

Minimum Wage & Overtime Updates

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September may mean saying goodbye to summer, but minimum wage and overtime developments across the country are still going strong. A nominee to lead federal wage and hour enforcement efforts has been put forward, labor agencies are beginning to announce their adjusted minimum wage rates for 2018, and state and local legislatures are looking to expand existing laws.

Supreme Court Will Hear Overtime Exemption Case (Again): On September 28, 2017, the U.S. Supreme Court agreed to review, for a second time, the U.S. Court of Appeals for the Ninth Circuit's conclusion that the FLSA's exemption for automobile dealership salesman, partsman, and mechanics does not apply to service advisors.¹

U.S. Department of Labor Wage & Hour

Administrator Nominee: Cheryl Stanton, the South Carolina Department of Employment and Workforce's executive director, has been nominated to be the U.S. Department of Labor's Wage & Hour Division Administrator. The Administrator enforces minimum wage and overtime laws, among other responsibilities.

2018 Federal Government Contractor Minimum

Wage: The DOL announced that, effective January 1, 2018, the minimum wage for certain federal government contractors will increase from \$10.20 to \$10.35 per hour. The minimum cash wage for covered tipped employees will increase from \$6.80 to \$7.25 per hour, and the maximum tip credit will decrease from \$3.40 to \$3.10 per hour.

Ninth Circuit Dines and Dashes on DOL Tip

Regulation:² The Ninth Circuit declined to defer to the DOL's interpretation of its tipped employee "dual jobs" regulation contained in the DOL's Field Operations Handbook. It found the guidance inconsistent with the official regulation and attempted to create a de facto new regulation. The court rejected the FOH's requirement that employers evaluate work on a duty-by-duty and minute-by-minute basis to determine whether a tip credit may be claimed for specific time worked. The Ninth Circuit favored earlier DOL guidance, which instructed employers to look for a "clear dividing line" to distinguish when an employee is engaged in a customarily tipped, and a second and separate non-tipped, occupation.

White Collar Salary Level Comment Period

Closes: Following an injunction, and ultimately the invalidation, of the 2016 Final Rule increasing the minimum salary threshold for exempt employees under the FLSA issued by a federal court in Texas, the DOL sought information from the public on if, and how much, to increase the salary levels. The deadline for public comments closed on September 25, 2017. Comments received showed disagreement as to what the salary threshold amount should be. Although it is anticipated that the DOL will revisit the salary level, it is unclear when this will occur.

State 2018 Minimum Wage Annual Adjustment

Announcements: Normally, October is when most states announce their annually adjusted minimum wage rates, but some states could not wait to

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deliver the news. South Dakota announced that, effective January 1, 2018, its minimum wage will increase from \$8.65 to \$8.85 per hour, and, for covered tipped employees, the minimum cash wage and maximum tip credit will increase from \$4.325 to \$4.425 per hour.

October Local Minimum Wage Increases:

On October 1, 2017, the minimum wage in two localities will increase. In Berkeley, California, the minimum wage will increase from \$12.53 to \$13.75 per hour. California law prohibits tip credits, so tipped employees must be paid the full minimum wage. In Prince George's County, Maryland, the minimum wage will increase from \$10.75 to \$11.50 per hour and, for covered tipped employees, the maximum tip credit will increase from \$7.12 to \$7.87 per hour while the minimum cash wage will remain \$3.63 per hour.

Under-the-Radar Changes: Highlighting the difficulty of tracking local developments,³

Richmond, California, in mid-July, and Santa Clara, California, in late August, amended their minimum wage ordinances.

In Richmond, the amendments: 1) eliminate the exception for employees that receive 50% or more of their income from the government; 2) eliminate the exception for small businesses; 3) eliminate the "intermediate" minimum wage for Richmond employers that derived more than half their income from goods and services produced in, but shipped outside, the city; and 4) increase the minimum wage from \$12.30 to \$13.41 per hour, effective January 1, 2018, to \$15.00 per hour, effective January 1, 2019, with annual adjustments beginning January 1, 2020.

In Santa Clara, the amendments: 1) increase the minimum wage from \$11.10 per hour to \$13.00 per hour, effective January 1, 2018, to \$15.00 per hour, effective January 1, 2019, with annual adjustments beginning January 2020; 2) cap future annual increases at 5%; 3) require the minimum wage to remain the same if there is no net increase in the cost of living; 4) allow the city to temporarily delay increases due to economic conditions; and

5) include a rebuttable presumption of retaliation if adverse action is taken against an individual within 90 days of protected rights being exercised (this provision took effect on September 21, 2017, the amendments' effective date).

What's New in the Legislature: Massachusetts S. 1004 seeks to schedule minimum wage increases beginning January 1, 2018 and each subsequent January until the minimum wage reaches \$15.00 per hour in 2021, with annual adjustments beginning in 2022. Starting in January 2026, the tip credit would be eliminated, so employers would have to pay covered tipped employees the full minimum wage. Massachusetts S. 1040 would create a standalone, higher minimum wage rate applicable to a "big box retail retailer employer," *i.e.*, a business that employs 200 or more big box retail employees (*i.e.*, those working on the premises of a big box retail store) in Massachusetts, whether directly or through a (sub)contractor like a staffing agency or a cleaning or security contractor.

Pennsylvania SB 150 would catapult the state minimum wage from \$7.25 to \$15.00 per hour, require annual adjustments, and eliminate the tip credit so tipped employees must be paid the full minimum wage. The bill would also increase damages an employee could recover for minimum wage violations to triple the amount of wages owed. The law would take effect 60 days after enactment, while the increases would become operative 30 days later.

Putting the Mo in Montgomery County, MD:

On September 26, 2017, the Montgomery County, Maryland County Council held its first public hearing concerning Bill 28-17 which, if passed, would, beginning July 1, 2018, eliminate the single-tier minimum wage and create a two-tier minimum wage. Under the provisions of the bill, one rate would apply to employers with 26 or more employees and another would apply to employers with 25 or fewer employees, that have 501(c)(3) tax-exempt status, or that provide home health or home or community-based services and receive funding through state and federal Medicaid programs. The bill proposes to increase the "large"

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employer minimum wage to \$15.00 per hour as soon as July 2020, with annual adjustments in later years.

Changes (Potentially) Ahead in Emeryville, CA:

On October 3, 2017, the Emeryville, California City Council will hold its second reading of a bill to amend its minimum wage, paid sick leave, and hospitality industry service charge ordinance to amend the definition of “service charge” and beef-up the penalties and damages statute.

Ballot Boxing: The Attorney General of Massachusetts certified Initiative 17-17, which would, by 2022, increase the state minimum wage to \$15.00 per hour and increase the minimum cash wage that tipped employees must be paid to \$9.00 per hour, with annual adjustments beginning in 2023. Proponents must collect 64,750 registered voter signatures by Dec. 6, 2017 and, if they do, the item is sent to the state legislature to enact before the first Wednesday in May 2018. If the legislature does not enact the measure, proponents must collect an additional 10,792 registered voter signatures by early July 2018 to put the initiative before voters at the November 2018 ballot.

The “MI One Fair Wage Petition” was filed with The Michigan State Board of Canvassers. The petition would, by 2022, increase the state minimum wage to \$12.00 per hour, with annual adjustments beginning in 2023. It would also, starting in 2024, eliminate the tip credit, so tipped employees would need to be paid the full minimum wage. Proponents must collect 252,523 registered voter signatures to place the issue before voters at the November 2018 election.

Hokey Pokey in Calumet City, IL: On September 28, 2017, the City Council of Calumet City, Illinois considered whether to opt into the Cook County Minimum Wage Ordinance. Previously, Calumet City voted to opt out of the county law, which took effect on July 1, 2017.

Fight for \$15 Labor Day Rallies: On Labor Day, at rallies held across the country, participants called for increasing the minimum wage. Some rallied during their off-hours, while others walked off the job to protest what they considered insufficient wage rates.

1. 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).
2. For a more in-depth discussion of the decision, see Rick Roskelley and Kathryn Blakey, [Ninth Circuit Rejects DOL’s Interpretation of the “Dual Jobs” Regulation for Tipped Employees](#), Littler Insight (Sept. 13, 2017).
3. At the time of publication, over two months since the amendments were adopted, the City of Richmond’s [minimum wage webpage](#) does not reflect changes made to the law. It was not until September 2017 that the City of Santa Clara’s [minimum wage webpage](#) was updated to reflect the changes.

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