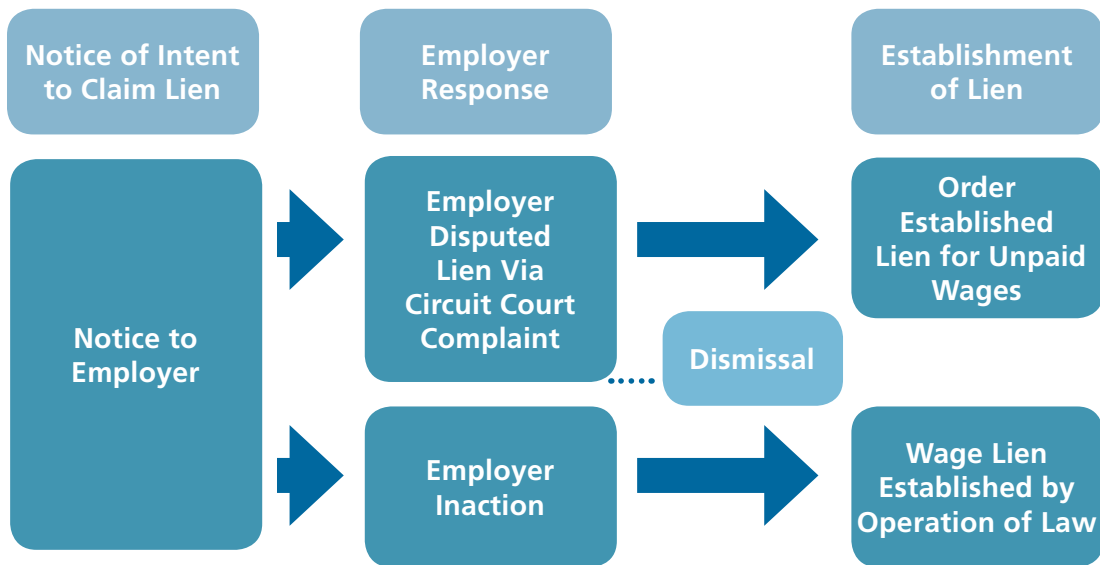
Employers have three options: 1) engage with the employee to resolve the issue and/or pay the wages owed; 2) ignore the Notice; or 3) file a complaint to dispute the lien. The simplest option is to pay the wages, which removes the need for the lien. The other two options require explanation.

Inaction: If the employer does nothing, then, 30 days after Notice is served, a lien is established on the property specified in the Wage Lien Statement. It arises by operation of law, as do liens that secure debts owed to artisans, attorneys, and condominium associations. Md. Code Ann., Com. Law § 16-302 (West 1994); Md. Code Ann., Bus. Occ. & Prof. § 10-501 (West 2002); Md. Code Ann., Real Prop. § § 14-201 to -206 (West 2013). From there, employees may record a Wage Lien Statement to secure their claim, a process discussed in Step 3.

Complaint: An employer that disputes the claim must file a complaint against the employee within 30 days of being served with the Notice. Jurisdiction lies in the circuit court of the county in which the property—whether real or personal—is located. Md. Code Ann., Lab. & Empl. § 3-1103(a) (West 2013). The complaint includes the parties’ names, a copy of the Notice, the date the employer was served, a statement of any defense the employer asserts, and any supporting documents, and proof of service upon the employee. Lab. & Empl. § 3-1103(b). Employers can access forms at the Department of Labor website, at <https://www.dllr.state.md.us/labor/wages/essunpaidwageslien.shtml>.

Once a complaint is filed, employees must establish their claim by a preponderance of the evidence. Either party may request a hearing, and the Circuit Court must adjudicate employers’ claims within 45 days of filing (or, under the Proposed Rules, of serving the complaint on the employee).

If the court issues an order to establish a lien for unpaid wages, the em-



the employee's wage lien claim as a "secured claim" and directs employees asserting a claim against personal property to file their Statements in the same manner, form, and place as set forth in Article 9. Lab. & Empl. § 3-1105(c), (e). At a minimum, compliance with the wage lien act prevents an employer from evading the lien by transferring the property to a third party, because security interests travel with collateral. Md. Code Ann. Comm. Law §

9-201(a) (West 1999).

ployee may request reasonable attorney's fees and court costs. If the court instead decides in the employer's favor, and also finds that the employee's claim was frivolous or made in bad faith, then the court may also require the employee to pay the employer's reasonable attorney's fees and court costs. Lab. & Empl. § 3-1103(e).

Step 3: Establishment of Lien & Recordation

Similar to step two, the lien can be established by two different procedures, one if the employer ignores the Notice, and the other if it files a complaint.

Inaction: If the employer ignores the Notice, then the employee has 180 days to record its security interest in the employer's property by filing a Wage Lien Statement ("Statement"). The Statement identifies the property, the lien amount, and includes both the Notice and proof of service. If a court issued an order, the employee also files the order.

For personal property, the employee files the Statement and proof of service with the Maryland Department of Assessments and Taxation, in the same way that other secured creditors file UCC-1 financing statements. As soon as an employee files these documents he or she has a "secured claim." Md. Code Ann., Lab. & Empl. § 3-1105(e) (West 2013). If the lien is on real property, the employee files the Statement

and proof of service with the clerk of the Circuit Court in the county in which any part of the property is located. Lab. & Empl. § 3-1105(c).

Complaint: If the employer files a complaint and the circuit court issues an order establishing the lien, then the employee follows the same process to record the lien as described above except that the employee must also file the court order along with the Notice in either the UCC-1 filing office or in the recording office for interests in real property.

An employee who files these materials within 180 days obtains a security interest in the employer's property, retroactive to either the date the employee filed the wage lien claim or the date of the court order, as applicable. Lab. & Empl. §3-1105 (d). If an employee does not record within 180 days, then the lien is extinguished without prejudice. Lab. & Empl. § 3-1105(d).

Releasing and Enforcing the Lien

The easiest way for an employer to release the lien is to pay the wages owed or to post a bond in the amount claimed. Md. Code Ann., Lab. & Empl. §3-1105(d) (West 2013). If the employer does not pay the wages or post a bond, then the employee can enforce the same way that any other secured creditor enforces any other security interest. The wage lien act describes

9-201(a) (West 1999).

Because "secured claim" is a term of art under UCC Article 9, it stands to reason that the legislature also meant to give employees new tools to counter wage theft, including Article 9's self-help remedies of seizing and selling the employer's property to collect the wage debt. Md. Code Ann., Comm. Law, §§ 9-609,-610 (1999).

One of those tools is Article 9's fast and straightforward option of self-help for creditors, as long as they do not breach the peace and dispose of collateral in a commercially reasonable manner. A less obvious remedy lies in the leverage that the lien gives an employee in light of the strong likelihood that the employer has already encumbered the property with a security interest in favor of a bank or other lending institution. Security agreements routinely make a debtor's default on any other obligation and imposition of a lien on the encumbered property an event of default, which in turn could trigger acceleration of the entire debt, and thus put the employer out of business.

The cascade of problems that could flow from wage theft means that an employer faced with the prospect of a wage lien should either promptly engage with the employee to resolve the matter by paying any overdue wages or posting a bond to lift the lien pending resolution of the dispute. If your

client concedes that it failed to pay the employee, the quickest and cheapest resolution may be to settle quickly. The most dangerous course is for that employer to simply ignore the Notice.

For employers that ignore the Notice or otherwise fail to satisfy the wage claim, the wage lien law allows employees to pursue both judicial and self-help remedies.

Judicial: Employees can enforce a court order establishing a lien for unpaid wages in the same manner as any judgment under Maryland law. The order has a 12-year statute of limitations. Md. Code Ann. Lab. & Empl. § 3-1106(b) (West 2013). Additionally, Maryland Rules 12-601 and 12-602 entitle a creditor to file a District Court complaint for replevin.

Self-Help: As discussed below, the WLL does not provide detailed instructions for non-judicial enforcement of wage liens. However, the statute's reference to UCC Article 9 and its designation of the wage lien as a "secured claim" suggests that employees with wage liens enjoy the same remedies as other secured creditors under Article 9. A car dealership that financed a car sale can repossess it and sell the collateral to satisfy the debt, and an employee with a recorded wage lien could hire a repossession company to seize personal property like a construction company's bulldozer, and then sell it to satisfy the wage claim. Attorneys advising employees in this self-help process should be sure to comply with UCC Article 9 formalities such as notifying the employer of the method of sale and conducting the sale in a "commercially reasonable" fashion. Md. Code Ann. Comm. Law, §§ 9-601, -611 (West 2001).

Rule Changes

During the fall of 2017 the Court of Appeals evaluated procedural rules aimed to make the wage lien process clearer and more predictable. Through careful consideration, the Committee sought "to strike a balance between the statutory goal of providing a relatively fast process for resolving a contested proposed wage lien while assuring fundamental fairness to the

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parties . . . and to ensure that the court gets the necessary information." Md. Standing Comm. On Rules of Prac. & Proc., Notice of Proposed Rule Changes (Title 15, Chapter 1400)(Md. 2017). The changes apply to all proceedings initiated on or after January 1, 2018.

While space considerations preclude detailed discussion of the new rules, a few areas of proposed changes are worth noting: notice of the lien; the employer's complaint contesting the lien, and enforcement through confirmatory orders to enforce the lien.

Notice of Intent to Claim Lien:

New Rule 15-1402 imposes two new requirements on the employee's Notice on the employer's property. First, it requires that the Notice be supported by an oath or affidavit, and second that the Notice include information such as an employee's telephone number and email address.

Employer Complaint Contesting the Lien

New Rule 15-1403 clarifies the procedure for employer complaints and

increases the likelihood of employers promptly serving complaints upon employees. First, it requires the employer to include additional information in the complaint such as whether the employer has an ownership interest in the property on which the lien would be imposed. Second, the new rule requires that the 45-day clock for a court to decide the case starts when the employee gets served instead of the date that the employer files its complaint. Finally, the new rule shortens the time for employees to respond to employer complaints from 30 days to 10 days, giving the employee 10 days after service of the complaint to file an answer, a motion to dismiss, or to withdraw the Notice. However, the self-help aspects of the wage lien process are preserved by the new rule's mandate that the employer does not have a remedy of a default judgment if the employee fails to file a response to the employer's complaint.

Lien Enforcement

Two important provisions of the new rules address the timing regard-

ing priority of the lien in a contest with other creditors and a method for an employee to transform the self-help remedy of a filed Statement into a confirmatory order.

New Rule 15-1404 sets the priority of an employee's wage lien from the date the order was docketed or from when the employee recorded the Statement.

Next, new Rule 15-1406 addresses the difficulties that Public Justice Center has faced as it sought to enforce wage liens that arise as a matter of law through garnishment proceedings. In these situations, courts do not have an order upon which to base the garnishment, so new Rule 15-1406 allows the employee to seek a confirmatory order in the Circuit Court where the property encumbered by the lien is located. That petition must state any payments that the employer has made to reduce the wages due, and also include the Notice, proof of service on the employer, and any other documentation. As with employer complaints, hearings are available. Employees that obtain confirmatory orders in this process will file them in the Circuit Court where they seek to enforce the order.

Statutory Silences: Perfection and Priority

One final note: given the innovative quality of the wage lien statute, it is not surprising that gaps remain in the rights and remedies it conveys. While the WLL designates the lien as a "secured claim," it does not explicitly give employees all the rights and duties of Article 9 secured creditors, such as self-help repossession and the duty to dispose of collateral in a commercially reasonable manner. Nor does it specify the priority of a wage lien in relation to other claims on the same property.

Despite this, standard principles of statutory construction suggest that the wage lien could be a perfected security interest. The rule to avoid surplusage treats every word and phrase in a statute as meaningful and avoids making one provision of a statute a nullity.

Here, the General Assembly expressed an intent to create new rights and remedies by using the term "secured claim" and directing employees to file wage lien claims alongside UCC-1 financing statements. Because a UCC-1 financing statement generally perfects a security interest in personal property, and gives priority to the first to file or otherwise perfect, the legislature likely also intended to treat an employee filing the Notice or order as a

Perfection matters most when third parties such as competing creditors and the bankruptcy trustee claim an interest in the property that is covered by the wage lien.

method to perfect the wage claim. Md. Code Ann., Comm. Law, § 9-322 (West 1999).

Perfection matters most when third parties such as competing creditors and the bankruptcy trustee claim an interest in the property that is covered by the wage lien. If the wage lien is the equivalent of a perfected security interest, then it has priority over later-perfected security interests in the same collateral, and also over claims by the bankruptcy trustee. Md. Code Ann., Comm. Law, § 9-317 (West 1999).

The WLL is new and innovative, leaving courts to address the potential intersection with Article 9 in the future. If a court interprets the statute to make wage liens merely attach to the property, and not perfect a security interest in that property, then an employee holding a wage lien will still prevail over most third parties who purchase the encumbered property. Md. Code Ann., Comm. Law, § 9-201 & 9-320 (West 1999). If the property is not already encumbered, the employee could exercise self-help remedies to

seize and sell it. If another creditor of the employer has already secured a security interest in the property, then the likelihood that the wage lien jeopardizes the employer's other credit relationships gives an employee powerful leverage to negotiate a just settlement to the wage dispute.

Before 2013, employers held a distinct advantage over employees under Maryland law, indirectly creating an incentive for wage theft. The WLL evens up that disparity a bit, largely through the self-help remedies that employees can exercise without hiring counsel.

Conclusion

The Maryland Wage Lien Law is a step in the right direction for employees to resolve wage claims. Employees and employers alike enjoy due process through simple procedures that minimize attorney's fees on both sides. Moreover, online forms and procedures are straightforward and easy to understand, increasing access for the many employees who pursue wage claims pro se, and both modest and substantial claims fall within the statute. The statute, regulations, and proposed rule changes also give employers due process by providing them with notice and an opportunity to be heard by disputing the lien, in addition to allowing them to lift the lien simply by paying the wages or posting a bond, and to recover attorney's fees and costs for frivolous claims.

An additional benefit to the newly-minted procedural clarifications is that more people now know about the new remedy. Too few advocates for employers and employees alike know that Maryland employees have what many other creditors take for granted: a simple, cheap, quick way to get a security interest to help collect a debt.

Ms. Ertman is Carole & Hanan Sibel Research Professor at the University of Maryland Francis King Carey School of Law. Ms. Weil is Assistant Counsel at the Baltimore City Department of Housing & Community Development.