

Employment Law Update

Arizona Prop 206

(Minimum Wage & Paid Sick Time)



May 23, 2017

Presented by
Joseph T. Clees (Phoenix)

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Joe Clees is a shareholder in the firm's Phoenix office and a member of the firm's Board of Directors. Mr. Clees represents employers throughout the United States in employment litigation and labor relations. He also counsels clients on a wide array of state, federal and tribal compliance laws. Joe has been singled out by *Chambers USA America's Leading Lawyers* as one of the top labor and employment lawyers in the country for many years and as a *Chambers USA Top Leader in his Field*. He has been applauded for his "integrity and common sense" as well as his "pragmatic style." Joe was honored as one of the "100 Most Powerful Employment Lawyers in America" by *HR Executive* magazine each year from 2009 to 2016. He was named an "Eminent Practitioner" by *Chambers* in 2014, 2015 and 2016 and he is ranked in the "Number 1" tier among Arizona employment lawyers by *Chambers*, and has been selected as one of *Arizona's Finest Lawyers*. In addition, Joe has been named a "Top 100" Lawyer by *Arizona Business Magazine* from 2015 to 2017.

In 2014, Joe was named a Fellow in The College of Labor and Employment Lawyers. He also has been recognized for several years as one of the *Best Lawyers in America* and honored as one of the *Best Lawyers in the United States*. Joe has been singled out as one of the "*The Legal 500*" nationally and the *Arizona Business Magazine* has recognized him as an "Arizona Business Leader" and one of the "Top Attorneys of Arizona." He also has been designated as a "Best of the Bar" by the *Phoenix Business Journal* and has been rated as a "Southwest *Super Lawyer*" for many years. He has been recognized as one of the "Top 50 Southwest *Super Lawyers*" from 2010 to 2015.

In 2016, Joe was honored as the "Phoenix Lawyer of the Year" for Labor Law-Management by *Best Lawyers* and in 2013 was "Phoenix Lawyer of the Year" for Employment Law-Management. He has served as the Chair of the Executive Committee of the State Bar of Arizona's Employment and Labor Law Section, a member of the Board of Directors of the Arizona Affirmative Action Association and Board of Directors of the Metro Phoenix Human Resources Association (SHRM). He is employment law counsel to many industry and trade groups and he regularly speaks on labor and employment law topics, both regionally and nationally.

Admitted to Practice

- Arizona
- Arizona Court of Appeals
- Arizona Supreme Court
- U.S. District Court, District of Arizona
- U.S. Court of Appeals, Ninth Circuit
- U.S. Supreme Court
- Apache Tribal Court

Education

- J.D., Villanova University, 1984
- B.A., *magna cum laude*, Dickinson College, 1981



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Arizona Voters Approve Proposition 206
a/k/a Minimum Wage and Paid Time Off
Initiative a/k/a Healthy Working Families

- Raises the minimum wage (effective January 1, 2017)
- Provides for paid sick time (effective July 1, 2017)
- Approved by 58.33%

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Chamber of Commerce Lawsuit

- *Riddle, et al. v. State of Arizona, et al.*
 - Challenged constitutionality of Prop. 206
 - Arizona Supreme Court dismissed the lawsuit, finding no constitutional basis to overturn Prop. 206.
 - Still waiting for the Court's “full opinion.”

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Which Employees Are Covered?

- Most private employers, as well as all municipalities and school districts
- Broad definition
 - Any employee employed by an employer except:
 - Employed by parent of sibling
 - Casual babysitter
- Applies to temporary and part-time employees
- Eligibility begins on first day of employment, but no duty to allow use of earned PST until 90 days after hire.
 - Employees on payroll before July 1st begin to earn and use PST on July 1st

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Which Employers Are Covered?

- Inapplicable to state and federal workers
- No “small business” exemption for Paid Sick Time law
 - But may request exemption from notice and recordkeeping requirements if “unreasonably burdened”

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Paid Sick Time – General Principles

Paid Sick Time should be viewed as a guarantee of *both* time off and compensation for such time off.

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How Much Paid Sick Time Must An Employer Allow To Accrue Annually?

- Rate of no less than one hour for every 30 hours worked
- Fewer than 15 employees – at least 24 hours per year
- 15 or more employees – at least 40 hours per year
- These are only statutory minimums. Employers may set a higher limit.
- ICA says mandatory “carryover” is limited to 40 hours.

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Paid Sick Time – General Principles

- PST must be paid at no less than the rate the employee would have earned had the employee actually worked the PST (including benefit accrual).
 - What about exempt salaried employees?
 - What about commissioned employees?
 - What if pay rate varies (based on task performed or otherwise)?

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How Does Paid Sick Time Accrue?

- Employers may “front-load” PST before it’s earned.
 - Not clear how employer may recoup used PST if employee leaves before PST is “earned.”
- Existing PTO Policies: Employers with policies that meet or exceed the benefits provided under the PST law are “not required to provide additional paid sick time.”
 - BUT must be able to use for “same purpose” and “under the same conditions” as PST

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How Much Paid Sick Time May An Employee Use Annually?

- Fewer than 15 employees – at least 24 hours per year
- 15 or more employees – at least 40 hours per year
- Like accruals, these are only statutory minimums. Employers may set a higher limit.

What's a “Year”?

A year is “a regular and consecutive 12-month period as determined by the employer.” A.R.S. 23-371(L)

- Calendar year
- Fiscal year, or
- Employee's anniversary year.

Given the mid-year start in 2017, employers may still designate a 12 month “year” at any time and could restart their year on January 1, 2018.

Carryover

- Statute says: “[e]arned paid sick time **shall** be carried over to the following year, **subject to the limitations on usage** in subsections A and B.”
- ICA proposed regs. say: “An employee of an employer with 15 or more employees **may** carry over to the following year a maximum of 40 hours of unused earned paid sick time. Alternatively, in lieu of carry over, an employer may pay an employee for unused earned paid sick time pursuant to A.R.S. § 23-372(D)(4). **Carry over shall not affect accrual or use rights under the Act.**

Termination, Reinstatement, Successors

- **No earned PST needs to be paid upon termination, layoff, or retirement**
- All earned PST is reinstated if rehired within 9 months.
- If an employer “succeeds or takes the place of an existing employer,” the PST accrued by employees of the original employer who “remain employed” by the successor employer remains valid and exercisable.
- Successor employers should consider treating accrued PST as an assumed liability irrespective of how the predecessor employer’s employees become employed by the successor.

When Can PST Be Used?

- For employees or for an employee to care for a “family member,” which includes:
 - **Children** of any age (including biological, adopted, or foster children, legal wards, children of a domestic partner, or children for whom the employee stands *in loco parentis*);
 - **Parents** (including biological, foster, stepparents or adoptive parents or legal guardians of the employee or the employee’s spouse or domestic partner, including persons who stood *in loco parentis* when the employee or employee’s spouse or domestic partner was a minor child);
 - **Spouses or domestic partners**;
 - **Grandparents, grandchildren, or siblings** (including foster, adoptive, or step relationships) of the employee or the employee’s spouse or domestic partner;
 - **Any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.**

When Can PST Be Used?

- For employees themselves (or for an employee to care for a family member’s):
 - Mental or physical illness, injury, or health condition
 - Need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition
 - Need for preventative medical care
- Closure of workplace or school due to public health emergency
- Time off relating to domestic or sexual violence, or “abuse or stalking,” including the need for medical attention, services from a victim services program, counseling, relocation, or attendance at legal hearings

How Much PST May Be Used at a Time?

- Employees may use accrued PST in the smallest increments that the employer's payroll system uses to account for absences “or use of other time.”
- Example: “if an employer's payroll system accounts for absences or use of other time in 6 minute increments (a tenth of an hour), an employee may use earned paid sick time in this same increment.” (AZ Lab Dept. FAQ)
- However, ICA Director indicated that employers may limit PST to one-hour minimum increments.

Notices – Employers

- By July 1, 2017, must post notices that state:
 - Entitlement to earn PST
 - How much PST employees entitled to earn
 - Guaranteed terms of PST use
 - Prohibition against retaliation and right to file a complaint (with ICA), including ICA's contact information.
- Notice must be in English, Spanish, and any other language the ICA requires.
- ICA has issued “model” notices in both English and Spanish.

Notices – Paycheck Stub Notification

Three Parts

1. Amount of accrued PST available to employee
2. Amount of PST employee has used during that benefit year
3. Total amount of pay received as earned PST (also part of recordkeeping obligation)

Notices – Employees

- **“Foreseeable Leave”**: Must make “good faith effort” to give employer advance notice and schedule leave in a manner “not to unduly disrupt the employer’s operations”
- Request “may be made orally, in writing, by electronic means or by any other means acceptable to the employer.”
- **“Unforeseeable Leave”**: Employees may be required to give notice of “unforeseeable” need for PST
 - However, this requirement must itself be disseminated in a notice to the affected employees in advance of the leave
- Request shall include the expected duration of the absence

Notices – Employees (cont.)

- **Verification**:
 - Documentation only required for leaves of 3 or more days
 - **Medical-mental health care**: documentation signed by a health care professional indicating earned paid sick time is necessary shall be considered reasonable documentation for purposes of this section
 - **Other covered reasons**: a police report, court order, signed statement from a domestic violence services organization, signed statement from an attorney, clergy member, doctor, or even the employee’s own written statement are all considered reasonable verifying documentation

Confidentiality and Nondisclosure

- Employers prohibited from requiring employees to disclose details of the nature of the employee’s (or family member’s) health condition or details relating to domestic violence, sexual violence, abuse, or stalking, as a condition of providing earned PST.
- If employer possesses such health or other PST qualifying information, they must treat it as confidential and may only disclose it to the affected employee or with the affected employee’s permission.

Collective Bargaining Agreements

- Does not apply to employees covered by a collective bargaining agreement in effect on July 1, 2017, until that CBA expires
- CBAs entered into after July 1, 2017 can waive the PST law’s requirements so long as the waiver is done by “clear and unambiguous” language in the CBA.

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Nondiscrimination and Non-retaliation Provisions and Enforcement

- Protection from discrimination and retaliation – good faith allegations of violations protected
- May file complaint with ICA
- Lawsuits by Attorney General and other enforcement officers
- Private lawsuits

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Sanctions and Penalties

- Presumption that within 90 days of an employee's engaging in any protected activity, any adverse action taken against that person is retaliatory. Protected activity includes:
 - “Asserting any claim or right under this article”
 - Taking or requesting to use PST, or denying same
 - Assisting others
 - ICA or court complaints, informing anyone about a violation, and participating in an investigation or proceeding
- Presumption rebutted only by “clear and convincing evidence” that adverse action taken for permissible reasons.

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Sanctions and Penalties

- Civil penalties – at least \$250 for first violation and at least \$1,000 for each subsequent or willful violation
- Monitoring and inspection
- Balance of PST owed, plus interest and liquidated damages
- \$150/day for retaliation
- Attorneys’ fees and costs
- “[N]o verbal or written agreement or employment contract may waive any rights under [the PST law].”

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