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New legislation increasing the minimum wage in Michigan has unintended consequence of increasing the number of employees eligible for overtime pay.

Change in Minimum Wage Rate Jeopardizes the Exempt Status of Thousands of Michigan Employees

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Overview

New legislation increasing Michigan's minimum wage rate could result in hundreds of thousands of employees suddenly becoming eligible for overtime pay. The increase in Michigan's minimum wage occurred through the passage of Senate Bill 318, enacted as Michigan Compiled Laws section 408.384. The bill increases the state's minimum wage rate to \$6.95 per hour effective October 1, 2006, \$7.15 per hour effective July 1, 2007, and \$7.40 per hour effective July 1, 2008.

With the increase, the Michigan Minimum Wage will now be higher than the federal minimum wage of \$5.15 per hour currently required under the federal Fair Labor Standards Act (FLSA). For the reasons discussed below, the increase means that many workers suddenly will be covered by Michigan's Minimum Wage Law which does not contain many of the overtime exemptions and the salary basis tests for doctors, lawyers, and teachers. Accordingly, effective October 1, 2006, it appears that many employees not previously eligible for overtime will be eligible to receive overtime compensation.

Republican majorities in both houses of the Michigan legislature approved Senate Bill 318 in an attempt to thwart the Democrats' effort to increase the minimum wage through a petition drive which would have resulted in an amendment

to the Michigan constitution. Faced with deciding between a constitutional amendment and Senate Bill 318, the GOP decided to quickly pass the bill and close any loopholes later.

Michigan's Overtime Law

Michigan's overtime law is set forth in the Minimum Wage Law of 1964. Section 408.394 of the Law states that its provisions do "not apply to an employer who is subject to the minimum wage provisions of the fair labor standards act of 1938 (sic)..., unless application of those federal minimum wage provisions would result in a lower minimum wage than provided in this act." Because the Michigan minimum wage has traditionally been lower than the federal minimum wage, most Michigan employees previously have not been subject to the state overtime provisions.

This will change beginning October 1, 2006, when Michigan's minimum wage will surpass the federal standard. Employees who were previously exempt from Michigan's overtime provisions (because they were subject to the FLSA) will now be subject to those provisions and, because Michigan law does not contain many of the overtime exemptions available under the FLSA, will be eligible to receive overtime pay. Conservative estimates place the number of employers impacted by the new minimum wage law at 15,000, and the number of employees affected at 320,000.

Employees That Would Be Most Affected

The following categories of employees satisfy the requirements of a federal overtime exemption but soon will be entitled to overtime pay because there is no corresponding state exemption:

- Drivers whose driving is regulated by the U.S. Department of Transportation
- Mechanics, drivers and driver helpers employed by a motor carrier if duties affect the safety of operation of vehicles in interstate or foreign commerce
- Babysitters on a casual basis
- Domestic employees who live-in
- Employees of newspapers of limited circulation
- Radio and television station employees in small markets
- Taxicab drivers
- Salespersons, partsmen and mechanics employed by automobile dealerships
- Salespersons, partsmen and mechanics employed by boat dealers
- Aircraft salespersons
- Forestry employees of small firms (less than 9 persons)
- Employees of motion picture theaters
- Newspaper delivery persons

Employers will be impacted in other ways as well. For example, state and federal law differ with respect to how to treat the salary basis test. Under this test, an exempt employee generally must be paid his or her complete salary for any week in which he or she does any work whatsoever. However, the FLSA allows employers to make certain deductions (e.g. deductions for absences of one

or more full days for personal reasons other than sickness or disability) from an employee's salary without jeopardizing the employee's exempt status. 29 C.F.R. §408.394. Michigan law does not address whether an employer who takes these deductions would jeopardize the exempt status of its employees. In addition, under federal law, the salary basis test does not apply to doctors, lawyers, teachers or computer professionals earning at least \$27.63 an hour. Michigan law does not contain such an exemption. Thus, a lawyer paid on an hourly basis may be exempt under federal but not state law.

Efforts to Solve the Problem

Michigan's Department of Labor & Economic Growth has been approached by several groups asking for advice on how to interpret and implement the statutory changes. These groups include:

- Michigan Trucking Association
- Michigan Chamber of Commerce
- Detroit Regional Chamber of Commerce
- Auto Dealers of Michigan LLC
- National Association of Theatre Owners
- National Federation of Independent Business
- Michigan Association of Broadcasters
- Michigan Association of Home Builders
- Michigan Association of Realtors
- Michigan Bankers Association
- Michigan Boating Industries Association
- Michigan Grocers Association
- Michigan Manufacturers Association

- Michigan Manufactured Housing, RV & Campground Association
- Michigan Press Association
- Michigan Restaurant Association
- Michigan Soft Drink Association
- Small Business Association of Michigan Chamber of Commerce

The Administrator of the Wage & Hour Division for the Michigan Department of Labor has been placed in charge of a task force to examine the issue. Specifically, the task force will examine whether, and to what extent, the new law will affect Michigan employers and will identify possible remedies.

Possible Remedies to the Michigan Minimum Wage Law

One possible solution that has been proposed is to edit Section 14 of the Michigan Minimum Wage Law. As mentioned above, section 14 currently provides, in pertinent part:

This act does not apply to an employer who is subject to the minimum wage provisions of the fair labor standards act of 1938 (sic), chapter 676, 52 Stat. 1060, 29 U.S.C. 201 to 216 and 217 to 219, unless application of those federal minimum wage provisions would result in a lower minimum wage than provided in this act.

As the statute currently reads, overtime eligibility is inexplicably tied to whether the state or the federal minimum wage is higher. The scope could easily be changed to read something similar to the following:

With the sole exception of the minimum wage rate provided at Section 4 of this act, and only to the extent that this rate is greater than the federal minimum wage

rate in section 6(a) of the Fair Labor Standards Act of 1938, chapter 676, 52 Stat. 1060, 29 U.S.C. 206(a), this act does not apply to an employer who is subject to the Fair Labor Standards Act of 1938, chapter 676, 52 Stat. 1060, 29 U.S.C. 201 to 216 and 217 to 219.

The change cited above would capture the essence of the Legislature's main goal: increasing the minimum wage. The number of employees eligible for overtime in the state would remain at current levels, however.

What is Next for Employers?

Michigan Speaker of the House Craig DeRoche (R) is concerned that Senate Bill 318 will place Michigan businesses at a competitive disadvantage and is examining what type of relief is necessary to prevent this from happening. Unexpected increases in the cost of doing business will most directly impact small businesses that have created 60-80% of the new jobs in America over the last decade. If the Michigan Legislature fails to change the Minimum Wage Law prior to October 1, 2006, Michigan employers, particularly those employing members of the categories listed above will face challenges. In addition to re-examining the exempt classification of their workers, they may also have to revisit the level of current staffing and future hiring needs in order to remain within budgetary constraints.

For any new legislation amending S.B. 318 to have an immediate effective date, the changes must be approved by a two-thirds majority. Otherwise, the legislation could not go into effect until April 2007, meaning that employees who would be eligible for overtime on October 1, 2006 would receive a wage cut in April 2007. Littler will keep clients informed of future developments in this area.

Contact Information

- Michigan Trucking Association
– For more information, please visit www.mitrucking.org, or contact Walt Heinritzi at (517) 321-1951.
- Michigan Chamber of Commerce
– For more information, please visit www.michamber.com, or contact Wendy Hofmeyer at (517) 371-7678.
- Detroit Regional Chamber of Commerce – For more information, please visit www.detroitchamber.com, or contact Melissa Trustman at (517) 321-1951.
- Michigan Department of Labor & Economic Growth – For more information, please visit www.michigan.gov/wagehour or call (517) 373-1820.
- Michigan Speaker of the House Craig DeRoche – For more information, please visit www.gophouse.com/deroche.htm, or call (517) 373-0827.

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