

ON THE HORIZON: Increase in Illinois Minimum Wage and Damages – a Death Knell for Illinois Employers?

Labor & Employment Law Update

By Sara Zorich on February 12, 2019

The changes anticipated after the Illinois elections are steadily moving forward. On Thursday, February 8, 2019, the Senate passed Senate Bill 0001 (SB0001). SB0001 has now moved on to the House of Representatives and been assigned to the Labor & Commerce Committee. The word is that the House of Representatives is looking to vote on this within the next week and if passed move it on to the Governor for signature within the next two weeks. With the change in administrations, it is safe to say that it is only a matter of time before SB0001, or another bill increasing the minimum wage, is passed and signed into law. The only questions left will be how fast minimum wage will be increased and what additional changes will the legislation include.

SB0001 provides for the following steady increase in the state minimum wage:

- January 1, 2020 – Increase from \$8.25 to **\$9.25** (increase of \$1.00)

Six months later...

- July 1, 2020 – Increase from \$9.25 to **\$10.00** (Increase of \$0.75)

Six months later...

- January 1, 2021 – Increase from \$10.00 to **\$11.00** (Increase of \$1.00)

One year later...

- January 1, 2022 – Increase from \$11.00 to **\$12.00** (Increase of \$1.00)

One year later...

- January 1, 2023 – Increase from \$12.00 to **\$13.00** (Increase of \$1.00)

One year later...

- January 1, 2024 – Increase from \$13.00 to **\$14.00** (Increase of \$1.00)

One year later...

- January 1, 2025 – Increase from \$14.00 to **\$15.00** (Increase of \$1.00)

While this is anticipated, the changes that SB0001 proposes with respect to damages under the Illinois Minimum Wage Law (IMWL) were not expected and are extremely punitive in nature.

First and foremost, it increases the damages available to employees. Currently, the IMWL provides that that an employee is entitled to (1) the underpayment or unpaid wages, (2) 2% of the underpayment for each month following the date wages should have been paid, and (3) reasonable attorney's fees and costs.

Under the SB0001, it is proposed that when an employer violates the IMWL, an employee will be entitled to **THREE TIMES (3X)** the amount of the underpayment and **5%** of the underpayments for each month following the date it should have been paid (an increase of 3%), as well as their reasonable attorney's fees and costs.

Additionally, SB0001 provides for two additional penalties payable to the Illinois Department of Labor's Wage Theft Enforcement Fund. The first is a \$1,500 penalty for a violation of the IMWL and the second is a \$100 penalty for each employee that an employer fails to keep "true and accurate" payroll records for.

These changes are incredibly punitive measures that are sure to be the end of some businesses if they are put into law, as employers will be held strictly liable and subject to these punishments, even if the underpayment is the result of an honest mistake or good faith legal argument (i.e. misclassification of an independent contractor).

The following is an example of the potential damages if an employer underpaid 100 employees \$10 each month for 3 years. Even if the underpayment is the result of a completely unintentional and inadvertent error (i.e. employee fails to report working time that equals \$10 or there is an inadvertent and accidental payroll error), an employer would be subject to the same damages as an employer who intentionally and willfully refused to pay an employee their earned wages, which are as follows:

- **SB0001 Proposed IMWL Damages:**

- Treble damages (\$10 per month x 12 months x 3 years = \$360 unpaid multiplied by 3) = \$1,080 per employee or \$108,000 for all 100 employees
- 5% of underpayments for each month following the date it should have been paid would equal \$315.00 per employee or \$31,500 for all 100 employees (e.g. underpayments started January 2018 through December 2021 and were paid in December 2021)(NOTE: the 5% interest continues to accrue until there is a judgment in the matter which could take additional months or years depending on the length of the litigation)

ON THE
HORIZON:
Increase in
Illinois
Minimum
Wage and
Damages –
a Death
Knell for
Illinois Emp-
loyers?

- Total Cost to Employer under proposed IMWL:
 - \$1,395.00 for just one employee for a \$360 underpayment; or \$139,500.00 for 100 employees for a \$36,000 underpayment; plus
 - Employees' attorney's fees and costs; plus
 - Additional penalties from IL-DOL (including \$100 per employee for failing to keep true and accurate time records, \$1,500 fine per violation and up to 20% of the total underpayment when violation was willful, repeated or with reckless disregard to the IMWL)

What may not have been considered by the legislature though, is the potential impact with the damages available under the Illinois Wage Payment and Collection Act (IWPCA) and federal Fair Labor Standard Act (FLSA) damages. Under the FLSA, an employee can argue for liquidated damages equal to the amount of the underpayment. Employers typically argue that employees are not entitled to both the liquidated damages under the FLSA and interest under the IMWL, as the FLSA provides that the liquidated damages covers any interest that could be owed. However, with proposed damages under the IMWL, we anticipate plaintiffs will argue that an employee is entitled to not just treble damages and interest under the IMWL, but also the liquidated damages under the FLSA increasing the proposed damages an employee could recover from not just the underpayment, but FOUR times the amount of the underpayment, plus 5% of underpayments for each month following the date it should have been paid and attorney's fees and costs.

So using the example above, if the employee was able to also recover the FLSA liquidated damages in addition to those purposed by the amended IMWL, the employer could be subject to a total cost of:

- **FLSA and SB0001 proposed IMWL damages:**
 - \$1,755.00 for just one employee for a \$360 underpayment; or \$175,500.00 for 100 employees for a \$36,000 underpayment; plus
 - Employees' attorney's fees and costs; plus
 - Additional penalties from IL-DOL (including \$100 per employee for failing to keep true and accurate time records, \$1,500 fine per violation and up to 20% of the total underpayment when violation was willful, repeated or with reckless disregard to the IMWL)

Additionally, due to the increased interest and attorney's fees and costs, it is anticipated that plaintiffs and plaintiff attorneys will be less inclined to try and amicably resolve these types of cases resulting in more lawsuits and longer lawsuits. Indeed, it is not unusual for a lawsuit to take 3 to 5 years from the beginning through trial, meaning that interest alone could balloon from \$315 to \$963 after 3 years or \$1,395 after five years under the above example raising the potential total damages as follows:

ON THE
HORIZON:
Increase in
Illinois
Minimum
Wage and
Damages –
a Death
Knell for
Illinois Emp-
loyers?

These figures do not include the attorney's fees and costs sought by a plaintiff, which after 3-5 years of litigation would likely easily be a six figure number in addition to the damages identified in the chart above for an unintentional and inadvertent error in which an employee(s) was underpaid by \$360.00 over a three year period.

As you can see, there are serious changes and consequences under the current proposed changes to the Illinois Minimum Wage Law that go a lot deeper than simply increasing the minimum wage. Make sure you are aware of these changes and your pay practices are in compliance as the cost of a wage and hour lawsuit are about to get drastically worse. Furthermore, if you are facing a wage and hour lawsuit or claim, make sure that you consult with experienced labor and employment law counsel who are aware of these changes as these changes will directly impact your defenses and strategies in addressing wage and hour lawsuits and claims.

ON THE
HORIZON:
Increase in
Illinois
Minimum
Wage and
Damages –
a Death
Knell for
Illinois Emp-
loyers?