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New York "Supersizes" the Minimum Wage for Certain Fast Food Employees

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On September 10, 2015, the New York Department of Labor issued an order increasing the minimum wage for fast food employees at certain fast food chain restaurants in New York State to \$15 per hour.¹ This increase fixes the fast food minimum wage at more than double the federal minimum wage of \$7.25, and 60% beyond the New York State minimum wage, which is currently \$8.75 per hour and scheduled to increase to \$9 per hour on December 31, 2015.² This new fast food minimum wage will be phased in over several years, reaching \$15 for New York City restaurants by December 31, 2018 and for restaurants in the entire state by July 1, 2021.³

New York's Fast Food Minimum Wage Increase

Scheduled Phase-In

For New York City:

- Increased to \$10.50 per hour on December 31, 2015
- Increased to \$12 per hour on December 31, 2016
- Increased to \$13.50 per hour on December 31, 2017
- Increased to \$15 per hour on December 31, 2018

For the Rest of New York State:

- Increased to \$9.75 per hour on December 31, 2015
- Increased to \$10.75 per hour on December 31, 2016

1 Acting Comm'r Mario J. Musolino, N.Y. Dept. of Labor, *Order Adopting Rep. and Recommendations of 2015 Fast Food Wage Board*, Sept. 10, 2015, available at <http://labor.ny.gov/workerprotection/laborstandards/wageboard2015.shtm>.

2 29 U.S.C. § 206(a); N.Y. Lab. Law § 652.

3 New York City's phase-in schedule is more aggressive because its fast food chain restaurants have faster sales growth, and it has greater private-sector employment growth, population density, tourism traffic, and a higher cost of living than the rest of the state. See N.Y. Fast Food Wage Bd. 2015, *Report of the Fast Food Wage Board to the NYS Commissioner of Labor*, July 31, 2015, available at <http://labor.ny.gov/workerprotection/laborstandards/wageboard2015.shtm> (hereafter, cited as the "Fast Food Rpt.").

- Increased to \$11.75 per hour on December 31, 2017
- Increased to \$12.75 per hour on December 31, 2018
- Increased to \$13.75 per hour on December 31, 2019
- Increased to \$14.50 per hour on December 31, 2020
- Increased to \$15.00 per hour on July 1, 2021

Who Is Covered by the Minimum Wage Increase?

The minimum wage increase applies to employees who perform customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning, or routine maintenance at or for a "fast food establishment." A fast food establishment is broadly defined as any establishment in the state that meets the following criteria:

- Has the primary purpose of serving food and drink items;
- Allows customers to order or select items and pay before eating, including delivery;
- Is part of a chain (set of establishments that share a common brand, or are characterized by standardized options for décor, marketing, packaging, products, and services); and
- Is one of 30 or more nationwide establishments, either through an integrated enterprise or franchisor-franchisee operation, where the integrated enterprise or the franchisor and franchisee together own or operate 30 or more of restaurants across the country. Therefore, a standalone franchisee could qualify as a fast food establishment if the franchisee is part of a franchisor that owns or operates 30 or more establishments nationally.

It is anticipated that a wide range of establishments – from burger and fries restaurants to snack and non-alcoholic beverage bars that serve juice, coffee, and donuts – will be subject to the minimum wage increase.⁴ The idea behind the "30-or-more-nationwide-establishment threshold" was that chains of that size were better equipped to absorb the wage increase.⁵ Also, franchises, even single-owned franchises, are deemed to have "structural and economic advantages over traditional small businesses," such as an established product that enjoys widespread brand recognition, shared marketing, financial assistance, economies of scale, and training and software support.⁶

Background

The movement to increase the minimum wage for fast food workers, which has been active for several years in New York, picked up much support this year, particularly from the Governor of New York, Andrew Cuomo. In a May 6, 2015 New York Times op-ed, Governor Cuomo stated he would direct the State's Commissioner of Labor to impanel a fast food "wage board" to examine the minimum wage in the fast food industry.⁷ Governor Cuomo's decision was strategic because the Commissioner has the power to increase the minimum wage in certain industries without approval from the state legislature.⁸ Specifically, the Commissioner can appoint a "wage board" to investigate whether wages paid in a specific industry or job classification are sufficient to provide for the life and health of those workers and recommend an adequate wage for the Commissioner's approval.

4 Fast Food Rpt. at 22-23.

5 *Id.* at 19.

6 *Id.* at 18.

7 Governor Andrew Cuomo, *Fast-Food Workers Deserve a Raise*, N.Y. Times, May 6, 2015, http://www.nytimes.com/2015/05/07/opinion/andrew-m-cuomo-fast-food-workers-deserve-a-raise.html?_r=0.

8 N.Y. Lab. Law §§ 653, 656.

The day after Governor Cuomo's op-ed was published, Acting Commissioner of Labor Mario J. Musolino announced he would appoint a fast food wage board "to inquire into and report and recommend adequate minimum wages and regulations for fast food workers."⁹ The Board's report, issued on July 31, 2015, characterized the state's fast food industry as a "successful service industry" that "stands out as heavily subsidized by taxpayers, through public assistance paid to its workforce." The report also noted that due to "the industry's preferences for paying minimum wages and offering part-time hours on irregular schedules...[w]orkers are left with weekly wages and schedules that are difficult to live on or work around."¹⁰

The Board concluded that overall, the economic benefits of a significant wage increase in the fast food chain sector outweighed the potential costs.¹¹ First, insofar as 60% of the state's fast food workers are on public assistance at a cost of \$903 million per year, it reasoned that the minimum wage increase would result in savings to the state's taxpayers.¹² Second, it determined that the fast food chain industry could absorb the increase because in 2014, the top 14 publicly traded fast food chains in New York had over \$9.3 billion in profits, paid \$5.1 billion in dividends, and spent \$5.7 billion in share buybacks.¹³ Additionally, in 2013, the average annual CEO compensation of the country's largest publicly traded fast food companies was \$23.8 million.¹⁴ Finally, it determined that the cost-savings from lower work turnover and revenue from small price increases, as well as normal sales growth, should cover the increased labor costs.¹⁵

Looking Ahead

There has been no announcement by Acting Commissioner Musolino or the New York Department of Labor as to whether the Department will be issuing regulations on the fast food minimum wage increase, although we have been told informally that regulations are forthcoming. In the meantime, fast food establishments operating in New York, particularly those in New York City, should begin reviewing their labor budgets, as well as their work schedules and menu prices, to determine how they will absorb the increased labor costs.

Finally, it is important to note that the fast food industry may not be alone in having to pay their employees \$15.00 per hour. On September 10, 2015, the same day that Acting Commissioner Musolino signed the order increasing the minimum wage for fast food workers, Governor Cuomo announced that he will seek to increase the state's minimum wage for all workers in New York to \$15 per hour.¹⁶

9 Acting Comm'r Musolino, N.Y. Dept. of Labor, *Determination Regarding Adequacy of Wages*, May 7, 2015, available at <http://labor.ny.gov/workerprotection/laborstandards/wageboard2015.shtm>.

10 Fast Food Rpt. at 8.

11 *Id.* at 18.

12 *Id.* at 1, 9, 18.

13 *Id.* at 8, 15, 18.

14 *Id.* at 15.

15 *Id.* at 17.

16 Ryan Sutton, *Governor Cuomo Announces 'All Industry' Minimum Wage of \$15 for New York State*, New York Eater, <http://ny.eater.com/2015/9/10/9306089/governor-cuomo-announces-all-industry-minimum-wage-of-15-for-new-york>.