

Tucson's Minimum Wage Ordinance Takes Effect on April 1, 2022—Don't Be Fooled

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On November 2, 2021, voters in Tucson, Arizona, passed Proposition 206 (officially titled the [Tucson Minimum Wage Act](#) (TMWA)). This new city ordinance increases the minimum wage for virtually all employees working within the city limits to **\$13.00 per hour, effective April 1, 2022**. (Arizona's minimum wage currently is \$12.80 per hour.) But there is more to the Tucson ordinance than just a pay increase for minimum wage workers. The ordinance also creates a host of other employer requirements unrelated to the minimum wage that substantially affects the employer-employee relationship.

After the initial minimum wage bump on April 1, the TMWA increases the Tucson minimum wage rate as follows:

- \$13.50 on January 1, 2023
- \$14.25 on January 1, 2024
- \$15.00 on January 1, 2025

On January 1, 2026, and each January thereafter, the TMWA increases the minimum wage rate based on the rate of inflation. Per the TMWA, the new rate will be determined by the percentage rate of inflation multiplied by the minimum wage on December 31 of the previous year, rounded to the nearest multiple of five cents (\$0.05).

The TMWA also created new requirements and restrictions that affect many more workers employed "within the geographic boundaries of the city" than just those earning a minimum wage. Here is a summary of those key changes.

"Worker for Hire" Minimum Wage

The TMWA adopts the worker-friendly "[ABC test](#)" for determining whether a worker is entitled to

earn at least the TMWA minimum wage. To accomplish this, the ordinance uniquely creates a new category of workers called “workers for hire,” who are entitled to receive the same minimum wage as “employees.” A “worker for hire” is any individual who is not an employee or a “qualified marketplace contractor” and works at least five hours in a workweek, *unless* the hiring entity can show: (1) “the individual is free from the control and direction of the hiring entity in connection with the performance of the work; (2) the individual performs work that is outside the usual course of the hiring entity’s business; and (3) the individual is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed for the hiring entity.”

Pay Card Restrictions

The TMWA prohibits employers from requiring “an employee to receive minimum wage payments using a pay card, reloadable debit card, or similar method that requires the employee to possess a valid Social Security number.” This requirement contradicts the Arizona Wage Act (AWA), which expressly permits employers to pay with a pay card any employees who fail or refuse to accept wages by direct deposit (the AWA does not prohibit pay cards that require valid Social Security numbers).

This provision also undercuts federal and state employment verification requirements, which rely on valid Social Security numbers as one of the bases for lawful employment in Arizona. There is also ambiguity as to whether the pay card restriction applies only to payments of the minimum wage, as opposed to amounts earned above that threshold. Until this issue is resolved by the courts, employers that use pay cards for their Tucson employees may want to carefully analyze their legal exposure before disciplining any employee who cannot fulfill the employer’s pay card requirements.

Expanded “Working Time”

The TMWA expands “compensable work hours” (i.e., “working time”) to include: (i) a “security screening immediately prior to or following a work shift”; (ii) whenever the employer “requires” employees “to be on the employer’s premises” or “at a prescribed work site”; or (iii) when the employer requires employees “to be logged in and actively attentive to an employer-provided computer program, phone application, or similar device.”

Minimum Show-up Pay

Large employers (i.e., employers with twenty-six or more employees on their payrolls, including employees who work outside the city) must pay each Tucson employee “at least three hours of compensation at no less than the minimum wage rate,” if: (1) the “employee is scheduled to work at least three hours; the employee timely reports for duty; the employee is able to work the entire shift; and the employer engages the employee for fewer than three hours”; or (2) the “employee is scheduled to work at least three hours and the employer cancels the employee’s shift with less than twenty-four (24) hours notice.”

Deductions and Tip Credits

Like the Fair Labor Standards Act (FLSA), the TMWA prohibits an employer from deducting from an employee’s wages if doing so would result in the employee receiving less than the minimum wage. And like the Arizona Minimum Wage Act (AMWA) and FLSA, the TMWA allows for a \$3.00 tip credit.

The AMWA specifies that employers may not apply such a credit when it would result in an employee receiving less than the minimum wage for all hours worked within a payroll period. The TMWA makes no mention of such a requirement, but it is likely that employers will have to ensure that such an offset does not bring the employee's wage below that set forth in the TMWA.

The TMWA explicitly permits "tip pool arrangement[s]" (the collecting of tips received by employees into a pool and then redistributed among the tipped employees), but like the FLSA and AMWA, it specifically states that employers, owners, supervisors, and managers may not participate in such arrangements.

Enforcement

The TMWA creates a private right of action for individuals aggrieved by a violation of the ordinance. In addition to permitting claims for nonpayment of the minimum wage, the ordinance prohibits retaliation "against any employee or worker for hire ... for filing a complaint," "asserting any claim or right" under the act, "assisting another employee in doing so, communicating a complaint to an interested party, or for informing another employee about [his or her] rights." Moreover, taking an adverse action against an individual within ninety days of the individual's engaging in such protected activity "raise[s] a rebuttable presumption that such action was retaliation." The private right of action also is available to "interested parties," which "means any nonprofit organization organized in part to protect the rights of workers [e.g., a labor union], or any subset of workers, [that] has at least one member within the city."

Such individual claims may be brought against an employer or "hiring entity," within three years of the cause of action accruing, in Tucson City Court or "any court of competent jurisdiction." However, the legitimacy and scope of such "private" actions remain murky at this time, as the Tucson City Court may be unconstitutionally prohibited from hearing such claims and whether other courts (such as the justice court or superior court) are "competent" to adjudicate a violation of this Tucson ordinance is unclear. Nonetheless, if a private lawsuit to enforce the TMWA is allowed to proceed, and the aggrieved party or interested party prevails, that party "shall be entitled" to recover reasonable attorneys' fees and costs, as well as appropriate legal or equitable relief, including back pay and "an additional equal amount in liquidated damages" (i.e., a doubling of the amount of unpaid minimum wages).

The act requires that the city establish a department of labor standards, whose head will be the director of labor standards. Last week, the Tucson City Council authorized establishing that office, to be called the Labor Standards Unit, within the city's Business Services Department. The enumerated purposes of that unit, include, but are not limited to: "receiving complaints filed by aggrieved individuals and interested parties, initiating investigations of employers and hiring entities" (within forty-five days of receipt of a complaint), "initiating enforcement actions, periodically conducting studies of low-wage workers in the city[,] ... educating employers of their obligations under [the act], and educating employees of their rights under [the act]."

The ordinance also grants the city a civil enforcement provision, which empowers it to order any employer to "cease and desist" from engaging in violations of the ordinance, to impose a civil penalty of up to \$100 "to be paid to the city for each employee whose rights under [the act] were violated for each day that the violation occurred," and to order the payment of back pay and liquidated damages. Finally, the ordinance expressly states that an "aggrieved party" is not required to "exhaust the municipal remedies stated." Presumably, this is intended to permit "aggrieved individuals" to avoid having to file complaints with the city as a condition of pursuing their private claims.

Key Takeaways

The TMWA does much more than simply raise the minimum wage in Tucson. It creates a number of additional requirements for employers, as well as new mechanisms of enforcement. The constitutionality of several of these new provisions is in doubt, and the methods of implementation remain to be tested. Other portions are unclear and seemingly contradict either existing Arizona law or other provisions within the TMWA itself.

Employers may want to be mindful of any active practices in effect (or ones they intend to implement) that may violate the provisions of the TMWA.

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