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Jack Schaedel,
Esq.

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How High Is Up? The Potential Effects of California's Minimum Wage Hike

By Jack Schaedel

Once again, California has raised the stakes in the perennial game of "Can you top this?" But what will be the ultimate impact of governments' latest round of minimum wage hikes on employers nationwide?

First, the recent history: On September 25, 2013, California Governor Jerry Brown signed into law a bill that will raise the Golden State's minimum wage by 25% over the next two years. Already one of the highest minimum wages in the nation at \$8 per hour, the state's minimum wage will increase to \$9 per hour on July 1, 2014, and then to \$10 per hour on January 1, 2016.

But the impact of raising California's minimum wage may have effects both beyond boosting the income of those at the bottom of the wage scale within the State of California and beyond California's borders. The three primary effects of this particular wage hike will likely be: (1) legal, to require increases for those the law may not have been designed to benefit; (2) political, by possibly prompting other states and the federal government to follow California's lead; and (3) economic, by potentially inducing employers to change their

behavior in response to the new law. Let's take these in turn.

Legally, in California (as elsewhere) employees are classified as exempt or non-exempt. Somewhat similar to the Fair Labor Standards Act's exemptions, under California state law employees who are "primarily engaged in" (in California, meaning those who spend more than 50% of their working hours) tasks that require the exercise of independent discretion and judgment are not entitled to overtime even if they work more than eight hours in a day or 40 hours in a week. Such employees usually fit into the professional, executive, or administrative exemptions, or are learned professionals, artists, computer software designers, or the like. There is a second test, however, beyond duties. To be exempt in California an employee must earn a monthly salary equal to *twice* the equivalent of full-time minimum wage employment. Currently, this is \$33,280 per year (or \$2,773.33 per month). Under the new law, however, the required salary will increase to \$41,600 annually (or \$3,466.67 per month). Thus, certain employees may lose their exempt status (at least under California law) due to the increase. Other employees affected may be those earning well above the minimum wage who receive lower wages for travel time or standby time or employees who have negotiated split shift rates with their employers. Employers who have any employees on differential rates must carefully reexamine all of their arrangements prior to 2014.

Litigation also may become more appealing to plaintiffs' lawyers. An employee incorrectly classified as exempt will not be paid at all for overtime hours. In addition to unpaid wages, a minimum wage violation can result in liquidated damages under Section 1197.1 of the California Labor Code equal to the difference between the amount paid (often zero) and the minimum wage. Thus, an unpaid ninth hour in a day will cost an employer at least \$25 (at the premium rate of 1.5 times the regular minimum wage of \$10, plus another \$10 in liquidated damages.) Similarly, penalties for failure to authorize a meal period, failure to authorize a rest period, or failure to pay an employee immediately upon termination are all calculated based on an employee's wage. For employees paid minimum wage, the latest increases the minimum penalties for all such violations by 25%.

Economically, employers are unlikely to absorb the entire increased cost (and increased legal risk) of a minimum wage hike. Some employers may respond to the increased minimum wage by seeking to reduce costs elsewhere or seeking a substitute for the increased expense. Employers also may seek to avoid "employing" people by reclassifying employees as independent contractors. This is a particularly dangerous strategy in California, where Labor Code section 226.8 provides for automatic penalties as high as \$25,000 per willfully misclassified employee.

The political impact of California's minimum wage increase already is being felt around the country. No state currently has a minimum wage higher than the \$10 per hour level California will hit in 2016, but ten states have a minimum wage that is higher than \$8 per hour or scheduled to increase beyond \$8 per hour before 2016. On November 5, 2013, New Jersey voters voted to increase that state's minimum wage to \$8.25 per hour. The Obama administration is also seeking an increase in the federal minimum wage. In his February 2013 State of the Union address, President Obama proposed a national minimum wage of \$9 per hour (the current federal minimum wage is \$7.25 per hour). Just five weeks after California's increase, however, the *New York Times* [reported, taking note of California's recent increase](#), that the White House supports a bill to increase the national minimum wage to \$10.10.

California is often seen as a leader in expansion of employee rights, but as discussed above, it actually does not have the nation's highest minimum wage (which is actually found at the city level, with the City of San Francisco at \$10.55 per hour). The states whose wages already exceed or were scheduled to exceed California's current \$8.00-per-hour minimum wage, as well as the federal government, may well seek to match or exceed California's movement. As this trend continues, employers around the nation may be wondering "How High is Up?"

While large national employers are wise to continue to watch California to identify nascent or continuing trends regarding employment law generally, on the issue of minimum wage California is far from an outlier. Its recent increase attracted national headlines, but it most likely will have been supplanted as the nation's minimum wage leader before 2016 rolls around.

As the nuances in California law demonstrate, increases in the minimum wage may have legal implications for employers beyond the need to increase wages. Thus, in whichever states an employer operates, regular consultation with competent employment counsel versed in current wage/hour laws and development is a must.

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