



# Florida Voters Pass Minimum Wage Amendment

Insights

11.12.04

On November 2, 2004, 72% of Florida voters supported an amendment to the Florida Constitution establishing a state minimum wage of \$6.15, \$1.00 more than the current federal minimum wage. Subsequently, the minimum wage will be indexed annually to the rate of inflation. The amendment takes effect on May 2, 2005.

This amendment could have consequences for all employers whose employees perform work within the State of Florida. While there may be legal challenges to the amendment based on alleged voter registration irregularities or on other theories, or an attempt to repeal the amendment in a subsequent election (as voters did with the high-speed train amendment), we want to alert you to what the amendment requires, the remedies it provides, and what you should consider in the way of compliance.

## What The Amendment Requires

Beginning on May 2, 2005, employers in Florida must pay their employees wages of no less than \$6.15 per hour for all hours worked in Florida. The terms "employer," "employee," and "wages" have the same meanings (and exceptions) established under the federal Fair Labor Standards Act (FLSA) and its regulations.

On September 30, 2005, and on each subsequent September 30, the state Agency for Workforce Innovation will calculate an adjusted minimum wage rate by increasing the then-current minimum rate by the rate of inflation. The Agency will publish the adjusted rate, which will take effect on the following January 1.

Employers who are properly taking the FLSA tip credit against the federal minimum wage for their tipped employees may also credit the FLSA-allowable tip amount as of 2003, or \$3.02 per hour, towards the state minimum wage requirement (assuming that these employees receive enough in tips to generate this credit).

The amendment makes it unlawful to retaliate against an employee for exercising rights protected under the amendment. These rights include, but are not limited to, the right to file a complaint or inform any person about noncompliance with the amendment, and the right to inform persons of their rights under the amendment or to assist them in asserting such rights.

## Remedies

Employees may file a lawsuit to recover any unpaid minimum wages. Should they prevail, they would be entitled to the full amount of back wages withheld plus an equal amount as liquidated damages, as well as reasonable attorney's fees and costs. A prevailing plaintiff also would be entitled to appropriate legal and equitable relief including an injunction and job reinstatement. Any employer or other person found liable for willfully violating the amendment would also be subject to a \$1,000 fine payable to the State for each violation. Class actions are permitted.

In addition to actions by a private party, the amendment permits the State Attorney general or other official designated by the Florida legislature to bring an action to enforce the amendment.

The Statute of Limitations, or time frame within which an action must be brought, is four years or, in the case of a willful violation, five years. These are two-year increases over the corresponding time frames for bringing an action under the FLSA.

## Compliance

For employees not exempt from the FLSA's minimum wage requirements, compliance with this amendment is straightforward. You must make sure that your employees' total compensation is sufficient to cover the minimum wage for all hours that they work. For example, if you have employees paid only on an hourly basis, you must ensure that their hourly rate exceeds \$6.15 or any subsequently adjusted minimum wage rates published in future years. If you have salaried non-exempt employees, you must make sure that their salaries are sufficient to cover the new minimum wage when divided by the number of hours they work.

For tipped employees engaged in an occupation in which they customarily and regularly receive more than \$30 a month in tips, and for whom taking the full FLSA tip credit is otherwise proper, you will have to pay in direct cash wages the difference between the \$3.02 tip credit and the Florida minimum wage. As of May 2, 2005, that will amount to not less than \$3.13 an hour in direct cash wages.

For commission-based employees of a retail establishment properly paid today pursuant to the FLSA's section 7(i) overtime exception, you must ensure that their total compensation in weeks in which they work 40 hours or less comes to at least \$6.15 per hour (not just the \$5.15 per hour required by the FLSA). For workweeks in which they work more than 40 hours, there is no change: their compensation for those workweeks must still total "time and one-half" the federal minimum wage (i.e., it must average at least \$7.73 per hour at present) for all hours worked.

## Questions Remain

It is not clear whether the state's minimum wage will apply to employees who are exempt from the FLSA's minimum wage requirements, because the amendment does not expressly say whether it incorporates those exemptions. For instance, the FLSA's Section 13(a)(1) exempts employees employed in a bona fide executive, administrative, professional, or outside-sales capacity. The amendment's reference to the FLSA's "employees" definition does not draw in the Section 13(a)(1)

amendment's reference to the FLSA's employee definition does not draw in the Section 13(a)(1) exemptions, because those exemptions are not among the definition's few exclusions. The amendment does state that "case law, administrative interpretations, and other guiding standards developed under the federal FLSA shall guide the construction of this amendment and any implementing statutes or regulations," but this provision still falls short of clearly saying that the FLSA's relevant exemptions are therefore also included.

Consequently, whether the intent of those provisions is to incorporate all of the FLSA's minimum-wage exemptions remains unresolved. If the exemptions are included, employers need take no action with regards to employees qualifying for them. If the federal exemptions are not available under Florida law, employers will need to ensure that even those employees are earning not less than the State's minimum wage.

In terms of proving compliance, this would necessitate maintaining time records even for those employees, or at least (practically speaking) for employees whose pay is not sufficiently high to meet the state's minimum wage for all hours they could plausibly claim to have worked. Without such time records, federally-exempt employees could sue under this amendment and claim that they worked so many hours that the State minimum wage was not met.

Fisher Phillips has always recommended periodic, comprehensive wage-hour compliance audits, and a change like this one increases the importance of getting things right before problems arise. If you need help reviewing your current wage-hour compliance or assessing the impact of this amendment, or if you simply want more information, we encourage you to contact either our Ft. Lauderdale office at (954) 525-4800 or our Orlando office at (407) 541-0888.

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