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Labor & Employment Bulletin

HB 690 IMPLEMENTS MINIMUM WAGE AMENDMENT

H.B. 690 (hereinafter the "Act"), signed by the Governor on January 2, 2007, was enacted by the General Assembly to implement the Ohio Constitutional Amendment (hereinafter the "Amendment") that raised the minimum wage to \$6.85 per hour. The Act provides guidance to employers in two primary areas: exceptions to the requirement to pay minimum wage and record keeping. This bulletin addresses those areas.

Exceptions and Exemptions

The Amendment provides for three exceptions to the minimum wage: (1) employees under the age of 16, (2) employees of businesses with annual gross receipts of \$250,000 or less for the preceding calendar year and (3) persons employed on a casual basis in or about the property of the employer or individual's residence. Employees in the first two categories must be paid a wage rate no less than is required by the Fair Labor Standards Act, currently \$5.15 per hour. In addition, employees age 16 or over who are "tipped" must be paid at least one half of the minimum wage, \$3.43, per hour provided they are guaranteed a total wage of at least \$6.85 per hour. Tipped employees under age 16 may be paid \$2.13 per hour with a guarantee of at least \$5.15 per hour.

In a highly controversial action, the General Assembly interpreted the Amendment to permit further exceptions and included in the legislation language which grants exceptions to the Ohio minimum wage

rate for all of those individuals who are excepted from the definition of employee under 29 USC 203(e) of the FLSA and those employees to whom the minimum wage does not apply under section 213 of the Act. The section 203 exceptions are generally for public employees, persons who volunteer for a public agency or for a food bank from which the volunteer is receiving food, and family members employed by a family owned agriculture business. Among those whom Section 213 exempts are (1) executive, administrative and professional employees, (2) employees of certain seasonal amusement and recreational facilities, camps and non profit or religious educational conference centers, (3) employees in the fishing industry, (4) certain agricultural employees, (5) employees of small local newspapers, (6) employees employed on a casual basis to provide babysitting services and any employee in domestic service to provide companionship services for persons unable to care for themselves and (7) certain skilled workers in the computer and software industry. Anyone believing that they employ individuals included under these exemptions and exceptions should consult counsel.

Record Keeping

The Amendment provides that employers are required to provide to employees at the time of hire the employer's name, address, telephone number and other contact information and to update such information when it

changes. The Act specifies that "other contact information" may include, where applicable, the employer's internet site address, email address or fax number, or the name, address and telephone number of the employer's statutory agent. Other contact information does not include the name, address, telephone number, fax number, internet site address or email address of any employee, shareholder, officer, director, supervisor, manager or other individual employed by or associated with an employer. "When it changes" means within 60 business days after the change occurs. Changed information may be communicated using usual methods of communicating with employees including, but not limited to, listing change on the employer's website, internal computer network or bulletin board where it commonly posts employee communications or by insertion with employee pay checks or pay stubs.

The Amendment further requires that an employer maintain a record of the name, address, occupation, pay rate, hours worked for each day worked and each amount paid an employee, and that such information be provided without charge to the employee or his or her authorized representative. This requirement applies to records created after December 31, 2006. Record keeping requirements under prior minimum wage law are in effect with respect to records created on or before December 31, 2006. "Hours worked for each day worked" means the total

amount of time worked by an employee in whatever increments the employer uses for its payroll purposes during a day worked by the employee. For purposes of this Act, an employer is not required to keep a record of the time of day an employee begins and ends work on any given day. As used in this provision, "day" means a fixed period of 24 consecutive hours during which an employee performs work for an employer.

These records can be maintained in one or more documents, databases or other paper or electronic forms of record keeping. An employer must maintain a record or records from which the employee or person acting on behalf of that employee could reasonably review the information requested by the employee or person. The employer is not required to create or maintain a single record containing only the required information. On and after January 1, 2007, the employer must maintain the records required by the Act for three years from the date the hours were worked by the employee.

Under the Act, "each amount paid an employee" means the total gross wages paid to an employee for each pay period. As used in this provision, "pay period" means the period of time designated by an employer to pay an employee the employee's gross wages in accordance with the employer's payroll practices and existing law concerning semi monthly payment of wages.

Exempt Employees

The employer is not required to keep records of "hours worked for each day worked" for individuals for whom such records are not required by the FLSA and its regulations, by Ohio overtime pay law or rules, or for employees who are exempt under this Act. However, employers are required to keep records of the names, addresses, occupations and rates of pay of exempt employees, not by a new requirement for Ohio employers as this information is generally necessary for proper administration of payroll and wages.

Disclosure of Information

The Amendment requires the disclosure

of information without charge to the employee or his or her authorized representative "acting on behalf of an employee." The Act defines such a representative as any of the following: (1) the certified or legally recognized collective bargaining representative for that employee under the applicable federal law or Ohio's Public Employees' Collective Bargaining Law, (2) the employee's attorney, or (3) the employee's parent, guardian, or legal custodian. The bill further specifies that a person "acting on behalf of an employee" must be specifically authorized by an employee in order to make a request for that employee's own name, address, occupation, pay rate, hours worked for each day worked, and each amount paid to that employee. The employer may require that the employee or his or her representative provide a written request that has been signed by the employee and notarized and that reasonably specifies the particular information being requested. The Act gives the employer up to 30 days after the date the employer receives the request to provide the information unless the parties agree to an alternative time period or the 30 day period would cause a hardship on the employer. In the case of a hardship, the employer must provide the information as soon as practicable.

The Act specifies that an employer who provides the information specified in the Amendment and the Act is immune from any civil liability for injury, death, or loss to person or property that otherwise might be incurred or imposed as a result of providing that information to an employee or person acting on behalf of an employee in response to a request by the employee or person.

Enforcement

An employee or someone acting on his or her behalf or an interested party may file a complaint with the Director of Commerce alleging a violation of the Amendment or the Act. "Interested party" is defined as a party who alleges to be injured by the alleged violation and who has standing to file a complaint under common law principles of standing. In addition, the Director of

Commerce may investigate any employer's compliance without regard to a specific complaint.

The Act further specifies that all records and information related to investigations by the state are confidential and are not a public record subject to the Public Records Law. However, the bill's confidentiality requirement does not prevent the state from releasing to or exchanging with other state and federal wage and hour regulatory authorities information related to investigations.

Civil Actions

The Amendment permits the Attorney General or an employee or person acting on behalf of an employee or all similarly situated employees to bring an action for equitable or monetary relief against an employer in any court of competent jurisdiction, including the common pleas court of an employee's county of residence, for any violation of Section 34a or any law or regulation implementing its provisions. Any such action must be brought within three years of the violation or of when the violation ceased or within one year after notification to the employee of final disposition by the state of a complaint for the same violation, whichever is later. In order for an action to be brought, the employee must first give written consent to become such a party plaintiff and that consent must be filed with the court in which the action is brought. The Act also specifies that any agreement between an employee and employer to work for less than the wage rate specified in the Amendment is no defense to an action under the Act.

Damages, Costs and Fees

The Amendment requires damages to be calculated as an additional two times the amount of the back wages, and in the case of a violation of an anti-retaliation provision, an amount set by the state or court sufficient to compensate the employee and deter future violations, but not less than \$150 for each day that the violation continued. The Act specifies that the \$150 penalty may be imposed only for violations of the anti-retaliation provision in Section 34a. The anti-retaliation provision in Section

34a prohibits an employer from discharging or in any other manner discriminating or retaliating against an employee for exercising any right under that section or any law or regulation implementing its provisions or against any person for providing assistance to an employee or information regarding the same. The Amendment specifies that the employer's attorney fees cannot be charged to the employee except upon a finding that the civil action was frivolous. Parties may agree to submit a dispute to alternative dispute resolution such as arbitration or mediation.

Individuals with Disabilities

The Amendment authorizes the state to issue licenses to employers authorizing payment of a wage rate below that required by that section to individuals with mental or physical disabilities that may otherwise adversely affect their opportunity for employment. This is consistent with prior law.

Posting Requirement

Existing law requires every employer subject to the minimum wage law to keep a summary of the minimum wage law, including rules adopted pursuant to the law, posted in a conspicuous and accessible place in or about the employer's premises. The Act specifies that the Director must make this summary available on the web site of the Department of Commerce and it requires the Director to update the summary as necessary, but not less than annually, in order to reflect changes in the minimum wage rate as required under the Amendment.

Summary

What every employer should do:

1. Pay the minimum wage as required for each category of non exempt employees effective January 1, 2007 and adjust annually.
2. Disclose employer identifying information to newly hired employees and update if changes occur. As a precaution, provide the same information to all current employees.
3. Keep required employee records.

4. Timely disclose employee information as requested pursuant to law. Consider designating specific people responsible for handling disclosure requests.

5. Post minimum wage law summary to be provided by the Director of Commerce.

Additional Information

To learn more about the minimum wage amendment, please contact **Marty Sweterlitsch** at 614.223.9367 or msweterlitsch@bfca.com or one of the members of our Labor and Employment Practice Group.

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