

IN THE SUPREME COURT OF OHIO

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

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I. Introduction

More than eight years ago, Ohio voters amended the state constitution to substantially increase protections for Ohio's lowest paid workers. The amendment, Article II, Section 34a of the Ohio Constitution ("§34a"), grants its protections to "employees." The question before the Court is whether Appellees are "employees" under §34a and, thus, subject to its protections.

Under §34a, "employee" has the same meaning as under the Fair Labor Standards Act. In turn, the FLSA states, "As used in this chapter -- the term 'employee' means any individual employed by an employer." *See* 29 U.S.C. 203(e). Because Appellees are individuals employed by an employer, they are "employees." Section 34a goes on to expressly list any exemptions to its coverage. Section 34a's list of exemptions includes some but not all the FLSA's exemptions. The FLSA's exemption for outside salespeople is *not* included in §34a.

Despite the plain language in §34a and the FLSA, the General Assembly passed legislation that excludes from the meaning of "employee" anyone exempt from the FLSA's minimum wage requirements, regardless of whether that person is an "employee" under the FLSA. *See* R.C. 4111.14(B)(1) ("§B1"). By ignoring §34a's explicit list of exemptions and, instead, incorporating all of the FLSA's exemptions, §B1 strips many employees of their constitutionally protected right to a minimum wage. The statutory language excludes Appellees from §B1's definition of employee because Appellees are exempted under the FLSA as "outside salesmen." 29 U.S.C. § 213(a).

Section 34a defends itself from such legislative interference in a number of ways. First, §34a is self-executing and expressly authorizes actions to enforce its provisions. This allows §34a's protections to apply, even if the General Assembly legislates the same subject matter. Next, §34a

forbids the application of any exemptions not expressly found in §34a. (“Only the exemptions set forth in this section shall apply to this section.”) Further still, §34a forbids any implementing legislation from restricting its provisions. (“Laws may be passed to implement its provisions * * * but in no manner restricting any provision of the section.”) Finally, §34a mandates that it must “be liberally construed in favor of its purposes.”

Because §B1 directly conflicts with §34a, the court of appeals held, “there is a clear conflict between the definition of an employee in R.C. 4111.14(B)(1) and the definition of an employee in Section 34a.” *Haight v. Cheap Escape Co.*, 2014-Ohio-2447, ¶20, 11 N.E. 3d 1258 (2nd Dist.). The court of appeals adopted two ways to resolve this conflict: (1) §34a is self-executing and, therefore, §B1 does not apply to this action, and/or (2) §B1 is unconstitutional. *Id.*, ¶¶8, 25. Appellees ask the Court to affirm that court of appeals’ decision.

The Court should also reject Appellants’ request that the Court take the extraordinary step of limiting its holding to prospective application. In effect, Appellants ask the Court to license eight years of depriving Ohioans of the constitutional protections that voters overwhelmingly approved. Appellants’ request flies in the face of long-established precedent that decisions of this Court apply retroactively, particularly when the Court is applying a constitutional or statutory provision and not overturning one of the Court’s prior decisions.

II. Statement of Facts

This case is about a company that paid its sales employees less than minimum wage and, often times, nothing at all. When an employee quit because she could no longer sustain herself on little to no pay, the company kept and benefited from whatever accounts the employee generated.

This was the Cheap Escape Company's ("Cheap Escape") business model until the company declared bankruptcy in July 2013.

Prior to its bankruptcy, Cheap Escape published the coupon magazine *J.B. Dollar Stretcher Magazine* and operated an "E-Coupon" website. *See* Second Amended Complaint, ¶19. Appellants Robert and Joan Minchak each owned half of the company and employed sales representatives, such as Appellees, to sell advertising space in the magazine and on the website. *Id.* at ¶¶ 5, 6, 25. Appellants' sales representatives typically worked about 50 hours per week and performed most of their work at one of Cheap Escape's six Ohio offices. *Id.* at ¶¶ 23, 27-31.

Appellants generally paid new sales representatives a combination of commissions and a draw of between \$100 and \$200 per week. *Id.* at ¶¶ 36, 38. If Appellants felt that a sales representative was not generating sufficient business or had been employed long enough, Appellants switched the sales representative to a commissions-only pay structure. *Id.* at ¶ 41. Under either compensation method, Appellants regularly paid sales representatives less than minimum wage (often nothing at all). *Id.* at ¶ 43.

As a result of Appellants' pay practices, Appellees brought this action to recover unpaid minimum wages. Appellees seek only the state-mandated minimum wage, not, as Appellants now claim, minimum wage in addition to commissions. *See generally Id.* Whether Appellees' pay comes from commissions, a draw, wages, or some combination, it makes no difference as long as it is at least the minimum wage that §34a requires.

III. Argument

Proposition of Law 1: Article II, Section 34a of the Ohio Constitution is a self-executing constitutional provision and, as such, the definition of “employee” under §34a controls actions under that section instead of the narrower definition of “employee” in R.C. 4111.14(B)(1).

Proposition of Law 2: R.C. 4111.14(B)(1) is unconstitutional because the legislature exceeded its authority to implement Article II, Section 34a of the Ohio Constitution when it defined “employee” differently, and more narrowly, than the term is defined in §34a or in the Fair Labor Standards Act

A. Section B1 does not apply to this action, and/or §B1 conflicts with Article II, Section 34a of the Ohio Constitution.

The question before the Court is whether the statutory definition of “employee” under §B1 conflicts with the constitutional definition of the same term.

Under the constitution:

“employer,” “employee,” “employ,” “person” and “independent contractor” have the same meanings as under the federal Fair Labor Standards Act * * * 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.

Ohio Constitution, Article II, Section 34a.

Under the statute:

“Employee” means individuals employed in Ohio, but it does not mean individuals who are excluded from the definition of “employee” under 29 U.S.C. 203(e) or individuals who are exempted from the minimum wage requirements in 29 U.S.C. 213 and from the definition of “employee” in this chapter.

R.C. 4111.14(B)(1).

Section B1 excludes “individuals who are exempted from the minimum wage requirements in 29 U.S.C. 213” from the meaning of “employee,” *even though those individuals are employees under the FLSA*. This is substantially different than §34a, which only incorporates

the FLSA’s meaning of “employee.” The constitution’s broader definition must control over the statute’s narrower definition.

1. Section 34a incorporates the definition of “employee” from the FLSA but does not incorporate every FLSA exemption.

Section 34a defines the words “employee,” “employer,” and other key terms by reference to the definitions of the same terms in the FLSA. Section 34a also includes a few, but not all of the FLSA’s exemptions from coverage for certain individuals that the FLSA defines as employees. This means that some individuals, like Appellees, are covered by §34a, but are considered “exempt employees” for purposes of the FLSA’s minimum wage coverage. An examination of the structure of the FLSA helps explain this important, but unambiguous, distinction.

a. “Employee” under the FLSA is “any individual employed by an employer.”

The FLSA’s Definitions section opens with “As used in this chapter--.” *See* 29 U.S.C. 203. The meaning of any term following that phrase must be applied to the entire FLSA. Appellants’ argument that the meaning of “employee” is found or modified anywhere but 29 U.S.C. § 203 ignores this phrase.

Under the FLSA:

As used in this chapter--.

* * *

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term “employee” means any individual employed by an employer.

29 U.S.C. 203(e).¹ This is the only meaning of “employee” under the FLSA.

¹ The enumerated exceptions to the meaning of “employee” do not apply to Appellees.

The FLSA's use of the word "means" when defining "employee" renders irrelevant Appellants' argument that a meaning is broader than a definition. Because the FLSA states exactly what "employee" *means* by using the word "means" in the definition, there can be no serious argument that "employee," is anything other than "any individual employed by an employer."

Following the "Definitions" section, the FLSA imposes minimum wage and overtime requirements. *See* 29 U.S.C. 206-7. After imposing those requirements, the FLSA then exempts certain employees from some or all of those requirements. *See* 29 U.S.C. 213. Such employees are commonly referred to as "exempt employees." The outside salesperson exemption is relevant to this case:

(a) Minimum wage and maximum hour requirements

The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to --

(1) Any employee employed * * * in the capacity of outside salesman...

29 U.S.C. 213(a).

Section 213 only exempts individuals already defined as employees from some or all of the FLSA's requirements. Where it does so, Section 213 specifies to which FLSA section the exemption applies. *See, e.g.,* 29 U.S.C. § 213(a) and (b). As the court of appeals found, "the exemptions remove certain categories of employees from the minimum wage requirements set forth in other parts of the Fair Labor Standards Act, but they do not remove persons in those categories from the definition of an employee." *Haight* at ¶17. This is logically consistent because if an individual is not an employee, then the individual would not be subject to the

FLSA's requirements in the first place. Instead, any exclusion from the meaning of "employee" is done in the Definitions section itself. *See* 29 U.S.C. 203(e)(2)-(5).

Although Section 213 exempts employees from the FLSA's minimum wage and/or overtime requirements, it does not exempt them from other FLSA sections. For example, exempt employees are protected by the FLSA's Equal Pay Act because exempt employees are employees. *See* 29 U.S.C. 206(d). For the same reason, exempt employees are protected under the FLSA's anti-retaliation provisions. *See* 29 U.S.C. 215(a)(3) and 218c(a). The FLSA's Exemption section is clear that it only exempts employees from minimum wage or overtime requirements, not from the meaning of "employee."

Under the only meaning of "employee" that the FLSA uses, exempt employees are "employees."² Thus, Appellees, as outside salespeople, are "employees," but are exempt from the FLSA's minimum wage and overtime requirements in Sections 206 and 207. 29 U.S.C. 213(a)(1).

b. Section 34a uses the FLSA's meaning of "employee" but not the FLSA's exemptions from coverage.

Section 34a uses the FLSA's unambiguous meaning of "employee," which is "any individual employed by an employer." 29 U.S.C. 203(e). This includes exempt employees, like outside salespeople. *See supra* pp. 5-7.

Instead of using the FLSA's coverage scheme, §34a expressly sets forth its own exemptions from coverage, *including five from the FLSA* (tipped employees, employees with disabilities, employees of family businesses, young workers, and casual workers employed on the

² In responding to Request for Admission 43, "[Appellants] admit that Plaintiffs and other Outside Commission Salespeople were 'employees' within the meaning of that term as used in the Fair Labor Standards Act, but maintain they were exempt employees."

property of an employer or their residence). *Compare* §34a with 29 U.S.C. 203(m), (s)(2), 206(a), (g), 213(a)(15), and 214(c). The fact that §34a includes *some* FLSA exemptions, while not including others, leaves no doubt that §34a did not intend to incorporate *all* of the FLSA’s exemptions.

Ohio’s overtime law reveals how easy it is to incorporate FLSA exemptions, if §34a’s drafters wanted to do so.³ “An employer shall pay an employee for overtime * * * in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the [FLSA].” R.C. 4111.03(A). Notably, there was no similar blanket incorporation of the FLSA’s minimum wage exemptions in the prior version of Ohio’s minimum wage law (R.C. 4111.01), making it even clearer that both the prior minimum wage law and §34a deliberately chose to cover certain FLSA-exempt employees. Moreover, Ohio’s overtime law demonstrates that an exemption from coverage and an exclusion from a definition are two different things;⁴ *i.e.*, simply because §34a borrows the meaning of a term from the FLSA does not mean that §34a also borrows the FLSA’s exemptions.

³ The brief of the Ohio Council of Retail Merchants, Ohio Chamber of Commerce, Ohio Chapter of the National Federation of Independent Business, Ohio Farm Bureau Federation, and Ohio Management Lawyers Association (collectively “OMLA”) curiously claims that Ohio courts have consistently held that Ohio’s minimum wage law incorporates the FLSA’s exemptions. *See* OMLA Brief, p. 10, n.4. Nearly all of the cases OMLA cites deal with Ohio’s overtime law, which *does* incorporate the FLSA’s exemptions. *See Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 501 (6th Cir. 2007); *Dillworth v. Case Farm’s Processing, Inc.* No. N.D. Ohio 5:08-cv-1694, 2009 WL 2766991, *4 (Aug. 27, 2009), *order vacated in part on reconsideration*, N.D. Ohio No. 5:08-cv-1694, 2010 WL 776933 (Mar. 8, 2010); *Trocheck v. Pellin Emergency Medical Services, Inc.*, 61 F. Supp. 2d 685, 699-700 (N.D. Ohio 1999). The one exception deals with whether §34a provides an independent cause of action. *See Murray v. Mary Glynn Homes, Inc.*, N.D. Ohio No. 1:11-cv-532, 2013 WL 4054595 *15 (Aug. 12, 2013). The court in *Murray* never actually reached that issue. *Id.*

⁴ Ohio’s overtime law separately (and redundantly, in some cases) excludes specific categories of workers from the meaning of “employee.” R.C. 4111.03(D)(3).

To the extent that it is unclear whether §34a implicitly includes any exemptions beyond those expressly set forth, §34a clarifies the matter. Section 34a states, “Only the exemptions set forth in this section shall apply to this section.” An exemption for outside salespeople is not set forth in §34a.

Further still, any ambiguity must be resolved in Appellees’ favor because §34a requires that it be “liberally construed in favor of its purposes.” In other words, §34a “is to be liberally construed in favor of the persons to be benefited.” *State ex rel. Maher v. Baker*, 88 Ohio St. 165, 172, 102 N.E. 732 (1913). Ohio workers, like Appellants, are the “persons to be benefited” by §34a. The only way to liberally construe §34a is that “employee” is “any individual employed by an employer.”

c. Section 34a expands Ohio’s minimum wage protections beyond those of the FLSA and Ohio’s prior minimum wage law.

Appellants say it best on the second page of their brief, “The entirety of Appellees’ claim is predicated on a complete revision and rewriting of Ohio’s wage and hour law.” Section 34a *is* a complete revision and rewrite of Ohio’s prior minimum wage law. Section 34a’s purpose is to expand minimum wage protections from those of Ohio’s prior minimum wage law (old R.C. § 4111.01) and the FLSA. This is evident because every part of §34a increases protections, remedies, and rights compared to old R.C. § 4111.01 and the FLSA.

Compared to the FLSA, §34a offers employees markedly increased rights and protections. *See* Comparison Between §34a and the FLSA, App., p. 19.⁵ The differences between §34a and the FLSA include expanded employer coverage, an obligation to provide

⁵ Appellees’ counsel authored this chart, which was originally attached to Appellees’ Rely Brief in the lower court.

employees with records, a private right of action to enforce the recordkeeping provision, no opt-in requirement, protection for employees from liability for costs and attorneys fees, increased and mandatory damages for unpaid wages, exemplary damages for retaliation claims, minimum damages for retaliation, a mandatory three year statute of limitations, and a requirement that the payment of damages may not be stayed pending an appeal. There is little room to argue that §34a is anything less than a substantial departure from the FLSA's statutory scheme. Granting minimum wage rights to FLSA-exempt employees is consistent with that departure.

The Ohio minimum wage law predating §34a *already* included fewer exemptions (and thus covered more workers) than the FLSA.⁶ By claiming that §34a incorporates the FLSA's exemptions, Appellants are actually claiming Ohio's voters intended *reduced* Ohio's minimum wage protections from where they already were in the prior version of R.C. § 4111.01.⁷ Given that every part of §34a has the obvious effect of expanding minimum wage protections, Appellants' claim defies reason.

In short, the drafters of §34a explicitly included some, but not all, of the exemptions listed in Ohio's then-existing minimum wage law, which, in turn, explicitly included some, but not all of the exemptions in the FLSA. The amendment's drafters also expressly barred the use of any other exemptions not listed in the amendment, and, for good measure, required that the

⁶ The FLSA provides employees with far less protection than the prior version of R.C. § 4111.01 because the FLSA includes all but one of old R.C. § 4111.01's minimum wage exemptions (the exception is fire/police workers) and exempts eight additional categories of workers. *See* 29 U.S.C. 213(a)(5), (7), (8), (10), (12), (16), and (17). The FLSA also contains expanded exemptions or exceptions for seasonal camp and recreational workers and volunteers. *See* 29 U.S.C. 203(e)(5) and 213(a)(3).

⁷ Section 34a includes three of the prior version of R.C. § 4111.01's exemptions/exclusions (casual workers, family businesses, and young workers), indicating that §34a purposefully did not adopt any other exemptions from old R.C. § 4111.01.

amendment be liberally construed in favor of its purposes. But, according to Appellants, by merely referencing the meaning of the term “employee” in the FLSA (rather than explicitly incorporating its separate exemptions, like the existing Ohio overtime statute that they were surely aware of), the drafters and the voters who approved the amendment sought to dramatically reduce the number of employees entitled to Ohio’s minimum wage. That argument strains credulity and simply disregards the plain language of the amendment, the plain language of the FLSA, and the textual and historical context of §34a.

d. Section 34a’s use of the words “meanings” and “exemptions” is consistent with finding that the meaning of “employee” under §34a includes FLSA-exempt employees.

Section 34a uses the plural words “meanings” and “exemptions” in its second paragraph. The use of each word is consistent with the court of appeals’ finding that §34a borrows only the meaning of “employee” from the FLSA and does not borrow the FLSA’s exemptions.

i. Section 34a uses “meanings” because each of five borrowed terms has its own meaning.

Section 34a states, “As used in this section: ‘employer,’ ‘employee,’ ‘employ,’ ‘person’ and ‘independent contractor’ have the same *meanings* as under the federal Fair Labor Standards Act...” (Emphasis added.) The sentence uses the plural word “meanings” because the sentence references multiple terms, each with its own meaning.

The lower court’s dissent mistakenly took the word “meanings” to indicate that the borrowed words were subject to “more than a single definition;” *i.e.*, a meaning beyond that contained in 29 U.S.C. §203(e). *Haight*, 2014-Ohio-2447 at ¶29. But in fact, there are simply five

words and five meanings, one meaning for each word. If §34a used the singular “meaning,” it would indicate that all five of terms share a common meaning.

R.C. § 4111.14 provides examples of how “meaning” versus “meanings” is used. For instance, R.C. § 4111.14(M) states “As used in division (M) of this section, ‘such information,’ ‘acting on behalf of an employee,’ and ‘request’ have the same meanings as in division (G) of this section.” The plural “meanings” is used because each term has its own meaning. Division (G) confirms that each of the three terms has its own *single* meaning, just like the five terms in §34a. Conversely, the singular “meaning” is used when a single term is being defined. *See, e.g.*, R.C. 4111.14(B)(2) and (H)(2).

ii. Section 34a uses “exemptions” because §34a includes multiple exemptions to its provisions.

Section 34 states that “Only the *exemptions* set forth in this section shall apply to this section.” (Emphasis added.) Section 34a uses the plural word “exemptions” because §34a includes more than one exemption within its provisions.

OMLA incorrectly defines “exemption” as a complete removal from coverage. *See* OMLA Brief, p. 12. Using this tortured definition, OMLA argues that §34a contains only one exemption and, thus, “exemptions” must refer to something not actually set forth in §34a’s text. *Id.* In fact, “exemption” is the “freedom from being required to do something that others are required to do.” *See* <http://www.merriam-webster.com/dictionary/exemption> (accessed Feb. 20, 2015). Thus, any provision is an exemption if it allows an employer to pay an employee something less than the full minimum wage required by §34a.

This definition is consistent with how “exemption” is used in the FLSA. Under the FLSA’s Exemption section, employees can be exempt from either or both the overtime and

minimum wage requirements. *See* 29 U.S.C. 213. A complete exemption from the entire FLSA is not required to be “exempt.” Likewise, the most common three exemptions (executive, administrative, and professional) all require a minimum salary; *i.e.*, they are not completely exempt from the FLSA’s requirements. *See* 29 C.F.R. 541.100, 541.200, 541.300.

Using the proper definition of “exemption,” §34a has five exemptions (employees under the age of sixteen, employees of businesses with annual gross receipts of two hundred and fifty thousand or less, tipped workers, employees of solely family owned and operated businesses who are family members of an owner, and employees with mental or physical disabilities). Because §34a contains more than one exemption, it uses the plural word “exemptions.”

e. Ohio expanded minimum wage protections at the same time and in the same way as other states.

Statutory construction follows a three-step process. *Lockhart v. Napolitano*, 573 F.3d 251, 255 (6th Cir. 2009). First, the Court must examine the plain language of the provision. *Id.* Next, the Court should use the common-law meaning of the statutory terms. *Id.* Last, the Court can consider the statutory and legislative history. *Id.* The Court should not look beyond §34a’s plain language unless §34a is ambiguous and that ambiguity cannot be resolved by simply liberally construing §34a. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) (“When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”). To the extent that the Court looks beyond §34a’s language, the historical context supports finding that §34a only incorporates exemptions that are expressly set forth in §34a itself.

In 2006, six other states adopted measures to increase minimum wage rights to varying degrees. Two states (Arizona and Nevada), like Ohio, substantially expanded their state’s

minimum wage protections in addition to raising the minimum wage. *See* Ariz. Rev. Stat. Ann. 23-362(A);⁸ Nevada Constitution, Article XV, Section 16. The four other states (Colorado, Michigan, Missouri, and Montana) adopted measures that only increased the state minimum wage and tied it to inflation.⁹

The four states that only raised their minimum wage also kept exemptions or exclusions for FLSA exempt employees. Those states did so *expressly* within their amendments and statutes. *See* Colorado Constitution, Article XVIII, Section 15 (“The minimum wage shall be paid to employees who receive the state or federal minimum wage.”); Mich. Comp. Laws Ann. 408.420(b) (“This act does not apply to an employee who is exempt from the minimum wage requirements of the fair labor standards act of 1938, 29 USC 201 to 219.”); Mo. Ann. Stat. 290.500(3), (3)(k); Mont. Code Ann. 39-3-409(1)(j). In contrast, Ohio did not expressly include an exemption for outside salespeople in §34a or expressly incorporate all FLSA exemptions, as the General Assembly did in Ohio’s overtime statute. R.C. 4111.03(A).

The two states that extended minimum wage protections to previously exempt employees did it in the same way as Ohio. Each state broadly defined employee to be any individual employed by an employer and then enumerated any exemptions or exceptions to that definition or coverage. *See* Ariz. Rev. Stat. Ann. 23-362(A); Nev. Const. art. XV, §16. The effect of

⁸ *See* <http://www.azsos.gov/election/2006/info/pubpamphlet/english/prop202.htm> (accessed Feb. 20, 2015).

⁹ For Colorado, *see* <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2005-2006/result104-0506.html> (accessed Feb. 20, 2015); <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2005-2006/result104-0506.html> (accessed Feb. 20, 2015). For Michigan, *see* http://ballotpedia.org/Michigan_Minimum_Wage_Increase_%282006%29 (accessed Feb. 20, 2015); *and see* *Arrington v. Michigan Bell Tel. Co.*, 746 F. Supp. 2d 854, 857 (E.D. Mich. 2010). For Missouri, *see* Mo. Ann. Stat. 290.502. For Montana, *see* Mont. Code Ann. 39-3-409.

expressly setting forth specific exemptions is to exclude all exemptions not set forth. *See Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52 ¶7, 327 P.3d 518 (2014), *reh'g denied* (Sept. 24, 2014).

In our view, the district court's and respondents' reading of the Minimum Wage Amendment as allowing the Legislature to provide for additional exceptions to Nevada's constitutional minimum wage disregards the canon of construction "expressio unius est exclusio alterius," the expression of one thing is the exclusion of another." The Minimum Wage Amendment expressly and broadly defines employee, exempting only certain groups: * * * Following the *expressio unius* canon, the text necessarily implies that all employees not exempted by the Amendment, including taxicab drivers, must be paid the minimum wage set out in the Amendment. The Amendment's broad definition of employee and very specific exemptions necessarily and directly conflict with the legislative exception for taxicab drivers established by NRS 608.250(2)(e). Therefore, the two are "irreconcilably repugnant," such that "both cannot stand," and the statute is impliedly repealed by the constitutional amendment.

(Internal citations removed.) *Id.*

Ohio's minimum wage amendment came at a time when other states were doing the same thing, including granting minimum wage rights to FLSA exempt employees. Section 34a, like similar measures in Arizona and Nevada, extends minimum wage rights to FLSA exempt employees.

2. Because §34a includes FLSA-exempt employees and §B1 excludes them, the statute conflicts with the constitution.

Section 34a defines "employee" as "any individual employed by an employer," while §B1 defines "employee" as "any individual employed by an employer minus a long list of FLSA exempt employees." At this point, it should be obvious that §B1 conflicts with §34a.

To combat the obvious, Appellants ask the Court to "harmonize" §34a and §B1. *See* Appellants' Brief, p. 8. Because there is not a dispute as to what §B1 means, Appellants are really asking the Court to interpret the constitution to fit a statute. This is inappropriate, and the Court

should decline to do so. “Statutes are construed to accord with constitutions, not vice versa.”
Thomas, 357 P.3d at 521.

There is no dispute that if “employee” under §34a means “any individual employed by an employer,” then §B1 conflicts with §34a. Because “employee” under §34a can have no other meaning, the statute must give way to the constitution.

3. There are two ways to resolve the conflict between §34a and §B1. Either (1) §34a is self-executing, and §B1 does not apply to §34a actions, or (2) §B1 is unconstitutional.¹⁰

a. Section 34a is self-executing, and §B1’s definition of “employee” does not apply to §34a actions.

The Court need not reach the constitutional question in this case if it holds that §34a is self-executing and that, as a result, §B1’s conflicting definition of “employee” does not apply to §34a actions. If §B1 does not apply to §34a actions, then it does not unconstitutionally restrict the rights that §34a grants.

i. Whether §34a is self-executing and whether §B1 applies to a §34a action are not issues properly before the Court.

Appellants’ Memorandum in Support of Jurisdiction did not raise the issue of whether (1) §34a is self-executing and (2) §B1 applies to a §34a action. *See* Appellants’ Memorandum in Support of Jurisdiction, pp. 6, 10. As a result, this question is not properly before the Court. *See In re Timken Mercy Med. Ctr.*, 61 Ohio St. 3d 81, 87, 572 N.E. 2d 673 (1991) (“However, in its memorandum in support of jurisdiction, the appellant did not raise or even allude to this issue. * * * Consequently, the question * * * is not properly before us and we decline to rule on it.”).

¹⁰ Appellees raised and the court of appeals sustained both issues as assignments of error. *See Haight*, 2014-Ohio-2447 at ¶¶8, 25.

Further, prior to Appellants' Merits Brief, Appellants did not dispute that §34a is self-executing. *See* Appellants' Response to Plaintiffs' Motion for Declaratory Judgment, pp. 12-13 (filed Mar. 5, 2013); Appellants' Response Brief, pp. 6-8 (filed Feb. 12, 2014). Accordingly, Appellants have waived this argument.

ii. If the Court considers this issue, the Court should hold that §34a is self-executing, and §B1 does not apply to §34a actions.

***a.* Section 34a is self-executing.**

The court of appeals held that §34a is self-executing by stating, "The amendment did not require any action by the Ohio General Assembly to implement its protections..." *See Haight* at ¶8. Section 34a did not require legislative action because it is operative without the aid of implementing legislation; *i.e.*, it is self-executing. "A constitutional provision is self-executing if it provides sufficient details to put its rights and liability into effect without the need for implementing legislation. *See State ex rel. Russell v. Bliss*, 156 Ohio St. 147, 152 (1951).

In *Bliss*, the Court found that a constitutional provision

must be regarded as self-executing if the nature and extent of the rights conferred and the liability imposed are fixed by the constitution itself so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.

Id. Modern constitutional provisions, like §34a, are presumed to be self-executing. *Id.* at 150-51 ("the presumption now is that all provisions of the constitution are self-executing."). Section 34a is self-executing because it creates a precise framework that describes who is entitled to minimum wage and how those so entitled may enforce their rights.

First, §34a details the rights under that provision and provides for specific exclusions and exemptions. Second, §34a defines the terms pertinent to that provision. For example, §34a states

that “employer,” “employees,” and “employ,” have the same meanings as under the FLSA. Third, after defining what rights are involved and who has those rights, §34a creates an enforcement mechanism by authorizing employees to bring an action for equitable and monetary relief against their employer. Section 34a provides a statute of limitations (three years) and describes what relief an employee may seek (back wages, damages of an additional two times the amount owed, attorney’s fees, and costs).

Further supporting §34a’s self-execution, §34a’s requirements are contingent only on the calendar. “Except as provided by 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.*” (Emphasis added.) For this language to be given effect, §34a must be self-executing.

Moreover, §34a specifically authorizes employees to enforce §34a’s provisions *or* those of future implementing legislation. (“An action for equitable and monetary relief may be brought * * * for any violation of this section *or* any law or regulation implementing its provisions...””) (Emphasis added.) This language would be meaningless without §34a being self-executing and enforceable by itself.

R.C. § 4111.14 also supports finding §34a is enforceable, independent of any statute: “In accordance with [§34a], an action for equitable and monetary relief may be brought * * * *for any violation of Section 34a of Article II, Ohio Constitution* or any law or regulation implementing its provisions...” (Emphasis added.) R.C. 4111.14(K). Both §34a and R.C. 4111.14(K) differentiate and authorize actions for violations of §34a *or* implementing legislation. Accordingly, an action may enforce §34a itself.

Section 34a’s phrase “laws may be passed to implement its provisions” is consistent with self-execution. The permissive “may,” indicates that laws are not required to implement §34a.¹¹ Further, the phrase “laws may be passed to implement its provisions” does not render impotent an otherwise self-executing provision. For example, Ohio Const. Art. II, Sec. 1g uses a nearly identical phrase. (“Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved.”) That provision, “by its own language, is a self-executing provision.” *In re Protest Filed by Citizens for Merit Selection of Judges, Inc.*, 49 Ohio St. 3d 102, 104 551 N.E.2d 150 (1990). As long as a constitutional provision is otherwise self-executing, a phrase like “laws may be passed to implement its provision” does not alter the provision’s status.

In spite of §34a’s detailed language, and having waived argument concerning whether §34a is self-executing, Appellants argue that §34a is not self-executing because §34a leaves certain terms undefined, including “employee,” “damages,” the statute of limitations, and “interested person.” *See* Appellants’ Brief, pp. 13-14. Appellants’ argument is misplaced because, with the exception of “interested person,”¹² all of those terms are defined in §34a. *See* §34a, ¶2 for “employee,” and ¶4 for a description of “damages” and the statute of limitations.

Section 34a fixes rights and liabilities in detail. As a result, and as the court of appeals found, §34a is self-executing. *See Haight* 2014-Ohio-2447 at ¶8 (“The amendment did not

¹¹ Compare §34a’s “may” to Ohio Const. Art. XV, Sec. 10: “laws shall be passed for providing for the enforcement of this provision.” The word “shall” indicates the subject is referred to the legislature. *Ohio Ass’n of Public School Employees, Chapter No. 471 v. City of Twinsburg*, 36 Ohio St. 180, 188, 522 N.E.2d 532 (1988).

¹² There is no requirement that every word must have its own definition within a provision before the provision can be self-executing. Such a requirement would be nonsensical.

require any action by the Ohio General Assembly to implement its protections...”). The U.S. Southern District Court agreed with the court of appeals:

The State of Ohio’s argument defies both common sense and the text of §34a by implying that Ohio voters enacted this constitutional amendment and specified its terms, definitions, exceptions, causes of actions, limitations period, and available damages, including a clause mandating that the provision be “liberally construed in favor of its purposes,” and yet, in fact only set forth the “authority for the General Assembly to pass whatever legislation is necessary to enforce Section 34a,” not an actionable claim for relief. The Court struggles to square this reading with the plain language of §34a and, in light of the Second District’s decision, declines to adopt the State’s position.

Castillo v. Morales, Inc., 302 F.R.D. 480, 489 (S.D. Ohio 2014). *See also Brennehan v. Cincinnati Bengals, Inc.*, No. 1:14-cv-136, 2014 WL 5448864, *4 (S.D. Ohio Oct. 24, 2014) (Noting that one of the purposes of adopting §34a was to take the minimum wage issue out of the hands of the Ohio General Assembly.).

Consistent with the courts that have looked at this issue, Appellees ask this Court to affirm the court of appeals’ holding that §34a is self-executing.

***b.* Section B1 does not apply to a §34a action because §34a is self-executing.**

Because §34a is self-executing, its provisions control this lawsuit instead of those in any statute. *See State ex rel. Russell v. Bliss*, 156 Ohio St. at 150 (“The determination of the issues here presented turns upon whether the constitutional provisions above set out are self-executing. If they are, the Constitution must control as against the provisions of Section 4785-80, General Code. This court concludes that the constitutional provisions are self-executing and apply *instead of the provisions of the statute.*” (Emphasis added.)). When determining whether §B1 applies to this action because §34a is self-executing, the Court should give no deference to §B1 or attempt

to “harmonize” it with §34a.¹³ Consequently, the meaning of “employee” is that found in §34a, not §B1.

Appellants rely on *State ex rel. Vickers v. Summit Cty. Council* to argue that implementing legislation may “limit” a self-executing constitutional provision. *See* Appellants’ Brief, pp. 14-16, *citing State ex rel. Vickers v. Summit Cty. Council*, 2002-Ohio-5583, 97 Ohio St. 3d 204 (2002). Contrary to Appellants’ claim, it is black letter law that a statute may never limit a right enshrined in a constitution. Were it any other way, the constitution would cease to be the supreme law of the land.

In any case, the statute at issue in *Vickers* dealt with a subject (an election fraud notice) on which the constitutional provision was silent. Here, the §B1 undisputedly defines the same term already defined §34a. In such a case, the constitution’s definition must prevail.

Further, unlike §34a, the provision in *Vickers* did not contain a prohibition that laws may “in no manner restrict[] any provision of [the constitutional provision].” *Compare* Ohio Constitution, Article II, Section 34a *with* Ohio Constitution, Article X, Section 4. Section 34a does use that phrase, and, as a result, legislation may not limit or restrict §34a’s provisions.

Because §34a defines “employee,” §34a’s definition controls instead of that in §B1. As the court of appeals held, and as Appellants did not dispute in their Jurisdictional Memorandum, §B1 does not apply to §34a actions.

¹³ For this reason, the court of appeals was able to provide one analysis to support two holdings ((1) §34a is self-executing, and §B1 does not apply to this action, and (2) §B1 is unconstitutional). Having determined that §B1 conflicts with §34a under the most rigorous standard (constitutionality), the Court did not need to also find the conflict using basic statutory construction rules.

b. If the definition of “employee” under §B1 applies to §34a actions for any reason, then §B1 is unconstitutional.

If the Court finds that §34a is not self-executing or that §B1’s definition of “employee” applies to this action for any other reason, then §B1 is unconstitutional. Section B1 impermissibly conflicts with §34a in several ways, any one of which is sufficient to declare the statute unconstitutional. When a statute conflicts with the plain language of the constitution, it must be held unconstitutional. *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 147, 128 N.E. 2d 59 (1995).

First, §34a prohibits additional exemptions from applying to §34a. (“Only the exemptions set forth in this section shall apply to this section.”) The FLSA’s exemptions are not incorporated in §34a. *See supra* pp. 7-8. Consequently, because §B1 imposes additional exemptions to the meaning of “employee,” it is unconstitutional.

Second, §34a forbids any law to restrict §34a’s provisions. (“Laws may be passed * * * but in no manner restrict[] any provision of the section...”) Because §B1 restricts and narrows the definition of “employee” (and, thus, overall coverage) by excluding “individuals who are exempted from the minimum wage requirements in 29 U.S.C. 213,” it is unconstitutional.

Third, §34a allows the legislature to pass implementing legislation, but only if the legislation meets at least one of three enumerated purposes. Because §B1 falls outside of the scope of permissible legislation, it is unconstitutional.

Laws may be passed to implement its provisions and create additional remedies, increase the minimum wage rate *and* extend 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.

(Emphasis added.) §34a. Section 34a uses the word “and” because, consistent with its remedial goals, implementation must be coupled with additional remedies, a higher minimum wage, or an extension of coverage. Section B1 (and R.C. § 4111.14 in general) does not create additional remedies, increase the minimum wage rate, or extend §34a’s coverage. In fact, §B1 does the opposite by shrinking the definition of “employee” to exclude certain types of employees. Because §B1 is not the type of law that §34a allows, §B1 is constitutionally invalid.

Fourth, §34a expressly includes its own exemptions, and, by doing so, excludes any exemptions not included. *See Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d at 521 (Following the *expressio unius* canon, the text necessarily implies that all employees not exempted by the Amendment * * * must be paid the minimum wage set out in the Amendment.) Because §B1 contains exemptions not set forth in §34a (or even the prior version of R.C. § 4111.01), it conflicts with §34a.

For all of the above reasons, §B1 is unconstitutional. As the court of appeals found, “the legislature exceeded its authority to implement Section 34a when it defined ‘employee’ differently, and more narrowly, than that term is defined in Section 34a or the Fair Labor Standards Act.” *Haight* 2014-Ohio-2447 at ¶ 24. This Court should affirm the court of appeals’ decision that §B1 is unconstitutional.

c. Article II, Section 34 of the Ohio Constitution does not permit the General Assembly to legislatively strip constitutionally granted or protected rights.

Appellants argue that, if §34a does not authorize the legislature to pass §B1, then Article II, Section 34 of the Ohio Constitution authorizes it. Section 34 states, “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.” While Section 34 certainly allows the legislature to pass laws regarding a state minimum wage, it does not allow the General Assembly to legislatively strip constitutionally granted or protected rights. To hold otherwise would destroy the concept of constitutional supremacy.

Moreover, even if Section 34 *did* authorize legislative repeal of constitutionally protected rights (which, of course, it does not), it cannot do so with respect to §34a. Section 34a was adopted after Section 34 and, as a result of well-established jurisprudence, §34a supersedes Section 34. “By definition, an amendment to the Ohio Constitution, once adopted, supersedes any preexisting provisions of the Constitution.” *State v. Ward*, 2006-Ohio-1407, ¶18, 166 Ohio App. 3d 188, 849 N.E.2d 1076 (2nd Dist.), *rev’d on other grounds sub nom. In re Ohio Domestic-Violence Statute Cases*, 2007-Ohio-4552, ¶18, 872 N.E.2d 1212. *See also Russell v. State*, 312 So 2d 422, 429 (Miss. 1975) (“the court pointed out that new amendments supersede the old amendments when they are in conflict. This rule seems to be universal.” (collecting cases)).

4. Appellees’ Response to OMLA’s Policy Arguments

Much of OMLA’s brief is the equivalent of anti-§34a campaign literature aimed at convincing the Court that §34a is bad for Ohio (businesses). Whether OMLA is right or not is irrelevant. Section 34a is the law. The Court should reject OMLA’s request to overrule Ohio’s voters and change the law judicially. OMLA’s remedy is not found here; it can only be found at the ballot box.

In considering whether to adopt §34a, Ohio voters knew that *all* employees (including FLSA-exempt employees) would benefit from the recordkeeping and minimum wage provisions.

The voters were presented with summaries of arguments for and against adopting §34a. *See* OMLA Appendix A, p. 23, ¶¶1, 2.” The “Explanation and Argument Against” §34a included the very argument OMLA now makes to the Court.

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)*.

(Emphasis added.) *Id.* at ¶1. Ohio voters were thus aware of and overwhelmingly rejected OMLA’s policy-based arguments (by 56.65% to 43.35%¹⁴). Accordingly, this Court should defer to the judgment of Ohio’s voters.

a. Minimum Wage Coverage

As discussed throughout this brief, §34a grants minimum wage rights to employees that were previously exempt under the FLSA. OMLA claims that this expansion of rights will have disastrous effects on Ohio because there are many people in FLSA-exempt positions, like executives, administrative employees, professionals, and outside salespeople. OMLA glosses over the fact §34a’s minimum wage requirements affect almost none of those workers.

To be properly classified as an executive, administrative, or professional employee, the worker must be paid a salary of at least \$455 per week. *See* 29 C.F.R. 541.100, 541.200, 541.300. That requirement meets employers’ minimum wage obligations for any employees who work 56 hours or less each week. For those few FLSA exempt employees who worked for *less* than minimum wage, §34a does indeed grant them wage rights that the federal law does not. *That is the purpose of §34a.* OMLA apparently advocates that Ohio employers should be granted license

¹⁴ *See* <https://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2006ElectionsResults/06-1107Issue2.aspx> (accessed Feb. 20, 2015).

to pay their executive, administrative, professional, and outside sales employees less than the wages paid to a fast-food cashier. OMLA does not provide a justification for why this is desirable.

In most cases, FLSA exempt employees, like administrative, executive, and professional employees, are already paid more than minimum wage. Where they are not, Ohio voters determined that those employees should be paid at least as much as our lowest paid workers. This is hardly a radical notion.

b. Recordkeeping Requirements

OMLA devotes substantial attention to §34a's recordkeeping requirement. *See* OMLA's Brief, pp. 16-17, 20-21. According to OMLA, this requirement imposes an undue burden on Ohio employers. *See Id.* In fact, §34a's recordkeeping requirements are not burdensome.

First, §34a does not require an exacting level of detail in the records. Section 34a simply requires records of the hours worked for each day. As the Court is aware, attorneys record their hours worked *and* tasks performed in tenth of an hour increments. If attorneys can do this, it is not too much to ask an employer to record that an employee worked nine to five each day. If the employer requires more accuracy, then a time clock can be used. This is especially true in light of smart phones that can download an app to record hours worked. Likewise, storage of records in electronic format has a minimal cost.

Second, the records protect both the employer and the employee by providing clear evidence of how much time an employee actually worked. Given the amount of FLSA litigation over how many hours employees work, it is less burdensome to require employers keep these records from the start.

Employers already maintain most, if not all, of the records that §34a requires, including for FLSA exempt employees. Of note, employers keep records of employees' names, addresses, and pay rates for tax purposes. Job titles are also generally in employee personnel files. Further, employers must keep records to calculate employee benefits/vacation accrual, and to comply with the Employee Retirement Income Security Act. *See, e.g.*, 29 U.S.C. 1059. It is not extraordinary to require employers to keep records of hours worked by their employees.

Proposition of Law 3: This case does not present the extraordinary circumstances required to apply the decision of the court of appeals prospectively-only, and, as a result, the general rule of retroactive application controls.

B. A decision to hold §B1 unconstitutional should not be limited to prospective application.

Appellants ask the Court to apply a holding that §B1 is unconstitutional prospectively-only. This would allow Appellants to have unlawfully paid employees less than minimum wage (and in some cases, nothing) for years, reap the profits, and simply walk away – a true “cheap escape.” The Court should deny Appellants’ request because this case does not present the exceptional circumstances required for prospective-only application. *DiCenzo v. A-Best Prods. Co.*, 2008-Ohio-5327, ¶ 28, 157, 897 N.E.2d 132 (“[P]rospective-only application [of a decision] is justified only under exceptional circumstances.”).

1. Appellants waived their request for prospective application because they did not previously raise the issue.

Appellants did not raise the issue of prospective application until they filed their memorandum in support of jurisdiction in this Court. As a result, Appellants waived review of this issue, and the Court should not consider it. *See State ex rel. Quarto Mining Co. v. Foreman*, 1997-Ohio-71, 79 Ohio St. 3d 78, 81, 679 N.E. 2d 706.

2. This case does not present the exceptional circumstances required for prospective application.

Appellants ask the Court to do the extraordinary: Ratify, for a period of more than eight years, an unconstitutional law that conflicts with a remedial constitutional amendment. The Court should reject Appellants' proposal.

The general rule is that decisions apply retroactively. *DiCenzo* at ¶ 11. Although the Court may deviate from this rule, prospective-only application of a decision requires "exceptional circumstances." *Id.* at ¶28.

The Court must weigh three factors when considering whether exceptional circumstances exist to justify prospective-only application:

- Does the decision establish a new principle of law that was not foreshadowed?
- Does retroactive application of the decision promote or retard the purpose behind the rule defined in the decision?
- Will retroactive application of the decision cause an inequitable result?

Id. at ¶25. In this case, none of these factors support prospective-only application of a holding that §B1 is unconstitutional.

a. The court of appeals decision only affirmed what Ohio's law is.

The first factor is whether a decision establishes a new principle of law that was not foreshadowed in prior decisions. Here, no new principle of law is created.

While it is true that this case presents an issue of first impression, that alone does not weigh in favor of prospective-only application. If it did, prospective-only application would be the rule, not an exception. This Court considers cases almost exclusively involving unresolved

conflicts or undecided issues of great public importance, but few of these cases meet the stringent standards for prospective-only application.

Instead, the Court must look at whether its decision creates a new principle of law. Here, the legal principle comes from §34a, not the court of appeals' decision. Simply interpreting a statute (or constitutional provision) does not “announce a new principle of law.” *Berlin Twp. Bd. of Trustees v. Delaware Cty. Bd. of Commrs.*, 2011-Ohio-2020, ¶34, 194 Ohio App. 3d 109, 954 N.E.2d 1264 (5th Dist.). Notably, this is not a case where the Court is overruling a prior decision. Instead, here, §34a's plain language not just “foreshadowed” the court of appeals' decision, it spelled out exactly what the court of appeals had to decide.

Appellants claim that the Ohio Attorney General opined that §B1's additional exemptions are consistent with §34a. *See* Appellants' Brief, p. 18, *citing* Office of the Attorney General, State of Ohio, Opinion No. 2007-033, p. 6, n.9. Appellants' goal with this claim is to show that even the Ohio Attorney General would be blindsided by a decision that §B1 is unconstitutional. The opinion letter does not support Appellants' argument because the letter is limited to determining whether an individual (an election judge), excluded from the meaning of “employee” under 29 U.S.C. 203(e), is an “employee” under §34a. The answer is no and, *on this issue*, §B1 is indeed consistent with §34a. That is all the Attorney General's letter opines.

A new legal principle is not created each time this Court interprets a constitutional or statutory provision for the first time. Because the court of appeals' only affirmed the legal principle that §34a created, the Court should not apply its decision prospectively-only.

b. Retroactive application is necessary to promote the purpose of the court of appeals' decision and §34a.

Section 34a mandates that employers pay their employees minimum wage “beginning January 1, 2007.” Accordingly, the Court’s decision must apply retroactively to give effect to §34a. Doing otherwise renders the provision’s start date meaningless and nullifies Ohio voters’ intent in adopting §34a.

The voters bargained for and adopted a measure to begin on January 1, 2007. The Court should enforce the amendment as written.

c. Prospective-only application creates inequitable results.

Employees, who were paid *less than minimum wage* (and, in some cases, nothing at all), bring this action. Employers, who made substantial profits as a result of not paying employees, defend it. The employers now claim that making them pay minimum wage to their employees would be “inequitable.” Requiring Appellants to pay their employees according to §34a is precisely what is required for an equitable result in this case.

Section 34a became effective on January 1, 2007. Appellants chose to ignore §34a and, instead, paid many of their employees next to nothing. Consistent with Appellants’ business philosophy, Appellants now ask the Court to grant them a license to violate a remedial constitutional amendment so that Appellants can “get all the money.”¹⁵ There is no reason to reward Appellants for breaking the law.

¹⁵ In a 1995 Inc.com article, Mr. Minchak explained “who gets what” at Cheap Escape: “The formula is for me to get all the money.” On Appellants’ philosophy regarding their company: “‘Our mission is to maximize our own personal gain,’ he says. ‘You can’t rape your company and make it unhealthy, but it is a cash cow.’ Minchak further allows: ‘I have all the toys – a yacht, a pool, fountains, maids.’” See Edward O. Wells, Inc.com, *CEO Compensation: What CEOs Make*, INC. <http://www.inc.com/magazine/19950901/2396.html> (accessed Feb. 20, 2015). Mr.

In fact, if the Court grants Appellants' request for prospective application, the Court would not only reward Appellants for breaking the law, but also punish all businesses that paid their employees according to the law. Employers that break the rules and under-pay employees, cheat on taxes, or hire undocumented workers gain a competitive advantage over businesses that operate lawfully. *See, e.g., Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 893, 81 L. Ed. 2d 732 (1984) (discussing hiring undocumented aliens). Enforcing the law as written removes the advantage of cheating and levels the playing field for businesses. The Court should act to protect all law-abiding Ohio businesses by refusing to apply its decision prospectively-only. To do otherwise deprives employees of their bargained-for protections and puts businesses that play by the rules at a disadvantage. Both of these results are inequitable.

Further, if the Court adopted the extraordinary measure of prospective application, the Court would ratify the legislature's unconstitutional act for a period of over eight years. Such a decision would send a message to the General Assembly that it is free to pass unconstitutional legislation, knowing that unconstitutional acts will be effective until someone finally expends the enormous sweat and treasure to obtain judicial review. That is not a message this Court should send.

Appellants essentially raise a single argument regarding the equities of this case: there could be a financial impact on various employers if they are required to abide by §34a. Appellants' argument, however, is simply an indictment of §34a itself, not the court of appeals'

Minchak described his strategy: "at the end of the year he tries to take as much out of the company's bank account as he can. 'We try to leave just enough money in the company to limit the tax liability.'" *Id.*

decision. If §34a creates an inequitable result, then the remedy is not found here. Appellants' remedy is found through the electoral process.

In the balance are two possible results. Either (1) the Court requires Appellants fulfil their obligations under §34a and pay minimum wage to their employees, or (2) the Court grants employers a license to ignore the explicit requirements in a voter initiative and, all the while, gain a competitive advantage over businesses that played by the rules. The equities in this case are obvious. Section 34a must apply from January 1, 2007 to present. The Court should reject Appellants' request for prospective application of its decision to hold §B1 unconstitutional.

IV. Conclusion

Appellees respectfully ask that this Court affirm the court of appeals holdings that (1) §34a is self-executing and §B1 does not apply to §34a actions and (2) §B1 is unconstitutional. Appellees further ask the Court to decline to apply its decision prospectively-only.

Respectfully submitted,

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The undersigned hereby certifies that on February 23, 2015, a copy of the foregoing was served upon the following and by regular mail.

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Baldwin's Ohio Revised Code Annotated
Title XLI. Labor and Industry
Chapter 4111. Minimum Fair Wage Standards (Refs & Annos)
General Provisions

R.C. § 4111.03

4111.03 Overtime pay; county employees affected; exception

Effective: July 1, 2007

[Currentness](#)

(A) 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 worked in excess of forty hours in one workweek, in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the "Fair Labor Standards Act of 1938," 52 Stat. 1060, [29 U.S.C.A. 207, 213](#), as amended.

Any employee employed in agriculture shall not be covered by the overtime provision of this section.

(B) If a county employee elects to take compensatory time off in lieu of overtime pay, for any overtime worked, compensatory time may be granted by the employee's administrative superior, on a time and one-half basis, at a time mutually convenient to the employee and the administrative superior within one hundred eighty days after the overtime is worked.

(C) A county appointing authority with the exception of the county department of job and family services may, by rule or resolution as is appropriate, indicate the authority's intention not to be bound by division (B) of this section, and to adopt a different policy for the calculation and payment of overtime than that established by that division. Upon adoption, the alternative overtime policy prevails. Prior to the adoption of an alternative overtime policy, a county appointing authority with the exception of the county department of job and family services shall give a written notice of the alternative policy to each employee at least ten days prior to its effective date.

(D) As used in this section:

(1) "Employ" means to suffer or to permit to work.

(2) "Employer" means the state of Ohio, its instrumentalities, and its political subdivisions and their instrumentalities, any individual, partnership, association, corporation, business trust, or any person or group of persons, acting in the interest of an employer in relation to an employee, but does not include an employer whose annual gross volume of sales made for business done is less than one hundred fifty thousand dollars, exclusive of excise taxes at the retail level which are separately stated.

(3) "Employee" means any individual employed by an employer but does not include:

(a) Any individual employed by the United States;

(b) 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;

(c) Any individual engaged in the delivery of newspapers to the consumer;

(d) Any individual employed as an outside salesperson compensated by commissions or employed in a bona fide executive, administrative, or professional capacity as such terms are defined by the "Fair Labor Standards Act of 1938," 52 Stat. 1060, [29 U.S.C.A. 201](#), as amended;

(e) 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;

(f) A member of a police or fire protection agency or student employed on a part-time or seasonal basis by a political subdivision of this state;

(g) Any individual in the employ of a camp or recreational area for children under eighteen years of age and owned and operated by a nonprofit organization or group of organizations described in [Section 501 \(c\)\(3\) of the "Internal Revenue Code of 1954,"](#) and exempt from income tax under Section 501 (a) of that code;

(h) Any individual employed directly by the house of representatives or directly by the senate.

CREDIT(S)

([2006 H 187, eff. 7-1-07](#); [2006 H 690, eff. 4-4-07](#); [1999 H 471, eff. 7-1-00](#); [1995 H 117, eff. 9-29-95](#); [1987 H 178, eff. 6-24-87](#); [1986 H 428](#); [1978 S 246](#); [1973 H 201](#))

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Current through Files 1 to 195 and Statewide Issue 1 of the 130th GA (2013-2014).

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2006 Ohio Laws File 184 (Am Sub. H.B. 690)

OHIO 2006 SESSION LAW SERVICE
126TH GENERAL ASSEMBLY

Additions are indicated by **Text**; deletions by
~~Text~~ . Changes in tables are made but not highlighted.

File 184
Am Sub. H.B. No. 690
MINIMUM WAGE—RECORDS AND RECORDATION—OVERTIME

< **Section Effective Date(s)** : This Act contains provisions which take effect on dates different from the effective date of the Act itself. See Act sections 5 and 8. >

To amend sections 4111.01, 4111.02, 4111.03, 4111.04, 4111.08, 4111.09, and 4111.10 and to enact section 4111.14 of the Revised Code to implement Section 34a, Article II, of the Constitution of the State of Ohio and to further amend section 4111.08 of the Revised Code on January 1, 2010, to apply certain record-keeping provisions only to employers subject to Ohio's overtime law.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 4111.01, 4111.02, 4111.03, 4111.04, 4111.08, 4111.09, and 4111.10 be amended and section 4111.14 of the Revised Code be enacted to read as follows:

<< OH ST 4111.01 >>

As used in sections ~~4111.01 to 4111.17 of the Revised Code~~ **this chapter**:

(A) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to the deductions, charges, or allowances permitted by rules of the director of commerce under section 4111.05 of the Revised Code. "Wage" includes an employee's commissions of which the employee's employer keeps a record, but does not include gratuities, except as provided by rules issued under section 4111.05 of the Revised Code.

"Wage" also includes the reasonable cost to the employer of furnishing to an employee board, lodging, or other facilities, if the board, lodging, or other facilities are customarily furnished by the employer to the employer's employees. The cost of board, lodging, or other facilities shall not be included as part of wage to the extent excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the employee.

(B) "Employ" means ~~to suffer or to permit to work~~.

(C) "Employer" means ~~the state of Ohio, its instrumentalities, and its political subdivisions and their instrumentalities, any individual, partnership, association, corporation, business trust, or any person or group of persons, acting in the interest of an employer in relation to an employee, but does not include an employer whose annual gross volume of sales made for business done is less than one hundred fifty thousand dollars, exclusive of excise taxes at the retail level which are separately stated.~~

(D) "Employee" means ~~any individual employed by an employer but does not include:~~

- (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 engaged in the delivery of newspapers to the consumer;
- (4) Any individual employed as an outside salesperson compensated by commissions or in a bona fide executive, administrative, or professional capacity as such terms are defined by the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C.A. 201, as amended;

(5) Any employee employed in agriculture if the employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred worker-days of agricultural labor, or if the employee is the parent, spouse, child, or other member of the employer's immediate family;

(6) 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;

(7) A member of a police or fire protection agency or student employed on a part-time or seasonal basis by a political subdivision of this state;

(8) Any individual in the employ of a camp or recreational area for children under eighteen years of age and owned and operated by a nonprofit organization or group of organizations described in Section 501 (c)(3) of the "Internal Revenue Code of 1954," and exempt from income tax under Section 501 (a) of that code;

(9) Any individual employed directly by the house of representatives or directly by the senate.

(E) "Occupation" means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which individuals are employed.

<< OH ST 4111.02 >>

(A) Every employer and employers with less than one hundred fifty thousand dollars gross annual sales, as defined in Section 34a of Article II, Ohio Constitution, shall pay each of the employer's employees at a wage rate of not less than the wage rate specified in the "Fair Labor Standards Act," 29 U.S.C. 206, as now or hereafter amended, beginning on the effective date of this amendment, except as otherwise provided in this section Section 34a of Article II, Ohio Constitution.

(B) Every employer shall pay each employee in agriculture at a wage rate not less than the wage rate described in division (A) of this section. This provision does not apply to any employee employed in agriculture if the employee: (1)(a) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (b) commutes daily from the employee's permanent residence to the farm on which the employee is so employed, and (c) has been employed in agriculture less than thirteen weeks during the preceding calendar year, or (2)(a) is sixteen years of age or under, is employed as a hand harvest laborer, and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been paid on a piece rate basis in the region of employment, (b) is employed on the same farm as the employee's parent or person standing in the place of the employee's parent, and (c) is paid at the same piece rate as employees over age sixteen are paid on the same farm. Such employees shall be paid no less than two dollars and eighty cents per hour.

(C) For any employee engaged in an occupation in which the employee customarily and regularly receives tips from patrons or others, the employer shall pay The director of commerce annually shall adjust the wage rate as specified for tipped employees in the "Fair Labor Standards Act," 29 U.S.C. 203, as now or hereafter amended in Section 34a of Article II, Ohio Constitution. As used in this section, "employee" has the same meaning as in section 4111.14 of the Revised Code.

<< OH ST 4111.03 >>

(A) 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 worked in excess of forty hours in one workweek, in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C.A. 207, 213, as amended.

Any employee employed in agriculture shall not be covered by the overtime provision of this section.

(B) For the purposes of this section, the number of hours worked by a county employee in any one workweek shall be deemed to include, in addition to hours actually worked, all periods in an active pay status.

(C) If a county employee elects to take compensatory time off in lieu of overtime pay, for any overtime worked, such compensatory time may be granted by the employee's administrative superior, on a time and one-half basis, at a time mutually convenient to the employee and the administrative superior within one hundred eighty days after the overtime is worked.

(D) A county appointing authority with the exception of the county department of job and family services may, by rule or resolution as is appropriate, indicate the authority's intention not to be bound by division (B) or (C) of this section, and to adopt a different policy for the calculation and payment of overtime that is embodied in those divisions. Upon adoption, the alternative policy prevails. Prior to the adoption of an alternative overtime policy, the county appointing authority with the exception of

the county department of job and family services shall give a written notice of the alternative policy to each employee at least ten days prior to the effective date of the policy.

(E) As used in this section:

(1) "Employ" means to suffer or to permit to work.

(2) "Employer" means the state of Ohio, its instrumentalities, and its political subdivisions and their instrumentalities, any individual, partnership, association, corporation, business trust, or any person or group of persons, acting in the interest of an employer in relation to an employee, but does not include an employer whose annual gross volume of sales made for business done is less than one hundred fifty thousand dollars, exclusive of excise taxes at the retail level which are separately stated.

(3) "Employee" means any individual employed by an employer but does not include:

(a) Any individual employed by the United States;

(b) 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;

(c) Any individual engaged in the delivery of newspapers to the consumer;

(d) Any individual employed as an outside salesperson compensated by commissions or employed in a bona fide executive, administrative, or professional capacity as such terms are defined by the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C.A. 201, as amended;

(e) 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;

(f) A member of a police or fire protection agency or student employed on a part-time or seasonal basis by a political subdivision of this state;

(g) Any individual in the employ of a camp or recreational area for children under eighteen years of age and owned and operated by a nonprofit organization or group of organizations described in Section 501 (c)(3) of the "Internal Revenue Code of 1954," and exempt from income tax under Section 501 (a) of that code;

(h) Any individual employed directly by the house of representatives or directly by the senate.

<< OH ST 4111.04 >>

The director of commerce may:

(A) Investigate and ascertain the wages of persons employed in any occupation in the state;

(B) Enter and inspect the place of business or employment of any employer for the purpose of inspecting any books, registers, payrolls, or other records of the employer that in any way relate to the question of wages, hours, and other conditions of employment of any employees, and may question the employees for the purpose of ascertaining whether sections 4111.01 to 4111.17 of the Revised Code, and the rules adopted thereunder, have been and are being obeyed. In conducting an inspection of the records of an employer, the director shall make every effort to coordinate the inspection with those conducted by the federal agency responsible for enforcement of the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C.A. 201, as amended. If the federal agency has completed an audit or examination of the employer's records within the sixty days prior to the date the director notifies the employer of the director's intent to examine the employer's records, the director shall accept in lieu of the director's own inspection, a report from the federal agency that the employer is in compliance with the federal act, unless the director has reasonable grounds for believing that the report is inaccurate or incomplete for the purposes of sections 4111.01 to 4111.13 of the Revised Code, or that events occurring since the audit give the director reasonable grounds for believing that a violation of sections 4111.01 to 4111.13 of the Revised Code has occurred.

(C) In the event the director is prohibited by any employer from carrying out the intent of this section, the director may apply to any court of common pleas having jurisdiction of that employer or the place of employment under issue subpoenas and compel attendance of witnesses and production of papers, books, accounts, payrolls, documents, records, and testimony relating and relevant to the director's investigation, for an order directing compliance with this section. Failure of the employer to obey the order of the court may be punished by said court as a contempt thereof .

<< OH ST 4111.08 >>

Every employer subject to sections 4111.01 to 4111.17 of the Revised Code, or to any rule adopted thereunder, shall make and keep for a period of not less than three years a record of the name, address, and occupation of each of the employer's employees, the rate of pay and the amount paid each pay period to each employee, the hours worked each day and each work week by the employee, and other information as the director of commerce prescribes by rule as necessary or appropriate for the enforcement of sections 4111.01 to 4111.17 of the Revised Code, or of the rules thereunder. Records may be opened for inspection or copying by the director at any reasonable time. Any records an employer creates on or before December 31, 2006, shall be created and maintained in accordance with this section.

<< OH ST 4111.09 >>

Every employer subject to sections 4111.01 to 4111.17 of the Revised Code, or to any rules issued thereunder, shall keep a summary of the sections, approved by the director of commerce, and copies of any applicable rules issued thereunder, or a summary of the rules, posted in a conspicuous and accessible place in or about the premises wherein any person subject thereto is employed. The director of commerce shall make the summary described in this section available on the web site of the department of commerce. The director shall update this summary as necessary, but not less than annually, in order to reflect changes in the minimum wage rate as required under Section 34a of Article II, Ohio Constitution. Employees and employers shall be furnished copies of the summaries and rules by the state, on request, without charge.

<< OH ST 4111.10 >>

(A) Any employer who pays any employee less than wages to which the employee is entitled under sections ~~4111.01 to 4111.17~~ section 4111.03 of the Revised Code, is liable to the employee affected for the full amount of the overtime wage rate, less any amount actually paid to the employee by the employer, and for costs and reasonable attorney's fees as may be allowed by the court. Any agreement between the employee and the employer to work for less than the overtime wage rate is no defense to an action.

(B) At the written request of any employee paid less than the wages to which the employee is entitled under sections ~~4111.01 to 4111.17~~ section 4111.03 of the Revised Code, the director of commerce may take an assignment of a wage claim in trust for the assigning employee and may bring any legal action necessary to collect the claim. The employer shall pay the costs and reasonable attorney's fees allowed by the court.

<< OH ST 4111.14 >>

(A) 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. In implementing Section 34a of Article II, Ohio Constitution, the general assembly hereby finds that the purpose of Section 34a of Article II, Ohio Constitution is to:

(1) Ensure that Ohio employees, as defined in division (B)(1) of this section, are paid the wage rate required by Section 34a of Article II, Ohio Constitution;

(2) Ensure that covered Ohio employers maintain certain records that are directly related to the enforcement of the wage rate requirements in Section 34a of Article II, Ohio Constitution;

(3) Ensure that Ohio employees who are paid the wage rate required by Section 34a of Article II, Ohio Constitution may enforce their right to receive that wage rate in the manner set forth in Section 34a of Article II, Ohio Constitution; and

(4) Protect the privacy of Ohio employees' pay and personal information specified in Section 34a of Article II, Ohio Constitution by restricting an employee's access, and access by a person acting on behalf of that employee, to the employee's own pay and personal information.

(B) In accordance with Section 34a of Article II, Ohio Constitution, the terms "employer," "employee," "employ," "person," and "independent contractor" have the same meanings as in the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 203, as amended. In construing the meaning of these terms, due consideration and great weight shall be given to the United States department of labor's and federal courts' interpretations of those terms under the Fair Labor Standards Act and its regulations. As used in division (B) of this section:

(1) "Employee" means individuals employed in Ohio, but does not mean individuals who are excluded from the definition of "employee" under 29 U.S.C. 203(e) or individuals who are exempted from the minimum wage requirements in 29 U.S.C. 213 and from the definition of "employee" in this chapter.

(2) "Employ" and "employee" do not include any person acting as a volunteer. In construing who is a volunteer, "volunteer" shall have the same meaning as in sections 553.101 to 553.106 of Title 29 of the Code of Federal Regulations, as amended, and due consideration and great weight shall be given to the United States department of labor's and federal courts' interpretations of the term "volunteer" under the Fair Labor Standards Act and its regulations.

(C) In accordance with Section 34a of Article II, Ohio Constitution, the state may issue licenses to employers authorizing payment of a wage below that required by Section 34a of Article II, Ohio Constitution to individuals with mental or physical disabilities that may otherwise adversely affect their opportunity for employment. In issuing such licenses, the state shall abide by the rules adopted pursuant to section 4111.06 of the Revised Code.

(D)(1) In accordance with Section 34a of Article II, Ohio Constitution, individuals employed in or about the property of an employer or an individual's residence on a casual basis are not included within the coverage of Section 34a of Article II, Ohio Constitution. As used in division (D) of this section:

(a) "Casual basis" means employment that is irregular or intermittent and that is not performed by an individual whose vocation is to be employed in or about the property of the employer or individual's residence. In construing who is employed on a "casual basis," due consideration and great weight shall be given to the United States department of labor's and federal courts' interpretations of the term "casual basis" under the Fair Labor Standards Act and its regulations.

(b) "An individual employed in or about the property of an employer or individual's residence" means an individual employed on a casual basis or an individual employed in or about a residence on a casual basis, respectively.

(2) In accordance with Section 34a of Article II, Ohio Constitution, employees of a solely family-owned and operated business who are family members of an owner are not included within the coverage of Section 34a of Article II, Ohio Constitution. As used in division (D)(2) of this section, "family member" means a parent, spouse, child, stepchild, sibling, grandparent, grandchild, or other member of an owner's immediate family.

(E) In accordance with Section 34a of Article II, Ohio Constitution, an employer shall at the time of hire provide an employee with the employer's name, address, telephone number, and other contact information and update such information when it changes. As used in division (E) of this section:

(1) "Other contact information" may include, where applicable, the address of the employer's internet site on the world wide web, the employer's electronic mail address, fax number, or the name, address, and telephone number of the employer's statutory agent. "Other contact information" does not include the name, address, telephone number, fax number, internet site address, or electronic mail address of any employee, shareholder, officer, director, supervisor, manager, or other individual employed by or associated with an employer.

(2) "When it changes" means that the employer shall provide its employees with the change in its name, address, telephone number, or other contact information within sixty business days after the change occurs. The employer shall provide the changed information by using any of its usual methods of communicating with its employees, including, but not limited to, listing the change on the employer's internet site on the world wide web, internal computer network, or a bulletin board where it commonly posts employee communications or by insertion or inclusion with employees' paychecks or pay stubs.

(F) In accordance with Section 34a of Article II, Ohio Constitution, 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 by that employer. As used in division (F) of this section:

(1) "Address" means an employee's home address as maintained in the employer's personnel file or personnel database for that employee.

(2)(a) With respect to employees who are not exempt from the overtime pay requirements of the Fair Labor Standards Act or this chapter, "pay rate" means an employee's base rate of pay.

(b) With respect to employees who are exempt from the overtime pay requirements of the Fair Labor Standards Act or this chapter, "pay rate" means an employee's annual base salary or other rate of pay by which the particular employee qualifies for that exemption under the Fair Labor Standards Act or this chapter, but does not include bonuses, stock options, incentives, deferred compensation, or any other similar form of compensation.

(3) “Record” means the name, address, occupation, pay rate, hours worked for each day worked, and each amount paid an employee in one or more documents, databases, or other paper or electronic forms of record-keeping maintained by an employer. No one particular method or form of maintaining such a record or records is required under this division. An employer is not required to create or maintain a single record containing only the employee's name, address, occupation, pay rate, hours worked for each day worked, and each amount paid an employee. An employer shall maintain a record or records from which the employee or person acting on behalf of that employee could reasonably review the information requested by the employee or person.

An employer is not required to maintain the records specified in division (F)(3) of this section for any period before January 1, 2007. On and after January 1, 2007, the employer shall maintain the records required by division (F)(3) of this section for three years from the date the hours were worked by the employee and for three years after the date the employee's employment ends.

(4)(a) Except for individuals specified in division (F)(4)(b) of this section, “hours worked for each day worked” means the total amount of time worked by an employee in whatever increments the employer uses for its payroll purposes during a day worked by the employee. An employer is not required to keep a record of the time of day an employee begins and ends work on any given day. As used in division (F)(4) of this section, “day” means a fixed period of twenty-four consecutive hours during which an employee performs work for an employer.

(b) An employer is not required to keep records of “hours worked for each day worked” for individuals for whom the employer is not required to keep those records under the Fair Labor Standards Act and its regulations or individuals who are not subject to the overtime pay requirements specified in section 4111.03 of the Revised Code.

(5) “Each amount paid an employee” means the total gross wages paid to an employee for each pay period. As used in division (F)(5) of this section, “pay period” means the period of time designated by an employer to pay an employee the employee's gross wages in accordance with the employer's payroll practices under section 4113.15 of the Revised Code.

(G) In accordance with Section 34a of Article II, Ohio Constitution, an employer must provide such information without charge to an employee or person acting on behalf of an employee upon request. As used in division (G) of this section:

(1) “Such information” means the name, address, occupation, pay rate, hours worked for each day worked, and each amount paid for the specific employee who has requested that specific employee's own information and does not include the name, address, occupation, pay rate, hours worked for each day worked, or each amount paid of any other employee of the employer. “Such information” does not include hours worked for each day worked by individuals for whom an employer is not required to keep that information under the Fair Labor Standards Act and its regulations or individuals who are not subject to the overtime pay requirements specified in section 4111.03 of the Revised Code.

(2) “Acting on behalf of an employee” means a person acting on behalf of an employee as any of the following:

(a) The certified or legally recognized collective bargaining representative for that employee under the applicable federal law or Chapter 4117. of the Revised Code;

(b) The employee's attorney;

(c) The employee's parent, guardian, or legal custodian.

A person “acting on behalf of an employee” must be specifically authorized by an employee in order to make a request for that employee's own name, address, occupation, pay rate, hours worked for each day worked, and each amount paid to that employee.

(3) “Provide” means that an employer shall provide the requested information within thirty business days after the date the employer receives the request, unless either of the following occurs:

(a) The employer and the employee or person acting on behalf of the employee agree to some alternative time period for providing the information.

(b) The thirty-day period would cause a hardship on the employer under the circumstances, in which case the employer must provide the requested information as soon as practicable.

(4) A “request” made by an employee or a person acting on behalf of an employee means a request by an employee or a person acting on behalf of an employee for the employee's own information. The employer may require that the employee provide the employer with a written request that has been signed by the employee and notarized and that reasonably specifies the particular information being requested. The employer may require that the person acting on behalf of an employee provide the employer with a written request that has been signed by the employee whose information is being requested and notarized and that reasonably specifies the particular information being requested.

(H) In accordance with Section 34a of Article II, Ohio Constitution, an employee, person acting on behalf of one or more employees, and any other interested party may file a complaint with the state for a violation of any provision of Section 34a of Article II, Ohio Constitution 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. As used in division (H) of this section:

(1) "Complaint" means a complaint of an alleged violation pertaining to harm suffered by the employee filing the complaint, by a person acting on behalf of one or more employees, or by an interested party.

(2) "Acting on behalf of one or more employees" has the same meaning as "acting on behalf of an employee" in division (G) (2) of this section. Each employee must provide a separate written and notarized authorization before the person acting on that employee's or those employees' behalf may request the name, address, occupation, pay rate, hours worked for each day worked, and each amount paid for the particular employee.

(3) "Interested party" means a party who alleges to be injured by the alleged violation and who has standing to file a complaint under common law principles of standing.

(4) "Resolved by the state" means that the complaint has been resolved to the satisfaction of the state.

(5) "Shall be kept confidential" means that the state shall keep the name of the employee confidential as required by division (H) of this section.

(I) In accordance with Section 34a of Article II, Ohio Constitution, the state may on its own initiative investigate an employer's compliance with Section 34a of Article II, Ohio Constitution and any law or regulation implementing Section 34a of Article II, Ohio Constitution. The employer shall make available to the state any records related to such investigation and other information required for enforcement of Section 34a of Article II, Ohio Constitution or any law or regulation implementing Section 34a of Article II, Ohio Constitution. The state shall investigate an employer's compliance with this section in accordance with the procedures described in section 4111.04 of the Revised Code. All records and information related to investigations by the state are confidential and are not a public record subject to section 149.43 of the Revised Code. This division does not prevent the state from releasing to or exchanging with other state and federal wage and hour regulatory authorities information related to investigations.

(J) In accordance with Section 34a of Article II, Ohio Constitution, 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. The "not less than one hundred fifty dollar" penalty specified in division (J) of this section shall be imposed only for violations of the anti-retaliation provision in Section 34a of Article II, Ohio Constitution.

(K) In accordance with Section 34a of Article II, Ohio Constitution, 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 court of common pleas of an employee's county of residence, for any violation of Section 34a of Article II, Ohio Constitution 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.

(1) As used in division (K) of this section, "notification" means the date on which the notice was sent to the employee by the state.

(2) No employee shall join as a party plaintiff in any civil action that is brought under division (K) of this section by an employee, person acting on behalf of an employee, or person acting on behalf of all similarly situated employees unless that employee first gives written consent to become such a party plaintiff and that consent is filed with the court in which the action is brought.

(3) A civil action regarding an alleged violation of this section shall be maintained only under division (K) of this section. This division does not preclude the joinder in a single civil action of an action under this division and an action under section 4111.10 of the Revised Code.

(4) Any agreement between an employee and employer to work for less than the wage rate specified in Section 34a of Article II, Ohio Constitution, is no defense to an action under this section.

(L) In accordance with Section 34a of Article II, Ohio Constitution, 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. Nothing in division (L) of this section affects the right of an employer and employee to agree to submit a dispute under this section to alternative dispute resolution, including, but not limited to, arbitration, in lieu of maintaining the civil suit specified in division (K) of this section. Nothing in this division limits the state's ability to investigate or enforce this section.

(M) An employer who provides such information specified in Section 34a of Article II, Ohio Constitution, shall be immune from any civil liability for injury, death, or loss to person or property that otherwise might be incurred or imposed as a result of providing that information to an employee or person acting on behalf of an employee in response to a request by the employee or person, and the employer shall not be subject to the provisions of Chapters 1347. and 1349. of the Revised Code to the extent that such provisions would otherwise apply. As used in division (M) of this section, "such information," "acting on behalf of an employee," and "request" have the same meanings as in division (G) of this section.

(N) As used in this section, "the state" means the director of commerce.

SECTION 2. That existing sections 4111.01, 4111.02, 4111.03, 4111.04, 4111.08, 4111.09, and 4111.10 of the Revised Code are hereby repealed.

SECTION 3. That section 4111.08 of the Revised Code be amended to read as follows:

<< OH ST 4111.08 >>

Every employer subject to ~~sections 4111.01 to 4111.17~~ section 4111.03 of the Revised Code, or to any rule adopted thereunder, shall make and keep for a period of not less than three years a record of the name, address, and occupation of each of the employer's employees, the rate of pay and the amount paid each pay period to each employee, the hours worked each day and each work week by the employee, and other information as the director of commerce prescribes by rule as necessary or appropriate for the enforcement of ~~sections 4111.01 to 4111.17~~ section 4111.03 of the Revised Code, or of the rules thereunder. Records may be opened for inspection or copying by the director at any reasonable time. ~~Any records an employer creates on or before December 31, 2006, shall be created and maintained in accordance with this section.~~

SECTION 4. That existing section 4111.08 of the Revised Code, as it results from Sections 1 and 2 of this act, is hereby repealed.

SECTION 5. Sections 3 and 4 of this act take effect January 1, 2010.

SECTION 6. (A) The General Assembly, by enacting this act, intends to implement the Ohio Fair Minimum Wage Amendment in the manner in which the proponents of the Amendment described it to Ohio voters during the campaigns for the General Election on November 7, 2006.

(B) The proponents of the Ohio Fair Minimum Wage Amendment issued campaign materials, one of which was entitled "Fact vs. Fiction: Minimum Wage Opponents Shamelessly Distort Facts to Deny Low-Wage Workers a Raise," published by Ohioans for a Fair Minimum Wage, that stated all of the following upon which Ohio voters relied to be honest and accurate:

(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.

(2) By referencing the federal minimum wage law directly, the Amendment ensures that the Ohio law tracks the federal minimum wage requirements with respect to individuals who volunteer their time.

(3) The Amendment does not threaten employees' privacy because employees may seek access only to their own payroll records.

(4) The Amendment allows an employer to take reasonable steps to verify that a person does in fact represent the employee.

(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.

(C) The General Assembly enacts this act according to the proponents' campaign materials and pursuant to the authority vested in the General Assembly by the following constitutional provisions:

(1) Section 34a of Article II, Ohio Constitution, which states that "laws may be passed to implement its provisions. . . ."

(2) Section 34 of Article II, Ohio Constitution, which states that "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,” which Section 34a of Article II, Ohio Constitution, made no attempt to amend, repeal, or otherwise modify.

SECTION 7. If any item of law that constitutes the whole or part of a codified or uncodified section of law contained in this act, or if any application of any item of law that constitutes the whole or part of a codified or uncodified section of law contained in this act, is held invalid, the invalidity does not affect other items of law or applications of items of law that can be given effect without the invalid item of law or application. To this end, the items of law of which the codified and uncodified sections of law contained in this act are composed, and their applications, are independent and severable.

SECTION 8. The amendment by this act of the section of law listed in this section is subject to the referendum. Therefore, under Ohio Constitution, Article II, Section 1c and section 1.471 of the Revised Code, the amendment, and the items of law of which the amendment is composed, take effect as specified in this section. If, however, a referendum petition is filed against any such amendment, or against any item of law of which any such amendment is composed, the amendment, unless rejected at the referendum, goes into effect at the earliest time permitted by law that is on or after the effective date specified in this section.

Section 4111.08 of the Revised Code, as amended in Sections 3 and 4 of this act, takes effect January 1, 2010.

Date Passed: December 20, 2006

Approved January 2, 2007

Act. Eff. April 4, 2007

OH LEGIS 184 (2006)

End of Document

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Code of Federal Regulations

Title 29. Labor

Subtitle B. Regulations Relating to Labor

Chapter V. Wage and Hour Division, Department of Labor

Subchapter A. Regulations

Part 541. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees (Refs & Annos)

Subpart B. Executive Employees

29 C.F.R. § 541.100

§ 541.100 General rule for executive employees.

Currentness

(a) The term “employee employed in a bona fide executive capacity” in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

(b) The phrase “salary basis” is defined at [§ 541.602](#); “board, lodging or other facilities” is defined at [§ 541.606](#); “primary duty” is defined at [§ 541.700](#); and “customarily and regularly” is defined at [§ 541.701](#).

SOURCE: [69 FR 22260](#), April 23, 2004, unless otherwise noted.

AUTHORITY: [29 U.S.C. 213](#); [Public Law 101–583](#), [104 Stat. 2871](#); Reorganization Plan No. 6 of 1950 (3 CFR 1945–53 Comp. p. 1004); Secretary's Order No. 4–2001 ([66 FR 29656](#)).

Notes of Decisions (119)

Current through Feb. 12, 2015; 80 FR 7966.

Code of Federal Regulations

Title 29. Labor

Subtitle B. Regulations Relating to Labor

Chapter V. Wage and Hour Division, Department of Labor

Subchapter A. Regulations

Part 541. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees (Refs & Annos)

Subpart C. Administrative Employees

29 C.F.R. § 541.200

§ 541.200 General rule for administrative employees.

Currentness

(a) The term “employee employed in a bona fide administrative capacity” in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(b) The term “salary basis” is defined at § 541.602; “fee basis” is defined at § 541.605; “board, lodging or other facilities” is defined at § 541.606; and “primary duty” is defined at § 541.700.

SOURCE: 69 FR 22260, April 23, 2004, unless otherwise noted.

AUTHORITY: 29 U.S.C. 213; Public Law 101–583, 104 Stat. 2871; Reorganization Plan No. 6 of 1950 (3 CFR 1945–53 Comp. p. 1004); Secretary's Order No. 4–2001 (66 FR 29656).

Notes of Decisions (180)

Current through Feb. 12, 2015; 80 FR 7966.

Code of Federal Regulations

Title 29. Labor

Subtitle B. Regulations Relating to Labor

Chapter V. Wage and Hour Division, Department of Labor

Subchapter A. Regulations

Part 541. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees (Refs & Annos)

Subpart D. Professional Employees

29 C.F.R. § 541.300

§ 541.300 General rule for professional employees.

Currentness

(a) The term “employee employed in a bona fide professional capacity” in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging, or other facilities; and

(2) Whose primary duty is the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

(b) The term “salary basis” is defined at § 541.602; “fee basis” is defined at § 541.605; “board, lodging or other facilities” is defined at § 541.606; and “primary duty” is defined at § 541.700.

SOURCE: 69 FR 22260, April 23, 2004, unless otherwise noted.

AUTHORITY: 29 U.S.C. 213; Public Law 101–583, 104 Stat. 2871; Reorganization Plan No. 6 of 1950 (3 CFR 1945–53 Comp. p. 1004); Secretary's Order No. 4–2001 (66 FR 29656).

Notes of Decisions (32)

Current through Feb. 12, 2015; 80 FR 7966.

COMPARISON BETWEEN §34A AND THE FLSA

FLSA	§34a
<p>2014 Minimum Wage Rate \$7.25</p> <p>Does not automatically increase.</p>	<p>2014 Minimum Wage Rate \$7.95</p> <p>Automatically increases based on inflation.²</p>
<p>2014 Tipped Minimum Wage Rate \$2.13</p> <p>Does not automatically increase.</p>	<p>2014 Tipped Minimum Wage Rate \$3.98</p> <p>Automatically increases based on inflation.³</p>
<p>Employers Subject to Minimum Wage Requirements Only those employers whose annual gross volume of sales made or business done is at least \$500,000.¹</p> <p>Solely family owned and operated businesses excluded. 29 U.S.C. 203(s)(2) and 206(a).</p>	<p>Employers Subject to Minimum Wage Requirements Every employer, including the state and political subdivisions, must pay at least the federal minimum wage.</p> <p>Employers earning more than \$250,000 in gross receipts per year must pay the higher, state minimum wage.</p> <p>Solely family owned and operated businesses excluded.⁴</p>
<p>Employees Exempt from Minimum Wage Requirements Employees who are family members working in a solely family owned and operated business. 29 U.S.C. 203(s)(2) and 206(a).</p> <p>Tipped employees may be paid “tipped minimum wage.” 29 U.S.C. 203(m).</p> <p>Employees with disabilities that may adversely affect their opportunity for employment may be</p>	<p>Employees Exempt from Minimum Wage Requirements Employees who are family members working in a solely family owned and operated business.⁵</p> <p>Tipped employees may be paid half of minimum wage.⁶</p> <p>Employees with disabilities that may adversely affect their opportunity for employment may be</p>

¹ See 29 U.S.C. 206(a) and 203(s)(1). In order to be subject to the minimum wage requirements, the employer also must have “employees engaged in commerce or in the production of goods for commerce, or [have] employees handling, selling, or otherwise working on goods or materials that have been moved in or produced in commerce by any person.” 29 U.S.C. 203(s)(1)(i).

² “this state minimum wage rate shall be increased effective the first day of the following January by the rate of inflation...”

³ The tipped minimum wage rate under §34a is half of “the minimum wage rate required by this section.” That rate is “increased effective the first day of the following January by the rate of inflation...”

⁴ “The provisions of this section shall not apply to employees of a solely family owned and operated business who are family members of an owner.”

⁵ *Id.*

⁶ “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...”

<p>paid less than minimum wage if a special certificate is obtained. 29 U.S.C. 214(c).</p> <p>Newly hired employees under 20 years old may be paid less than minimum wage. 29 U.S.C. 206(g).</p> <p>Employees who are employed on a casual basis as a babysitter. 29 U.S.C. 213(a)(15).</p> <p>Learners, apprentices, and messengers may be paid less than minimum wage with receipt of a special certificate. 29 U.S.C. 214(a).</p> <p>Full-time students working part-time in retail or service establishments, agriculture, schools, may be paid less than minimum wage with a certificate. 29 U.S.C. 214(b).</p> <p>Students working at their schools. 29 U.S.C. 214(d).</p> <p>Executive employees. 29 U.S.C. 213(a)(1).</p> <p>Administrative employees. 29 U.S.C. 213(a)(1).</p> <p>Professional employees. 29 U.S.C. 213(a)(1).</p> <p>Outside salespeople. 29 U.S.C. 213(a)(1).</p> <p>Employees of certain amusement, recreational, organized camp, or religious or non-profit educational conference centers. 29 U.S.C. 213(a)(3).</p> <p>Employees engaged in the harvesting or processing of aquatic animals and plants. 29 U.S.C. 213(a)(5).</p> <p>Employees of seasonal or small farms. 29 U.S.C. 213(a)(6).</p> <p>Newspaper workers. 29 U.S.C. 213(a)(8).</p> <p>Switchboard operators. 29 U.S.C. 213(a)(10).</p> <p>Seaman on a vessel other than an American vessel. 29 U.S.C. 213(a)(12).</p>	<p>paid less than minimum wage if a license is obtained.⁷</p> <p>Employees under 16 years old may be paid federal minimum wage.⁸</p> <p>Employees employed in or about the property of the employer or individual's residence on a casual basis.</p>
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⁷ "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..."

⁸ "Employees under the age of sixteen *** shall be paid a wage rate of not less than that established under the [FLSA]."

<p>Employees who provides companionship services. 29 U.S.C. 213(a)(15).</p> <p>Criminal investigators. 29 U.S.C. 213(a)(16).</p> <p>Skilled computer workers. 29 U.S.C. 213(a)(17).</p> <p>Wreath makers. 29 U.S.C. 213(d).</p> <p>Recordkeeping Requirements Employers must maintain and preserve payroll records, records of hours worked, and certain other data for employees subject to minimum wage requirements. 29 C.F.R. 516.2. Employers need not maintain records of hours worked for “white collar” workers. 29 C.F.R. 516.3.</p> <p>Employers only need to make the records available for inspection by the Administrator of the Department of Labor. 29 C.F.R. 516.17.</p> <p>Recordkeeping Requirements Enforcement No private cause of action exists. <i>East v. Bullock’s Inc.</i>, 34 F.Supp. 2d 1176, 1184 (D. Ariz. 1998).</p> <p>Procedural Requirements for Action An action may be maintained in a court of competent jurisdiction. 29 U.S.C. 216(b).</p> <p>“No employee shall be a party plaintiff to any [] action unless he gives consent in writing *** and such consent is filed in the court in which the action is brought.” 29 U.S.C. 216(b).</p> <p>Damages for Failure to Pay Minimum Wages An amount equal to the unpaid wages as liquidated damages. 29 U.S.C. 216(b).</p> <p>Employer may assert a good faith defense to the imposition of liquidated damages. 29 U.S.C. 260.</p>	<p>Recordkeeping Requirements Employers must maintain and preserve payroll records, records of hours worked, and certain data for all employees.</p> <p>Upon request, employers must provide records, without charge, to an employee or an employee’s representative.</p> <p>Recordkeeping Requirements Enforcement Express grant of a private cause of action. <i>Craig v. Bridge Bros. Trucking LLC</i>, 2:12-CV-954, 2013 WL 4010316 *3 (S.D. Ohio Aug. 6, 2013).</p> <p>Procedural Requirements for Action An action may be maintained in a court of competent jurisdiction, including the common pleas court of an employee’s county of residence.</p> <p>“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 an action...”</p> <p>Employees are specifically not liable for costs or attorney’s fees in an action absent a showing that the action was frivolous.</p> <p>Damages for Failure to Pay Minimum Wages An additional two times the amount of unpaid wages.</p> <p>No defense to the imposition of the above damages.</p>
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<p>Damages for Unlawful Retaliation “Legal or equitable relief.” 29 U.S.C. 216(b).</p> <p>No minimum.</p> <p>Statute of Limitations Two years, or three years if the employee proves a willful violation. 29 U.S.C. 255(a).</p> <p>Time Period to Pay Judgment</p>	<p>Damages for Unlawful Retaliation Equitable and monetary relief, and/or an amount sufficient to compensate the employee and deter future violations.</p> <p>\$150/day of violation minimum.</p> <p>Statute of Limitations Three years.⁹</p> <p>Time Period to Pay Judgment Payment must be made within 30 days of finding an employer violated any part of §34a.</p> <p>Payment may not be stayed pending an appeal.</p>
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⁹ “An action *** may be brought *** within three years of the violation or of when the violation ceased if it was of a continuing nature...”

Arizona Revised Statutes Annotated
Title 23. Labor
Chapter 2. Employment Practices and Working Conditions
Article 8. Minimum Wage (Refs & Annos)

A.R.S. § 23-362

§ 23-362. Definitions

Effective: January 1, 2007

[Currentness](#)

<Section added by Proposition 202 (2006 election). See, also, section added by [Laws 1997, Ch. 51, § 1.](#)>

As used in this article, unless the context otherwise requires:

A. “Employee” means any person who is or was employed by an employer but does not include any person who is employed by a parent or a sibling, or who is employed performing babysitting services in the employer's home on a casual basis.

B. “Employer” includes any corporation, proprietorship, partnership, joint venture, limited liability company, trust, association, political subdivision of the state, individual or other entity acting directly or indirectly in the interest of an employer in relation to an employee, but does not include the state of Arizona, the United States, or a small business.

C. “Small business” means any corporation, proprietorship, partnership, joint venture, limited liability company, trust, or association that has less than five hundred thousand dollars in gross annual revenue and that is exempt from having to pay a minimum wage under [§ 206\(a\) of title 29 of the United States Code](#).

D. “Employ” includes to suffer or permit to work; whether a person is an independent contractor or an employee shall be determined according to the standards of the federal fair labor standards act, but the burden of proof shall be upon the party for whom the work is performed to show independent contractor status by clear and convincing evidence.

E. “Wage” means monetary compensation due to an employee by reason of employment, including an employee's commissions, but not tips or gratuities.

F. “Law enforcement officer” means the attorney general, a city attorney, a county attorney or a town attorney.

G. “Commission” means the industrial commission of Arizona, any successor agency, or such other agency as the governor shall designate to implement this article.

Credits

Added by Proposition 202, approved election Nov. 7, 2006, as proclaimed by the Governor Dec. 7, 2006, eff. Jan. 1, 2007.

[Notes of Decisions \(2\)](#)

A. R. S. § 23-362, AZ ST § 23-362

Current through legislation effective February 18, 2015 of the First Regular Session of the Fifty-Second Legislature

End of Document

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West's Nevada Revised Statutes Annotated
The Constitution of the State of Nevada (Refs & Annos)
Article 15. Miscellaneous Provisions

N.R.S. Const. Art. 15, § 16

§ 16. Payment of minimum compensation to employees

Currentness

A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents (\$5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents (\$6.15) per hour if the employer does not provide such benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over \$5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.

B. The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section. An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.

C. As used in this section, "employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.

D. If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the remaining provisions and all portions not declared illegal, invalid or inoperative shall remain in full force or effect, and no such determination shall invalidate the remaining sections or portions of the sections of this section.

Credits

Added in 2006. Proposed by initiative petition and approved and ratified by the people at the 2004 and 2006 General Elections.

[Notes of Decisions \(1\)](#)

N. R. S. Const. Art. 15, § 16, NV CONST Art. 15, § 16

Current through End of 28th Special Session (2014) and all technical corrections received by publisher from Legislative Counsel Bureau

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Vernon's Annotated Missouri Statutes
Title XVIII. Labor and Industrial Relations
Chapter 290. Wages, Hours and Dismissal Rights (Refs & Annos)
Minimum Wage Law (Refs & Annos)

V.A.M.S. 290.502

290.502. Minimum wage rate--increase or decrease, when

Effective: January 1, 2007

[Currentness](#)

1. Except as may be otherwise provided pursuant to [sections 290.500 to 290.530](#), effective January 1, 2007, every employer shall pay to each employee wages at the rate of \$6.50 per hour, or wages at the same rate or rates set under the provisions of federal law as the prevailing federal minimum wage applicable to those covered jobs in interstate commerce, whichever rate per hour is higher.

2. The minimum wage shall be increased or decreased on January 1, 2008, and on January 1 of successive years, by the increase or decrease in the cost of living. On September 30, 2007, and on each September 30 of each successive year, the director shall measure the increase or decrease in the cost of living by the percentage increase or decrease as of the preceding July over the level as of July of the immediately preceding year of the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) or successor index as published by the U.S. Department of Labor or its successor agency, with the amount of the minimum wage increase or decrease rounded to the nearest five cents.

Credits

(L.1990, H.B. No. 1881, § 2. Amended by Proposition B, approved at November 7, 2006 election, eff. Jan. 1, 2007.)

[Notes of Decisions \(5\)](#)

V. A. M. S. 290.502, MO ST 290.502

Statutes are current through the end of the 2014 Second Regular Session of the 97th General Assembly. Constitution is current through the November 4, 2014 General Election.

End of Document

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West's Montana Code Annotated
Title 39. Labor
Chapter 3. Wages and Wage Protection
Part 4. Minimum Wage and Overtime Compensation (Refs & Annos)

MCA 39-3-409

39-3-409. Adoption of minimum wage rates--exception

Currentness

- (1) The minimum wage, except as provided in subsection (3), must be the greater of either:
- (a) the minimum hourly wage rate as provided under the federal Fair Labor Standards Act of 1938 ([29 U.S.C. 206\(a\)\(1\)](#)), excluding the value of tips received by the employee and the special provisions for a training wage; or
 - (b) \$6.15 an hour, excluding the value of tips received by the employee and the special provisions for a training wage.
- (2)(a) The minimum wage is subject to a cost-of-living adjustment, as provided in subsection (2)(b).
- (b) No later than September 30 of each year, an adjustment of the wage amount specified in subsection (1) must be made based upon the increase, if any, from August of the preceding year to August of the year in which the calculation is made in the consumer price index, U.S. city average, all urban consumers, for all items, as published by the bureau of labor statistics of the United States department of labor.
 - (c) The wage amount established under this subsection (2):
 - (i) must be rounded to the nearest 5 cents; and
 - (ii) becomes effective as the new minimum wage, replacing the dollar figure specified in subsection (1), on January 1 of the following year.
- (3) The minimum wage rate for a business whose annual gross sales are \$110,000 or less is \$4 an hour.

Credits

Enacted by Laws 1989, ch. 674, § 2. Amended by [Laws 1991, ch. 650, § 1](#); amended approved Nov. 7, 2006, [Initiative Measure No. 151](#), § 1.

MCA 39-3-409, MT ST 39-3-409

Current through the 2013 Session, and the 2014 general election. Court Rules in the Code are current with amendments received through August 1, 2014.

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West's **Colorado** Revised Statutes Annotated
Constitution of the State of **Colorado** [1876] (Refs & Annos)
Article **XVIII**. Miscellaneous

C.R.S.A. **Const. Art. 18, § 15**

§ 15. State minimum wage rate

Currentness

Effective January 1, 2007, **Colorado's** minimum wage shall be increased to \$6.85 per hour and shall be adjusted annually for inflation, as measured by the Consumer Price Index used for **Colorado**. This minimum wage shall be paid to employees who receive the state or federal minimum wage. No more than \$3.02 per hour in tip income may be used to offset the minimum wage of employees who regularly receive tips.

Credits

Added by Initiative Nov. 7, 2006, effective Jan. 1, 2007.

Editors' Notes

RESEARCH REFERENCES

Treatises and Practice Aids

- 10 **Colorado** Practice Series § 7:90, Amount of Earnings Subject to Garnishment.
- 16 **Colorado** Practice Series § 7.14, Minimum Wage.
- 5A **Colorado** Practice Series App. J, Selected **Colorado** Statutes.
- 16A **Colorado** Practice Series § 3.1, Work Week and Pay.
- 16A **Colorado** Practice Series § 3.2, Payroll Deductions.
- 16A **Colorado** Practice Series § 2.12, Overtime: Exempt/Nonexempt.
- 16A **Colorado** Practice Series § 3.17, Employment of Minors.
- 16A **Colorado** Practice Series § 9.14, FLSA: Fair Labor Standards Act of 1938, 29 U.S.C.A. §§ 201-219; 29 C.F.R. §§ 515-580, 775-793.
- 16A **Colorado** Practice Series § 1103-1, **Colorado** Minimum Wage Order Number 29.
- 16A **Colorado** Practice Series § 8-6-106, Determination of Minimum Wage and Conditions.

C. R. S. A. **Const. Art. 18, § 15**, CO **CONST Art. 18, § 15**

Current with amendments adopted through the Nov. 4, 2014 General Election.

Michigan Compiled Laws Annotated
Chapter 408. Labor (Refs & Annos)
Workforce Opportunity Wage Act (Refs & Annos)

M.C.L.A. 408.420
Formerly cited as MI ST 408.394

408.420. Applicability; employer and employee exceptions

Effective: May 27, 2014
[Currentness](#)

Sec. 10. (1) This act does not apply to an employer that is subject to the minimum wage provisions of the fair labor standards act of 1938, [29 USC 201 to 219](#), unless those federal minimum wage provisions would result in a lower minimum hourly wage than provided in this act. Each of the following exceptions applies to an employer who is subject to this act only by application of this subsection:

(a) Section 4a¹ does not apply.

(b) This act does not apply to an employee who is exempt from the minimum wage requirements of the fair labor standards act of 1938, [29 USC 201 to 219](#).

(2) Notwithstanding subsection (1), an employee shall be paid in accordance with the minimum wage and overtime compensation requirements of sections 4 and 4a if the employee meets either of the following conditions:

(a) He or she is employed in domestic service employment to provide companionship services as defined in [29 CFR 552.6](#) for individuals who, because of age or infirmity, are unable to care for themselves and is not a live-in domestic service employee as described in [29 CFR 552.102](#).

(b) He or she is employed to provide child care, but is not a live-in domestic service employee as described in [29 CFR 552.102](#). However, the requirements of sections 4 and 4a² do not apply if the employee meets all of the following conditions:

(i) He or she is under the age of 18.

(ii) He or she provides services on a casual basis as defined in [29 CFR 552.5](#).

(iii) He or she provides services that do not regularly exceed 20 hours per week, in the aggregate.

(3) This act does not apply to persons employed in summer camps for not more than 4 months or to employees who are covered under section 14 of the fair labor standards act of 1938, [29 USC 214](#).

(4) This act does not apply to agricultural fruit growers, pickle growers and tomato growers, or other agricultural employers who traditionally contract for harvesting on a piecework basis, as to those employees used for harvesting, until the board has acquired sufficient data to determine an adequate basis to establish a scale of piecework and determines a scale equivalent to the prevailing minimum wage for that employment. The piece rate scale shall be equivalent to the minimum hourly wage in that, if the payment by unit of production is applied to a worker of average ability and diligence in harvesting a particular commodity, he or she receives an amount not less than the hourly minimum wage.

(5) Notwithstanding any other provision of this act, subsection (1)(a) and (b) and subsection (2) do not deprive an employee or any class of employees of any right that existed on September 30, 2006 to receive overtime compensation or to be paid the minimum wage.

Credits

[P.A.2014, No. 138, § 10, Imd. Eff. May 27, 2014.](#)

Notes of Decisions (18)

Footnotes

1 [M.C.L.A. § 408.414a.](#)

2 [M.C.L.A. §§ 408.414 and 408.414a.](#)

M. C. L. A. 408.420, MI ST 408.420

The statutes are current through P.A.2014, No. 572 of the 2014 Regular Session, 97th Legislature.

Vernon's Annotated Missouri Statutes
Title XVIII. Labor and Industrial Relations
Chapter 290. Wages, Hours and Dismissal Rights (Refs & Annos)
Minimum Wage Law (Refs & Annos)

V.A.M.S. 290.500

290.500. Definitions

Effective: January 1, 2007

[Currentness](#)

As used in sections 290.500 to [290.530](#), the following words and phrases mean:

- (1) **“Agriculture”**, farming and all its branches including, but not limited to, the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural commodities, the raising of livestock, fish and other marine life, bees, fur-bearing animals or poultry and any practices performed by a farmer or on a farm as an incident to or in conjunction with farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market;
- (2) **“Director”**, the director of the department of labor and industrial relations or his authorized representative;
- (3) **“Employee”**, any individual employed by an employer, except that the term “employee” shall not include:
 - (a) Any individual employed in a bona fide executive, administrative, or professional capacity;
 - (b) Any individual engaged in the activities of an educational, charitable, religious, or nonprofit organization where the employer-employee relationship does not, in fact, exist or where the services rendered to the organization are on a voluntary basis;
 - (c) Any individual standing in loco parentis to foster children in their care;
 - (d) Any individual employed for less than four months in any year in a resident or day camp for children or youth, or any individual employed by an educational conference center operated by an educational, charitable or not-for-profit organization;
 - (e) Any individual engaged in the activities of an educational organization where employment by the organization is in lieu of the requirement that the individual pay the cost of tuition, housing or other educational fees of the organization or where earnings of the individual employed by the organization are credited toward the payment of the cost of tuition, housing or other educational fees of the organization;
 - (f) Any individual employed on or about a private residence on an occasional basis for six hours or less on each occasion;

- (g) Any handicapped person employed in a sheltered workshop, certified by the department of elementary and secondary education;
- (h) Any person employed on a casual basis to provide baby-sitting services;
- (i) Any individual employed by an employer subject to the provisions of part A of subtitle IV of title 49, United States Code, [49 U.S.C. §§ 10101 et seq.](#);
- (j) Any individual employed on a casual or intermittent basis as a golf caddy, newsboy, or in a similar occupation;
- (k) Any individual whose earnings are derived in whole or in part from sales commissions and whose hours and places of employment are not substantially controlled by the employer;
- (l) Any individual who is employed in any government position defined in [29 U.S.C. §§ 203\(e\)\(2\)\(C\)\(i\)-\(ii\)](#);
- (m) Any individual employed by a retail or service business whose annual gross volume sales made or business done is less than five hundred thousand dollars;
- (n) Any individual who is an offender, as defined in [section 217.010](#), who is incarcerated in any correctional facility operated by the department of corrections, including offenders who provide labor or services on the grounds of such correctional facility pursuant to [section 217.550](#);
- (o) Any individual described by the provisions of [section 29 U.S.C. 213\(a\) \(8\)](#);
- (4) **“Employer”**, any person acting directly or indirectly in the interest of an employer in relation to an employee;
- (5) **“Learner and apprentice”**, any individual under 20 years of age who has not completed the required training for a particular job. In no event shall the individual be deemed a learner or apprentice in the occupation after three months of training except where the director finds, after investigation, that for the particular occupation a minimum of proficiency cannot be acquired in three months. In no case shall a person be declared to be a learner or apprentice after six months of training for a particular employer or job. Employees of an amusement or recreation business that meets the criteria set out in [29 U.S.C. § 213\(a\) \(3\)](#) may be deemed a learner or apprentice for ninety working days. No individual shall be deemed a learner or apprentice solely for the purpose of evading the provisions of sections 290.500 to [290.530](#);
- (6) **“Occupation”**, any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which individuals are gainfully employed;
- (7) **“Wage”**, compensation due to an employee by reason of his employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value;

(8) **“Person”**, any individual, partnership, association, corporation, business, business trust, legal representative, or any organized group of persons;

(9) **“Man-day”**, any day during which an employee performs any agricultural labor for not less than one hour.

Credits

(L.1990, H.B. No. 1881, § 1. Amended by Proposition B, approved at November 7, 2006 election, eff. Jan. 1, 2007.)

[Notes of Decisions \(3\)](#)

V. A. M. S. 290.500, MO ST 290.500

Statutes are current through the end of the 2014 Second Regular Session of the 97th General Assembly. Constitution is current through the November 4, 2014 General Election.

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Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article II. Legislative (Refs & Annos)

OH Const. Art. II, § 1g

O Const II Sec. 1g Requirements for initiative and referendum petitions

Currentness

Any initiative, supplementary, or referendum petition may be presented in separate parts but each part shall contain a full and correct copy of the title, and text of the law, section or item thereof sought to be referred, or the proposed law or proposed amendment to the constitution. Each signer of any initiative, supplementary, or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and his place of residence. A signer residing outside of a municipality shall state the county and the rural route number, post office address, or township of his residence. A resident of a municipality shall state the street and number, if any, of his residence and the name of the municipality or post office address. The names of all signers to such petitions shall be written in ink, each signer for himself. To each part of such petition shall be attached the statement of the circulator, as may be required by law, that he witnessed the affixing of every signature. The secretary of state shall determine the sufficiency of the signatures not later than one hundred five days before the election.

The Ohio supreme court shall have original, exclusive jurisdiction over all challenges made to petitions and signatures upon such petitions under this section. Any challenge to a petition or signature on a petition shall be filed not later than ninety-five days before the day of the election. The court shall hear and rule on any challenges made to petitions and signatures not later than eighty-five days before the election. If no ruling determining the petition or signatures to be insufficient is issued at least eighty-five days before the election, the petition and signatures upon such petitions shall be presumed to be in all respects sufficient.

If the petitions or signatures are determined to be insufficient, ten additional days shall be allowed for the filing of additional signatures to such petition. If additional signatures are filed, the secretary of state shall determine the sufficiency of those additional signatures not later than sixty-five days before the election. Any challenge to the additional signatures shall be filed not later than fifty-five days before the day of the election. The court shall hear and rule on any challenges made to the additional signatures not later than forty-five days before the election. If no ruling determining the additional signatures to be insufficient is issued at least forty-five days before the election, the petition and signatures shall be presumed to be in all respects sufficient.

No law or amendment to the constitution submitted to the electors by initiative and supplementary petition and receiving an affirmative majority of the votes cast thereon, shall be held unconstitutional or void on account of the insufficiency of the petitions by which such submission of the same was procured; nor shall the rejection of any law submitted by referendum petition be held invalid for such insufficiency. Upon all initiative, supplementary, and referendum petitions provided for in any of the sections of this article, it shall be necessary to file from each of one-half of the counties of the state, petitions bearing the signatures of not less than one-half of the designated percentage of the electors of such county. A true copy of all laws or proposed laws or proposed amendments to the constitution, together with an argument or explanation, or both, for, and also an argument or explanation, or both, against the same, shall be prepared. The person or persons who prepare the argument or explanation, or both, against any law, section, or item, submitted to the electors by referendum petition, may be named in such petition and the persons who prepare the argument or explanation, or both, for any proposed law or proposed amendment to the constitution may be named in the petition proposing the same. The person or persons who prepare the argument or explanation, or both, for the law, section, or item, submitted to the electors by referendum petition, or against any proposed law submitted by supplementary petition, shall be named by the general assembly, if in session, and if not in session then by the governor. The law, or proposed law, or proposed amendment to the constitution, together with the arguments and explanations, not exceeding a total of three hundred words for each, and also the arguments and explanations, not exceeding a total of three hundred words

against each, shall be published once a week for three consecutive weeks preceding the election, in at least one newspaper of general circulation in each county of the state, where a newspaper is published. The secretary of state shall cause to be placed upon the ballots, the ballot language for any such law, or proposed law, or proposed amendment to the constitution, to be submitted. The ballot language shall be prescribed by the Ohio ballot board in the same manner, and subject to the same terms and conditions, as apply to issues submitted by the general assembly pursuant to [Section 1 of Article XVI of this constitution](#). The ballot language shall be so prescribed and the secretary of state shall cause the ballots so to be printed as to permit an affirmative or negative vote upon each law, section of law, or item in a law appropriating money, or proposed law, or proposed amendment to the constitution. The style of all laws submitted by initiative and supplementary petition shall be: "Be it Enacted by the People of the State of Ohio," and of all constitutional amendments: "Be it Resolved by the People of the State of Ohio." The basis upon which the required number of petitioners in any case shall be determined shall be the total number of votes cast for the office of governor at the last preceding election therefor. The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved.

CREDIT(S)

([2008 HJR 3, am. eff. 11-4-08](#); 1977 HJR 12, am. eff. 6-6-78; 1971 SJR 2, am. eff. 1-1-72; 1912 constitutional convention, adopted eff. 10-1-12)

[Notes of Decisions \(80\)](#)

Const. Art. II, § 1g, OH CONST Art. II, § 1g

Current through Files 1 to 195 and Statewide Issue 1 of the 130th GA (2013-2014).

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article II. Legislative (Refs & Annos)

OH Const. Art. II, § 34

O Const II Sec. 34 Wages and hours; employee health, safety and welfare

[Currentness](#)

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 employes; and no other provision of the constitution shall impair or limit this power.

CREDIT(S)

(1912 constitutional convention, adopted eff. 1-1-13)

[Notes of Decisions \(46\)](#)

Const. Art. II, § 34, OH CONST Art. II, § 34

Current through Files 1 to 195 and Statewide Issue 1 of the 130th GA (2013-2014).

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United States Code Annotated

Title 29. Labor

Chapter 18. Employee Retirement Income Security Program (Refs & Annos)

Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)

Subtitle B. Regulatory Provisions

Part 2. Participation and Vesting (Refs & Annos)

29 U.S.C.A. § 1059

§ 1059. Recordkeeping and reporting requirements

Currentness

(a)(1) Except as provided by paragraph (2) every employer shall, in accordance with such regulations as the Secretary may prescribe, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees. The plan administrator shall make a report, in such manner and at such time as may be provided in regulations prescribed by the Secretary, to each employee who is a participant under the plan and who--

(A) requests such report, in such manner and at such time as may be provided in such regulations,

(B) terminates his service with the employer, or

(C) has a 1-year break in service (as defined in [section 1053\(b\)\(3\)\(A\)](#) of this title).

The employer shall furnish to the plan administrator the information necessary for the administrator to make the reports required by the preceding sentence. Not more than one report shall be required under subparagraph (A) in any 12-month period. Not more than one report shall be required under subparagraph (C) with respect to consecutive 1-year breaks in service. The report required under this paragraph shall be in the same form, and contain the same information, as periodic benefit statements under [section 1025\(a\)](#) of this title.

(2) If more than one employer adopts a plan, each such employer shall furnish to the plan administrator the information necessary for the administrator to maintain the records, and make the reports, required by paragraph (1). Such administrator shall maintain the records, and make the reports, required by paragraph (1).

(b) If any person who is required, under subsection (a) of this section, to furnish information or maintain records for any plan year fails to comply with such requirement, he shall pay to the Secretary a civil penalty of \$10 for each employee with respect to whom such failure occurs, unless it is shown that such failure is due to reasonable cause.

CREDIT(S)

(Pub.L. 93-406, Title I, § 209, Sept. 2, 1974, 88 Stat. 865; Pub.L. 110-458, Title I, § 105(f), Dec. 23, 2008, 122 Stat. 5105.)

[Notes of Decisions \(24\)](#)

29 U.S.C.A. § 1059, 29 USCA § 1059

Current through P.L. 113-294 (excluding P.L. 113-235, 113-283, 113-287, and 113-291) approved 12-19-2014

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PRICING

CEO Compensation: What CEOs Make

Eight CEOs reveal how much they are earning, and what their challenges are.

BY EDWARD O. WELLES

How do you fill in the numbers on your own paycheck? Do company needs overwhelm personal financial goals? Who helps you figure out what would constitute a 'fair and reasonable' -- or maybe just practical -- CEO compensation package? Here's what a handful of company builders revealed about this trickiest of managerial questions

People who start their own companies say they do it because they love the challenge of building a business. Less often do they admit they want to get rich. But let's face it, you don't put yourself through hell just to feed the soul. Moreover, [it's well documented](#) that the time-tested way to lasting wealth in America is to start your own company. Do it right and you get the lion's share of what your company earns. Do it really right and you build up some impressive equity that could one day turn into a goodly chunk of cash.

But even if your company takes off, the issue of how much you should pay yourself will not go away. What is "fair" or "reasonable" when you sign your own paycheck? Money often becomes a charged issue within capital-hungry fast-growing companies, in which cash can seem so scarce to founders -- and so abundant to their hardworking employees. To further cloud the issue, there seem to be few norms or guidelines when it comes to how much money an entrepreneur should be making. That was made clear by a recent poll of CEOs of companies that have made the *Inc.* 500 list of the fastest-growing private companies in the past five years. Of the 496 companies that responded, 85% were profitable, 46% considered themselves "professionally managed," and one-third foresaw a public offering. And yet 50% of the CEOs queried consulted no one in determining their compensation.

Although CEO compensation in many small companies may be a freelance affair, *Inc.*'s survey does not imply that those at the helm operate without a plan -- however fluid it might be. The heart of that plan typically involves growing the company, *not* cutting as fat a paycheck as possible. Eighty percent of respondents said that the company's needs were a major factor in determining their level of compensation, and 39% deemed their

aggressively growing the business -- creating new divisions quickly and moving managers around at will. "Beneath the top level, it's chaotic. Ken and I are very happy with that. The staff is not," Mudge admits. "We want fluidity and people moving from profit center to profit center. We want compensation based on what people do, not their titles."

Mudge and Rubin are moving Apogee toward being an open-book company so that employees can better understand management's value-building bias. And yet abstraction still looms, since Apogee is a company rich in intellectual assets, where value can be slippery and fleeting, a common affliction for many small service companies.

To overcome that, Mudge and Rubin have placed a number of investment bankers and accountants on the board. Applying a conservative yardstick, Mudge and Rubin have valued the company at five times earnings before interest and taxes, which, they feel, creates a "public value" for their stock. The nature of the board has the secondary intent of conferring credibility, since the management's credentials are somewhat unorthodox. Mudge and Rubin have Ph.D.'s in economics and engineering, respectively, and their business education has occurred exclusively at Apogee. (The company's controller is a former concert pianist.)

Mudge admits that equity ownership remains largely a puzzle to most employees. "I'm not sure how to sell equity to people. We try to get managerial people to own stock. But below that level people can't always afford it. They need the cash."

* * *

Bob Minchak

\$500,000+

Age: 36

Position: CEO, J.B. Dollar Stretcher Magazine, Cleveland

1994 financials: \$4.5 million in revenues; profitable

Equity ownership: 100%

Number of employees: 49

Business founded: 1985

Challenge: To maximize personal gain

Bob Minchak will never be mistaken for one of those New Age entrepreneurs who bends

Appellees' App. 038

your ear about sharing, empowerment, and the world-class day-care center in his building. His sentiments about who gets what are a bit more unvarnished than that: "The formula is for me to get all the money."

Minchak publishes a regional "shopper" in northeastern Ohio that is loaded with advertising. The paper gets mailed out free to 2.8 million readers once every seven weeks between February and December. Sales this year will be about \$6 million, and as Minchak puts it, "30% of those sales come my way." Nice work if you can get it.

Asked how much he makes, Minchak replies, "My salary is \$5,000 a week -- or is it \$10,000? I forget. My wife signs the checks." Minchak says that at the end of the year he tries to take as much out of the company's bank account as he can. "We try to leave just enough money in the company to limit the tax liability."

Minchak and his wife are the sole stockholders. "Our mission is to maximize our own personal gain," he says. "You can't rape your company and make it unhealthy, but it *is* a cash cow." Minchak further allows: "I have all the toys -- a yacht, a pool, fountains, maids. I don't have to do anything except work. Sometimes I screw off massively, and then I get bored and go back to work." He calls entrepreneurs "extremists," for whom "*moderation* is a difficult word to understand." He hastens to add, "That describes me, unfortunately."

In case you're wondering, *J.B. Dollar Stretcher* Magazine does have other employees. It has five vice-presidents who run the sales operation. "I clone them to do what I've done," says Minchak. The company has a bonus pool that can amount to up to 6% of sales. Between commissions, base salary, and the bonus, Minchak's clones can earn from \$65,000 to more than \$100,000.

Minchak says selling equity to other investors would be a mistake. "I'd probably offend any shareholders I had by pillaging the coffers of the company, but they are not the ones working 7 to 11 every day." Nor does he fear alienating those around him -- perhaps because he doesn't know what fear is. "I am a mutant. I flourish with competition," he says. "No one has launched a competing company against me in this area. I take no prisoners. I steal my competitors' customers first, then I go in the back door and raid their salespeople." Minchak, at 36, has no regrets. He says that at the end of the day "there's loyalty, love, and confidence" inside his company.

* * *

John Ballenger

\$50,000

Age: 63