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Minimum Wages, Maximum Challenges in 2016 (2017, 2018 . . .)

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Although the state-level minimum wage changes in 2015 have been tame compared to the significant changes in 2014,¹ employers should be aware of a number of minimum wage legislative developments on the federal, state, and local levels this year. The U.S. Department of Labor has proposed significant increases to the minimum salary that must be paid to executive, administrative, and professional employees for them to be exempt from federal minimum wage and overtime requirements. Proponents of increased minimum wages have succeeded in having more cities and counties enact local minimum wage laws and raise minimum wage rates where rates have remained unchanged for years.

This article will discuss minimum wage changes that will occur in 2016 and subsequent years. We will briefly discuss the impact these increases can have on overtime-exempt employees. Additionally, we will take a closer look at local minimum wage developments. Finally, we will provide recommendations on how employers can effectively manage minimum wage changes on the federal, state, and local levels.

Complications in Minimum Wage Compliance

Compliance with minimum wage requirements has been complicated by California's and Washington State's restrictive interpretations of how the minimum wage must be paid. In California and Washington State, hourly-paid employees must be paid the minimum wage for each increment of work time, even if the employees' total pay, when divided by the hours worked, would exceed the minimum wage. In California, a piece rate pay plan is considered to provide compensation only for the activities which are directly related to earning the piece rate, and in Washington State a piece rate pay plan is not considered to provide compensation for rest breaks.

¹ See Brian Dixon and Sebastian Chilco, *The Future of the Minimum Wage – 2015 and Beyond*, Littler Insight (Nov. 13, 2014).

For piece rate workers, separate compensation has been found to be due for non-productive and rest periods in California,² and for rest periods in Washington.³

Compliance with California's minimum wage with respect to piece-rate-paid employees will become more complicated in 2016 by new Labor Code section 226.2. Section 226.2 will require piece-rate employees to be separately paid for non-productive time and for rest and recovery periods. Section 226.2 will also impose additional recordkeeping and pay stub requirements.⁴ The new statute also offers a defense to claims that compensation was not provided for rest and recovery periods.

Overview of State Minimum Wage Increases⁵

Currently⁶ 11 states require officials to examine and potentially adjust the minimum wage annually: Arizona; Colorado; Florida; Missouri; Montana; Nevada; New Jersey; Ohio; Oregon; South Dakota;⁷ and Washington.

To date, 15 state legislatures have enacted laws increasing the minimum wage in 2016: Alaska; Arkansas; California; Connecticut; District of Columbia; Hawaii; Maryland; Massachusetts; Michigan; Minnesota; Nebraska; New York;⁸ Rhode Island;⁹ Vermont; and West Virginia. Additionally, Arkansas, Connecticut, and Massachusetts have scheduled increases in 2017, and Hawaii, Maryland, Michigan, and Vermont have set increases for 2017 and 2018.

Decreased Consumer Price Index Causes Many State Minimum Wages to Not Increase

Many state minimum wage rates are adjusted annually based on changes to the consumer price index (CPI). The CPI used by most states either decreased or the increase was insufficient to trigger a raise in 2016. However, employers should not expect a corresponding decrease in the minimum wage. Rather, 2015 rates will continue into and throughout 2016 in the following states: Arizona; Florida; Missouri; Montana; New Jersey; Ohio; Oregon; and Washington State.

2 See Richard Rahm, Julie Dunne, and Michelle Heverly, *"That Can't Be Right!" California Appellate Court Rules that Piece Rate Workers Are Entitled to Separate Hourly Compensation*, Littler Insight (Mar. 22, 2013); see also *Bluford v. Safeway Inc.*, 216 Cal. App. 4th 864, 872 (2013) ("a piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law."). Like rest periods, Labor Code section 226.7 requires that a recovery period mandated by state law be counted as hours worked.

3 See Breanne Sheetz Martell, *Washington Piece-Rate Workers to Receive Separate Rest Breaks*, Littler ASAP (July 23, 2015).

4 See Richard Rahm and Angela Raforth, *California Governor Signs AB 1513, Severely Limiting Piece-Rate Compensation but Throwing a Liability Life Raft to Employers*, Littler Insight (Oct. 12, 2015).

5 Minimum wage rates in the following 25 states are currently not scheduled to change or possibly change via annual adjustment: Alabama; Delaware; Georgia; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Maine; Mississippi; New Hampshire; New Mexico; North Carolina; North Dakota; Oklahoma; Pennsylvania; South Carolina; Tennessee; Texas; Utah; Virginia; Wisconsin; Wyoming.

6 The following states will adjust their rates annually in the future: Alaska (effective January 1, 2017); District of Columbia (effective July 1, 2017); Minnesota (effective January 1, 2018); Vermont (effective January 1, 2019); and Michigan (effective April 1, 2019).

7 2016 is the first year South Dakota's minimum wage will be annually adjusted.

8 New York's minimum wage rates change on December 31, 2015, which for all intents and purposes is a 2016 increase.

9 Rhode Island is the only state to enact a relevant law in 2015; other states enacted laws in previous years.

State Minimum Wage Increases

Rates Increasing on December 31, 2015						
State	2015 Minimum Wage	2016 Minimum Wage	2015 Minimum Cash Wage	2016 Minimum Cash Wage	2015 Maximum Tip Credit	2016 Maximum Tip Credit
New York	\$8.75	\$9.00	See below	See below	See below	See below
Service Employee	\$8.75	\$9.00	\$5.65	\$7.50	\$3.10	\$1.50
Resort Hotel Service Employee	\$8.75	\$9.00	\$4.90	\$7.50	\$3.85 (If weekly average of tips at least \$4.90 per hour)	\$1.50 (If tips received equal or exceed at least \$5.50 per hour)
Food Service Worker	\$8.75	\$9.00	\$5.00	\$7.50	\$3.75	\$1.50
Fast Food Worker ¹⁰	Not applicable	\$9.75	Not applicable	Not applicable	Not applicable	Not applicable
Fast Food Worker (New York City)	Not applicable	\$10.50	Not applicable	Not applicable	Not applicable	Not applicable

10. Additional increases will occur outside New York City on December 31 in 2016, 2017, 2018, 2019, and 2020, and on July 1, 2021; additional increases will occur inside New York City on December 31 in 2016, 2017, and 2018. The wage order's validity is currently subject to a legal challenge. For a general, but more in-depth discussion about the wage order, see George Pauta and Stefanie Kastrinsky, *New York "Supersizes" the Minimum Wage for Certain Fast Food Employees*, Littler Insight (Sept. 29, 2015).

Rates Increasing on January 1, 2016						
State	2015 Minimum Wage	2016 Minimum Wage	2015 Minimum Cash Wage	2016 Minimum Cash Wage	2015 Maximum Tip Credit	2016 Maximum Tip Credit
Alaska	\$8.75	\$9.75	Not applicable.	No change	Prohibited	No change
Arkansas	\$7.50	\$8.00	\$2.63	No change	\$4.87	\$5.37
California ¹¹	\$9.00	\$10.00	Not applicable.	No change	Prohibited	No change
Colorado ¹²	\$8.23	\$8.31	\$5.21	\$5.29	\$3.02	No change
Connecticut	\$9.15	\$9.60	See below	See below	See below	See below
Connecticut (Wait Staff)	\$9.15	\$9.60	\$5.78	\$6.07	\$3.37	\$3.53
Connecticut (Bartender)	\$9.15	\$9.60	\$7.46	\$7.82	\$1.68	\$1.78
Connecticut (Other Tipped Employee)	\$9.15	\$9.60	\$8.80	\$9.25	\$3.35	No change
Hawaii	\$7.75	\$8.50	\$7.25	\$7.75	\$.50 (If wages and tips combined result in the employee earning at least \$7.00 more than minimum wage)	\$.75 (If wages and tips combined result in the employee earning at least \$7.00 more than minimum wage)
Massachusetts	\$9.00	\$10.00	\$3.00	\$3.35	\$6.00	\$6.65
Michigan	\$8.15	\$8.50	\$3.10	\$3.23	\$5.05	\$5.27
Nebraska	\$8.00	\$9.00	\$2.13	No change	\$5.87	\$6.87
Rhode Island	\$9.00	\$9.60	\$2.89	\$3.39	\$6.11	\$6.21
South Dakota	\$8.50	\$8.55	\$4.25	\$4.28	\$4.25	\$4.27
Vermont	\$9.15	\$9.60	\$4.58	\$4.80	\$4.57	\$4.80
West Virginia	\$8.00	\$8.75	\$2.40	\$2.63	\$5.60	\$6.12

11. The rates certain computer software employees, licensed physicians, and surgeons must be paid will also increase effective January 1, 2016. For computer employees, the hourly rate will increase from \$41.27 to \$41.85, the monthly rate from \$7,165.12 to \$7,265.43, and the annual rate from \$85,981.40 to \$87,185.14. For licensed physicians and surgeons, the hourly rate will increase from \$75.19 to \$76.24.
12. The 2016 wage rates are contained in Proposed Colorado Minimum Wage Order Number 32. A hearing was held on the proposal on November 9, 2015, which was also the deadline to submit comments on the proposal. We anticipate the proposal to be completed soon.

Rates Increasing on July 1, 2016 ¹³						
State	2015 Minimum Wage	2016 Minimum Wage	2015 Minimum Cash Wage	2016 Minimum Cash Wage	2015 Maximum Tip Credit	2016 Maximum Tip Credit
D.C.	\$10.50	\$11.50	\$2.77	No change	\$7.73	\$8.73
Maryland	\$8.25	\$8.75	\$3.63	No change	\$4.62	\$5.12
Rates Increasing on August 1, 2016						
State	2015 Minimum Wage	2016 Minimum Wage	2015 Minimum Cash Wage	2016 Minimum Cash Wage	2015 Maximum Tip Credit	2016 Maximum Tip Credit
Minnesota (Employers with gross sales of at least \$500,000)	\$9.00	\$9.50	Not applicable	No change	Prohibited	No change
(Employers with gross sales of less than \$500,000)	\$7.25	\$7.75	Not applicable	No change	Prohibited	No change

The Impact of Minimum Wage Increases on Overtime-Exempt Employees

Minimum wage increases may also affect overtime-exempt employees. Section 7(i) of the Fair Labor Standards Act (FLSA) provides that overtime requirements do not apply to retail or service establishment employees if more than half their compensation for a representative period of not less than one month represents commissions on goods or services and their regular rate of pay exceeds 1.5 times the federal minimum wage.¹⁴ State laws may require an employee's pay rate to exceed 1.5 times the state minimum wage for similar exemptions to apply.

The minimum wage does not directly impact the proposed increase in the minimum salary for overtime-exempt white-collar employees, but increases in state minimum wage rates may impact the minimum salaries which must be paid to be overtime exempt under state law. Presently, employees may qualify as overtime-exempt executive, administrative, or professional employees under the FLSA if they are paid a salary of at least \$455 per week and meet the exemptions' other requirements.¹⁵ Under the DOL's proposed regulations, the weekly salary requirement may soon increase to \$970.¹⁶ Although the FLSA's minimum salary requirement is not tied to the federal minimum wage, some states' minimum salary requirements are tied to the states' minimum wage rates.¹⁷ Increases in those states' minimum wage rates will increase the minimum salary which must be paid. Employers must ensure employees are properly paid under federal and state law.

13. In Nevada, the minimum wage may increase in 2016. The state labor department must publish its decision by April 1, 2016. The current minimum wage rate is in effect from July 1, 2015 through June 30, 2016. The minimum wage is \$7.25 per hour for employees receiving qualified health benefits from their employer and \$8.25 per hour for employees who do not receive health benefits.

14. 29 U.S.C. § 207(i).

15. For more information about the proposed regulations, see Lisa Schreter and Tammy McCutchen, *DOL Releases Proposed Revisions to "White Collar" Overtime Exemptions*, Littler ASAP (June 30, 2015); see also Lisa Schreter, Tammy McCutchen, and Libby Henninger, *DOL Publishes the Proposed Revisions to the White Collar Regulations and Sets a Deadline to Submit Comments*, Littler ASAP (July 7, 2015).

16. *Id.*

17. See, e.g., Alaska (Alaska Stat. § 23.10.055); California (California Wage Orders Nos. 1-13 & 15-16, § 1); Colorado (7 Colo. Code Regs. § 1103-1(5)); Maine (Me. Rev. Stat. tit. 26, § 663); Oregon (Or. Rev. Stat. § 653.010; Or. Admin. R. 839-020-0004); Rhode Island (R.I. Gen. Laws § 28-12-4.3).

Local Minimum Wages

The Local Minimum Wage Compliance Battle

Local minimum wage¹⁸ laws present multiple challenges for employers. First, such laws add an additional layer of compliance for businesses covered by federal and state minimum wage laws. Second, monitoring such laws is more difficult. Third, the ordinances may be subject to legal challenge.

New ordinances enacted by cities and counties generally institute a minimum wage that exceeds federal and state rates.¹⁹ The ordinances often build in multiple future increases in the minimum wage rate and some ordinances call for future increases to be indexed to inflation. The speed at which local minimum wage rates increase often outpaces state law. For example, there are currently more localities with double-digit minimum wage rates than states scheduled to have double-digit rates more than two years from now.

Tracking local minimum wage laws can be challenging, especially for businesses with multi-state or nationwide operations. Generally, local governments provide fewer interpretive materials and officials to provide guidance as to the interpretation of local ordinances. The uncertainty for employers is increased by legal challenges to local ordinances. Opponents often contend local measures are preempted by a state or federal law,²⁰ or that the local governing body exceeded its legislative authority in enacting a local minimum wage.²¹ Employers must comply with the local ordinance or risk compliance with both the local minimum wage obligation and the penalties provided for non-compliance.

New Laws Preempting Local Minimum Wage Laws

In 2015, some states enacted laws to curb local minimum wage measures. Michigan's HB 4052 prohibits local governments from adopting, enforcing, or administering an ordinance, local policy or resolution requiring private employers to provide employees a minimum wage higher than required under state or federal law. The law applies to local measures adopted after December 31, 2014. In Missouri, state legislators voted to override the governor's veto of HB 722 and, as a result, unless already in effect on August 28, 2015, a local law requiring a minimum wage exceeding the state or federal rate is invalid. HB 722 immediately negated Kansas City's proposed minimum wage law. On October 14, 2015, the day before the first increase in St. Louis was scheduled to take effect, a state court held that ordinance was void and unenforceable, and permanently enjoined the city from implementing or enforcing the law.²²

Recommendations for Employers

- Implement an effective system of monitoring minimum wage increases at all levels.
- Ensure non-exempt employees – tipped and non-tipped – are paid at least the minimum wage (and that the minimum wage is paid separately for each hour of work in jurisdictions that require such strict compliance).
- If operating in a state that has a 7(i) exemption or an exempt employee salary basis component that uses the state minimum wage, ensure wage requirements are satisfied.
- Update minimum wage posters.
- Inform employees about their new rate(s).
- Train HR, payroll, and managerial employees on increases, posting, and notice requirements, and how to respond to employee inquiries concerning wage rate changes.
- Confirm that third-party payroll processors are aware of minimum wage changes and have updated systems accordingly.

18. There are two types of local minimum wage legislation. The first, "living wage" ordinances, generally applies only to employers that contract with a local government entity. The second, "minimum wage" ordinances, applies generally to all employees who work within the local jurisdiction. This article focuses on the latter.

19. For example, in 2015, local minimum wage laws were enacted in Los Angeles, California, Johnson County, Iowa, and St. Louis, Missouri.

20. See, e.g., Pamela Salgado, *Washington Supreme Court Finds that City of SeaTac Minimum Wage/Paid Sick Leave Ordinance Applies to Employers Located at the Port of Seattle*, Littler ASAP (Aug. 21, 2015).

21. See, e.g., *Cooperative Home Care v. St. Louis*, No. 1522-CC10607 (22nd Judicial Circuit) (Challenging St. Louis Minimum Wage Ordinance, in part, on the basis that city exceeded its charter authority under the Missouri Constitution).

22. *Id.*