



WAGE Watch

Monthly Newsletter | February 2018

WPI Wage Watch: Minimum Wage and Overtime Updates

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February may be the shortest month of the year, but what it lacked in days it made up with minimum wage and overtime developments at the federal, state, and local levels.

A Second Look at Dual Jobs: A full panel of the U.S. Court of Appeals for the Ninth Circuit will determine what deference, if any, should be given to the U.S. Department of Labor's (DOL) interpretation of its "dual jobs" regulation for tipped employees. Previously, a three-judge panel rejected the requirement in the DOL's Field Operations Handbook that work should be evaluated on a duty-by-duty and minute-by-minute basis to determine whether a tip credit may be claimed for specific time worked by a tipped employee.¹

While We're on the Subject of Tip-Rule-Related Litigation: On February 2, 2018, the DOL sought its seventh extension of time to file its brief in response to the National Restaurant Association's request for the U.S. Supreme Court to review an Obama-era tip pooling regulation. The DOL claimed it needed more time to respond based on new rulemaking it proposed that would rescind the challenged provisions.

Alaska Subminimum Wage Eliminated: As we highlighted last month, on 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the state labor department to pay individuals with a mental or physical disability less than the state minimum wage was repealed.

Upcoming Santa Fe Increases: Annual minimum wage adjustments were announced in the City of Santa Fe, and County of Santa Fe, New Mexico. On March 1, 2018, both rates will increase from \$11.09 to \$11.40 per hour. Additionally, the minimum cash wage that covered tipped employees may be paid will increase from \$3.32 to \$3.41 per hour under the county ordinance, which applies only in unincorporated areas. The city ordinance does not expressly address the minimum cash wage / tip credit question, but federal and state law permit a minimum cash wage of \$2.13 per hour if direct wages plus tips equal at least the minimum wage.

Minneapolis Prevails in Minimum Wage Ordinance Challenge: On February 27, 2018, after a bench trial, a Hennepin County, Minnesota district court judge held that the Minneapolis Minimum Wage Ordinance was not preempted by state law, that minimum wages are not solely a matter of state concern, and that local regulation of minimum wages would not have an unreasonable adverse effect on the general populace of Minnesota. Accordingly, the court denied the challenger's requests to find the ordinance invalid and unenforceable and to permanently enjoin the city from enforcing it. The decision could be appealed.

What Passed At Least One House: Vermont SB 40 seeks to increase the state minimum wage from \$10.50 per hour to \$15.00 per hour as of 2024, beginning with incremental increases in interim years and implementing annual increases thereafter. **Mississippi** HB 1241 proposes to, among other things, prohibit local laws regulating or creating remedies for wage and hour disputes. Currently a state statute preempts local minimum wage laws.

¹ For a more in-depth discussion of the Ninth Circuit three-judge panel ruling, see Rick Roskelley & Kathryn Blakey, [Ninth Circuit Rejects DOL's Interpretation of the "Dual Jobs" Regulation for Tipped Employees](#), Littler Insight (Sept. 13, 2017).

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Similarly, **West Virginia** SB 458 would prohibit local laws requiring a wage greater than required under state or federal law. **Arizona** HCR 2028 aims to submit to the voters a proposal to eliminate the rebuttable presumption that arises when adverse action is taken against an employee within 90 days of the employee engaging in protected activity under the minimum wage law.

What Passed At Least One Committee: **Hawaii** SB 2291 would increase the state minimum wage from \$10.10 to \$12.25 per hour beginning in 2019, and to \$15.00 per hour in 2020, eliminate the tip credit, and annually adjust the minimum wage in 2021 and future years. **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. **Arizona** SCR 1016 aims to submit to the voters a proposal to roll back minimum wage increases approved by voters in November 2016, set the minimum wage at \$10.50 per hour, and prohibit local minimum wage rates that exceed the state rate.

New Legislation

• Minimum Wage

- **Fight for \$15:** Numerous states are proposing to eventually increase their minimum wage to \$15.00 per hour, including **Connecticut** HB 5138 & 5140 (2019), **Kentucky** HB 303 (August 2022), Maryland SB 1019 (July 2021 for employers with 50 or more employees) and HB 664 & SB 543 (July 2023), **Pennsylvania** SB 1044 (2024), and **Rhode Island** HB 7636 & SB 2244 (2023).
- **Lesser Increases:** **New Jersey** A. 2377 & S. 864 propose increasing the state minimum wage from to \$8.60 to \$10.10 per hour, with multiple annual increases of either \$1.25 per hour or \$1.00 per hour plus an increase based on the consumer price index (whichever is greater). **Oklahoma** HB 2533 would increase the state minimum wage from \$7.25 to \$11.00 per hour in 2019. In **Rhode Island**, SB 2246 would, in 2020, increase the state minimum wage based on changes to the consumer price index, and SB 2247 would increase the pre-set minimum wage for 2019 from \$10.50 to \$11.00 per

hour, with an increase to \$12.00 in 2020. **Utah** HB 117 aims to increase the state minimum wage from \$7.25 to \$10.25 per hour from July 2018 through June 2022, and to \$12.00 beginning in July 2022.

- **Anti-Preemption:** **Kansas** HB 2647 would eliminate the state law preempting local minimum wage ordinances. **Kentucky** SB 393 would allow local minimum wage laws and overturn a state supreme court decision. **Pennsylvania** HB 1045 would also permit local minimum wage laws.
 - **Preemption:** **Oklahoma** SB 1475 would prohibit local enforcement of minimum wage laws that differ from the state minimum wage and would prohibit new minimum wage laws. The state, however, currently prohibits such laws and there are no Oklahoma cities with a generally applicable minimum wage, so arguably the bill's intention is to eliminate living wage laws applicable to government contracts and/or laws that set a minimum wage for local government employees.
 - **Subminimum Wage:** **Michigan** HB 5587 would eliminate the ability of the state labor department to establish a subminimum wage rate for individuals with physical or mental disabilities. **New York** S. 7629 would permit a training wage equal to 85% of the state minimum wage or 100% of the federal minimum wage for minors with no prior job experience, but no more than 20% of an employer's workforce, or more than six employees, at one location could receive a training wage.
 - **Tax Credits:** **Oklahoma** HB 2744 would require businesses to forfeit all eligible state tax credits if they violate the minimum wage law.
- ### • Tips
- **Credit Cards:** **New Jersey** A. 3410 & S. 1694 would require credit card tips to be paid in full to employees – without deducting for processing fees – and require that credit card tips be paid by the next regular payday after the credit card tip was authorized.
 - **Tip Credit:** At least two **New Jersey** bills would establish a maximum tip credit employers could apply toward meeting their minimum wage obligations for covered tipped employees. Under

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S. 1329, beginning in 2019, the credit would be 60% of the minimum wage, which would decrease to 31% the next year (the tip credit set in A. 1972). Currently, the minimum wage law sets neither a minimum cash wage, nor a maximum tip credit. **Rhode Island** HB 7397 would annually increase the minimum cash wage by 50 cents until it reached 2/3 of the minimum wage, at which point it would annually increase in two-thirds proportion to any general minimum wage increase.

- **Tip Credit Elimination:** Numerous states have proposed phasing out and/or eliminating the tip credit, including **Maryland** HB 664 & SB 543 (phase-out with elimination in July 2026), **Pennsylvania** HB 1045 (phase-out with elimination in 2027 at the earliest), and **Rhode Island** SB 2476 & HB 2476 (phase-out with elimination in 2023 or 2028).
- **Multiple Tip-Related Issues:** **Rhode Island** HB 7398 would place restrictions on tip pooling and establish pay standards for service charges and tips left via credit card.
- **Private Right of Action:** **Tennessee** HB 2416 & SB 2447 would establish a private right of action against employers violating a statute governing tip and service charge distribution.
- **Overtime**
 - **Alternative Work Schedules:** **California** SB 2482 would create a flexible scheduling exception to state daily overtime requirements that would allow a non-exempt employee to work up to 10 hours per workday without being paid overtime, if various other requirements were satisfied.
 - **Exempt Employee Salary Levels:** **Maryland** HB 974 would increase the minimum salary (or fee) amount that must be paid to exempt executive,

administrative, or professional employees from \$455 to \$900 per week, excluding board, lodging, or other facilities. **Rhode Island** H. 7428 would increase the minimum salary amount for such employees from no less than \$200 per week to no less than \$1,036 per week, with annual increases beginning in 2020. **Vermont** HB 751 would establish a minimum salary requirement of \$913 per week for such employees.

Failed Legislation:² Last month we noted the influx of legislation that routinely occurs at the beginning of each year. However, another common legislative occurrence is that many items will fail to live up to their potential; and many of those bills that died in or around February were (unsurprisingly) from the south. At least five bills from Virginia are no more (HB 39, 518, 715, 1109, 1259), and 10 Mississippi bills are no longer with us (HB 310, 854, 1246, 1258-61, 1303 & SB 2254 and 2714).

Miscellaneous Local Developments: On February 5, 2018, the **Baltimore, Maryland** City Council passed a resolution calling on state legislators and the governor to enact legislation establishing a \$15.00 per hour statewide minimum wage. On February 21, 2018, the **Saint Paul, Minnesota** City Council received a report by a non-government organization, the aim of which was “to identify the key questions, resources, and stakeholders that would need to be part of a larger potential effort in 2018 to . . . propose an implementation plan for” implementing a citywide minimum wage. Reports suggest that in March a minimum wage ordinance is expected to be introduced in **Redwood City, California**, located in the San Francisco Bay Area.

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

² For inquisitive minds, the vast majority of these listed, failed bills were briefly summarized in last month’s article.

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