



POLICY AND PROGRAM REPORT



Labor and Employment

April 2016

INTRODUCTION

The employment of workers is a cornerstone of any economy and a fundamental subject of governmental oversight. The State of Nevada has a long history of involvement in employment issues. The first miners’ unions in the western United States formed on the Comstock in the early 1800s. Chapter 613 (“Employment Practices”) of *Nevada Revised Statutes* (NRS) dates to 1911. In 1915, Nevada’s Legislature created the Office of Labor Commissioner, giving the Commissioner primary responsibility to enforce the State’s labor laws, particularly those related to wages and hours.

At the national level, the Wagner Act of 1935, also known as the National Labor Relations Act, provided federal support for unionization and collective bargaining. In 1947, the Taft-Hartley Act shifted federal policy toward a more neutral position on unionization. The Landrum-Griffin Act of 1959, known as the Labor-Management Reporting and Disclosure Act, created a bill of rights for union members.

The following sections of this report outline some important aspects of labor and employment policy in Nevada, including the concepts of at-will employment, the minimum wage, the right to work, unemployment insurance, workers’ compensation, and other subjects.

AT-WILL EMPLOYMENT

At-will employment is a legal doctrine that defines an employment relationship in which either the employer or employee may break off the relationship with no liability, provided that the employee has no contract for a definite term or that the employer has not recognized a labor union. Nevada is an at-will employment state.

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In most states, including Nevada, an employer may not fire an employee if the firing would violate the state's public policies (against discrimination, for example) or a state or federal statute. Also, an employee with an implied contract may not be fired without liability on the part of the employer. Eleven states, again including Nevada, also recognize a breach of an implied covenant of good faith and fair dealing as an exception to at-will employment.

In 1989, in the case of *Vancheri v. GNLV Corporation* (105 Nev. 417, 777 P.2d 366 [1989]), the Supreme Court of Nevada considered at-will employment, saying, "Employment 'at-will' is a contractual relationship and thus governed by contract law. An employer can dismiss an at-will employee with or without cause, so long as the dismissal does not offend a public policy of this state."

Similarly, in the 1990 case of *American Bank Stationery v. Farmer* (106 Nev. 698, 799 P.2d 1100 [1990]), the Court said, "All employees in Nevada are presumed to be at-will employees. An employee may rebut this presumption by proving by a preponderance of the evidence that there was an expressed or implied contract between his employer and himself that his employer would fire him only for cause."

EMPLOYEE MISCLASSIFICATION

Employee misclassification involves purposefully treating individuals providing services to businesses as nonemployees to avoid paying certain taxes and employee-related expenses and benefits. The most common method of employee misclassification is to treat individuals as independent contractors when, in fact, they are employees. In Nevada, one factor that had made it easier for employers to misclassify employees was that State law, relative to compensation, wages, and hours, did not contain a clear definition for "independent contractor." This led to varying interpretations as to what constitutes an independent contractor versus an employee.

In 2014, in the case of *Terry v. Sapphire Gentlemen's Club* (130 Nev. Adv. Op. No. 87, 336 P.3d 951 [2014]), the Supreme Court of Nevada concluded the existing State law regarding employee classification was unclear. The Court determined employee status with regard to Nevada's minimum wage laws required analysis under the federal Fair Labor Standards Act's "economic realities" test. That test considers the degree of control a business has over the labor or work performed by a person, as well as the degree to which that person is economically dependent on the business. The test is one of many methods of determining a person's status as an independent contractor, and because of differences in federal and State law, it is possible that a person could be classified as an employee under one law and an independent contractor under another.

In order to more clearly define Nevada law relative to compensation, wages, and hours, and the separation of an independent contractor from an employee, the 2015 Legislature enacted Senate Bill 224 (Chapter 325, *Statutes of Nevada*). The measure established a conclusive presumption that a person is an independent contractor, rather than an employee, if he or she meets one or more of the following criteria:

- First, the person possesses or has applied for an employer identification number or Social Security number, or has filed an income tax return for a business or earnings from self-employment with the federal Internal Revenue Service in the previous year, unless the person is a foreign national;

- Second, the person is required by a contract to hold an applicable State or local business license and to maintain any necessary occupational license, insurance, or bonding; and
- Finally, the person must maintain three or more of the following in the performance of his or her work: (1) control and discretion over the means and manner of the performance of any work; (2) control over the completion schedule, range of work hours, and time the work is performed, unless an agreement between the parties dictates otherwise; (3) the ability to perform work for more than one party, unless otherwise required by law or contract between the parties for a limited period; (4) the freedom to hire employees to assist with the work; and (5) a substantial investment of capital in his or her business.

EMPLOYMENT OF MINORS

In the early 1900s, the numbers of child laborers in the U.S. peaked. Minors worked in agriculture, in industry, as newsboys and messengers, and in other jobs. In 1938, the U.S. government regulated for the first time minimum ages of employment and hours of work for children, in the Fair Labor Standards Act.

Nevada restricts the employment of minors under the age of 16 and between the ages of 16 and 18. No person under 16 years of age may be legally employed to work in any capacity in connection with:

- The preparation of compounds using dangerous or poisonous acids;
- The manufacture of colors, paints, or white lead;
- Dipping, drying, or packing matches;
- The manufacture of goods for immoral purposes;
- A coal breaker, glass furnace, mine, ore reduction works, quarry, or smelter;
- A cigar factory, tobacco warehouse, or other factory where tobacco is prepared;
- A laundry;
- A brewery, distillery, or other establishment where malt or alcoholic liquors are bottled, manufactured, or packed;
- The outside erection or repair of electric wires;
- Running or managing elevators, hoists, or lifts or oiling dangerous or hazardous machinery in motion;
- Gate tending, track repairing, or switch tending;

- Acting as a brakeman, conductor, engineer, fireman, or motorman on any railroad; or
- Establishments where explosives are manufactured or stored.

The Labor Commissioner may also declare other employment to be dangerous or injurious to the health or morals of persons under 16 years of age, thus prohibiting the employment of children in those lines of work as well. No person under the age of 16 may work more than 48 hours a week or 8 hours a day, with certain exceptions, and no person under the age of 14 may be employed without written permission from a district court judge or other person authorized by a judge.

Except for employment as a performer in a motion picture, no person may employ any child under the age of 14 during the hours when school is in session, unless the child has been excused by the school district or the order of the juvenile court.

For persons between the ages of 16 and 18, Nevada has fewer restrictions. They may not work in bars or casinos or in occupations dangerous to health. In incorporated cities and towns, no person under the age of 18 may be employed to deliver goods or messages before 5 a.m. or after 10 p.m. on any day.

In 2003, Nevada amended its laws to provide for judicial approval of a contract involving a minor rendering artistic, athletic, creative, or intellectual property services. If the court grants its approval, it must immediately appoint a special guardian to receive and hold a specific percentage of the minor's earnings. When the contract is terminated, the earnings must be transferred to the minor, if emancipated, or to the minor's guardian.

MINIMUM WAGE

Both federal laws and the laws of the State of Nevada require an employer to pay a minimum wage. The current federal minimum wage, pursuant to the Fair Labor Standards Act (FLSA), is \$7.25 per hour, effective July 24, 2009. The FLSA does not supersede any state or local law that is more favorable to employees. Therefore, in a state with a higher minimum wage, the employer must pay the higher rate.

In 2004 and 2006, Nevada's voters approved an amendment to the *Nevada Constitution* (Article 15, Section 16) adding a new section regarding minimum wages. An employer must pay a certain wage to any employee for whom the employer provides health care benefits or a higher wage to any employee who does not receive health care benefits. The minimum wage is adjusted annually to the level of the federal minimum wage or by the cumulative increase in the cost-of-living index, whichever results in the higher amount. The adjustment, if any, is announced on April 1 by the Office of Labor Commissioner and is effective on July 1. Effective July 1, 2013, the State minimum wage is \$7.25 per hour for employees who receive health care benefits and \$8.25 for employees who do not receive health care benefits. "Health benefits" mean a health insurance plan that is available to the employee and the employee's dependents at a total cost to the employee of not more than 10 percent of his or her gross taxable income from that employer.

An employee under the age of 18 who is employed by a nonprofit corporation for after-school or summer employment, or as a trainee, for not more than 90 days is exempt from Nevada's minimum wage rules. In 2007, the Legislature clarified the relationship between clients and providers of rehabilitation services and training programs for handicapped persons. Such a relationship is not considered employment for purposes related to the minimum wage.

OCCUPATIONAL HEALTH AND SAFETY

To prevent work-related illnesses, injuries, and occupational fatalities, federal and State laws set standards and establish enforcement programs for workplace health and safety. These laws address such subjects as asbestos exposure, blood-borne pathogens, exposure to other chemicals, guards on moving parts, hazard communication, and work in confined spaces.

The federal Occupational Safety and Health Act of 1970 created the Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH), a research agency. The law authorizes states to develop approved health and safety plans, if they cover public employees and provide protection equivalent to federal regulations. Nevada's laws are found in Chapter 618 ("Occupational Safety and Health") of NRS.

In response to a number of serious worker safety issues—including 12 fatalities in southern Nevada in 2008—the Legislature passed two measures in 2009 to promote safety on construction sites and to assist families affected by fatal construction accidents. Nevada law requires construction workers and their supervisors to take construction safety courses and obtain completion cards, or be subject to suspension or termination by their employers. A nonsupervisory construction worker must complete an approved 10-hour course in construction industry safety and health hazard recognition and prevention, known as an "OSHA-10 course." A supervisory construction worker must complete a similar 30-hour course, known as an "OSHA-30 course." The employee must present a completion card within 15 days of his or her employment date. If the employee does not present the card, the employer must suspend or terminate the employee.

RIGHT TO WORK

Nevada is a right-to-work state. Right-to-work laws prohibit agreements between labor unions and employers making membership in a union, or payment of union dues, a condition of employment. Fewer than half of the 50 states have such laws.

The federal Taft-Hartley Act authorizes individual states to adopt an "open shop" rule, under which an employee cannot be compelled to join a union or pay the equivalent of dues to a union, nor can the employee be fired if he or she joins the union. In other words, the employee has the right to work.

Nevada's right-to-work law is found in NRS 613.230 through 613.300. The law was enacted by an initiative of the people and became effective in 1953. In the 1950s, voters defeated three initiatives aimed at repealing the law, and a fourth initiative failed for lack of a sufficient number of signatures. Since 1959, the Legislature has considered and rejected at least ten measures to amend or repeal the law, and in 1994, an initiative to repeal the law did not gain enough signatures to be placed on the ballot.

UNEMPLOYMENT INSURANCE

The federal Social Security Act of 1935 created the unemployment insurance (UI) system, which provides workers with partial replacement of wages lost as a result of involuntary unemployment. The UI system helps to dampen economic fluctuations by replacing a portion of workers' wages during troughs in the business cycle, drawing on reserves built up during more favorable periods.

The UI system is a shared federal-state program financed jointly by federal and state payroll taxes. The Federal Unemployment Tax Act (FUTA) authorizes a tax to cover the costs of administering UI programs and a portion of the costs of extended UI benefits. The U.S. Department of Labor administers the federal components of the system.

Nevada's Legislature enacted the Unemployment Compensation Law in 1937, declaring, "Economic insecurity due to unemployment is a serious menace to the health, welfare, and morals of the people of this state." The Employment Security Division (ESD), Department of Employment, Training and Rehabilitation, administers the system in Nevada.

To qualify for benefits, a person must be fully or partially unemployed, must have earned enough wages to qualify, and must be unemployed through no fault of his or her own. A claimant must be able to work, available for work, and actively seeking work. The amount of benefits depends on the wages the worker earned during a base period, usually defined as the first four of the last five completed calendar quarters preceding the claim. The maximum benefit is set at 50 percent of the statewide annual average weekly wage, and it is based on past earnings, up to a maximum of \$417 per week. The duration of benefits is generally limited to 26 weeks unless extended by law.

An employer who pays wages of \$225 or more during any calendar quarter for services performed in Nevada must register with the ESD and pay quarterly unemployment taxes. (Employees do not pay UI taxes.) The tax rate for new employers is 2.95 percent of a worker's taxable wages, plus 0.05 percent for the Career Enhancement Program, a training program to foster job creation and provide more skilled workers. After being in the system for a minimum of 14 quarters, an employer receives an experience rating, which is a function of the excess of taxes paid over benefits charged to the employer's account. The employer's tax rate is then based on that rating, varying from 0.25 percent to 5.4 percent of taxable wages. In 2016, an individual's taxable wages are capped at \$28,200.

During the economic downturn in 2008 and 2009, both in Nevada and the nation as a whole, contributions from employers were not sufficient to cover the cost of providing benefits to the unemployed. As a result, in October 2009, the State began borrowing from the U.S. Department of the Treasury to continue payment of unemployment insurance benefits. As of 2015, the outstanding balance on this loan was approximately \$355.8 million. To repay the principal, employers have been paying additional charges as required by the FUTA. The State General Fund has funded the interest on the loan.

To help limit the impact on the State General Fund, the Nevada Legislature enacted Assembly Bill 482 (Chapter 367, *Statutes of Nevada 2013*), which levied a temporary assessment on employers to pay the

interest on the loan. The ESD sent out a press release in June 2013 with details about the assessment, which will occur annually as long as it is necessary. According to the ESD, the average employer will pay approximately \$25 per employee in temporary assessments.

To reduce the cost of this debt over the long term, the Legislature also approved S.B. 515 (Chapter 450, *Statutes of Nevada 2013*), which enabled the ESD to issue bonds to finance the outstanding loan principal and interest. If bonds are sold, the temporary assessment imposed under A.B. 482 and the FUTA charges would be discontinued, and employers would instead pay special bond contributions to repay the bonds. This would result in lower costs for most employers.

WORKERS' COMPENSATION (INDUSTRIAL INSURANCE)

The concept of compensating workers for on-the-job injuries is an ancient one, dating to ancient Arab, Chinese, Greek, and Roman law. The Code of Hammurabi, 1750 B.C., provided rewards for specific injuries (Guyton, G.P., "A Brief History of Workers' Compensation," *The Iowa Orthopaedic Journal*, 19 [1999]: 106-110). In the U.S., Wisconsin passed the first comprehensive industrial insurance law in 1911. Nevada passed its Industrial Insurance Act in 1913. The purpose of these laws revolves around economic efficiency and social justice.

The workers' compensation system is a no-fault insurance system. Employers either purchase insurance or set up self-insurance accounts. Injured workers receive compensation to replace wages ("indemnity payments") and to cover medical and rehabilitation costs. Second-injury funds, which cover benefits when a second injury proves incapacitating, are important in maintaining the employability of partially impaired workers. In exchange for covering all work-related injuries and occupational diseases, regardless of fault, employers are protected by the exclusive remedy provision, under which an injured worker cannot sue an employer in tort, even if the employer was in fact responsible.

Nevada authorized self-insurance for qualified employers in 1979. Prior to that time, the Nevada Industrial Commission (NIC) was the only provider of workers' compensation insurance in Nevada. In 1981, the Legislature enacted laws replacing the NIC with the State Industrial Insurance System (SIIS), which began operation as a State-run insurance carrier in July 1982. At the same time, the Division of Industrial Relations (DIR) became the primary regulator of the State's workers' compensation program.

Prior to the 1993 Session, the Legislature learned that SIIS was insolvent, with an unfunded \$2.2 billion liability. To address this problem, the Legislature enacted a comprehensive reform measure and adopted cost-savings provisions, including implementation of a managed care program, imposition of employer deductibles, and aggressive pursuit of fraud. The measure also reduced injured workers' benefits by limiting stress as a compensable injury, limiting eligibility and compensation amounts for rehabilitation, and making other changes.

In 1995, the Legislature prohibited civil lawsuits against an insurer or third-party administrator (TPA) who in bad faith violates the workers' compensation laws. Rather than allowing bad-faith lawsuits, the Legislature created a benefit penalty to be paid directly to an injured worker, and authorized the

Commissioner of Insurance to withdraw the self-insurance certificate of an employer for violations of laws intended to protect injured workers from unreasonable acts.

In 1999, the Legislature authorized privatization of SIIS, and in January 2000, SIIS became a private domestic mutual insurance company doing business as Employers Insurance Company of Nevada. Then, in 2007, the company converted to a publicly traded stock company and operates in Nevada under the name “Employers.”

The Commissioner of Insurance reviews and approves premium rates and must certify self-insured employers and associations that meet statutory requirements. The Commissioner also regulates managed care organizations and TPAs of self-insured programs.

The Office of the Nevada Attorney for Injured Workers, a State agency, represents claimants free of charge at appeals before the Hearings Division of Nevada’s Department of Administration. In selected cases, the Office also represents claimants in the district courts and the Supreme Court of Nevada.

Benefits under Nevada’s workers’ compensation system fall into three general categories:

1. Indemnity payments;
2. Medical benefits; and
3. Rehabilitation expenses.

Indemnity payments replace a portion of lost wages in temporary or permanent cases of partial or total disability. *Nevada Revised Statutes* establishes eligibility requirements and the amount and duration of benefits.

For permanent and temporary total disability (PTD and TTD), the benefit is generally two-thirds of the person’s wages at the time of his or her injury, not to exceed 150 percent of the average weekly wage, for the duration of the disability.

For permanent and temporary partial disability (PPD and TPD), the primary factor in determining the indemnity benefit amount is the extent of the injury. How this determination is made has been a major issue in workers’ compensation laws nationwide. Pursuant to S.B. 195 (Chapter 500, *Statutes of Nevada*) of the 2009 Session, the DIR must adopt regulations providing that the American Medical Association’s *Guides to the Evaluation of Permanent Impairment, Fifth Edition*, must be applied to all PPD examinations.

When an injured worker is permanently and totally disabled (PTD) from an occupational injury or disease and can no longer work, he or she receives cash payments, based on wages at the time of the injury, for life (as long as the disability continues to exist). This benefit recognizes not only the inability to earn income but also the inability to contribute to a pension fund or accumulate savings for retirement.

When a worker is killed as the result of an accident in the course and scope of employment, Nevada law provides burial benefits and benefits to surviving spouses and dependents. Until 2007, the surviving spouse of the deceased worker received monthly compensation payments until death or remarriage. Senate Bill 3 (Chapter 214, *Statutes of Nevada*) of the 2007 Session removed the so-called “remarriage penalty” for a surviving spouse of a firefighter or police officer who remarries on or after October 1, 2007, and S.B. 363 (Chapter 503, *Statutes of Nevada*) of the 2009 Session removed the remarriage penalty for any surviving spouse who remarries on or after the same date.

The insurer pays medical benefits for all medically necessary procedures and devices related to the injured worker’s claim, with no deductible or copayment. A health care provider may not seek payment from the injured worker for any portion of the medical costs. The insurer also pays rehabilitation expenses when the nature of the injury prevents the injured worker from returning to pre-injury employment. Rehabilitation plans may include educational or vocational training, compensation payments (known as rehabilitation maintenance), or a lump sum payment in lieu of rehabilitation.

ADDITIONAL REFERENCES

Employment Security Division: <http://detr.state.nv.us/esd.htm>.

Division of Industrial Relations: <http://dir.nv.gov/>.

Office of Labor Commissioner: <http://www.laborcommissioner.com/>.

Office of the Nevada Attorney for Injured Workers: <http://naiw.nv.gov/>.

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