



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

June 2, 2021

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 Minimum Wage Rate for Employees and the Minimum Direct Wage Rate for Tipped Employees; to Strike Provisions that Allow Lower Minimum Wage Rates for New Employees Under 20 Years of Age; and to Expressly Authorize Counties and Cities to Establish Higher Minimum Wage Rates

Dear Secretary of State Denney:

An initiative petition was filed with your office on May 5, 2021. Pursuant to Idaho Code section 34-1809, this office reviewed the petition and has 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." Due to the available resources and limited time for performing the review, we did not communicate directly with the petitioners as part of the review process. 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 litigation that could ensue over the initiative's validity.

BALLOT TITLES

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.

MATTERS OF FORM

The proposed initiative would amend the Minimum Wage Law, Idaho Code sections 44-1501, *et seq.* ("Minimum Wage Law"), and has two sections. Section 1 is merely a short title. Section 2 is, for the most part, in the proper legislative format for showing amendments to statutory provisions. Two minor corrections relating to format are recommended:

1. The initiative, in two instances, adds to Idaho Code section 44-1502(1), along with other text, the language "until June 30, 2023." Although the initiative underlines "June 30, 2023," it neglects to underline the word "until." All text added to a statute by an initiative should be underlined. To correct this, this language in the initiative should be changed to read "until June 30, 2023."

2. The language of the initiative striking the first sentence of the existing text of Idaho Code section 44-1502(3) omits the word "not" that currently precedes the phrase "less than four dollars and twenty-five cents (\$4.25) an hour." To correct this the stricken text of the first sentence of Idaho Code section 44-1502(3) should be amended to read: "~~In lieu of the rate prescribed by subsection (1) of this section, an employer may pay an employee who has not attained twenty (20) years of age a wage which is not less than four dollars and twenty five cents (\$4.25) an hour during the first ninety (90) consecutive calendar days after such employee is initially employed.~~"

SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

I. Summary of Proposed Initiative

The proposed initiative amends the Minimum Wage Law by adding and striking language from Idaho Code section 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 In doing so, the initiative effects four significant changes to Idaho Code section 44-1502.

First, the initiative increases annually the minimum wage rate applicable to most non-exempt employees beginning July 1, 2023 until July 1, 2025, when the minimum wage will be \$12.00 per hour. For 2026 and subsequent years, it establishes a formula to annually increase the minimum wage rate using any increase in the cost of living according to a specified federal consumer price index.

¹ 29 U.S.C. §§ 201-219.

Second, the initiative increases annually the minimum hourly direct wage rate for tipped employees beginning July 1, 2023 until July 1, 2025, when the minimum direct wage for tipped employees will be \$8.50 per hour. For 2026 and subsequent years, it provides that the minimum direct wage rate for tipped employees shall not be less than the minimum hourly wage rate minus \$3.90.

Third, the initiative removes provisions of the statute establishing a minimum hourly wage of \$4.25 for employees under 20 years of age during their initial 90 days of employment.

Fourth, the initiative removes language from the statute that now prohibits political subdivisions of the state of Idaho from establishing minimum wage rates higher than those specified by Idaho Code section 44-1502(4) and adds language authorizing counties and municipal corporations to establish and enforce minimum wages rates higher than those set by the statute.

Each of these changes is discussed more fully below.

A. Increasing the General Minimum Wage Rate

The proposed initiative amends Idaho Code section 44-1502(1) to increase over a three-year period Idaho's current minimum hourly wage rate of \$7.25 to \$12.00 an hour on July 1, 2025. The minimum wage rate would increase to \$9.50 per hour on July 1, 2023; to \$11.00 per hour on July 1, 2024; and to \$12.00 per hour on July 1, 2025.

Further, under the proposed initiative, beginning July 1, 2026, and each year that follows, the minimum wage rate would increase if there was an increase in the cost of living as established by the United States Department of Labor's consumer price index for Urban Wage Earners and Clerical Workers (CPI-W, non-seasonally adjusted, U.S. City average) or a "successor index." The statute would be further amended to provide in a new subsection 44-1502(1)(e) that "[t]he new minimum wage shall be calculated by adding the existing minimum wage to the rise in the cost of living multiplied by the existing minimum wage and rounded to the nearest multiple of five cents."

B. Increasing the Minimum Direct Wage Rate for 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 \$3.35 to \$8.50 per hour on July 1, 2025, in three successive years, as follows: to \$5.50 per hour on July 1, 2023; to \$7.00 per hour on July 1, 2024; and to \$8.50 per hour on July 1, 2025. Beginning July 1, 2026, the minimum direct wages payable to tipped employees would be the minimum wage rate for un-tipped employees less \$3.90.

C. Removing the Lower Minimum Wage Rate for New Employees Under 20 Years of Age

Idaho Code section 44-1502(3) currently allows employers, subject to restrictions, to pay employees under 20 years of age an hourly wage of \$4.25 per hour during their initial 90 days of employment.² The initiative would strike this language, which would require that these younger new employees be paid the existing minimum wage.

D. Adding Language to Allow Counties and Cities to Establish Higher Minimum Wage Rates

As currently written, Idaho Code section 44-1502(4) expressly forbids political subdivisions from enacting higher minimum wage laws: "No political subdivision of this state, as defined by section 6-902, Idaho Code, shall establish by ordinance or other action minimum wages higher than the minimum wages provided in this section." The initiative would reverse this by striking the existing language and expressly authorizing local governments to set higher minimum wage rates. The initiative would replace the existing language with this language added to subsection (3) of the amended statute: "Counties named in Chapter 1 of Title 31, Idaho Code, and municipal corporations governed by Title 50, Idaho Code, may establish and enforce minimum wage laws higher than the minimum wages provided in this section."

II. Substantive Analysis

The first issue is whether the higher minimum wage rates³ set by the proposed initiative would be lawful under the FLSA. Even though the initiative's minimum wage rates are higher than the minimum wages under the FLSA, they nonetheless would be lawful under the FLSA because that Federal law does not preempt state minimum wage laws. The FLSA contains a savings clause specifically authorizing states to set higher minimum wage 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]..."⁴ As a result, states are free to adopt and enforce minimum wage rates and overtime rules that

² These provisions mirror those of the FLSA. See 29 U.S.C. § 206(g)(1).

³ Currently, the general minimum wage rate under Idaho's Minimum Wage Law is \$7.25, which is identical to the minimum wage rate under the FLSA. Idaho Code section 44-1502(3) currently allows employers to pay a minimum wage of not less than \$4.25 an hour to new employees who are under 20 years of age during the first 90 consecutive calendar days after initial employment. Idaho Code section 44-1502(2) currently differs from FLSA minimum wage rates in its treatment of tipped employees. The minimum amount of direct wages that employers must pay to tipped employees under Idaho law is \$3.35 an hour, which exceeds the FLSA's minimum direct wage rate of \$2.13 an hour. See 29 C.F.R. § 531.59.

⁴ 29 U.S.C. § 218(a).

afford greater protections for workers than does the FLSA.⁵ Currently, 30 states have minimum wage rates that are higher than those of the FLSA.⁶

Proposed Idaho Code section 44-1502(3) in Section 2 of the initiative authorizes counties and municipal corporations to establish minimum wage rates higher than the minimum wage rates. This gives rise to the question whether a county or city could lawfully establish higher minimum wage rates under this proposed subsection. The answer is yes. Article XII, section 2 of the Idaho Constitution grants police power to counties and cities:

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.

Article XII, section 2 grants police power to counties and cities, but with an important limitation: the exercise of those powers cannot be in conflict "with the general laws." Here, initiative provisions would not conflict with the general laws because Idaho Code section 44-1502 is the general law and, as amended by the initiative, would expressly authorize the exercise of police powers relating to minimum wage rates.

In sum, the proposed amendments to the Minimum Wage Law do not appear to be unlawful under either State or Federal law.

III. Recommended Revisions, Alterations, Suggestions, and Miscellaneous Issues

In addition to the comments already made in this certificate for review, the following are recommended revisions, alterations, suggestions, and miscellaneous issues for Section 2 of the proposed initiative:

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):

[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 (first 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); then citing Ervin v. OS Rest. Servs., Inc., 632 F.3d 971, 997 (7th Cir. 2011) (same); and then citing Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1151 (9th Cir. 2000)).

⁶ See U.S. DEP'T OF LABOR, WAGE & HOUR DIV., *State Minimum Wage Laws*, (updated May 1, 2021), <https://www.dol.gov/agencies/whd/minimum-wage/state>.

1. The first sentence of subsection (1) of Idaho Code section 44-1502 currently uses the pronoun "his"; if the statute is amended, to be consistent with current drafting guidance this pronoun should be changed to "its."⁷

2. The beginning language of subsection (1) of Idaho Code section 44-1502 of the proposed initiative, which reads "Except as hereinafter otherwise provided in this section," incorrectly refers to "this section"; because the exemptions from the minimum wage requirements are not found in section 44-1502 itself, but rather, are found in other sections of the chapter codifying the Minimum Wage Law, this added language should read "Except as hereinafter otherwise provided in this chapter."

3. It should be noted that the proposed initiative, with regard to minimum wage rates beginning July 1, 2026 to be determined using a statutory formula and the increase of the cost of living under a federal consumer price index, does not designate a State agency to make these calculations and provide notice of what any new annual minimum wage rate would be. That could prove problematic.

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 Petitioners via a copy of this Certificate of Review, deposited in the U.S. Mail to Chris Stroh, P.O. Box 9573, Boise, ID 83707.

Sincerely,



LAWRENCE G. WASDEN
Attorney General

Analysis by:

Douglas A. Werth
Lead Deputy Attorney General

⁷ LEGIS. SERVS. OFFICE, RES. & LEGIS. BRANCH, LEGISLATION DRAFTING MANUAL (CONCISE VERSION) (Rev. May 2017) at 32, <https://legislature.idaho.gov/wp-content/uploads/research/draftingmanual.pdf> ("Avoid using gender specific words. The Idaho Code provides that the masculine includes the feminine. If you must use a gender specific word, use the masculine unless the context requires using 'she.'").