

“The Sky is Falling!” Chicken Little and the Albuquerque Minimum Wage Ordinance

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You may recall the old fable of Chicken Little who, convinced that the sky was falling, whipped his colleagues into the mass hysteria that ultimately led to their demise. The analogous reaction of many employers to the recently-enacted Albuquerque Minimum Wage Ordinance threatens to perpetuate the same type of hysteria and eventual demise at the hands of the restrictions and requirements imposed by the new ordinance. The ordinance has taken effect, and first of three resulting minimum wage increases is less than six months away. The time is now for affected employers and their advocates to become familiar with the provisions and requirements of the ordinance, and implement a plan to ensure compliance.

Frustrated with the lack of action on the part of the Federal and State legislatures, and emboldened by the enactment and successful defense of Santa Fe’s living wage, the Albuquerque City Council recently passed the Albuquerque Minimum Wage Ordinance. Starting in January of 2007, the ordinance raises the minimum wage for workers in the City of Albuquerque, which is home to twenty-five percent of New Mexico’s residents. According to the New Mexico Department of Labor, the ordinance will directly impact the wages of nearly forty thousand workers. In addition to raising the minimum wage, the ordinance imposes numerous restrictions and requirements upon affected employers, and provides damages for violations thereof.

Following in the footsteps of many other states, counties, and cities throughout the country, an increase in the minimum wage has been at the forefront of the Albuquerque City Council’s agenda for the past two years. Early in 2005, Southeast Heights City Councilor, Martin Heinrich, introduced a bill to raise Albuquerque’s minimum wage from the federal minimum of \$5.15 per hour, which had been in effect since 1997. The bill died amidst rumors of impending action by the state legislature, which ultimately suffered the same fate. Then, in the Fall of 2005, voters defeated an Albuquerque ballot initiative, by a narrow margin of less than two percent. In April of this year, Councilor Heinrich introduced an amended version of his 2005 minimum wage bill, which the Council passed by a 6-3 vote. Mayor Martin Chavez signed the ordinance into law on April 27, 2006.

The ordinance raises the minimum wage in Albuquerque to \$6.75 per hour, effective January 1, 2007. It provides for additional increases to \$7.15 per hour and \$7.50 per hour on January 1, 2008 and January 1, 2009, respectively. The ordinance does not contain an inflation adjustment provision, which means that the wage will not increase without further action from lawmakers, after it reaches \$7.50 per hour in 2009. In the event that the State of New Mexico or the Federal government ultimately increase their

respective minimum wages to an amount exceeding that which is provided for under the ordinance, this higher rate would supersede the City's minimum.

The scope of the ordinance is quite broad. It applies to anyone who (1) is required to have a business license or business registration from the City of Albuquerque, and (2) directly or indirectly employs or exercises control over the wages, hours or working conditions of an employee who performs at least two hours per week of work for the employer, within the municipal limits of the City. The ordinance applies to part-time, seasonal, and temporary employees, as well as employees who receive tips or work for commissions.

Despite its breadth, the ordinance expressly exempts from its purview several categories of individuals, including employees of the Federal government; certain individuals and volunteers working for educational, charitable, religious or non-profit organizations; salespeople who are compensated only by piecework, flat rate or commission; and registered apprentices. The ordinance also expressly excludes both seasonal employees and disabled individuals who hold valid exemption certificates from the Department of Labor, as provided for by the New Mexico Minimum Wage Act.

The ordinance provides employers with a credit towards the minimum wage under specific circumstances. For example, tips and commissions received and retained by an employee may be counted as wages and credited towards the satisfaction of the minimum. However, the ordinance's detailed definition of a "tip" restricts the applicability of that credit to very specific circumstances. This definition is fraught with potential pitfalls for affected employers. Familiarity with the nuances of when an employee's tips may be credited towards the minimum, and meticulous attention to detail on the part of employers utilizing that credit are necessary to ensure compliance with this particularly intricate provision of the ordinance. In addition, the ordinance reduces the minimum wage by one dollar per hour for employers who provide healthcare and/or childcare benefits to employees for which the employer pays at least \$2500 per year.

Employers must provide their employees with notice of the minimum wage and their rights under the ordinance. Such notices must be posted, in both English and Spanish, in a conspicuous place at any workplace or job site where any employee works. The notice is created by, and can be obtained from, Albuquerque's City Attorney.

In addition to the notice requirement, the ordinance mandates that all employers must keep detailed records of both the daily hours worked by and wages paid to all employees. These records must be retained by the employer for a period of three years. In addition, when an employer uses an employee's tips to meet the minimum wage, the employer must obtain a signed tip declaration from each such employee for each pay period in which the tip credit is invoked. These declarations must also be maintained by the employer for a period of three years.

The aforementioned rights and requirements of the ordinance may be enforced either through civil litigation by an aggrieved employee, or by the Albuquerque City Attorney. The ordinance allows an employee who has been paid less than the applicable minimum wage to file a civil suit to recover the balance of the wages owed, including interest. The same provision provides for additional damages equal to twice the wages owed, as well as the recovery of litigation costs and attorneys' fees for a prevailing plaintiff. In addition, the ordinance expressly prohibits an employer from retaliating against an employee who seeks to enforce his or her rights under the ordinance, and provides damages for such retaliation, as well as reinstatement in the event of a retaliatory discharge. In such situations, damages are calculated from the date of discharge to the date of reinstatement, waiver of reinstatement, or the issuance of a final judgment.

In sum, don't be a Chicken Little. The Albuquerque Minimum Wage Ordinance is in place and affected employers must ensure compliance to avoid liability. The scope of the ordinance is broad, and its exceptions are both narrow and limited in number. Regardless of whether the sky is indeed falling, affected employers must be aware of and understand the nuances of the ordinance's requirements for calculating wages, posting notices, keeping records and preventing retaliation. Employers who fail to abide by, or neglect to ensure strict compliance with, the ordinance face civil liability for damages that may substantially exceed the wages owed to the employee. In order to avoid such liability, affected employers and their advocates should take action now to become familiar with the ordinance's requirements and ensure compliance therewith.