



Question 6 passes! New Nevada Minimum Wage Takes Effect November 28, 2006

Insights

11.21.06

With a majority of voters voting yes on Question 6 last election day, the Constitution of the State of Nevada has been amended to include a new minimum wage standard. Beginning on November 28, 2006, employers in Nevada will be required to pay a minimum wage of either \$5.15 or \$6.15 per hour depending on whether health insurance benefits are provided to employees. But the new amendment will have a greater impact on Nevada wage and hour law than simply raising the minimum wage it will also lead to changes in administration and enforcement.

New Requirements

Do You Provide Health Benefits?

On November 28, all Nevada employers who do not provide "health benefits" for their employees will be required to pay each employee at least \$6.15 per hour. An employer provides "health benefits" if it provides family health insurance coverage at a cost to an employee of no more than 10% of the employee's gross taxable income received from the employer. Those employees receiving health insurance benefits according to this standard can still be paid at a rate of \$5.15 per hour.

What happens if an employer does provide "health benefits" as defined above, but will not allow an employee to participate in a company insurance plan until the completion of his or her probationary period? The new constitutional amendment provides that an employer must make health insurance available to the employee and his or her dependents. During a probationary period, health benefits are not typically "available" to the employee, even if participation will commence at the conclusion of the probationary period. Therefore, Nevada employers should pay probationary employees the higher minimum wage of \$6.15 per hour. Once an employee completes the probationary period, and the employer makes health benefits available to the employee, the employer is free to reduce the hourly minimum wage to \$5.15 per hour.

Employers in the hospitality industry should note that the Nevada Labor Commissioner has taken the position that an employee's gross taxable income "received from the employer" does not include any gratuities, because gratuities are not "received" from the employer. Therefore, a calculation of whether an employee's cost of insurance meets the 10% threshold should include only base wages an employee receives through payroll. Nevada's new minimum wage does not change the prohibition on Nevada employers taking a tip credit against minimum wage. Additionally, the Nevada

Labor Commissioner is currently advising that the calculation of the 10% of the employee's gross taxable income must be done on a per pay period basis.

Here is an example of how the new law will work for tipped employees:

Bill works at the Moonglow Restaurant 6 hours a day, 5 days a week for \$5.15 per hour plus tips. Moonglow has a bi-weekly pay period, and Bill earns a gross wage of \$309.00 per pay period, not including tips. For Bill to continue to be compensated at a rate of \$5.15 per hour, Moonglow must provide insurance that will not cost Bill more than \$30.90 per pay period (10% of \$309.00) for both Bill and his dependents.

The result is the same whether or not Bill actually elects to accept the insurance coverage for himself or his dependents. Note that in any pay period where Bill works less than the regularly scheduled number of hours, Moonglow needs to recalculate whether the cost for available family coverage exceeds 10% of Bill's gross income in that pay period. If the cost of available insurance exceeds the 10% cap, Bill is entitled to the higher \$6.15 minimum wage for that pay period.

So far, the Nevada Labor Commissioner has not issued guidance as to what types or levels of health insurance coverage will be necessary for an employer to avail itself of the lower, \$5.15 minimum wage rate.

Employee Defined

What may have been missed by many voters is that the new amendment provides a new definition of "employee" for purposes of entitlement to minimum wage. Prior to Question 6's passage, the statutory definition of a covered "employee" specifically exempted certain job classifications from minimum wage requirements, including: casual babysitters; live-in, domestic service employees; outside salespersons earning commissions; certain agricultural workers; taxi and limousine drivers; and severely handicapped workers. Now, under the newly-ratified amendment, an "employee" is any person employed by an "employer." Only one exemption from minimum wage requirements is identified in the amendment, that being any individual "under eighteen years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days."

Because Question 6 has become part of the Nevada Constitution, it effectively repeals the previous statutory definition of employee for purposes of minimum wage payment. Likewise, all the exemptions from minimum wage payment provided under Nevada statutory law no longer exist.

Nevada's Minimum Wage Tied To Federal Minimum Wage or CPI

In general, Nevada's minimum wage is now tied to increases in the federal minimum wage, which currently is \$5.15 per hour. For example, a dollar increase in the federal minimum wage will also mean an increase in Nevada's minimum wage to either \$6.15 or \$7.15 per hour. In addition, Nevada's minimum wage will also be permanently tied to increases in the cost of living index. If the cumulative increase in the cost of living for a given year is greater than any increase in the federal minimum wage, Nevada's minimum wage will increase by the percentage of the cumulative

minimum wage, Nevada's minimum wage will increase by the percentage of the cumulative increase in the cost of living. The cost of living increase will be measured by the percentage increase as of December 31 of any year over the level of the consumer price index (CPI) of December 31, 2004. The Bureau of Labor Statistics, U.S. Department of Labor, currently publishes the CPI. A cost of living adjustment in Nevada's minimum wage cannot exceed 3% over the previous year's minimum wage.

Nevada employers will not need to worry about complicated calculations over the percentage increase in the cost of living from one year to the next. Nevada's Governor, or an agency designated by the Governor, is obligated under the new amendment to publish the adjusted rate by April 1 each year. The adjusted rate will then take effect the following July 1. In order to receive the adjusted rate bulletin, you must file a request with the Governor, or the agency designated by the Governor.

Union Employees

The minimum wage provisions now part of the Nevada Constitution may not be waived by an individual employee. However, the new provisions may be waived in a bona fide collective bargaining agreement (CBA). The waiver in the CBA must be explicitly set forth in the CBA in "clear and unambiguous terms." Any unilateral implementation of the terms and conditions of employment by either party to a CBA is not a waiver of any of the provisions of the new amendment.

Remedies

Currently, the Nevada minimum wage statute permits an employee to recover owed-wages by either filing a claim with the Nevada Labor Commission or by filing a lawsuit. Under the new amendment, an employee may directly file suit against his or her employer. The remedies available to an employee who brings a lawsuit under Nevada's Constitution include back pay, damages, reinstatement, and injunctive relief. Additionally, employees prevailing on minimum wage claims will be entitled to their attorney's fees. Employers will not be able to recover attorney's fees even if they present a successful defense to an employee's claim. Finally, under the new amendment, employers are prohibited from discharging, reducing the compensation of, or otherwise discriminating against employees for using civil remedies to enforce their rights to minimum wages.

More disconcerting for Nevada employers is the potential scope of backpay that may now be awarded to an employee who successfully brings a claim under the new amendment. Nevada statutory law previously dictated that any claim would apply only to the two years of employment preceding the date of the employee's claim. The new amendment provides no discernible statute of limitations, and a claim could cover a period of employment far greater than two years.

Labor Commissioner's Enforcement Capabilities

The Nevada Labor Commissioner currently enforces minimum wage laws, which state that the "Labor Commissioner shall enforce the provisions of the law and may impose, in addition to other remedies or penalties, an administrative penalty of no more than \$5,000 for each violation. With the Constitution's repeal of this law, there is a question as to whether the Labor Commissioner retains the power to levy civil penalties with respect to an employer's failure to pay an appropriate minimum wage. In any event, any alteration in the Labor Commissioner's enforcement authority will apply to

wage. In any event, any alteration in the Labor Commissioner's enforcement authority will apply to minimum wage violations only. The Labor Commissioner is still empowered to enforce the state's general labor laws under other sections of Nevada statutory law, including enforcement of overtime requirements.

Overtime Considerations

Prior to November 28, if an employee earned less than one-and-a-half times the current minimum wage (i.e., \$7.73 per hour), Nevada law required that the employee receive an overtime premium for any hours worked beyond the normal eight-hour day. The effect the new minimum wage mandates will have on this daily overtime requirement remains unclear.

The Nevada Labor Commissioner has taken the position that the dual-rate minimum wage established by the new amendment also creates a dual standard under Nevada's daily overtime requirement. In other words, if you offer adequate health benefits to your employees, then employees will be entitled to daily overtime premiums if they earn less than \$7.73 per hour. But if the \$6.15 minimum wage applies to particular employees, (because their health insurance costs them more than 10% of their gross income), then those employees earning less than \$9.23 will be entitled to daily overtime premiums. In essence, the Labor Commissioner's opinion may lead to an expansion of the number of Nevada employees receiving daily, rather than weekly, overtime pay.

The Nevada Attorney General previously issued a formal opinion stating that the new amendment does not affect Nevada's daily overtime requirements, and that employees are only entitled to daily overtime if they earn less than \$7.73 per hour. But until the Labor Commissioner's and the Attorney General's opinions are reconciled, our advice is to pay your employees according to the Labor Commissioner's position, given that it is the broader of the two.

Likewise, Nevada's daily overtime requirements do not apply to any employee working an agreed-upon four, ten hour day work week. In such cases, Nevada employers should continue to pay that employee 40 hours at his or her regular rate of pay.

Actions You Should Take

Nevada employers should take the following steps immediately:

- Identify which employees are currently being paid wages of less than \$6.15 per hour. Don't forget piece rate employees they are also covered by the minimum wage provisions.
- Identify any employees that were exempt from minimum wage requirements but will now be covered as of November 28. Again, these include:
 - Casual babysitters
 - Domestic service employees residing in the household where they work
 - Outside salespersons paid by commission
 - Agricultural employees

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 - Taxi-cab and limousine drivers
 - Severely handicapped individuals working under government issued certificates
 - Supervisory, administrative or professional employees you have considered exempt from overtime but whose hourly rate (derived by dividing the weekly salary by the number of hours actually worked in a workweek) is less than \$6.15
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- Identify part time employees who are being paid less than \$6.15 per hour. Consider offering health insurance or modifying health insurance premiums for those employees in order to avoid paying the higher minimum wage.
 - Analyze to whom, when, and at what cost health insurance is being offered at your company. Consider offering low-cost health insurance for employees and their dependents as a way to avoid the higher minimum wage.
 - Identify which employees will become eligible for daily overtime. Consider formalizing voluntary arrangements for 4/10 schedules.
 - Begin compliance with the new minimum wage obligations on November 28. Note: The Labor Commissioner has informally taken the enforcement position that employers who cannot implement the changes by November 28 will not be penalized provided that they come into compliance as quickly as possible and make retroactive payments to employees for the period they were not in compliance.
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This Labor Alert is intended to provide a brief overview of the significant portions of this new law. It is not intended to serve as, nor should it be construed as, advice for any particular legal situation. If you would like more information, contact any attorney in our Las Vegas office at 702.252.3131.