



SUMMARY OF THE FAIR WAGES AND HEALTHY FAMILIES ACT – AZ PROP. 206

The Fair Wages and Healthy Families Act (the “Act” or “Prop. 206”) Increases Arizona’s Minimum Wage

Under existing law, Arizona's minimum wage is \$8.05 per hour in 2016. The federal minimum wage is \$7.25. Proposition 206 will increase the minimum wage to:

- \$10 in 2017
- \$10.50 in 2018
- \$11.00 in 2019, and
- \$12 in 2020.

Starting in 2021, the measure will increase the minimum wage with the cost of living.

Prop. 206 Will Mandate Providing “Earned Paid Sick Time” to Employees

- “Earned Paid Sick Time” is defined 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 the hours worked, but in no event less than the minimum wage.”
- Prop. 206 will guarantee:
 - **40 hours** of annual “earned paid sick time” (PST) to employees of employers with **15 or more employees**; or
 - **24 hours** of PST to employers with **fewer than 15 employees**.
 - Employees must earn at least **one hour of PST for each 30 hours of work**.
- For determining the size of the employer, all *full-time, part-time or temporary employees performing work for compensation in a given week are counted*. If the number of employees fluctuates from week-to-week, the employer will be treated as having 15 or more employees if it maintained 15 or more employees on the payroll for some portion of a day in any 20 calendar weeks during the current or preceding year.
- The Act allows for more generous paid time-off policies by employers, if desired.
- Employees must begin accruing earned PST the *later* of when they **commence employment or July 1, 2017**.
- As an alternative to accruing PST, employers may provide all expected earned PST to the employee **up front** at the beginning of the year.
- For purposes of determining the annual allotment of PST, “year” means a regular and consecutive 12-month period as determined by the employer.
- Employers may set a **90-calendar day waiting period** before new employees can begin using PST; otherwise employees may begin using PST as it accrues. **Overtime-exempt employees** are

presumed to work **40 hours/week** for purposes of accruing PST, unless their normal workweek is less than 40 hours, in which case it accrues based on that normal workweek.

- **Unused PST carries over** to the following year, unless the employer elects to pay out accrued PST at the end of the year.
- Accrued but unused PST is **not required to be paid out** at separation from employment.
- If an employee leaves and is rehired with **nine months**, any accrued PST must be **immediately reinstated and available** for use upon rehire.
- Employees are entitled to PST regardless of whether they are transferred to a separate related business entity or location or the company is taken over by a different employer.
- The employer may at its discretion loan or advance PST before it's accrued by an employee.
- If an employer has a paid time off (PTO) policy that (1) meets the minimum accrual or lump sum requirements of the Act, and (2) PTO can be used for the same purpose and under the same conditions of the Act, is not required to provide additional PST.

Requesting and Using PST

- PST Can Be Used For:
 - An employee's or family member's illness, injury or health condition.
 - Diagnosis, care or treatment for the employee or a family member.
 - A closure of the employee's place of business, child's school or place of care, or other public health emergency.
 - Addressing domestic or sexual violence, abuse or stalking.
- "Family member" is defined as:
 - A child regardless of age including a biological, adopted, or foster child, stepchild or legal ward, a child of a domestic partner, or a person to whom the employee stood *in loco parentis* when the individual was a minor.
 - A biological, foster, stepparent or adoptive parent or legal guardian of an employee or an employee's spouse or domestic partner or a person to whom the employee stood *in loco parentis* when the individual was a minor.
 - A spouse or registered domestic partner.
 - A grandparent, grandchild, or sibling of the employee or employee's spouse or domestic partner.
 - Any blood relative or person of such affinity or close association as to be the equivalent of a family member.
- When the need to use PST is foreseeable the employee must make a good faith effort to provide **reasonable advance notice** of the need for PST.
- The employee must make a reasonable effort to schedule the use of the PST in a manner that does not unduly disrupt the operations of the employer.
- PST must be provided upon verbal, written or electronic request of the employee, including the expected duration of the absence, "when possible."
- If the employer has a written policy that contains procedures for the employee to provide notice of the need to take PST when the need is not foreseeable, and the employee has provided an advance copy of the policy to the employee, the employer may deny PST if the employee failed to comply with the policy. If the employer does not have a policy it may not deny PST.

- The employer cannot require the employee to find a replacement worker to cover the time the employee is out on PST.
- PST can be used in the smallest increment the employer's payroll system uses to account for absences or use of other time, but not more than one hour.
- For PST absences of **three or more consecutive work days**, an employer may require a **doctor's note** indicating that the PST is necessary for a medical purpose.
 - For PST used for addressing domestic violence, assault, etc., virtually any document, including an *unsworn* statement from the employee, must be accepted.
 - The employer may not require the employee to explain the nature of the health condition (e.g., diagnosis) or details of the domestic violence, assault, etc.
- Use of PST cannot be used against the employee as a violation under the employer's absence or attendance policy.

Required Notice to Employees

- Employers must give employees **written notice** of their PST rights when employment begins or by **July 1, 2017**, whichever is later. The notice must be in English and Spanish (and other language deemed appropriate by the Industrial Commission of Arizona) and contain the following elements:
 - The fact that employees are entitled to PST and the amount of PST;
 - The terms of its use;
 - Retaliation against employees who request or use it is prohibited;
 - Employees have the right to file a complaint if properly requested PST is denied or the employee is subjected to retaliation for requesting or taking PST; and
 - The contact information for the Industrial Commission of Arizona where questions about PST rights and responsibilities may be answered.
- The Commission will create and make available to employers model notices containing the required information.
- Employee paystubs (or attachments to paychecks) must include the following:
 - The amount of PST available to the employee;
 - The amount of PST taken by the employee year to date; and
 - The amount of pay the employee has received as PST.

Enforcement Provisions

Prop. 206 also:

- **Prohibits discriminating or retaliating** against employees asserting their rights under the Act or assisting other employees in doing so;
- Protects from retaliation employees who mistakenly, but in good faith, alleges violations of the Act.
- Exempts employees who expressly waive the sick leave requirements under collective bargaining agreements; and
- Raises a rebuttable presumption of retaliation if adverse action occurs within 90 days of asserting their PST rights.

- Adds earned PST to the existing requirement to maintain payroll records showing the hours worked for each day worked and the wages paid to all employees for a period of four years. Failure to do so will raise a rebuttable presumption that the employer did not pay the required earned PST.
- Requires employers that fail to pay earned PST to pay the employee the balance of the PST owed, plus interest and liquidated damages equal to twice the amount owed.
- Subjects employers who fail to provide the required notices and paystub information to civil penalties.
- Health information and information related to domestic violence, sexual assault, etc. obtained by the employer in connection with PST requests must be treated as confidential.
- Local laws with more generous PST requirements will prevail.

Unanswered Questions

The Fair Wages and Healthy Families Act leaves a number of questions unanswered about how the law will be interpreted; some which might be answered by Commission guidance or implementing regulations. Unsettled questions include:

Are seasonal employees counted for purposes of PST?

It is clear that seasonal employees fall under the definition of “employees” and would be entitled to PST under the same accrual rules as any other employee. The more difficult question is: Are seasonal employees counted for purposes of determining whether an employer meets the “15 or more employees” threshold?

For determining the size of the employer, all “full-time, part-time or temporary employees” are included. Missing from this description are *seasonal* employees. It is unclear whether this was an oversight by the drafters of the initiative or if seasonal employees, who are not otherwise full-time, part-time or temporary employees, were intentionally omitted. A farmer with few than 15 regular employees, but a large number of seasonal employees, could argue that it is only required to provide 24 hours of PST (instead of 40 hours), because the statute does not count seasonal employees in the calculation of the size of the employer.

Pursuant to the rule of statutory construction known as *Expressio unius* (“inclusion of one thing implies the exclusion of the other”), where certain terms have been explicitly set forth in a statute, that statute may be interpreted not to apply to terms that have been excluded from the statute. For example, one could argue that a statute that prohibits “*any horse, mule, cattle, hog, sheep, or goat*” from running upon lands enclosed by a fence does not apply to *turkeys* because the statute does not explicitly proscribe turkeys.¹ In this case, the common term, “seasonal” employee, was omitted from the list of categories of employees for determining employer size, and the question for the court would be whether the drafters thought through the language, “carefully, considering every possible variation.”² It is simply uncertain what a court would do under the circumstances. Subsequent regulations may answer this question.

¹ *A Guide To Reading, Interpreting And Applying Statutes*, Katharine Clark and Matthew Connolly, Georgetown University Law Center, April 2006; *Tate v. Ogg*, 195 S.E. 496, 499-500 (Va. 1938).

² Clark and Connolly, *supra*, note 28.

Can an employer offer one group of employees (e.g., management) a more generous allotment of PST than another classification of employees?

The language of the initiative does not specifically address this question. However, it does say that nothing in the Act should be interpreted to discourage employers from giving more generous allotments of PST at its discretion. Offering more generous PTO to a readily identifiable classification of workers (e.g., management) is typically permitted; however the employer cannot discriminate against protected classes in offering the benefit (e.g., men get 60 hours of PST, but women get 40 hours.) As long as all eligible employees receive at least the minimum required PST, we do not anticipate this being an issue.

In calculating the rate of pay for PST, how do you calculate the rate of pay for piece-rate workers?

Prop. 206 is unclear on this point. The Act requires employees using PST to be compensated “at the same hourly rate... as the employee normally earns during the hours worked, but in no event less than the minimum wage.” Employees paid on a pure piece-rate basis do not earn a “normal” amount; their pay is variable depending on productivity.

Piece-rate will likely be required to be paid PST at their average rate of pay, determined by dividing gross pay by hours worked in the work week. This will be particularly challenging for employers using the upfront method which requires employers to pay all expected PST at the beginning of the applicable 12-month period. It may be difficult to assess what a piece-rate worker’s normally expected pay at the beginning of the year. This means that if the amount expected and paid upfront turns out to be less than what was truly earned, the employer would likely have to make a subsequent adjustment to true-up the compensation that should have been paid based on the average rate of pay for the year. It would probably be more feasible to use the accrual method for piece-rate employees. Again, as the Act is silent on this point, subsequent guidance or regulations may provide more clarity.

Our Yuma workers work for a short period of time in the Imperial Valley. Do they accrue PST while working in California and do I have to permit use of PST while they are working in California?

The Act says that employees are entitled to accrue and use PST even while working at a different location. Since the employees in this example are working for the same employer at a “different location,” the work in California should probably be treated the same as the work in Arizona. The conservative approach would be to maintain the regular PST accrual and usage policies even while employees are working in California.

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