

2018 Arizona Legislative Session: What's New for Arizona Employers?

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Arizona's fifty-third legislature ended in early May of 2018 while over 50,000 demonstrators protested for increased education funding at the state capitol. While the #RedForEd movement essentially ground all remaining legislative action for the 2018 session to a halt, the legislature did manage to pass 369 bills this session before its attention turned entirely to education funding. However, only four bills that substantively impact employers made it to the governor's desk and either received his signature or were allowed to become effective after the veto deadline passed. Among those that did not make the cut was a provocative bill to place a referendum before Arizona voters to freeze the minimum wage at \$10.50 per hour and rescind the paid sick leave law that [voters passed in 2016](#).

Limited Liability for Hiring Ex-Offenders

While so-called "ban-the-box" legislation thus far has failed to gain traction in Arizona, the legislature took a modest step towards removing one of the reasons employers cite for not hiring (or even considering) persons with criminal records: fear of negligent hiring claims by those alleging harm by the actions of ex-offenders.

[House Bill \(HB\) 2311](#) first creates a blanket limitation on liability for employers that hire an employee or contract with an independent contractor "who has previously been convicted of a criminal offense." However, "criminal offense" is specifically defined *not* to include "violent offenses and sexual offenses." So, presumably, the new law provides no protection from liability if the ex-offender's criminal offense involved a crime of violence, such as assault or battery, or a sexual offense that landed the worker on Arizona's sex offender registry.

Next, the law creates an additional layer of protection in negligent hiring actions by prohibiting claimants from introducing "the fact that the employee or independent contractor was previously convicted of a criminal offense before the employee's employment or independent contractor's contractual obligation began with the employer" into evidence. However, once again, presumably if the criminal offense involved a violent or sexual offense, this rule would not apply.

The new law also addresses one of negligent hiring's frequent companion claims—failure to provide adequate supervision. So-called negligent supervision claims are expressly preserved under the new

law, and an employee's or independent contractor's past criminal record may be introduced into evidence in support of such claims. However, HB 2311 directs that such evidence be excluded unless the employer "knew of the conviction or was grossly negligent in not knowing of the conviction *and* the conviction was *directly* related to the nature of the employee's or independent contractor's work *and* the conduct that gave rise to the alleged injury that is the basis of the cause of action." [Emphasis added.] So, by way of example, a delivery driver involved in a vehicular crash while engaged in his employment duties presumably would have his past driving under the influence (DUI) conviction be subject to admission into evidence in a case filed against his employer if the employee was under the influence when the crash occurred. However, if that same employee's duties did not typically involve driver duties on behalf of his employer, then the DUI would not be admissible against the employer according to the new law.

The new law includes further exceptions from the protections of the law in the following limited scenarios:

- Claims for misuse of monies or property if at the time the individual was hired he or she had previously been convicted of an offense that included fraud or the misuse of monies or property as an element of the offense *and* it was foreseeable that the position for which the individual was hired would involve discharging a fiduciary responsibility in the management of monies or property
- Claims for misappropriation of monies if the individual was hired as an attorney and at the time of hire he or she had previously been convicted of an offense that included fraud or the misuse of monies or property as an element of the offense (Presumably, this would be an exceedingly rare circumstance since an attorney with a previous criminal conviction involving fraud or misappropriation of money likely would be disbarred.)

HB 2311, which is codified at Arizona Revised Statutes (A.R.S.) Section 12-558.03, will become effective on August 3, 2018.

Injunctions Against Harassment

The legislature tinkered with the language for injunctions against harassment (for both individuals and employers). The most noteworthy change made by [HB 2249](#) is that within 24 hours after a party obtaining an injunction files an affidavit of service with the court issuing the injunction, the court must register a copy of the injunction with the [National Crime Information Center](#) (NCIC). Also, the Arizona Supreme Court must "maintain a central repository for injunctions so that the existence and validity of the injunctions can be easily verified." It is noteworthy that HB 2249 (which is codified at A.R.S. Sections 12-1809 and 12-1810) will not become effective until December 31, 2019, more than a year and a half from now.

Unemployment Compensation

[Senate Bill 1398](#) made a number of changes to Arizona's unemployment compensation laws.

"Suitable Work" Defined (A.R.S. Section 23-776)

This controversial new provision discontinues unemployment benefits for individuals who do not accept an offer of employment after the first 4 weeks of receiving unemployment compensation benefits, provided the job pays at least 120 percent of the individual's weekly unemployment benefit. Exceptions still apply if the job is one that fills a striking worker's position, is "substantially less

favorable to the individual than those prevailing for similar work in the locality,” or requires the employee to join a union or refrain from joining a union.

Return-to-Work Program (A.R.S. Section 23-771.02)

State law currently allows for the continuation of unemployment benefits while a recipient of such benefits is in “training with the approval of the [Arizona Department of Economic Security (DES)].” This new statute establishes a framework for providing “a structured, supervised training opportunity to individuals [receiving unemployment compensation] through employers that volunteer to participate in the program.” Participants in such training will be accorded workers’ compensation coverage from DES in the event they suffer any injuries during training. While individual participation in a return-to-work training program is voluntary, participation is subject to a number of requirements and restrictions.

An individual who participates in the program must:

- be currently receiving or be eligible to receive unemployment compensation benefits;
- be willing to develop new skills or work experience;
- continue to seek work unless otherwise exempted by DES;
- certify to DES that he or she understands that participating in the program does not guarantee him or her any future employment or expectation of being hired by the employer; and
- participate in no less than 20 hours but no more than 32 hours per week of training, for a period of no more than 6 weeks.

Participating employers must:

- have employees in the state of Arizona;
- have at least one full-time employment position available in Arizona;
- “provide training opportunities that benefit an individual who participates in the program and notify [DES] when the employer offers an individual a training opportunity under the program”;
- “certify to [DES] that the employer will not pay any wages to an individual who participates in the program during the individual's participation in the program”;
- “sign a written agreement with each individual who participates in the program that sets forth the terms of the training”; and
- “agree that the employer’s current employees will not be displaced or lose any promotion rights due to an individual's participation in the program.”

While DES is expected to prepare regulations that further explain the terms and benefits for participating in such training programs, presumably one benefit is to allow individuals to continue to receive unemployment benefits while receiving training for a potential new position with the participating employer. The governor neither signed nor vetoed this new law by the veto deadline, which means this law automatically will become effective on August 3, 2018. Also, the training program will end on July 1, 2028 unless legislatively renewed.

Workers’ Compensation for Working Members of LLCs and Working Shareholders of Corporations

[HB 2047](#) expands mandatory workers’ compensation coverage to all working members of limited liability companies (LLCs) with less than 50 percent membership interest in the LLC, as well as to working shareholders of corporations who own less than 50 percent of the beneficial interest in the

corporation. If the individual's membership interest or beneficial interest is 50 percent or more, then workers' compensation coverage may be extended "on the written acceptance, by endorsement, of an application for coverage" by the working member or working shareholder "at the discretion of the insurance carrier" for the LLC or corporation. This section (codified at A.R.S. Section 23-901) will become effective on July 1, 2019.

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