

## Minimum Wage & Overtime Updates

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Never mind the Ides of March, for employers with tipped employees: beware the federal budget process. Presumably no one's March Madness bracket had federal Fair Labor Standards Act (FLSA) amendments going to, let alone winning, D.C.'s "big dance." How this Cinderella story plays out remains to be seen, so, during federal legislative half-time, we'll take a quick look at the scores from other minimum wage, tips, and overtime games around the country.

**FLSA Amendments (Tipped Employees Dunk & Baseball Players Get Dunked On):** Within a 2,232-page budget bill were two FLSA amendments that took effect on March 23, 2018; the first concerned tips, and the second exempted certain employees from minimum wage and overtime requirements.

As amended, the FLSA prohibits employers from keeping employees' tips for any purposes, including allowing managers or supervisors to keep any portion of these tips. The restriction applies regardless of whether a tip credit is claimed. If a violation occurs, an employer is liable for the amount of any tip credit taken and tips unlawfully kept, plus an equal amount in liquidated damages. Additionally, violators are subject to a civil penalty up to \$1,100 per offense. Finally, the amendments provide that portions of the U.S. Department of Labor's (DOL) 2011 final rule concerning tips "that are not addressed by section 3(m)" of the FLSA "have no further force or effect until any future action taken by the Administrator of the Wage and

Hour Division." It remains to be seen exactly what portions of the final rule will be impacted.

The Save America's Pastime Act exempts from the FLSA's minimum wage and overtime requirements any employee employed to play baseball who is compensated per a contract that provides for a weekly salary of not less than \$290 for services performed during the league's championship season (excluding spring training and the off season). It does not matter how many hours the employee devotes to baseball-related activities.<sup>1</sup>

**DOL Unveils PAID Program (The Unintentional Foul):** The DOL unveiled its Payroll Audit Independent Determination (PAID) program, a six-month pilot program that allows certain employers to proactively address potential FLSA underpayments that are not connected to existing (or known threats of) litigation or administrative enforcement. In return for paying 100% of wages owed, a participating employer will not be required by the DOL to pay liquidated damages or civil monetary penalties.<sup>2</sup>

**Montana Subs In Various Regulations:** The Montana Department of Labor and Industry revised various wage and hour regulations. The revised rules permit voluntary tip pooling, discuss how service charges are distributed, and allow employers to deduct the percentage they pay on credit card tips when providing such tips to employees. Additionally, the Department

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aligned its independent contractor determination rules with similar workers' compensation and unemployment rules.

**Minimum Wage Will Not Change in Nevada (No Starting Lineup Changes):** The Nevada Labor Commissioner announced that the state minimum wage will not change from July 1, 2018 through June 30, 2019 for employees who are offered qualified health benefits from their employers (\$7.25 per hour) and employees who are not offered such benefits (\$8.25 per hour).

**California Supreme Court Will Hear Meal & Rest Period Case (Officials Are Reviewing the Play):**

The California Supreme Court accepted certified questions from the U.S. Court of Appeals for the Ninth Circuit. In doing so, the Court agreed to answer the following questions concerning California meal and rest period requirements: 1) Must employers of ambulance attendants working 24-hour shifts relieve attendants of all duties during rest breaks, including the duty to be available to respond to an emergency call if one arises during a rest period? 2) May such an employer require attendants to be available to respond to emergency calls during meal periods without a written agreement that contains an on-duty meal period revocation clause and, if such a clause is required, will a general at-will employment clause satisfy this requirement?<sup>3)</sup> Do violations of meal period requirements, which require payment of a premium for each improper meal period, give rise to claims under California Labor Code sections 203 (waiting time penalty for final wages violation) and 226 (paystub requirements) if the employer does not include the premium in pay or paystubs?

**Johnson County Iowa's Unofficial Minimum Wage Increase (After the Buzzer – Does Not Count):**

Although in 2017 local minimum wage laws for private employers were preempted by state law, this did not stop the Johnson County Board of Supervisors from voting to "increase" the now-defunct (and inapplicable) local minimum wage rate from \$10.10 to \$10.27 per hour, effective July 1, 2018. As we previously noted, Johnson County vowed to continue to publish annual adjustments

and urged employers to voluntarily pay the county's minimum wage.

**Redwood City Minimum Wage Ordinance Proposal (To Enact or Not to Enact, That Is The Question):**

A proposed minimum wage ordinance passed its first of two required readings by the City Council of Redwood City, California (Northern California – San Francisco Bay Area). Under the proposal, beginning January 1, 2019, the local minimum wage would be \$13.50 per hour, increasing to \$15.00 per hour on January 1, 2020, with annual adjustments occurring in 2021 and subsequent years (notably, the 2021 rate will factor in the cost-of-living increase for both 2019 and 2020). Tips cannot be used to pay the minimum wage. Employers cannot fund pay increases or respond to the law by reducing wages, increasing charges for parking, meals, uniforms, or other items, reducing non-wage benefits, or increasing an employee's share of benefits (unless the prohibition is preempted by federal ERISA). The law's requirement can be waived in a bona fide CBA if done explicitly, in clear and unambiguous terms, and prospectively; except in the property services industry (e.g., janitors, landscapers, groundskeepers, security guards). City-created posters must be conspicuously displayed and payroll records must be kept for three years. Discrimination or adverse action is prohibited, and a rebuttable presumption of retaliation exists if adverse action is taken within 120 days of a person exercising protected rights. The city can receive and investigate complaints, but employees also can file a private right of action.

That New Bill Smell (A Bill by Any Other Name Would Smell as Sweet): Numerous items were introduced since our last update, which are briefly highlighted below.

- **Minimum Wage:** Minnesota SB 3108 would eliminate the minimum wage rate certain lodging facilities can pay employees working on a J visa (summer work travel exchange visitor). Minnesota SF 1901 would exempt minor league baseball players from state minimum wage and overtime requirements. However, reports suggest the author did not hit a

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home run during a committee hearing, so he benched (*i.e.*, tabled) the bill. **Puerto Rico** PS 153 would, among other things, create a two-tier minimum wage system based upon whether a business grossed more or less than \$1 million, gradually increase the minimum wage until it reaches \$15.00 per hour, and require companies that gross less than \$500,000 annually to pay 70% of the applicable minimum wage.

- **Tips:** **U.S.** HR 5180, the Tip Income Protection (TIP) Act of 2018, was introduced but is unlikely to advance in light of the above-referenced FLSA tip amendments. **Louisiana** HB 126 would establish a statewide minimum wage, but only for tipped employees. Covered employees would be entitled to the full FLSA minimum wage (currently \$7.25 per hour). The bill aims to essentially eliminate the tip credit for FLSA-covered employers. **Minnesota** SB 3108 would require all employers – regardless of size – to pay tipped employees at least \$8.00 per hour so that when tips and the direct cash wages are combined, an employee averages at least \$12.00 per hour. It would also require that employees receive the full amount of a tip left by credit card.
- **Anti-Preemption:** **Louisiana** SB 159 would repeal the state’s ban of local minimum wage laws. **Wisconsin** AB 998 seeks to repeal the ban against local minimum wage laws, but its chance of success appears slim given AB 748, an omnibus preemption bill that Governor Scott Walker (R) is expected to sign.<sup>3</sup>

**What Passed at Least One House (Dignified, Sure, but Definitely Outside Verona):** **Arizona** HCR 2028 aims to submit to voters a proposal to eliminate the rebuttable presumption that arises when adverse action is taken against an employee within 90 days of engaging in protected activity under the minimum wage law. **Hawaii** HB 1627 would eliminate the state labor department’s authority to issue rules allowing individuals whose earnings capacity are impaired by old age to be paid less than the minimum wage, as would SB 3023, which seeks to repeal the ability to pay less than the minimum wage to individuals with physical or mental disabilities.

**What Passed at Least One Committee (Pun-Free Throw):** **Connecticut** HB 5388, co-sponsored by

seven state senators and 41 state representative and approved by the Joint Committee on Labor and Public Employees, seeks to increase the state minimum wage from \$10.10 to \$12.00 per hour, effective January 1, 2019, to \$13.50 and \$15.00 per hour in 2020 and 2021, respectively, with annual adjustments beginning in 2023. **Louisiana** SB 162 would establish a statewide minimum wage. Beginning January 1, 2019, the minimum wage would be \$8.00 per hour, increasing to \$8.50 per hour on January 1, 2020; unless the FLSA minimum wage is greater, in which case the state minimum wage will be the federal rate. However, if enacted, the law would not apply to student employees nor to tipped employees or agriculture employees covered by the FLSA. The bill includes a name-and-shame provision, requiring the Louisiana Workforce Commission to compile a list of employers that violate the law, the number of employees affected by violations, and the dollar amount of each violation, and to annually submit it to the Senate and House Committees on Labor and Industrial Relations and the governor. **Louisiana** SB 252 also seeks to enact a statewide minimum wage, but the provisions will be in the state constitution instead of a statute. It calls for the question to be put to voters in the November 2018 election. The minimum wage rates would generally be the same as in SB 162. However, SB 252 would apply to employers with 50 or more full-time employees and would cover tipped employees while allowing employers to claim a tip credit that would be set by state labor officials. Its effective date would be August 1.

**Parting Is Such Sweet Sorrow:** For at least this legislative session, we’ll have to live without the following bills. **Delaware** SB 10 sought to institute lock-step increases to the state minimum wage on October 1, 2017, 2018, 2019, and 2020. **Louisiana** HB 192 sought to establish, effective January 1, 2019, a statewide minimum wage of \$15.00 per hour or the FLSA minimum wage (if greater), but was “involuntarily deferred in committee,” meaning it is highly unlikely it will again be considered. **Maryland** HB 974 would have increased the minimum salary (or fee) amount that must be paid to exempt executive, administrative, or professional employees from

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\$455 to \$900 per week, excluding board, lodging, or other facilities. Mississippi HB 1241 proposed to, among other things, prohibit local laws regulating or creating remedies for wage and hour disputes.

**Tennessee** HB 2416 aimed to create a private right of action against employers violating a statute governing tip and service charge distribution.

We will continue to monitor and report on minimum wage and overtime developments as they occur.

1. The U.S. Court of Appeals for the Ninth Circuit asked parties involved in litigation under the FLSA involving minor league baseball players to file briefs concerning what impact the amendments have on the case.
2. For a more in-depth discussion of the PAID program, see Tammy McCutchen, Lee Schreter, and Meredith Schramm-Strosser, [DOL Launches Payroll Audit Independent Determination \(PAID\) Program to Promote Self-Reporting and Early Resolution of Wage and Hour Claims](#), Littler ASAP (Mar. 7, 2018).
3. For a more in-depth discussion of Wisconsin AB 748, see Adam Tuzzo and Jonathan Levine, [Still “Open for Business” – New Wisconsin Legislation to Preempt Most Local Employment Ordinances](#), Littler ASAP (Mar. 27, 2018).

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