

**PROPOSED REGULATION OF THE
LABOR COMMISSIONER**

LCB File No. R028-20

October 15, 2020

EXPLANATION – Matter in *italics* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: §§1-6, NRS 607.160, 608.250 and 608.270; §7, NRS 607.160 and 608.250; §8, NRS 607.160, 608.018 and 608.270; §9, NRS 607.160 and 608.120; §10, NRS 607.160 and 608.110

A REGULATION relating to employment; revising provisions relating to the minimum wage paid to employees in this State; prescribing certain requirements for health benefits for the purpose of determining the minimum wage required to be paid to employees in this State; requiring an employee to take certain actions before filing with the Labor Commissioner a claim or complaint for the payment of commissions owed; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

Existing law requires the Labor Commissioner, with few exceptions, to enforce all labor laws of the State of Nevada and authorizes the Labor Commissioner to adopt regulations to carry out this duty. (NRS 607.160) Existing law further requires the Labor Commissioner to administer and enforce certain provisions governing the minimum wage in this State and to adopt regulations necessary to carry out this duty. (NRS 608.270).

The Nevada Constitution requires each employer in this State to pay a certain minimum wage to each employee of the employer. (Nev. Const. Art. 15, § 16) Before the enactment of Assembly Bill No. 456 of the 2019 Legislative Session (A.B. 456), the Labor Commissioner was required to establish the minimum wage by regulation. (Chapter 591, Statutes of Nevada 2019, at page 3747) A.B. 456 removed the requirement for the Labor Commissioner to adopt such regulations and instead placed the current minimum wage in statute. (NRS 608.250) **Section 1** of this regulation removes provisions of existing regulations setting forth the minimum wage rates previously established by the Labor Commissioner and replaces those provisions with the provisions in statute setting forth the current minimum wage rates. **Section 1** retains certain interpretations of the Labor Commissioner concerning the scope of the minimum wage requirements set forth in existing regulations. **Section 6** of this regulation makes a conforming change.

Under Section 16 of Article 15 of the Nevada Constitution, if an employer offers health benefits to an employee and his or her dependents, the minimum wage required to be paid to the employee is lower than the minimum wage otherwise required to be paid to the employee. (Nev.

Const. Art. 15, §16) The Labor Commissioner has adopted regulations setting forth requirements for the health benefits that an employer must offer in order to qualify to pay an employee the lower minimum wage. (NAC 608.102-608.108) Senate Bill No. 192 of the 2019 Legislative Session (S.B. 192) sets forth in statute the minimum level of health benefits that an employer is required to make available to an employee and his or her dependent for the purpose of determining whether the employer is authorized to pay the employee the lower minimum wage. (Chapter 95, Statutes of Nevada 2019, at page 536; NRS 608.258) **Section 2** of this regulation removes provisions of existing regulations setting forth the minimum level of health benefits established by the Labor Commissioner and replaces those provisions with the provisions in statute setting forth the minimum level of health benefits an employer is required to offer in order to pay an employee the lower minimum wage. **Section 2** retains certain interpretations of the Labor Commissioner set forth in existing regulations concerning waiting periods for health benefits and the share of the total cost of the premium paid by the employee for health benefits. **Sections 4, 5 and 10** of this regulation make conforming changes.

Under the Nevada Constitution, for an employer to be authorized to pay an employee a lower minimum wage by offering health benefits to an employee, the total cost to the employee for premiums of such benefits must not exceed 10 percent of the employee's gross taxable income from the employer. (Nev. Const. Art. 15, § 16) The Nevada Supreme Court has held that in calculating whether the premiums exceed this percentage, the employee's gross taxable income from the employer must not include tips earned by the employee. (*MDC Rests., LLC v. Eighth Jud. Dist. Ct.*, 132 Nev. 774, 781 (2016)) **Section 3** of this regulation revises existing regulations to reflect this holding by excluding tips from the definition of "gross taxable income of the employee attributable to the employer" in provisions governing the calculation of the total cost to an employee of premiums of health benefits offered by an employer.

Existing regulations provide that if an employer and an employee agree that the employee is to be paid by commission based upon a sale, the employer is required to pay the employee when the commission becomes payable pursuant to the agreement. (NAC 608.120) **Section 7** of this regulation provides that before an employee may file a complaint or claim with the Labor Commissioner for the payment of commissions, the employee must submit a written request to the employer for the payment of the commissions owed. Under **section 7**, after receiving the request, the employer has 15 days to: (1) respond to the request; (2) pay the employee the commissions owed; or (3) reach an agreement with the employee for the commissions owed.

Section 8 of this regulation updates provisions of existing regulations concerning the payment of overtime to refer to the correct provisions of existing law.

Section 1. NAC 608.100 is hereby amended to read as follows:

608.100 1. ~~{Except as otherwise provided in subsections 2 and 3.}~~ *As provided in NRS 608.250, each employer shall pay to each employee of the employer a wage of not less than:*

(a) Beginning July 1, 2019:

(1) If the employer offers health benefits to the employee in the manner described in Section 16 of Article 15 of the Nevada Constitution, \$7.25 per hour worked.

(2) If the employer does not offer health benefits to the employee in the manner described in Section 16 of Article 15 of the Nevada Constitution, \$8.25 per hour worked.

(b) Beginning July 1, 2020:

(1) If the employer offers health benefits to the employee in the manner described in Section 16 of Article 15 of the Nevada Constitution, \$8.00 per hour worked.

(2) If the employer does not offer health benefits to the employee in the manner described in Section 16 of Article 15 of the Nevada Constitution, \$9.00 per hour worked.

(c) Beginning July 1, 2021:

(1) If the employer offers health benefits to the employee in the manner described in Section 16 of Article 15 of the Nevada Constitution, \$8.75 per hour worked.

(2) If the employer does not offer health benefits to the employee in the manner described in Section 16 of Article 15 of the Nevada Constitution, \$9.75 per hour worked.

(d) Beginning July 1, 2022:

(1) If the employer offers health benefits to the employee in the manner described in Section 16 of Article 15 of the Nevada Constitution, \$9.50 per hour worked.

(2) If the employer does not offer health benefits to the employee in the manner described in Section 16 of Article 15 of the Nevada Constitution, \$10.50 per hour worked.

(e) Beginning July 1, 2023:

(1) If the employer offers health benefits to the employee in the manner described in Section 16 of Article 15 of the Nevada Constitution, \$10.25 per hour worked.

(2) If the employer does not offer health benefits to the employee in the manner described in Section 16 of Article 15 of the Nevada Constitution, \$11.25 per hour worked.

(f) Beginning July 1, 2024:

(1) If the employer offers health benefits to the employee in the manner described in Section 16 of Article 15 of the Nevada Constitution, \$11.00 per hour worked.

(2) If the employer does not offer health benefits to the employee in the manner described in Section 16 of Article 15 of the Nevada Constitution, \$12.00 per hour worked.

2. *The Commissioner will interpret the provisions of NRS 608.250 as requiring* the minimum wage for an employee in the State of Nevada ~~is~~ *to be* the same whether the employee is a full-time, permanent, part-time, probationary or temporary employee. ~~and:~~

~~—(a) If an employee is offered qualified health insurance, is \$5.15 per hour; or~~

~~—(b) If an employee is not offered qualified health insurance, is \$6.15 per hour.~~

~~—2. The rates set forth in subsection 1 may change based on the annual adjustments set forth in Section 16 of Article 15 of the Nevada Constitution.]~~

3. The ~~minimum wage provided in subsection 1 does~~ *Commissioner will interpret the provisions of NRS 608.250 as* not ~~apply~~ *applying* to:

(a) A person under 18 years of age;

(b) A person employed by a nonprofit organization for after-school or summer employment;

(c) A person employed as a trainee for a period not longer than 90 days, as described by the United States Department of Labor pursuant to section 6(g) of the Fair Labor Standards Act; or

(d) A person employed under a valid collective bargaining agreement in which wage, tip credit or other provisions set forth in Section 16 of Article 15 of the Nevada Constitution have been waived in clear and unambiguous terms.

~~{4. As used in this section, “qualified health insurance” means health insurance coverage offered by an employer which meets the requirements of NAC 608.102.}~~

Sec. 2. NAC 608.102 is hereby amended to read as follows:

608.102 ~~{To qualify to pay an employee the minimum wage set forth in paragraph (a) of subsection 1 of NAC 608.100, an employer must meet each of the following requirements:}~~

1. ~~{The employer must offer a health insurance plan which:~~
 - ~~—(a) Covers those categories of health care expenses that are generally deductible by an employee on his or her individual federal income tax return pursuant to 26 U.S.C. § 213 and any federal regulations relating thereto, if such expenses had been borne directly by the employee; or~~
 - ~~—(b) Provides health benefits pursuant to a Taft-Hartley trust which:~~
 - ~~——(1) Is formed pursuant to 29 U.S.C. § 186(e)(5); and~~
 - ~~——(2) Qualifies as an employee welfare benefit plan:~~
 - ~~——(I) Under the guidelines of the Internal Revenue Service; or~~
 - ~~——(II) Pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.~~
- ~~—2. The health insurance plan must be made available to the employee and any dependents of the employee. The Labor Commissioner will consider such a health insurance plan to be available to the employee and any dependents of the employee when:~~
 - ~~—(a) An employer contracts for or otherwise maintains the health insurance plan for the class of employees of which the employee is a member, subject only to fulfillment of conditions required to complete the coverage which are applicable to all similarly situated employees within the same class; and~~

~~(b)~~ As provided in NRS 608.258, for the purpose of determining the minimum wage that may be paid per hour to an employee in private employment pursuant to Section 16 of Article 15 of the Nevada Constitution and NRS 608.250, an employer 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:

(I) Ambulatory patient services;

(II) Emergency services;

(III) Hospitalization;

(IV) Maternity and newborn care;

(V) Mental health and substance use disorder services, including, without limitation, behavioral health treatment;

(VI) Prescription drugs;

(VII) Rehabilitative and habilitative services and devices;

(VIII) Laboratory services;

(IX) Preventative and wellness services and chronic disease management;

(X) Pediatric services, which are not required to include oral and vision care; and

(XI) 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:

(1) The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq.; or

(2) The provisions of the Internal Revenue Code.

2. As provided in NRS 608.258, for the purpose of determining the minimum wage that may be paid per hour to an employee in private employment pursuant to Section 16 of Article 15 of the Nevada Constitution and NRS 608.250, an employer does not provide health benefits as described in Section 16 of Article 15 of the Nevada Constitution if the employer makes available to the employee and the employee's dependents a hospital-indemnity insurance plan or fixed-indemnity insurance plan unless the employer separately makes available to the employee and the employee's dependents at least one health benefit plan that complies with the requirements of subsection 1.

3. The Labor Commissioner will interpret the provisions of NRS 608.258 as providing that an employer provides health benefits as described in Section 16 of Article 15 of the Nevada Constitution only if the health benefit plan or health benefits made available to the employee and the employee's dependents meet the following requirements:

(a) The waiting period for the health ~~insurance~~ benefit plan or health benefits is not more than 6 months.

~~{3.}~~ *(b) The share of the cost of the premium for the health ~~insurance~~ benefit plan or health benefits paid by the employee must not exceed 10 percent of the gross taxable income of the*

employee attributable to the employer under the Internal Revenue Code, as determined pursuant to the provisions of NAC 608.104.

4. As used in this section, “health benefit plan” has the meaning ascribed to it in NRS 687B.470.

Sec. 3. NAC 608.104 is hereby amended to read as follows:

608.104 1. To determine whether the share of the cost of the premium of the qualified health ~~insurance~~ **benefit plan or health benefits** paid by the employee does not exceed 10 percent of the gross taxable income of the employee attributable to the employer, an employer may:

(a) For an employee for whom the employer has issued a Form W-2 for the immediately preceding year, divide the gross taxable income of the employee paid by the employer into the projected share of the premiums to be paid by the employee for the health ~~insurance~~ **benefit plan or health benefits** for the current year;

(b) For an employee for whom the employer has not issued a Form W-2, but for whom the employer has payroll information for the four previous quarters, divide the combined total of gross taxable income normally calculated from the payroll information from the four previous quarters into the projected share of the premiums to be paid by the employee for ~~qualified~~ **the health insurance benefit plan or health benefits** for the current year;

(c) For an employee for whom there is less than 1 aggregate year of payroll information:

(1) Determine the combined total gross taxable income normally calculated from the total payroll information available for the employee and divide that number by the number of weeks the total payroll information represents;

(2) Multiply the amount determined pursuant to subparagraph (1) by 52; and

(3) Divide the amount calculated pursuant to subparagraph (2) into the projected share of the premiums to be paid by the employee for ~~qualified~~ *the* health ~~insurance~~ *benefit plan or health benefits* for the current year; and

(d) For a new employee, promoted employee or an employee who turns 18 years of age during employment, use the payroll information for the first two normal payroll periods completed by the employee and calculate the gross taxable income using the formula set forth in paragraph (c).

2. As used in this section, “gross taxable income of the employee attributable to the employer” means the amount specified on the Form W-2 issued by the employer to the employee and includes, without limitation, ~~tips,~~ bonuses or other compensation as required for purposes of federal individual income tax. *The term does not include tips.*

Sec. 4. NAC 608.106 is hereby amended to read as follows:

608.106 If an employee declines coverage under a health ~~insurance~~ *benefit plan or health benefits* that ~~meets~~ *meet* the requirements of NAC 608.102 and which ~~is~~ *are* offered by the employer, the employer must maintain documentation that the employee has declined coverage. Declining coverage may not be a term or condition of employment.

Sec. 5. NAC 608.108 is hereby amended to read as follows:

608.108 If an employer does not offer a health ~~insurance~~ *benefit plan* ~~is~~ *or health benefits that meet the requirements of NAC 608.102* or the health ~~insurance~~ *benefit plan* ~~is~~ *or health benefits are* not available or ~~is~~ *are* not provided within 6 months of employment, the employee must be paid at least the minimum wage ~~set forth in paragraph (b) of subsection 1 of NAC 608.100~~ *associated with an employer who does not offer health benefits in the manner described in Section 16 of Article 15 of the Nevada Constitution as provided in NRS 608.250*

until such time as the employee becomes eligible for and is offered coverage under a health ~~insurance~~ *benefit* plan *or health benefits* that ~~meets~~ *meet* the requirements of NAC 608.102 or until such a health ~~insurance~~ *benefit* plan *or health benefits* ~~becomes~~ *become* effective. The term of the waiting period may be modified in a bona fide collective bargaining agreement if the modification is explicitly set forth in such agreement in clear and unambiguous terms.

Sec. 6. NAC 608.115 is hereby amended to read as follows:

608.115 1. An employer shall pay an employee for all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee.

2. If an employer pays an employee by salary, piece rate or any other wage rate except for a wage rate based on an hour of time, the employer shall pay an amount that is at least equal to the minimum wage when the amount paid to an employee in a pay period is divided by the number of hours worked by the employee during the pay period. ~~[This subsection does not apply to an employee who is exempt from the minimum wage requirement pursuant to NRS 608.250.]~~

3. For the purpose of a claim for wages, holidays, vacation days, sick days and any other days that an employee did not actually work are not counted as time worked by the employee.

Sec. 7. NAC 608.120 is hereby amended to read as follows:

608.120 1. If an employer and an employee agree that the employee is to be paid by commission based upon a sale, the employer shall pay each commission to the employee when the commission becomes payable pursuant to the agreement.

2. If the agreement described in subsection 1 is not in writing, the terms and conditions of the agreement may be determined by the facts and circumstances related to the course of dealing between the employer and the employee.

3. All commissions that an employer pays to an employee during a pay period may be used to meet the minimum wage requirement described in subsection 3 of NAC 608.115.

4. Before an employee may file a complaint or claim for the payment of commissions, the employee shall submit to the employer a written request for the payment of the commissions owed. The employer shall have 15 days after receiving the request to:

(a) Respond to the request;

(b) Pay the employee the commissions owed; or

(c) Reach an agreement with the employee for the commissions owed.

Sec. 8. NAC 608.125 is hereby amended to read as follows:

608.125 1. An employer shall not substitute compensatory time in place of a wage payment for overtime that was worked by an employee.

2. If an employee is paid by salary, piece rate or any other wage rate except for a wage rate based on an hour of time, the rate of compensation for the purposes of ~~paragraph (b) of subsection~~ *subsections 1 and 2* of NRS 608.018 is determined by dividing the amount paid to an employee in a week by the number of hours worked by the employee during the week.

3. The Commissioner will refer to 29 C.F.R. §§ 541.1 and 541.2 to determine if an employee is employed in a bona fide executive or administrative capacity for the purposes of paragraph (d) of subsection 3 of NRS 608.018.

Sec. 9. NAC 608.135 is hereby amended to read as follows:

608.135 1. In addition to the information required pursuant to NRS 608.080, the notice described in NRS 608.080 may include:

(a) Alternative paydays for use if a regular payday occurs on a nonbusiness day, including a Saturday, Sunday or holiday;

(b) Acceptable alternatives to the method of payment if an employee is not available for payment;

(c) Procedures for releasing payment to a third party; and

(d) Any other provision that the employer deems to be relevant if the provision does not violate any law or regulation of this State.

2. An employer may use an electronic payment system, including, but not limited to, a direct deposit, debit card or similar payment system, as an alternative location of payment if:

(a) The employee can obtain immediate payment in full;

(b) The employee receives at least one free transaction per pay period and any fees or other charges are prominently disclosed to and subject to the written consent of the employee;

(c) The alternative location of payment is easily and readily accessible to the employee;

(d) There are no other requirements or restrictions that a reasonable person would find to be an unreasonable burden or inconvenience; and

(e) ~~The~~ *Unless a legally enforceable directive issued by an agency of a federal, state or local government which requires payment to be issued only by electronic means is in place or payment by a bank or other financial institution by means other than an electronic payment system is no longer feasible as a result of a public health or safety emergency, the* use of an electronic payment system is optional at the election of the employee.

Sec. 10. NAC 608.160 is hereby amended to read as follows:

608.160 1. Without the written authorization of an employee, an employer may withhold from the wages due the employee:

(a) Any amount required by law; and

(b) Any employee contribution to a benefit program, such as *a* health ~~insurance~~ *benefit plan or health benefits* or a pension plan, as permitted pursuant to NRS 608.110.

2. Except as otherwise provided in subsection 1, an employer may not deduct any amount from the wages due an employee unless:

(a) The employer has a reasonable basis to believe that the employee is responsible for the amount being deducted by the employer;

(b) The deduction is for a specific purpose, pay period and amount; and

(c) The employee voluntarily authorizes the employer, in writing, to deduct the amount from the wages.

3. An employer may not use a blanket authorization that was made in advance by the employee to withhold any amount from the wages due the employee.