

TIPS & BEST PRACTICES
FROM THE EXPERTS

My**HR**Help™

Hot Topics in Wage & Hour Law

Presented by: GORDON&REES
SCULLY MANSUKHANI

Disclaimer

This is a broad overview, it is **not** meant to be a comprehensive look at all wage & hour issues.



This one hour webinar is presented for illustrative purposes only and is not meant to constitute legal advice.

Statistics

- Wage-and-hour class action litigation is on the rise.
- In 2015, we saw the sixth straight year with an increase in filings with almost 9,000 lawsuits.
- Over the past 15 years, we have seen an increase of about 450%.
- Increase in government enforcement. The Department of Labor's Wage and Hour Division recovered approximately \$250 million in back wages in 2015, which was up from the year prior.
- These numbers will only increase due to legislative and administrative initiatives.

Executive

- primary duty must be management
- employee must customarily and regularly direct the work of two or more employees
- employee's recommendations about hiring, firing, etc., of these workers must be given "particular weight"

Administrative

- performing office or non-manual work directly related to the management or general business operations of the employer or its customers
- include the exercise of discretion and independent judgment of significant matters

Professional

- requiring advanced knowledge in a field of science or of other high-level learning
- in a recognized field of artistic endeavor

Highly Compensated

- customarily and regularly perform one or more exempt duties of an executive, administrative, or professional nature

Recent Developments

- The status of arbitration agreements and mandatory class action waivers
- Calculation of the regular rate
- Compensable “non-productive time” for commissioned-only and similar employees

Practical Considerations

- Time Keeping Systems and Methodologies
- Scheduling
- Compliant clear policies
- Response to claims

The DOL's Heightened Scrutiny of the Misclassification of Employees as Independent Contractors

Employees

- The worker must be an "employee" of the employer, meaning that an employment relationship must exist between the worker and the employer.
- The FLSA defines "employ" as including to "suffer or permit to work."
- Workers who are economically dependent on the business of the employer, regardless of skill level, are considered to be employees.
- Independent contractors are workers with economic independence who are in business for themselves.
- The FLSA does not follow the common law "control" test.

Determining Employee vs. Independent Contractor under the FLSA

- The extent to which the work performed is an integral part of the employer's business
- The worker's opportunity for profit or loss depending on his or her managerial skill
- The extent of the relative investments of the employer and worker
- Whether the work performed requires special skills and initiative
- The permanency of the relationship
- The degree of control exercised or retained by the employer

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Off-the-Clock Work

The *De Minimis* Doctrine: Cell Phones as a Prime Example

- Is simply viewing work email compensable time?
- What about actually composing work email?
- Will the DOL and/or courts view these activities as *de minimis* and thus not subject to minimum wage and overtime requirements?
- What is *de minimis*? There is no precise amount of time.
 - amount of time spent on the extra work
 - practical administrative difficulties of recording additional time
 - regularity with which the additional work is performed
 - aggregate amount of compensable time

Even where *de minimis*, to state a claim under the FLSA, an employee must show that an employer had actual or constructive knowledge of the work.

Recommendations for Employers

Option A: Prohibit Off-the-Clock Work—including Work Performed Outside of the Workplace—including Work Performed Outside of the Workplace—for Non-Exempt Employees.

Option B: Allow Off-the-Clock Work—including Work Performed Outside of the Workplace—but Implement a Robust System for Tracking All Time for Non-Exempt Employees.

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The DOL's Broad View of Joint Employment Status

Joint Employment Relationships

Horizontal

- relationship between the two potential joint employers
- exists when two (or more) employers each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee
- established or admitted employment relationship between the employee and each of the employers, and often the employee performs separate work or works separate hours for each employer.

Example: Pancake House A and Pancake House B

Vertical

- employee's relationship with the potential joint employer and whether that employer jointly employs the employee
- exists where the employee, with regard to the work performed for the intermediary employer, is economically dependent on another employer.

Example: Manufacturing Plant and Staffing Agency

Pay attention to the employment practices of the other.

Implications for Employers

- DOL will be scrutinizing joint employment status as it relates to overtime
- Industries include: construction, agricultural, janitorial, distribution and logistics, hospitality, and staffing.
- Employers cannot rely solely on contract terms to insulate themselves from potential liability
- Employers should carefully analyze how these relationships work in practice

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Meal and Rest Periods

Know your state's law!

Federal Law

No required breaks, but once given, employers are subject to some obligations.

- Requires an employer who grants employees non-meal rest period (usually the type lasting 20 minutes or less) to pay employees for their time on break.
- If an employer grants employees a bona fide meal or lunch period (usually of the type lasting more than 30 minutes), an employer does not need to pay for the break time so long as the employee is free to do what they wish while on break.
- If an employee works during a lunch break that is supposed to be unpaid, an employer may be obligated to pay additional wages, including unintended overtime, to that employee.
- Employers can implement policies to prevent employees from working during unpaid meal or lunch periods to ensure they will not be held responsible for paying employees during that time.

State Law: *California*

- Requires an employer to provide an uninterrupted 30-minute meal period for every 5 hours worked, unless the employee is scheduled for less than 6 hours and then the meal period can be waived. A second meal meal period may also be required.
- Employer is not required to pay for meal periods, so long as
 - (1) the meal period is at least 30 minutes, and
 - (2) employees are completely relieved from their work duties (i.e., it cannot be a "working lunch").
- Employees are entitled to a 10-minute rest period for every 4 hours worked or fraction thereof.

Federal Law

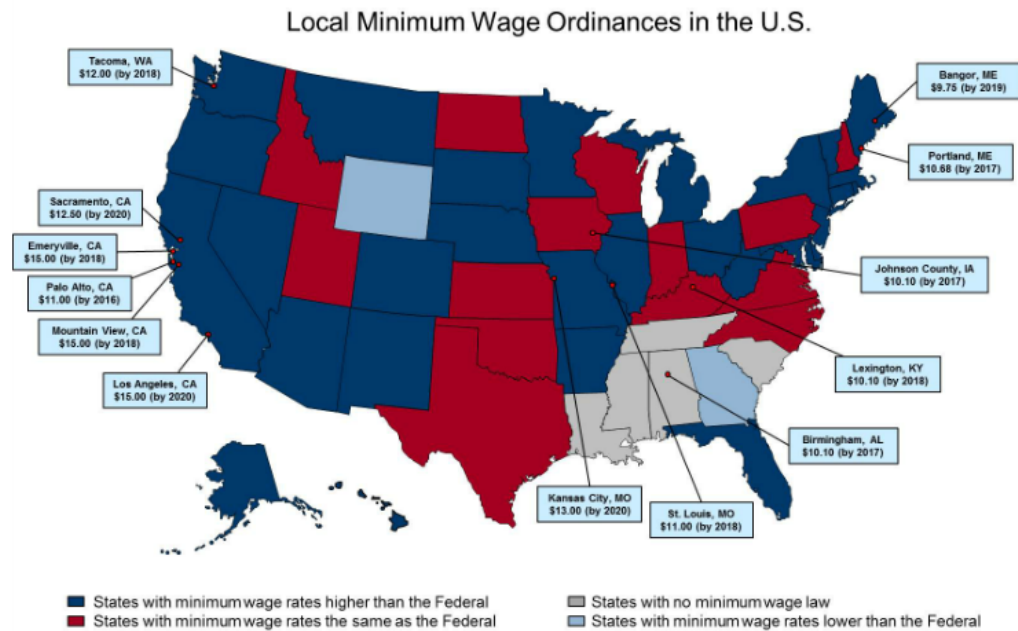
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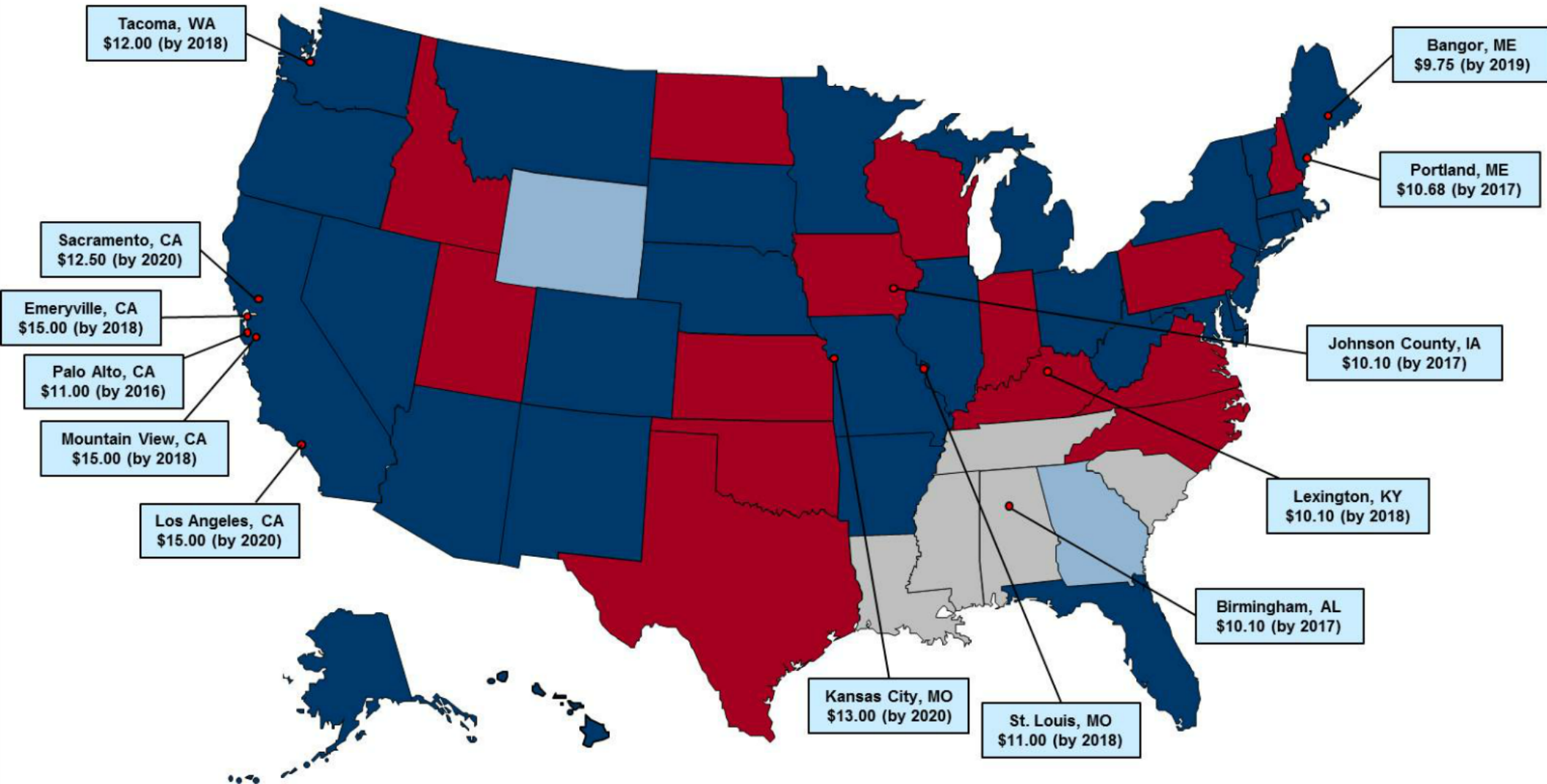
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Increasing Minimum Wages Nationwide



Local Minimum Wage Ordinances in the U.S.



■ States with minimum wage rates higher than the Federal
■ States with minimum wage rates the same as the Federal

■ States with no minimum wage law
■ States with minimum wage rates lower than the Federal