Local Minimum Wage Laws and the Challenge of Balancing Interests

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by

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I. INTRODUCTION

Recently a movement to increase the minimum wage to $15 per hour has gained momentum in places across the country. With little chance of Congress raising the federal minimum wage in the immediate future, advocates of raising the minimum wage have instead focused on the enactment of state and local minimum wage laws. In California, where the minimum wage is currently $10 per hour, numerous cities have recently enacted or increased the local minimum wage rate, including Los Angeles, San Francisco, San Jose, Palo Alto, and El Cerrito. The State of California also recently enacted legislation that will increase the minimum wage statewide to $15 per hour over the span of a few years. The adoption of an increase in the state minimum wage will likely reduce the pressure on cities to adopt local minimum wage ordinances. However, individuals cities, especially in areas of the state with relatively higher costs of living or that want to accelerate increases more quickly, may nevertheless wish to adopt a local ordinance that establishes a minimum wage greater than what was established by the Legislature. This paper discusses some of the legal and policy issues to consider in drafting a local minimum wage ordinance.

II. AUTHORITY TO ENACT MINIMUM WAGE LAW

The Federal Fair Labor Standards Act of 1938 ("FLSA"), as amended from time to time, establishes a national minimum wage, which is currently $7.25 per hour. (29 U.S.C. § 206.) The FLSA expressly permits state and municipal governments to establish a minimum wage higher than the federal minimum wage. (29 U.S.C. § 218.) California has exercised this authority, and adopted a separate statewide minimum wage. (Labor Code § 1182.12.) Because the FLSA authorizes a city to establish its own minimum wage, whether or not a city can adopt its own minimum wage is dependent upon California law. Until recently, the vast majority of California cities adopting local minimum wage laws were charter cities. Some have wondered whether a general law city may enact a local minimum wage. It appears that general law and charter cities have the same authority to adopt local minimum wage ordinances. There is no express prohibition in state or federal law against general law cities establishing local minimum wage requirements.

The California Constitution gives both general law and charter cities the power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws of the state." (Cal. Const., art. XI, § 7.) It is well established that regulation of the employment relationship is an exercise of police power. (*Metro. Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 756; *Salas v. Sierra Chem. Co.* (2014) 59 Cal. 4th 407, 423.) This includes the establishment of a minimum wage. (*Metro Life Ins. Co*, 471 U.S. at 756.) "The power to regulate wages and employment conditions lies clearly within a state's or a municipality's police power. States possess broad authority under their police powers to regulate the employment relationship to protect workers within the state. Child labor laws, minimum and other wage laws . . . are only a few examples." (*RUI One Corp. v. City of Berkeley* (9th Cir. 2004) 371 F.3d 1137, 1150 (internal citations omitted).)

State law does not preempt a city's use of its police power to establish a minimum wage. To the contrary, the Labor Code expressly provides that "[n]othing in this part shall be deemed to restrict the exercise of local police powers in a more stringent manner." (Labor Code § 1205(b).) Nothing in the Labor Code suggests that this authorization applies differently to charter cities and general law cities. The California minimum wage law is a matter of statewide concern, equally applicable to general law and charter cities. (*See State Bldg. & Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal. 4th 547, 564.) However, the Legislature has authorized all cities to create more stringent minimum wage standards. Accordingly, there is no reason to believe that the Legislature intended to preempt a general law or charter city's use of its police power to establish a minimum wage.

III. TIMING OF INCREASES AND AFFECTED EMPLOYERS

A. Phase in Schedule

Among the issues that has resulted in the greatest variation in crafting a local minimum wage ordinance is the decision of what the minimum wage will be. There is currently a movement, both nationally and in California, for states and localities to adopt a $15 per hour minimum wage. Many localities are adopting local minimum wage ordinances that provide for the minimum wage to eventually reach that rate, and the State of California has adopted legislation to create a $15 minimum wage for all employees by January 1, 2023 and for employers with 26 or more employees by January 1, 2022. Others that have already adopted a local minimum wage have elected not to use the $15 per hour target. Those jurisdictions will now have work through issues arising from the state's schedule of increases potentially being higher than the local rates in some years and the final year. A city considering a local minimum wage ordinance is now precluded from considering rates lower than those in the new state law. In addition to the hourly rate, cities must still determine how quickly to raise the minimum wage to the desired amount. For example, a city might choose to increase the minimum hourly wage by $1 every year on January 1 until the wage is $15 per hour, rather than implement the entire increase at once. A city must also consider whether to coordinate the minimum wage increase with increases adopted by other jurisdictions. There are potential implementation benefits to different jurisdictions within the same geographic area adopting the same increase schedule, such as greater public awareness of the increases.

California's adoption of a new statewide minimum significantly alters many of the considerations of whether or not to adopt a local minimum wage ordinance. There are significant administrative costs and burdens in adopting and enforcing a local minimum wage ordinance, which must be considered relative to the benefits, particularly if an existing or proposed schedule of increases i differs only slightly from the state minimum wage. For example, if a local minimum wage is $0.25 more than the state minimum wage, the City would still bear the cost of enforcing the higher minimum wage, but perhaps without significant additional benefits to local low-wage workers. Cities might also want to consider the increased complexity employers could face if they have workers throughout California subject to slightly different minimum wage scales.

The minimum wage increase passed by the Legislature and signed into law by Governor Brown, increases the California minimum wage to $15 per hour for employers who employ 26 or more employees as of January 1, 2022.[1] For employers who employ 25 or fewer employees, the $15 per hour minimum wage will be effective on January 1, 2023. Beginning on January 1, 2024, the minimum wage will increase by an amount equal to the rate of inflation or 3.5%, whichever is less. Cities that believe the state minimum wage takes too long to reach $15 per hour may still wish to adopt a local minimum wage ordinance. For example, an ordinance that establishes a $15 an hour minimum wage for all employees by January 1, 2020, and thereafter increases by the amount of inflation, would provide higher wages more quickly to minimum wage employees than will be provided by the state minimum wage.

It is advisable when presenting options to a city council and in drafting local minimum wage ordinances to take into account existing and potentially new state law regulating the minimum wage as well as neighboring jurisdictions' regulations to assess potential administrative complications for the city, employers, and employees. Among the administrative complications worth considering are additional enforcement burdens potentially resulting from schedules or rules that conflict with state law or regulations in adjacent cities.

Finally, cities must consider whether the minimum wage should increase automatically every year after the final established wage rate is reached. Supporters of increasing the minimum wage note that the value of the minimum wage has fallen, in real terms, over time as a result of inflation. To rectify this problem, a city may decide to automatically increase the minimum wage annually by the same percent as the increase in the consumer price index. While automatic increases ensure that the minimum wage approximately keeps up with inflation, employers frequently object that such increases may result in financial hardship if their revenues do not increase enough to match steadily increasing labor costs. Options that have been identified to address that concern include capping the automatic increases at a maximum percentage and annual review by the city council to determine whether to allow an automatic increase to go into

[1] The text of SB 3, signed by the Governor on April 4, 2016, is available at http://leginfo.ca.gov/pub/15-16/bill/sen/sb_0001-0050/sb_3_bill_20160404_chaptered.pdf

effect. Beginning in January, 2024 California's minimum wage automatically increases by an amount equal to the rate of inflation or 3.5%, whichever is less.

B. Small Business Exceptions

In adopting a local minimum wage ordinance there will likely be a concern that increasing the minimum wage will be a significant financial burden on local businesses. To address this potential problem, there may be a desire to adopt a separate minimum wage for small and large employers, due to a belief that large employers have a greater ability to absorb the costs of an increased minimum wage. For example, if an ordinance established a timeline for the minimum wage to reach $15 per hour in four years for large employers, the ordinance might establish a six year time period before small employers were required to pay their employees that same minimum wage.

It is well established that a city may enact economic regulations that treat various individuals or businesses in different manners. A statutory classification that does not differentiate between individuals or businesses on account of a suspect classification, such as race or gender, does not violate equal protection as long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (*F.C.C. Beach Comm'ns, Inc.* (1993) 508 U.S. 307, 313.) This is a low burden for a city to meet, and there are numerous conceivable rational bases for treating small and large employers differently under a minimum wage ordinance. (*See Int'l Franchise Ass'n, Inc. v. City of Seattle* (9th Cir. 2015) 803 F.3d 389, 407.)

Despite the clear legal authority to apply different minimum wage rates to small and large employers, there are many policy reasons a city council might nevertheless desire one uniform minimum wage. Most notably, an increased minimum wage is generally adopted for the benefit of low wage workers. A low wage worker is not less deserving of an increased wage simply because he or she works for a small employer. Depending on the economy of a particular city, treating small employers differently might result in the benefits of an increased minimum wage not reaching a large portion of the city's low wage workers. Furthermore, creating two different minimum wages levels is likely to substantially increase the administrative burden of implementing and enforcing a local minimum wage ordinance. However, it is important to note that California's new minimum wage law creates two separate wage rates for large and small employers, which might create an expectation of a similar distinction in local minimum wage ordinances.

IV. EXCEPTIONS AND SPECIAL CONSIDERATIONS

There are many considerations a city must address in adopting a local minimum wage ordinance. A city has broad discretion to design a unique ordinance, as long as it does not result in a worker being paid less than the state or federal minimum wage, or is otherwise in conflict with state or federal law. For example, a city must decide what workers, if any, will be exempt from the minimum wage requirement. A brief discussion of some of these special considerations is below.

A. State Formula

Cities may wish to exempt certain types of employees from the local minimum wage ordinance, or apply special rules to certain employees. However, developing these exceptions and rules might be difficult. Generally, cities have relatively little experience and expertise in regulating employment conditions in comparison to the state. When drafting a minimum wage ordinance, a city is unlikely to think of every possible employment situation that might justify a deviation from the standard minimum wage rate. In contrast, the state has developed a wide range of wage rules over a period of decades.

A simple way for a city to take advantage of the state's developed set of rules is to draft the minimum wage ordinance to require that whenever the Labor Code or Department of Industrial Relations regulations require an employee to be paid using a formula based off of the state minimum wage, the same formula shall apply to workers within the city, except that the local minimum wage rate shall be used. For example, the Labor Code includes a learners exception that allows an employee with no previous or related experience in the occupation to be paid 85% of the minimum wage during the employee's first 160 hours of employment. (Labor Code § 1192; Industrial Welfare Commission Order 4-2001, §4(A).) If a city does not provide any exceptions to its minimum wage ordinance, employers in the city would be required to pay "learners" the entire local minimum wage. In contrast, adopting state wage formulas, but substituting the local minimum wage rate, would allow employers to pay "learners" 85% of the local minimum wage. Adopting state wage formulas, but requiring the local minimum wage to be used, allows a city to take advantage of the state's existing set of detailed regulations, while also ensuring the local minimum wage applies to the maximum extent possible.

B. Collective Bargaining Agreements

State and federal law both prohibit a collective bargaining agreement from establishing a wage rate below the respective state and federal minimum wage. (29 CFR § 541.4; Civil Code § 1668, 3513.) However, nothing prevents a city from exempting employees subject to a collective bargaining agreement from the city's minimum wage requirement, as long as such agreement still complies with all federal and state labor laws. A city may decide that exempting collective bargaining agreements is beneficial for workers because it allows employees to bargain on all elements of compensation, rather than simply subjecting these workers to a uniform minimum wage rate. For example, workers might decide that it is beneficial to agree to wage rates below the local minimum wage in exchange for greater health care benefits. Generally, a collective bargaining agreement may only waive statutory rights if it is "clear and unmistakable" that such a waiver was the intent of the agreement. (*Metro. Edison Co. v. N.L.R.B.* (1983) 460 U.S. 693, 708.) If a city wants to exempt collective bargaining agreements from the local minimum wage ordinance, the city may consider incorporating standards for agreements to follow in order to be exempt from the local minimum wage. Such a requirement would help ensure that employees are aware of the rights they are agreeing to waive.

C. Treatment of tips and commissions

Local ordinances should also address the treatment of an employee's tips and commissions. California law prohibits an employer from counting the tips received by an employee toward the payment of the California minimum wage. (Labor Code § 351.) In contrast, an employer is generally allowed to count commission payments toward the payment of minimum wage. (Labor Code § 200.) The reason for this distinction is straight forward - a tip is a voluntary payment made by a customer directly to an employee, whereas a commission is a portion of the proceeds of a sale shared with an employee by an employer.

Allowing tips to be counted toward the payment of minimum wage would decrease the impact of a minimum wage increase on some employers, perhaps increasing support for the ordinance. However, it would also necessarily decrease the benefit of a local minimum wage increase to tipped workers. Restaurants and other businesses with a high percentage of tipped workers are often among the businesses that are most vocal about the economic effects of a local minimum wage increase. Early and meaningful discussions with representatives of that sector—both employers and employees—can help a city understands the interests to be balanced in crafting a local policy about how to treat tips as part of a minimum wage ordinance. Similar consideration exists regarding the treatment of commission income.

D. Service Charges

Many advocates of adopting local minimum wage rates also support mandatory disbursement of hospitality service charges to employees. Examples of hospitality service charges include delivery fees and room service charges at a hotel. Additionally, a small number of restaurants have eliminated tips and implemented a flat service charge. The rationale behind requiring the distribution of service charges to employees is to ensure that the employee performing the service task receives the charge for that task. Furthermore, customers may consider these types of hospitability service charges to be in-lieu of a tip, and therefore leave a smaller tip or no tip at all. This results in a loss of tip income for employees, but with the hospitability service charge revenue actually going to the employer. Requiring employees to receive the revenue from any hospitability service charges ensures that the employee performing the service receives the fee for that service.

There are many issues to consider in adopting a requirement that hospitality service charges be given to employees. There may be reasons to exclude certain charges, and a city must decide what type of service charges to include within the requirement. For example, a delivery charge might be excluded because that charge is necessary for an employer to offset the costs of maintaining a delivery vehicle. Similarly, cities must decide what employees will share the service charge revenue. Does that revenue only go to the employee performing the actual task (like a delivery), or to other non-management employees who perform other related tasks (like making the pizza). Restaurants that have eliminated tips and implemented service charges say that the charge allows them to ensure that "back of the house employees" (like cooks and bussers)

receive a share of the charge.[2] Furthermore, cities must consider the implementation challenges of adopting this type of requirement. It is far more difficult for a city to enforce this type of requirement than it is to enforce a minimum wage ordinance. Generally, an employee does not have knowledge of how much hospitality service charge revenue an employer collected, and therefore the employee, and city, have no easy way to determine if the employee is getting his or her legally required share.

V. ENFORCEMENT

Cities that adopt a local minimum wage ordinance must also consider how to enforce the ordinance. An individual who is paid less than the state minimum wage can currently report that violation of the Labor Code to the Department of Industrial Relations using a well-established procedure, and the Department of Industrial Relations has extensive experience investigating such reports. In contrast, cities generally do not have existing personnel or infrastructure in place to take on a new enforcement obligation. Even if a city has staff that can take on enforcement, they are unlikely to have experience with wage issues or auditing business financial records to determine whether the legally required amount has been paid to an employee. A city must decide how much resources and staff time to dedicate to enforcing a local minimum wage law. Some cities may decide it makes more sense, practically and financially, to hire a consultant or organization with more expertise in this area to assist in the investigation and enforcement of possible violations. Below is a brief discussion of some possible enforcement tools cities may utilize.

A. Linking Compliance to Business License

One tool for enforcement of a minimum wage ordinance is to incorporate compliance into the city's business license regulations. An employer could be required to certify that it complies with the requirements of the minimum wage ordinance whenever it applies for a license renewal. Additionally, failure to pay all employees the local minimum wage could be grounds for revocation of a business license. The threat of losing a business license may be a more effective enforcement tool than fines or other forms of punishment. Although business license revocation or non-renewal provides a powerful remedy, a city would still have to be prepared to conduct investigations of non-compliance complaints.

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[2] Tips are the property of the employee, and the Fair Labor Standards Act of 1938 and United States Department of Labor regulations significantly restrict the ability of employers to require tips to be pooled and shared with employees who are not "customarily and regularly" tipped. (29 U.S.C. § 203(m); 76 Fed. Reg. 11,832, 18,841-42 (April 5, 2011); see also *Oregon Rest. & Lodging Ass'n v. Perez*, ___ F.3d ____No. 13-35765, 2016 WL 706678 (9th Cir. Feb. 23, 2016).) These restrictions do not appear to apply to hospitality charges, which are the property of the employer. Accordingly, a City can mandate that hospitality charges be shared by tipped and non-tipped employees.

Additionally, if a city's business license ordinance explicitly states that it is adopted only for revenue generating purposes, a city may want to amend the ordinance before using it as a tool to regulate and enforce a minimum wage ordinance.

B. Enforcement Tools

1. Code enforcement

A city may include within its minimum wage ordinances authority to utilize the full range of traditional enforcement tool provided to cities, such as imposing administrative citations and pursing civil enforcement. In developing the range of enforcement tools available, it is important to remember the relatively unique nature of a minimum wage violation. Unlike most municipal code violations, violation of the minimum wage ordinance directly and personally impacts a single individual, the employee. The purpose of enforcement must be to ensure that employees receive the compensation to which they are entitled. Accordingly, cities may consider approaching minimum wage violations differently from other violations. For example, giving staff broad discretion to waive or reduce fines enables staff to use the promise of a reduction as a tool to ensure employers make employees whole as quickly as possible.

2. Private right of action

Another option is including within the ordinance a private right of action for employees, which would help ensure employees receive the full protection of the ordinance. Cities do not always have the resources or expertise to uncover every violation, and a private right of action allows any individual harmed by a violation of the minimum wage ordinance to pursue the compensation he or she is entitled too. Individuals being paid the minimum wage also often lack resources to initiate legal action to recover unpaid wages, but nonprofit organizations exist in many communities that can assist employees who believe that they may not be receiving legally required compensation. Although a court would likely find that a minimum wage ordinance contains an implied cause of action, including an explicit private right of action within the ordinance telegraphs to employees that they have the ability to sue to enforce their compensation rights.

C. Pooling Investigation and Enforcement with Other Local Government Agencies

Neighboring cities may also want to consider pooling resources to investigate and enforce their local minimum wage ordinances. A small city may not have the resources, or the need, to dedicate significant staff time to enforcement. If cities work together they can share expertise and expenses, such as sharing the cost of a full time consultant to investigate possible violations. The formality of the relationship between cities can differ depending on the manner and scope of the cooperation. However, formal cooperation and pooling of resources likely only makes sense if the cities have adopted similar minimum wage ordinances. This is another reason why cities may want to consider or replicate the ordinances other nearby jurisdictions have adopted when drafting their own ordinance.

VI. SICK DAYS

Cities may also wish to adopt minimum sick leave benefits at the same time that they adopt a local minimum wage ordinance. Advocates of such minimum benefits argue that the lack of sick leave can have significant financial consequences for low-wage workers if they are forced to take time off due to sickness or to care for a family member. Advocates also point to the public policy benefits of sick leave, such as a reduction in the spread of illness because sick employees have the ability to stay home.

The California Health Workplaces, Health Families Act of 2014 implemented statewide sick leave requirements effective July 1, 2015. (Labor Code § 245 *et seq*.) The Act requires employers to provide eligible employees with one hour of sick leave for every 30 hours worked. Employers may limit the use of sick leave to 24 hour or three days paid sick leave per year, and may limit the total accrual of sick leave to 48 hours or 6 days. Additionally, sick leave advocates are currently gathering signatures to place an initiative on the November 2016 ballot that that would amend the Act to provide increased sick leave benefits, such as raising the minimum permitted usage cap to 48 hours or 6 days per year.[3] Since the state law has been in effect for less than a year, and may change again soon, cities may wish to wait before implementing their own minimum sick leave requirements to better understand some of the challenges of implementing a minimum sick leave requirement and in order to better identify what deviations from the state law would be beneficial for a city to adopt. On the other hand, advocates have suggested that the new sick leave requirement is as inadequate as the current minimum wage, so there is just as much reason to enhance the benefit at the local level as there is to increase the minimum wage.

VI. CONCLUSION

A movement to increase the minimum wage to $15 per hour has gained momentum in places across the country, and the California Legislature recently adopted legislation to eventually increase the minimum wage to $15 statewide. Prior to the adoption of an increase in the California minimum wage, many cities adopted or were considering adopting local minimum wage ordinances. The Legislature's recent action may decrease some cities desire to adopt local ordinances, but other cities may nevertheless move forward with adopting and implementing a local minimum wage. In drafting a local minimum wage ordinance cities must decide on a schedule for increasing that wage, whether to make the minimum wage applicable to all employers regardless of size, and whether to create any exceptions to the ordinance, among other considerations. Additionally, cities must evaluate whether the minimum wage ordinance is an appropriate method for adopting local sick leave requirements or a requirement to distribute mandatory service charges to staff. Given the adoption of a new statewide minimum wage, cities must also weigh whether the benefits of a new local minimum wage ordinance justify the significant administrative costs and burdens of adopting and enforcing a local minimum wage ordinance.

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[3] The text of the proposed ballot measure is available at http://www.oag.ca.gov/system/files/initiatives/pdfs/15-0105%20%28Minimum%20Wage%29_0.pdf

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