

ORIGINAL

IN THE SUPREME COURT OF OHIO

John Haight, et al.,	:	
	:	Supreme Court Case No. 2014-1241
Plaintiffs/Appellees,	:	
	:	Appeal from the Montgomery County
v.	:	Court of Appeals, 2nd District
	:	
The Cheap Escape Company, et al.,	:	Appeal No. CA 25983
	:	
Defendants/Appellants.	:	Trial No. 2012 CV 00946

BRIEF OF AMICUS CURIAE
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OHIO FARM BUREAU FEDERATION, AND OHIO MANAGEMENT LAWYERS
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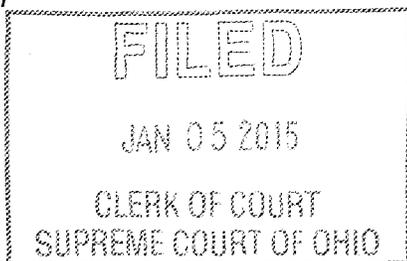
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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

 I. Description of the Amici..... 1

 II. Amici's interest in the outcome of this case..... 3

STATEMENT OF FACTS 4

ARGUMENT 5

Proposition of Law No. 1: The meaning of the term "employee" under R.C. 4111.14(B)(1) is constitutionally valid because it does not clearly conflict with or restrict the meaning of that same term under Article II, Section 34a of the Ohio Constitution..... 5

 I. The history of, and purpose for, the passage of Section 34a 5

 A. Voters approved Section 34a to provide minimum wage protection for 700,000 low income earners..... 5

 B. The Amendment establishes requirements for compliance 6

 C. The Amendment sets up remedies for noncompliance..... 6

 D. The Amendment was designed to clarify the enforcement of the law by adopting the FLSA's definitions 7

 E. Section 34a's textual content clearly intends to exempt non-hourly employees..... 8

 F. The General Assembly adopted R.C. 4111.14 to implement the Amendment, as the text of Section 34a expressly provides 9

 G. For seven years, all Ohio employers, including those represented or counseled by amicus here, complied with the Amendment, the statute, and the rules and regulations..... 9

 II. Section 34a should be interpreted to include within its meaning the exemptions from the minimum wage found in the FLSA, and therefore R.C. 4111.14 does not conflict 11

 A. Section 34a refers to the entirety of the FLSA, not a portion of it..... 11

 B. Reading Section 34a to include multiple exemptions is a common-sense reading of the Amendment..... 12

 C. No other provision of the Constitution can limit Section 34, pursuant to which the General Assembly adopted R.C. 4111.14, and therefore the General Assembly's enactment must be given effect..... 13

1.	The court of appeals' decision creates conflict where none need exist.....	13
2.	Reading Section 34a to include the full FLSA harmonizes the conflict the court of appeals decision creates	14
III.	The court of appeals' interpretation in this case would lead to a devastating restructuring of Ohio wage and hour law and the cost would be destructive to the Ohio economy.....	14
A.	The scope of the opinion doesn't just affect outside salespersons, like Appellees here, but all other exempted employees	14
B.	If there are no exemptions, each group would now be subject to the minimum wage and recordkeeping requirements of Section 34a, to the detriment of employer, employee, and the public alike	16
1.	The regulatory burden on Ohio employers will grow by requiring employers to keep records on an entirely new swath of employees.....	16
2.	The court of appeals holding will make Ohio unique among states in the Midwest and elsewhere	17
3.	The Appellee's interpretation harms employees, and not just employers.....	19
C.	Thousands of Ohio employers will now face potential liability from litigation exposure.....	20
1.	Class actions will result.....	20
2.	Appellee's interpretation creates a minimum wage trap for well-intentioned and law abiding employers	20
3.	The unintended consequences could mirror the outcome of <i>Scott-Pontzer</i>	21
IV.	Whether Section 34a is "self-executing" is irrelevant to this case and should not stand in the way of correcting the decision below	21
	Proposition of Law No. 2: If the statutory definition of "employee" under R.C. 4111.14(B)(1) is unconstitutional and invalid, that conclusion and ruling should apply prospectively only under the three-part test propounded in <i>DiCinzo v. A-Best Products Company</i>	22
I.	Damage to Ohio occurs regardless of the timing of the decision.....	22
II.	The <i>Sunburst</i> doctrine would at least limit the damage to the future	23
	CONCLUSION.....	24
	CERTIFICATE OF SERVICE.....	26
	APPENDICES.....	27

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
Cincinnati v. De Golyer, 25 Ohio St.2d 101, 267 N.E.2d 282 (1971)	14
DiCenzo v. A Best Prods. Co., 120 Ohio St.3d 149, 2008-Ohio-5327, 897 N.E.2d 132	22, 23
Dillworth v. Case Farm's Processing, Inc., N.D. Ohio No. 5:08CV1694, 2009 U.S. Dist. 76947, (Aug. 27, 2009)	10
Haight v. Cheap Escape Co., 2014-Ohio-2447, 11 N.E.3d 1258, (2d Dist.)	12, 13, 14, 20
Haight, 2014-Ohio-2447, 11 N.E.3d 1258.....	22
Minster Farmers Coop. Exchange Co., Inc. v. Meyer, 117 Ohio St.3d 459, 2008- Ohio-1259, 884 N.E.2d 1056.....	23
Murray v. Mary Glynn Homes, Inc., N.D. Ohio No. 1:11-CV-532, 2013 U.S. Dist. LEXIS 114310, (Feb. 20, 2013).....	10
Scott-Pontzer v. Liberty Mut. Fire Ins. Co., 85 Ohio St.3d 660, 1999-Ohio-292, 710 N.E.2d 1116	21
State ex rel. Bd. of Trustees v. Bd. of Trustees, 12 Ohio St.2d 105, 107, 233 N.E.2d 135 (1967).....	13
State ex rel. King v. Summit Cty. Council, 99 Ohio St.3d 172, 2003-Ohio-3050, 789 N.E.2d 1108	14
State v. Talty, 103 Ohio St.3d 177, 2004-Ohio-4888, 814 N.E.2d 1201	14
Thomas v. Speedway SuperAmerica, LLC, 506 F.3d 496, 501 (6th Cir.2007)	10
Trocheck v. Pellin Emergency Medical Services, Inc., 61 F. Supp. 2d 685, 699 (N.D. Ohio 1999).....	10
Westfield Ins. Co. v. Galatis, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E.2d 1256	21
Wolfram v. PHH Corp., S.D. Ohio No. 1:12-cv-599, 2014 U.S. Dist. LEXIS 82378, (June 17, 2014).....	19
Statutes	
2006 Am.Sub.H.B. No. 690, Section 1.....	6
2006 Am.Sub.H.B. No. 690, Section 6.....	7, 9
29 U.S.C. § 213(a)(1).....	15
29 U.S.C. § 213(a)(17).....	15
29 U.S.C. § 213(a)(3).....	15
29 U.S.C. § 213(a)(6).....	15, 16

R.C. 4111.....	6, 23
R.C. 4111.14.....	passim
R.C. 4111.14(A).....	9
R.C. 4111.14(B)(1)	5, 13, 22

Rules

29 C.F.R. § 541.602	8
---------------------------	---

Treatises

Ohio Constitution, Article II, Section 34.....	9, 13, 14, 24
Ohio Constitution, Article II, Section 34a.....	passim
Ohio Constitution, Article XVIII.....	9

Constitutional Provisions

Indiana: Burns Ind. Code Ann. § 22-2-2-3	18
Kentucky: KRS 337.010.....	18
Kimberlin, California Courts Have Yet To Offer Clear Guidance on the Certification of Class Actions in Wage and Hour Disputes, 25 Los Angeles Lawyer 22, 23-24 (2002)	18
Michigan: Mich. Comp. Laws Ann., Chapter 408.420	18
Oklahoma: 40 Okl. St. 197.4	18
Pennsylvania: 43 Pa. C. Stat. 333.105	18
Sullivan, Enforceability of Choice-of-Law Clauses in the Context of Misclassification Litigation: Bridging the Gap Between Worker and Employer, 47 Ga. L. Rev. 1359, 1391 (2013).....	18
Virginia: Va. Code Ann. § 40.1-28.9	18
West Virginia: W. Va. Code § 21-5C-1	18

STATEMENT OF INTEREST

I. Description of the Amici.

Founded in 1922, Amicus Curiae the **Ohio Council of Retail Merchants ("Council")** is Ohio's oldest and largest advocate for the retail and wholesale industries, representing more than 6,400 retailers and wholesalers across the state. Ohio's retail industry accounts for \$46.5 billion of Ohio's annual Gross Domestic Product and supports 1.5 million jobs, one in four of all Ohio jobs, more than any other industry. The Council promotes the interests of the retail and wholesale distribution industries and helps these enterprises achieve lasting excellence in all areas of their business.

Founded in 1893, Amicus Curiae the **Ohio Chamber of Commerce ("Ohio Chamber")** is Ohio's largest and most diverse business advocacy organization. The Ohio Chamber works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena.

Amicus Curiae **Ohio Farm Bureau Federation ("OFBF")** is Ohio's largest general farm organization, with over 200,000 members who share its vision of a partnership between farmers and consumers to ensure agricultural prosperity and abundance in the global marketplace. It was originally founded in 1919 to address emerging issues affecting farmers and farms, but it presently develops and conducts educational campaigns and programs that address a wide variety of issues affecting both rural and urban citizens of Ohio, including taxes and fees, the environment, trade regulation, land use and property rights, and health and safety. The OFBF relies on

public policy generated by political activism, from the county level to the national level, to create a stronger economy and a better future for farmers and consumers alike.

Members of the OFBF run the gamut from large to small businesses. The policies of the OFBF are created by the members through a grassroots process.

Amicus Curiae **Ohio Chapter of the National Federation of Independent Business ("NFIB/Ohio")** has more than 25,000 members and is the State's largest association dedicated exclusively to the interests of business owners. NFIB/Ohio aggressively promotes and protects the rights of its members to create, operate, and grow their own businesses. A major tenet of its public policy agenda is to ensure that Ohio's system of employment regulations treats individuals, businesses, corporations, and other entities fairly. NFIB/Ohio supports rules and regulations that will provide an economic climate that attracts new businesses to Ohio and support their growth and development.

Amicus Curiae **Ohio Management Lawyers Association ("OMLA")** is an Ohio nonprofit corporation. Its stated purpose is "[t]o provide an organization [for the] discussion of common issues and problems, and promotion of the administration of justice with respect to employment, labor, and other areas of law affecting employers." Its members regularly advise employers in Ohio on employment-law related issues. Wage and hour issues, including issues like which employees are exempt from minimum wage and record-keeping obligations, are a common question of concern that clients of OMLA members regularly seek advice on, and are directly implicated by the court of appeals' holding in this case.

II. Amici's interest in the outcome of this case.

As representatives of employers of hundreds of thousands of Ohioans, many of whom are currently classified as exempt from minimum wage and related recordkeeping obligations, each of the amici has a keen interest in the outcome of this case. The implication of affirming the judgment below for amici specifically, and Ohio generally, is an astonishing expansion of the regulatory burden on employers.

This expansion would set Ohio apart in the Midwest, and from many states across the country, when it comes to the applicability of commonly accepted exemptions to minimum wage requirements that have been in place under federal and state law for decades. The court of appeals' decision will injure Ohio's competitive standing among the states, dealing a blow to the efforts of the Ohio Chamber and NFIB/Ohio, in particular, to make Ohio an inviting place for businesses to locate or expand. The decision endangers exemptions specifically applicable to, and relied upon by, all amici, including the OFBF's and the Council's members.

Failing to reverse the holding below would be:

- contrary to the terms and purpose of the minimum wage constitutional amendment itself;
- contrary to another provision of the Ohio Constitution;
- contrary to the guidance of the administrative agency that administers the constitutional amendment; and
- contrary to the settled expectations of Ohio's employers.

For all of these reasons, the amici represented in this brief, and their members across the state, have a substantial interest in the outcome of the case, and urge the Court to reverse the untenable holding of the lower court.

STATEMENT OF FACTS

In reversing the trial court, the court of appeals held that Appellees were "employees" under Article II, Section 34a¹ of the Ohio Constitution. Thus, they would be entitled to receive the minimum wage specified therein. Contrary to the assertion of Appellees, see Plaintiff/Appellee's Memorandum in Opposition to Jurisdiction at 4-5, however, the import of the court's rationale is not limited to outside sales employees. Rather, the court of appeals holding **would also strike down other exemptions**, including those for executives, professionals, administrative employees, certain computer employees, certain agricultural employees, and more. See *infra* § III.A.

Moreover, the Court is presented not just with a claim on behalf of two employees, but rather a claim on behalf of potentially many employees. Appellees' amended complaint **sought class certification for all similarly-situated employees** employed by Appellant. For further factual discussion, amici refer the Court to Appellants' merit brief and adopt its Statement of Facts.

¹ Amici will refer to Article II, Section 34a of the Ohio Constitution interchangeably as "Section 34a" or the "Amendment."

ARGUMENT

Proposition of Law No. 1: The meaning of the term "employee" under R.C. 4111.14(B)(1) is constitutionally valid because it does not clearly conflict with or restrict the meaning of that same term under Article II, Section 34a of the Ohio Constitution.

I. **The history of, and purpose for, the passage of Section 34a**

A. ***Voters approved Section 34a to provide minimum wage protection for 700,000 low income earners.***

In 2006, voters were presented with Issue 2, a proposed amendment to the Ohio Constitution that added Section 34a. The "Argument and Explanation" included with the ballot issue speaks very clearly to the Amendment's objective. It asserts that "[t]he real value of the federal minimum wage has reached a 50-year low" and notes "[w]e can do better." (Emphasis added.) The Ohio Ballot Board, *Ohio Issues Report*, "State Issues Ballot Information for the November 7, 2006 General Election."² After establishing what the new minimum wage would be, it goes on to explain that "[t]he Amendment would raise wages for over 700,000 Ohio workers" and concludes with "[v]ote YES on Issue 2 to restore the value of the minimum wage for hard working Ohioans." (Emphasis added.) *Id.* The proponents of the Amendment also argued that the intention of the Amendment was to "lift many low-wage workers out of poverty." *Id.*

There is no suggestion in the Argument and Explanation section that the proponents of the Amendment aimed to expand or alter the scope of workers covered by the minimum wage. There is no suggestion that the Amendment was intended to cover professionals, executives paid on a salary basis, or persons working on a commission basis. Indeed, up to the time the Amendment received the voters'

² Available at http://www.sos.state.oh.us/sos/upload/elections/2006/gen/IssuesReport_2006.pdf (accessed January 5, 2015). The portions of the report discussing Issue 2 are attached hereto as Appendix A.

approval, the minimum wage in Ohio was set by statute, and the statute explicitly included the minimum wage exemptions found in federal law, specifically under the Fair Labor Standards Act ("FLSA"). See 2006 Am.Sub.H.B. No. 690, Section 1 (amending R.C. 4111). Rather, the policy arguments in favor of the Amendment clearly reflected a more limited goal: to increase the hourly wage rate paid to workers already entitled to minimum wage under the law. Indeed, the proponents' use of the word "restore," rather than "expand," for example, supports this interpretation.

B. The Amendment establishes requirements for compliance.

To achieve these goals, the Amendment requires the payment of a minimum wage that is higher than the minimum wage found in the FLSA. But the Amendment requires more than just a higher wage rate. It also requires recordkeeping to ensure that those entitled to receive the minimum wage are earning the minimum wage. Thus, Section 34a requires that employers keep records of the "name, address, occupation, pay rate, hours worked for each day worked and each amount paid an employee...." Ohio Constitution, Art. II, Section 34a. These records must be maintained during the entirety of an employee's employment, and for a period of at least three years following termination of the employee. The information must be provided to the employee or a "person acting on behalf" of the employee "without charge." *Id.*

C. The Amendment sets up remedies for noncompliance.

If an employee believes that there has been a "violation of any section or any law or regulation" implementing its requirements, the employee can file a complaint with "the state," which can also begin an investigation on its own initiative. *Id.* An employee may also file a lawsuit, as may the attorney general, against the employer for "equitable and monetary relief." *Id.* The lawsuit may be on behalf of the employee herself, or on

behalf of "all similarly situated employees...." *Id.* The remedies available in this individual or class action lawsuit include:

- Back wages;
- "Damages," calculated as an additional two times the amount of the back wages;
- Costs of the suit;
- Reasonable attorney's fees;
- A fine of \$150 per day in the case of a violation of the anti-retaliation provisions of the Amendment for each day the violation continued.

D. The Amendment was designed to clarify the enforcement of the law by adopting the FLSA's definitions.

To assure Ohio voters that the meaning of the Amendment's terms was clear, and thus would not be difficult to enforce or result in litigation, proponents' campaign literature discussed how those terms would be interpreted. For example, pro-Amendment literature stated:

(1) The Amendment defines "employer," "employee," and "employ" **as having the same meanings as under the federal Fair Labor Standards Act.** Clear definitions for terms such as "employ" and "casual basis" will not necessitate litigation to clarify their meanings because those terms have been established by federal regulations, well settled case law, or both.

(Emphasis added.) 2006 Am.Sub.H.B. No. 690, Section 6. Thus, even before the Amendment passed, the proponents of it were clear in their understanding that the meanings of the FLSA would apply.

Furthermore, the same campaign literature noted that:

(5) Employment law experts explain that state authorities in Ohio will undoubtedly interpret the parallel language in the Amendment in the same manner as the federal Department

of Labor, clarifying that employers need not keep irrelevant records for non-hourly employees.

(Emphasis added.) *Id.* As backers of the Amendment told Ohio voters, "parallel language" in the Amendment and from the U.S. Department of Labor ("DOL")³ would be read together, "clarifying" the recordkeeping requirements of the Amendment. *Id.*

E. Section 34a's textual content clearly intends to exempt non-hourly employees.

The foregoing passage in particular demonstrates the intent to preserve minimum wage exemptions found in the FLSA by incorporating the meaning of that statute into the Amendment. A "non-hourly" employee is a short-hand reference for an exempt employee.⁴ Keeping records, including records of hours worked during a workweek, is "irrelevant" for exempt employees because they are paid on a salary basis. Thus, it is not necessary to know whether they worked 30, 40, or 50 hours in a week, because they receive the same amount of compensation every week regardless of the number of hours worked. Alternatively, in the case of an outside salesperson, their compensation is usually based on commission, which is related not to the hours worked but to their sales generated.

If, as the court of appeals held, Appellees are not exempt from the Amendment's requirements, it is necessary to keep records of their hours worked. It is not possible to determine whether employees have been paid the minimum wage unless their hours are tracked so that their total compensation can be divided by their total earnings to see if it is above the statutory minimum level specified as a set amount per hour. Clearly,

³ The DOL is the agency responsible for enforcing the FLSA.

⁴ Non-hourly paid employees would include salaried employees because payment of a salary is a necessary precondition to being classified as exempt under the FLSA. 29 C.F.R. § 541.602. Thus, the literature obviously refers, at least in part, to exempt employees.

then, maintaining records for exempt employees under the FLSA is no longer "irrelevant"; doing so is absolutely necessary in order to comply with the law. That is not what the advocates of the Amendment told Ohioans was the effect of the Amendment. In fact, advocates told voters the opposite.

F. *The General Assembly adopted R.C. 4111.14 to implement the Amendment, as the text of Section 34a expressly provides.*

Section 34a of the Ohio Constitution states:

Laws may be passed to implement [34a's] provisions and create additional remedies, increase the minimum wage rate and extend the coverage of the section, but in no manner restricting any provision of the section or the power of municipalities under Article XVIII of this constitution with respect to the same.

Ohio Constitution, Art. II, Section 34a. R.C. 4111.14 was enacted with this purpose in mind: "Pursuant to the general assembly's authority to establish a minimum wage under Section 34 of Article II, Ohio Constitution, this section is in implementation of Section 34a of Article II, Ohio Constitution." R.C. 4111.14(A). Moreover, the General Assembly made clear that it was "enact[ing] [4111.14] according to the proponent's campaign materials...." 2006 Am.Sub.H.B. No. 690, Section 6.

G. *For seven years, all Ohio employers, including those represented or counseled by amicus here, complied with the Amendment, the statute, and the rules and regulations.*

For many years, Ohio employers have operated under a common-sense interpretation of Section 34a and R.C. 4111.14. Indeed, the proponents' campaign literature encouraged such an approach with their assurance about "irrelevant" records and the FLSA "clarifying" various terms in Section 34a. See 2006 Am.Sub.H.B. No. 690, Section 6. Meanwhile, in the courts, both before and after the adoption of Section 34a, jurists consistently applied the FLSA's exemptions to Ohio's minimum

wage law.⁵ In doing so, Ohio courts have reaped the benefit of **decades of FLSA jurisprudence** defining the scope of coverage as well as the burden to be borne by an employer in classifying an employee as exempt.

The **administrative agency** necessary for administration of the Amendment holds a similar view. Each year, the Department of Commerce's ("DOC") Wage and Hour Section publishes a notice for employers. The notice announces the new minimum wage, recalculated for inflation as required by Section 34a, and also announces information about which employees must be paid the minimum wage. For many years, the notice from the DOC has advised employers and employees alike that certain categories of employees, including but not limited to outside salespersons like Appellees here, are **"exempt"** from minimum wage requirements.⁶

Ohio employers, and their counsel represented by amicus OMLA, have benefited from these well-established legal principles in classifying employees and in maintaining records. The proponents of Section 34a were clearly motivated by a desire to increase the wage rate paid to minimum wage workers, and **not to abandon decades of jurisprudence** regarding the categories of workers subject to the minimum wage and the type of records required to be maintained.

⁵ See, e.g., *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 501 (6th Cir. 2007) (Ohio and federal minimum wage laws are interpreted similarly); *Murray v. Mary Glynn Homes, Inc.*, N.D. Ohio No. 1:11-CV-532, 2013 U.S. Dist. LEXIS 114310, at *29 (Feb. 20, 2013) (relief available under Section 34a does not differ from FLSA); *Dillworth v. Case Farm's Processing, Inc.*, N.D. Ohio No. 5:08CV1694, 2009 U.S. Dist. LEXIS 76947, at *15 (Aug. 27, 2009) ("Ohio's minimum wage and hour statute... 'expressly incorporates the standards and principles found in the FLSA.'"); *Trocheck v. Pellin Emergency Medical Services, Inc.*, 61 F. Supp. 2d 685, 699-700 (N.D. Ohio 1999) (finding analysis of an FLSA misclassification claim applies equally to a claim brought under Ohio law).

⁶ See Appendix B.

II. **Section 34a should be interpreted to include within its meaning the exemptions from the minimum wage found in the FLSA, and therefore R.C. 4111.14 does not conflict.**

A. ***Section 34a refers to the entirety of the FLSA, not a portion of it.***

Interpreting Section 34a is ultimately very straightforward. Section 34a reads:

As used in this section: "employer," "employee," "employ," "person" and "independent contractor" **have the same meanings as under the federal Fair Labor Standards Act** or its successor law, except that "employer" shall also include the state and every political subdivision and "employee" shall not include an individual employed in or about the property of the employer or individual's residence on a casual basis. Only the exemptions set forth in this section shall apply to this section.

(Emphasis added.) Ohio Constitution, Art. II, Section 34a. The meaning of various terms in the Amendment is the "same" as the FLSA. Importantly, Section 34a **doesn't single out a particular section of the FLSA**, but refers to the FLSA in its entirety.

Thus, it adopts the FLSA's meanings of these various terms in their entirety as well.

The dispute over whether Section 34a is "self-executing," therefore, ultimately misses the point. The important question is who is an "employee" for purposes of Section 34a. Appellee's argument assumes that the Amendment only adopted half of the FLSA's meaning about this term, but there is no suggestion in the text of the Amendment that this is the case. Accordingly, even if the Amendment is "self-executing," at least two critical questions go unanswered: who can utilize that cause of action and whether any legal duty has been violated. See *also* § IV, *infra*. The answers to those questions come only through analysis of what Section 34a intended when it referred to the FLSA generally, and not to a particular section of it.

B. Reading Section 34a to include multiple exemptions is a common-sense reading of the Amendment.

Appellees point to a phrase in the Amendment that reads "[o]nly the exemptions set forth in this section shall apply to this section." (Emphasis added.) Ohio Constitution, Art. II, Section 34a. A textual review of Section 34a, however, demonstrates that this provision can't possibly be intended as a limitation. According to Appellees, and the court of appeals, an "exemption" removes certain categories of employees from the minimum wage requirements. See *Haight v. Cheap Escape Co.*, 2014-Ohio-2447, 11 N.E.3d 1258, ¶ 17 (2d Dist.). An exemption does not, however, remove persons in those categories from the definition of employee. *Id.*

Applying this rule to Section 34a, there is only one exemption. Specifically, "employees" of a small, family-owned business who are family members need not be paid the minimum wage, nor have their hours of work tracked. See Section 34a ("[t]he provisions of [Section 34a] shall not apply to [the above] employees. . .").

Section 34a does identify several categories of employees who receive a lower minimum wage, like (1) individuals employed by employers making less than \$250,000 a year, (2) minors, (3) tipped employees, and (4) disabled employees. *Id.* But these individuals are not "exempt" because they are still owed a minimum wage and records of their hours worked must still be maintained.

Finally, Section 34a contains one exclusion from the definition of "employee." That term "does not include individuals employed in or about the property of the employer or an individual's residence on a casual basis. . . ." (Emphasis added.) *Id.* This clause removes from the definition of employee a particular group of people.

Thus, the plural "exemptions" could only be understood to encompass Section 34a's single exemption—not found in the FLSA—and the exemptions in the FLSA, which both Section 34a and R.C. 4111.14(B)(1) incorporate. To read otherwise would, in the words of Judge Welbaum, "make no sense." *Haight*, 2014-Ohio-2447, 11 N.E.3d 1258, at ¶ 30 (Welbaum, J., dissenting).

C. *No other provision of the Constitution can limit Section 34, pursuant to which the General Assembly adopted R.C. 4111.14, and therefore the General Assembly's enactment must be given effect.*

Separate from Section 34a, for over 100 years, Section 34, Article II, of the Ohio Constitution has given the General Assembly exclusive constitutional authority to establish a minimum wage:

Laws may be passed fixing and regulating the hours of labor, **establishing a minimum wage**, and providing for the comfort, health, safety and general welfare of all employees; and **no other provision of the constitution shall impair or limit this power**.

(Emphasis added.) Ohio Constitution, Art. II, Section 34. This section grants broad authority to the General Assembly notwithstanding any other provision of the Constitution. See *State ex rel. Bd. of Trustees v. Bd. of Trustees*, 12 Ohio St.2d 105, 107, 233 N.E.2d 135 (1967).

1. *The court of appeals' decision creates conflict where none need exist.*

Accepting Appellee's argument creates an untenable conflict between Section 34 and Section 34a. The General Assembly enacted R.C. 4111.14 pursuant to its authority under Section 34. See § I.F, *supra*. That authority—to establish a minimum wage—necessarily includes the power to determine who is eligible to receive any such minimum wage. Holding that R.C. 4111.14 is unconstitutional would, therefore, nullify a

legislative act specifically authorized in the constitution, that is, the General Assembly's power to legislate on the minimum wage. See *State ex rel. King v. Summit Cty. Council*, 99 Ohio St.3d 172, 176, 2003-Ohio-3050, 789 N.E.2d 1108, ¶ 37 (in determining whether there is a conflict, "the test is whether one provision permits that which the other provision forbids, and vice versa").

2. *Reading Section 34a to include the full FLSA harmonizes the conflict the court of appeals decision creates.*

The Court can avoid entirely having to resolve any conflict between Sections 34 and 34a by reading these sections in harmony instead. It is only the court of appeals' holding that creates this constitutional conflict. *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶ 9 ("this Court will not decide constitutional issues unless absolutely necessary"); *Cincinnati v. De Golyer*, 25 Ohio St.2d 101, 106, 267 N.E.2d 282 (1971) ("where a court is faced with two possible interpretations of a statute or ordinance, one which would render it constitutional and another which would render it unconstitutional, it is the duty of the court to choose that interpretation which will uphold the validity of the statute or ordinance."). If Ohioans had intended for Section 34a to conflict with Section 34, then surely Section 34a would not have been silent regarding that conflict.

III. **The court of appeals' interpretation in this case would lead to a devastating restructuring of Ohio wage and hour law and the cost would be destructive to the Ohio economy.**

A. ***The scope of the opinion doesn't just affect outside salespersons, like Appellees here, but all other exempted employees.***

Appellees were outside sales employees. They were "non-hourly" employees, with "all or a substantial part of their pay" through commissions. See *Haight*, 2014-Ohio-2447, 11 N.E.3d 1258, at ¶ 5. Under the FLSA, they were properly categorized as

exempt. 29 U.S.C. § 213(a)(1). But the Court cannot look at this case in a vacuum; the effect of Appellees' and the court of appeals' reasoning would sweep away many exemptions in the FLSA, including:

- Executive employees, 29 U.S.C. § 213(a)(1);
- Administrative employees, 29 U.S.C. § 213(a)(1);
- Professional employees, 29 U.S.C. § 213(a)(1) (collectively the executive, administrative, and professional exemptions are commonly referred to as the "white collar" exemptions);
- Certain agricultural employees, 29 U.S.C. § 213(a)(6);
- Certain amusement and recreational establishment employees, 29 U.S.C. § 213(a)(3); and
- Certain computer systems analysts, computer programmers, software engineers, and other similarly skilled employees, 29 U.S.C. § 213(a)(17).

In each case, if outside sales employees are not exempt under the court of appeals' rationale, then all other people in these categories are likewise not exempt.

There are potentially hundreds of thousands, if not millions, of employees in these groups in Ohio. The DOL calculates Ohio's civilian employed workforce as of November 2014 as approximately 5,453,900 workers. U.S. Dept. of Labor, Bureau of Labor Statistics, *Economy at a Glance—Ohio*.⁷ In Ohio:

- 1,866,067 people are employed in "management, business, science, and arts occupations," and most of these workers would be properly classified as exempt under the white collar exemptions;
- 1,267,347 people work in "sales and office occupations," and many of these workers are exempt from the minimum wage under the white collar exemptions or the outside salesperson exemption; and
- food and agriculture supports 1 in 7 jobs in Ohio, and there are more than 75,000 farm operations in the state. See Feran, Tom, PolitiFact Ohio, *John Kasich says agriculture is the "strongest industry in Ohio,"* (Dec. 12,

⁷ Available at http://www.bls.gov/eag/eag.oh.htm#eag_oh.f.P (accessed Dec. 23, 2014).

2012);⁸ U.S. Dept. of Agriculture, *2013 State Agriculture Overview: Ohio*, (2013).⁹ At least some of these employees would be exempt under the agricultural worker exemption.¹⁰

The court of appeals decision excludes all of the exemptions found in the FLSA. Losing the minimum wage exemptions under the FLSA will, therefore, have a significant impact on many sectors of the economy in Ohio.

B. *If there are no exemptions, each group would now be subject to the minimum wage and recordkeeping requirements of Section 34a, to the detriment of employer, employee, and the public alike.*

The practical effect of the loss of these exemptions means that individuals in a range of jobs will be owed minimum wage. While amici here have some concern about the possibility of increased wage expense associated with such an outcome, and the negative impact on Ohio's competitiveness as a place to do business, the record keeping obligations are even more concerning. The consequences of this ruling would be numerous, onerous, and far reaching.

1. *The regulatory burden on Ohio employers will grow by requiring employers to keep records on an entirely new swath of employees.*

Even if the loss of the exemption does not entail an increase in wage expense, it will necessarily require an increase in record keeping burdens. As noted above, records of hours worked must be kept for all "employees." Declaring R.C. 4111.14

⁸ Available at <http://www.politifact.com/ohio/statements/2012/dec/12/john-kasich/john-kasich-says-agriculture-strongest-industry-oh/> (accessed Dec. 23, 2014).

⁹ Available at http://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=OHIO (accessed Dec. 23, 2014).

¹⁰ It is, of course, true that not all of these workers would be exempt. The agricultural exemption applies only to certain employees. 29 U.S.C. § 213(a)(6). The point, however, is that this is a very large issue that has wide-ranging implications for Ohio's economy, and is not a minor or limited issue as characterized in Appellees' jurisdictional briefing. See Plaintiff/Appellees' Memo in Opposition to Jurisdiction at 4-5.

unconstitutional will mean that employers must track the hours that judges,¹¹ doctors, attorneys, managers, and many others work during the work week. Small and farm businesses in this state, an engine of economic growth, will be acutely burdened by these requirements.

Another regulatory burden arises from the mere fact that Ohio law would depart from federal law. If Section 34a does not follow the FLSA, Ohio employers will be required to classify each of their employees twice — once to determine their status under federal law and once under the Amendment. Of course, if the FLSA exemptions are inapplicable under Ohio law, hundreds of thousands, if not millions, of workers properly classified as exempt under federal law will not be exempt from Ohio's minimum wage requirements. Inconsistent results will be particularly problematic for multi-state employers who classify their employees under the federal standard with the expectation that employees exempted from the federal law are also exempt from Ohio's minimum wage requirements (as they have been for decades).

2. *The court of appeals holding will make Ohio unique among states in the Midwest and elsewhere.*

Many states have implemented minimum wages at a higher hourly rate than the federal minimum wage. However, most states have **not** elected to abandon the FLSA's definitions for exempt and non-exempt employees. In states all around Ohio, state law

¹¹ "Employer" under Section 34a includes the state and every political subdivision of the state. See Ohio Constitution, Art. II, Section 34a. Since the definition refers to the state, every judge could arguably be an employee of the state and thus have an apparent obligation to keep records of hours worked.

tracks the FLSA when it comes to the issue of who is exempt from payment of minimum wage.¹²

California is a notable example of what happens when the state and federal rules differ. California has different exemption rules from the FLSA, and has adopted laws that alter the proof needed to establish certain employees as exempt. See Kimberlin, *California Courts Have Yet To Offer Clear Guidance on the Certification of Class Actions in Wage and Hour Disputes*, 25 Los Angeles Lawyer 22, 23-24 (2002) ("Many employers previously unaware of the significant differences between California's wage and hours [sic] laws and the federal Fair Labor Standards Act have learned at considerable cost that California's tests for exemption from overtime pay requirements are harder to meet than those under the federal law."). These distinctions between California and federal law have overwhelmed California courts with wage and hour litigation. See Sullivan, *Enforceability of Choice-of-Law Clauses in the Context of Misclassification Litigation: Bridging the Gap Between Worker and Employer*, 47 Ga. L. Rev. 1359, 1391 (2013) ("Given that states like California and Oregon are known for having favorable labor laws, it is customary for wage and hour class actions to be filed in such forums, especially in California."). At least in California, these distinctions were knowingly adopted.

Appellees want this Court to abandon decades of FLSA precedent, ignore the interpretation of the General Assembly, the regulatory agency, and the proponents of

¹² For example, the following neighboring states expressly adopt the FLSA's exemptions or a set of exemptions that closely tracks those of the FLSA: Michigan: Mich. Comp. Laws Ann., Chapter 408.420; Pennsylvania: 43 Pa. C. Stat. 333.105; West Virginia: W. Va. Code § 21-5C-1; Kentucky: KRS 337.010; Indiana: Burns Ind. Code Ann. § 22-2-2-3. Other states, which do not border Ohio, provide additional examples: Virginia: Va. Code Ann. § 40.1-28.9; Oklahoma: 40 Okl. St. 197.4.

the Amendment, thereby rendering Ohio uncompetitive with other states. Because the plain text of Section 34a does not require it, this absurd result can be avoided.

3. *The Appellee's interpretation harms employees, and not just employers.*

The best example of this harm is to Appellees themselves. As outside salespersons, they are exempt under the FLSA because they "work[] individually, there are no restrictions respecting the time [they] shall work and [they] can earn as much or as little, within the range of [their] ability, as [their] ambition dictates." *Wolfram v. PHH Corp.*, S.D.Ohio No. 1:12-cv-599, 2014 U.S. Dist. LEXIS 82378, at *11 (June 17, 2014). Thus, if an outside sales employee wants to limit his or her working hours, the employee can **choose** to do so.

If Appellees' interpretation prevails, however, many employers would respond to the possibility of minimum wage liability by **imposing a limit on the hours** the outside salesperson may work. Such a limit would assist an employer in ensuring that any liability that could result from insufficient earnings of the employee is limited to a manageable amount, or ensure that some base compensation the employer decides to provide is sufficient to cover any minimum wage liability. In that limitation on hours, however, comes an inherent limitation on the earnings of a commissioned salesperson. That harms the employee in a very tangible sense.

Moreover, in order to monitor the hours worked and ensure legal compliance, employers may be **less willing to support alternative work arrangements** for exempt employees and may not be able to be as flexible with their exempt employees. The law would move **away** from accommodating the increasing demand for flexibility in working arrangements, and towards a more rigid, documented system. This will be necessary

so that employers will be able to assure themselves, their counsel, and the regulators that employees are earning at least the minimum wage and to comply with Section 34a's record keeping provisions.

C. *Thousands of Ohio employers will now face potential liability from litigation exposure.*

1. *Class actions will result.*

The penalties associated with violations of the Amendment are significant. As noted above, back pay, double damages, attorney's fees and costs are all recoverable, in addition to "equitable relief." This latter category could presumably include an order to maintain records that are not being maintained.

Section 34a also permits class actions. Indeed, **the complaint in this case was amended to seek class certification.** See *Haight*, 2014-Ohio-2447, 11 N.E.3d 1258, at ¶ 6. Thus, if millions of Ohio workers presently classified as exempt under the FLSA are not exempted from Section 34a's coverage, their employers will be subjected to a wave of class action litigation on behalf of middle and high wage earners for violation of the Amendment's record keeping provisions. Ohio's courts could be **inundated with claims asserted for technical violations** of Section 34a's recordkeeping requirement on behalf of employees who were never within the intended class of beneficiaries of the Amendment. This is contrary to the proponent's assertion that the FLSA standards would be used to exempt employees under Section 34a from the "irrelevant" recordkeeping requirements. See 2006 Am.Sub.H.B. No. 690, Section 6.

2. *Appellee's interpretation creates a minimum wage trap for well-intentioned and law abiding employers.*

Currently, many, if not most, Ohio employers do not track the hours worked by their exempt employees. If these employees suddenly became eligible for minimum

wage, they could bring lawsuits alleging that they worked so many hours that they failed to receive the minimum wage. This would be the case even though their employer set a salary designed to pay them more than the minimum wage for their scheduled hours of work.

If such an employee were to now assert a claim for additional time, the employer would have no records to refute the employee's allegations. Indeed, for the last three years, his employer could not even establish that the employee worked the number of hours he was scheduled to work, let alone controvert his claim to have worked **additional** hours. Employers would be forced to prove a negative – that no work was done away from the workplace or that employees previously believed to be exempt did not work more than they were scheduled.

3. *The unintended consequences could mirror the outcome of Scott-Pontzer.*

At the end of the day, the Court could witness a result akin to what happened after *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 1999-Ohio-292, 710 N.E.2d 1116, was decided. *Scott-Pontzer* opened the floodgates of litigation, upended settled expectations, and was so widely derided that, just four years later, the Court limited the decision. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 59. This is what Ohio employers and employees face if the court of appeals' decision stands. The Court "would abandon certainty in the law and contribute to the continuing morass of litigation." *Id.*

IV. **Whether Section 34a is "self-executing" is irrelevant to this case and should not stand in the way of correcting the decision below.**

Appellees have urged this Court to dismiss the appeal as improvidently granted. They reason that no implementing legislation was necessary and Section 34a is "self-

executing." This argument is a red herring, and amici urge the Court to reject it. The Appellees conflate the distinct notions of a cause of action and a remedy. A cause of action only exists with a violation of a legal duty. The court of appeals properly described the "pivotal question" as the constitutionality of R.C. 4111.14 precisely because there can be no violation of the duty Section 34a imposes without first deciding what "employee" means. See *Haight*, 2014-Ohio-2447, 11 N.E.3d 1258, at ¶ 9. In determining whether R.C. 4111.14 is constitutional, the Court must necessarily decide the meaning of "employee" in Section 34a as well as the intent behind Section 34a's reference to the FLSA. Section 34a simply **cannot be executed at all** until it is known what is being executed.

Moreover, allowing this decision to stand will mean that Montgomery County will have a different rule than the rest of the state. All of the problems described in Section III, *supra*, will be visited upon a single county. In addition, allowing the decision to stand without addressing the issue that has been raised will cast a **pall of uncertainty over wage and hour law** in Ohio. Over time, this uncertainty combined with the risk of class action exposure will lead to a *de facto* adoption of the court of appeals' mistaken decision as the law of Ohio.

Proposition of Law No. 2: If the statutory definition of "employee" under R.C. 4111.14(B)(1) is unconstitutional and invalid, that conclusion and ruling should apply prospectively only under the three-part test propounded in *DiCinzo v. A-Best Products Company*.

I. **Damage to Ohio occurs regardless of the timing of the decision.**

Any application of the court of appeals' holding, prospective or retroactive, imposes substantial harm on Ohioans. **The minimum wage exemptions did not spring into existence by virtue of R.C. 4111.14.** On the contrary, minimum wage

exemptions have existed in Ohio law for decades. See 2006 Am.Sub.H.B. No. 690, Section 1 (amending R.C. 4111). As discussed above, there is no indication in Section 34a itself or, in the years since its adoption, by the courts interpreting Section 34a (until now) or the General Assembly that the minimum wage exemptions were somehow abolished. Employers and employees have relied on these exemptions in their employment relationships for decades — and have continued to do so in the years following Section 34a — and have settled expectations on who is and who is not entitled to minimum wage. For all the reasons above, therefore, the Court should not reach this proposition of law.

II. **The Sunburst doctrine would at least limit the damage to the future.**

If for some reason, however, the Court rejects Appellant's first proposition of law and upholds the elimination of the minimum wage exemptions, the Court's decision should certainly only apply prospectively because (1) the decision establishes a new principle of law that was not foreshadowed in prior decisions, (2) retroactive application retards the purposes of Section 34a, and (3) retroactive application causes an inequitable result. See *DiCenzo v. A Best Prods. Co.*, 120 Ohio St.3d 149, 2008-Ohio-5327, 897 N.E.2d 132, paragraph two of the syllabus. "Consistent with what has been termed the *Sunburst* Doctrine, state courts have * * * [sic] recognized and used prospective application of a decision as a means of avoiding injustice in cases dealing with questions having widespread ramifications for persons not parties to the action." (Citation omitted.) *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, 884 N.E.2d 1056, ¶ 30. Prospective application of the holding here would limit the harm of any such decision only at the margins, leaving employers

and employees in Ohio vulnerable to the substantial negative effects of abolishing minimum wage exemptions for years to come.

CONCLUSION

In 2006, Ohioans expressed a clear desire for an increase in the minimum hourly wage. There was no reason to think, however, that the exemptions from that hourly minimum wage that had existed in Ohio and federal law for decades would vanish with their vote, and proponents of the Amendment encouraged that belief with their supporting arguments. Indeed, those exemptions have continued to be applied in the years since the Amendment was adopted. Implementing that intent, pursuant to its authority under independent constitutional authority in Section 34, the General Assembly lawfully enacted Section 4111.14. The amici urge this Court to give that act effect by reversing the decision of the court of appeals, and making clear to all employers that they, and the Ohio Department of Commerce, were correct to conclude that the exemptions found in federal and state law continue to apply to employees in Ohio.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amicus Curiae was served by regular U.S. Mail, postage prepaid, upon the following counsel, this 5th day of January, 2015:

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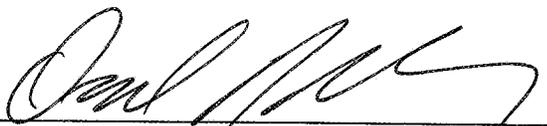
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APPENDICES

Appendix A

OHIO ISSUES REPORT

STATE ISSUES BALLOT INFORMATION FOR THE
NOVEMBER 7, 2006 GENERAL ELECTION



DISTRIBUTED BY THE OHIO BALLOT BOARD

This publication gives Ohioans an opportunity to review the full text and ballot language of the five state issues on the November 7 ballot, and to compare the arguments for and against each issue. The ballot language for each issue was certified by the bi-partisan Ohio Ballot Board. The explanations and arguments for and against each issue were prepared by persons appointed by the committee representing the petitioners and are printed as submitted to the Secretary of State's office.

We urge all Ohioans to study the issues carefully before voting. Remember, when voting at the polls, bring with you a valid and current form of identification with your current address.

OHIO BALLOT BOARD

Chairman

Secretary of State J. Kenneth Blackwell

Senator Randy Gardner

Senator Teresa Fedor

Mr. William N. Morgan

Mr. Thomas R. Winters, Esq.

NOTICE TO VOTERS:

As required by law, this 2006 Ohio Issues Report includes ballot language and arguments for and against each statewide issue submitted to voters for the November General Election. This piece also includes the actual, proposed language amendments to the Ohio Constitution.

Voters should note, however, that, as of the publication date of this Report, legal action was pending in regard to State Issues 1, 4 and 5. It is possible that court action may affect whether voters will actually vote on these Issues on Election Day, November 7, 2006.

Voters are encouraged to remain informed on the status of pending legal action in relation to these statewide ballot Issues.

TABLE OF CONTENTS

ISSUE 1	1
(REFERENDUM ON AMENDED SUBSTITUTE SENATE BILL NO. 7)	
ISSUE 2	20
(PROPOSED AMENDMENT TO THE OHIO CONSTITUTION)	
ISSUE 3	25
(PROPOSED AMENDMENT TO THE OHIO CONSTITUTION)	
ISSUE 4	30
(PROPOSED AMENDMENT TO THE OHIO CONSTITUTION)	
ISSUE 5	33
(PROPOSED LAW)	

**ARGUMENT AND EXPLANATION
IN SUPPORT OF ISSUE 2**

Vote **YES** on Issue 2 to restore the value of the minimum wage so hard working Ohioans are able to provide for themselves and their families. Raising the wage will encourage personal responsibility and lift many low-wage workers out of poverty.

The real value of the federal minimum wage has reached a 50-year low because it has not kept up with the rising cost of living. Today, a full-time worker at the current minimum wage of \$5.15 earns just \$206 per week, or \$10,712 per year, well below the poverty line for a family of three.

We can do better. The Ohio Minimum Wage Amendment would restore the value that the minimum wage has lost over time.

The Amendment would raise Ohio's minimum wage from \$5.15 to \$6.85 per hour on January 1, 2007. Each year afterwards, the minimum wage would increase if the cost of living rises, protecting Ohio's lowest paid workers from losing ground. It also provides enforcement measures, similar to the federal minimum wage law, so Ohioans can protect themselves against unscrupulous employers.

The Amendment would raise wages for over 700,000 Ohio workers. On average, these workers provide half of their families' weekly earnings. Nearly three-quarters of the workers who would benefit are adults over twenty. More than 250,000 Ohio children have a parent who will benefit.

Twenty-two other states have raised the minimum wage above the federal level and studies show that **raising the minimum wage substantially helps families while improving the overall economy.** Between 1997 and 2003, states with higher minimum wages had more overall job growth.

Ohioans have always valued hard work, but our minimum wage has not kept pace. We believe honest work deserves honest pay. **Vote YES on Issue 2 to restore the value of the minimum wage for hard working Ohioans.**

Prepared by: Ohioans for a Fair Minimum Wage,
Hon. C. J. Prentiss, Pierrette M. Talley, Katrin Heins, and Gary L. Coles

**FULL TEXT OF
PROPOSED
AMENDMENT**

**THE OHIO FAIR
MINIMUM WAGE AMEND-
MENT**

*Be it Resolved by the People of the
State of Ohio that Article II, Sec-
tion 34a of the Ohio Constitution is
hereby enacted as follows:*

ARTICLE II, Section 34a

Except as provided in this section, every employer shall pay their employees a wage rate of not less than six dollars and eighty-five cents per hour beginning January 1, 2007. On the thirtieth day of each September, beginning in 2007, this state minimum wage rate shall be increased effective the first day of the following January by the rate of inflation for the twelve month period prior

to that September according to the consumer price index or its successor index for all urban wage earners and clerical workers for all items as calculated by the federal government rounded to the nearest five cents. Employees under the age of sixteen and employees of businesses with annual gross receipts of two hundred fifty thousand dollars or less for the preceding calendar year shall be paid a wage rate of not less than that established under the

**Explanation and Argument
Against Issue 2**

Vote NO on Issue 2 for these reasons:

- **It's a massive intrusion into your personal privacy.** Backers say the amendment is about the minimum wage, but read the fine print. It gives employees or any person acting on behalf of an employee the right to demand private salary records for all employees (not just hourly workers). This will give access to your private information, which could then become public. Disclosure of home addresses and other personal data will put you at risk of identity theft.
- **Records requirements are costly and open employers to harassment.** The amendment was drafted by anti-business activists who propose that all public and private employers – including state and local governments and homeowners – maintain decades worth of records while employees are working and three years afterward. This will cost millions of dollars, yet employers will have to provide these records without charge to any employee or employee representative who asks. Unhappy workers or activist organizations will have authority to make repeated, costly requests.
- **The amendment means a huge increase in the cost of government.** State and local governments will be saddled both with enforcing the amendment and meeting their own costly obligations as major employers. You'll foot the bill.
- **The amendment doesn't really help low-income Ohioans.** A higher minimum wage will trigger thousands of layoffs in lower-paying jobs – hurting, rather than helping, Ohioans who need higher wages the most. Better approaches are to increase the federal Earned Income Tax Credit and to improve job-development and training.
- **As part of the Constitution, the amendment cannot easily be changed to correct unintended consequences.** This amendment, which is hostile to both employers and employees, will damage Ohio's job climate. The legislature will be powerless to fix it.

VOTE NO ON ISSUE 2.

Submitted by Ohioans to Protect Personal Privacy

John C. Mahaney, Jr., Andrew Doehrel and Ty Pine

federal Fair Labor Standards Act or its successor law. This gross revenue figure shall be increased each year beginning January 1, 2008 by the change in the consumer price index or its successor index in the same manner as the required annual adjustment in the minimum wage rate set forth above rounded to the nearest one thousand dollars. An

employer may pay an employee less than, but not less than half, the minimum wage rate required by this section if the employer is able to demonstrate that the employee receives tips that combined with the wages paid by the employer are equal to or greater than the minimum wage rate for all hours worked. The provisions of this section shall not apply to em-

ployees of a solely family owned and operated business who are family members of an owner. The state may issue licenses to employers authorizing payment of a wage rate below that required by this section to individuals with mental or physical disabilities that may otherwise adversely affect their opportunity for employment.

As used in this section: "employer," "employee," "employ," "person" and "independent contractor" have the same meanings as under the federal Fair Labor Standards Act or its successor law, except that "employer" shall also include the state and every political subdivision and "employee" shall not include an individual employed in or about the property of the employer or individual's residence on a casual basis. Only the exemptions set forth in this section shall apply to this section.

An employer shall at the time of hire provide an employee the employer's name, address, telephone number, and other contact information and update such information when it changes. An employer shall maintain a record of the name, address, occupation, pay rate, hours worked for each day worked and each amount paid an employee for a period of not less than three years following the last date the employee was employed. Such information shall be provided without charge to an employee or person acting on behalf of an employee upon request. An employee, person acting on behalf of one or more employees and/or any other interested party may file a complaint with the state for a violation of any provision of this section or any law or regulation implementing its provisions. Such complaint shall be promptly investigated and resolved by the state. The employee's name shall be kept confidential unless disclosure is necessary to resolution of a complaint and the employee consents to disclosure. The state may on its own initiative investigate an employer's compliance with this section and any law or regulation implementing its provisions. The employer shall make available to the state any records related to such investigation and other information required for

enforcement of this section or any law or regulation implementing its provisions. No employer shall discharge or in any other manner discriminate or retaliate against an employee for exercising any right under this section or any law or regulation implementing its provisions or against any person for providing assistance to an employee or information regarding the same.

An action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person acting on behalf of an employee or all similarly situated employees in any court of competent jurisdiction, including the common pleas court of an employee's county of residence, for any violation of this section or any law or regulation implementing its provisions within three years of the violation or of when the violation ceased if it was of a continuing nature, or within one year after notification to the employee of final disposition by the state of a complaint for the same violation, whichever is later. There shall be no exhaustion requirement, no procedural, pleading or burden of proof requirements beyond those that apply generally to civil suits in order to maintain such action and no liability for costs or attorney's fees on an employee except upon a finding that such action was frivolous in accordance with the same standards that apply generally in civil suits. Where an employer is found by the state or a court to have violated any provision of this section, the employer shall within thirty days of the finding pay the employee back wages, damages, and the employee's costs and reasonable attorney's fees. Damages shall be calculated as an additional two times the amount of the back wages and in the case of a violation of an anti-retaliation provision an amount

set by the state or court sufficient to compensate the employee and deter future violations, but not less than one hundred fifty dollars for each day that the violation continued. Payment under this paragraph shall not be stayed pending any appeal.

This section shall be liberally construed in favor of its purposes. Laws may be passed to implement its provisions and create additional remedies, increase the minimum wage rate and extend the coverage of the section, but in no manner restricting any provision of the section or the power of municipalities under Article XVIII of this constitution with respect to the same.

If any part of this section is held invalid, the remainder of the section shall not be affected by such holding and shall continue in full force and effect.

DATES TO REMEMBER

OCTOBER 3

ABSENTEE BALLOTING BEGINS

OCTOBER 10

DEADLINE FOR VOTER REGISTRATION FOR GENERAL ELECTION

NOVEMBER 4

DEADLINE FOR APPLYING FOR AN ABSENTEE BALLOT BY MAIL
FOR THE NOVEMBER 7TH ELECTION

NOVEMBER 6

DEADLINE FOR VOTING AN ABSENTEE BALLOT IN PERSON AT A
COUNTY BOARD OF ELECTIONS FOR THE NOVEMBER 7TH ELECTION

NOVEMBER 7

ELECTION DAY

POLLS OPEN FROM 6:30 A.M. TO 7:30 P.M.

FOR MORE INFORMATION, CONTACT:

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180 E. BROAD STREET, 15TH FLOOR
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Appendix B



TED STRICKLAND
Governor

STATE OF OHIO MINIMUM WAGE

OHIO DEPARTMENT OF COMMERCE
DIVISION OF LABOR & WORKER SAFETY
www.com.ohio.gov/



KIMBERLYA. ZURZ
Director

NON-TIPPED EMPLOYEES

A Minimum Wage of

\$7.00 per hour (as of January 1, 2008)

"Non-Tipped Employees" includes any employee who does not engage in an occupation in which he/she customarily and regularly receives more than thirty dollars (\$30.00) per month in tips from patrons or others.

"Employers" who gross under \$255,000.00 shall pay their employees no less than the current Federal Minimum wage rate.

"Employees" under the age of 16 shall be paid no less than the current federal minimum wage rate.

"Current Federal Minimum Wage" is \$5.85 per hour. Effective July 24, 2008, it is \$6.55 per hour.

TIPPED EMPLOYEES

A Minimum Wage of

\$3.50 per hour **PLUS TIPS** (as of January 1, 2008)

"Tipped Employees" includes any employee who engages in an occupation in which he/she customarily and regularly receives more than thirty dollars (\$30.00) per month in tips from patrons or others. The tips are proven if indicated by the employee's declaration for the purposes of the federal insurance contribution act, including when tips are added to the employee's wage, his/her hourly pay cannot be less than the regular minimum wage of \$7.00 prescribed by law.

OVERTIME (ORC 4111.03)

1. An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours in excess of forty hours in one work week, except for employers grossing less than \$150,000 per year.
2. Hospitals and Nursing Homes are permitted time and one-half in excess of eighty hours in a two week period and also in excess of eight hours a day.

PERMANENT RECORDS TO BE KEPT BY THE EMPLOYER (ORC 4111.08 & 4111.14(F))

1. Each employer shall keep permanent records for at least three years, available for transcription and inspection by a duly authorized Deputy of the Division, showing the following facts concerning each employee:
 - A. Name
 - B. Address
 - C. Occupation
 - D. Rate of Pay
 - E. Amount paid each pay period
 - F. Hours worked each day and each work week
2. Determinations of compliance. The records may be opened for inspection or copying at any reasonable time and no employer shall hinder or delay authorized Deputies of the Division in the performance of their duties.

HANDICAPPED RATE (ORC 4111.06)

To prevent the curtailment of opportunities for employment and avoid undue hardship to individuals whose earning capacity is affected or impaired by physical or mental deficiencies or injuries a sub-minimum wage may be paid, as provided in the rules and regulations set forth by the Administrator.

INDIVIDUALS EXEMPT FROM MINIMUM WAGE (ORC 4111.14 (B))

1. Any individual employed by the United States;
2. Any individual employed as a baby-sitter in the employer's home, or a live-in companion to a sick, convalescing, or elderly person whose principal duties do not include housekeeping;
3. Any individual employed as an outside salesman compensated by commissions or in a bona fide executive, administrative, or professional capacity, or computer professionals.
4. Any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate government agency, if
 - (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
 - (ii) such services are not the same type of services which the individual is employed to perform for such public agency.
5. Any individual who works or provides personal services of a charitable nature in a hospital or health institution for which compensation is not sought or contemplated.
6. Any individual in the employ of a camp or recreational area for children under eighteen years of age and owned and operated by a non-profit organization or group of organizations.
7. Employees of a solely family owned and operated business who are family members of an owner.

This summary does not include all of the requirements for minimum and overtime wages. Persons should refer to ORC 4111 for specific requirements applicable to them.

POST IN A CONSPICUOUS PLACE

For further information about minimum wage issues, please contact: The Ohio Department of Commerce, Division of Labor & Worker Safety, 77 South High Street, 22nd Floor, Columbus, Ohio 43215. Phone: (614) 644-2239. TTY/TDD: 1-800-750-0750.

(REV. 10/23/07)

An Equal Opportunity Employer and Service Provider



STATE OF OHIO

2011 MINIMUM WAGE

OHIO DEPARTMENT OF COMMERCE
DIVISION OF INDUSTRIAL COMPLIANCE & LABOR

JOHN KASICH
Governor

DAVID GOODMAN
Director

www.com.ohio.gov

NON-TIPPED EMPLOYEES

A Minimum Wage of

\$7.40 per hour

"Non-Tipped Employees" includes any employee who does not engage in an occupation in which he/she customarily and regularly receives more than thirty dollars (\$30.00) per month in tips from patrons or others.

"Employers" who gross under \$271,000.00 shall pay their employees no less than the current Federal Minimum wage rate.

"Employees" under the age of 16 shall be paid no less than the current federal minimum wage rate.

"Current Federal Minimum Wage" is \$7.25 per hour.

TIPPED EMPLOYEES

A Minimum Wage of

\$3.70 per hour **PLUS TIPS**

"Tipped Employees" includes any employee who engages in an occupation in which he/she customarily and regularly receives more than thirty dollars (\$30.00) per month in tips from patrons or others. The tips are proven if indicated by the employee's declaration for the purposes of the federal insurance contribution act. Including when tips are added to the employee's wage, his/her hourly pay cannot be less than the regular minimum wage of \$7.40 prescribed by law.

Below is a partial summary of the requirements and exemptions for minimum and overtime wages. Persons should refer to Ohio Revised Code Chapter 4111 and the federal Fair Labor Standards Act of 1938, as amended, for specific requirements applicable to them. For further information about minimum wage issues, please contact: The Ohio Department of Commerce, Division of Industrial Compliance & Labor, 6606 Tussing Road, Reynoldsburg, Ohio 43068. Phone: (614) 644-2239. TTY/TDD: 1-800-750-0750.

OVERTIME

1. An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours in excess of forty hours in one work week, except for employers grossing less than \$150,000 per year.
2. Hospitals and Nursing Homes are permitted time and one-half in excess of eighty hours in a two week period and also in excess of eight hours a day.

HANDICAPPED RATE

To prevent the curtailment of opportunities for employment and avoid undue hardship to individuals whose earning capacity is affected or impaired by physical or mental deficiencies or injuries, a sub-minimum wage may be paid, as provided in the rules and regulations set forth by the Director of the Ohio Department of Commerce.

INDIVIDUALS EXEMPT FROM MINIMUM WAGE

1. Any individual employed by the United States;
2. Any individual employed as a baby-sitter in the employer's home, or a live-in companion to a sick, convalescing, or elderly person whose principal duties do not include housekeeping;
3. Any individual employed as an outside salesman compensated by commissions or in a bona fide executive, administrative, or professional capacity, or computer professionals.
4. Any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate government agency, if
 - (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
 - (ii) such services are not the same type of services which the individual is employed to perform for such public agency.
5. Any individual who works or provides personal services of a charitable nature in a hospital or health institution for which compensation is not sought or contemplated;
6. Any individual in the employ of a camp or recreational area for children under eighteen years of age and owned and operated by a non-profit organization or group of organizations.
7. Employees of a solely family owned and operated business who are family members of an owner.

PERMANENT RECORDS TO BE KEPT BY THE EMPLOYER

1. Each employer shall keep permanent records for at least three years, available for copying and inspection by the Director of the Ohio Department of Commerce, showing the following information concerning each employee:
 - A. Name
 - B. Address
 - C. Occupation
 - D. Rate of Pay
 - E. Amount paid each pay period
 - F. Hours worked each day and each work week
2. The records may be opened for inspection or copying at any reasonable time and no employer shall hinder or delay the Director of the Ohio Department of Commerce in the performance of these duties.

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STATE OF OHIO

2012 MINIMUM WAGE

OHIO DEPARTMENT OF COMMERCE
DIVISION OF INDUSTRIAL COMPLIANCE & LABOR

JOHN R. KASICH
Governor

DAVID GOODMAN
Director

www.com.ohio.gov

NON-TIPPED EMPLOYEES

A Minimum Wage of
\$7.70 per hour

'Non-Tipped Employees' includes any employee who does not engage in an occupation in which he/she customarily and regularly receives more than thirty dollars (\$30.00) per month in tips from patrons or others.

'Employers' who gross under \$283,000.00 shall pay their employees no less than the current Federal Minimum wage rate.

'Employees' under the age of 16 shall be paid no less than the current federal minimum wage rate.

'Current Federal Minimum Wage' is \$7.25 per hour.

TIPPED EMPLOYEES

A Minimum Wage of
\$3.85 per hour PLUS TIPS

'Tipped Employees' includes any employee who engages in an occupation in which he/she customarily and regularly receives more than thirty dollars (\$30.00) per month in tips from patrons or others. The tips are proven if indicated by the employee's declaration for the purposes of the federal insurance contribution act. Including when tips are added to the employee's wage, his/her hourly pay cannot be less than the regular minimum wage of \$7.70 prescribed by law.

Below is a partial summary of the requirements and exemptions for minimum and overtime wages. Persons should refer to Ohio Revised Code Chapter 4111 and the federal Fair Labor Standards Act of 1938, as amended, for specific requirements applicable to them. For further information about minimum wage issues, please contact: The Ohio Department of Commerce, Division of Industrial Compliance & Labor, 6606 Tussing Road, Reynoldsburg, Ohio 43068. Phone: (614) 644-2239. TTY/TDD: 1-800-750-0750.

OVERTIME

- 1. An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours in excess of forty hours in one work week, except for employers grossing less than \$150,000 per year.
2. Hospitals and Nursing Homes are permitted time and one-half in excess of eighty hours in a two week period and also in excess of eight hours a day.

HANDICAPPED RATE

To prevent the curtailment of opportunities for employment and avoid undue hardship to individuals whose earning capacity is affected or impaired by physical or mental deficiencies or injuries, a sub-minimum wage may be paid, as provided in the rules and regulations set forth by the Director of the Ohio Department of Commerce.

PERMANENT RECORDS TO BE KEPT BY THE EMPLOYER

- 1. Each employer shall keep permanent records for at least three years, available for copying and inspection by the Director of the Ohio Department of Commerce, showing the following information concerning each employee:
A. Name
B. Address
C. Occupation
D. Rate of Pay
E. Amount paid each pay period
F. Hours worked each day and each work week
2. The records may be opened for inspection or copying at any reasonable time and no employer shall hinder or delay the Director of the Ohio Department of Commerce in the performance of these duties.

INDIVIDUALS EXEMPT FROM MINIMUM WAGE

- 1. Any individual employed by the United States;
2. Any individual employed as a baby-sitter in the employer's home, or a live-in companion to a sick, convalescing, or elderly person whose principal duties do not include housekeeping;
3. Any individual employed as an outside salesman compensated by commissions or in a bona fide executive, administrative, or professional capacity, or computer professionals;
4. Any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate government agency, if
(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
(ii) such services are not the same type of services which the individual is employed to perform for such public agency;
5. Any individual who works or provides personal services of a charitable nature in a hospital or health institution for which compensation is not sought or contemplated;
6. Any individual in the employ of a camp or recreational area for children under eighteen years of age and owned and operated by a non-profit organization or group of organizations.
7. Employees of a solely family owned and operated business who are family members of an owner.

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STATE OF OHIO

2013 MINIMUM WAGE

OHIO DEPARTMENT OF COMMERCE
DIVISION OF INDUSTRIAL COMPLIANCE

JOHN R. KASICH
Governor

ANDRE T. PORTER
Director

www.com.ohio.gov

NON-TIPPED EMPLOYEES

A Minimum Wage of

\$7.85 per hour

"Non-Tipped Employees" includes any employee who does not engage in an occupation in which he/she customarily and regularly receives more than thirty dollars (\$30.00) per month in tips.

"Employers" who gross under \$288,000.00 shall pay their employees no less than the current federal minimum wage rate.

"Employees" under the age of 16 shall be paid no less than the current federal minimum wage rate.

"Current Federal Minimum Wage" is \$7.25 per hour.

TIPPED EMPLOYEES

A Minimum Wage of

\$3.93 per hour **PLUS TIPS**

"Tipped Employees" includes any employee who engages in an occupation in which he/she customarily and regularly receives more than thirty dollars (\$30.00) per month in tips. Employers electing to use the tip credit provision must be able to show that tipped employees receive at least the minimum wage when direct or cash wages and the tip credit amount are combined.

OVERTIME

1. An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours in excess of forty hours in one work week, except for employers grossing less than \$150,000 per year

HANDICAPPED RATE

To prevent the curtailment of opportunities for employment and avoid undue hardship to individuals whose earning capacity is affected or impaired by physical or mental deficiencies or injuries, a sub-minimum wage may be paid, as provided in the rules and regulations set forth by the Director of the Ohio Department of Commerce.

RECORDS TO BE KEPT BY THE EMPLOYER

1. Each employer shall keep records for at least three years, available for copying and inspection by the Director of the Ohio Department of Commerce, showing the following information concerning each employee:
 - A. Name
 - B. Address
 - C. Occupation
 - D. Rate of Pay
 - E. Amount paid each pay period
 - F. Hours worked each day and each work week

INDIVIDUALS EXEMPT FROM MINIMUM WAGE

1. Any individual employed by the United States;
2. Any individual employed as a baby-sitter in the employer's home, or a live-in companion to a sick, convalescing, or elderly person whose principal duties do not include housekeeping;
3. Any individual employed as an outside salesman compensated by commissions or in a bona fide executive, administrative, or professional capacity, or computer professionals;
4. Any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate government agency, if
 - (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
 - (ii) such services are not the same type of services which the individual is employed to perform for such public agency;
5. Any individual who works or provides personal services of a charitable nature in a hospital or health institution for which compensation is not sought or contemplated;
6. Any individual in the employ of a camp or recreational area for children under eighteen years of age and owned and operated by a non-profit organization or group of organizations.
7. Employees of a solely family owned and operated business who are family members of an owner.

For further information about minimum wage issues, please contact: The Ohio Department of Commerce, Division of Industrial Compliance, 6606 Tussing Road, Reynoldsburg, Ohio 43068. Phone: (614) 644-2239. TTY/TDD: 1-800-750-0750.

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(REV. 09/28/12)



STATE OF OHIO

2014 MINIMUM WAGE

OHIO DEPARTMENT OF COMMERCE
DIVISION OF INDUSTRIAL COMPLIANCE

JOHN R. KASICH
Governor

ANDRE T. PORTER
Director

www.com.ohio.gov

NON-TIPPED EMPLOYEES

A Minimum Wage of

\$7.95 per hour

"Non-Tipped Employees" includes any employee who does not engage in an occupation in which he/she customarily and regularly receives more than thirty dollars (\$30.00) per month in tips.

"Employers" who gross under \$292,000.00 shall pay their employees no less than the current federal minimum wage rate.

"Employees" under the age of 16 shall be paid no less than the current federal minimum wage rate.

"Current Federal Minimum Wage" is \$7.25 per hour.

TIPPED EMPLOYEES

A Minimum Wage of

\$3.98 per hour **PLUS TIPS**

"Tipped Employees" includes any employee who engages in an occupation in which he/she customarily and regularly receives more than thirty dollars (\$30.00) per month in tips. Employers electing to use the tip credit provision must be able to show that tipped employees receive at least the minimum wage when direct or cash wages and the tip credit amount are combined.

OVERTIME

1. An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours in excess of forty hours in one work week, except for employers grossing less than \$150,000 per year.

HANDICAPPED RATE

To prevent the curtailment of opportunities for employment and avoid undue hardship to individuals whose earning capacity is affected or impaired by physical or mental deficiencies or injuries, a sub-minimum wage may be paid, as provided in the rules and regulations set forth by the Director of the Ohio Department of Commerce.

RECORDS TO BE KEPT BY THE EMPLOYER

1. Each employer shall keep records for at least three years, available for copying and inspection by the Director of the Ohio Department of Commerce, showing the following information concerning each employee:

- A. Name
- B. Address
- C. Occupation
- D. Rate of Pay
- E. Amount paid each pay period
- F. Hours worked each day and each work week

2. The records may be opened for inspection or copying at any reasonable time and no employer shall hinder or delay the Director of the Ohio Department of Commerce in the performance of these duties.

INDIVIDUALS EXEMPT FROM MINIMUM WAGE

1. Any individual employed by the United States;
2. Any individual employed as a baby-sitter in the employer's home, or a live-in companion to a sick, convalescing, or elderly person whose principal duties do not include housekeeping;
3. Any individual employed as an outside salesman compensated by commissions or in a bona fide executive, administrative, or professional capacity, or computer professionals;
4. Any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate government agency, if
 - (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
 - (ii) such services are not the same type of services which the individual is employed to perform for such public agency;
5. Any individual who works or provides personal services of a charitable nature in a hospital or health institution for which compensation is not sought or contemplated;
6. Any individual in the employ of a camp or recreational area for children under eighteen years of age and owned and operated by a non-profit organization or group of organizations.
7. Employees of a solely family owned and operated business who are family members of an owner.

For further information about minimum wage issues, please contact: The Ohio Department of Commerce, Division of Industrial Compliance, 6606 Tussing Road, Reynoldsburg, Ohio 43068. Phone: (614) 644-2239. TTY/TDD: 1-800-750-0750.

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(REV. 09/25/13)



STATE OF OHIO

2015 MINIMUM WAGE

OHIO DEPARTMENT OF COMMERCE
DIVISION OF INDUSTRIAL COMPLIANCE

JOHN R. KASICH
Governor

ANDRE T. PORTER
Director

www.com.ohio.gov

NON-TIPPED EMPLOYEES

A Minimum Wage of

\$8.10 per hour

"Non-Tipped Employees" includes any employee who does not engage in an occupation in which he/she customarily and regularly receives more than thirty dollars (\$30.00) per month in tips.

"Employers" who gross under \$297,000.00 shall pay their employees no less than the current federal minimum wage rate.

"Employees" under the age of 16 shall be paid no less than the current federal minimum wage rate.

"Current Federal Minimum Wage" is \$7.25 per hour.

TIPPED EMPLOYEES

A Minimum Wage of

\$4.05 per hour **PLUS TIPS**

"Tipped Employees" includes any employee who engages in an occupation in which he/she customarily and regularly receives more than thirty dollars (\$30.00) per month in tips. Employers electing to use the tip credit provision must be able to show that tipped employees receive at least the minimum wage when direct or cash wages and the tip credit amount are combined.

OVERTIME

1. An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours in excess of forty hours in one work week, except for employers grossing less than \$150,000 per year.

HANDICAPPED RATE

To prevent the curtailment of opportunities for employment and avoid undue hardship to individuals whose earning capacity is affected or impaired by physical or mental deficiencies or injuries, a sub-minimum wage may be paid, as provided in the rules and regulations set forth by the Director of the Ohio Department of Commerce.

RECORDS TO BE KEPT BY THE EMPLOYER

1. Each employer shall keep records for at least three years, available for copying and inspection by the Director of the Ohio Department of Commerce, showing the following information concerning each employee:
 - A. Name
 - B. Address
 - C. Occupation
 - D. Rate of Pay
 - E. Amount paid each pay period
 - F. Hours worked each day and each work week

INDIVIDUALS EXEMPT FROM MINIMUM WAGE

1. Any individual employed by the United States;
2. Any individual employed as a baby-sitter in the employer's home, or a live-in companion to a sick, convalescing, or elderly person whose principal duties do not include housekeeping;
3. Any individual employed as an outside salesman compensated by commissions or in a bona fide executive, administrative, or professional capacity, or computer professionals;
4. Any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate government agency, if
 - (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
 - (ii) such services are not the same type of services which the individual is employed to perform for such public agency;
5. Any individual who works or provides personal services of a charitable nature in a hospital or health institution for which compensation is not sought or contemplated;
6. Any individual in the employ of a camp or recreational area for children under eighteen years of age and owned and operated by a non-profit organization or group of organizations.
7. Employees of a solely family owned and operated business who are family members of an owner.

For further information about minimum wage issues, please contact: The Ohio Department of Commerce, Division of Industrial Compliance, 6606 Tussing Road, Reynoldsburg, Ohio 43068. Phone: (614) 644-2239. TTY/TDD: 1-800-750-0750.

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