CHAPTER 18: EMPLOYMENT LAW

ARIZONA EMPLOYMENT PROTECTION ACT (AEPA) (A.R.S. § 23-1501)

Employment in Arizona is presumed to be at-will. This means that an employer may discharge an employee for any reason or for no reason at all, with or without notice. An employer, however, may not discharge an employee for a reason that violates Arizona's public policy or Arizona's employment laws. The public policy of the state is codified in the Arizona Employment Protection Act, A.R.S. § 23-1501.

HISTORY OF THE AEPA

Prior to the enactment of the AEPA, a number of court decisions recognized exceptions to the at-will rule – when termination contravened public policy or where there were implied promises of job security. In ***Wagenseller v. Scottsdale Mem'l Hosp.***, 147 Ariz. 370, 710 P.2d 1025 (1985), *superseded in part* by A.R.S. § 23-1501, the Arizona Supreme Court held that an employer may be liable for civil damages if the employer discharges an employee for a reason that contravenes public policy. In so holding, the court reasoned that it had independent authority to determine what actions of the employer violated the public policy of the state.

In 1996, in response to the *Wagenseller* line of cases, the Legislature enacted the AEPA. The AEPA sharply circumscribed common law claims for wrongful termination by, among other things:

- Abolishing implied oral employment contracts altering at-will employment, and making only express written contracts actionable as an exception to the at-will doctrine;
- Limiting the instances in which a wrongful discharge claim could be brought; and
- Preventing employees from bringing common law claims for wrongful termination when the statute alleged to be violated provided a remedy for its violation.

WHEN MAY AN EMPLOYER BE LIABLE UNDER THE AEPA?

To state a claim for wrongful termination under the AEPA, an employee must demonstrate one of three theories of liability:

1. Termination in breach of a qualifying employment contract;
2. Termination in violation of a specific statute; or
3. Retaliatory termination.

TERMINATION IN BREACH OF A QUALIFYING WRITTEN CONTRACT

When Does a Written Contract Qualify?

To be actionable under the AEPA, a written contract must:

1. State that the employment relationship has a specified duration, or otherwise expressly restrict the right of either party to terminate the employment relationship; and
2. Be signed by both parties, or the party to be charged, or clearly set forth an express intent for it to be an employment contract.

A.R.S. § 23-1501(2). Partial performance of employment is not sufficient to eliminate the requirements of § 23-1501(2). In addition, the AEPA's contract provisions do not affect the rights of public employees under the Arizona Constitution and state and local laws or the rights of employees and employers as defined by a collective bargaining agreement.

How the Courts Determine Whether a Document Qualifies

In determining whether an employment contract or other document satisfies the requirements of A.R.S. § 23-1501(2), the courts apply common law principles of contract interpretation and give effect to the parties' intent. ***Johnson v. Hispanic Broadcasters of Tucson, Inc.***, 196 Ariz. 597, 599, 2 P.3d 687, 689 (Ct. App. 2000). In *Johnson*, the court of appeals stated that if the employment agreement is reasonably susceptible to the interpretation that it guaranteed the employee employment for a specific length of time, thus restricting the employer from terminating him, extrinsic evidence is admissible to interpret the agreement's terms, but not to supply a required element. *Id*.

Although the AEPA requires contracts to be in writing to be actionable, contract terms limiting the right of the employer or employee to terminate the employment relationship can be either express or implied. ***Roberson v. Wal-Mart Stores***, 202 Ariz. 286, 292, 44 P.3d 164, 170 (Ct. App. 2002). Implied-in-fact terms may be found in an employer's policy statements regarding job security or employee disciplinary procedures, such as those contained in personnel manuals or memoranda. *Id.* Not all employer policy statements, however, create contractual promises. An implied-in-fact contract term is formed when a reasonable person could conclude that both parties intended to limit the employer's or the employee's right to terminate the employment relationship at-will. ***Demasse v. ITT Corp.***, 194 Ariz. 500, 505, 984 P.2d 1138, 1143 (1999).

How to Avoid a Finding of an Implied-in-Fact Contract Term That Limits At-Will Employment

Including disclaimers in personnel manuals that clearly and conspicuously tell employees that the manual is not part of the employment contract, and that their jobs are terminable at-will, helps insulate an employer from liability. *See, e.g.*, ***Hart v. Seven Resorts, Inc***., 190 Ariz. 272, 278, 947 P.2d 846, 852 (Ct. App. 1997) (holding that the employer prevented the personnel manual from converting an at-will relationship into one for a definite term by including a disclaimer in "plain and common language"); ***Duncan v. St. Joseph's Hosp. & Med. Ctr.***, 183 Ariz. 349, 354, 903 P.2d 1107, 1112 (Ct. App. 1995).

Damages for Breach of Contract Under the AEPA

A.R.S. § 23-1501(A)(3)(a) limits the damages a terminated employee can recover under the AEPA for breach of contract. An employee who prevails on a breach of contract claim under the AEPA is entitled to recover the value of all sums that would have been due from the time of the breach through the end of the agreement, less any sums that reasonably could have been earned from substitute employment before the end of the agreement. Tort damages, on the other hand, including lost earnings, diminution in future earning capacity, lost insurance coverage, mental anguish/emotional distress, reputational harm, punitive damages, etc., are not recoverable for termination in breach of an employment contract, though, as noted below, tort damages may be available for retaliatory discharge or other employment-related claims.

Mitigation of Damages

A terminated employee is required to make reasonable efforts to reduce damages by trying to find substantially similar employment. However, a terminated employee need not accept employment that is not substantially similar to his or her prior employment, nor does the terminated employee have a responsibility to accept employment that imposes an undue burden or hardship.

Statute of Limitations

Under A.R.S. § 12-541(3), claims for damages for breach of an employment contract must be brought within one year after the cause of action accrues.

TERMINATION IN VIOLATION OF AN ARIZONA STATUTE

In the absence of an employment contract, an employee may have a viable wrongful termination claim if the employer terminates the employment relationship in violation of a specific statute or the public policy prescribed in or arising out of a statute.

A.R.S. § 23-1501(3)(b) sets forth a non-exhaustive list of Arizona statutes that restrict an employer's ability to terminate an employee:

- Arizona Civil Rights Act (ACRA) – A.R.S. § 41-1401 *et seq*.
- Occupational Safety and Health Act (OSHA) – A.R.S. § 23-401 *et seq*.
- Statutes governing hours of employment – A.R.S. § 23-201 *et seq*.
- Agricultural Employment Relations Act – A.R.S. § 23-1381 *et seq*.
- Statutes governing disclosure of information by public employees – A.R.S. § 38-531 *et seq*.

Damages for Termination in Violation of Statute

A.R.S. § 23-1501(A)(3)(b) authorizes tort claims only in the limited circumstances where an employer's conduct violates a statute that provides no statutory remedy to the terminated employee. If the statute provides a remedy to the employee for a violation of the statute, the statutory remedies are the employee's exclusive remedies.

What if the Statute's Remedies are Unavailable to a Particular Employee/Claimant?

In addition to limiting tort claims to instances where a statute provides no remedy for its violation, A.R.S. § 23-1501(A)(3)(b) provides that "[a]ll definitions and restrictions contained in the statute also apply to any civil action based on a violation of the public policy arising out of the statute." Thus, in ***Taylor v. Graham County Chamber of Commerce***, 201 Ariz. 184, 189, 33 P.3d 518, 523 (Ct. App. 2001), the terminated employee could not bring an AEPA claim for wrongful termination based on a violation of the Arizona Civil Rights Act (ACRA) because ACRA provides an express remedy for its violation, despite the fact that ACRA's remedy was unavailable to the particular employee/claimant due to the employer's size.

No Claim for Wrongful Failure-to-Hire or Failure-to-Promote

Arizona courts have rejected tort actions for wrongful failure-to-hire, *see* ***Burris v. City of Phoenix***, 179 Ariz. 35, 875 P.2d 1340 (Ct. App. 1993), and wrongful failure-to-promote, *see* ***Mintz v. Bell Atl. Sys. Leasing Intern., Inc***., 183 Ariz. 550, 553, 905 P.2d 559, 562 (Ct. App. 1995). Thus, the only tort action available in Arizona is for wrongful discharge.

Procedural Requirements

An employee is required to exhaust all administrative procedures provided by the statute before bringing a tort claim under § 23-1501(A)(3)(b).

Statute of Limitations

Under A.R.S. § 12-541(4), a claim for damages for wrongful termination must be brought within one year after the cause of action accrues.

RETALIATORY TERMINATION

Finally, a wrongful termination claim might arise if an employer discharges or otherwise penalizes an employee in retaliation for the employee's exercise of certain legal rights or reporting certain legal violations.

A.R.S. § 23-1501(A)(3)(c)(i)-(x) prohibits employers from terminating the employment relationship of an employee in retaliation for any of the following:

- The employee's refusal to commit an act or omission that would violate a statute or the Arizona Constitution;
- The disclosure by the employee in a reasonable manner that the employee has information or a reasonable belief that the employer, or an employee of the employer, has violated, is violating or will violate the Constitution of Arizona or the statutes of this state to either the employer or a representative of the employer who the employee reasonably believes is in a managerial or supervisory position and has the authority to

investigate the information provided by the employee and to take action to prevent further violations of the Constitution of Arizona or statutes of this state or an employee of a public body or political subdivision of this state or any agency of a public body or political subdivision;

- The exercise of rights under the workers' compensation statutes, A.R.S. § 23-901 *et seq*.;
- Service on a jury as protected by § 21-236;
- The exercise of voting rights as protected by § 16-1012;
- The exercise of free choice with respect to non-membership in a labor organization as protected by § 23-1302;
- Service in the national guard or armed forces as protected by §§ 26-167 and 26-168;
- The exercise of the right to be free from extortion as a condition of employment as protected by § 23-202;
- The exercise of the right to be free from coercion to purchase goods or supplies from any particular person as a condition of employment as protected by § 23-203; or
- The exercise of a victim's right to leave work as provided in §§ 8-420 and 13-4439.

Damages for Retaliatory Discharge

If the referenced statute provides a remedy to an employee for its violation, those are the employee's exclusive remedies. If the statute does not provide a remedy to an employee for its violation, then A.R.S. § 23-1501(A)(3)(c) allows an employee to recover tort damages.

Typical Method of Proof

Prima Facie Showing

To recover for retaliatory discharge, the plaintiff-employee must first establish a prima facie case by showing that: 1) he engaged in a protected activity; 2) he suffered an adverse employment decision; and 3) there was a causal link between the protected activity and the adverse employment decision. ***Villiarimo v. Aloha Island Air, Inc***., 281 F.3d 1054, 1064 (9th Cir. 2002). With respect to causation, a plaintiff-employee must show by a preponderance of the evidence that engaging in the protected activity was one of the reasons for his firing, and that but for such activity he would not have been fired. *Id.* In some cases, causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity. *Id*. But timing alone will not show causation in all cases; rather, "in order to support an inference of retaliatory motive, the termination must have occurred fairly soon after the employee's protected expression." *Id*.

McDonnell Douglas Burden-Shifting

Once the plaintiff has established a prima facie case, the burden of production – but not persuasion – then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action. ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792, 802 (1973). If the employer does so, the plaintiff must show that the articulated reason is pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Villiarimo*, 281 F.3d at 1062. Although a plaintiff may rely on circumstantial evidence to show pretext, such evidence must be both specific and substantial. Note that while intermediate evidentiary burdens shift back and forth under this framework, the ultimate burden of persuading the trier of fact that the defendant retaliated against the plaintiff remains at all times with the plaintiff.

Statute of Limitations

The statute of limitations applicable to retaliatory discharge claims is one year. *See* A.R.S. § 12-541(4).

CONSTRUCTIVE DISCHARGE

State law also limits when an employee can claim they were constructively discharged. A.R.S.§23-1502, Arizona's Constructive Discharge Statute, states:

> In any action under the statutes of this state or under common law, constructive discharge may only be established by either of the following:
>
> 1. Evidence of objectively difficult or unpleasant working conditions to the extent that a reasonable employee would feel compelled to resign, if the employer has been given at least fifteen days' notice by the employee that the employee intends to resign because of these conditions and the employer fails to respond to the employee's concerns.
> 2. Evidence of outrageous conduct by the employer or a managing agent of the employer, including sexual assault, threats of violence directed at the employee, a continuous pattern of discriminatory harassment by the employer or by a managing agent of the employer or other similar kinds of conduct, if the conduct would cause a reasonable employee to feel compelled to resign.

If an employer posts a notice in the form described in A.R.S. §23-1502(E)(2), before an employee can be considered to have been constructively discharged, the employee must do the following before deciding whether to resign:

1. Notify an appropriate representative of the employer, in writing, that a working condition exists that the employee believes is objectively so difficult or unpleasant that the employee feels compelled to resign or intends to resign.

2. Allow the employer fifteen calendar days to respond in writing to the matters presented in the employee's written communication under paragraph 1 of this subsection.
3. Read and consider the employer's response to the employee's written communication under paragraph 1 of this subsection.

If an employee reasonably believes that the employee cannot continue to work during the period for the employer to respond to the employee's written communication regarding the conditions allegedly constituting constructive discharge, the employee is entitled to a paid or unpaid leave of up to fifteen calendar days or until the time when the employer has responded in writing to the employee's written communication, whichever occurs first. A.R.S. §23-1502(C).

THE ARIZONA CIVIL RIGHTS ACT (A.R.S. § 41-1461 *ET SEQ*.)

The Arizona Civil Rights Act (ACRA) makes it an unlawful employment practice for covered employers, employment agencies and labor organizations, to discriminate against any individual based on race, color, religion, sex, age (40 years old or older), national origin, or disability.

Who is Subject to ACRA?

Employers

Under A.R.S. § 41-1461(7), an "employer" for purposes of ACRA liability means:

Employers with fifteen or more employees during twenty or more weeks of the current or preceding year, or a person who has one or more employees in the current or preceding calendar year and any agent of that person, to the extent that person is alleged to have (i) committed any act of sexual harassment or (ii) discriminated against anyone for opposing sexual harassment or making a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing arising from sexual harassment.

Employment Agencies

Under A.R.S. § 41-1461(8), an "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer.

Labor Organizations

Under A.R.S. § 41-1461(9), a "labor organization" means a labor organization and any agent of a labor organization, and includes:

- Any organization of any kind in which fifteen or more employees participate and that exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pays, hours or other conditions of employment and
- Any conference, general committee, joint or system board or joint council that is subordinate to a national or international labor organization.

ACRA Exemptions

ACRA does not apply to:

- Employers with less than fifteen employees during twenty or more weeks of the current or preceding year (except in cases involving sexual harassment claims);
- The United States or any department or agency thereof;
- Corporations wholly owned by the United States;
- Indian tribes;
- Bona fide private membership clubs, other than labor organizations, that are exempt from taxation under section 501(c) of the 1954 Internal Revenue Code;

Unlawful Employment Practices

A.R.S. § 41-1463 sets forth a list of unlawful employment practices. In addition, the Arizona Attorney General's Office, the agency charged with ACRA's enforcement, provides a list of employment discrimination examples, which includes:

- Failing or refusing to hire or promote individuals for discriminatory reasons;
- Providing different pay, benefits or other terms of conditions and employment;
- Segregating jobs or work sites based on protected characteristics;
- Sexual harassment;
- Engaging in or tolerating harassment because of race, color, national origin, religion, age or disability;
- Pregnancy discrimination;
- Failing to provide a reasonable accommodation for disabled persons;
- Treating individuals differently because they have complained about discrimination (retaliation); and
- Treating an individual less favorably because of the results of genetic testing.

See **www.azag.gov/civil-rights/discrimination/employment** (last visited June 24, 2023).

Exempt Activities

The ACRA does not require any employer to grant preferential treatment to any individual or group because of the race, color, religion, sex or national origin of the individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer, in comparison with the total number or percentage of persons of that race, color, religion, sex or national origin in any community, state, section or other area, or in the available work force in any community, state, section or other area. *See* A.R.S. § 41-1463(L).

In addition, ACRA provides exemptions for certain types of discrimination. For example, it is not an unlawful employment practice:

- For an employer to hire and employ employees on the basis of the individual's religion, sex or national origin in those certain instances when religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.
- For an educational institution to hire and employ employees of a particular religion if the institution is in whole or in substantial part owned, supported, controlled or managed by a particular religion, or if the institution's curriculum is directed toward the propagation of a particular religion.
- For an employer to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, deferred compensation or insurance plan, which is not a subterfuge to evade the purposes of the age discrimination provisions of the Act, except that no seniority system or employee benefit plan may require or permit the involuntary retirement based on age.
- For an employer to apply different standards of compensation or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that these differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin.
- For an employer to give and act upon the results of any professionally developed ability test provided that the test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.
- For an employer to differentiate upon the basis of sex or disability in determining the amount of the wages or compensation to be paid to employees of the employer if the differentiation is authorized by the provisions of § 6(d) or § 14 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d).

See A.R.S. § 41-1463(H), (J).

Procedural Requirements of ACRA

Under A.R.S. § 41-1481, an aggrieved employee must file a claim with the Arizona Civil Rights Division (ACRD), or with the Equal Employment Opportunity Commission (EEOC) within 180 days of the last discriminatory act, before initiating a lawsuit for the alleged discrimination. An employee may also file a charge alleging a violation of certain federal anti-discrimination laws (such as Title VII, the Americans with Disabilities Act, or the Age Discrimination in Employment Act, or the Genetic Information Nondiscrimination Act) with either the ACRD or the EEOC within 300 days of the last discriminatory act. These are forwarded to the EEOC for investigation pursuant to a workshare agreement between the State of Arizona and the EEOC.

In ***Peterson v. City of Surprise***, 244 Ariz. 247, 418 P.3d 1020 (Ct. App. 2018), a former police detective sued the City alleging it constructively discharged her in retaliation for reporting

repeated instances of sexual harassment. The court of appeals reversed the verdict in her favor, holding that she had failed to exhaust her administrative remedies by filing a charge with the Arizona Civil Rights Division within 180 days of the alleged violation. The court held that she could not avoid the exhaustion requirement by alleging "illegal retaliation" instead of "gender discrimination in violation of the Arizona Civil Rights Act" when they were really the same claim.

Investigation

After a charge of discrimination is filed, the ACRD and/or the EEOC will begin an investigation of the allegations contained within the charge. Because the ACRA requires an employee to file a lawsuit within a year from the time the employee filed the charge, the ACRD investigates for a maximum of nine months. There are no time limits, however, for the EEOC investigation period. An investigation, whether conducted by ACRD or EEOC, may include conducting interviews, obtaining documents, and doing site visits. Generally, after investigation, the ACRD and/or the EEOC will determine either that no unlawful discriminatory act has occurred or that there is reasonable cause to believe that an unlawful discriminatory act has occurred. When the investigation is complete, whether or not the agency concludes that an unlawful discriminatory act has occurred, private parties retain the right to bring their own civil action within the time limits specified by law, for example, within 1 year of the date of the charge (ACRA claims) or within 90 days after receipt of the right-to-sue letter (Title VII and ADA claims). Note that neither the ACRD nor the EEOC's conclusions are binding.

Conciliation and Mediation

If the ACRD determines there is reasonable cause to believe that an unlawful employment practice has occurred, it will attempt to eliminate the alleged unlawful practice by informal methods of conciliation, mediation, and persuasion. If 30 days have passed following a determination of reasonable cause, and no conciliation agreement is reached, the ACRD may bring a civil action in state court against the alleged discriminator, or alternatively, issue a right-to-sue letter.

Damages for ACRA Violations

Since ACRA provides its own remedies for wrongful termination, such remedies become the exclusive remedy for an ACRA violation. Remedies available under ACRA are limited to:

- Reinstatement or hiring of employees with or without back pay;
- Front pay; and
- Reasonable attorney's fees.

See A.R.S. § 41-1481(G), (J).

Can a Prevailing Defendant Recover Attorney's Fees it Incurred?

A court may award attorney's fees to a prevailing defendant only if it finds that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. *See* ***Harris v. Maricopa County Superior Court***, 631 F.3d 963 (9th Cir. 2011).

ARIZONA WAGE ACT (A.R.S. § 23-350 *ET SEQ*.)

The Arizona Wage Act, A.R.S. § 23-350 *et seq*., prohibits an employer from procuring labor and services by a specific promise of compensation and then evading financial responsibility.

Requirements of the Act

Pursuant to A.R.S. § 23-351, every employer must establish at least two regular pay days each month, unless an employer's principal place of business is located – and payroll system is centralized – outside of Arizona. An employer whose principal place of business and payroll system is located outside Arizona may designate one or more days each month as fixed paydays. In addition, nonexempt employers must, with limited exceptions, pay on each regular payday all wages due employees up to such date.

What Happens When an Employment Relationship is Terminated?

If an employee voluntarily terminates, A.R.S. § 23-353(B) provides that the employee must be paid all wages due to him no later than the next regular payday. If an employee is terminated involuntarily, on the other hand, A.R.S. § 23-353(A) requires that the employee be paid all wages due to him within seven working days or the end of the next regular pay period, whichever is sooner.

Damages for Violation of the Arizona Wage Act

When an employer delays payment of wages due an employee without reasonable justification, A.R.S. § 23-355 authorizes the employee to recover treble the amount of unpaid wages. The Act's penalty provision applies to severance and bonus pay, in addition to regular wages. Generally, the courts have limited treble damages to instances in which the employer has acted unreasonably or in bad faith. However, in at least two cases, the courts upheld treble damages awards against employers who neglected, through inept bookkeeping, to compensate employees for wages due. *See* ***Patton v. County of Mohave***, 154 Ariz. 168, 172, 741 P.2d 301, 305 (Ct. App. 1987); ***Apache E., Inc. v. Wiegand***, 119 Ariz. 308, 313, 580 P.2d 779, 774 (Ct. App. 1978).

Court's Discretion

A.R.S. § 23-352 provides that an employer may withhold a portion of an employee's wages if: (1) the employer is required or empowered to do so by state or federal law; (2) the employer has prior written authorization from the employee; or (3) there is a reasonable good faith dispute as to the amount of wages due.[7] Consequently, a court has discretion to decline to award treble damages if it determines that the employer's failure to pay wages due arises out of a reasonable good faith dispute. In addition, the court may exercise its discretion to deny treble damages under § 23-355 for brief, good faith, inadvertent oversight immediately corrected upon notice.

[7] The Arizona district court held A.R.S. § 23-352(2) invalid to the extent it makes paycheck deductions revocable at the will of the employee. Such a precept conflicts with § 302 of the Labor Relations Management Act. ***United Food & Com. Workers Loc. 99 v. Bennett***, 934 F. Supp. 2d 1167, 1216 (D. Ariz. 2013).

See ***Crum v. Maricopa County***, 190 Ariz. 512, 950 P.2d 171 (Ct. App. 1997) (rejecting the assertion that any discretion to deny treble damages under § 23-355 is confined to delayed payments arising from good faith disputes).

Statute of Limitations

Under A.R.S. §§ 23-355, 12-541(5), a claim for unpaid wages and treble damages must be brought within one year after the cause of action accrues.

ARIZONA MINIMUM WAGE LAW (A.R.S. § 23-362 *ET SEQ*.)

A Brief History of the Arizona Minimum Wage Law

The Arizona Minimum Wage Law allows a terminated employee to recover statutory unpaid minimum wages (plus twice that amount) and interest within two years after a violation last occurs, or three years if the violation was willful. It also allows a claim for retaliatory discharge to be brought if an employee is terminated for asserting or assisting others to assert a minimum-wage claim or informing others about their minimum-wage rights. *See* A.R.S. § 23-364(E).

Minimum Wage Requirements

Under A.R.S. § 23-363, private employers are prohibited from paying their employees less than minimum wage, unless the employee regularly receives tips or gratuities, in which case special rules apply. This statute set the state minimum wage for 2020 at $12 per hour, and outlined a formula linked to the Consumer Price Index for recalculating it every year. The 2023 Arizona minimum wage is $13.85 per hour. See https://www.azica.gov/sites/default/files/media/2023%20THE%20FAIR%20WAGES%20AND%20HEALTHY%20FAMILIES%20ACT%20%281%29.pdf (last visited June 24, 2023). Pursuant to Chapter 15-01 of the Flagstaff City Code, workers in the City of Flagstaff are subject to a higher, local minimum wage rate of $16.80. *See* https://www.flagstaff.az.gov/minwage.

Special Rules for Tipped Employees

In the case of a tipped employee, the employer may pay the employee up to $3.00 per hour less than minimum wage (except in Flagstaff), if the employer can establish by its records of charged tips, or by the employee's declaration for federal insurance contributions act purposes, that for each week, when adding tips received to wages paid, the employee received not less than the minimum wage for all hours worked. A.R.S. § 23-363(C). Compliance with this provision is determined by averaging tips received by an employee over the course of the employer's payroll period, or any other period selected by the employer that complies with regulations adopted by the commission.

In Flagstaff, in 2023, the minimum wage for tipped employees is $2.00 per hour less than the minimum wage. Flagstaff City Code Ch. 15-01-0003(E).

Exempt Employers

State and federal employers are exempt from the state minimum wage requirements. Also exempt are small businesses, defined as businesses that have (1) an annual gross revenue of less than $500,000, and are (2) exempt from federal minimum wage requirements. A.R.S. § 23-362(C). However, few small businesses meet these requirements.

Statute of Limitations

A civil action to enforce the Arizona Minimum Wage Law may be commenced no later than two years after a violation last occurs, or three years in the case of a willful violation, and may encompass all violations that occurred as part of a continuing course of employer conduct regardless of their date. A.R.S. § 23-364(H). The statute of limitations shall be tolled during any investigation of an employer by the commission or other law enforcement officer, but such investigation shall not bar a person from bringing a civil action under this article. *Id*.

ARIZONA MEDICAL MARIJUANA ACT (A.R.S. § 36-2801 *ET SEQ*.)

The Arizona Medical Marijuana Act (AMMA) applies to all Arizona employers, both public and private. Among its provisions, the AMMA grants employees certain protections from discrimination. Specifically, the AMMA provides that:

> Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based on either:
>
> 1. The person's status as a cardholder.
> 2. A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.

A.R.S. § 36-2813(B).

Discrimination Against Medical Marijuana Cardholders

As noted above, the AMMA prohibits employers from discriminating against employees who are medical marijuana cardholders. Accordingly, the fact that an employee reveals his or her status as a cardholder should be ignored when considering hiring or job placement. Moreover, because a person's status as a cardholder could be viewed as notice that the employee has a disability under the Americans with Disabilities Act, employers have additional reasons to be cautious when considering employment action against medical marijuana cardholders.

Eligible Cardholders

The current medical conditions that can qualify a patient for medical marijuana use are:

- Cancer
- Glaucoma
- HIV/AIDS
- Hepatitis C
- ALS (Lou Gehrig's Disease)
- Crohn's
- Alzheimer's
- Cachexia
- Chronic Pain
- Severe Nausea
- Seizures and Persistent Spasm

A.R.S. § 36-2801(3). Conditions not listed are not eligible for medical marijuana protection.

To obtain a medical marijuana card, a person must have:

1. A medical condition that qualifies for medical marijuana use; and
2. Written certification from a licensed caregiver in Arizona that states that the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat the patient's debilitating medical condition.

If both of these requirements are met, the patient can apply with the State for a registry identification card. A.R.S. § 26-2801(18); A.R.S. § 36-2804.02(A)(1).

Protection from Positive Drug Tests for Marijuana

The AMMA also restricts an employer's ability to take adverse employment action against a registered qualifying patient's positive drug test for marijuana. The results of a drug test alone cannot support an adverse action against medical marijuana cardholders. If, in addition to a positive drug test, an employer has evidence that the employee used, possessed, or was impaired by marijuana on the worksite or during work hours, the employer may take disciplinary action against a medical marijuana cardholder under the AMMA.

In addition, A.R.S. § 36-2814 specifically states:

A. Nothing in this chapter requires:

* * *

3. An employer to allow the ingestion of marijuana in any workplace or any employee to work while under the influence of marijuana, except that a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.

B. Nothing in this chapter prohibits an employer from disciplining an employee for ingesting marijuana in the workplace or working while under the influence of marijuana.

Limited Protections

The AMMA does not specify any other protections for employees beyond those listed above. For example, the AMMA is silent regarding protecting employees for current or past marijuana use. Employers remain free to make employment decisions based on factors not covered by the AMMA, subject to the other employment laws governing employer actions. In addition, the AMMA's protections do not technically cover activity that remains illegal under Federal law, including marijuana use. *See* 21 U.S.C. § 812(b). Employees are protected from discrimination only for possessing a card or failing a drug test; the use of marijuana is not subject to employment protection. A.R.S. § 36-2813. Likewise, given that medical marijuana use is not covered by the ADA, *see* ***James v. City of Costa Mesa***, 700 F.3d 394, 397 (9th Cir. 2012) (holding that medical marijuana use constitutes "illegal use of drugs" under ADA), a cardholder cannot claim that medical marijuana use is a reasonable accommodation for a disability.

RECREATIONAL MARIJUANA – THE SMART AND SAFE ARIZONA ACT

In 2020, Arizona voters passed Prop 207, legalizing the recreational use of Marijuana. Prop 207 was codified in A.R.S. §36-2850-2865. The recreational marijuana use statute allows adults in Arizona to use marijuana under certain circumstances. Like the AMMA, the recreational use statute provides limited protections to marijuana users.

It expressly does not:

- Restrict the rights of employers to maintain a drug-and-alcohol-free workplace or affect the ability of employers to have workplace policies restricting the use of marijuana by employees or prospective employees;
- Require an employer to allow or accommodate the use, consumption, possession, transfer, display, transportation, sale or cultivation of marijuana in a place of employment;
- Allow driving, flying or boating while impaired to even the slightest degree by marijuana or prevent the state from enacting and imposing penalties for driving, flying or boating while impaired to even the slightest degree by marijuana; or
- Allow any person to: **(a)** Smoke marijuana in a public place or open space or **(b)** Consume marijuana or marijuana products while driving, operating or riding in the passenger seat or compartment of an operating motor vehicle, boat, vessel, aircraft or another vehicle used for transportation.

A.R.S. §36-2851. However, Arizona employers should carefully review their drug and alcohol policies to ensure that any restrictions on marijuana use outside of the workplace complies with these laws.

ARIZONA DRUG TESTING LAW (A.R.S. § 23-493)

Arizona Drug Testing Law provides protection from litigation to employers who take adverse employment action against an employee who fails a drug or alcohol test. A.R.S. § 23-493.06; A.R.S. § 23-493.07. The Act's protections apply to all employers in Arizona, provided the employer's drug testing policy meets several conditions discussed below.

The Act's Protections

Adverse Employment Action Based on a Positive Test

On receipt of a positive drug test or alcohol impairment test result that indicates a violation of the employer's written policy, or the refusal of an employee or prospective employee to provide a drug or alcohol impairment testing sample, an employer may use that test result or test refusal as a basis for disciplinary or rehabilitative actions. *See* A.R.S. § 23-493.05. Adverse employment action may include, but is not limited to, the following:

- A requirement that the employee enroll in an employer approved rehabilitation, treatment or counseling program, as a condition of continued employment;
- Suspension of the employee, with or without pay, for a designated period of time;
- Termination of employment; or
- In the case of drug testing, refusal to hire a prospective employee.

Protection from Litigation

With one exception, employers who have established a policy and initiated a testing program in accordance with the Act are immune from liability for implementing and monitoring measures to assess, supervise or control the employee's job performance, reassigning an employee to a different position or job duties, or suspending or terminating employment. *See* A.R.S. § 23-493.06.

The single exception is when the employer's action was based on a false positive test result and the employer knew or clearly should have known that the result was in error and ignored the true test result due to reckless or malicious disregard for the truth or the willful intent to deceive or be deceived. *See* A.R.S. § 23-493.07.

If the employer complied with the Act's provisions, there is a rebuttable presumption that the test result was valid. *See id*. Moreover, employers are not liable for any action based on a false negative drug test or alcohol impairment test, absent evidence of the employer's reckless or wanton conduct. *See id*. Nor is the employer liable for monetary damages if its reliance on a false positive test result was reasonable and in good faith. *See id*.

Requirements Regarding Scheduling of Tests

To obtain the benefits of the Act, the employer must follow these conditions regarding the timing and cost of drug tests:

1. Any drug testing or alcohol impairment testing by an employer normally shall occur during, or immediately before or after, a regular work period. The testing by an employer shall be deemed work time for the purposes of compensation and benefits for current employees.
2. An employer shall pay all actual costs for drug testing and alcohol impairment testing required of employees by the employer. An employer may, at its discretion, pay the costs for drug testing of prospective employees.
3. An employer shall pay reasonable transportation costs to current employees if their required tests are conducted at a location other than the employee's normal work site.

A.R.S. § 23-493.02.

Testing Policy Requirements

The Act mandates that drug or alcohol testing be carried out within the terms of a written policy distributed to every employee subject to testing, or which has been made available to employees in the same manner as the employer informs its employees of other personnel practices, and which meets the minimum requirements set forth in A.R.S. § 23-493.04(A). The employer shall inform prospective employees that they must undergo drug testing.

The written policy must contain at least the following:

1. A statement of the employer's policy respecting drug and alcohol use by employees.
2. A description of those employees or prospective employees who are subject to testing. [Note that § 23-493.04(D) requires that all compensated employees including officers, directors and supervisors, be uniformly included in the testing policy if an employer institutes a policy.]
3. The circumstances under which testing may be required.
4. The substances as to which testing may be required.
5. A description of the testing methods and collection procedures to be used.
6. The consequences of a refusal to participate in the testing.
7. Any adverse personnel action that may be taken based on the testing procedure or results.
8. The right of an employee, on request, to obtain the written test results.
9. The right of an employee, on request, to explain in a confidential setting, a positive test result.
10. A statement of the employer's policy regarding the confidentiality of the test results.

See A.R.S. § 23-493.04(A).

Testing Procedures

Finally, all sample collection and testing must be performed according to the conditions set forth in A.R.S. § 23-493.03. One important condition is that "drug testing shall be conducted at a laboratory approved or certified by the United States department of health and human services, the college of American pathologists or the department of health services." A.R.S. § 23-493.03. As a result, employers should avoid making adverse employment decisions based solely on an over the counter or "field test," which is not conducted in a laboratory setting.

EARNED PAID SICK LEAVE (A.R.S. § 23-371 *ET SEQ.*)

In November 2016, Arizona voters passed Proposition 206, the Fair Wages and Healthy Families Act. This proposition not only raised the minimum wage, but also required employers to give their employees paid sick leave. A.R.S. § 23-371 *et seq.*

Requirements of the Act

Pursuant to A.R.S. § 23-372(A), employees of an employer with fifteen or more employees shall accrue a minimum of one hour of earned paid sick time for every 30 hours worked, but employees shall not be entitled to accrue or use more than 40 hours of earned paid sick time per year, unless the employer selects a higher limit. Pursuant to A.R.S. § 23-372(B), employees of an employer with fewer than 15 employees shall accrue a minimum of one hour of earned paid sick time for every 30 hours worked, but employees shall not be entitled to accrue or use more than 24 hours of earned paid sick time per year, unless the employer selects a higher limit.

Employees are permitted to use earned paid sick time for a variety of purposes, including their own mental or physical illness, care of a family member with a mental or physical illness, closure of the employee's place of business due to a public health emergency, or absence necessary due to domestic violence. An employer may require documentation to substantiate the purpose of the earned paid sick time if used over three consecutive work days.

Retaliation Prohibited

A.R.S. § 23-374(A) makes it unlawful "for an employer or any other person to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under" the Fair Wages and Healthy Families Act. Similarly, A.R.S. § 23-374(B) prohibits an employer from retaliating or discriminating against an employee or former employee because that person has exercised rights protected under the Act (such as filing a complaint with the Industrial Commission or the courts or participating in an investigation). Finally, under A.R.S. § 23-374(C), it is unlawful for an employer's absence control policy "to count earned paid sick time taken under this article as an absence that may lead to or result in discipline, discharge, demotion, suspension, or any other adverse action." Subsection (D) states that the protections of this section shall apply to any person who mistakenly but in good faith alleges violations of this article.

Under A.R.S. § 23-364(B), an employer that takes adverse action against a person within ninety days of a person engaging in activities protected by the Act (including requesting earned paid sick leave) raises a presumption that such action was retaliatory. The presumption may be rebutted by clear and convincing evidence that such action was taken for other permissible reasons.

As damages for retaliation, an employer "shall be required to pay the employee an amount set by the [Industrial Commission] or a court sufficient to compensate the employee and deter future violations, but not less than one hundred fifty dollars for each day that the violation continued or until legal judgment is final." This can include unpaid wages, unpaid earned sick time, civil penalties, or equitable relief. A.R.S. § 23-364(G).

If you have questions regarding the information in this chapter, please contact the authors or any JSH attorney.

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