Legal Update Article

Tucson, Arizona Voters Pass Sweeping Wage & Hour Initiative, Including $15 Minimum Wage

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November 9, 2021

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Wage and Hour

By a 65% to 35% margin, on November 2, Tucson, Arizona, voters passed Proposition 206, officially known as the Tucson Minimum Wage Act, increasing the City's minimum wage to $15.00 an hour by 2025. In addition, the Act includes several other significant changes that will impact employers operating in the City.

Five years ago, voters statewide passed a similar proposition that incrementally raised the minimum wage to $12.00 by 2020.

Minimum Wage Increases

Under the Act, the City's minimum hourly wage will increase as follows:

- To $13.00 on April 1, 2022;
- To $13.50 on January 1, 2023;
- To $14.25 on January 1, 2024; and
- To $15.00 on January 1, 2025.

Thereafter, the minimum wage may increase each January, to the nearest $0.05, depending on the rate of inflation, and will be announced no later than November 1 of the previous year. A higher state or federal minimum wage will supersede these rates. Due to cost-of-living adjustments, the current hourly rate statewide is $12.15 and will increase to $12.80 on January 1, 2022.

The Act will apply to all employees, whether full-time, part-time, or temporary, who perform at least five hours of work within Tucson's geographic boundaries. Employers may take a tip credit of no more than $3.00 for "tipped employees," whose definition essentially matches that found under the federal Fair Labor Standards Act (FLSA). Casual employees who perform babysitting services at an employer's home are excluded. All employers, except the State of Arizona, the United States, and tribal entities, are covered by the Act.

The State of Arizona itself may challenge the Act, as it already has against the City of Flagstaff to enjoin that city from enforcing its previously enacted minimum wage ordinance.

Expanded Definition of Work Hours

Importantly, the Act goes well beyond the mere enactment of a $15.00 minimum wage. For example, and contrary to federal law, the Act defines work hours to expressly include:

> time that an employer requires the employee to undergo a security screening immediately prior to or following a work shift; to be on the employer's premises; to be at a prescribed work site; or to be logged in and actively attentive to an employer-provided computer program, phone application, or similar device.

A relatively recent U.S. Supreme Court case held that security screenings or other preliminary and postliminary time that is not "integral and indispensable" to the duties

performed by an employee is *not* compensable work time under the FLSA.

Employee or Independent Contractor?

While independent contractors are not considered employees, under the Act an individual is assumed to be an employee unless the employer can establish that:

> (1) the individual is free from the control and direction of the hiring entity in connection with the performance of the work; (2) the individual performs work that is outside the usual course of the hiring entity's business; and (3) the individual is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed for the hiring entity.

In other words, the Act implements the employee-friendly "ABC" test, recently adopted by the California Supreme Court for employers in that state and existing in few other states.

"Annexed" Employers and Remote Employees

If Tucson annexes property that brings it within the City limits and an employer's workplace(s) fall within the annexed property, the employees of that employer become covered by the Act 90 days after annexation. Similarly, if an employer and employee mutually agree that the employee will work from home and the employee's residence subsequently is annexed into the City, the employee will be covered by the Act 90 days after annexation. An employee's involuntary discharge during the 90-day period creates a rebuttable presumption that the discharge was retaliatory in violation of the Act.

Method of Payment

The Act prohibits employers from requiring employees "to receive minimum wage payments using a pay card, reloadable debit card, or similar method that requires the employee to possess a valid social security number." Whether this means that an employer may require such methods of payment for compensation *in excess of* minimum wage is unclear.

Scheduling Pay

Under the Act, "large" employers, defined as those that averaged at least 26 employees (full-time, part-time, or temporary) during the last quarter of the previous year, must pay at least three hours of minimum wage compensation when:

> (1) an employee is scheduled to work at least three hours; the employee timely reports for duty; the employee is able to work the entire shift; and the employer engages the employee for fewer than three hours; or (2) an employee is scheduled to work at least three hours and the employer cancels the employee's shift with less than twenty-four (24) hours' notice.

Prohibited Pay Deductions

Except as required by law or court order, the Act prohibits employers from making deductions from employee pay "if doing so will result in the employee receiving less than the minimum wage, including but not limited to amounts deducted for employer-provided meals and damaged, lost, or spoiled goods." The FLSA similarly prohibits deductions that drop an employee's pay below minimum wage for the hours worked in a workweek.

Creation of a Department of Labor Standards, Private Causes of Action

The Act provides that no later than April 1, 2022, the City will establish a Department of Labor Standards. The new department's purpose will be to receive complaints from

aggrieved individuals and interested parties, initiate investigations of employers and hiring entities, initiate enforcement actions, periodically conduct studies of the City's low-wage workers for the purpose of guiding the department's targeted enforcement efforts, educate employers of their obligations, and educate employees of their rights.

The Act prohibits retaliation for filing a complaint, asserting any claim or right or assisting another employee in doing so, communicating a complaint to an interested party, or informing another employee about their rights. If an employer takes an adverse action against an individual within 90 days of the individual engaging in the rights covered by state minimum wage and benefits law, or of notifying the employer or employer's representative of a violation of the Act, a rebuttal presumption will arise that the adverse action was retaliatory.

The Act provides a three-year statute of limitations. An aggrieved party may bring suit in the City's municipal court, where it may recover legal and equitable relief, including payment of back wages, liquidated damages in an equal amount, and reasonable attorneys' fees and costs. In addition, the City may initiate an investigation and bring its own complaint in municipal court, where it may recover a civil penalty of up to $100 per affected employee, to be paid to the City. For multiple or repeated violations, the City also may revoke, suspend, or decline to renew an employer's business license(s).

Jackson Lewis will continue to monitor and report further developments concerning the Act. In the meantime, employers should take the necessary actions to ensure they comply with the Act's expansive provisions.

If you have any questions about this development or any other wage and hour issue, please consult a Jackson Lewis attorney.