

Arizona's Proposition 206

The Fair Wages and Healthy Families Act

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Prop 206 Overview

- Voter Initiative
- Amends the Arizona Minimum Wage Act to provide:
 - Annual increases to Minimum Wage beginning January 1, 2017
 - Paid Sick Time benefits beginning July 1, 2017
- Arizona Supreme Court rejected constitutionality challenges
- Law is unlikely to be rolled back

Enforcement: Industrial Commission of Arizona (ICA)

- Issued Proposed Rules on May 5, 2017
 - <https://www.azica.gov/sites/default/files/NoticeOfProposedRuleMaking05052017.pdf>
- Comment period ended June 5, 2017, public hearing same day
- Frequently Asked Questions (Last updated May 23, 2017 and ongoing)
 - https://www.azica.gov/sites/default/files/media/Public%20FREQUENTLY%20ASKED%20QUESTIONS_MasterwTOC_REV05232017.pdf

Prop. 206: Minimum Wage

New Minimum Wage with Annual Increases

- January 1, 2017 = \$10.00 / hour
- January 1, 2018 = \$10.50 / hour
- January 1, 2019 = \$11.00 / hour
- January 1, 2020 = \$12.00 / hour
- January 1, 2021 = cost of living increase (if any)

Prop 206: Minimum Wage

- Requirements
 - Applies to almost all businesses
 - Applies to FT, PT, and temporary employees
 - No reduction for young workers or disabled workers
 - Notices Posted and Recordkeeping
 - Must keep records, including hours worked each day for 4 years
 - Federal law requires 3 years, but Arizona requires 4 years of records
 - <https://www.azica.gov/posters-employers-must-display>

Exemptions to Prop 206 Minimum Wage Requirements

- Employed by Parent or Sibling
- Casual babysitter
- “Small Business”
 - <\$500k in revenue and exempt under Title 29 (FLSA)
 - Individual employees not engaged in interstate commerce
- State of Arizona or Federal Employees
- True Independent Contractors and Volunteers

Exemption: “Small Business”

- Excluded from the definition of “Employer” for minimum wage purposes
- Defined as a corporation, proprietorship, partnership, joint venture, limited liability company, trust, or association that has less than 500K in gross annual revenue; **and**
- That is exempt from having to pay minimum wage under Section 206(a) of Title 29 of the United States Code, which requires employers whose employees or enterprises are engaged in “commerce” to pay employees the minimum wage
- Few businesses will qualify, as most engage in interstate commerce
- Examples: Barbers and janitors that buy all supplies locally and accept only cash or AZ checks

Tipped Employees

- Employers may pay tipped employees \$3.00 less per hour as a base wage (“Tip Credit), provided that the employee makes at least minimum wage when tips factored in
- Employer must make up any deficiency
- No change from prior treatment of Tip Credits

Prop 206 - Penalties for Violating Minimum Wage Requirements

- Prohibits retaliation
- Rebuttable presumption of retaliation if adverse action taken against employee within 90 days of protected activity
- Penalties Issued by ICA may include:
 - Civil Penalty of at least \$250 for first violation, \$1,000 for each subsequent or willful violation
 - Employee may also bring a suit for back wages and double damages
- Statute of Limitations
 - 2 years
 - 3 years if willful violation

Prop. 206: Paid Sick Time

- Effective July 1, 2017
- Applies to all Employers – NO small business exception
 - Not applicable to State of Arizona and Federal Employees, but does apply to political subdivisions of the state (counties, towns, villages, and special districts such as school districts, water districts, park districts, etc)
- Minimum Formula: *1 hour earned for every 30 hours worked*
 - *Less than 15 employees = Up to at least 24 hours in a year*
 - *15 or more employees = Up to at least 40 hours in a year*
- Employee = count all employees (FT, PT, temporary) if on payroll for any portion of the day for 20 or more calendar weeks in current or prior year

Employer Notice Re: PST

- **July 1, 2017** – Deadline to give notice of the paid sick time laws and what they mean to all employees
- All employees are entitled to earn paid sick time
- All employees are entitled to know the rate at which they will accrue paid sick time
- No retaliation against employees for requesting or using the time
- Employees may file a complaint if earned time is denied or retaliated against
- Arizona Industrial Commission Contact Information
- Poster (same website as above)
- Must include on paystub (or in attachment) the amount of PST available, amount of PST taken YTD, and amount of pay earned as PST.

Accrual of PST

- Accrual Options
 - Employees accrue PST as they work (at least 1 hour of PST for every 30 hours worked / .03334 hours of PST for every hour worked); or
 - Employer Provides Lump Sum of expected PST at beginning of the year (Front Loading)
- When Does Accrual Begin?
 - First day of employment or July 1, 2017, whichever is later
- Accrual Caps
 - Employers with 15 or more employees may cap annual accrual at 40 hours
 - Employers with less than 15 employees may cap annual accrual at 24 hours

What about Exempt Employees?

- Exempt employees under the FLSA are presumed to have worked 40 hours per workweek, unless the employee's normal workweek is less than 40 hours (in which case accrual of earned paid sick time is based on the employee's normal work week)

Accrual of PST (Cont.)

- Prorating Accrual for First Year
 - Depends on definition of “Year”
 - Proposed Rule: The ICA will permit an employer whose selected “year” ends less than 365 days after Proposition 206 PST effective date to prorate employees’ annual earned paid sick time accrual and usage caps based on the number of days remaining in the employer’s “year”
 - No impact on accrual rate

Examples

- **Calendar Year**: Employer A defines “year” as a calendar year (January 1 through December 31). Employer A will have 184 days remaining between the effective date (July 1, 2017) and the end of the employer’s selected “year.” Employer A may prorate the amount of earned paid sick time that its employees may accrue or use during the partial year at the rate of 0.504 (184/365). Assuming Employer A has 15+ employees and the smallest increment of time in the payroll system is one-tenth of an hour employees at Employer A would be entitled to accrue and use at least 20.2 hours of earned paid sick time (0.504 x 40 hours, rounded up to the nearest tenth of an hour) in the 184 days following July 1, 2017.
- **Anniversary or Fiscal Year**: Employer B’s selected year runs from the date of the new hire (June 1, 2017) or a fiscal year that runs from June 1 through May 31. Employer B will have 335 days remaining between the effective date (July 1, 2017) and the end of the employer’s selected year. Employer B may prorate the amount of earned paid sick time that its employees are entitled to accrue and use during the partial year at the rate of 0.918 (335/365). Assuming Employer B has less than 15 employees and the smallest increment of time in the payroll system is one-tenth of an hour, employees at Employer B would be entitled to accrue and use at least 22.5 hours of earned paid sick time (0.918 x 24 hours, rounded up to the nearest tenth of an hour) in the 184 days following July 1, 2017.

How Is Pay Determined?

- Employee must be paid no less than the rate employee would have earned if employee actually worked / “same hourly rate”
 - Hourly: pay the hourly rate
 - Multiple hourly rates: 1) wage would have been paid, if known; 2) weighted avg of hourly rates from prior pay period
 - Salaried: generally, total weekly salary divided by number of hours usually worked (or presume 40)
 - Commission, piece-rate, fee-for-service: 1) prior agreed-upon rate; 2) rate would have been paid, if known; 3) reasonable estimation; 4) weighted avg of hourly rate from previous 90-day period
 - “Same hourly rate” does not include:
 - Additions to Employee’s Base rate for overtime or holiday pay, bonuses or other types of incentive pay; and tips or gifts
 - But does include shift differentials and premiums (hazard pay or night shift)

Use of PST

- How Soon Can PST Be Used?
 - Employees hired on or before July 1, 2017 – as soon as it is accrued
 - Employees hired after July 1, 2017 – employer may require employee to wait 90 calendar days before using accrued PST.
- Use Caps
 - Employers with 15+ employees may cap annual use at 40 hours
 - Employers with less than 15 employees may cap annual use at 24 hours
- Prorating Use Caps During First Year Allowed by ICA

Use of PST (Cont.)

- For an employee's own, or for an employee to care for a family member's:
 - Mental or physical illness, injury, or health condition
 - Need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition
 - Need for preventative medical care
 - Closure of workplace or children's school due to public health emergency
 - Time off relating to domestic or sexual violence, or "abuse or stalking," including the need for medical attention, services from a victim services program, counseling, relocation, or attendance at legal hearings

Employee Notice Re: Use of PST

- Request to use PST may be made “orally, in writing, by electronic means or by any other means acceptable to the employer.”
- For foreseeable use of PST, employee shall make a good faith effort to provide advanced notice
- For unforeseeable circumstances, employees are only required to provide notice pursuant to a written policy provided by Employer
- Employer cannot require Employee to search for and find a replacement employee as a condition of using PST

Documentation to Support PST Use

- Employer can only request documentation for leave lasting 3 days or longer
 - For Sickness: document signed by health care professional indicating PST necessary
 - For Domestic/Sexual Violence, Abuse or Stalking: documentation showing employee or family member is a victim, such as police report, court paperwork, signed statement from victim services organization, signed statement of attorney/clergy/other professional
- Employer **cannot** require the employee to explain the health condition or the details of the domestic violence, sexual violence, abuse, or stalking.
- What can/should employer do if employer thinks employee is “abusing” sick time, but isn’t taking leave longer than 3 days?
 - Can investigate dishonesty with respect to PST use

Carryover

- “Earned Paid Sick Time shall be carried over to the following year, subject to the limitation on usage.” (only with accrual method)
- “Alternatively, in lieu of carryover of PST . . . An employer may pay for unused earned paid sick time at the end of the year and provide the employee with an amount of earned paid sick time that meets or exceeds the requirements of this [law] . . . That is available for the employee’s immediate use at the beginning of the subsequent year.” (only with front loading method)

What does this mean?

- Carryover Options:
 - Employees allowed to roll over any unused PST from one year to the next (Proposed Rules cap annual carryover at 40 hours for employers with 15 employees and 24 hours for employers with less than 15 employees); OEA
 - Pay employees for unused PST at the end of the year AND provide the employee with the expected lump sum of PST available for immediate use at beginning of year

What If Employer Already Has A PTO Policy?

- Employers with policies that meet or exceed the benefits provided under the PST law are “not required to provide additional paid sick time.”
- BUT must be able to use for “same purpose” and “under the same conditions” as PST
- Time off used under PTO policy prior to July 1, 2017 likely does not count to satisfy Prop 206 requirements
- This is not as straightforward as it seems, or as employers may hope...

For example....

- Employer PTO policy applies only to Full-Time employees or all employees except temporary employees
- Employer PTO policy allows use of PTO for any reason, but requires that employees use PTO before taking unpaid time off
- Employer PTO policy allows employees to take up to 80 hours of PTO per year, but limits carry over from one year to next to 15 hours
- Including PST in PTO policy subjects PTO policy to all restrictions and penalties of Proposition 206, including:
 - Rebuttable presumption of retaliation if adverse action occurs with 90 days of using PTO
 - Documentation requirements and restrictions
 - Notice requirements

Revise PTO Policy or Add PST?

If PTO policy does not allow for leave under same conditions as PST law (i.e., due to carry over or applicability requirements), what are an employer's options?

- Modify PTO policy so it complies with all PST law conditions (applies to all employees, minimum accrual, use, and carryover)
- Create a separate PST policy
 - Administration of two separate leave policies could become difficult
- If employer creates separate PST policy to supplement PTO policy, employer should consider whether to reduce PTO time by 40 hours (or the requirement for PST time)
- ICA Guidance: If Employer modifies PTO policy, employee uses all available PTO but later has a medical issue that would qualify for PST use, employers is not required to offer additional PST.
 - Could include warning in PTO policy about this circumstance. “Use at own risk”

Additional Issues

- Not Required to Payout PST at termination
 - If rehired within 9 months, then employer must reinstate PST
- Minimum increments in which PST must be taken?
- Use of PST “recordable” under attendance points system?
 - Can document violations of written call-in procedures
 - Attendance policies should be modified to exclude ADA, FMLA, and PS absences
- Multi-State Issues
 - Employee count should not include employees out of state
 - Only employees who work in AZ are entitled to PST under Prop 206

Questions?

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