



WAGE Watch



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WPI Wage Watch: Minimum Wage and Overtime Updates

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It's summertime, but the living is anything but easy for employers trying to track minimum wage and overtime developments. The U.S. Department of Labor is defending legal challenges to various rules the Obama administration adopted, while simultaneously working to revise those rules. States continue to battle with local jurisdictions over who dictates minimum wage rates, and are themselves generally amending minimum wage and/or overtime standards. Additionally, where unencumbered, cities and counties are proposing, enacting, or amending minimum wage ordinances.

Keep the Change, Not the Regulation: The U.S. Department of Labor filed with the Office of Management and Budget a proposal to rescind its rule restricting tip pooling by employers that pay tipped employees the full minimum wage and do not use a tip credit.¹ The rule's validity is currently before the U.S. Supreme Court and was recently rejected by the U.S. Court of Appeals for the Tenth Circuit.

Respect My (Rulemaking) Authority: On June 30, 2017, the U.S. Department of Labor filed its reply brief with the U.S. Court of Appeals for the Fifth Circuit concerning the validity of its currently-enjoined white collar salary rule. It asked the Fifth Circuit to reverse the lower court's decision that the Department did not have the authority to establish a salary level test for exempt employees

and requested that the court ignore the enjoined rule's salary level, "which the Department intends to revisit through new rulemaking." On July 26, 2017, the Department published a Request for Information in which it solicited "feedback on questions related to the salary level test, the duties test, varying cost-of-living across different parts of the U.S., inclusion of non-discretionary bonuses and incentive payments to satisfy a portion of the salary level, the salary test for highly compensated employees, and automatic updating of the salary level tests." Comments must be submitted by September 25, 2017.²

Tip Free or Die: In New Hampshire, voluntary tip pooling among directly tipped employees is permitted. However, amendments effective September 3, 2017, allow tip pool participants to agree, voluntarily and without coercion, to provide a portion of the common pool to other employees - regardless of job category - who participated in providing service to customers.

Less is MO: Missouri Governor Eric Greitens (R) neither signed nor vetoed HB 1194, which allowed the bill to become law and, effective August 28, 2017, ban local minimum wage ordinances that were in effect in St. Louis and scheduled to take effect later this year in Kansas City. Saint Louis publicly acknowledged the law's preemptive effect and noted online its ordinance would only apply until

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the state law kicked in. However, Kansas City has not published a similar statement about its ordinance or the local minimum wage ballot measure scheduled for August 8, 2017.

Tis the Season(onal Amusement or Recreational Establishment Overtime Exemption): North Carolina SB 82 tweaks the overtime exemption for employees of a seasonal amusement or recreational establishment. Before SB 82, employers had to pay overtime to these employees if they worked more than 45 hours per week. SB 82, however, fully exempts these employees from overtime requirements beginning January 1, 2018.

On the Governor's Desk: Oregon HB 3458 would change overtime-related provisions applicable to mills, factories, or manufacturing establishments, and canneries, driers, or packing plants. For example, the amendments would change how weekly overtime is determined from being based on a calendar week to a workweek, i.e., a fixed period of time an employer establishes that is a regularly recurring period of 168 hours or seven consecutive 24-hour periods. Also, the amendments provide that the amount of overall overtime owed an employee is based on the greater of daily or weekly overtime worked; this differs from how the state labor department interprets the law, which has been rejected by at least one state court.³ The amendments also address the maximum amount of weekly hours employees in such establishments may work. The overtime calculation amendments would become operative immediately, whereas the maximum workweek provisions would become operative on January 1, 2018.

Minneapolis, More Like Maxiapolis: The Minneapolis Minimum Wage Ordinance requires that covered employees working in the city be paid a local minimum wage, which differs based on whether an employer has more than 100, or 100 or fewer, employees. All covered employees – including tipped employees – must be paid the full Minneapolis minimum wage. The minimum wage for large employers will be: \$10.00 (January 1, 2018); \$11.25

(July 1, 2018); \$12.25 (July 1, 2019); \$13.25 (July 1, 2020); \$14.25 (July 1, 2021); and \$15.00 (January 1, 2022). Beginning January 1, 2023, and on each subsequent January 1, the large employer minimum wage will be increased based on changes to the consumer price index. The minimum wage for small employers will be: \$10.25 (July 1, 2018); \$11.00 (July 1, 2019); \$11.75 (July 1, 2020); \$12.50 (July 1, 2021); \$13.50 (July 1, 2022); \$14.50 (July 1, 2023). Beginning July 1, 2024, all employers will be subject to the adjusted large employer minimum wage. The ordinance also includes posting and recordkeeping requirements.

Flagstaff Mini(mum Wage Ordinance) Amendments: The Flagstaff Arizona City Council adopted amendments to its minimum wage ordinance, effective August 4, 2017. The amendments clarify that employers claiming a tip credit must establish each week that an employee's minimum cash wage plus tips equal at least the city minimum wage. Also, the amendments specify that the rate of interest on unpaid wages damages will be 10% per year.

H(OT Exception) for Teacher: California law provides an overtime exception for K-12 teachers at private schools if a number of conditions are met. These conditions include, in part, that they earn the greater of at least 100% percent of the lowest salary offered by any school or at least 70% percent of the lowest schedule salary offered by the school district or the school's county office of education to a person in a position that requires a valid California teaching credential and is not employed per an emergency permit, intern permit, or waiver. SB 621's amendments extend the exception to part-time teachers if their salary is proportionate to the full-time salary requirements.

Federal Fight for \$15: In a July 24, 2017 letter to Rep. Virginia Foxx (R-NC), Chair of the House Committee on Education and the Workforce, eight congressional representatives – Bobby Scott (D-VA); Raul Grijalva (D-AZ); Marcia Fudge (D-OH); Gregorio Kilili Camacho Sablan (D-NMI); Susan Davis

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(D-CA); Joe Courtney (D-CT); Jared Polis (D-CO); Frederica Wilson (D-FL) – requested a hearing on H.R. 15, the Raise the Wage Act, which proposes to eventually increase the federal minimum wage to \$15 and annually adjust the rate in future years, and phase-out the tip credit employers may apply when paying tipped employees the minimum wage and the subminimum wage that may be paid to certain individuals with disabilities.

Joint (Employer) Pain Relief: Rep. Bradley Byrne (R-AL) and 29 co-sponsors introduced H.R. 3441, the Save Local Business Act,⁴ which proposes amending the federal Fair Labor Standards Act (FLSA) (and National Labor Relations Act – NLRA) to clarify when two or more employers may be considered joint employers: “A person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over the essential terms and conditions of employment (including hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, and administering employee discipline).

Surf’s Up, But What About California White Collar Salaries?: California AB 1565 passed the State Assembly and on July 18, 2017, was ordered to a third and final reading in the State Senate. If it passes without being amended, the bill will go to the governor. If the governor signs AB 1565, minimum salary requirements for exempt executive, administrative, and/or professional employees would change from a monthly salary equal to at least twice the state minimum wage to that amount or \$3,956 – whichever is greater – for full time employment (i.e., 40 hours per week). The amendments would impact employers with 25 or fewer employees more than employers with 26 or more employees because of preset state minimum wage increases. The \$3,956 rate would apply to employers with 26 or more employees only in 2018, but would apply to employers with 25 or fewer employees in 2018 and

2019. Afterwards, the twice the state minimum wage standard would apply.

Everything’s Bigger in Texas: In July, Texas legislators introduced two new minimum wage bills. HB 105 proposes raising the minimum wage from \$7.25 to \$8.25 per hour in 2018 and 2019, \$9.25 per hour in 2020 and 2021, and in future years \$10.10 per hour; unless the federal minimum wage is greater, in which case that rate will apply. Additionally, it proposes setting the minimum cash wage that tipped employees must be paid at the federal rate (\$2.13 per hour) plus \$1.00 per hour in 2018 and 2019, plus \$2.00 per hour in 2020 and 2021, and plus \$2.85 per hour in future years. HB 133 proposes increasing the minimum wage to \$15.00 per hour on December 1, 2017.

Mo(Co) Money, Mo(Co) Money, Mo(Co) Money: The Montgomery County, Maryland Council introduced Bill 28-17 to increase the countywide minimum wage from \$11.50 to \$15.00 per hour as soon as July 2020, with annual adjustments beginning July 2023. The proposal would establish a two-tier minimum wage; one rate schedule would apply to employers with 26 or more employees and another would apply to employers: 1) with 25 or fewer employees; 2) that have 501(c)(3) tax-exempt status; or 3) that are certified by the Montgomery County Office of Human Rights as providing home health or home or community-based services and receiving at least 75% of gross revenues through state and federal Medicaid programs. Bill 28-17 allows the Director of Finance to suspend proposed increases based on economic conditions. If enacted, the changes would take effect on July 1, 2018.

Pay Less in Seattle (No More): Seattle Mayor Ed Murray announced that the city intends to revise its Minimum Wage Ordinance to eliminate subminimum wages for certain individuals with disabilities. According to the mayor, revisions to the ordinance will be included in omnibus legislation upon which the council will vote before 2017 ends.

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

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1. For a more complete discussion, see Eli Freedberg, [*DOL Announces Intent to Rescind Rule Restricting the Allocation of Gratuities to Non-Tipped Employees When the Employer Does Not Take a Tip Credit*](#), Littler Insight (Jul. 27, 2017).
2. For a more complete discussion, see Whitney Ferrer, [*DOL Seeks Input Before Issuing New Proposed Rulemaking on the White Collar Exemptions*](#), Littler ASAP (Jul. 25, 2017).
3. See Adam Brauner and Jennifer Warberg, [*Oregon Changes Interpretation of Overtime Laws, Advising Certain Employers to Double Count Daily and Weekly Overtime Payments*](#), Littler ASAP (Jan. 31, 2017); see also David Symes and Jennifer Warberg, [*Court Rejects Recent Interpretation of Oregon Overtime Laws That Would Have Required Certain Employers to Double Count Daily and Weekly Overtime*](#), Littler ASAP (Mar. 14, 2017).
4. For a more complete discussion, see Michael Lotito and Ilyse Schuman, [*House Introduces Bipartisan Bill Designed to Ease Joint Employer Uncertainty*](#), Littler ASAP (Jul. 27, 2017).

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