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# **Discussion of the Impacts of the New Minimum Wage Law**

**Senate Commerce and Labor Committee  
February 8, 2007**

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## INTRODUCTION

At the general election in November of 2006, the voters passed Question 6, a Constitutional Amendment governing minimum wages for all employees in Nevada. The amendment became effective on November 28, 2006 when the State Supreme Court certified the election.

With the amendment going into effect so quickly, my office was inundated with requests from employers, employees, trade associations, law firms, and the press; all seeking to find out what it all meant. After consultation with the Governor's office and the Attorney General, I held a public information workshop and we drafted some emergency regulations to give at least some guidance. The emergency regulations were, at best, a stop gap measure and left a lot of issues unresolved.

At the present time, I have started the temporary rulemaking process. A copy of the proposed temporary regulations is attached. There is some procedural overlap between my rulemaking and any action the Legislature may undertake. Because of the statutory time requirements for rulemaking, this was unavoidable. As the Legislature moves forward in addressing these issues, they will be deleted from the proposed regulations.

The proposed regulations do not answer all of the questions. However, they do deal with the major areas where clarification appears to

be the most needed. I hope that the Legislature will find the work that we have done so far to be useful.

I also want to take a moment to publicly thank the two hundred or so people who participated in the public workshops that we held last month. The quality of the participation was excellent with a lot of good ideas and solutions being generated by the participants.

## TEXT OF THE AMENDMENT

Sec. 16. Payment of minimum compensation to employees. [Effective November 28, 2006, if the proposed amendment is approved and ratified by the voters at the 2006 General Election.]

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.

Section A is the most substantive part of the amendment. It deals with several issues including:

1. The requirement for all employers to pay and the entitlement for all employees to receive at least one of the minimum wages.
2. It establishes two minimum wage rates. A basic rate of \$6.15 per hour and an alternative rate of \$5.15 per hour for employees who receive health benefits.
3. The requirement that the rates be adjusted to reflect changes in both the federal minimum wage and the Cost of Living.
4. It prohibits offsetting the minimum wage with tips and gratuities received by the employees.

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.

Section B deals with what could be described as some of the legal issues in the amendment. Section B deals with several issues including:

1. The prohibition against waiving the requirements by private agreement between employers and their employees.
2. An exception that permits non-compliance with the amendment if the matter is clearly addressed in a collective bargaining agreement.
3. The creation of a private right of action for employees who wish to take their employers to court.
4. A prohibition against retaliatory action against an employee for exercising his rights under the amendment.

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.

Section C is the definitional section and contains the definition of employee and employer.

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.

Section D contains the severability provisions of the amendment to preserve the balance of the language should the Court declare any portion invalid.

## ISSUES

1. To whom does the minimum wage apply?

The amendment says “Each employer shall pay a wage to each employee...” The language is clear and straightforward. The starting point is: If you are an employer you have to pay each of your employees the minimum wage. The analysis doesn’t stop there, however, because you have to look at the language in Section C to determine who is an employer and who is an employee.

Employer is broadly defined, specifically listing individuals and a variety of organizations as being employers. In addition, there is a catch-all phrase “...or other entity that may employ individuals.”

An employee is “...any person who is employed by an employer...” There are some exceptions that I will discuss further on.

2. Does the amendment extend to state and local government employees?

The Labor Commissioner’s jurisdiction relative to the minimum wage is limited to the private sector. I cannot address this question authoritatively. However, I have been assisting state and local governments with their analysis.

Under NRS 608.011, the term employer “...includes every person having control or custody of any employment, place of employment or any employee.” NRS 0.039 defines a person and specifically says “[T]he term does not include a government, governmental agency or political subdivision of a government.” The result is that under Chapter 608 state and local governments are not included, but the same thing cannot be said under the terms of the amendment because it uses the term “entity” rather than “person” in defining employers.

3. Are there any exemptions or exceptions to the minimum wage?

Yes. While the amendment does not specifically use the words exception or exemption it provides for them by excluding certain classes of people from the definition of employee. These classes are:

- a. everyone under the age of 18,
- b. those who are employed by a non-profit organization for after school or summer employment, and
- c. "trainees," but only for a maximum of 90 days.

In addition, Section B also provides for an exemption where it states "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."

4. What is the status of the exemptions that were provided for in NRS 608.250(2)?

NRS 608.250(2) provided for six specific exemptions to the statutory minimum wage law. These were:

- (a) Casual babysitters.
- (b) Domestic service employees who reside in the household where they work.
- (c) Outside salespersons whose earnings are based on commissions.
- (d) Employees engaged in an agricultural pursuit for an employer who did not use more than 500 man-days of agricultural labor in any calendar quarter of the preceding calendar year.
- (e) Taxicab and limousine drivers.
- (f) Severely handicapped persons whose disabilities have diminished their productive capacity in a specific job and who are specified in certificates issued by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation.

The general rule is that if a provision of a statute conflicts with a constitutional provision, the statute must give way. The exemptions in 608.250 are statutory and are not included among the exemptions allowed by the amendment. Unless they fit within one of the constitutional exemptions, employees listed in the statute are no longer exempt.

5. How do health benefits fit into the process?



We have two minimum wages, \$5.15 and \$6.15. The simplest way to approach it is to assume that, initially, all employers have to use the \$6.15 rate. Then, if they make insurance available to the employees that meets the requirements of the amendment, they can pay less than \$6.15.

The amendment sets out three requirements for the health benefits:

- a) Health insurance must be made "...available to the employee..."
- b) The insurance must be "...for the employee and the employee's dependents..."
- c) The "...total cost to the employee for premiums..." cannot be "...more than 10 percent of the employee's gross taxable income from the employer."

In order to qualify to use the lower rate, the employer must meet all three requirements. If any one of the requirements is not met, the employer must pay the higher rate. This is the major area of confusion over the amendment.

6. Do these requirements have to be met for all employees in order for an employer to use the lower rate?

The amendment imposes an affirmative duty on the employer to make the health benefits available if the employer wants to utilize the lower rate. The multitude of types of health benefits available as well as the wide range of variations within the individual benefit plans themselves results in an incredible number of possible outcomes.

Initially, I took the approach that it was a "yes" or "no" proposition. Either the employer meets all of the criteria or the employer doesn't. If they do, they do they can use the lower rate. If not, they must use the upper. This was referred to as the "employer specific" approach. As a result of the public workshops, the currently recommended approach is what we call "employee specific." The employer looks at each employee individually and determines on a case-by-case basis which minimum wage applies.

7. What is health insurance?

That is a very good question. The amendment doesn't say what it is, just that the employer has to offer it in order to take advantage of the lower rate. As pointed out earlier, there are all sorts of different kinds of health benefits that are available. Think of group health, HMO's, PPO's, self-funded plans, cost reimbursement plans, and the list goes on.

You have to be careful with this question because it is really easy to get bogged down in the complexity insurance. I have insurance companies sending me copies of their insurance policies wanting to know whether or not the plan complies with the amendment. I don't have the time, the expertise, or the staff to get into that level of detail. The preferred approach is to set understandable standards so the employers and employees can draw their own conclusions.

With the help of the Insurance Division, I was able to cobble together some language for the emergency regulation. I didn't like my solution then and I still don't like it. Fortunately, we have come with what seems to a pretty good approach since those early struggles.

The current approach is to adopt the standard used in the business tax provisions of NRS 363A and 363B. This has several advantages. We didn't need to "reinvent the wheel." It is a standard that is already in existence and with which employers are familiar. Employers know whether their insurance meets the standard. Since it is statutory, there is a legislative history behind it. Finally, we were able to get a good consensus for that approach from business and the drafters of the amendment. In addition, we included ERISA plans and Taft-Hartley plans. Those types of plans are rooted in pre-emptive federal law, are regulated, and cover some types of plans not covered under our statutes.

8. What if an employee doesn't want the health insurance?

The amendment only requires the employer to make qualifying insurance available to the employee. If the employer offers the insurance and the employee declines, the employer has met the requirement and can pay the lower rate to that employee.

9. What about waiting periods and eligibility?

Even if employers have qualifying health insurance available, not all employees can receive it when they first start work. There are two main reasons for this. Either the employer has a business policy not to make it available to all employees or else there is a waiting period in the policy itself.

If it is the employer's policy, for example they don't offer benefits to probationary, temporary, or part-time employees, then the employer is not making the policy available and would have to pay that employee the higher rate.

On the other hand, if the policy has a built-in restriction, such as a waiting period. If the health insurance has been made available to the employee, then the employer has met the requirement and can pay the lower rate. Waiting periods vary. We are considering six months as the outer limit.

In some cases, there could be a restriction in the plan that disqualifies the employee from coverage altogether. In that event, the employer would be obligated to pay the higher rate to that employee.

10. How is the "10% of the employee's gross taxable income" determined?

Nevada does not have a personal income tax. As a result, an employee's gross taxable income is not tracked for state purposes. The common denominator for all Nevada employees, however, is the gross taxable income that is reported to the Internal Revenue Service. That is the recommended income figure to use.

The problem with using gross taxable income is that it is generally not known until the end of the tax year when employees are given their W-2 forms. Currently, we consider three methods to calculate the 10% figure as being a reasonable approximation:

- a) If the employer issued a W-2 in the prior year, they can use that figure.

- b) If the employer did not issue a W-2 in the prior year, but has reported quarterly information, they can use that figure.
- c) If the employer doesn't have any historical information, they can make an annualized calculation based on the information they do have.

11. How much can the insurance premium be?

For minimum wage purposes, there is no requirement as to the cost of the insurance premium. It depends on the policy because there are a lot of variables that go into the premium. It is easy to get sidetracked on this issue. It is important to stay focused on the fact the only purpose that the 10% figure serves is to determine which minimum wage rate the employer has to use.

12. How do tips figure into the 10% calculation?

In the amendment it states: "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." As a result, there has been some confusion regarding how tips fit into the calculation.

There is a difference between the "wage rates" and "gross taxable income." The wage rates are the \$5.15 and \$6.15 rates established in the amendment. The employer cannot use tips to offset the requirement to pay the minimum wage. Nevada and five other states do not allow employers to offset the minimum wage with tips. This language reflects a continuation of that policy. The employer must pay the required minimum in addition to any tips that might be earned. The federal government and most other states do allow a deduction to be made.

The gross taxable income as reported to the IRS includes tips, commissions, and other types of payments to employees that are generally considered taxable. As stated above, the only purpose for the 10% number is to determine which minimum wage to use as a base wage rate.

13. How does the federal minimum wage fit in and how is the cost of living adjustment calculated?

I have requested an Attorney General's Opinion on this issue. I won't have a good answer until I get the opinion.

14. Can an employer and employee agree to something other than the minimum wage?

No. The terms of the amendment cannot be waived by agreement between an employer and employee.

15. How do collective bargaining agreements affect the minimum wages?

All of the minimum wage requirements can be waived in a bona fide collective bargaining agreement. However, the terms and conditions of the waiver must be explicit, clear, and unambiguous.

16. Who enforces the new law?

There are two options. First of all, the Labor Commissioner can enforce the law on behalf of an employee consistent with the statutory authority in NRS 607 and 608. As an alternative, an employee can file a court action against the employer on his or her own. This is an either/or choice.

17. What effect does the amendment have on overtime?

NRS 608.018(1) states:

1. An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate less than 1 1/2 times the minimum rate prescribed pursuant to NRS 608.250 works:

(a) More than 40 hours in any scheduled week of work; or

(b) More than 8 hours in any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.

This is Nevada's daily overtime statute. Employees who are paid less than 1 1/2 times the minimum wage are entitled to be paid overtime whenever they work more than eight hours in a workday. Prior to passage of the amendment, the minimum wage rate was pegged at the federal rate of \$5.15 per hour. Consequently, the daily overtime rate

was set at \$7.725 per hour. Any employee paid less than that amount was entitled to daily overtime.

I estimate that there were about 162,000 workers statewide in the class of workers entitled to daily overtime before the amendment was passed. (The actual number is probably lower because many employers used a starting hourly wage above \$7.73 in order to avoid dealing with the daily overtime calculation in addition to the more familiar weekly overtime requirement.) As a result of the amendment, the daily overtime rate ceiling increased to 1½ times \$6.15 per hour or \$9.225 per hour. This correlates to approximately 260,000 workers potentially eligible for daily overtime, an increase of 100,000.

From an enforcement standpoint, this is probably the biggest impact from the amendment. Historically, minimum wage problems have been extremely rare. Even though the legal requirements may be more complex under the amendment, I don't expect compliance to be much of a problem once the requirements are known.

Daily overtime is a different story and constitutes a significant portion of our existing caseload. The reason is fairly simple. Most employers and employees are familiar with the requirement to pay overtime anytime a non-exempt employee works more than 40 hours in a workweek. We get our share of claims for weekly overtime, but it is not what I would characterize as a major problem.

On the other hand, I am constantly amazed by the number of employers who don't know they are supposed to pay daily overtime and the number of employees who don't know they are supposed to receive it, even though Nevada's daily overtime requirement has been on the books for over 30 years. The most common problem we have found in this regard is that while most payroll software includes a computation for weekly overtime, they don't include a daily overtime component

Going forward, enforcement will be complicated by an increased number of employers who will have to pay daily overtime who did not have to consider it previously, the increased number of potential claimants, and the confusion of dealing with three different overtime

rates rather than two. In addition, calculating back wages will be complicated by any annual adjustments that may occur in the minimum wage with the concurrent adjustment in the daily overtime thresholds.

PROPOSED REGULATION OF THE LABOR COMMISSIONER  
**LCB File No. T004-07**  
February 2, 2007

EXPLANATION- Matter that is *italicized* is new; matter in brackets [omitted material] is material to be omitted.

AUTHORITY: § § 1-10; Article 15, Section 16, the constitution of the State of Nevada, NRS 607.110, NRS 607.160.

Section 1. Chapter 608 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 9, inclusive, of this regulation.

*Sec. 2. Definition of minimum wage tiers.*

- 1. The lower tier is from \$5.15 to \$6.14 per hour for employees who offered qualified health insurance benefits.*
- 2. The upper tier is \$6.15 per hour for employees who are not offered qualified health benefits.*
- 3. An employer must pay the upper tier rate unless the employee qualifies for the lower tier rate.*
- 4. These rates may change based on the annual adjustments as set forth in Article 15, Section 16 of the Constitution of Nevada.*

*Sec. 3. Applicability of Minimum Wage.*

- 1. The minimum wage applies to all employees in Nevada.*
- 2. The only exceptions to the minimum wage are*
  - (a) Persons under the age of 18; or*
  - (b) Persons employed by a nonprofit organization for after school or summer employment; or*
  - (c) Persons employed as trainees for a period not longer than ninety (90) days as interpreted by the U. S. Department of Labor pursuant to Section 6(g) of the Fair Labor Standards Act; or*
  - (d) Persons employed under a valid collective bargaining agreement where Article 15, Section 16 of the Nevada Constitution relating to minimum wage, tip credit or other provisions included therein have been waived in clear and unambiguous terms.*
- 3. There is no distinction between full-time, permanent, part-time, probationary, or temporary employees.*

*Sec. 4. In order to qualify for the lower minimum wage tier an employer must comply with all of the following:*

- 1. Qualified health insurance coverage must be made available to the employee and the employee's dependents, if any. For the purposes of this section, qualified health insurance coverage is "available to the employee and employee's dependents" when an employer contracts for and maintains qualified health insurance for the class of employees of which*



- the employee is a member, subject only to fulfillment of the conditions required to complete the coverage which are applicable to all similarly-situated employees within this class, unless the waiting period exceeds 120 days; and*
2. *The employee's share of the cost of the premium cannot exceed 10% of the employee's gross taxable income attributable to the employer as defined under the Internal Revenue Code;*
    - (a) *"Gross Taxable Income" attributable to the employer means the amount specified on the employee's W-2 issued by the employer and includes tips, bonuses or other compensation as required for purposes of federal individual income tax.*
    - (b) *To determine whether the employee's share of the premium does not exceed 10% of the employee's gross taxable income, the employer may:*
      - I. *For an employee for whom the employer has issued a W-2 for the immediately preceding year, divide the gross taxable income from the employer into the projected employee's share of the premiums for qualified health insurance for the current year;*
      - II. *For an employee for which the employer has not issued a W-2 and has payroll information for the four prior quarters, divide the combined total of gross taxable income normally calculated from this payroll information from these four quarters into the projected employee's share of the premiums for qualified health insurance for these four quarters;*
      - III. *For an employee for which there is less than an aggregate year of payroll information, the employer shall*
        - 1) *take the total payroll information available for the employee determine the combined total of gross taxable income normally calculated from this payroll information; and*
        - 2) *After dividing it by the number of weeks it represents and multiplying it by 52, divide this annualized number into the projected employee's share of the premiums for qualified health insurance for the current year;*
      - IV. *For a new employee or an employee who turns eighteen years of age during employment, the employer shall wait until the employee has completed two normal payroll periods and then utilize this payroll information as set forth in subsection 3 above relating to an employee for which there is less than a complete year of employment; and*
  3. *Offers a health benefit plan that meets one of the following requirements:*
    - (a) *The plan covers only those categories of health care expenses that are generally deductible by employees on their individual federal income tax returns pursuant to the provisions of 26 U.S.C. Sec. 213 and any federal regulations relating thereto, if those expenses had been borne directly by those employees; or*
    - (b) *Provides health benefits pursuant to a Taft-Hartley trust which:*

- I. Is formed pursuant to 29 U.S.C. Sec. 186(c)(5); and
  - II. Qualifies as an employee welfare benefit plan under the Internal Revenue Service guidelines; or
- (c) Is a qualified employee welfare benefit plan pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1001 et seq.

Sec. 5. An employer may decide to pay the maximum wage rate for minimum wage currently applicable in lieu of making any determination under this regulation that the employee may be paid the lower minimum wage rate.

Sec. 6. If a determination is made that the employee's share of the premium does not exceed 10% of the employee's gross taxable income from the employer, the employer may pay the employee through the end of the calendar year for which the determination has been made either:

1. The lowest minimum wage rate currently applicable; or
2. Any amount within the lower minimum wage tier currently applicable.

Sec. 7. If an employee declines coverage under a qualified health insurance plan offered by the employer, the employee may be paid in the lower minimum wage tier, however, the employer must document that the employee has declined coverage and the documentation must include the employee's signed waiver of coverage. Declining coverage may not be a term or condition of employment.

Sec. 8. If an employer offers qualified health insurance with a standard waiting period of no more than 6 months, the employee may be paid at the lower tier wage rate. If an employer does not offer a qualified health insurance plan or the health benefit plan is not available or the health benefit plan is not provided within 6 months of employment, the employee must be paid the upper tier wage rate until such time as the employee becomes eligible and is offered coverage or when the insurance becomes effective.

Sec. 9. For the purposes of complying with the daily overtime provisions of NRS 608.018(1), an employer shall pay overtime based on the minimum wage tier for which that employee is qualified.

Sec. 10. NAC 608.110 is hereby repealed

[NAC 608.110 Minimum wage. (NRS 608.250) The minimum wage for an employee in private employment who:

1. Is 18 years of age or older is \$5.15 per hour.
2. Is under 18 years of age is \$4.38 per hour.]