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Nevada voters overwhelmingly approved a constitutional amendment to raise the state minimum wage above the current federal minimum wage. Employers have only until November 28, 2006 to implement a new two-tiered minimum wage.

The Nevada Constitutional Minimum Wage

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Introduction

On November 7, 2006, the voters of six states passed ballot initiatives to raise the state minimum wage above the current federal minimum wage of \$5.15 an hour. These states include Arizona, Colorado, Ohio, Missouri, Montana and Nevada. The Nevada initiative, entitled "Raise the Minimum Wage for Working Nevadans Act," was presented as an amendment to the Nevada Constitution and listed on the ballot as Question 6.

Nevada voters overwhelmingly approved Question 6, by a margin of 69% in favor to 31% opposed. The initiative, previously approved in the election of 2004, was presented to the voters a second time in 2006 in accordance with state law requiring voters to pass constitutional amendments in two consecutive general elections. Question 6 amends the Nevada Constitution to provide a minimum wage that must be paid by all employers employing employees in this state. The Amendment effectively sets the Nevada minimum wage at least \$1 higher than the federal minimum wage. The new minimum wage becomes effective November 28, 2006.

In general, the Nevada minimum wage amendment raises the minimum wage from \$5.15 per hour to \$6.15 per hour. The Amendment, however, is unique in that it permits employers who offer employees a qualified health insurance plan to pay a minimum wage at the former rate of \$5.15 per hour. This two-tiered approach, as well as existing daily overtime requirements, present challenges to proper application of Nevada's new minimum wage laws.

Nevada employers now have a very short

period to examine their current payroll practices and determine what changes need to be implemented to assure compliance with the new minimum wage requirements. To assist in this process, we have provided the following answers to common questions regarding the new minimum wage requirements.

Answers to Common Questions

When does the new minimum wage become effective?

Article 15, section 16 of the Nevada Constitution ("Amendment"), or the minimum wage law, becomes effective November 28, 2006.

Under what circumstances must we pay a minimum wage of \$6.15 per hour?

The Amendment establishes a two-tiered minimum wage system for Nevada. Employers who provide health benefits as defined by the Amendment are required to pay employees a minimum wage of \$5.15 per hour. Employers who do not provide qualified health benefits must pay a minimum wage of at least \$6.15 per hour.

What constitutes health benefits under the Amendment?

To constitute qualifying health benefits, a health plan has to provide coverage for the employee and the employee's dependents. In addition, the cost to the employee of participating in the plan offered by the employer cannot exceed 10% of the employee's gross taxable income.

What if the health plan requires a waiting period before employees are eligible to

receive health insurance?

The Amendment does not specifically address this issue. The Amendment simply defines “offering health benefits” as making health insurance available to the employee and the employee’s dependents at a total cost to the employee for premiums of not more than 10% of his or her gross taxable income.

During informal discussions, the office of the Labor Commissioner has expressed the opinion that employers could pay the minimum wage of \$5.15 an hour during a bona fide waiting period specified in the health plan offered employees. It is important to stress, however, that the Nevada Labor Commissioner has yet to provide formal guidance on this subject. Further, as is noted below, the Amendment creates a private right of action allowing an employee to sue the employer directly in state court for violation of the Amendment. A court will not be bound by the Labor Commissioner’s interpretations of the Nevada Constitution. Consequently, we urge caution in determining which minimum wage to pay during introductory or waiting periods. Our recommendation for the present is to pay a minimum wage of \$6.15 per hour until such time as the employee is eligible to receive health insurance.

What happens if an employee declines coverage?

This issue is also not specifically addressed in the Amendment. However, the Amendment requires only that an employer offer health benefits to the employee. Offering health benefits is defined as making health insurance available to the employee and the employee’s dependents at a total cost to the employee for premiums of not more than 10% of his or her gross taxable income. Consequently, if an employer offers an employee health benefits that meet the coverage and the premium requirements, the employer’s obligations should be met. The Labor Commissioner has informally confirmed the position that the Amendment requires only that the employer offer qualified health coverage and that the employee’s declining such coverage does not obligate the employer to pay the higher minimum wage. Once again, an employer should proceed with caution in determining which minimum wage to pay. The employer

should watch for official guidance and clarification on this issue from the Nevada Labor Commissioner.

What if an employee drops below the required number of working hours to remain eligible for coverage?

Once again, the Amendment does not address this issue. However, if an employee is ineligible to participate in health benefits of his or her employer, arguably the employer has not “offered” health benefits as required by the Amendment. Consequently, the best practice would be to monitor employees’ eligibility for health benefits and to pay the increased minimum wage of \$6.15 an hour for any work week in which the employee is not eligible for coverage.

If an employer offers the employee the choice between two or more health plans, do all of the choices need to meet the 10% test for the employer to be able pay the \$5.15 minimum wage?

Probably not. Although the Amendment does not specifically address this scenario, the fact that one of the options offered to the employee meets the requirement that the employee contribution be 10% or less of his or her gross taxable income appears to be sufficient. The Amendment only requires that the employer offer health benefits to the employee and his or her dependents at a total cost to the employee of 10% or less of his or her gross taxable income. It does not mandate that the particular plan selected by the employee meet the 10% test. The Labor Commissioner has confirmed informally that it is the position of his office that an employer may pay the \$5.15 minimum wage as long as one of the choices offered to the employee meets the 10% test regardless of the actual option selected by the employee. Once again, however, the employer should watch for official guidance and clarification on this issue from the Nevada Labor Commissioner.

What is the period of time an employer must use to determine the gross taxable income for purposes of determining if the employer has offered qualified health benefits?

Offering health benefits is defined in the Amendment as making health benefits available to the employee and the employee’s

dependents at a total cost to the employee of not more than 10% of his or her gross taxable income. The Amendment does not discuss the period of time that must be taken into account in determining if the 10% ceiling has been surpassed. At this point, we have received no formal guidance from the Labor Commissioner on the issue. Because health premium contributions are generally made on a pay period basis, the best practice would appear to be to measure the employee contribution for health benefits against the gross taxable wages for the pay period.

May an employer count tips or gratuities toward payment of the minimum wage?

No. The amendment specifically provides that tips and gratuities received by employees cannot be credited or offset against the minimum wage.

May an employer count commissions and similar compensation toward payment of the minimum wage?

Yes. Nevada law defines wages to include commissions owed the employee. It also defines wages as any amount that an employer agrees to pay an employee for the time the employee has worked, computed in proportion to time. To the extent employee compensation is a commission or is paid for time worked, it may be credited toward payment of the minimum wage.

What effect does the amendment have on daily overtime under Nevada law?

The effect of the Amendment on daily overtime is not certain at this point as the Labor Commissioner and the Attorney General have taken differing positions on the issue.

The Labor Commissioner has publicly taken the position that employees who are offered qualifying health benefits will be entitled to daily overtime if they make \$7.725 or less per hour. He has also stated the employees who are not offered a qualifying plan must be paid overtime on a daily basis if their hourly rate is less than \$9.225 per hour.

That advice, however, conflicts with an official Opinion of the Nevada Attorney General issued March 2, 2005. The Nevada overtime law is found in Nevada Revised Statutes (NRS) section 608.018. Currently, Nevada

imposes an overtime obligation for more than 8 hours work in a day for an employee whose regular wage rate is less than 1 1/2 times the minimum rate prescribed pursuant to NRS section 608.250. The minimum wage set in NRS section 608.250 is the same as the federal minimum wage, currently \$5.15 an hour. In his March 2, 2005 opinion, the Attorney General concluded that the passage of Question 6 would not effect the triggering of or exemption from daily overtime under Nevada law. He concluded that employees who make at least 1 1/2 times the minimum rate set pursuant to NRS section 608.250 (which mirrors the federal minimum) would continue to be exempt from daily overtime in Nevada. This would mean that daily overtime would not be required for employees making at least \$7.73 an hour.

Are certain employees exempt from the new minimum wage law?

The Amendment increases the number of employees who are entitled to be paid minimum wage. The only exemption allowed under the new Amendment is for employees who are under the age of eighteen and are employed by nonprofit organizations for after-school or summer employment or employed as trainees for a period not longer than 90 days.

No other employees qualify for the exemption. This will make it necessary for Nevada employers to track the hours of a much broader number of employees, including salaried employees who are exempt from overtime but not the new minimum wage.

Employers that have employees who were previously exempt from the minimum wage will need to make the necessary payroll adjustments. Domestic service employees, outside salespersons, agricultural employees, taxicab and limousine drivers, and casual baby sitters will no longer be exempt from the minimum wage. In addition, the special minimum wage for severely handicapped persons with certificates issued by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation are not included among the exemptions identified in the Amendment.

Are there automatic increases built into the minimum wage?

Yes. The Amendment provides that the minimum wage will automatically be adjusted by the amount of increases in the federal minimum wage over \$5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase is to be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%.

How can we find out about subsequent increases to the minimum wage?

The Governor or a State agency designated by the Governor will publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. This bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive the bulletin, but lack of notice shall not excuse noncompliance with this section.

Are we required to provide employees notice of increases to the minimum wage?

Yes. Employers must provide written notification of the rate adjustments to each employee and make the necessary payroll adjustments by July 1 following the publication of the bulletin.

May an employee agree to earn less than the minimum wage?

No. The Amendment may not be waived by agreement between an individual employee and employer. The only exception to this rule is in the case of a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in the agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of the Amendment.

The non-waiver provision of the Amendment will also make it more difficult to informally resolve disputes with employee over payment

of the minimum wage. Because an employee cannot waive his or her rights, a settlement agreement and release may not be binding on the employee.

What protections are offered to employees that complain about non-compliance with the Amendment?

The Amendment prohibits employers from discharging, reducing the compensation of or otherwise discriminating against any employee for using any civil remedies to enforce his or her rights under the Amendment. An employee claiming violation of the Amendment may bring an action against his or her employer in the courts of this State to enforce the provisions of the Amendment. An employee successfully prosecuting a suit under the Amendment is entitled to all remedies available under the law or in equity appropriate to remedy any violation, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce his or her rights under the Amendment shall be awarded his or her reasonable attorney's fees and costs.

Conclusion

The Amendment and interpretation of the new minimum wage requirements raise numerous questions, many of which will need to be resolved by the implementation of new regulations or statutes and maybe even resort to the courts.

It is currently anticipated that the Legislative Counsel will issue an opinion regarding the interaction of the Amendment and existing minimum wage and overtime statutes. It is also anticipated that the Labor Commissioner will issue formal guidance and regulations on implementation of the minimum wage. Until that happens, employers in Nevada will need to proceed with caution and carefully consider their course of action in complying with the Amendment.

All employers, however, should take the following steps to ensure compliance with the minimum wage:

1. Conduct an audit of all hourly employees to ascertain any potential issues of non-compliance with the two-tiered minimum wage. Employees who earn less than

\$6.15 an hour should either have their pay raised to \$6.15 an hour, or they must be provided with health insurance that meets the minimum coverage and cost requirements.

2. Review the salaries and hours worked of all salaried employees considered exempt under the Fair Labor Standards Act to determine if any arguably make less than the new minimum wage during any workweek. Remember, salaried exempt employees are not exempt from the new minimum wage.
3. Review the methods of tracking hours of all employees to ascertain that all hours worked are properly accounted for.
4. Implement, where necessary, procedures for tracking the hours worked of salaried employees. Remember, salaried exempt employees are not exempt from the new minimum wage. The employer will be required to demonstrate compliance with minimum wage requirements for even the traditionally exempt employees. Time records is one way to do this.
5. Review your compliance decisions with and responses to the new minimum wage with your labor counsel.

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