



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

April 8, 2019

The Honorable Lawrence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

RE: Certificate of Review
Proposed Initiative Amending the Minimum Wage Law, Title 44,
Chapter 15, Idaho Code, to Increase the General Minimum Wage
Rate and the Direct Wage Rate for Tipped Employees, to Authorize
Counties and Municipalities to Enact Higher Minimum Wage Rates,
and to Strike Provisions that Allow Lower Minimum Wage Rates for
Employees Under Twenty (20) Years of Age

Dear Secretary of State Denney:

An initiative petition was filed with your office on March 11, 2019. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

BALLOT TITLE

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the

initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTER OF FORM

The proposed initiative has only one section. This section is not in the proper legislative format for showing amendments to statutory provisions because:

- (a) the existing text of subsection (2) of Idaho Code § 44-1502 is not quoted correctly: The first sentence of subsection (2) of the statute states in part: “the direct wages paid to the employee by the employer shall not be in an amount less than three dollars and thirty-five cents (\$3.35) an hour.”; however, the proposed initiative does not indicate that the initiative would strike the text “~~three dollars and thirty five cents (\$3.35) an hour~~” and add the text “: as of June 1, 2021,”;
- (b) the proposed initiative would strike in its entirety the existing text of subsection (3) of Idaho Code § 44-1502 and replace the stricken text with new text also numbered subsection (3), but the initiative does not underline the proposed new text to indicate that it is being added to the statute; and
- (c) the proposed initiative has three (3) minor clerical errors in subsection (1) of Idaho Code § 44-1502: On the first line of proposed subsection (1) in the initiative, the single space after the word “provided” should be underlined; on the third line of proposed subsection (1) in the initiative, the open parentheses before the word “seven” is a typographical error and should be removed; and on the fourth line of proposed subsection (1) in the initiative, where it reads “wage provided” the space between the two words should be underlined or, better yet, an underlined semicolon and underlined space should be added after the word “wage.”

SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

I. Summary of Proposed Initiative

The proposed initiative would amend the Minimum Wage Law, Idaho Code §§ 44-1501, *et seq.* (“Minimum Wage Law”), by adding and striking language from

Idaho Code § 44-1502 to increase the state's general minimum wage above the rate established by the federal Fair Labor Standards Act of 1938 ("FLSA").¹

The significant changes to the statute that would be effected by the proposed initiative are:

- (a) increasing the minimum wage rate applicable to most non-exempt employees annually for four (4) consecutive years, and establishing a formula for subsequent years to annually adjust the minimum wage rate in direct proportion to any increases in a specified federal consumer price index;
- (b) increasing the minimum amount of direct wages that must be paid to tipped employees annually for four (4) consecutive years, and providing further that on January 1 of each year following the fourth increase, the direct wages to be paid to tipped employees shall not be three dollars and ninety cents (\$3.90) less than minimum wage;
- (c) adding provisions authorizing counties and cities to enact laws setting higher minimum wages than those prescribed by the statute and striking provisions to the contrary in the statute; and
- (d) striking provisions in the statute setting a lower minimum wage for persons under twenty (20) years of age for a period of ninety (90) days after hire.

Each of these changes is discussed more fully below.

A. Increasing the Minimum Wage Rate. Over a four (4) year period, the proposed initiative would increase Idaho's minimum wage rate for employees established by Idaho Code § 44-1502(1) from its current level of seven dollars and twenty-five cents (\$7.25) an hour to twelve dollars (\$12.00) an hour as follows:

- (a) to eight dollars and seventy-five cents (\$8.75) per hour on June 1, 2021;
- (b) to nine dollars and seventy-five cents (\$9.75) per hour on June 1, 2022;

¹ Fair Labor Standards Act of 1938 ("FLSA"), Pub. L. No. 75-718, 52 Stat. 1060, *codified as amended at* 29 U.S.C. §§ 201, *et seq.*

- (c) to ten dollars and seventy-five cents (\$10.75) per hour on June 1, 2023; and
- (d) to twelve dollars (\$12.00) per hour on June 1, 2024.

The proposed initiative also would add language to Idaho Code § 44-1502(1) requiring the director of the Department of Commerce on September 30 of each year, beginning in 2024, to calculate an adjusted minimum wage rate “in direct proportion to the increase, if any” in the United States Department of Labor’s consumer price index for Urban Wage Earners and Clerical Workers (CPI-W) over the prior year (measured from July 1 to June 30). These adjusted minimum wage rates would become the minimum wage rate under the Minimum Wage Law effective on January 1 of the year following each annual calculation.

B. Increasing the Direct Wage Rate that Employers Must Pay Tipped Employees. The proposed initiative would increase the minimum amount of direct wages that employers must pay to tipped employees from the current rate of three dollars and thirty-five cents (\$3.35) an hour set by Idaho Code § 44-1502(2) to eight dollars and ten cents (\$8.10) an hour on June 1, 2024. This increase would occur over the course of four (4) consecutive years, with increases:

- (a) to four dollars and eighty-five cents (\$4.85) per hour on June 1, 2021;
- (b) to five dollars and eighty-five cents (\$5.85) per hour on June 1, 2022;
- (c) to six dollars and eighty-five cents (\$6.85) per hour on June 1, 2023; and
- (d) to eight dollars and ten cents (\$8.10) per hour on June 1, 2024.

The proposed initiative provides that on January 1, 2025, and each January 1 thereafter, the minimum amount of direct wages shall not be less than the minimum wage minus three dollars and ninety cents (\$3.90).

C. Expressly Providing that Counties and Cities May Prescribe Higher Minimum Wages. The proposed initiative states that counties and cities (municipal corporations) “may establish and enforce minimum wage laws higher than the minimum wages provided in [Idaho Code § 44-1502].” At the same time, the proposed initiative would strike language in the statute that now restricts counties, cities, and other “political subdivisions” as defined by title 6, chapter 9,

Idaho Code,² from passing laws setting minimum wage rates higher than those of Idaho Code § 44-1502.

D. Removing the Minimum Wage Rate Provisions for New Employees Under Twenty (20) Years of Age. As it reads now, subsection (3) of Idaho Code § 44-1502, subject to certain restrictions on employers, allows a minimum wage rate of four dollars and twenty-five cents (\$4.25) for employees under the age of twenty (20) years for a period of ninety (90) days after they are initially employed.³ The proposed initiative strikes in its entirety all the language in this subsection (3), which would increase the minimum wage rate for newly hired employees under twenty (20) years of age to the general minimum wage rate.

II. Substantive Analysis

There is little doubt but that the legislature may enact laws that establish minimum wage rates and tipped employee rates that are higher than the minimum rates under federal law. Currently, the general minimum wage rate is the same under the FLSA and the Minimum Wage Law. However, under Idaho Code § 44-1502(2), the amount of direct wages that employers must pay to tipped employees is three dollars and thirty-five cents (\$3.35) an hour, which exceeds the FLSA's minimum direct wage rate of two dollars and thirteen cents (\$2.13) an hour.⁴

A state may have higher minimum wage rates than federal law because the FLSA does not preempt state law. The FLSA contains a savings clause specifically authorizing states to set stricter standards: "No provision of [the FLSA] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under [the FLSA]" 29 U.S.C. § 218(a). As a result, states are free to adopt and enforce minimum wage rates and overtime rules that afford greater protections for workers than the FLSA.⁵ In fact, currently 31 states have

² Subsection (2) of Idaho Code § 6-902 defines a "political subdivision" as:
. . . any county, city, municipal corporation, health district, school district, irrigation district, an operating agent of irrigation districts whose board consists of directors of its member districts, special improvement or taxing district, or any other political subdivision or public corporation.

This subsection also provides: "As used in [the Idaho Tort Claims Act], the terms 'county' and 'city' also mean state licensed hospitals and attached nursing homes established by counties pursuant to chapter 36, title 31, Idaho Code, or jointly by cities and counties pursuant to chapter 37, title 31, Idaho Code."

³ These provisions mirror those of the FLSA. See 29 U.S.C. § 206(g).

⁴ See 29 C.F.R. § 531.59.

⁵ The Second Circuit Court of Appeals reached a similar conclusion in Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234 (2d Cir. 2011):

minimum wage rates that are higher than the FLSA.⁶ Thus, the higher minimum wage rates set by the proposed initiative would be lawful under the FLSA.

With respect to the provision in the proposed initiative that would authorize counties and cities to adopt minimum wage rates higher than those set by Idaho Code § 44-1502, the home rule provision of the Idaho Constitution grants to counties and cities broad police power, provided the exercise of that local power is “not in conflict . . . with the general laws” of the state.⁷ Thus, there does not appear to be anything unlawful about the provision in the proposed initiative expressly authorizing counties and cities to enact higher minimum wage rates.

If the proposed initiative were to become law, and a county or city was to enact an ordinance relating to minimum wage rates, such an ordinance, to be lawful, would need to meet three general restrictions: “(1) it must be confined to the territorial limits of the enacting body; (2) it must not conflict with the general laws of the State; and (3) it must not be an unreasonable or arbitrary enactment.” State v. Doe, 148 Idaho 919, 927, 231 P.3d 1016, 1024 (2010); *citing* Hobbs v. Abrams, 104 Idaho 205, 207, 657 P.2d 1073, 1075 (1983). This legal standard, however, does not apply to the text of the proposed initiative.

A similar legal analysis would apply to the remaining provisions of the proposed initiative. They all appear to be proper subjects of legislation and within the legislative power of the State of Idaho.

. . . [T]he FLSA's “savings clause” [29 U.S.C. § 218(a)] makes clear that states may enact wage laws that are more protective than those that are provided in the act . . . We have held that this clause demonstrates Congress' intent to allow state wage laws to co-exist with the FLSA by permitting explicitly, for example, states to mandate greater overtime benefits than the FLSA.

Id. at 247–48, *citing* Overnite Transp. Co. v. Tianti, 926 F.2d 220, 221–22 (2d Cir.1991) (rejecting the argument that the FLSA preempts state wage laws); and Ervin v. OS Rest. Servs., Inc., 632 F.3d 971, 997 (7th Cir. 2011)] (same).

⁶ See U.S. Department of Labor, Wage and Hour Division, *Minimum Wage Laws in the States*, March 29, 2019, <<https://www.dol.gov/whd/minwage/america.htm>> (April 2, 2019).

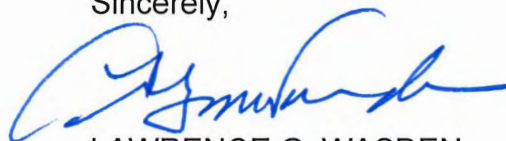
⁷ The home rule provision of the Idaho Constitution, art. XII, sec. 2, states: “Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.” The constitutional grant of these powers to local governments is also reflected in the Idaho Code. See, e.g., I.C. § 50-301 (“Cities governed by this act [may] . . . exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.”); I.C. § 50-302(1) (“Cities shall make all such ordinances, bylaws, rules, regulations and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry.”).

Secretary of State Denney
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CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Rod Couch, 5299 North Maidstone Way, Boise, Idaho 83713.

Sincerely,



LAWRENCE G. WASDEN
Attorney General

Analysis by:

Douglas A. Werth
Deputy Attorney General