

Punching the Clock: The Latest Trends in Wage & Hour Law

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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.
- Over the past 15 years, we have seen an increase of about 450%.
- In the last several years, representative actions under the Private Attorneys General Act also contributed to rise.
- Increase in government enforcement. In 2018, the Department of Labor's Wage and Hour Division recovered approximately \$304 million in back wages.
- These numbers will only increase due to legislative and administrative initiatives.

Executive Exemption

- Primary duties and responsibilities involve management of business
- Employee must customarily and regularly direct the work of two or more other employees
- Authority to decide or recommendation regarding hiring, firing, advancement, promotions
- Discretionary powers
- Meet salary test

Administrative Exemption

- Performs office or non-manual work directly related to the management or general business operations of the business or customers
- Customarily and regularly exercises discretion and independent judgment of significant matters
- Meet salary test

Professional Exemption

- Three potential categories: licensed, learned, artistic
- Customarily and regularly exercise discretion and independent judgment
- Meet salary test
- Licensed or certified and primarily engaged in recognized profession
- Advanced knowledge in science or learning field; predominantly intellectual and varied in character
- Engaged in performance of original and creative work

Highly Compensated Exemption

- Customarily and regularly perform one or more exempt duties of an executive, administrative, or professional nature
- March 2019: US-DOL issued proposal to increase salary test for exemption under FLSA

The DOL's Heightened Scrutiny of Employees as Independent Contractors

FLSA: Employee

- The FLSA does not follow the common law "control" test.
- 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.

FLSA: Employee vs. Independent Contractor

- Extent to which services rendered are integral part of the business
- Permanence of relationship
- Opportunity for profit or loss and investment in business
- Degree of control by principal
- Extent work is integral part of business or independent
- Degree of skill and independent initiative required to perform the work

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The DOL's Broad View of Joint Employment Status

Joint Employment Relationship

- March 2019: US-DOL proposes new four-factor test
- Joint employer test varies by circuit
- Relationship between the two potential joint employers
- Where two (or more) employers each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee
- If employee, with regard to the work performed for the intermediary employer, is economically dependent on another employer
- Contract cannot insulate employers

Examples: Joint Employment

Horizontal Example:

- *Pancake House A and Pancake House B*

Vertical Example:

- *Manufacturing Plant and Staffing Agency*

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Meal and Rest Periods

Know your state's law!

Federal Law: Meals and Rest Periods

- FLSA: breaks are not required.
- If breaks are provided, certain requirements follow:
 - Meal periods (usually of the type lasting more than 30 minutes) must be uninterrupted and off-duty.
 - Rest periods (usually the type lasting 20 minutes or less) are paid.
- Employers should implement written policies if meal or rest breaks are provided.

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Off-the-Clock Work

De Minimus Doctrine

- What is the De Minimus Doctrine?
 - amount of time spent on the extra work
 - practical administrative difficulties of recording additional time (advancing technology)
 - regularity with which the additional work is performed
 - aggregate amount of compensable time
- Effect on regular and overtime wages
- Employer must have actual or constructive knowledge of the work

Recommendations

- **Option A:** Update written policies to prohibit off-the-clock work by non-exempt employees - including work performed outside of the workplace.
- **Option B:** Implement a robust system for tracking all time worked by non-exempt employees.

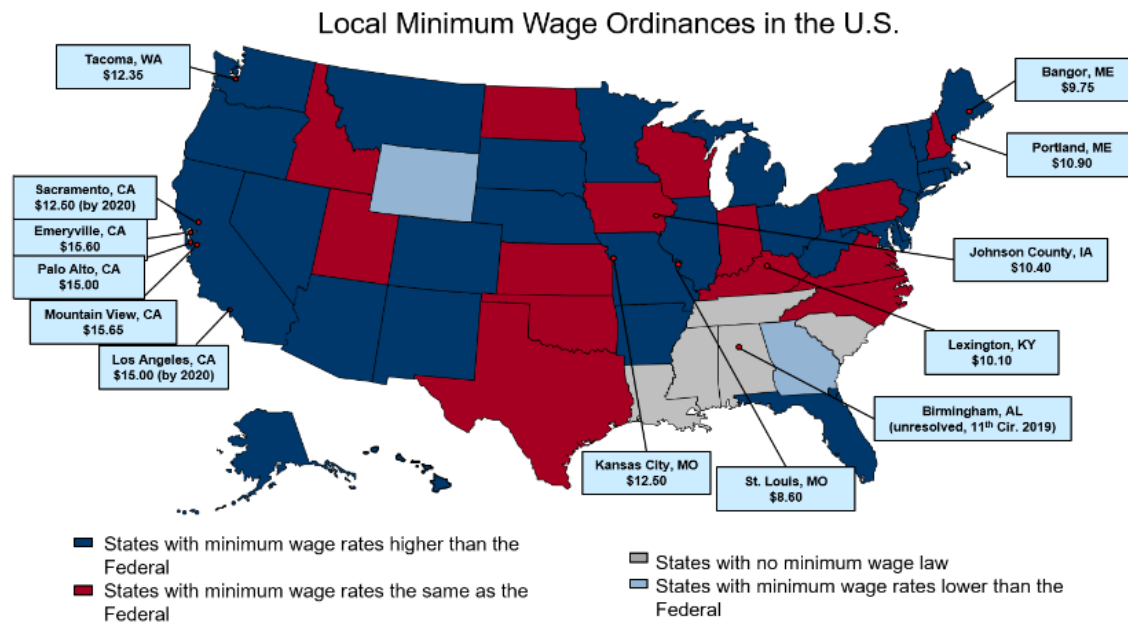
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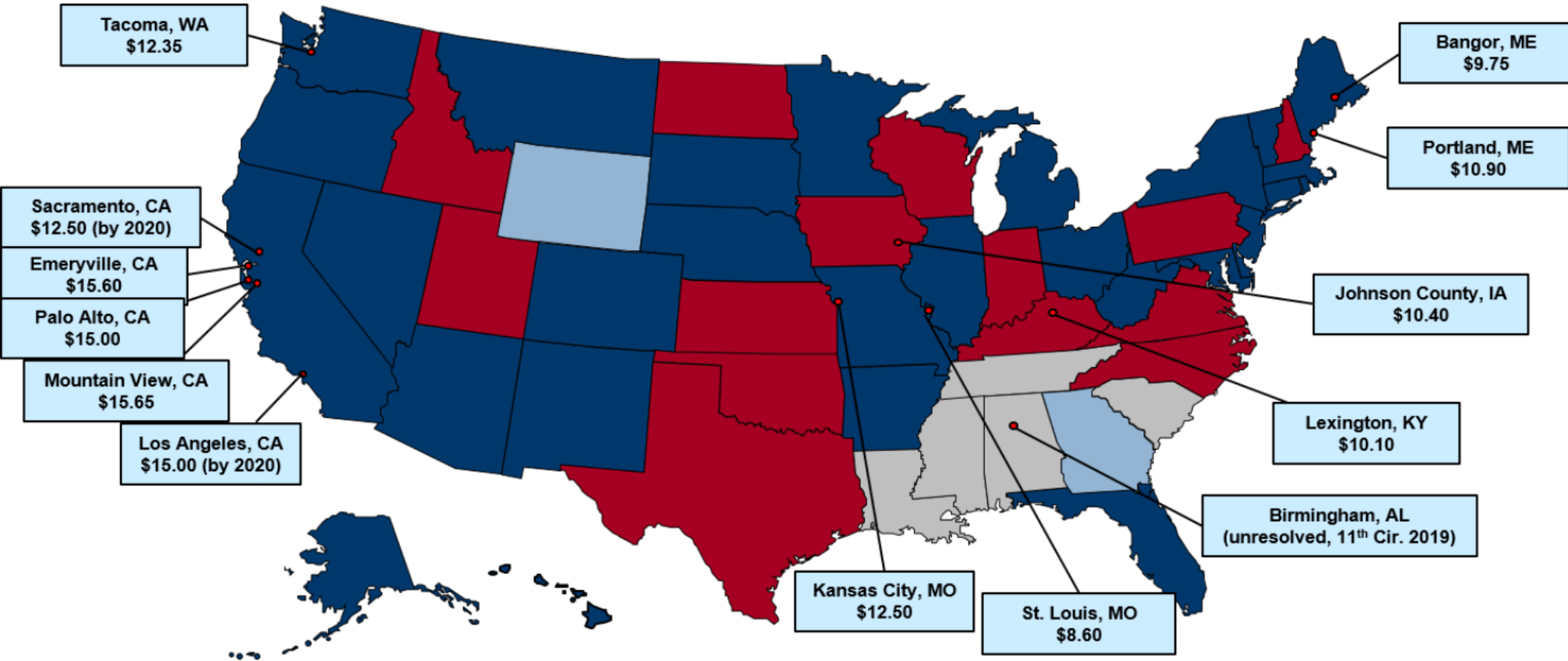
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Increasing Minimum Wages Nationwide



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

Practical Considerations

- Written policies
- Management training
- Timekeeping and payroll systems
- Scheduling
- Response to claims
- New state and local laws

Recent Developments

- Arbitration agreements and class action waivers
- Calculations of the regular rate
- Compensable “non-productive time” for commissioned-only and similar employees
- Reporting time pay