Insight

IN-DEPTH DISCUSSION

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New Arizona Law Provides Minimum Wage Increases And Paid Sick Time

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On November 8, 2016, Arizona voters enacted the Fair Wages and Healthy Families Act ("FWHFA" or "the Act"), which amended the Arizona Minimum Wage Act ("AMWA") to provide for incremental increases to the minimum wage for Arizona workers beginning on January 1, 2017. The Act also requires that, beginning July 1, 2017, Arizona workers shall accrue, and have the legal right to use, a minimum amount of "Paid Sick Time" benefits each year.

1. Applicability

The new minimum wage increase applies to all Arizona employers, except small businesses, in keeping with the present coverage provisions of the AMWA. Small businesses are defined as businesses that generate less than $500,000 in gross sales *and* that are not involved in interstate commerce. As a result, the vast majority of Arizona's businesses will be covered, exempting only the very smallest and most insulated of companies from this mandatory wage increase.

On the other hand, the FWHFA's provisions mandating Paid Sick Time for employees applies to all employers, regardless of size, with exclusions only for the State of Arizona and United States federal government.

2. Minimum Wage Increase

For those Arizona workers who are not otherwise exempt from the state's minimum wage requirements, the FWHFA implements incremental increases to the minimum wage as follows:

- $10.00 per hour on and after January 1, 2017 ($7.00 per hour plus tips for tipped employees);

- $10.50 per hour on or after January 1, 2018 ($7.50 per hour plus tips for tipped employees);
- $11.00 per hour on or after January 1, 2019 ($8.00 per hour plus tips for tipped employees);
- $12.00 per hour on or after January 1, 2020 ($9.00 per hour plus tips for tipped employees); and,
- Continued incremental increased based on the cost of living on January 1st of each following year.

3. Mandatory Paid Sick Time

a. What Are the Act's Requirements for Employers

Any employer that does not currently have a Paid Sick Time ("PST") policy or practice that meets or exceeds the requirements of the FWHFA will need to revise their policy, or create a policy, to comply on or before the PST effective date of July 1, 2017. Employers with existing policies that meet the statutory minima are not required to provide additional PST. Nevertheless, employers should consider policy revisions that provide employees with information about their statutory rights and duties regarding the use of PST, such as: requesting PST, PST borrowing, treatment of PST upon separation of employment, if these details are not currently laid out in writing. The practical implication of the new statute is that most employers should plan on updating their policies, and perhaps their leave practices as well, on or before July 1, 2017.

The Act also requires that employers include on employee pay statements (or in a notice provided with employee paychecks) the amount of an employee's accrued PST, the amount of PST used by the employee, and the amount of pay an employee has received as earned PST. Regardless of whether an employer currently maintains a compliant policy or will be implementing a new policy, an employer must post notice of employees' PST rights on or before July 1, 2017, as described more fully below.

b. Key Provisions

i. Paid Sick Time Defined

Under the FWHFA, all employees of Arizona entities covered by the Act (as described above) will now be lawfully entitled to accrue and use PST as provided by the statute. The Act defines PST as "time that is compensated at the same hourly rate and with the same benefits, including health care benefits, as the employee normally earns during hours worked." In other words, employers must pay employees for their use of PST no differently than they would pay an employee for time actually worked.

ii. Statutorily Mandated Minimum Accrual of Paid Sick Time

PST accrues at a rate of no less than one hour for every 30 hours actually worked. For employees who are **exempt from overtime and minimum wage requirements of the Fair Labor Standards Act (29 U.S.C. 213(A)(1)),** the statute assumes for purposes of PST accrual that the employee works 40 hours per week. If an exempt employee's normal workweek is less than 40 hours, his or her PST accrues based on the actual number of hours worked in that normal workweek.

The statute gives latitude to an employer to designate a calendar year, fiscal year, or any another consecutive 12-month period as a "year" for purposes of its PST policy. The statute is silent on how a "year" is defined by default if the employer fails to specify how it will define a "year" under its policy.

iii. Accrual Caps

If an employer has 15 or more employees, its employees can accrue a maximum of 40 hours of PST per year, unless the employer selects a higher limit. If an employer has fewer than 15 employees, the maximum an employee can accrue is 24 hours of PST per year, unless the employer selects a higher limit.

Employers should proceed with caution as to leave accrued under former leave policies and how such leave is treated in relation to any modifications to that policy. Under the most conservative approach, employees should generally be permitted to retain any accrued PST in their banks as of July 1, 2017. The statute is silent on whether an employee's already-accrued PST as of July 1, 2017 may be counted toward his or her statutory cap of 40 (or 24, depending on the size of the employer) hours per year, though, given the Act's purpose, it may be that such time could be counted toward the cap. Employers should continue to monitor developments as forthcoming regulations may address the transition year issue.

iv. Use of PST

An employee may use earned PST as it is accrued. An employer is required to permit employees to use their accrued PST in either hourly increments or "the smallest increment that the employer's payroll system uses to account for absences or use of other time[,]" whichever is smaller. The statute provides for the use of PST in the event of an employee's own illness or injury, a family member's illness or injury, and in other situations. Generally, these categories can be summarized as follows:

- An employee's own mental or physical illness, injury or health condition, or the employee's need to seek medical diagnosis, treatment, or preventative care;
- A family member's mental or physical illness, injury or health condition, or the family member's need to seek medical diagnosis, treatment, or preventative care;
- Closure of the employee's workplace due to a public health emergency, or an employee's need to care for a child whose school or place of care has been closed due to a public health emergency;
- When an employee or employee's family member's "presence in the community may jeopardize the health of others" due to exposure or suspected exposure to a communicable disease; and
- Absences due to domestic violence, sexual violence, abuse, or stalking of an employee or employee's family member, as these terms are defined in the statute, if the leave is to address the psychological, physical, or legal effects on the employee or the employee's family member.

The Act defines "family member" broadly as a spouse or legally registered domestic partner, a grandparent, grandchild, sibling, or person who stood *in loco parentis* of an employee or his or her spouse or domestic partner, a biological child, adopted child, foster child, stepchild, of the employee or the employee's spouse or domestic partner, regardless of age, a child to whom the employee or employee's spouse or domestic partner stands or stood *in loco parentis*, regardless of age, and any other individual related by blood or affinity whose close relationship is the equivalent of a family relationship.

Employers should note that, in some ways, the Act provides for broader use of PST than would be permitted under the FMLA (such as in domestic violence situations), but in others, the Act provides narrower coverage than the FMLA. For example, a conspicuous absence from the Act's approved list of PST uses is for the birth of a child or care of a newly adopted child. However, because the Act expressly states that it shall not be construed to preempt or conflict with federal statutes, there is no reason yet to believe that the Act would interfere with an employer's right under the FMLA to require that an employee's paid time off benefits, of which PST would be a part, run concurrently with his or her use of FMLA leave.

While all employees must begin to *accrue* PST under the Act on July 1, 2017 or their date of hire, whichever is later, an employer may require that employees hired after July 1, 2017 wait 90 days from their date of hire before they are permitted to *use* accrued PST.

v. Requesting PST

An employee's request for PST "may be made orally, in writing, by electronic means or by any other means acceptable to the employer." If possible, an employee's leave request must include the expected duration of the leave. If an employee's need to use leave is "foreseeable," employees must make a "good faith effort"

to give their employers advance notice and schedule their absences in a way that lessens the impact on the employers' businesses, much like an employee's obligation when using FMLA leave. For "unforeseeable leave," employers may require that employees give notice of the leave if the notice requirements are clearly set forth in writing and that written description is disseminated to the employee. The statute does not appear to place restrictions on the procedures an employer may require for notice of unforeseeable leave, but an employer should be hesitant to place an unreasonably onerous burden on employees to give notice of unforeseeable leave.

Note that the statute does not define the terms "foreseeable," "unforeseeable," and "good faith effort," so employers should continue to monitor further developments. Generally, a common-sense approach in interpreting these terms should be applied. Employers should refrain from ascribing meaning to these terms that could be viewed as unduly punitive to employees.

vi. Requesting Verification of The Reason for PST Use

The statute permits an employer to request "reasonable documentation" that earned PST is used for a proper purpose *only* where an employer seeks to use three or more consecutive work days of PST. "Reasonable documentation" is defined as "documentation signed by a health care professional indicating that the earned paid sick time is necessary." Where three or more consecutive PST days are used in cases of domestic violence, sexual violence, abuse, or stalking, the statute provides alternative forms of reasonable documentation that may be requested, such as a police report, a protective order, or a signed statement from the employee or other individual (a list of which appears in the statute) affirming that the employee was a victim of such acts.

The inference to be drawn from this language is that an employer may not ask for verification of the reason for an employee's use of PST if the employee uses only one or two consecutive days. Employers who currently follow a policy of requesting a doctor's note for any single-day absences should pay close attention to this change and modify its practices accordingly.

vii. Carry-Over Limits

An employee must be permitted to carry over unused, accrued PST to the next year, but cannot use this carried-over amount to increase his or her maximum use caps for that year. By way of example, an employee may carry over ten hours of unused accrued PST to a following year, accrue an additional 40 hours, but would still not be permitted to use over a total of 40 (or 24, depending on the size of the employer) hours of PST per year. Employers should continue to monitor whether limitations on carryover are discussed in any forthcoming regulations.

viii. End-Of-Year Payout Option

While the Act does give an employer the option to pay out unused, accrued PST to employees at the end of the year, this option is not without its drawbacks. The Act requires that, if an employer exercises its pay-out option, it must then "provide the employee with an amount of earned paid sick time that meets or exceeds the requirements of [the Act] that is available for the employee's immediate use at the beginning of the subsequent year." This perplexing requirement appears to diminish an employer's incentive to exercise this option by accelerating the employee's PST accrual for the subsequent year and requiring that the employer provide the employee with a "full" bank of accrued hours for the employee's immediate use at the beginning of that year, as opposed to requiring that the employee gradually accrue these hours as usual.

ix. PST Borrowing

The statute permits an employer, in its discretion, to allow an employee to borrow PST time from a subsequent year before it is earned; however, there is no provision in the statute speaking to an employer's ability to recover borrowed PST if the employee in question separates from employment before he or she

actually accrues the borrowed PST. While we are hopeful that this grey area will be addressed in forthcoming regulations, employers would be prudent to ensure they are complying with A.R.S. § 23-352(2) in the event they decide to recoup such borrowed PST from employees' wages, and understand that, in the absence of legislative guidance on this issue, doing so is not without risk.

x. Treatment of PST Upon Conclusion of Employment

Employers are not required to pay unused, accrued PST to employees whose employment terminates for any reason, including involuntary termination, voluntary resignation, layoff, or death. However, if an employer rehires a separated employee within nine (9) months, all PST that the employee had accrued at the time of his or her separation must be reinstated.

xi. Notice Requirements

The Act provides that in addition to the information that must now be included with an employee's pay statement (see Section 3(a) above), employers must give employees written notice informing them, at a minimum, of the following:

- Employees' entitlement to earn PST and the rate at which employees will accrue PST;
- The terms of use of PST as provided by the Act;
- That retaliation against employees requesting or using PST is prohibited;
- Employees' right to file a complaint if PST use is unlawfully denied or retaliated against; and
- The contact information for the Commission where questions about rights and responsibilities under the Act can be answered.

Under the Act, such notices must be provided by the statute's effective date of July 1, 2017, or the date of hire, whichever is later, and must be in English, Spanish, and "any language that is deemed appropriate by the commission." Civil penalties apply for failure to post such a notice. Sample notices in each language will be provided by forthcoming regulation prior to the Act's effective date. It also appears that employers must also post notices, as will be specified, notifying employees of their rights under the Act.

xii. Anti-Discrimination and Retaliation

The Act provides that it is "unlawful for an employer or any other person to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected" by the Act. In sum, much like the ADA and FMLA, the FWHFA carries with it provisions against discrimination and retaliation for requesting or using PST, or any other exercise of rights provided by the Act. Also like the FMLA, the Act prohibits employers from counting the use of PST "as an absence that may lead to or result in discipline, discharge, demotion, suspension, or any other adverse action." There is a presumption that any adverse employment action taken within 90 days of an employee's exercise of rights under the Act is retaliatory, unless there is "clear and convincing" evidence that the action was taken for other lawful reasons. This is a stark contrast to many "no fault" attendance policies that track all absences (whether paid or unpaid) and convert them into adverse points unless the absences are ADA or FMLA related. Under this new law, any PST day counts as a protected absence and cannot be used or counted toward disciplinary action.

The Act applies the AMWA's preexisting enforcement mechanisms to the new PST provisions. Among other things, those enforcement mechanisms permit employees, as well as State agencies, to file lawsuits to assert their PST rights. In addition to the prospect of defending civil lawsuits, employers may face investigations by the State of Arizona or its political subdivisions, including inspections and monitoring, and civil penalties, for violations of the Act.

xiii. Miscellaneous Provisions

- **Replacements.** Notably, an employee may not be required to find "coverage," or a replacement worker, for his or her use of Paid Sick Time.
- **Successor Employers.** If an employer "succeeds or takes the place of an existing employer," all employees of the original employer whose employment continues with the new employer must be permitted to retain their accrued PST as though no change in ownership had occurred.
- **Transfers.** If an employee is transferred to a separate division, entity, or location, but "remains employed by the same employer," the employee is entitled to retain all earned, accrued PST in his or her bank.
- **Nondisclosure.** Though employers may require verification of PST use in certain circumstances, employers may *never* require an employee to divulge details about the nature of a health condition or domestic violence, sexual violence, abuse, or stalking situation to justify a PST request.
- **Confidentiality.** An employer must treat any health or other verification information it obtains from an employee as confidential and "may only disclose it to the affected employee or with the affected employee's permission." Unfortunately, the law is silent as to an employer's obligation to release this information if requested by subpoena or other court order, or if requested in a government investigation. We are hopeful that this issue will be addressed with forthcoming regulations.
- **Collective Bargaining Agreements ("CBAs").** If employees are covered by a CBA that is in effect as of the July 1, 2017 (the Act's effective date), the Act will not apply to those CBA-covered employees until the CBA's "stated expiration date." CBAs entered into after July 1, 2017, may contain a waiver of employees' PST entitlements under the Act if the waiver is "express" and "clear and unambiguous."
- **Waiver by Other Employment Contract.** The statute expressly provides that "no verbal or written agreement or employment contract may waive any rights" under the Act. As a result, employers are prevented from negotiating lesser PST rights with employees in employment contracts, and employers should carefully consider the terms to be included in all agreements with employees..
- **Recordkeeping Requirements.** The Act requires employers to add to their existing Arizona Minimum Wage Act recordkeeping obligations details of an employee's PST use and accrual for four years. There is a rebuttable presumption that an employer who fails to maintain such records did not pay statutorily earned PST.