

Arizona's New Minimum Wage Law (Prop 206): How Does It Impact Workers with Disabilities?

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On November 8, 2016 Arizona voters passed Proposition 206, which will incrementally raise Arizona's hourly wage from its current rate of \$8.05 to \$12.00 in 2020.¹ The proposition also entitles employees to earn one hour of paid sick leave for every 30 hours worked and provides broad conditions for which sick leave may be taken. But, what does this minimum wage increase mean for workers with disabilities who currently receive less than the minimum wage and no sick leave? This brief will discuss the "special minimum wage" for persons with disabilities and the controversy surrounding it, its status in Arizona, and the implications of Proposition 206.

The Controversy over the Special Minimum Wage

To "prevent the loss of employment opportunities for workers with disabilities," Congress established a special minimum wage in 1938 – a wage below the standard minimum wage – through Section 14(c) of the Fair Labor Standards Act (FLSA). More than 75 years and numerous amendments later, Section 14(c) remains intact and allows employers, after being granted special certification from the Wage and Hour Division of the U.S. Department of Labor (DOL), to pay less than the minimum wage to individuals whose earning or productive ability is considered to be "impaired by a physical or mental disability for the work to be performed."² According to DOL, these special wages do not apply to all employees with disabilities -only to those who have disabilities that affect their production, such as "blindness, mental illness, mental retardation³, cerebral palsy, alcoholism and drug addiction" (as quoted by DOL).

Calculating Special Minimum (Commensurate) Wage Rates

Example: An experienced, nondisabled worker who makes boxes can produce 40 boxes in an hour, but a worker with a disability can only produce 10 boxes an hour. The worker with a disability is considered 25 percent as productive as the experienced, nondisabled worker and should receive at least 25 percent of the prevailing wage rate in a specific geographic area for such work.

If the prevailing wage rate for that job is determined to be \$10 an hour (based on the new minimum wage law), the worker with the disability employed under a special certificate would receive at least 25 percent of that wage rate, or \$2.50 an hour, for performing the work.

(U.S. Department of Labor; <http://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=359>)

¹ Copy of ballot measure: <http://apps.azsos.gov/election/2016/general/ballotmeasuretext/I-24-2016.pdf>

² United States Department of Labor, Fact Sheet #39 The Employment of Workers with Disabilities at Special Minimum Wages; <http://www.dol.gov/whd/regs/compliance/whdfs39.htm>. (All quoted comments in this section originate from this source.)

³ The DOL uses what appear to be out-of-date terms and assumptions in labeling the types of disabilities that are deemed to affect production

DOL determines the special minimum wage rates, which are reviewed and re-determined at least every six months, based on:

- standard production rates for workers who do not have disabilities;
- quantity and quality produced by the worker with a disability as compared to standard production rates;
- prevailing wages, or wages paid to experienced workers who do not have disabilities for similar work in the same geographic regions.

Despite these requirements the special minimum wage remains a contentious issue across the country. Many workers with disabilities are not assumed to be as productive as workers without disabilities. With this perception in mind, providers and some families of people with disabilities argue that the special minimum wage is necessary to provide workers with significant disabilities job training and employment opportunities that they would otherwise not be able to access. They also get to earn “something,” making the individuals feel good and giving them a productive way to spend their time. Providers also maintain that they cannot afford to pay the state’s standard minimum wage to workers with disabilities. Reimbursement rates provided through the state’s Rehabilitation Services Administration Vocational Rehabilitation (VR) program and the Division of Developmental Disabilities (DDD) do not properly fund job wages to direct care staff, not to mention workers with disabilities. If they were required to pay the minimum wage to workers with disabilities, they would have to lay off workers or close programs altogether.⁴

On the other hand, disability rights organizations and advocates argue that what they call the “sub-minimum” wage is a violation of the Americans with Disabilities Act. Allowing this reduced minimum wage treats people with disabilities inequitably and segregates them from the rest of the society. While the original intent of the special minimum wage was to incentivize businesses to hire people with disabilities, advocates argue that these wages have only subsidized segregated, employment settings (i.e., center-based employment settings) that do not transfer workers with disabilities into a mainstream work environment. Furthermore, they state that these settings have not properly trained “trainees” in the skills needed in the competitive marketplace or have adequately compensated them for work completed.⁵ Previous research has shown that these training programs traditionally are “isolated from competitive standards regarding work training, modern equipment, job requirements, behavioral expectations, and social relations.” They are a unique environment not applicable to a mainstream work situation. This results in the majority of participants not receiving adequate training for employment in the open market, or integrated employment.⁶

The Status of Special Minimum Wages in Arizona

Setting a Precedent through Proposition 202

Before Proposition 206, there was Proposition 202, which set the precedent in which wages for workers with disabilities were applied. Proposition 202 was passed by Arizona voters in 2006, creating a state minimum

⁴ Personal Communication, Bev Harmon, Arizona Association of Providers for People with Disabilities, May 7, 2012

⁵ Samuel Bagenstos, The Case Against the Section 14(c) Subminimum Wage Program, available at <http://thegao.org/wp-content/uploads/2012/03/Bagenstos.pdf>

⁶ Alberto Migliore, Sheltered Workshops, in International Encyc. of Rehab. (J.H. Stone & M. Blouin, eds., 2010) (“Even when work is the main focus of sheltered workshops, the work environment tends to be different from the one in mainstream businesses.”), available at <http://cirrie.buffalo.edu/encyclopedia/en/article/136/>

⁷ In 2012, the Arizona minimum wage is \$7.65 an hour, while the federal minimum wage is \$7.25 an hour

wage that was higher than the federal minimum wage rate and included an annual cost-of-living increase.⁷ What was noticeably absent from this new law was Section 14(c) of the FLSA that allows the special minimum wage for workers with disabilities. Attorney General Terry Goddard ruled that the special minimum wage was not incorporated in Proposition 202 and was, therefore, considered inapplicable. Goddard further explained:

“Developmentally disabled workers are not exempt from the minimum wage enacted in Proposition 202. Thus, developmentally disabled workers formerly earning a subminimum wage under the FLSA “special certificate” are entitled to earn the new state minimum wage of \$6.75 per hour if they are employees subject to the new law.”⁸

After public pressure to change this voter proposition to allow the special minimum wage, the Industrial Commission of Arizona (ICA) released a policy statement⁹ clarifying the term ‘employee:’

“The individual is an employee under the Act when there is an expectation of a wage for services rendered (implied or express) and the services rendered are for the primary benefit of the employer. An individual does not meet the definition of employee, and therefore is not an employee covered under the Act, if that individual performs work activities for the primary or personal benefit of the individual (as opposed to the employer) without an agreement for compensation.”

ICA determined that workers with disabilities do not meet the definition of an employee under the Act. Additionally, the ICA created caveats,¹⁰ described in the following bullets, to allow employers to continue to pay special minimum wages (or stipends)¹¹:

- Vocational training: The participant is considered a trainee and is temporarily incapable of employment, even with assistance. However, with training, this individual may be able to meet the minimum qualifications for a position in integrated employment¹² earning at least the standard minimum wage. There is no expectation of payment of compensation, though the individual may receive a stipend for the work performed. The training program should not last longer than 7,560 hours¹³, but this clock may start over if the individual enters a new training program. The vocational training shall be provided under a program administered by a certified provider with the ultimate goal of equipping the individual with skills that lead to integrated employment at a salary that meets or exceeds the minimum wage, with long-term support, if necessary.
- Service recipient: Participants in this long-term program are limited to individuals with disabilities who have received vocational training but have not reached the goal of successful integrated employment. While the work activities themselves serve primarily a therapeutic purpose, the ultimate goal is to develop job skills for integrated community employment. While there is no expectation of compensation of any

⁸ State of Arizona, Office of the Attorney General, Attorney General Opinion Re: Proposition 202 and the Disabled Worker, February 7, 2007

⁹ ICA, Substantive Policy Statement Regarding Application of Arizona Minimum Wage Act to Work Activities Performed By Individuals with Disabilities, March 29, 2007

¹⁰ Ibid

¹¹ Personal Communication, U.S. Department of Labor, Phoenix Wages and Hours division, May 9, 2012

¹² Integrated employment refers to jobs held by people with the most significant disabilities in typical workplace settings where the majority of persons employed are not persons with disabilities. The individuals with disabilities earn wages consistent with wages paid to workers without disabilities in the community performing the same or similar work. (Available at <http://www.dol.gov/odep/topics/IntegratedEmployment.htm>)

¹³ Some trainees have already started to reach their maximum hours under this program

kind, there may be a stipend for work performed. The status of the service recipient is re-examined annually by an interdisciplinary planning team, which includes the guardian and the service recipient.

One state representative observed that these efforts to not classify these workers as “employees” were likely futile because “the state can’t exempt these employers from legal action since the minimum wage law didn’t do it.”¹⁴ In response, the Arizona Legislature passed a statutory amendment that exempts an employer from liability if the employer fails to pay the minimum wage to an employee in good-faith reliance upon “an administrative regulation, order, ruling, approval or interpretation, administrative practice or enforcement policy issued by the Industrial Commission pursuant to and in accordance with the commission’s authority under [the Act].”¹⁵ This legislative intervention provided an immediate solution for employers of workers with disabilities that feared prosecution under the Act.

The Status of Proposition 206

Workers with disabilities currently receiving minimum wages and classified as employees will reap the same hourly wage increases and sick leave benefits as other employees starting on January 1, 2017; however for workers with disabilities paid through certificates, it is a different story. Like Proposition 202, there is no mention in Proposition 206 of workers with disabilities paid under FLSA, and no further clarification has been offered by ICA. But with a the previous standing substantive statement by ICA that some workers with disabilities are not considered employees, it can be presumed that the special minimum wage will continue to be administered to this group, despite the passage of Proposition 206. Workers who do receive these certificates may see a slight increase in their pay if the prevailing wage rate for their job is increased to the new state minimum hourly wage rate. The increase, however, will be minimal and sick leave would still not be guaranteed.

Today, 46 providers in Arizona continue to distribute federally-issued Section 14(c) certificates for workers with disabilities. These workers are classified as trainees or service recipients in the state of Arizona, so the new minimum wage law does not apply.¹⁶ A spokesman for ICA stated: “It is up to the individuals or their advocates to complain if they do not believe they are being paid fairly or if they are classified incorrectly. We have yet to receive a complaint.” Unless any further statements are made by ICA, Proposition 206 will have minimal effects on workers with disabilities who are currently receiving the special minimum wage.

¹⁴ See Mary Jo Pitzl, Disabled Workers’ Pay Wage Debated, *Ariz. Republic*, Mar. 23, 2007 available at <http://www.azcentral.com/specials/special12/articles/0323minwage0323.html>

¹⁵ *Ariz. Rev. Stat. Ann.* § 23-365 (Supp. 2007)

¹⁶ Similarly, British Columbia legally mandated that all workers with disabilities were paid minimum wage, but a loophole for trainees was constructed to allow stipends less than the minimum wage. More than ten years later, much of the work in center based employment settings in British Columbia have been re-classified as non-work with wages administered at less than minimum wage

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