

Arkansas

Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

Topics

I. Discrimination

Arkansas has enacted the Intrastate Commerce Improvement Act, a law designed to improve intrastate commerce by ensuring that employers doing business in Arkansas are subject to uniform nondiscrimination laws and obligations regardless of the areas of the state in which the employer operates. To that end, the Act prohibits counties, municipalities, or other political subdivisions of the state from adopting or enforcing an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not provided for under state law. However, this provision of the Act does not apply to a rule or policy that pertains only to public employees, that is, the employees of a county, municipality, or other political subdivision.

A.C.A. § 14-1-401 through A.C.A. § 14-1-403 (Effective 02/25/2015).

II. Pre-Employment Inquiry Guidelines

Arkansas has amended its statute dealing with employer references. State law permits an employer to disclose certain categories of information about a current or former employee's employment history to a prospective employer of the current or former employee, if the employer has written consent from the current or former employee. The amendment provides that the employer may present the information to the prospective employer in a format convenient to the current or former employer, including any electronic format.

The law sets forth the required contents of the written consent to be obtained from the employee, and provides that the consent is valid only for the length of time that the application is considered active by the prospective employer, but in no event longer than 6 months. The amendment clarifies the time limit:

- If the applicant is hired and remains with the new employer for longer than 6 months, the consent shall be valid for no longer than 6 months.
- If the applicant is hired and remains with the new employer for less than 6 months, the consent shall be valid for 6 months after the termination of employment.

A.C.A. § 11-3-204 (Effective Date 08/06/2015).

III. Family and Medical Leave

No new laws or regulations enacted in 2015 or 2016.

IV. Wage and Hour Laws

Arkansas law restricts the hours that minors may be permitted to work. The new law lowers the age for these restrictions from 18 to 17 years of age. Accordingly, a child under age 17 cannot be employed or permitted to work:

- More than six days in any week;

- More than 54 hours in any week;
- More than 10 consecutive hours in any one day;
- More than 10 hours in a 24-hour period; or
- Before 6:00 a.m. or after 11:00 p.m., except that this limitation does not apply to children under 17 years of age employed on nights preceding non-school days in occupations determined by the state labor department to be sufficiently safe for their employment.

A.C.A. § 11-6-110 (Effective Date 02/25/2015).

V. **Drug Testing**

Arkansas has amended its unemployment statutes governing: 1) Benefits disqualification for misconduct and failure or refusal to apply for or accept suitable work; and 2) employer contributions and penalties.

Benefits Disqualification

The misconduct statute provides that an individual cannot receive unemployment benefits if discharged for work misconduct related to a positive drug test per a U.S. Department of Transportation-qualified drug screen conducted according to an employer's bona fide written drug policy. As amended, the statute provides that any benefits payable after the disqualification date will be terminated, but only in the benefit year in which the positive drug result occurred.

The failure or refusal to apply for or accept suitable work statute provides that an individual cannot receive benefits if s/he was rejected for employment because s/he failed to appear for a U.S. DOT drug screen after receiving a bona fide job offer of suitable work subject to passing the screen, or s/he failed to pass the screen after receiving such an offer.

Additionally, both statutes provide that following the initial disqualification for benefits, the disqualification continues until, after the disqualification, the individual has been paid wages in two quarters for insured work totaling not less than 35 times his or her weekly benefits amount. As amended, the requirement that s/he also pass a U.S. DOT drug screen by testing negative has been removed.

Employer Contributions & Penalties

As amended, the employer contributions statute provides that liability determinations are final unless an employer requests an administrative determination of coverage within 30 days after the determination is mailed. However, if a request is submitted late due to circumstances beyond an employer's control, the department may consider the request timely.

A separate statute has been amended to provide that, if a person defaults on paying unemployment contributions after due notice, his or her federal income tax refund will be used to pay the debt.

A.C.A. § 11-10-514, A.C.A. § 11-10-515, A.C.A. § 11-10-701, and A.C.A. § 11-10-717 (Effective Date 07/01/2015).

VI. Noncompete and Other Employment Agreements

A new business and commercial law statute addresses enforceability of non-competition agreements. The law, however, will not impair, limit, or change a party's protections and rights under the Arkansas Trade Secrets Act, or apply to a person holding a professional license.

Agreement Requirements & Provisions

A non-competition agreement is enforceable if ancillary to an employment relationship or part of an otherwise employment agreement or contract to the extent: 1) the employer has a protectable business interest; and 2) the agreement is limited in time and scope to protect that interest. Concerning scope, the lack of a specific or defined geographic restriction will not make an agreement overbroad if the second prong is satisfied. Concerning time, a two-year post-termination restriction is presumptively reasonable unless facts and circumstances clearly demonstrate the restriction is unreasonable compared to the employer's business interest. The law provides that an employee's continued employment is sufficient consideration for such an agreement.

A "protectable business interest" includes the employer's: A) trade secrets; B) intellectual property; C) customer lists; D) customer goodwill; E) knowledge of business practices; F) method; G) profit margins; H) costs; I) other confidential business information that is confidential, proprietary, and increases in value by not being known by a competitor; J) training and education of employees; K) other valuable employer data provided to an employee that an employer would reasonably seek to protect or safeguard from a competitor in the interest of fairness.

An agreement's reasonableness is determined by considering: I) the nature of the employer's business interest; II) the geographic scope of the employer's business and whether a limitation is feasible under the circumstances; III) whether the restriction is limited to a specific group of customers / individual / entities associated with the employer's business; and IV) the nature of the employer's business.

Enforcement & Amendment

If a lawsuit is filed concerning a breach of the agreement, the court can award an employer damages, appropriate injunctive relief, or both. Moreover, the immediate harm associated with a breach is considered irreparable for preliminary injunction purposes. Note, however, that the enforcement provisions do not limit any other defense available to a party against a preliminary injunction claim, or an employer right to monetary damages for a breach.

If an agreement's restrictions are found unreasonable and impose unnecessary restraint, a court can reform the agreement to make the limitation reasonable and impose restrictions that are necessary to protect the protectable business interest. After a court has "blue penciled" invalid provisions, it can enforce the reformed agreement.

Agreements Not Covered by the Law

The provisions do not apply to non-competition agreements that are ancillary to other contractual relationships, including business sale / purchase agreements, franchise agreements, and agreements that are not ancillary to an employment relationship or contract.

Additionally, the law does not apply to other employer-employee agreements that do not concern competition or competitive work, including: 1) agreements not to solicit, recruit, or hire employees; 2) confidentiality agreements; 3) nondisclosure agreements; and 4) terms and conditions of employment or an employment agreement.

For these agreements, common law (i.e., law set by courts) will control their enforceability.

A.C.A. § 4-75-101 (Effective Date 08/06/2015).

VII. Workplace Safety

No new laws or regulations enacted in 2015 or 2016.

VIII. Workers' Compensation

No new laws or regulations enacted in 2015 or 2016.

IX. Miscellaneous

Legally Admitted Aliens under the Department of Workforce Services Law

The Arkansas Department of Workforce Services Law ("Law") governs the state's unemployment insurance program. The Law includes services by various categories of workers in its definition of "employment," including agricultural workers performing labor for employers who employ 10 or more agricultural workers for some portion of a day in at least 20 calendar weeks of the preceding year. The Law also excludes the services of certain types of agricultural workers from its definition of employment.

This amendment changes the definition of employment under the Law to exclude the agricultural labor services of an alien admitted to the United States under the Immigration and Nationality Act of 2011. However, such aliens must still be counted in determining whether an agricultural employer meets the 10-employee threshold for employer coverage.

A.C.A. § 11-10-210(f)(1) (Effective Date 08/06/2015).