



OHIO VOTERS APPROVE SMOKING BAN AND AN INCREASE IN MINIMUM WAGE

After a heated election campaign, with both sides devoting considerable resources to promoting their respective positions, Ohio voters approved two new pieces of legislation affecting Ohio employers. Ohio voters approved a new statute providing for an almost complete smoking ban in public places and places of employment. The ban will go into effect December 7, 2006. Ohio voters also approved a constitutional amendment increasing the minimum wage to \$6.85/hour, effective January 1, 2007, with additional annual increases to follow. The new constitutional amendment also imposes new record-keeping requirements for Ohio employers. This *Commentary* reviews the substantive terms of these two pieces of legislation and how they affect business in Ohio.

SMOKING BAN

On November 7, 2006, Ohio voters adopted a new law, Ohio Rev. Code § 3794.01 *et seq.*, which takes effect on December 7, 2006. This new law bans smoking in

public places and places of employment. The statute broadly defines “place of employment” to include any enclosed area, under an employer’s direct or indirect control, which employees use for work or other purposes. Examples include offices; meeting rooms; restrooms; stairways; hallways; warehouses; garages; vehicles; and sales, production, and storage areas.

Employers must enforce the ban in any enclosed area under their control. Not only must employers prohibit smoking, but they cannot allow tobacco smoke to enter any area in which smoking is prohibited, whether it is through entrances, windows, ventilation systems, or other means. In fact, employers are specifically required to enforce the ban in areas immediately adjacent to their places of employment, such as entrances or exits. As a result, employers can no longer allow employees to leave the building and smoke immediately outside the doors.

If an employer chooses to permit smoking in a designated location, it can do so on an outdoor patio.

The outdoor patio must be physically separated from any enclosed area, and any windows or doors between the outdoor patio and the enclosed area must be closed. The outdoor patio may be covered by a roof, so long as it has walls on no more than two sides. If the outdoor patio does not have a roof, it may have walls on all sides. An employer does not have any obligation to provide such a place for its employees to smoke.

Employers must enforce the smoking ban at all times, even when employees are not present. Employers are required to post "No Smoking" signs in their place of employment, including at all entrances. The signs must contain a telephone number for reporting violations. It is unclear whether the required telephone number must be an internal number of the employer or the toll-free number for reporting violations to be established by the Ohio Department of Health. Until the state establishes this toll-free number, we recommend posting an internal number for complaints. Employers also must remove all ashtrays and other smoking receptacles.

For employers with union-represented employees, to the extent that there are no choices to be made on how to comply with the law, this issue is probably not a subject of bargaining. However, to the extent the employer has some options (such as whether to provide an outdoor patio), the employer may be required to bargain about this subject.

Failure to comply with this new law will result in penalties. For a first violation, the Ohio Department of Health will issue a warning letter. If a subsequent violation is found, the Ohio Department of Health will impose a civil fine. The schedule of these fines has not yet been established, but it is supposed to range between \$100 and \$2,300 per violation, with each day being a separate violation.

MINIMUM WAGE

On November 7, 2006, Ohio voters also approved a constitutional amendment increasing the minimum wage to \$6.85/hour, beginning on January 1, 2007. This amendment supersedes the federal minimum wage and applies to all Ohio employees, except employees under age 16, employees of

businesses with annual gross receipts of less than \$250,000, and family-member employees working in family-owned and -operated businesses. There is no exception for employers operating pursuant to collective bargaining agreements. An employer may pay an employee less than the minimum wage (but not less than half) if the employer can demonstrate that the employee receives tips so that his or her combined wages are equal to or greater than the minimum wage for all hours worked.

In addition to the January 2007 increase in the minimum wage, the amendment provides for subsequent annual increases beginning on January 1, 2008. These additional increases will be equal to the rate of inflation (according to the consumer price index or successor index) for the 12-month period prior to September 30 of the preceding year.

Just as significant, but somewhat overlooked during the campaign, are the record-keeping requirements the amendment imposes upon employers, which in some instances exceed an employer's requirements under federal law. At the time an employee is hired, the employer must provide the employee with the employer's name, address, telephone number, and other contact information and must update any changes. The employer also must maintain a record for each employee that includes his or her name, address, occupation, pay rate, and hours worked each day, as well as the amount paid to that employee. The amendment does not instruct whether a particular form is required. The amendment also does not address how an employer is to identify the pay rate for exempt employees. That is, it is unclear whether the record includes only the base salary, or whether it also includes bonuses, stock options, and other additional compensation. It is further unclear whether an employer now needs to maintain a record of daily hours worked by exempt employees. We hope that future regulations will clarify these issues. An employer must maintain these employee records for at least three years.

Perhaps the most disconcerting element of this new amendment is the disclosure requirement. The amendment provides that, upon request and at no charge, these employee records must be given to an employee or a person acting

on the employee's behalf. Employers should be aware that this requirement specifically mandates disclosure, outside of litigation, of employee records concerning pay and hours worked. A "person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons. Thus, it is certainly conceivable that a labor organization could attempt to use this amendment to obtain information about an employer's workforce.

The amendment does not specify a time frame in which an employer must respond to a request. The amendment also fails to specify how an employer can verify that a person is requesting records on an employee's behalf. Accordingly, we recommend that an employer release records only to an employee or to a person with a written request signed by the employee. While the amendment does not specifically delineate the effective date of these record-keeping requirements, it appears to take effect immediately. You should refer any questions to legal counsel.

Employers cannot discriminate or retaliate against any employee who exercises his or her rights under this new law. If a violation is found, possible damages include back wages, liquidated damages (equal to two times the amount of back wages), costs, and reasonable attorney's fees. Additional damages can be awarded if a violation of the anti-retaliation provision is found. These additional damages are determined by the state or a court and cannot be less than \$150 for each day the violation continued. Employers will not be permitted to stay payment pending any appeal.

The amendment also provides several means to address violations of the pay and record-keeping requirements. An employee can file a confidential complaint with the state. Alternatively, an employee (or the attorney general) can proceed directly to court and file a claim, including a class action, seeking monetary and equitable relief. It is unclear whether an action brought under this new amendment would supersede a similar action under Ohio's wage and hour statutes.

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