



# WAGE Watch

Monthly Newsletter | January 2018

## WPI Wage Watch: Minimum Wage and Overtime Updates

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2018 may have barely begun, but minimum wage and overtime activity at the local, state – and even federal – levels is well underway. Settle in – we’ve got a lot to cover.

**A Case Supreme:** On January 17, 2018, the U.S. Supreme Court heard oral arguments concerning a Ninth Circuit decision addressing whether the FLSA’s exemption for automobile dealership salesman, partsman, and mechanics applies to service advisors. This is the second time the case was before the Court.<sup>1</sup>

**The House of Acosta Unveils Retro Collection:** What do fashion trends and U.S. Department of Labor (DOL) opinion letters have in common? They both come back into style after a while. But, with opinions letters employers do not have to wait 20 years – only nine. The DOL reinstated 17 opinion letters that were issued at the end of the George W. Bush administration and withdrawn during the Obama administration. Most of the letters concern exempt status, but others discuss the regular rate for overtime calculation purposes, joint employment, volunteer status, and on-call time compensability.

**New Minimum Wage Proposals:** A plethora of bills proposing to increase the minimum wage have been introduced throughout the country, including but not limited to: Arizona, Florida, Hawaii, Indiana, Kentucky, Maryland, Mississippi, Missouri, New Jersey, Rhode Island, Utah, and Virginia. We cannot give a detailed analysis of each bill, but we can highlight common themes and unique items.

- **The Fight for \$15:** In 2018, no state will reach a \$15.00 per hour minimum wage.<sup>2</sup> The earliest any such rate is currently set to go in effect is 2020 for the District of Columbia and 2022 in California for employers with 26 or more employees.<sup>3</sup> Other states are looking to join the \$15 per hour club, some even sooner than 2020. **Mississippi** HB 1303 aims to go from no state minimum wage to a \$15.00 per hour minimum wage in 2018 (SB 2254 would have the state eventually get there in 2021). A pair of **Missouri** bills (SB 637 and HB 1784) would increase the state minimum wage to \$15 in 2019. **Hawaii**, which is a top contender in terms of most minimum wage increase bills introduced to date, has two measures calling for a \$15.00 per hour rate in 2020 (numerous other bills propose 2019 or 2021; at least one suggests 2023). **Indiana** SB 121 would set a \$15.00 per hour minimum wage in mid-2021. Bills in **Maryland** (SB 368) and **Virginia** (HB 518) eventually set a \$15 minimum wage in 2022 (another Maryland bill uses 2026). **Wisconsin** AB 814 proposes a rate of \$15.00 per hour by the 51st month after the law would

<sup>1</sup> For a more in-depth discussion of the original Ninth Circuit decision that the U.S. Supreme Court vacated, see Benjamin Emmert, [Ninth Circuit Finds Auto ‘Service Advisors’ Not Exempt Under FLSA](#), Littler Insight (Mar. 31, 2015).

<sup>2</sup> There are, however, \$15.00 per hour local minimum wage rates set by state law that will take effect in 2018. For example, the rate applicable in New York City for employers with 11 or more employees, and the New York City rate applicable to certain fast food workers, will take effect on the last day of 2018, December 31. The minimum wage in Mountain View & Sunnyvale, California became \$15.00 per hour on January 1, 2018, and other California cities will require a \$15.00 per hour minimum wage at various times in 2018, e.g., Berkeley, Emeryville, and San Francisco. The minimum wage in SeaTac, Washington is \$15.64 per hour, and is \$15.45 per hour (\$15.00 with qualifying medical benefits) in Seattle, Washington for certain employers.

<sup>3</sup> We leave it the reader to decide whether to lump the District of Columbia in the “state” race.

take effect, and **Kentucky** SB 17 gets the minimum wage to \$15 in 2025.

- **Tiered Minimum Wage Rates:** A potential trend from 2016 that never picked up steam was the tiered state minimum wage, under which different rates apply at different times to different employers.<sup>4</sup> For example, California rates are based on employer size, Oregon rates are based on location, and New York rates are based on location, size, and/or industry. Legislators in **Maryland** and **Hawaii**, however, are unconcerned whether tiered minimum wages are en vogue. Maryland SB 368 would create a lower minimum wage for employers with 50 employees that have annual gross income of \$400,000 or less. Hawaii SB 2460 would allow employers with fewer than 50 employees to pay 90% of the proposed increased minimum wage. **Washington** SB 5530 – a 2017 bill that was re-introduced this session – would set a lower minimum wage for employers located in a county with a population of less than 1.5 million people.
- **Minimum Wage Rate Based on Benefits:** Currently, Nevada is the only state that sets different minimum wage rates based on whether an employer offers health benefits.<sup>5</sup> Believing that, as the song suggests, one is the loneliest number, **New Hampshire** SB 554 proposes to increase the minimum wage and establish different rates based on whether an employer offers health care benefits to an employee through an employer sponsored plan.
- **Annual Increases:** Over a third of the states and the District of Columbia either currently or at a future date will annually adjust their minimum wage rate.<sup>6</sup> **West Virginia** HB 2969 would require the

4 Oregon enacted its three-tier system in March 2016 and California created a two-tier system and New York created four new rates on the same day in April 2016.

5 There are a few local minimum wage rates that sets different rates based on whether benefits are offered, e.g., Richmond, California; Albuquerque and Bernalillo County, New Mexico; and Seattle, Washington (though in 2019 this will stop).

6 Alaska, Florida, Minnesota, Missouri, Montana, Nevada, New Jersey, Ohio, and South Dakota currently annually adjust; the District of Columbia and Arizona, California, Colorado, Maine, Michigan, New York (one rate only), Oregon, Vermont, and Washington will adjust their rates in future years.

minimum wage to be annually adjusted. Various **Florida** bills, including SB 166, would change the formula used for the annual adjustments to include a set dollar amount in addition to the inflation-based rate increase.

- **Subminimum Wages:** Effective February 16, 2018, an **Alaska** regulation permitting employers to petition the state labor department to pay individuals with a mental or physical disability less than the state minimum wage will be repealed. Multiple bills in **Hawaii** (e.g., SB 2362, HB 1627 & 1721) would amend state law concerning the ability to pay a subminimum wage to individuals impaired by age or physical or mental deficiency or injury.

**New Tip Proposals:** Oftentimes if a minimum wage rate is amended, so too will the minimum cash wage that must be paid to employees and the maximum tip credit an employer can apply toward meeting its minimum wage obligations. However, this is not guaranteed and sometimes amendments will focus exclusively on tipped employee wages. Below are tip-related items that were introduced in minimum wage bills or as standalone items.

- **Tip Credit Elimination:** Currently, tipped employees must be paid the full minimum wage, and tips credits are prohibited, in seven states: Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington. Throughout 2017 we saw an uptick in proposals to eliminate the tip credit. The only relevant action, however, was Maine (LD 673) reinserting the tip credit after voters at the November 2016 election approved phasing out, and eventually eliminating, it. Whether tip credit elimination bills will fare better in 2018 remains to be seen, but numerous bills have been introduced in **Hawaii** (e.g., SB 2942 and HB 2293), as well as **Tennessee** (SB 1590), **Virginia** (HB 1259), and **Wisconsin** (AB 814). Additionally, the **New York** State Department of Labor announced five hearings will occur from mid-March through mid-May 2018 concerning, among other issues, the possible elimination of the tip credit. There will also be a hearing in New York City concerning only the hospitality industry on a to-be-determined date.

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- **Establishing a Tip Credit:** New Jersey statutory law is silent concerning tip credits, though a state labor department rule says an employer can pay tipped employees the federal minimum cash wage of \$2.13 per hour. **New Jersey** A. 2000 and S. 500 would set a minimum cash wage and maximum tip credit.
- **Tip Credit Changes: Nebraska** LB 211 would increase the minimum cash wage tipped employees must be paid from \$2.13 per hour to, eventually, 50% of the applicable minimum wage.
- **Who Owns Tips (Left on Credit Cards): Vermont** H. 618 and **Pennsylvania** HB 2003 provide that tips are solely an employee's property, and both address tips left via credit cards.
- **Tip Sharing & Pooling: New Hampshire** SB 465 would amend existing tip sharing and pooling requirements. **Vermont** H. 618 addresses tip pooling. **New Jersey** A. 2000 and S. 500 cover tip pooling amongst customarily and regularly tipped employees, which is currently only addressed by regulation.
- **New Rules:** The **Montana** Department of Labor and Industry proposed, among other changes, revising its rules concerning tips to address tip pooling, service charges, and tips left by credit card.

**You're Halfway Done and Doing Great!** Hey, you've made it this far, why not go for glory and head toward the finish line.

**New Overtime Proposals:** Proposals to add, or change, overtime requirements are never as prolific as those concerning the minimum wage or tips. However, in 2018 it would not be surprising to see an uptick in overtime-related legislation and regulation, though when and how it may be introduced might be influenced the U.S. Department of Labor's actions on the minimum amount exempt executive, administrative, or professional (EAP) employees must be paid.

- **White Light, White Heat, White Collar Salary Requirements:** Some states are not waiting for the U.S. Department of Labor to sort out EAP employee pay. **Pennsylvania** Governor Tom Wolf directed the state labor department to revise its rules to increase

the minimum salary amount for EAP employees to \$31,720 in 2020 (\$610 per week), \$39,832 in 2021, and to \$47,892 in 2022. Currently, the minimum salary amount under Pennsylvania law is lower than the FLSA (\$155 or \$255 per week, depending on the test used). **Hawaii** SB 1117 proposes increasing the minimum amount from \$2,000 a month to a monthly equivalent of 292 times the minimum wage (based on the current minimum wage this would be \$2,949.20). **Arizona** HB 2436 and SB 1193 propose that EAP employees must be paid a rate similar to one proposed in the Obama-era white collar salary rules: a rate at the 40th percentile of weekly earnings of full-time workers in the lowest-wage census region, with adjustments every three years. Interestingly, the bill creates an overtime-pay exemption statute without an overtime requirement. For all intents and purposes, the bills propose to impact the minimum pay amount these employees must be paid under federal law.<sup>7</sup> **Rhode Island** S. 2103 would, beginning in 2021, increase the minimum amount EAP employees must be paid from \$200 to \$1,036 per week, with annual increases occurring in future years of not less than the 40th percentile of weekly earnings of full-time, non-hourly workers in the Northeast Census Region. However, **Maine** LD 1769 would decrease the minimum amount EAP employees must be paid from an annual salary that exceeds 3,000 times the state minimum wage (*i.e.*, exceeds \$30,000 in 2018) to the FLSA rate (currently \$23,660).

- **Time (And a Half) After (Over) Time: Virginia** HB 1109 would create not only a weekly overtime requirement, but a daily overtime requirement too. **Indiana** HB 1413 would require, beginning in 2019, that non-exempt employees be paid at least one-and-a-half times their regular rate if they work longer than their previously scheduled shift; twice the regular rate if an employee worked more than 52 hours in a week.

<sup>7</sup> As odd as that sounds, this would not be the first state to piggy-back on federal requirements. For example, Colorado does not have its own mini-FMLA law, but the Colorado Family Care Act requires FMLA-covered employers to extend FMLA protections to FMLA-eligible employees in civil unions or domestic partnerships. The state law was enacted before the U.S. Supreme Court legalized same-sex marriage.

- **Holiday . . . (Retail Employers) Celebrate: California** AB 1173 proposes a limited exception from daily overtime requirements for retail employees during the holiday season if they request a flexible work schedule.

**Preemption v. Anti-Preemption:** The push to increase the minimum wage is a bottom-up movement. With no federal action, and limited state activity, more cities and counties propose or enact minimum wage ordinances, or push state legislators to introduce state-level increases. States' responses have varied. Some have banned local laws (even if a local law did not exist at the time of preemption), while others have taken no action and allowed the proliferation of local minimum wage ordinances. More recently, we have seen state legislators propose expressly allowing local laws (if state law is silent on the issue) or repealing state preemption laws so local laws can be enacted.

- **Preemption: Arizona** SCR 1016 seeks to amend an existing preemption statute to prevent local minimum wage rates that exceed the state rate, and rollback future minimum wage increases approved by voters in 2016. **Mississippi** HB 1241 also seeks to amend an existing preemption statute to prevent local minimum wage ordinances (and other employment-related laws). **Utah** HB 117 seeks to tweak its existing local minimum wage restriction to prevent a wage that exceeds the state wage (which is proposed to increase) instead of the FLSA rate; like in Mississippi, there are no current local minimum wage ordinances in the state. **New Jersey** SB 535 would preempt local minimum wage ordinances
- **Anti-Preemption: Wisconsin** AB 814, **Missouri** SB 1395, and **Idaho** HB 397 would repeal existing state statutes prohibiting local minimum wage ordinances. **Mississippi** SB 2714 would amend an existing preemption law to prohibit local laws that set a minimum wage rate below the proposed statewide rate. **Kentucky** SB 17 would permit local minimum wage ordinances, which would overturn a state supreme court decision that held such laws were preempted by state law, even though no express preemption provision was codified.

**Please Tell Me Nothing Else Happened.** Well . . . actually . . . yes, there's more to cover. But you're *super* close to finishing. Don't give up now. There are snacks at the finish line.

- **The Newest in New: Mississippi** is one of the few states without a minimum wage or overtime law. However, multiple bills seek to establish a statewide minimum wage and overtime requirements. Some of those bills (e.g., HB 1259-1261) would also, in part, establish a limited version of the FLSA's executive, administrative, and professional exemptions from overtime because overtime would be required for individuals receiving \$455 or less per week and, regardless of pay received, overtime would be required for employees whose primary duty is not: management of the entity in which the employee is employed; the performance of work directly related to the management or general business operations of the employer or its customers; or the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.
- **Potential Ballot Initiatives: Massachusetts** HB 4111 is a proposal to gradually increase the state minimum wage – eventually to \$15.00 per hour in 2022 (and a minimum cash wage of \$9.00 per hour for tipped employees). **Mississippi** HB 854 proposes a special election to allow voters to decide in 2019 whether to implement a statewide minimum wage beginning in 2020.
- **Employer- & Employee-Based Exemptions: Kentucky** HB 184 proposes to exempt FLSA-covered employers from state minimum wage and/or overtime requirements if federal law imposes comparable or greater requirements and an employer files a statement with the state labor department that it is covered by the FLSA. Various **Virginia** bills, including HB 518 and 715, would no longer exempt individuals whose employment is covered by the FLSA. **Missouri** SB 680 would limit the applicability of its minimum wage and

overtime laws to employers with 15 employees, and would gradually increase the state minimum wage, beginning in 2019.

- **Tax Credits: Indiana** SB 15 proposes up to \$1 million in overall tax credits per fiscal year for employers that raise wages above the state's \$7.25 per hour minimum wage for employees that complete a career enhancement training program. **Hawaii** SB 2119 would make a tipped employee's first \$10,000 of tip income excluded from gross income.
- **Hours Worked:** For minimum wage and overtime purposes, **Vermont** S. 236 would define "employed or permitted to work" to include time when employees are subject to an employer's control or engaged to wait while on or near an employer's premises.
- **Better Late Than Never: Santa Monica, California** (Los Angeles County) adopted rules implementing its minimum wage ordinance. The minimum wage provisions became operative on July 1, 2016 for employers with 26 or more employees.

**We Hardly Knew You:** Less than one week after being introduced, **Colorado** HB 18-1106 was indefinitely postponed. The bill sought to allow employees and applicants to waive their right to the state minimum wage and negotiate a wage rate that was agreeable to them and an employer.

**Local v. State Court Battle:** The State of Florida and various industry groups asked the Florida Supreme Court to not review decisions by a trial court and appellate court that held state law preempted the **City of Miami Beach's** ability to enact its local minimum wage ordinance, which never went into effect because of the rulings.

**Hey, Where Are the Snacks?** Sorry about that. We've been here for a while and got hungry. We'll make it up to you next month. Until then, we will continue to monitor and report on minimum wage and overtime developments as they occur

## ABOUT LITTLER'S WORKPLACE POLICY INSTITUTE®

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