

## Indiana

### Employment Law Workbook Addendum

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

#### Topics

##### **I. Discrimination**

Indiana has enacted a new law making it an unlawful employment practice to terminate an employee in relation to the employee's use of a protective order. Specifically, an employer is prohibited from terminating an employee due to:

- the filing of a petition for a protective order for the protection of the employee, regardless of whether the protective order has been issued; or
- the actions of an individual against whom the employee has filed a protective order.

"Protective order" means an order of protection, a no-contact order, a workplace violence restraining order, a foreign protective order, and various other types of protective orders as set forth under Indiana Code section 5-2-9-2.1.

The new law does not prohibit an employer from changing the employee's work location, compensation, benefits, or other terms and conditions of employment, if the employer and employee have mutually agreed to make such changes.

Burns Ind. Code Ann. § 22-5-7 (Effective Date 07/01/2015).

##### **II. Pre-Employment Inquiry Guidelines**

A new law allows private employers to institute a veterans preference employment policy that gives preference to covered veterans over another qualified applicant or employee concerning decisions relating to hiring, promotion, or retention during a reduction-in-force without violating fair employment laws. Under the law, a covered "veteran" is a person who served in the U.S. armed forces or reserves, or the Indiana Army or Air National Guard, and was released from active duty under conditions other than dishonorable.

To be valid, a policy must be in writing and uniformly applied to decisions regarding the aforementioned employment events. Under a policy, an employer can require a veteran to submit a Department of Defense Form DD 214 (or its predecessor or successor form) to prove eligibility.

However, a valid adopted policy cannot:

- Apply to or abrogate a collective bargaining agreement in effect before the policy was adopted; and
- Interfere with an employer's obligation under the federal National Labor Relations Act or Uniform Services Employment and Reemployment Act.

Burns Ind. Code Ann. § 10-17-15-1 through Burns Ind. Code Ann. § 10-17-15-10 (Effective Date 07/01/2015).

##### **III. Family and Medical Leave**

No new laws or regulations enacted in 2015 or 2016.

*Tammy D. McCutchen, principal with Littler Mendelson PC, oversaw the firm's review and update of this state employment law workbook addendum.*

#### **IV. Wage and Hour Laws**

##### **A. Employee Scheduling**

Indiana law prohibits a county, municipality, or township from requiring an employer to provide certain benefits, employment terms or conditions, or attendance or leave policies that exceed federal or state requirements. The amendments now prohibit counties, municipalities, or townships from requiring an employer to provide a scheduling policy that exceeds federal or state requirements.

The amendments also create a new code section in its Unemployment Compensation statutes that lists the persons that may represent a claimant or an employer or employing unit in a claim for benefits pending before an administrative law judge, the unemployment compensation review board, or other individuals who adjudicate claims.

An employer or employing unit may be represented by:

- a designated officer or other employee of the employer or employing unit;
- an attorney;
- an accountant certified by and in good standing with the state; or
- a representative of an unemployment compensation service firm.

A claimant may be represented by:

- the claimant in person (claimants may also designate a lay person to assist the claimant in the presentation);
- an attorney;
- an accountant certified by and in good standing with the state; or
- an authorized agent of a bona fide labor organization to which the claimant belonged when the pending claim occurred.

Burns Ind. Code Ann. § 22-2-16-3 and Burns Ind. Code Ann. § 22-4-17-3.2 (Effective Date 07/01/2016).

##### **B. Wage Payment Damages & Wage Deductions**

Indiana has amended its liability provisions for unpaid wages, and also made numerous changes to its wage assignment / deduction statute.

##### **Liability for Unpaid Wages**

As amended, an employer that fails to pay wages will be liable as follows:

- Compensatory damages for unpaid wages.
- Liquidated damages in an amount equal to twice the amount of compensatory damages, if an employer was not acting in good faith.

- Attorneys' fees and costs.

Before the amendments, liquidated damages of 10% of the unpaid wages could be awarded per day, up to twice the amount of unpaid wages.

### **Wage Deductions**

The statute has been amended, in part, concerning deductions relating to employee purchases of employer goods. Under the amended provision, a wage assignment / deduction is allowed for the purchase price of merchandise, goods, or food offered by the employer and sold to the employee for his or her benefit, use, or consumption, upon the employee's written request.

The amendments also change requirements concerning loans to employees. Because of the changes, the interest rate charged on loans or advances cannot exceed the bank prime loan interest rate as reported by the Federal Reserve or any successor rate, plus 4%.

Additionally, the amendments create new permitted deductions relating to:

- The purchase of uniforms and equipment necessary to fulfill the duties of employment. Such deductions are permitted if they do not exceed \$2,500 per year or 5% of the employee's weekly disposable earnings, whichever is less.
- Reimbursement for education or employee training skills, unless wholly or partly provided through an economic development incentive from any federal, state, or local program.
- Advances for payroll or vacation.

For any permitted deductions, a wage assignment must be in writing, signed personally by the employee, revocable at any time by the employee upon written notice to the employer, and agreed to in writing by the employer. Moreover, an executed copy must be delivered to the employer within 10 days after it is executed.

Burns Ind. Code Ann. § 22-2-5-2 and Burns Ind. Code Ann. § 22-2-6-2 (Effective Date 07/01/2015).

### **C. Withholding Orders**

A new chapter to Indiana unemployment laws covers withholding wages when an employee previously was overpaid unemployment benefits.

If the Department of Workforce Development establishes an individual was overpaid unemployment benefits, and the determination becomes final, it can require each employer of said individual to withhold amounts from his or her income and pay those amounts to the Department. The Department will provide a notice to withhold income to each employer, which will contain the following information:

- The individual's Social Security number;
- The total amount to be withheld, including any interest, penalties, or assessments;

- An explanation of an employer's duties once an employee receives notice from the Department;
- A description of the withholding limitations;
- A description of:
  - The law prohibiting an employer from using income withholding as a basis for refusing to hire, discharging, or taking disciplinary action against an individual; and
  - The penalties for refusing to withhold income or for knowingly misrepresenting an employee's income.

An employer that receives a notice to withhold income must:

- Verify the individual's employment to the Department;
- Withhold income each pay period, applying state law garnishment principles (Note: A withholding is not considered a wage assignment / deduction);
- Begin withholding the amount during the first pay period that occurs no later than 14 days after the employer received the notice;
- Remit the amount withheld to the Department by check or electronic payment no later than 7 days after each regularly scheduled payday;
- Continue withholding until the Department notifies the employer to stop withholding or until the full amount has been paid as indicated by a written statement from the Department to the employer; and
- Notify the Department if the individual ends employment, and include his or her last known address and the name of any new employer, if known.

As with garnishments, an employer can collect a fee for withholding and remitting, which is not considered a wage assignment / deduction.

As noted in part above, an employer cannot use a withholding as a basis for:

- Refusing to hire an applicant;
- Discharging an employee; or
- Taking disciplinary action against an employee.

If an employee reasonably believes an employer committed an unlawful action and s/he was adversely affected by it, the employee can file a lawsuit in state court. If the employee wins, a court can order that the individual be hired or reinstated without loss of pay or benefits, and impose a fine up to \$1,000.

Additionally, an employer that refuses to withhold income, or knowingly misrepresents an employee's income is liable to the Department for the amount that was not withheld, and may be ordered to pay punitive damages to the Department of up to \$1,000 for each pay period a violation occurred. Also, the Department can file a lawsuit and, if successful, a court can

order the aforementioned damages and also order the employer to provide accurate information concerning an employee's income and to comply with the chapter's requirements.

However, the law states that an employer complying with a notice that is regular on its face is not liable in any civil action for any conduct it took to comply with the notice, and that an employer complying with a notice is discharged from liability regarding the part of the employee's income that was withheld to comply with the notice.

Burns Ind. Code Ann. § 22-4-10-4.5 (Effective Date 07/01/2015).

**V. Drug Testing**

No new laws or regulations enacted in 2015 or 2016.

**VI. Noncompete and Other Employment Agreements**

No new laws or regulations enacted in 2015 or 2016.

**VII. Workplace Safety**

**Indiana Final Rule on Improving Tracking of Workplace Injuries and Illnesses Bulletin #16-02**

The Indiana Department of Labor has issued a final rule on improving tracking of workplace injuries and illnesses. Indiana law provides that a standard lawfully adopted by the federal Occupational Safety and Health Administration (OSHA) under federal law may be enforced by the Indiana Department of Labor not earlier than 60 days after the OSHA standard becomes effective. In May 2016, OSHA published its final rule on electronic reporting of workplace injuries and illnesses, which requires employers to adopt an electronic recordkeeping system or to transfer all paper records to electronic format for submission. The Indiana final rule incorporates by reference the provisions of the OSHA final rule.

**VIII. Workers' Compensation**

No new laws or regulations enacted in 2015 or 2016.

**IX. Miscellaneous**

**A. Franchisor Liability**

This new law amends Indiana franchise law to clarify that the franchisor is not an employer or co-employer of a franchisee the franchisee's employees unless the franchisor agrees, in writing, to assume the role of an employer or co-employer of the franchisee or the franchisee's employees.

Burns Ind. Code Ann. § 23-2-2.5-0.5 (Effective Date 07/01/2016).

**B. National Guard Protections**

Indiana law ensures that members of the Indiana National Guard are eligible for the rights, benefits, and protections of the federal Uniformed Services Employment and Reemployment Rights Act (USERRA) and the federal Servicemembers Civil Relief Act (SCRA). The amendments extend these protections to National Guard members of states other than Indiana. Thus, an Indiana employee who is a member of the National Guard of another state is entitled to the employment protections and other benefits afforded under Indiana law.

Burns Ind. Code Ann. § 10-16-7-23, Burns Ind. Code Ann. § 10-16-20-2, and Burns Ind. Code Ann. § 12-15-2.5-2 (Effective Date

### **C. Medical Savings Account Withdrawals**

Indiana has enacted comprehensive amendments to its tax code. With respect to employee medical savings accounts, the statute provides that money deposited by an employer prior to January 1, 2016 into a medical care savings account established for an employee is exempt from income taxation in the taxable year in which the money is deposited, unless the employee has already excluded the amount from income for purposes of the employee's federal taxes. Money withdrawn by the employee to use for eligible medical expenses is likewise exempt from taxation, but money withdrawn and used for any other purpose is subject to tax withholding. The statute also requires that an employer that establishes a medical care savings account program shall, before making any contributions to any accounts under the program, inform all employees in writing of the federal tax status of contributions made under the program.

The amendments provide that if an employer contributes money to a medical care savings account after December 31, 2015 for which no exemption applies, the money may be withdrawn from the account by the employee at any time and for any purpose without a penalty.

Burns Ind. Code Ann. 6-3-2-18 and Burns Ind. Code Ann. 6-8-11-11.5 (Effective Date 12/01/2015).