Bill Analysis

Elizabeth Dominic *Legislative Service Commission*

Am. Sub. H.B. 690

126th General Assembly
(As Passed by the House)

Reps. Seitz, Brinkman, Combs, D. Evans, Flowers, Gibbs, Hood, Martin, Reidelbach, Schneider, Setzer, Webster

BILL SUMMARY

- Restates the provisions in Section 34a of Article II, Ohio Constitution, which was approved in the last General Election, concerning the minimum wage amount; an employer's record-keeping requirements relative to wage payments; an employee's ability to have access to those records; and actions by certain private parties, the Director of Commerce, or the Attorney General for violations of those provisions.
- Defines various terms used in Section 34a.
- Exempts from the minimum wage and record-keeping requirements employees who are exempt from the federal minimum wage law.
- Requires an employer to update an employee with the employer's new contact information 60 business days after the information changes.
- Exempts an employer from certain record-keeping requirements for employees who are employed as outside salespersons or employed in a bona fide executive, administrative, or professional capacity.
- Specifies the application of other provisions contained in Section 34a.
- Includes a purpose clause and severability clause.

TABLE OF CONTENTS

Contrasting Section 34a of Article II, Ohio Constitution, with Chapter 4111. of the Revised Code 2
Minimum wage amounts 2
To whom Ohio's minimum wage applies 3

Definition of "employer" 4
Definition of "employee" 5
Other terms defined under Section 34a and the bill 7
Record-keeping requirements under Section 34a and the bill 8
Complaints by private parties for violations of Section 34a, laws implementing that Section, and the bill 11
Actions by private parties or the state for equitable or monetary relief 13
Actions under prior minimum wage law 14
Individuals with mental or physical disabilities 15
Powers of the Director of Commerce 15
Requirement to post a summary of the minimum wage law 16
Purposes of Section 34a of Article II, Ohio Constitution 16
Emergency and severability clauses 17

CONTENT AND OPERATION

Contrasting Section 34a of Article II, Ohio Constitution, with Chapter 4111. of the Revised Code

Prior to passage of Issue 2 in the General Election in November, employers that were subject to Ohio's Minimum Wage Law were subject to the provisions in Chapter 4111. of the Revised Code. After the passage of Issue 2, employers who were subject to that chapter are now subject to Section 34a of Article II, Ohio Constitution (hereafter "Section 34a"), as well as that chapter. However, because some provisions in Section 34a conflict with certain provisions in Chapter 4111. of the Revised Code, as explained in detail below, Section 34a supercedes those conflicting provisions (hereafter "prior minimum wage law"). The bill amends those conflicting provisions to comply with Section 34a.

Minimum wage amounts

Under prior minimum wage law, every employer, including an employer with less than $150,000 gross annual sales, who was subject to that law was required to pay each of the employer's employees at a wage rate of not less than the wage rate specified in the federal Fair Labor Standards Act (hereafter "FLSA"). The FLSA requires employers generally to pay their employees at least $5.15 per hour. Under prior minimum wage law, this wage requirement also applied to agricultural employees with certain exceptions. Prior minimum wage law specified that an employer must pay any employee engaged in an occupation in which the employee customarily and regularly receives tips from patrons or others the wage specified in the FLSA, which is a minimum of $2.13 per hour plus an amount on account of tips, so that the total wage paid to the tipped employee equals at least $5.15. (R.C. 4111.02; also see 29 U.S.C. 206.)

Section 34a requires every employer to pay the employer's employees a wage rate of not less than $6.85 per hour beginning on January 1, 2007. Beginning in 2007, on September 30 of every year, the minimum wage rate must be adjusted by the rate of inflation for the 12 month period prior to that September, according to the Consumer Price Index for all Urban Wage Earners and Clerical Workers, or its successor index, for all items as calculated by the federal government rounded to the nearest five cents. This adjusted wage rate becomes effective January 1 following the September in which it was adjusted.

Under Section 34a, an employer must pay a wage rate of not less than the wage rate specified in the FLSA, as described above, to the employer's employees (1) who are under the age of 16 or (2) if the employer has annual gross receipts of $250,000 or less for the preceding calendar year. Under Section 34a, the $250,000 threshold must be increased annually, beginning on January 1, 2008, in the same manner as the minimum wage amount is adjusted, except that the threshold must be rounded to the nearest $1,000.

Section 34a permits an employer to pay an employee less than, but not less than half, the minimum wage rate required by that section if the employer is able to demonstrate that the employee receives tips that, combined with the wages the employer pays, are equal to or greater than the minimum wage rate for all hours worked. Thus, a tipped employee who is not under the age of 16 or employed by an employer whose gross annual receipts are less than $250,000 may be paid a minimum of $3.43 per hour if the employee's employer can demonstrate that the employee receives sufficient tips as described above. A tipped employee who is under the age of 16 or employed by an employer whose gross annual receipts are less than $250,000 may be paid a minimum of $2.13 per hour if the employee's employer can make the above-described demonstration concerning tip sufficiency.

Under the bill, the prior minimum wage law that required employers to pay certain wage rates, as described above, is amended to specify that every employer must pay each of the employer's employees at a wage rate of not less than the wage rate specified in Section 34a. (R.C. 4111.02.)

To whom Ohio's minimum wage applies

Under the bill, in order for an employer or employee to be subject to Ohio's minimum wage requirements, that entity or person must fit within the definitions of "employer" or "employee," respectively, that appear in Section 34a and the bill. The FLSA specifies that an employer who is subject to both the FLSA and state law is governed by the law that establishes the higher minimum wage or the lower maximum workweek. Because Ohio's basic minimum wage was increased to $6.85 per hour under Section 34a, as explained above, employers who are subject to the FLSA, Section 34a, and Chapter 4111. of the Revised Code must pay not

less than $6.85 per hour instead of not less than $5.15 per hour as the FLSA requires. (See 29 U.S.C. 218.)

Definition of "employer"

Prior minimum wage law defined "employer" to mean the state of Ohio, its instrumentalities, and its political subdivisions and their instrumentalities, any individual, partnership, association, corporation, business trust, or any person or group of persons, acting in the interest of an employer in relation to an employee. "Employer" did not include an employer whose annual gross volume of sales made for business done is less than $150,000, exclusive of excise taxes at the retail level that are separately stated. (R.C. 4111.01.)

Section 34a states that "employer" has the same meaning as in the FLSA, except that Section 34a adds that "employer" also includes the state and every political subdivision. Under the FLSA, "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." "Public agency" means (1) the United States government, (2) the government of a state or political subdivision thereof, (3) any agency of the United States, including the United States Postal Service and Postal Rate Commission, a state, or a political subdivision of a state, or (4) any interstate governmental agency. However, unlike prior minimum wage law in Ohio, the definition of "employer" is not the only factor used to determine whether an employer is subject to the FLSA. Other definitions used in and other provisions of the FLSA also are used to determine if an employer must follow the requirements of that law.[1] Section 34a stipulates that only the exemptions set forth in that section apply to that section; however, that section does not address whether the other definitions and provisions concerning the term "employer" in the FLSA apply under that section. (See Section 34a of Article II, Ohio Constitution, and 29 U.S.C. 203.)

The bill restates the provision in Section 34a that defines "employer" to mean the same as in the FLSA. Additionally, the bill specifies that in construing the meaning of "employer," due consideration and great weight must be given to the United States Department of Labor's (hereafter "USDOL") and federal courts' interpretations of that term under the FLSA and its regulations. (R.C. 4111.14(B).)

---

[1] *For example, unless exempt from the FLSA, generally an employer is subject to the FLSA if the employer's annual gross volume of sales is $500,000 or more, or if the employer is engaged in commerce.*

Definition of "employee"

Under prior minimum wage law, "employee" meant any individual employed by an employer, but did not include several types of employees such as (1) any individual employed by the United States, (2) any individual employed as an outside salesperson compensated by commissions or in a bona fide executive, administrative, or professional capacity as such terms are defined in the FLSA, and (3) certain agricultural employees.[2] (R.C. 4111.01.)

Section 34a specifies that "employee" has the same meaning as in the FLSA except that "employee" does not include (1) an individual employed in or about the property of the employer or individual's residence on a casual basis and (2) employees of a solely family owned and operated business who are family members of the owner.

Under the FLSA, "employee" is defined generally to be "any individual employed by an employer," but then includes many specifications and exceptions to the definition. If an individual is employed by a public agency, "employee" means individuals employed by (1) United States government in specified positions, (2) the United States Postal Service or Postal Rate Commission, or (3) a state, political subdivision of a state, or an interstate governmental agency. However, an individual is not an "employee" if the individual is employed by a state, political subdivision of a state, or an interstate governmental agency but is not subject to the civil service laws of the state, political subdivision, or agency and holds one of various political positions specified in the FLSA.[3] Additionally,

---

[2] *The other employees excluded from the definition of "employee" were (1) any individual employed as a baby-sitter in the employer's home, or a live-in companion to a sick, convalescing, or elderly person whose principal duties do not include housekeeping, (2) any individual engaged in the delivery of newspapers to the consumer, (3) any individual who works or provides personal services of a charitable nature in a hospital or health institution for which compensation is not sought or contemplated, (4) a member of a police or fire protection agency or student employed on a part-time or seasonal basis by a political subdivision of the state, (5) any individual in the employ of a camp or recreational area for children and owned and operated by a nonprofit organization, and (6) any individual employed directly by the House of Representatives or directly by the Senate. (R.C. 4111.01.)*

[3] *The political positions that disqualify an individual from being considered an "employee" under the FLSA are (1) holding a public elective office of the state, political subdivision, or agency, (2) being selected to be a member of a public elective officerholder's personal staff, (3) being appointed to serve on a policy-making level by an officerholder, (4) being an immediate adviser to an officeholder with respect to the constitutional or legal powers of the officeholder's office, or (5) being employed in a legislative branch or legislative body of the state, political subdivision, or agency and not*

"employee," under the FLSA, does not include (1) an individual who volunteers to perform services for a state, political subdivision of a state, or interstate governmental agency if certain conditions apply or (2) an individual who volunteers the volunteer's services solely for humanitarian purposes to private nonprofit food banks and who receives groceries from the food banks. (See 29 U.S.C. 203.)

Under the FLSA, unlike prior minimum wage law in Ohio, other individuals are exempt from the requirements of the FLSA, but those individuals are not specified in the definition of "employee." Other provisions of the FLSA exempt these individuals from the FLSA, as explained below, similar to how certain persons are exempt from the term "employer," as explained above. Section 34a stipulates that only the exemptions set forth in that section apply to that section; however, that section does not address whether the exemptions specified in the FLSA concerning the term "employee" apply under that section. (*Id.*)

The bill reiterates the provision in Section 34a that requires "employee" to have the same meaning as in the FLSA and specifies that "employee" means individuals employed in Ohio, but does not mean individuals who are excluded from the definition of "employee" under the FLSA (29 U.S.C. 203(e)) or individuals who are exempted from the minimum wage requirements in the FLSA (29 U.S.C. 213) and from the definition of "employee" in Ohio's minimum wage law. (See **COMMENT**.) The FLSA exempts many types of individuals from the minimum wage requirements of the FLSA, such as (1) any employee employed in a bona fide executive, administrative, or professional capacity, (2) various employees engaged in agriculture, (3) any employee employed on a casual basis in domestic service employment to provide (a) babysitting services or (b) companionship services to those unable to care for themselves, (4) certain criminal investigators, and (5) certain computer system analysts, computer programmers, software engineers, and other similarly skilled employees.[4] The bill also specifies that in construing the meaning of "employee" and "employ," due consideration

---

being employed by the legislative library of that state, political subdivision, or agency. (29 U.S.C. 203.)

[4] *Other individuals exempt from the minimum wage requirements of the FLSA include (1) employees employed in amusement parks, recreational establishments, organized camps, or religious or non-profit educational conference centers, when these entities satisfy specified criteria, (2) certain apprentices and students, (3) employees employed in connection with certain types of newspapers of less than 4,000 circulation, (4) switchboard operators of certain public telephone companies, (5) seaman on a vessel other than an American vessel, (6) outside salespersons, and (7) employees engaged in fishing operations. (See 29 U.S.C. 213.)*

and great weight must be given to the USDOL's and federal courts' interpretations of those terms under the FLSA and its regulations.

Additionally, under the bill, "employee" does not include any person acting as a volunteer. In construing who is a volunteer, the bill states that "volunteer" has the same meaning as in specified federal regulations.[5] The bill requires that due consideration and great weight be given to the USDOL's and federal courts' interpretations of the term "volunteer" under the FLSA and its regulations. (R.C. 4111.14; also see 29 U.S.C. 213.)

Concerning the exclusion in Section 34a of "an individual employed in or about the property of the employer or individual's residence on a casual basis" from the definition of "employee," the bill specifies that "casual basis" means employment that is irregular or intermittent and that is not performed by an individual whose vocation is to be employed in or about the property of the employer or individual's residence. The bill specifies that in construing who is employed on a "casual basis," due consideration and great weight must be given to USDOL's and federal courts' interpretations of the term "casual basis" under the FLSA and its regulations. The bill also defines "an individual employed in or about the property of an employer or individual's residence" to mean an individual employed on a casual basis or an individual employed in or about a residence on a casual basis, respectively. (R.C. 4111.14(D).)

Other terms defined under Section 34a and the bill

Under prior minimum wage law, "employ" meant to suffer or to permit to work. Section 34a requires that "employ" have the same meaning as in the FLSA, in which "employ" means to suffer or permit to work. The bill restates the provision in Section 34a concerning the definition of "employ" and specifies that "employ" does not include any person acting as a volunteer, as is explained above for the term "employee." (R.C. 4111.01 and 4111.14(B); also see 29 U.S.C. 203.)

Under the bill, the definitions of "employ," "employer," and "employee," as defined under prior minimum wage law, apply to only the overtime provision in Chapter 4111. of the Revised Code (R.C. 4111.03). The bill does not change the definitions of "wage" and "occupation," thus those definitions continue to apply to all of that chapter, including the minimum wage provisions.

---

[5] *For example, under one specified provision in federal regulations, "volunteer" means an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for services rendered. (29 C.F.R. 553.101.)*

The bill specifies that, in accordance with Section 34a, the terms "person" and "independent contractor" have the same meanings as in the FLSA. However, the bill also specifies that in construing the meanings of those terms, due consideration and great weight must be given to the USDOL's and federal courts' interpretations of those terms under the FLSA and its regulations. Under the FLSA, "person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons. "Independent contractor," however, is not specifically defined in the FLSA, thus its definition is unclear. (R.C. 4111.14(B); also see 29 U.S.C. 203.)

Record-keeping requirements under Section 34a and the bill

Under prior minimum wage law, every employer that was subject to the prior law was required to make and keep for a period of not less than three years a record of the name, address, and occupation of each of the employer's employees, the rate of pay and the amount paid each pay period to each employee, the hours worked each day and each work week by the employee, and other information as the Director of Commerce prescribed by rule. The employer was required to permit the Director to inspect or copy those records at any reasonable time. (R.C. 4111.08.)

Section 34a requires an employer, at the time of hire, to provide an employee with the employer's name, address, telephone number, and other contact information and update such information when it changes. It also requires an employer to maintain a record of the name, address, occupation, pay rate, hours worked for each day worked, and each amount paid an employee for a period of not less than three years following the last date the employee was employed.

Under the bill, the record-keeping requirements in prior minimum wage law are amended to specify that any records an employer creates on or before December 31, 2006, must be created and maintained in accordance with that prior law. On and after January 1, 2007, an employer is required to create and maintain records as specified in Section 34a and the bill, described below, instead of in accordance with prior minimum wage law. On January 1, 2010, the bill repeals the record-keeping requirements in prior minimum wage law. (R.C. 4111.08 and 4111.14(F)(3) and Section 3.)

The bill reiterates the record-keeping requirements of Section 34a explained above and further defines several of the terms used in those requirements. The bill specifies that "other contact information" may include, where applicable, the employer's internet site address on the world wide web, electronic mail address, or fax number, or the name, address, and telephone number of the employer's statutory agent. It specifies that "other contact information" does not include the name, address, telephone number, fax number, internet site address, or electronic

mail address of any employee, shareholder, officer, director, supervisor, manager, or other individual employed by or associated with an employer. (R.C. 4111.14(E).)

Under the bill, "when it changes" means that the employer must provide its employees with the change in its name, address, telephone number, or other contact information within 60 business days after the change occurs. The employer must provide the changed information by using any of its usual methods of communicating with its employees, including, but not limited to, listing the change on the employer's internet site on the world wide web, internal computer network, or a bulletin board where it commonly posts employee communications or by insertion or inclusion with employees' paychecks or pay stubs. (R.C. 4111.14(E)(2).)

The bill defines "address," when used with respect to an employee's information, to mean an employee's home address as maintained in the employer's personnel file or personnel database for that employee. With respect to employees who are *not* exempt from the overtime pay requirements of the FLSA or Ohio's minimum wage law, "pay rate" means an employee's base rate of pay.[6] With respect to employees who are exempt from the overtime pay requirements of the FLSA or Ohio's minimum wage law, "pay rate" means an employee's annual base salary or other rate of pay by which the particular employee qualifies for that exemption under the FLSA or Ohio's minimum wage law, but does not include bonuses, stock options, incentives, deferred compensation, or any other similar form of compensation. (R.C. 4111.14(F)(1) and (2).)

Under the bill, "record" means the name, address, occupation, pay rate, hours worked for each day worked, and each amount paid an employee in one or more documents, databases, or other paper or electronic forms of record-keeping maintained by an employer. The bill also specifies that no one particular method or form of maintaining such a record or records is required under the bill. An

---

[6] *The FLSA exempts many different types of employees from the law's overtime provisions. In addition to the exemptions explained above from the term "employee," the following individuals are examples of the those exempt from the FLSA overtime payment requirements: (1) employees subject to the authority of the United States Secretary of Transportation to establish maximum hours for those employees, (2) employees engaged in the operation of a rail carrier or carrier by air, (3) individuals employed as outside buyers of poultry, eggs, cream, or milk in their raw or natural state, (4) seamen, (5) announcers, news editors, or chief engineers of certain radio or television stations, (6) salesmen, partsmen, or mechanics engaged in selling or servicing automobiles, trucks, farm implements, trailers, boats, or aircraft, and (7) certain agricultural employees. (29 U.S.C. 213.)*

employer is not required to create or maintain a single record containing only the employee's name, address, occupation, pay rate, hours worked for each day worked, and each amount paid an employee. An employer must maintain a record or records from which the employee or person acting on behalf of that employee could reasonably review the information requested by the employee or person. An employer is not required to maintain the records specified in the bill for any period before January 1, 2007. On and after January 1, 2007, the employer must maintain the records required by the bill for three years from the date the hours were worked by the employee. (R.C. 4111.14(F)(3).)

The bill stipulates that with respect to employees who are not employed as outside salespersons compensated by commissions or employed in a bona fide executive, administrative, or professional capacity as such terms are defined in the FLSA, "hours worked for each day worked" means the total amount of time worked by an employee in whatever increments the employer uses for its payroll purposes during a day worked by the employee. An employer is not required to keep a record of the time of day an employee begins and ends work on any given day. As used in this provision, "day" means a fixed period of 24 consecutive hours during which an employee performs work for an employer. The bill specifies that an employer is not required to keep records of "hours worked for each day worked" for employees who are employed as outside salespersons compensated by commissions or employed in a bona fide executive, administrative, or professional capacity as such terms are defined in the FLSA. (R.C. 4111.14(F)(4).)

Under the bill, "each amount paid an employee" means the total gross wages paid to an employee for each pay period. As used this provision, "pay period" means the period of time designated by an employer to pay an employee the employee's gross wages in accordance with the employer's payroll practices and existing law concerning semimonthly payment of wages. (R.C. 4111.14(F)(5) and 4113.15, not in the bill.)

Section 34a requires an employer to provide information maintained in an employee's record, which Section 34a describes as "such information," to an employee or person acting on behalf of an employee upon request and without charge.

The bill restates this provision from Section 34a and defines several terms used in that provision. "Such information" means the name, address, occupation, pay rate, hours worked for each day worked, and each amount paid for the specific employee who has requested that specific employee's own information and does not include the name, address, occupation, pay rate, hours worked for each day worked, or each amount paid of any other employee of the employer. "Such information" does not include hours worked for each day worked by employees

employed as outside salespersons compensated by commissions or employed in a bona fide executive, administrative, or professional capacity as such terms are defined in the FLSA and its regulations. (R.C. 4111.14(G)(1).)

Under the bill, "acting on behalf of an employee" means a person acting on behalf of an employee as any of the following: (1) the certified or legally recognized collective bargaining representative for that employee under the applicable federal law or Ohio's Public Employees' Collective Bargaining Law (R.C. Chapter 4117.), (2) the employee's attorney, or (3) the employee's parent, guardian, or legal custodian. The bill further specifies that a person "acting on behalf of an employee" must be specifically authorized by an employee in order to make a request for that employee's own name, address, occupation, pay rate, hours worked for each day worked, and each amount paid to that employee. (R.C. 4111.14(G)(2).)

The bill defines "provide" to mean that an employer must provide the requested information within 30 business days after the date the employer receives the request, unless either of the following occurs: (1) the employer and the employee or person acting on behalf of the employee agree to some alternative time period for providing the information or (2) the 30-day period would cause a hardship on the employer under the circumstances, in which case the employer must provide the requested information as soon as practicable. (R.C. 4111.14(G)(3).)

Under the bill, a "request" made by an employee or a person acting on behalf of an employee means a request by an employee or a person acting on behalf of an employee for the employee's own information. The bill further permits the employer to require that the employee provide the employer with a written request that has been signed by the employee and notarized and that reasonably specifies the particular information being requested. The employer also may require that the person acting on behalf of an employee provide the employer with a written request that has been signed by the employee whose information is being requested and notarized and that reasonably specifies the particular information being requested. (R.C. 4111.14(G)(4).)

Complaints by private parties for violations of Section 34a, laws implementing that Section, and the bill

Section 34a states:

> An employee, person acting on behalf of one or more employees, and/or any other interested party may file a complaint with the state for a violation of any provision of this section or any law or regulation

> implementing its provisions. Such complaint shall be promptly investigated and resolved by the state. The employee's name shall be kept confidential unless disclosure is necessary to resolution of a complaint and the employee consents to disclosure. The state may, on its own initiative, investigate an employer's compliance with this section and any law or regulation implementing its provisions. The employer shall make available to the state any records related to such investigation and other information required for enforcement of this section or any law or regulation implementing its provisions. (Section 34a of Article II, Ohio Constitution, not in the bill.)

The bill reiterates the above provisions from Section 34a and defines several of the terms used in those provisions (R.C. 4111.14(H) and (I)). The bill defines "complaint" to mean a complaint of an alleged violation pertaining to harm suffered by the employee filing the complaint, by a person acting on behalf of one or more employees, or by an interested party (R.C. 4111.14(H)(1)).

The bill defines "the state" throughout the bill to mean the Director of Commerce. (R.C. 4111.14(N).)

Under the bill, "acting on behalf of one or more employees" has the same meaning as explained above in "***Record-keeping requirements under Section 34a and the bill***." The bill requires each employee to provide a separate written and notarized authorization before the person acting on that employee's or those employees' behalf may request the name, address, occupation, pay rate, hours worked for each day worked, and each amount paid for the particular employee. (R.C. 4111.14(H)(2).)

The bill specifies that "interested party" means a party who alleges to be injured by the alleged violation and who has standing to file a complaint under common law principles of standing. (R.C. 4111.14(H)(3).)

Under the bill, "resolved by the state" means that the complaint has been resolved to the satisfaction of the state. (R.C. 4111.14(H)(4).)

The bill defines "shall be kept confidential" to mean that the state must keep the name of the employee confidential as required by the bill. (R.C. 4111.14(H)(5).)

The bill specifies that the state must investigate an employer's compliance with the bill in accordance with the investigation procedures in existing law

described below in "***Powers of the Director of Commerce***." The bill further specifies that all records and information related to investigations by the state are confidential and are not a public record subject to the Public Records Law (R.C. 149.43). However, the bill's confidentiality requirement does not prevent the state from releasing to or exchanging with other state and federal wage and hour regulatory authorities information related to investigations. (R.C. 4111.14(I)(1).)

Actions by private parties or the state for equitable or monetary relief

Section 34a permits the Attorney General or an employee or person acting on behalf of an employee or all similarly situated employees to bring an action for equitable or monetary relief against an employer in any court of competent jurisdiction, including the common pleas court of an employee's county of residence, for any violation of Section 34a or any law or regulation implementing its provisions. If the Attorney General, employee, or person chooses to bring such an action, the Attorney General, employee, or person must bring the action within three years of the violation or of when the violation ceased if it was of a continuing nature, or within one year after notification to the employee of final disposition by the state of a complaint for the same violation, whichever is later. (Section 34a of Article II, Ohio Constitution, not in the bill.)

The bill reiterates the above provisions and defines "notification" to mean the date on which the notice was sent to the employee by the state (i.e., the Director of Commerce). The bill prohibits an employee from joining as a party plaintiff in any civil action that is brought under the bill by an employee, person acting on behalf of an employee, or person acting on behalf of all similarly situated employees unless that employee first gives written consent to become such a party plaintiff and that consent is filed with the court in which the action is brought. A civil action regarding an alleged violation of the bill may be maintained only under the bill. However, the bill does not preclude the joinder in a single civil action of an action for minimum wage violations maintained under the bill and an action for overtime violations maintained under existing law. The bill also specifies that any agreement between an employee and employer to work for less than the wage rate specified in Section 34a is no defense to an action under the bill. (R.C. 4111.14(K).)

Section 34a requires damages to be calculated as an additional two times the amount of the back wages, and in the case of a violation of an anti-retaliation provision, an amount set by the state or court sufficient to compensate the employee and deter future violations, but not less than $150 for each day that the violation continued. The bill restates the above provision and specifies that the $150 penalty may be imposed only for violations of the anti-retaliation provision in Section 34a. The anti-retaliation provision in Section 34a prohibits an employer from discharging or in any other manner discriminating or retaliating against an

employee for exercising any right under that section or any law or regulation implementing its provisions or against any person for providing assistance to an employee or information regarding the same. (R.C. 4111.14(J).)

Section 34a stipulates that there can be no exhaustion requirement; no procedural, pleading, or burden of proof requirements beyond those that apply generally to civil suits in order to maintain such action; and no liability for costs or attorney's fees on an employee except upon a finding that such action was frivolous in accordance with the same standards that apply generally in civil suits. The bill restates the above provision and specifies that nothing in that provision affects the right of an employer and employee to agree to submit a dispute under the bill to alternative dispute resolution, including, but not limited to, arbitration, in lieu of maintaining the civil suit specified in the bill. The bill specifies that nothing in that provision of the bill limits the state's ability to investigate or enforce the provisions of the bill. (R.C. 4111.14(L).)

The bill also specifies that an employer who provides the information specified in Section 34a, as explained above in "***Record-keeping requirements under Section 34a and the bill***," is immune from any civil liability for injury, death, or loss to person or property that otherwise might be incurred or imposed as a result of providing that information to an employee or person acting on behalf of an employee in response to a request by the employee or person. Additionally, the employer is not subject to the provisions of the Personal Information Systems Law (R.C. Chapter 1347.) or the Consumer Protection Law (R.C. Chapter 1349.) to the extent that such provisions would otherwise apply. The terms "such information," "acting on behalf of an employee," and "request" have the same meanings as explained above in "***Record-keeping requirements under Section 34a and the bill***." (R.C. 4111.14.)

Actions under prior minimum wage law

Under prior minimum wage law, any employer who paid any employee less than wages to which the employee was entitled under that law was liable to the employee affected for the full amount of the wage rate, less any amount actually paid to the employee by the employer, and for costs and reasonable attorney's fees as allowed by the court. As explained above in "***Actions by private parties or the state for equitable or monetary relief***," Section 34a created more detailed damages provisions than in prior minimum wage law. Under the bill, the provision in prior minimum wage law explained above applies to only the overtime provisions in existing law instead of applying to any claims filed for a violation of Chapter 4111. of the Revised Code, which includes minimum wage claims. (R.C. 4111.10.)

Individuals with mental or physical disabilities

Under existing law, the Director of Commerce must adopt rules permitting employment in any occupation at wages lower than the wage rates applicable under Ohio's minimum wage rate requirements of individuals whose earning capacity is impaired by physical or mental deficiencies or injuries. Existing law specifies that these rules must be adopted in order to prevent curtailment of opportunities for employment, to avoid undue hardship, and to safeguard minimum wage rates. The rules must provide for licenses to be issued authorizing employment at the wages of specific individuals or groups of employees, or by specific employers or groups of employers. The rules must not conflict with the federal Americans with Disabilities Act. (R.C. 4111.06 and 42 U.S.C. 12111, et seq., both not in the bill.)

Section 34a authorizes the state to issue licenses to employers authorizing payment of a wage rate below that required by that section to individuals with mental or physical disabilities that may otherwise adversely affect their opportunity for employment. This requirement does not appear to conflict with the provision explained above.

The bill restates the provision in Section 34a but specifies that such licenses can be issued to employers who are not subject to the FLSA. The bill also specifies that in issuing such licenses, the state must abide by the rules adopted by the Director of Commerce, as described above. (R.C. 4111.14(C).)

Powers of the Director of Commerce

Under existing law, the Director may investigate and ascertain the wages of persons employed in any occupation in Ohio and enter and inspect the place of business or employment of any employer for various purposes, such as inspecting the employer's books, registers, and payrolls. If an employer prohibits the Director from carrying out the Director's powers, the Director may apply to any court of common pleas having jurisdiction of that employer or the place of employment under investigation for an order directing an employer's compliance. The court may punish failure to obey as contempt of court. (R.C. 4111.04.)

The bill replaces the Director's authority to apply for compliance orders with the authority to issue subpoenas and compel attendance of witnesses and production of papers, books, accounts, payrolls, documents, records, and testimony relating and relevant to the Director's investigation. (*Id*.)

Requirement to post a summary of the minimum wage law

Existing law requires every employer subject to the minimum wage law to keep a summary of the minimum wage law, including rules adopted pursuant to the law, posted in a conspicuous and accessible place in or about the employer's premises. The bill specifies that the Director must make this summary available on the web site of the Department of Commerce. The bill requires the Director to update the summary as necessary, but not less than annually, in order to reflect changes in the minimum wage rate as required under Section 34a. (R.C. 4111.09.)

Purposes of Section 34a of Article II, Ohio Constitution

The bill stipulates that, pursuant to the General Assembly's authority to establish a minimum wage under Section 34a, the bill is implementing that section. In implementing that section, the General Assembly finds that the purposes of that section are all of the following: (1) to ensure that Ohio employees, as defined in the bill, are paid the wage rate required by Section 34a, (2) to ensure that covered Ohio employers maintain certain records that are directly related to the enforcement of the wage rate requirements in Section 34a, (3) to ensure that Ohio employees who are paid the wage rate required by Section 34a may enforce their right to receive that wage rate in the manner set forth in that section; and (4) to protect the privacy of Ohio employees' pay and personal information specified in Section 34a by restricting an employee's access, and access by a person acting on behalf of that employee, to the employee's own pay and personal information. (R.C. 4111.14(A).)

The bill also specifies that the General Assembly, by enacting the bill, intends to implement the Ohio Fair Minimum Wage Amendment in the manner in which the proponents of the Amendment described it to Ohio voters during the campaigns for the General Election on November 7, 2006. (Section 4.)

The bill states that the proponents of the Ohio Fair Minimum Wage Amendment issued campaign materials, one of which was entitled "Fact vs. Fiction: Minimum Wage Opponents Shamelessly Distort Facts to Deny Low-Wage Workers a Raise," published by Ohioans for a Fair Minimum Wage, that stated all of the following upon which Ohio voters relied to be honest and accurate:

(1) Section 34a defines "employer," "employee," and "employ" as having the same meanings as under the federal Fair Labor Standards Act. Clear definitions for terms such as "employ" and "casual basis" will not necessitate litigation to clarify their meanings because those terms have been established by federal regulations, well settled case law, or both.

(2) By referencing the federal minimum wage law directly, Section 34a ensures that the Ohio law tracks the federal minimum wage requirements with respect to individuals who volunteer their time.

(3) Section 34a does not threaten employees' privacy because employees may seek access only to their own payroll records.

(4) Section 34a allows an employer to take reasonable steps to verify that a person does in fact represent the employee.

(5) Employment law experts explain that state authorities in Ohio will undoubtedly interpret the parallel language in Section 34a in the same manner as the federal Department of Labor, clarifying that employers need not keep irrelevant records for non-hourly employees. (*Id.*)

The bill explains that the General Assembly wishes to enact the bill according to the proponents' campaign materials and pursuant to the authority vested in the General Assembly by (1) Section 34a, which states that "laws may be passed to implement its provisions. . .," and (2) Section 34 of Article II, Ohio Constitution, which states that "laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power," which Section 34a made no attempt to amend, repeal, or otherwise modify. (*Id.*)

Severability clause

The bill contains a severability clause that stipulates that if any item of law in the bill, or if any application of any item of law in the bill, is held invalid, the invalidity does not affect other items of law or applications of items of law that can be given effect without the invalid item of law or application. To this end, the items of law of which the codified and uncodified sections of law contained in the bill are composed, and their applications, are independent and severable. (Section 5.)

COMMENT

Section 34a stipulates that the section must be liberally construed in favor of its purposes. The section specifies that laws "may be passed to implement and create additional remedies, increase the minimum wage rate, and extend the coverage of the section, but in no manner restricting any provision of the section . . . ." If a court would find that the bill's provisions are considered a restriction on Section 34a, then the bill may be contrary to Section 34a. However, only a court could determine whether the bill's provisions are a restriction.

HISTORY

ACTION	DATE
Introduced	11-28-06
Reported, H. State Government	12-12-06
Passed House (55-42)	12-12-06

h0690-ph-126.doc/kl