Why There Are No Privacy Problems Raised by the Ohio Fair Minimum Wage Amendment

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As a privacy law expert at the Ohio State University, I have recently been asked to comment by newspapers and others about the claims that the Ohio Fair Minimum Wage Amendment (also known as Issue 2) would create privacy problems for Ohio workers. After carefully reviewing these claims, I have come to a simple conclusion: There are no privacy problems created by the Amendment.

Opponents of the Amendment have created a Political Action Committee called "Ohioans to Protect Personal Privacy" (OTPPP). OTPPP has issued radio advertisements and met with newspaper editorial boards. The heart of its critique is that the Amendment says that payroll records "shall be provided without charge to an employee or person acting on behalf of an employee upon request." OTPPP claims in its ads that this language "would make your payroll records public." It wants the voters to believe that access "on behalf of" an employee is the same as "making the employee's payroll records public."

That claim is clearly wrong, contrary to law, and shows an ignorance of actual privacy law. The right of individuals to access their own records is one of the Fair Information Practices, built into privacy laws both in the United States and globally. Similarly, privacy laws enable personal representatives, such as lawyers or family members, to get access to records on an individual's behalf. This right of access ensures that individuals can check their own records, such as to verify that they have been paid the minimum wage in compliance with law. In short, the right of access protects the accuracy of a person's private information, and is not a privacy violation.

The text of the Amendment is abundantly clear, in my opinion as a law professor expert in privacy law and legislative interpretation. In addition, there are three backup protections against abuse:

- First, uniform practice under other privacy and consumer protection laws is that the party that holds the records, such as the employer, can verify a requester's identity, to protect against fraud.

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- Second, the text of the Amendment provides that it "shall be liberally construed in favor of its purposes." The purposes are to protect workers, not to violate their privacy, and courts have no reason to reach any other conclusion.

- Third, the text of the Amendment states that "Laws may be passed to implement [the Amendment's] provisions . . . ." In the remote chance that privacy problems arise under the Amendment, the legislature can fix them.

I first read the text of the Amendment when a manager at a major Ohio company asked me to look at the claims of privacy problems. My response then was that the claims were so weak that they should not be taken seriously. Now, in light of continued advertisements and lobbying by OTPPP, and in response to requests from major Ohio papers, I have looked at the claims in more detail. My conclusion is the same – there are no privacy problems with Issue 2.

Analysis

I. The Ohio Fair Minimum Wage Amendment and the Right to Access

The main purpose of the Ohio Fair Minimum Wage Amendment is to raise the minimum wage. This paper takes no position on the desirability of raising the minimum wage, but instead addresses the (incorrect) allegation that there are privacy problems with the Amendment.

In order to ensure effective enforcement, the Amendment has provisions that ensure that wage records are kept accurately and are available for inspection by employees. The Amendment is attached in its entirety. The language relevant to enforcement states:

> "An employer shall 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. **Such information shall be provided without charge to an employee or person acting on behalf of an employee upon request.** 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." (emphasis added)

The highlighted portion is a standard protection included in privacy regimes. Privacy laws in the U.S. and globally include "access" provisions, so that individuals can see their own records, ensure their accuracy, and correct any mistakes. This access right is considered one of the five key Fair Information Practices by the Federal Trade

Commission.[1] The legal right of access is required, for instance, under the HIPAA medical privacy rule, 45 C.F.R. § 164.524. A standard part of access, in turn, is that a personal representative can exercise the right on the individual's behalf. The HIPAA medical privacy rule, for instance, authorizes a personal representative to act for a patient at 45 C.F.R. § 164.502(g). Lawyers and family members are examples of personal representatives who often act on an individual's behalf. Unions may also act on behalf of union members. Because unions already have the right to access the pay records of their members, however, my understanding is that the Amendment would not affect unions' access to pay records.[2]

II. Ohioans to Protect Personal Privacy

Opponents of the Amendment have organized a political action committee called the Ohioans to Protect Personal Privacy, and they have focused their opposition to the Amendment on their "privacy" concerns. (See http://www.otppp.com .) As an expert in Ohio on privacy issues, I have been called by major Ohio newspapers to comment on the OTPPP statements. Based on what the newspapers have told me, the OTPPP has been contacting reporters and editorial boards to encourage them to run stories on privacy arguments and oppose the Amendment on this basis (rather than focusing on the minimum wage). The OTPPP has also launched a radio campaign with this advertisement (which is available on their website):

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[1] The most detailed U.S. government discussion of the Fair Information Practices is Federal Trade Commission, "Privacy Online: A Report to Congress," (1998), available at http://www.ftc.gov/reports/privacy3. The Safe Harbor Principles, which govern U.S. companies' use of data from the European Union, include the right of access. *See* http://www.export.gov/safeharbor. There are numerous other U.S., international, and scholarly discussions of Fair Information Practices, with access included as a standard component of such lists at least since 1980, when the Organization of International Cooperation and Development, with U.S. support, issued its OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, available at http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html.

[2] The National Labor Relations Act prohibits an employer from "refus[ing] to bargain collectively with the representatives of his employees." 29 USC § 158(a)(5). The Amendment specifically incorporates federal definitions for terms such as "employer" and "employee." Once a union is recognized as the representative of a set of employees for collective bargaining purposes, an employer cannot refuse to bargain with them "in good faith with respect to wages, hours, and other terms and conditions of employment." 29 USC 158(d). My understanding of the case law is that an employer's refusal to share basic wage records with a union constitutes a refusal to bargain collectively in violation of 158(a)(5). See *NLRB v. Truitt*, 351 US 149 (1956), *Detroit Edison Co v. NLRB*, 440 US 301 (1979).

It thus appears that the Amendment does not alter the pre-existing ability of a union that already represents the employees at a workplace to see payroll records when acting on behalf of a union member. Even if this is mistaken, however, and the Amendment does allow somewhat increased access by unions that represent employees, that would not make the payroll records available to the general public, as critics have claimed. Nor would it make payroll records available to a union that does not represent the employees at a workplace. In addition, if any additional records did become available to a union, the union still owes a duty of fair representation to every employee in the bargaining unit, with legal sanctions against the union for actions taken in an arbitrary, discriminatory, or bad faith fashion that injure an individual employee.

Of all the Ohio political ballot issues this fall, watch out for Issue 2. Issue 2's supporters say they just want to raise the minimum wage to help the poor. They won't say Issue 2's fine print can also make your payroll records public: how much you make, when you worked, where you live—that's really dangerous, especially if someone is set on intimidation, identity theft, or fraud. But Issue 2 promoters have been investigated in 12 states for fraud, including Ohio. So it's no surprise they're not telling the whole truth here.

Helping the poor is a good thought, but Issue 2 is just plain bad. That's why the Columbus Dispatch and other leaders say, Issue 2 is wrong for our state.

So protect your personal privacy, vote no on Issue 2.

To learn about more problems with Issue 2, go to otppp.com, that's o-t-triple-p-dot-com. Paid for by Ohioans to Protect Personal Privacy, John C. Mahaney, Jr., Treasurer. Watch out for Issue 2.

III. Why the OTPPP's Privacy Concerns are Wrong

A. The "on behalf of" language does not create privacy problems. The OTPPP advertisement claims that the Amendment "can also make your payroll records public: how much you make, when you worked, where you live – that's really dangerous." It urges listeners to vote against the Amendment to "protect your personal privacy."

The Amendment never states that payroll records will be made public. Its language simply does not say that.

Instead, based on discussions with the newspapers who have been lobbied by the OTPPP, critics are focusing on the Amendment's language that payroll information "shall be provided without charge to an employee or person acting on behalf of an employee upon request." The Columbus Dispatch made a similar point in an editorial.[3]
As explained above, there is an entirely sensible reason for having a provision of this sort in the Amendment – to allow employees to check their own records, to make sure that the wage rules are being followed. This sort of access right is a standard part of many privacy and other consumer protection regimes. Also as explained above, it is standard to allow personal representatives – those acting "on behalf of" the individual – to make the request for the individual. Lawyers and family members are common examples of personal representatives. Other persons are not given any right of access by the Amendment – there is no privacy problem here to solve.

[3] An editorial in the Dispatch on September 13 originally (and incorrectly) stated that records could be seen by any "person acting on behalf of an employee and/or other interested party." The Amendment does mention "interested party" in an unrelated part of the Amendment. The Amendment does not allow "interested parties "to see employee records, and any argument that it does is unsupported by the text. The Dispatch issued a correction on September 16.

B. There is no employer-wide access under the Amendment. Ohio newspapers have asked me about another claim that opponents have made. Apparently, some opponents are arguing that the Amendment will allow any one employee to review payroll records for every other employee of that employer. I have not heard any reason given for why this interpretation makes sense, or why any court interpreting the Amendment would understand the text in this way.

Nonetheless, for purposes of completeness, it makes sense to show why the Amendment does not mean this. The Amendment's text is clear once the recordkeeping requirement and records review provisions are read together:

> "An employer shall 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. **Such information** shall be provided without charge to **an** employee or person acting on behalf of **an** employee upon request**."** (emphasis added)

Both the recordkeeping and records review provisions are consistently expressed in terms of each individual employee. The recordkeeping provision requires an employer to keep records for "*an* employee" for a fixed number of years after "*the* employee" was employed. The records review provision allows "*an* employee" to review "*such information*"—that is, the records of "*an* employee" (singular) described in the preceding recordkeeping sentence. The consistent use of the singular form—"*an* employee"— demonstrates that the Amendment is intended only to provide each individual employee with the opportunity to review *his or her own* payroll records.

C. Other safeguards provide additional protection against privacy problems. While I believe it is clear from the Amendment's plain language that it would not create privacy problems, there are at least three additional layers of protection against the privacy problem that the OTPPP alleges.

First, the standard practice in privacy laws is that the organization holding the records can assure that the right person is making the request. Under the HIPAA medical rules, for instance, hospitals and other records-holders are expected to implement procedures to verify that the person seeking access to records is authorized to do so. 45 C.F.R. § 164.312(d). There is no reason for an employer to turn over payroll records until authentication occurs.

Second, the text of the Amendment provides that it "shall be liberally construed in favor of its purposes." The purposes of the Amendment are to raise the minimum wage and to have records maintained and used in ways that assist its enforcement. The intent of the Amendment to protect employees is inconsistent with an interpretation that harms employees. I have not seen any argument by the OTPPP or other critics that would explain why creating privacy problems is a "purpose" of the Amendment. As a law

professor, I simply do not see any basis for believing that courts will interpret the Amendment to create a privacy problem that does not exist in the text.

Third, the text of the Amendment provides backup power in the General Assembly to clarify or correct any problems that may occur. The Amendment provides: "Laws may be passed to implement [the Amendment's] provisions . . . ." If there is any lack of clarity about who has the right to access records, the legislature can act. No one is saying that the Amendment should become open season on the private records of the people of Ohio. If any clarification is needed, the problems can be promptly fixed in the future.

About the author:

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Professor Swire is a leading national and international expert in privacy law. From 1999 until early 2001 he served as the Chief Counselor for Privacy in the U.S. Office of Management and Budget, where he coordinated U.S. government policy on the use of personal information in the public and private sectors. His work in government included being the White House coordinator for the HIPAA medical privacy rule. Since leaving government, in addition to his scholarship and teaching, Professor Swire has been a leader on many privacy law issues, testifying regularly before the Congress, consulting with major corporations, and being the lead author for the privacy certification materials of the International Association of Privacy Professionals. Professor Swire has received no compensation for the writing of this document. Contact information -- cell phone: 240.994.4142; email: peter@peterswire.net; web: www.peterswire.net.

Document completed October 10, 2006

FULL TEXT

The Ohio Fair Minimum Wage Amendment

Be it Resolved by the People of the State of Ohio that Article II, Section 34a of the Ohio Constitution is hereby enacted as follows:

ARTICLE II, Section 34a

Except as provided in this section, every employer shall pay their employees a wage rate of not less than six dollars and eighty-five cents per hour beginning January 1, 2007. On the thirtieth day of each September, beginning in 2007, this state minimum wage rate shall be increased effective the first day of the following January by the rate of inflation for the twelve month period prior to that September according to the consumer price index or its successor index for all urban wage earners and clerical workers for all items as calculated by the federal government rounded to the nearest five cents. Employees under the age of sixteen and employees of businesses with annual gross receipts of two hundred fifty thousand dollars or less for the preceding calendar year shall be paid a wage rate of not less than that established under the federal Fair Labor Standards Act or its successor law. This gross revenue figure shall be increased each year beginning January 1, 2008 by the change in the consumer price index or its successor index in the same manner as the required annual adjustment in the minimum wage rate set forth above rounded to the nearest one thousand dollars. An employer may pay an employee less than, but not less than half, the minimum wage rate required by this section if the employer is able to demonstrate that the employee receives tips that combined with the wages paid by the employer are equal to or greater than the minimum wage rate for all hours worked. The provisions of this section shall not apply to employees of a solely family owned and operated business who are family members of an owner. The state may issue licenses to employers authorizing payment of a wage rate below that required by this section to individuals with mental or physical disabilities that may otherwise adversely affect their opportunity for employment.

As used in this section: “employer,” “employee,” “employ,” “person” and “independent contractor” have the same meanings as under the federal Fair Labor Standards Act or its successor law, except that “employer” shall also include the state and every political subdivision and “employee” shall not include an individual employed in or about the property of the employer or individual’s residence on a casual basis. Only the exemptions set forth in this section shall apply to this section.

An employer shall at the time of hire provide an employee the employer’s name, address, telephone number, and other contact information and update such information when it changes. An employer shall 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. Such information shall be provided without charge to an employee or person acting on behalf

of an employee upon request. 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. No employer shall discharge or in any other manner discriminate or retaliate against an employee for exercising any right under this section or any law or regulation implementing its provisions or against any person for providing assistance to an employee or information regarding the same.

An action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person acting on behalf of an employee or all similarly situated employees in any court of competent jurisdiction, including the common pleas court of an employee's county of residence, for any violation of this section or any law or regulation implementing its provisions 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. There shall 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. Where an employer is found by the state or a court to have violated any provision of this section, the employer shall within thirty days of the finding pay the employee back wages, damages, and the employee's costs and reasonable attorney's fees. Damages shall 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 one hundred fifty dollars for each day that the violation continued. Payment under this paragraph shall not be stayed pending any appeal.

This section shall be liberally construed in favor of its purposes. Laws may be passed to implement its provisions 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 or the power of municipalities under Article XVIII of this constitution with respect to the same.

If any part of this section is held invalid, the remainder of the section shall not be affected by such holding and shall continue in full force and effect.