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ARIZONA VOTERS INCREASE MINIMUM WAGE AND APPROVE PAID SICK LEAVE

By:

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On November 8, 2016, the Arizona voters passed Proposition 206, which increases the minimum wage to \$12.00 per hour by January 1, 2020 and provides up to 40 hours of paid sick leave for employees working in Arizona. The minimum wage increased to \$10.00/hour effective January 1, 2017. The **paid sick leave** requirement is effective beginning **July 1, 2017**, and the Arizona Industrial Commission has issued proposed rules further clarifying the paid sick leave requirements. Please keep in mind that the proposed rules are subject to revision and the Industrial Commission does not anticipate issuing final rules until the end of summer/early fall. Please ensure that you keep up with any changes in the regulations or guidance issued by the Industrial Commission.

I. MINIMUM WAGE WILL GRADUALLY INCREASE TO \$12.00/HOUR.

Under Prop 206, the following increases are made to the Arizona minimum wage.

January 1, 2017 - \$10.00 per hour

January 1, 2018 - \$10.50 per hour

January 1, 2019 - \$11.00 per hour

January 1, 2020 - \$12.00 per hour

January 1, 2021 and subsequent years – increased annually commensurate with the cost of living.

II. ARIZONA PROP 206 PAID SICK TIME (EFFECTIVE JULY 1, 2017)

In November 2016, Arizona voters passed Prop 206, the Fair Wages and Healthy Families Act, which increased the minimum wage and for the first time establishes a paid sick leave requirement for most employees in Arizona. As an initiative approved by the voters, the law cannot be amended by the Legislature except to further its purpose. The paid sick leave requirement goes into effect on July 1, 2017. Employers should note, however, that there is currently a legal challenge to Prop 206 pending before the Arizona Supreme Court.

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III. WHAT PAID SICK TIME ARE ARIZONA EMPLOYERS REQUIRED TO PROVIDE?

A. Total Hours Accrued Annually Depends on Size.

Pursuant to Prop 206, beginning on July 1, 2017, all employees earn one (1) hour of paid sick time for every 30 hours worked, up to the required maximum. This requirement applies to all employees, both full-time and part-time, temporary or permanent. The paid sick time requirement applies to all employers except the State of Arizona or the U.S. government. Notably, the paid sick time requirement applies to small employers who have gross revenue of less than \$500,000 annually and are exempt under the Arizona Minimum Wage law.

If a company has 15 or more employees, employees are entitled to accrue and use up to 40 hours of paid sick time per year. If a company has fewer than 15 employees, employees are entitled to accrue and may use up to 24 hours of paid sick time per year. Exempt employees are presumed to work 40 hours per week (unless their actual schedule is fewer hours, then their actual schedule can be used).

B. Unused Sick Leave Rolls Over Up to Max of 40 Hours (24 for Small Employers).

Unused sick time rolls over from year to year unless the employer pays for the unused leave at the end of the year and provides paid sick time in one lump amount to the employee at the beginning of the following year (either 40 or 24 hours, depending on size). Under regulations proposed by the Industrial Commission of Arizona, employers are only required to roll over a maximum of 40 hours (24 for small employers) of paid sick time each year. For example, if an employee accrues 40 hours and uses 8 hours in the first year, 32 hours rolls over to the next year and the employee can accrue an additional 40 hours in year 2. If the employee does not use any paid sick time, they would have 72 hours at the end of year 2. Employers can have a policy that limits the rollover to 40 hours per year.

Regardless of the amount of paid sick time that the employee has accrued, employers may cap the amount of leave that an employee can use per year for qualifying purposes at 40 hours for employers with 15 or more employees or 24 hours for those with fewer than 15 employees.

C. Options to Hourly Accrual Include Awarding Time Up Front and Paying for Unused Sick Time.

In lieu of an hourly accrual, an employer may give employees all of their sick time hours up front at the beginning of the year. Additionally, if employers already have a paid time off plan that provides at least as much paid time off and allows leave for the same purposes, that plan will satisfy the requirements of Prop 206 and no additional paid leave is required. Therefore, if employers are already providing vacation or other paid leave, they should consider combining all of their leave policies into one paid time off policy that will provide at least as much leave and for the same purposes as required by Prop 206.

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D. New Employees Must be Employed 90 Days to Take Paid Sick Time.

Although employees begin accruing paid sick time starting from the first day of employment, for employees hired after July 1, 2017, employers can have a policy that the individual must be employed for a period of 90 days before they take any paid sick time.

E. Use-It-or-Lose-It Permitted for Unused Sick Time, But May Have to Be Reinstated if Rehired

Unused sick time is not required to be paid upon separation of employment. Unused paid sick time must be reinstated to employees rehired within nine months and must be available to the employee immediately at the start of their rehired term of employment. Additionally, if an employee is transferred from one division, location, or entity of an employer to another division, location, or entity, their paid sick time must transfer with them. Finally, if a successor employer purchases a business and takes over the workforce, employees are entitled to the paid sick time that they had with the previous employer.

F. Sick Time is Paid at the Hourly Rate the Employee Would Have Earned in Week in Which They Take Leave.

Employees who use paid sick time at the same hourly rate that an employee earns for the workweek in which the employee uses the paid sick time, but in no event less than minimum wage. The regulations proposed by the Industrial Commission define the “same hourly rate” for employees who are paid multiple rates of pay or who are paid on commission, piece-rate, or fee-for-service basis. For employees earning more than one hourly rate of pay, the rate of pay to use for paid sick time is determined in the following order:

1. The wages the employee would have been paid, if known, for the period of time during which the paid sick time is used;
2. The weighted average of all hourly rates of pay during the previous pay period.

For employees paid on commission, piece rate, or fee-for-service basis, the rate of pay to use for paid sick time is determined in the following order:

1. The hourly rate of pay agreed upon by the employer and employee, if an hourly rate of pay was previously established;
2. The wages that the employee would have been paid, if known, for the period of time in which earned paid sick time is used;
3. A reasonable estimation of the wages that the employee would have been paid for the period of time in which the earned paid sick time is used;
4. The weighted average of all hourly rates of pay during the previous 90 days, if the employee worked regularly during the previous 90-day period.

IV. WHAT CAN EMPLOYEES USE PAID SICK TIME FOR?

A. Reasons for Taking Sick Time Include Employees' or Families' Illnesses, Medical Appointments, and Issues Relating to Domestic Abuse of Sexual Violence.

Companies must allow employees to use their paid sick time for their own or a family member's mental or physical illness or injury (including diagnosis and treatment) or for preventative care. Leave may also be used if a place of business or child care is closed by order of a public health official or an employee or family member must stay home by order of a public health official due to exposure to a communicable disease, even if the employee or family member does not have the disease.

Leave may also be used for time off needed relating to the employee's or a family member's domestic violence, sexual violence, abuse, or stalking if the leave is for medical attention, counseling services, services from a domestic violence or sexual violence or similar program, legal services, or the relocation or securing safety at an existing home.

B. Family Members is Broadly Defined.

The new law defines "family member" very broadly to include children (regardless of age), parents, spouses/domestic partners, grandparents, grandchildren, siblings, etc. Family includes biological, step-, adopted, foster, or similar relationships and also includes "any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship" regardless of whether there is a legal familial relationship.

C. Requests for Sick Time Can Be Determined in Large Part by Employers' Policy.

Employees must be allowed to take paid sick time in increments of one hour or the smallest increments by which the employer generally accounts for absences in its payroll system, whichever is smaller.

Employees may request sick time orally, in writing, electronically, or by other methods if approved by the employer. Employees must try to schedule foreseeable leave when it does not unduly disrupt the company's operations and provide advance notice and include the duration of the leave, if known. Employers can establish written procedures for providing notice relating to unforeseeable leave.

D. Certification Can Be Requested Only for Absences of Three or More Days.

Employers may request certification relating to an absence of three days or more, but may not request certification for an absence of one to two days. A simple statement that leave was needed for a qualifying reason is all that is required and an employer cannot request additional details of the illness or reason for leave, as long as the information provided by the employee shows that the leave was for a covered reason. Documentation for absences relating to the employees' or employees' families' illness can include a note or other documentation from a

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health care professional. Documentation of leave relating to domestic violence, sexual violence, assault, or stalking can include a police report, court protective order, information from court or prosecuting attorney that the individual was in court, statement from domestic abuse or other counselor, statement from an attorney, clergy, or medical or other professional that the employee or employee's family member is receiving services relating to domestic violence, sexual violence or stalking, or the employee's own written statement.

All information obtained about an employee or family members' medical condition or history or facts relating to them being a victim of domestic violence, sexual violence, etc. must be treated as confidential.

V. WHAT NOTICES AND INFORMATION MUST EMPLOYERS PROVIDE EMPLOYEES REGARDING THEIR SICK TIME?

A. Posters and Notices Are Provided by the Industrial Commission.

Under Prop 206, employers are required to provide employees a notice at the time of hire (or on July 1, 2017 for employees hired prior to that date) that provides details of the employee's rights under the new paid sick time law. The Industrial Commission has created a form notice/poster that can be used by employers to satisfy this requirement. The notice must be posted in English and Spanish or any other language required by the Industrial Commission.

Individual employees must be notified with their regular paycheck:

- (1) how many paid sick time (or PTO) hours they have available,
- (2) how many paid sick time (or PTO) hours they have used YTD; and
- (3) how much they have been paid for sick time (or PTO) used YTD.

Employers must keep records of this information for four (4) years, which matches the recordkeeping requirements for payroll data under Arizona law.

An employer who fails to provide the required notices can be fined up to \$250 for the first violation and \$1,000 for subsequent or willful violations.

The Industrial Commission has available on its website a Paid Sick Time poster.

B. Employers are Prohibited from Interfering with Leave or Retaliating Against Employees Who Take Leave, with Presumption of Discrimination if Adverse Action in 90 Days

Retaliation or adverse action based on the use of sick time or other rights is prohibited. Employers are prohibited from interfering with, restraining, or denying any employee the exercise of their rights under Prop 206. Employers are also prohibited from retaliating against or

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discriminating against an employee or former employee because a person exercised their rights, which may include the right to accrue and use sick time, make a complaint, participate in an investigation of their own or another person's complaint, etc.

Similar to the Arizona Minimum Wage law, the new law contains a presumption that any adverse action taken within 90 days after an employee uses their sick time or exercises other rights on the law. An employer must show by "clear and convincing evidence" that the action was taken for a permissible reason. Penalties for retaliation can include reinstatement, back wages, and penalties of up to \$150 per day, similar to the minimum wage statute. Therefore it is important for employers to document performance or disciplinary issue and have records to demonstrate the legitimate reasons for the termination or other adverse action.

Further, an employer cannot use an absence covered by the paid sick time as an absence that may lead to or result in discipline or termination. Therefore, an employer with a "no fault" attendance policy or a policy based on points would have to modify their attendance policy.

VI. HOW ARE THE PAID SICK TIME REQUIREMENTS ENFORCED?

The paid sick time requirements are enforced using the same procedures that are used to enforce the Arizona minimum wage. An employee may file a complaint with the Industrial Commission or file a lawsuit in State court if the employee believes that the employer violated Prop 206 or retaliated against the employee for exercising rights under Prop 206. A civil suite must be filed within 2 years, or 3 years for a willful violation. Additionally, similar to the Minimum Wage Act, a civil action to enforce Prop 206 may be filed by any attorney general, city attorney, county attorney, or town attorney or by any private party "injured" by violations of The Fair Wages and Healthy Families Act.

An employer who fails to pay employees the required paid sick time will be required to pay the employee the wages owed, an additional amount equal to twice the wages/sick time owed, plus interest. An employer who retaliates against an employee may be subject to penalties of not less than \$150/day that the violation continued or until a legal judgment is final.

The Industrial Commission and the courts may also issue other appropriate legal or equitable relief for violation of the Fair Wages and Healthy Families Act.

VII. WHAT OPTIONS DO EMPLOYERS HAVE TO COMPLY WITH THE PAID SICK TIME REQUIREMENT? PAID TIME OFF VERSUS SICK LEAVE POLICIES.

Employers are not required to have a separate paid sick time policy if they have a leave policy that provides the same amount of leave and can be used for the same purposes as required under Prop 206. Prop 206 specifically provides:

Any employer with a paid leave policy, such as a paid time off policy, who makes available an amount of paid leave sufficient to meet accrual requirements of this section that may be used for the same purposes and under the same

conditions as earned paid sick time under this article is not required to provide additional paid sick time.

Employers should review their current leave policies and determine whether it may be beneficial to combine all current leave into one paid time off policy, rather than providing separate paid sick time leave, vacation leave, bereavement leave, etc. An employer who already provides vacation and/or sick leave can benefit from combining existing leave into one PTO policy.

Employers may also have different policies for different groups of people. For example, if field employees currently do not have any paid leave and office and management employees have two weeks of vacation, the employer can implement a PTO policy for the office and management employees that allows the two weeks that they currently receive to also count for paid sick time while implementing a paid sick time policy or other policy for the field that provides only 5 days of leave per year.

One thing for employers to keep in mind is that the paid sick time does not have to be paid upon separation of employment. In Arizona, whether unused vacation is paid out upon separation of employment is a matter of policy or contract, meaning that employers may have a policy that says unused vacation is not paid out upon separation of employment. Some other states, however, require payment for accrued but unused vacation. Multistate employers should review the laws in each state in which they operate.

Multistate employers may face multiple and conflicting paid sick time and vacation requirements. Employers have the option of having one policy for each state based on the state law of each state or having one policy that complies with the strictest requirements of any state in which the employer operates. By establishing the same policy for every state, however, the employer will be providing more benefits to many employees than are required by the applicable state law.

VIII. EMPLOYERS SHOULD REVIEW THEIR CURRENT LEAVE POLICIES AND RECORDKEEPING SYSTEMS TO PREPARE FOR PROP 206.

Employers should review their current leave policies. Any policies that provide greater leave and rights than required by Prop 206 will satisfy its requirements. If the employer does not already have a paid leave policy, it should work with legal counsel to draft a compliant leave policy to implement by July 1, 2017.

Employers should also review their timekeeping and record keeping systems to ensure that there are programs in place that can track hours worked and sick leave accrual. Additionally, employers need to ensure that they can print the sick leave accrued, sick leave used, and sick leave available on the employee paychecks so that the employer is ready to comply with the notice requirements under Prop 206. This new law adds yet another factor that employers should consider when making decision about employee discipline or termination to minimize the risk of retaliation claims.



Julie Pace's practice handles employment law, handbooks, drug and alcohol policies, I-9 and E-Verify compliance, OSHA, independent contractor and alleged misclassification issues with DES and other government agencies, and defends claims of sexual harassment, employment

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