

A man in a dark blue suit and light blue shirt is shown from the chest up, interacting with a digital interface. The interface consists of a network of white human icons connected by thin white lines. The man's hands are positioned as if he is touching or moving some of the icons. The background is a dark, textured blue.

From Protections for Marijuana Users to Mandatory Paid Time Off: The 2019 Nevada Legislature Was Busy on Employment Matters (Again)

By: Dora Lane

The 2017 legislative session yielded a substantial number of employment-related laws. The same trend continued in 2019. Unfortunately, many of these laws received little publicity, even though some of them are already effective. This article outlines some of the most notable new laws affecting Nevada employers.

AB 132 (Pre-Employment Marijuana Drug Testing)

Starting with one of the most controversial bills, AB 132 addresses pre-employment marijuana screening of job applicants. To put things in perspective, when the recreational marijuana initiative passed in 2016 (effective 2017), it specifically stated that it did not prohibit “[a] public or private employer from maintaining, enacting, and enforcing a workplace policy prohibiting or restricting actions or conduct otherwise permitted under this chapter.”¹ AB 132 provides that, subject to the exceptions listed below, it is unlawful for any employer in Nevada to “fail or refuse to hire a prospective employee because the prospective employee submitted to a screening test and the results of the screening test indicate the presence of marijuana.” AB 132 creates exceptions to this mandate if the prospective employee is applying for a position:

- a) As a firefighter, as defined in NRS 450B.071;
- b) As an emergency medical technician, as defined in NRS 450B.065;
- c) That requires the employee to operate a motor vehicle and for which federal or state law mandates that the employee submit to screening tests; or

- d) That, in the employer's determination, could adversely affect the safety of others.

Further exceptions to AB 132 apply to the extent AB 132 is inconsistent or conflicts with the provisions of an employment contract, a collective bargaining agreement, or federal law. AB 132 also does not apply to a position funded by a federal grant.

AB 132 also provides that if an employer requires an employee to submit to a screening test within the initial 30 days of employment, the employee has the right to submit to an additional screening test (at the employee's expense) to rebut the results of the initial test. The employer is required to accept and give appropriate consideration to the results of the second test.

AB 132 becomes effective January 1, 2020.



AB 456 (Minimum Wage Increase)

Another bill likely to have a substantial effect on employers is AB 456, which, effective July 1, 2020, raises the minimum wage to \$8/hour (if the employer offers qualifying health benefits) and to \$9/hour (if the employer does not offer qualifying health benefits). For the next 4 years thereafter (2021-2024), on July 1, the respective minimum wage rates raise by \$0.75, until they reach \$11/hour (with qualifying benefits) and \$12/hour (without qualifying benefits), beginning July 1, 2024. By placing these automatic increases in NRS 608.250, AB 456 removes the establishment of the applicable minimum wage rate from the Nevada Labor Commissioner's purview.

AB 456 also provides that an employee who prevails in a civil action may be entitled to recover all remedies available in law or in equity, such as back pay, damages, reinstatement, or injunctive relief. Notably, an employee who prevails in a minimum wage action "must" be awarded reasonable attorney's fees and costs.

Finally, AB 456 removes certain statutory language from NRS 608.250, which was in conflict with Article 15, Section 16 of the Nevada Constitution to the extent it provided that certain employees not listed in the Constitution were exempt from minimum wage requirements. AB 456 clarifies, however, that employees who are exempt from minimum wage pursuant to the Nevada Constitution are also exempt from NRS 608.018's overtime provisions.

AB 456 is effective July 1, 2019.



SB 192 (Qualifying Health Benefits for Minimum Wage Purposes)

Related to AB 456 is the issue what constitutes "qualifying health benefits" that would entitle an employer to pay the lower tier minimum wage.

By way of background, the Minimum Wage Amendment (MWA) to the Nevada Constitution (Article 15, Section 16) currently allows an employer who provides qualifying health benefits to pay employees a \$7.25/hour minimum wage, instead of a \$8.25/hour minimum wage. One of the applicable requirements to be able to pay the lower minimum wage is the mandate that health insurance must be made available to an employee and the employee's dependents at a total premium cost to the employee of not more than 10 percent of the employee's gross taxable income from the employer. Prior to May 31, 2018, employer-provided health benefit plans also had to meet certain substantive coverage requirements under NRS Chapters 689A and 689B.

On May 31, 2018, the Nevada Supreme Court issued its decision in *MDC Restaurants, LLC v. District Court*,² holding that a health benefit plan under the MWA needed not meet the substantive provisions of NRS

Chapters 689A and 689B. Instead, the Nevada Supreme Court stated that an employer could pay the lower tier minimum wage if the employer provided “a benefit in the form of health insurance at least equivalent to the one dollar per hour in wages that the employee would otherwise receive.” The Supreme Court also indicated that the health benefits provided must be “at a cost to the employer of the equivalent of at least an additional dollar per hour in wages.”

In a seeming response to the *MDC Restaurants* decision, the Nevada Legislature passed SB 192, which re-introduces substantive requirements that a health plan must meet to qualify for payment of the lower tier minimum wage. More specifically, SB 192 amends NRS Chapter 608 to state that, for purposes of paying the lower tier minimum wage, an employer:

1. Provides health benefits as described in Section 16 of Article 15 of the Nevada Constitution only if the employer makes available to the employee and the employee’s dependents:
 - (a) At least one health benefit plan that provides:
 - (1) Coverage for services in each of the following categories and the items and services covered within the following categories:
 - Ambulatory patient services;
 - Emergency services;
 - Hospitalization;
 - Maternity and newborn care;
 - Mental health and substance use disorder services, including, without limitation, behavioral health treatment;
 - Prescription drugs;
 - Rehabilitative and habilitative services and devices;
 - Laboratory services;
 - Preventative and wellness services and chronic disease management;
 - Pediatric services, which are not required to include oral and vision care; and
 - Any other health care service or coverage level required to be included in an individual or group health benefit plan pursuant to any applicable provision of title 57 of NRS; and

(2) A level of coverage that is designed to provide benefits that are actuarially equivalent to at least 60 percent of the full actuarial value of the benefits provided under the plan; or

(b) Health benefits pursuant to a Taft-Hartley trust which is formed pursuant to 29 U.S.C. § 186(c)(5) and qualifies as an employee welfare benefit plan pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq.; or the provisions of the Internal Revenue Code.

SB 192 uses the definition of “health benefit plan” set forth in NRS 687B.470. Additionally, SB 192 indicates that a hospital-indemnity insurance plan or fixed-indemnity insurance plan does not meet the “qualifying health plan” requirements, unless the employer separately makes available to the employee and the employee’s dependents at least one health benefit plan that meets the above requirements in subsection 1.

SB 192 is effective January 1, 2020.

AB 221 (Employment of Persons Under 21 in Gaming Industry)

Relevant to the gaming industry, AB 221 amends NRS Chapter 463 to permit a person who is of the age of majority (18 or 16, in some circumstances) to be employed as a gaming employee by a licensed manufacturer or distributor at the business premises of the licensed manufacturer or distributor if the employee:

- designs, develops, programs, produces or composes a control program or other software, source language, or executable code of a gaming device, associated equipment or a gaming support system, subject to peer review and change management procedures adopted by the licensee;
- fabricates or assembles the components of a gaming device, associated equipment or a gaming support system; or
- installs, modifies, repairs or maintains a gaming device, associated equipment or a gaming support system.

AB 221 is effective July 1, 2019.

SB 493 (Employee/Contractor Misclassification)

SB 493 adds sections to NRS Chapter 608, precluding an employer from using coercion, misrepresentation, or fraud to require a person to be classified as an independent contractor or form a business entity in order to classify the person as an independent contractor. SB 493 also prohibits employers from

willfully misclassifying or “otherwise willfully fail to properly classify a person as an independent contractor.” Employers who violate SB 493 may be subject to administrative penalties imposed by the Labor Commissioner as follows: (1) a warning for a first instance of unintentional misclassification; (2) \$2,500 fine for a first instance of willful misclassification; (3) for a second or a subsequent offense, a fine of \$5,000 for each employee who was willfully misclassified.



SB 493 authorizes a person to file a complaint with the Labor Commissioner, seeking administrative penalties for misclassification. The Labor Commissioner is obligated to make a determination as to the alleged misclassification within 120 days after the complaint is received. Employers are entitled to a notice and an opportunity to be heard before penalties are imposed, and the hearing must be conducted in accordance with NRS Chapter 233B. An employee who, after a hearing is found to have been misclassified as an independent contractor, is entitled to recover lost wages, benefits, or other economic damages to make the person whole. Any party to the hearing may petition for judicial review pursuant to NRS Chapter 233B.

SB 493 further requires the offices of the Labor Commissioner (wage and hour), the Division of Industrial Relations of the Department of Business and Industry (workers' compensation, among others), the Employment Security Division of the Department of Employment, Training, and Rehabilitation (unemployment), the Department of Taxation, and the Attorney General to share information regarding suspected misclassification of employees collected in the course of performing their official duties, which has not otherwise been declared confidential under applicable law. If the information has otherwise been deemed confidential, these offices “may” still communicate the information to each other, if the confidentiality of the information is maintained under the terms required by law. In other words, employers should expect that a finding of misclassification by one agency may lead to an investigation by another agency.

SB 493 also creates a Task Force on employee misclassification (defined as practice by employers to classify employees as independent contractors in order to

avoid legal obligations under various applicable laws). The Task Force is comprised of the Nevada Governor, a representative of a Nevada employer who has more than 500 employees, a representative of a Nevada employer who has 500 employees or less, one independent contractor, two union representatives, one representative of a Nevada trade or business association, and a representative of a governmental agency that administers laws dealing with employee misclassification. The Governor may appoint up to 2 additional members if the Governor so deems appropriate. The Task Force's mandate is to evaluate the policies and practices of the above-mentioned offices; evaluate existing fines, penalties, and disciplinary action related to employee misclassification; and develop recommendations to reduce the occurrence of employee misclassification. The Task Force is required to submit a written report containing a summary of its work and related recommendations to the Director of the Legislative Counsel Bureau on or before July 1, 2020 and on or before July 1 of each subsequent year.

After their initial appointments, the Task Force members generally serve 2-year terms and may be re-appointed. The Task Force is required to meet at least twice per year; these meetings are to be conducted in accordance with NRS Chapter 241.

Importantly, SB 493 modifies the definition of “independent contractor” for purposes of the conclusive presumption under NRS 608 by requiring that a contractor hold a state or local business license to operate in Nevada. SB 493 further provides that a natural person is conclusively presumed to be an independent contractor if the person is a contractor or subcontractor licensed under NRS Chapter 624 or is directly compensated by a contractor or subcontractor licensed under NRS Chapter 624 for providing labor for which an NRS Chapter 624 license is required and:

1. The person has been and will continue to be free from control or direction over the performance of the services, both under his or her contract of service and in fact;
2. The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprises for which the service is performed; and
3. The service is performed in the course of an independently established trade, occupation, profession or business in which the person is customarily engaged, of the same nature as that involved in the contract of service.

The term “providing labor” does not encompass delivery of supplies.

Finally, SB 493 also requires that the mandatory workers' compensation posters include the definitions of

“employee” and “independent contractor,” as those terms are defined in Nevada’s workers’ compensation statutes.

SB 493 is effective July 1, 2019.

AB 181 (Employee Attendance Requirements)

AB 181 adds a new section to NRS Chapter 613 to make it unlawful for an employer to require an employee to be physically present at the employee’s place of work in order to notify the employer that the employee is sick or has sustained a non-work-related injury and cannot work. An employer may, however, require an employee to provide notification that the employee is sick or injured and cannot report to work.

Employers (or agents or representatives thereof) who violate AB 181 are subject to, among other remedies or penalties, an administrative penalty imposed by the Labor Commissioner (up to \$5,000) “for each such violation.” If an administrative penalty is imposed, the Labor Commissioner may also recover the costs of the proceeding, including investigative costs and attorney’s fees.

AB 181 is already effective.

SB 312 (Mandatory Paid Leave for Certain Private Employers)

SB 312 states that every Nevada private employer who has 50 or more employees in private employment in Nevada is obligated to provide paid leave to “each employee of the employer,” subject to certain exceptions and stipulations. Under SB 312, an employee is entitled to at least 0.01923 hours of paid leave for each hour of work performed (meaning, part-time employees also accrue paid leave, unless otherwise excluded). An employer can satisfy the paid leave requirement by “front-loading” on the first day of each benefit year the total amount of hours of paid leave that the employee is entitled to accrue that benefit year or accruing the total number of hours

of paid leave over the course of the benefit year. Employers are allowed to provide more generous paid leave benefits.

Employees may use available paid leave beginning on the 90th calendar day of their employment and need not give a reason to their employer for such use. Employees must, however, as soon as practicable, provide notice of their intent to use paid leave. An employer may not deny employees their right to use available paid leave, require employees to find replacements as a condition of using available paid leave, or retaliate against employees for using available paid leave.

Employers can limit paid leave use to 40 hours per benefit year. Employers can also limit the amount of paid leave carried over from one benefit year to the other to 40 hours per benefit year. Employers are allowed to set a minimum increment of paid leave (not to exceed 4 hours) that an employee may use at one time.

Employees’ paid leave is compensated at the rate of pay at which the employee is compensated at the time when leave is taken. For employees compensated by salary, commission, or through a method other than hourly wage,

the rate of paid leave compensation is calculated by dividing the total wages of the employee paid for the immediately preceding 90 days by the number of hours worked during that period. Such rate must include any earned non-discretionary bonuses, but exclude discretionary bonuses, overtime pay, hazardous pay, holiday pay, or earned tips. For employees compensated on an hourly basis, the paid leave rate is the employee’s hourly wage. The paid leave

compensation is to be paid on the same pay day as the hours taken are normally paid.

On each pay day, employers are required to provide an accounting of the hours of paid leave available to the employee (which can be accomplished via the employer’s payroll system). Employers must also keep records of the receipt or accrual and use of paid leave by each employee for a 1-year period following the



entry of such information on the record and make these records available for inspection by the Labor Commissioner. In addition, the Labor Commissioner is required to prepare, and employers will be required to post a bulletin outlining employees' rights to paid leave in a conspicuous location in each workplace maintained by the employer.

Employers may, but are not required to, pay out accrued but unused paid leave upon termination of employment. However, if the employment separation was not due to the employee's voluntary resignation and the employee is rehired within 90 days, any previously unused paid leave hours available for use by the employee must be reinstated.

SB 312 has a number of exceptions. For example, for the first 2 years of a business' operation, SB 312 does not apply. The bill also does not apply to employers who, by contract, policy, collective bargaining agreement or another agreement, provide employees with paid leave at a rate of at least 0.01923 hours of paid leave per hour of work performed. Finally, SB 312 does not apply to temporary, seasonal, or on-call employees.

SB 312 is effective January 1, 2020.



AB 248 (Settlement Agreements)

AB 248 provides that, except as otherwise indicated in NRS 233.190 (dealing with confidentiality of Nevada Equal Rights Commission settlements and related information), a settlement agreement must not include provisions that prohibit or otherwise restrict a party from disclosing factual information related to a claim in a civil or administrative action, if the claim relates to: (a) conduct that would constitute a sexual offense under NRS 179D.097 and be punishable as a felony (regardless of whether criminal investigation, prosecution, or conviction of such conduct ultimately occurred); (b) discrimination on the basis of sex; or (c) retaliation by an employer against the employee for the employee's reporting of sex discrimination. Any provision in a settlement agreement executed after July 1, 2019 that prohibits or restricts the disclosure of the above information is void and unenforceable, and a

court shall not enter an order that restricts the disclosure of the factual information outlined above.

Except where a governmental agency or a public officer is a party to the settlement agreement, upon the claimant's request, the settlement agreement must contain a provision that prohibits disclosure of the claimant's identity and any facts relating to the action that could lead to the disclosure of the claimant's identity. If a governmental agency or a public officer is a party to the settlement agreement, such a provision cannot be requested. A "claimant" is a person who filed a claim in a civil action, or an administrative action based on the grounds set forth in sections (a) through (c) above.

AB 248 does not prohibit a court from considering any pleading or other record to determine the factual basis of a civil claim, or an entry or enforcement of a settlement agreement clause that prohibits a party from disclosing the settlement amount.

Interestingly, AB 248 also applies to landlords, and the definition of "employer" it uses is the definition set forth in NRS 33.220 ("a public or private employer in this state, including, without limitation, the State of Nevada, an agency of this state and a political subdivision of this state.")

AB 248 is effective July 1, 2019.

SB 177 (Title VII-Like Remedies for Nevada Law Violations)

Finally, in relevant part, SB 177 provides that an employee who successfully brings a claim under NRS Chapter 613 may be awarded the same legal or equitable remedies that may be awarded to the employee pursuant to Title VII of the Civil Rights Act of 1964 (federal anti-discrimination law). The likely consequence of this bill is that employers will face more discrimination lawsuits in Nevada state courts, which have traditionally been deemed more favorable to employees than federal courts.

SB 177 is effective October 1, 2019.



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¹ See NRS 453D.100(2)(a).

² 134 Nev. Adv. Op. 41 (May 31, 2018).

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