

Supplement to Chapter Nine of *Going Solo in Arizona*

Two major changes occurred in Arizona employment law in 2016 which will affect every solo practice with employees. The first change is from the Legislature and deals with the determination of independent contractor status under state law. The second is from the People and more far-reaching as there is both a new minimum wage and, for the first time in Arizona, mandatory paid leave for illness and domestic violence.¹

DIBS: A new way to prove independent contractor status

The Gig Economy is alive and well in Arizona. In response to the Governor's agenda, the 2016 Legislature created a rebuttable presumption of independent contractor status with the Declaration of Independent Business Status (DIBS).² So long as the independent contractor signs and complies with the DIBS, s/he is not an employee. The statute even sets forth a complete template for the DIBS in Section B. The law does not supplant the written contract requirements that establish a rebuttable presumption of independent contractor status in worker compensation in A.R.S. §23-902(D).

Ethical Rule 5.3 requires that attorneys supervise staff. This supervision requirement may be problematic with a true independent contractor (e.g. a contract paralegal) but the Legislature removed doubt with A.R.S. §23-1602, which states in pertinent part,

any supervision or control exercised by an employing unit to comply with any statute, rule or code adopted by the federal government, this state or a political subdivision of this state or any requirement of licensing, professional *or ethical standards* may not be considered for the purposes of determining the independent contractor or employment status of any relationship or individual for the purposes of this title. (emphasis supplied)

Proposition 206: A new challenge for Arizona employers.

By a two-to-one margin, Arizona voters passed Proposition 206 in November 2016 which raised the minimum wage and mandated paid sick leave for all employees. The following chart contains the new minimum wages and effective dates.

¹ It is also the first paid leave law in Arizona besides voting leave.

² A.R.S. §23-1601

- \$10.00 per hour January 1, 2017
- \$10.50 per hour January 1, 2018
- \$11.00 per hour January 1, 2019
- \$12.00 per hour January 1, 2020
- \$12 + Cost of Living Allowance January 1, 2021 + thereafter³

The biggest challenge for solo practice employers is not minimum wage but Earned Paid Sick Time (EPST), as of July 1, 2017, mandated for all employees.⁴ Employers of 14 or fewer employees must give employees at least 24 hours of EPST per year; employers of 15 or more employees must give at least 40 hours of EPST per year. EPST can be accrued at one hour for every 30 hours worked or “frontloaded” at the beginning of each year. EPST can be used for an employee’s own illness; a family member’s illness; a quarantine situation; or domestic or sexual violence. Family is broadly defined and domestic violence leave includes protection from stalking, visits to attorneys and counselors. EPST and attendance policies are now required in every employee handbook because employers cannot refuse EPST unless the requesting employee is violating a written policy that all employees have in their possession. Employers must keep EPST information confidential.

The Industrial Commission of Arizona (ICA) is tasked with enforcement, although there is a private right of action that provides for attorney fees. Civil money penalties and other remedies are the same as those passed by the voters in the 2006 Minimum Wage Initiative.

There are myriad questions that have been raised by both employers and employees about EPST. The ICA has issued two sets of proposed rules and has Frequently Asked Questions on its website.⁵ As of this writing, it appears that no one fully understands all the parameters and consequences of this new law.

³ A.R.S. §§23-362 *et seq.* The City of Flagstaff has greater minimum wage rates and different effective dates.

⁴ A.R.S. §§23-371 *et seq.*

⁵ www.azica.gov

Perhaps the most sobering part of Proposition 206 for employers is that it creates a huge exception to employment at will. If an employer terminates an employee within 90 days of his/her taking EPST, there is a rebuttable presumption of retaliation, which can only be overcome with clear and convincing evidence. Firing an employee for no reason is now incredibly dangerous if that employee has taken EPST within the last three months. Retaliation is broadly defined and statutory penalties start at \$150.00 per day. These penalties are in addition to other remedies a terminated employee may seek.⁶

Just when you thought you were ready to start your own practice.... It is important for the solo practitioner employer to keep informed of new developments in federal and state labor and employment laws. Please do not be afraid to seek assistance in this regard from Human Resources attorneys and other professionals.

⁶ A.R.S. §§23-364 and 23-374.