

Proposed Rule Regarding Enforcement of the Albuquerque Minimum Wage Ordinance

This is a proposed administrative rule required by the Albuquerque Minimum Wage Ordinance. ROA 1994, § 13-12-1 et seq. (“AMWO”).

Contact Information

Any employee or former employee (“Employee”) may contact the City of Albuquerque Legal Department (“Legal”) at (505)768-4500 and report an allegation of non-compliance with AMWO by an employer. The City recognizes that some Employees may want to initiate the matter anonymously to prevent retaliation or termination. Therefore, an Employee may contact Legal and ask to proceed anonymously. A request to proceed anonymously at the outset will be accommodated except as otherwise provided herein.

Initial Demand Letter

Upon receipt of a claim from an Employee regarding an alleged violation of AMWO, Legal shall send a demand letter to the employer notifying the employer that the City is in receipt of a complaint of non-compliance. Legal shall demand written confirmation of compliance or corrective action within ten days from the date of the letter. If the Employer disputes the claim, the Employer shall forthwith provide written documentation showing that the required wages were paid. Failure of the Employer to provide proof of compliance is itself a basis for further action.

The letter shall inform the employer that failure to comply may result in criminal charges, a civil action seeking three times the shortfall, attorneys’ fees and the pursuit of other legal remedies where applicable. The letter shall also inform the employer that retaliation against an Employee for claiming rights under AMWO is a basis for a private right of action seeking additional monetary damages to be determined by a court. The City may represent the Employee on a retaliation claim, or, where appropriate, seek a private attorney to represent the Employee on the retaliation claim. The reason for seeking private counsel is that some attorneys who represent employers have delayed relief to the Employee by claiming that the City does not have standing or authority to represent an Employee in a private right of action against an employer for retaliation, which has traditionally been viewed by the courts as a private right of action sounding in tort.

Civil Litigation

The Employee has the right to hire a lawyer and proceed independent from the City or to proceed without a lawyer. On the other hand, an Employee may ask to be represented by Legal. The Employee has the right to choose whether to be named as a party to the lawsuit. An Employee may also elect to proceed as an unidentified party in the form of “Jane Doe” or “John Doe” if the Employee determines that being named as a party in the lawsuit could foreclose future opportunities for employment.

If the Employee chooses to be represented by Legal, suit shall not be filed unless and until the Employee provides admissible written documentation, such as a check stub, showing the shortfall. If requested, the Employee shall execute an affidavit prior to the filing of the lawsuit stating they worked the hours claimed, the amount of the shortfall and other facts Legal may deem necessary to prevail by motion under the rules of civil procedure once suit is filed. Legal shall not file a lawsuit if the Employee is a party to pending litigation against the City. Legal may decline representation without explanation if the City Attorney determines that representation of the Employee is prohibited by the Code of Professional Responsibility or other rules of ethics that would lead a reasonable attorney to conclude representation is not appropriate. Legal may withdraw from representation if withdrawal is required under the Code of Professional Responsibility. Legal shall not represent more than one Employee in a particular lawsuit if there is a conflict between the Employees as determined by Legal.

The Employee shall have the sole discretion regarding whether to accept any offer of settlement from the Employer. All damages, including attorney's fees, awarded in a civil lawsuit are the property of the Employee. If the City proceeds as a single party plaintiff, any amounts awarded to the City shall be paid to the Employee by the City.

Criminal Prosecution

Legal may elect not to file a criminal action against an employer. The decision of whether to file a criminal action shall be made by the City Attorney, not the Employee. If Legal files a criminal action, the Employee shall not proceed anonymously and shall be listed as a witness in the action. The Employee shall make themselves available for all court appearances and for trial. If a court levies a fine, the fine is not the property of the Employee. If a court orders restitution, the amounts paid are the property of the Employee.

Equitable Relief

The maximum criminal fine is five hundred dollars and incarceration is unlikely, at least for the first offense. If the fine is less than the wages owed, some Employers may elect to pay the fine in lieu of compensating the Employee. The City may, when appropriate, seek an injunction or restraining order against an Employer to preclude, without limitation, non-compliance or retaliation. If an Employer demonstrates a pattern of non-compliance with AMWO, the City may seek a court order requiring compliance. If the Employer further fails or refuses to comply, the City shall file charges for contempt. Monetary sanctions for contempt are not the property of the Employee unless a court orders otherwise.