

in this issue:

AUGUST 2006

Chicago has passed a unique living wage ordinance targeted at "Big Box" retailers that could change the landscape of wage law across the United States, city by city.

Chicago's Living Wage Ordinance: A Sign of What is to Come?

By D. Chad Anderton and Stephanie Seay Kelly

Overview

After weeks of harried lobbying, grassroots protests and dueling full-page newspaper ads, the Chicago City Council, by a vote of 35 to 14, passed a controversial ordinance requiring "Big Box" retailers (defined as stores that occupy more than 90,000 square feet, whose parent companies gross over \$1 billion dollars annually) to pay employees a minimum or "living" wage of \$10 per hour by the year 2010. The Big Box ordinance, the first such law in the United States to set apart large retailers for wage rules, also requires large retailers in the City of Chicago to pay an additional \$3 an hour worth of benefits.

Under the ordinance, minimum wages at Chicago Big Box retailers will rise to \$9.25 an hour in 2007, \$10 in 2010, and will be indexed for inflation thereafter, representing a significant increase in hourly pay from Illinois' current minimum wage of \$6.50 an hour. Smaller retailers will remain subject to the state minimum wage of \$6.50 an hour.

The ordinance, which was ardently opposed by Chicago's Mayor Richard Daley, has served as a lightning rod for both passionate protests and political gamesmanship. Indeed, Chicago's recent saga with its living wage ordinance is the most recent example of what is becoming a nationwide phenomenon.

Living Wage v. Minimum Wage

Living wage ordinances have been enacted in more than 70 localities (both state and municipalities) across the nation. A "living wage" is defined by its proponents as the wage a full-time worker would need to earn to support a family of three to four people above the federal poverty line. In most instances, a living wage ordinance requires employers to pay wages that substantially exceed federal or state minimum wage levels. Typically, a limited set of workers are covered by living wage ordinances, such as those employed by businesses that contract with a city or county government, or those who receive economic development subsidies from the subject local governmental body. Anti-poverty organizations such as the Association of Community Organization for Reform Now (ACORN), the catalyst of Chicago's living wage movement, maintain that city and county governments should not contract with or subsidize employers who pay at or below the federally-defined poverty level. While there is currently no campaign for a national living wage, local efforts are popping up across the country and are supported by national organizations like ACORN and Jobs with Justice. Living wage ordinances account for wage rates ranging from a low of \$6.25 per hour in Milwaukee, Wisconsin to a high of \$12 per hour in Santa Cruz, California. Many such ordinances also have provisions regarding health benefits, labor relations

and hiring practices.

Federal law requires that all workers covered under the Fair Labor Standards Act (FLSA) be paid at least \$5.15 an hour. In the event that an employee is subject to both the state and federal minimum wage laws, the employee is entitled to the higher of the two minimum wages. Two states, Kansas and Ohio, have a minimum wage rate below the federal rate for some workers who are not covered under the federal law, such as waitresses. Six states (Alabama, Arizona, Louisiana, Mississippi, South Carolina and Tennessee) have no minimum wage law at all, while 22 states (Alaska, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin) have approved a higher minimum wage than the federal law.¹ Most of these states' wage rates fall somewhere between \$6 to \$7 per hour, with the highest being \$7.63 per hour in Washington. In contrast, living wage rates typically range between \$9 and \$10 an hour.

States are not the only governments raising wage rates. Chicago's Big Box ordinance is just the latest example of an increasing trend in local municipalities' efforts to require employers to raise wages. Cities like Washington D.C., New Orleans, Santa Fe, San Francisco and Albuquerque have recently seen virtually across the board increases of the local minimum wage via living wage ordinances. Chicago's new Big Box ordinance is distinct from typical living wage ordinances, however, because it specifically singles out large retailers.

Future of the Minimum and Living Wage

Experts suggest that the increasing number of minimum and living wage laws across the nation is largely due to the federal government's failure to raise

the minimum wage over the last decade. Indeed, this represents the longest period without an increase since the federal minimum wage was introduced in 1938. It is predicted that as many as 19 states could consider legislative proposals to increase the minimum wage this year, and another 11 states have similar proposals that carried over from 2005.

Given Congress's recent failure to pass a minimum wage increase, we can expect increased lobbying and legislative efforts at the local level. The U.S. House of Representatives recently agreed to a change in the federal wage law in hopes of increasing the minimum wage for the first time since 1997. The bill called for an increase in the federal minimum wage rate from \$5.15 per hour to \$7.25 per hour over 3 years, in the following increments: \$5.85 per hour effective on January 1, 2007, \$6.55 per hour effective on June 1, 2008 and \$7.25 per hour effective on June 1, 2009. The provision, attached to the Estate Tax and Extension of Tax Relief Act of 2006, also provides that tips may be counted toward meeting any future minimum wage increases by employers in those states where state law prohibits tips from being calculated as part of the minimum wage. (The states currently prohibiting this practice are Alaska, California, Minnesota, Montana, Nevada, Oregon and Washington). On August 3, the Senate voted to halt debate on the bill thereby ending the hopes of a federal minimum wage hike in the near term. The estate tax provision and the effects on tipped employees led many Senate Democrats to vote against the bill, thereby resulting in the bill's demise.

To be certain, due to the successful passage of Chicago's Big Box ordinance, similar efforts to raise the "living wage" in other localities, especially in relation to "Big Box" retailers should be expected. Anti-poverty organizations like ACORN will continue to rally and organize workers in efforts to raise the living wage in localities around the country.

Conversely, such efforts will not go unopposed. Prior to its passage, Mayor Daley threatened to veto Chicago's Big Box ordinance, yet in order for such a veto to be effective, he will be forced to use his political heft to change the votes of two council members. The Illinois Retail Merchants Association has already threatened to mount a constitutional challenge to the Chicago ordinance suggesting that the ordinance, by targeting large retailers, violates constitutional equal protection guarantees. Similarly, other business groups are lobbying and organizing to enact state-level legislation prohibiting local wage laws. Such preemption laws have already passed in Arizona, Colorado, South Carolina, Louisiana, Missouri, Utah, Oregon and Texas. Other preemption campaigns are being mounted in Michigan, Kansas, Tennessee and New Mexico.

Recommendations for Employers

As indicated by the significant recent activity in this area, minimum and living wage laws are on the rise. As a result, employers must become familiar with local and state wage laws and proposed legislation before entering new markets. Those employers already established in existing markets should keep abreast of any newly effective legislation, as well as any proposed legislation that could adversely impact its business.

D. Chad Anderton is a Shareholder and Stephanie Seay Kelly is an Associate in Littler Mendelson's Chicago office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Anderton at canderton@littler.com, or Ms. Kelly at skelly@littler.com.

¹ The remaining twenty states have adopted the federal minimum wage rate.