

Since most states have wage law enforcement language, the following is language that can either be substituted for or added to existing language in various sections of existing law to strengthen enforcement.

Definitions. As used in this chapter:

1. *"Employee"* means a natural person who is employed in this state by an employer, including an individual who is in receipt of or is entitled to any compensation for labor performed for any employer. Employee also includes a commission salesperson who takes orders or performs services on behalf of a principal and who is paid on the basis of commissions but does not include persons who purchase for their own account for resale.

Comment: Creates a slightly stronger standard of who constitutes an employee to include more independent contractors.

2. *"Employer"* means a person, firm or corporation, agent, manager, representative, contractor, subcontractor or principal, or other person acting directly or indirectly in the interest of an employer to suffer or permit another person to work; whether a person is an independent contractor or an employee shall be determined according to the standards of the federal Fair Labor Standards Act, 29 U.S.C. 201 to 219, but the burden of proof shall be upon the party for whom the work is performed to show independent contractor status by clear and convincing evidence.

Comment: Creates a strong standard of who constitutes an employee to include more independent contractors and dual employees under the employment definition using federal FLSA language.

3. An *Independent Contractor* exempt from state wage laws means a person who:

(a) Performs services free from direction and control over the means and manner of providing the services, subject only to the right of the person or entity for whom services are provided to specify the desired result;

(b) Furnishes the tools and equipment necessary to provide the service;

(c) Operates a business that is considered inseparable from the individual for purposes of taxes, profits, and liabilities:

(I) In which the individual:

1. Owns all of the assets and profits of the business; and

2. Has sole, unlimited, personal liability for all of the debts and liabilities of the business, unless the business is organized as a single-owned corporate entity, to which sole, unlimited personal liability does not apply; and

(II) For which:

1. The individual does not pay taxes for the business separately but reports business income and losses on the individual's personal tax return; and
 2. If the business is organized as a corporate entity and the individual otherwise qualifies as an exempt person under this subsection, the individual files a separate federal informational tax return for the entity as required by law;
- (d) Exercises complete control over the management and operations of the business; and
- (e) Exercises the right and opportunity on a continuing basis to perform the services of the business for multiple entities at the individual's sole choice and discretion.

Comment: Tightens definition of independent contractor to prevent misclassification of employees and exclude them from wage law protections.

4. "*Liquidated damages*" means the sum of five percent multiplied by the amount of any wages that were not paid or of any authorized expenses that were not reimbursed on a regular payday or on another day pursuant to section 91A.3 multiplied by the total number of days, excluding Sundays, legal holidays, and the first seven days after the regular payday on which wages were not paid or expenses were not reimbursed. However, such sum shall not exceed twice the amount of the unpaid wages and shall not accumulate when an employer is subject to a petition filed in bankruptcy. REWRITE FOR STANDARD LANGUAGE

5. A *Violation* of state wage laws shall constitute any week where an individual employee was not paid the legally required wages under this chapter, state taxes were not withheld, or in the case of retaliation against an employee, every week after retaliation has occurred until compensation is finally made.

Comment: By declaring individual weeks of illegal payments to each be a separate violation, this will create larger penalties against employers with long-term violations of the law.

Notice and recordkeeping requirements.

1. An employer shall:

a. Notify its employees in writing at the time of hiring what wages and regular paydays are designated by the employer.

b. Notify, at least one pay period prior to the initiation of any changes, its employees of any changes in any arrangements that reduce wages or alter the regular paydays. The notice shall either be in writing or posted at a place where employee notices are routinely posted.

c. Make available to its employees upon written request, a written statement enumerating employment agreements and policies with regard to vacation pay, sick leave, reimbursement for expenses, retirement benefits, severance pay, or other comparable matters with respect to wages. Notice of such availability shall be given to each employee in writing or by a notice posted at a place where employee notices are routinely posted.

d. Establish, maintain, and preserve for three calendar years the payroll records showing the hours worked, wages earned, and deductions made for each employee and any employment agreements entered into between an employer and employee. Failure to do so shall raise a rebuttable presumption that the employer did not pay the required minimum wage rate.

Comment: This makes notification of employees of their expected pay a regular procedure and will help employees develop a paper trail needed to enforce their rights in court. Requiring

employers to keep records of each employee's regular rate of pay will also streamline investigations. Arizona law includes this express presumption for employers who fail to keep records – builds upon case law under FLSA that shifts the burden to employers who don't keep records.

2. Within ten working days of a request by an employee, an employer shall furnish to the employee a written, itemized statement or access to a written, itemized statement listing the earnings and deductions made from the wages for each pay period in which the deductions were made together with an explanation of how the wages and deductions were computed.

3. On each regular payday, the employer shall send to each employee by mail or shall provide at the employee's normal place of employment during normal employment hours a statement showing the hours the employee worked, the wages earned by the employee, and deductions made for the employee.

Comment: Strong reporting requirements to employees help them track their own wages and understand whether violations have occurred.

Damages recoverable by an employee.

When it has been shown that an employer has intentionally failed to pay an employee wages or reimburse expenses whether as the result of a wage dispute or otherwise, the employer shall be liable to the employee for any wages or expenses that it failed to be paid or reimbursed, plus liquidated damages, court costs and any attorney's fees incurred in recovering the unpaid wages and determined to have been usual and necessary.

Comment: This definition specifically does not base liability based on intent of the employer, since the responsibility for accurate wage accounting should be on the employer, and proof of intent is often too high a burden for employees to prove in situations of deliberately poor or deceptive record-keeping by an employer.

Private Right of Action by Misclassified Employees

1. Notwithstanding any remedy available under this subtitle, an individual who has not been properly classified as an employee may bring a civil action for damages against the employer for any violation of this subtitle.

2. An action filed under this section shall be filed within 3 years of after the date the cause of action accrues.

3. If the court determines that an individual or class of individuals is entitled to judgment in an action against an employer filed in accordance with this section, the court may award each individual:

- (a) Any damages to which the individual may be entitled under subsection (a) of this section;
- (b) An additional amount up to three times the amount of any such damages, if the employer knowingly failed to properly classify the individual;
- (c) Reasonable counsel fees and other costs of the action; and
- (d) Any other appropriate relief.

Comment: A private right of action of misclassified employees is key to preventing abuses of independent contractor rules.

State Investigations and Enforcement

1. The [Department of Labor or appropriate commission] shall administer and enforce the provisions of this chapter. The commissioner may hold hearings and investigate charges of violations of this chapter.

2. The commissioner may, consistent with due process of law, enter any place of employment to inspect records concerning wages and payrolls, to question the employer and employees, and to investigate such facts, conditions or matters as are deemed appropriate in determining whether any person has violated the provisions of this chapter. The name of any employee identified in a complaint to the department shall be kept confidential as long as possible. Where the department determines that an employee's name must be disclosed in order to investigate a complaint further, it may do so only with the employee's consent.

3. The commissioner shall promulgate any rules necessary to carry out the provisions of this chapter.

Comment: This gives authority to the state for physical investigations of employer property based on statistical analysis of known economic data or other reports. Protecting the anonymity of employee complaints helps protect employees from retaliation during early parts of an investigation.

Preventing Retaliation against Employees.

1. No person or employer shall discharge or in any other manner discriminate or retaliate against an employee or other person for exercising any right under this chapter or any regulation implementing its provisions, or against any person for providing assistance to any employee or information regarding the same, or for testifying or planning to testify in any investigation or proceeding regarding the same. Taking adverse action against a person within ninety days of a person's engaging in the foregoing activities shall raise a presumption that such action was retaliation, which may be rebutted by clean and convincing evidence that such action was taken for other permissible reasons. Any employee may file a complaint with the [Department of Labor or appropriate commission] alleging discharge or discrimination within thirty days after such violation occurs. Upon receipt of the complaint, the commissioner shall cause an investigation to be made to the extent deemed appropriate. If the commissioner determines from the investigation that the provisions of this subsection have been violated, the commissioner shall bring an action in the appropriate district court against such person. The district court shall have jurisdiction, for cause shown, to restrain violations of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to the former position with back pay. A civil action to enforce this section may also be maintained in any court of competent jurisdiction by the state or by any party injured by a violation of this section. Any employer who retaliates against an employee or other person in violation of this chapter shall be required to pay the person an amount set by the department or a court sufficient to compensate the employee and deter future violations, but not less than \$150 for each day that the violations continued, or until legal judgment is final.

Comment: This creates a very strong disincentive against employer retaliation against employees or others bringing complaints under the law.

Civil penalties. Any employer who violates the provisions of this chapter or the rules promulgated under it shall be subject to a civil money penalty of not more than five hundred dollars for each violation. Any civil money penalty recovered shall be dedicated to further enforcement of this chapter.

Comment: This creates significant civil penalties that will both deter violations and help to make enforcement of the wage law a largely self-funding enterprise.

Liability of shareholders for wages due to employees: The ten largest shareholders, as determined by the fair value of their beneficial interest as of the beginning of the period during which the unpaid services referred to in this Article are performed, of every corporation (other than an investment company registered as such under an act of congress entitled "Investment Company Act of 1940"), no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its employees for services performed by them for such corporation. Civil action may be brought against a shareholder liable for wages due under this chapter instead of and in addition to the employer.

Comment: This provision protects employees who are hired by shell corporations that use bankruptcy law to evade payment.

Private Attorneys General Provision for Enforcement

1.(a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the [Department of Labor or other Commission] may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees.

(b) No action may be brought under this section by an aggrieved employee if the [Department of Labor or other Commission] on the same facts and theories, cites a person within the timeframes set forth in this part for a violation of the same section or sections of law under which the aggrieved employee is attempting to recover a civil penalty on behalf of himself or herself or others.

(c) Civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the [Department of Labor or other Commission] for enforcement of labor laws and education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees.

(d) Courts shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to this part.

(e) The [Department of Labor or other Commission] may promulgate regulations to implement the provisions of this part.

2. (a) A civil action by an aggrieved employee seeking civil penalties pursuant to this part alleging a violation of any provision shall commence only after the following requirements have been met:

(1) The aggrieved employee or representative shall give written notice by certified mail to the [Department of Labor or other Commission] and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.

(2) (A) The agency shall notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 30 calendar days of the postmark date of the notice received pursuant to paragraph (1). Upon receipt of that notice or if no notice is

provided within 33 calendar days of the postmark date of the notice given pursuant to paragraph (1), the aggrieved employee may commence a civil action.

(B) If the [Department of Labor or other Commission] intends to investigate the alleged violation, it shall notify the employer and the aggrieved employee or representative by certified mail of its decision within 33 calendar days of the postmark date of the notice received pursuant to paragraph (1). Within 120 calendar days of that decision, the agency may investigate the alleged violation and issue any appropriate citation. If the agency determines that no citation will be issued, it shall notify the employer and aggrieved employee of that decision within five business days thereof by certified mail. Upon receipt of that notice or if no citation is issued by the agency within the 158-day period prescribed by subparagraph (A) and this subparagraph or if the agency fails to provide timely or any notification, the aggrieved employee may commence a civil action.

(C) Notwithstanding any other provision of law, a plaintiff may as a matter of right amend an existing complaint to add a cause of action arising under this part at any time within 60 days of the time periods specified in this part.

Comment: A Private Attorneys General provision helps the state collect civil penalties against wage law violators, especially when they lack the manpower to followup on complaints and investigations.