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February 18, 2021

### City of Seattle Passes Hazard Pay for Grocery Employees

On February 3, 2021, Seattle Mayor Jenny Durkan signed into law a new ordinance requiring grocery employers to provide their employees an additional \$4.00/hour in hazard pay due to the COVID-19 pandemic. The law went into effect immediately after it was passed unanimously by the Seattle City Council several days after it was introduced. It will last the duration of the city of Seattle's COVID-19 emergency proclamation.

#### **Covered Employers**

Larger grocery businesses in the city of Seattle that employ 500 or more employees worldwide must adhere to the new hazard pay requirements. "Grocery business" is defined under the ordinance as a retail store that is either:

- Over 10,000 square feet and primarily engaged in retailing groceries for off-site consumption, or
- Over 85,000 square feet with at least 30% or more of its sales floor area dedicated to the sale of groceries.

Franchises associated with larger franchise networks that employ 500 or more employees in the aggregate are covered under the ordinance. Smaller grocery businesses such as convenience stores, food marts, and farmers' markets are specifically excluded from coverage.

#### **Covered Employees**

Employees eligible for the hazard pay include full-time, part-time, and temporary workers as defined under Seattle Municipal Code Section 12A.28.200 who work at a retail location in Seattle. Employees who qualify under a bona fide executive, administrative, professional, or outside sales exemption are not eligible for hazard pay under the ordinance. Gig workers subject to Seattle's Premium Pay for Gig Workers Ordinance are also excluded.

#### **Hazard Pay Requirements**

Employers must pay covered employees \$4.00/hour in hazard pay for every hour worked in addition to their regular wages. Employers cannot reduce employees' base wages to offset the new hazard pay requirements. Employers also cannot ask employees to waive their right to hazard pay, nor can they retaliate against employees for exercising their rights under the ordinance. A rebuttable presumption of retaliation exists if an employer takes an adverse action against a person within 90 days of a person exercising their rights under the ordinance.

Hazard pay must be paid on regular payroll days and must be itemized separately from regular wages paid to employees. Employers are required to retain records documenting compliance with the ordinance for at least three years. Failing to retain adequate records creates a presumption that an employer violated the ordinance.

Employers must also post a written notice of rights in a conspicuous and accessible area in the workplace. The notice must provide information on the right to the hazard pay, the right to be protected from retaliation for exercising rights under the ordinance, and the right to file a complaint with the Seattle Office of Labor Standards or bring a civil action for any violation.

## **Penalties for Violating the Ordinance**

An employer who violates the ordinance is liable for full payment of any unpaid compensation due, plus interest, for each aggrieved party. The Seattle Office of Labor Standards may also assess liquidated damages of up to twice the unpaid compensation.

If an employer retaliates against an employee under the ordinance, remedies include, but are not limited to, reinstatement of the aggrieved party, front pay in lieu of reinstatement plus interest, and liquidated damages of up to twice any unpaid compensation. An additional penalty of up to \$5,565.10 may be issued, made payable to the aggrieved party.

Fines may also be issued for failing to display a written notice of rights in the workplace, failing to retain adequate records, and failing to provide a notice of any Seattle Office of Labor Standards investigation. The maximum amount of fines in a one-year period is \$5,565.10 for each type of violation, unless a fine for retaliation is issued, in which case the maximum amount is \$22,259.36.

In addition to the above, the Seattle Office of Labor Standards also has authority to deny, revoke, or refuse to renew any business license for failure to comply with the ordinance. Aggrieved parties also have a private right action for any violations of the ordinance.

## **Legal Challenges and Trends**

On February 3, 2021, the same day the ordinance went into effect, the Northwest Grocery Association and the Washington Food Industry Association filed a complaint against the city of Seattle in the U.S. District Court for the Western District of Washington seeking declaratory and injunctive relief that the ordinance was invalid and unconstitutional.

The associations contend in their complaint that the National Labor Relations Act (NLRA) prohibits state and local regulation of conduct intended to be left to the "free play of economic forces," and that legislation that interferes with collective bargaining is preempted by NLRA. The associations argue that the ordinance undermines the collective bargaining process by securing premium pay standards for unions that may not have otherwise been obtained during bargaining.

The associations further argue the ordinance violates the equal protection clauses of the U.S. and Washington constitutions by treating large grocery businesses differently without justification for the exclusion of other employers or frontline retail workers.

Hazard pay is a hot topic of debate among grocery stores, unions, and employees across the region. The city of Burien, located just south of Seattle, passed its own hazard pay ordinance requiring an additional \$5.00/hour for covered employees, effective February 17, 2021. Three cities in California (Oakland, Long Beach, and Montebello) also passed hazard pay ordinances during the pandemic, and more are expected to join. With the trend continuing, grocery and retail employers across the nation should be on the lookout for new hazard pay requirements in their cities.

## Authors

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