



Employers Beware A Patchwork Of Calif. Minimum Wage Laws

Share us on:    

Law360, New York (October 6, 2016, 12:40 PM EDT) -- California's recent minimum wage increase will, over 18 months, create the highest state minimum wage in the U.S. history, by 2023 at \$15 per hour,[1] when adjusted for inflation. California's minimum wage will, likewise, exceed the national minimum wage of any country in the world.[2]

While California's employee-friendly reputation is well known, many California cities and local governments have recently enacted local wage ordinances that exceed or differ from statewide requirements. Nearly two dozen cities and counties in California adopted local wage ordinances with more to come.

Local wage ordinances include a variety of implementation schedules, rates, possible exclusions, covered entities and employees, as well as different posting and notification requirements that create a minefield for employers. And, some local ordinances include mandatory sick leave requirements that go beyond California's paid sick leave law. These very real costs and complications should be considered as part of every California employer's decision of where to do business in California.

This article first considers some of the existing concerns and overlapping issues associated with California's patchwork of minimum wage rate requirements. Next, the legal basis for California local governments to create and implement local wage ordinances is examined. Then, the potential concerns about the ability to enforce and regulate local wage ordinances are discussed, including, the interplay and possible conflicting nature of California's recently enacted Fair Pay Act. Finally, the article analyzes future issues that California's patchwork of minimum wage requirements presents and the possible impact of future legislation.



Dan M. Forman



Brian E. Cole II

Costs of Patchwork of Local Minimum Wage Rate Ordinances

Currently, nearly two-dozen cities and counties within California have local minimum wage ordinances, including: Berkeley, El Cerrito, Emeryville, Long Beach, Los Angeles city, Los Angeles County, Mountain View, Oakland, Palo Alto, Pasadena, Richmond, San Diego, San Francisco, San Jose, Santa Clara, Santa Monica, and Sunnyvale. While California employers face a statewide minimum wage increase to \$15 per hour by 2023, many California employers face even greater and/or more rapid increases under local wage ordinances.

Companies and industries facing highly competitive markets, both domestic and global economic concerns, and razor-thin profit margins will be forced to address rising employment costs. Many employers will react by cutting jobs and hours, increasing prices, utilizing labor-saving technologies such as technological automation, relocating, outsourcing, or some combination thereof. California's plan to increase the statewide minimum wage to \$15 by 2023 has been estimated to eliminate approximately 900,000 full-time equivalent jobs by 2023.[3] Local wage ordinances that increase the minimum wage beyond California statewide requirements only exacerbate these concerns by shortening the time frame for a \$15 minimum wage rate.

Los Angeles, once the hub of apparel manufacturing in the United States, has faced a steady exodus of labor and manufacturers forced to seek out cheaper labor overseas and through outsourcing to combat thin profit margins and increasing labor and real estate costs. American Apparel, a longtime proponent of local manufacturing in Los Angeles, which long promoted its higher-than-average wages for garment workers, may be changing its tune given evolving minimum wage rate increases and local wage ordinances. In April 2016, American Apparel, the biggest clothing maker in Los Angeles, announced that it may start outsourcing the production of certain garments to other manufacturers in the United States, eliminating about 500 local jobs. Faced with California's increasing minimum wage rates and local wage ordinances affecting the city of Los Angeles and certain unincorporated areas of Los Angeles County, many companies are evaluating similar moves.[4]

Local wage ordinances increase both the direct and indirect costs of doing business for affected California employers. In addition to the increased wages, the patchwork effect of different and potentially overlapping wage ordinances will drive up compliance costs and litigation expenses. Local wage ordinances bring with them a variety of compliance issues, and the possibility of overlapping concerns. Not only do local wage ordinances incorporate

different rates on various timelines but the language of different ordinances, while frequently similar, use terminology that may be distinct, confusing and may create different standards by locality.

Some local governments include exemptions and exceptions to the wage increases while others do not. Finally, some cities and counties are using local wage ordinances as the mechanism for addressing and implementing paid sick leave laws that exceed California's newly enacted laws and other issues. Simply put, the minimum wage and other once standardized statewide requirements for paying California employees is no longer a simple formula when employers have employees performing the same job in different, even adjacent, cities.[5]

The local wage ordinances recently implemented by the city of Los Angeles and Los Angeles County are a good example of the compliance complexities and possible overlapping requirements. Effective July 1, 2016, employers with 26 or more employees, must pay employees who perform at least two hours of work within the geographic boundaries of the city within a particular week at least \$10.50 for each hour worked. Similarly, the county's equivalent minimum wage rate increase schedule, also effective on July 1, 2016, applies to employees who perform at least two hours of work in a particular week within unincorporated areas of Los Angeles County. Incorporated cities in Los Angeles County may have (or will have) their own minimum wage increase schedules and requirements. For example, the city of Long Beach, another city in Los Angeles County, created a minimum wage increase that does not take effect until Jan. 1, 2017, for certain employers.

Compliance differentials are exemplified by the Los Angeles city and county ordinances. For example, under the city of Los Angeles wage ordinance, nonprofit organizations with more than 25 employees may apply for coverage under the small business schedule, which delays the rate increase schedules by one year. Additionally, beginning in July 1, 2022, the minimum wage rate increases will be determined by the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) in the Los Angeles metropolitan area under the city of Los Angeles wage ordinance.

Under the Los Angeles County wage ordinance, increases will be determined by a different adjusted CPI measure. The city of Los Angeles wage ordinance requires employers to display new postings. This mandatory posting for the city of Los Angeles requires notice of

the city's new paid sick leave requirements which differs from the county of Los Angeles which has a different posting requirement and an initial compensation disclosure statement. What is an employer to do?

The Authority of Cities and Counties to Implement Minimum Wage Ordinances

A city's ability to establish minimum wages is not expressly prohibited by state or federal law and cities, therefore, rely on their ability to regulate local police powers to enact local wage ordinances. The California Constitution authorizes local governments to establish and enforce local police powers provided that they are not in conflict with state requirements. (California Constitution, Article XI, Section 7.) Regulations impacting employment relationships, including the establishment of a minimum wage, are considered to be an exercise of police power. Therefore, cities and counties within California have the ability to establish local wage ordinances, beyond minimum statewide requirements. *Metro Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985); *Salas v. Sierra Chem. Co.*, 59 Cal.4th 407, 423 (2014).

California state law will not preempt a city or county from implementing a local wage ordinance as an exercise of its police powers given that the Labor Code expressly provides that "[n]othing in this part shall be deemed to restrict the exercise of local police powers in a more stringent manner." Labor Code, § 1205(a); see, e.g., *State Bldg. & Const. Trades Council of Cal.*, *AFL-CIO v. City of Vista*, 54 Cal.4th 547, 564 (2012). Therefore, while the authority to establish and maintain local wage ordinances comports with both federal and California law, the actual enforcement of such regulations presents a series of additional considerations for cities and counties within California and their employers.

Enforcement of Local Minimum Wage Ordinances

One of the issues associated with the disjointed local wage ordinance model is the ability to enforce and regulate such violations. An employee paid less than the state's minimum wage has the ability to report such violations to the Division of Labor Standards Enforcement (DLSE) and seek remedies and enforcement under the DLSE's administrative mechanisms. As the DLSE's website makes clear "[t]he effect of this multiple coverage by different government sources is that when there are conflicting requirements in the laws, *the employer must follow the stricter standard; that is, the one that is the most beneficial to the employee* ... if a local entity (city or county) has adopted a higher minimum wage,

employees must be paid the local wage where it is higher than the state or federal minimum wage rates.”[6] (emphasis in original). The DLSE’s enforcement mechanisms, however, are only part of the equation the employer faces as cities and counties come on line to enforce local ordinances.

In addition to the DLSE’s existing regulatory authority, local governments are creating their own enforcement mechanisms, perhaps as newfound sources of revenue. For example, the city of Los Angeles created the Wage Enforcement Division Ordinance to enforce the local wage ordinance and whose responsibilities “will include investigating potential violations, issuing determinations of compliance or noncompliance, and obtaining restitution, fines, penalties and/or interest where violations have occurred.”[7]

Thus, California employers should expect to face both the DLSE and local enforcement mechanisms, and the overlap between these regulatory bodies is unknown. For example, will the DLSE investigate and enforce an employee’s claim that his or her hourly rate falls below that of a local ordinance but satisfies the state’s requirements? Moreover, will employers face duplicative fines/penalties under both the DLSE and local enforcement mechanisms?

The following hypothetical brings to light certain additional concerns employers may face as a result of local ordinances and enforcement measures: Employee Doe works for XYZ Company which is located in City A, which has not enacted a local wage ordinance. The XYZ Company is physically located in City A and all of its employees work in City A. As such, the employees of the XYZ Company are required to receive a minimum wage rate of \$10 per hour under California law. If Employee Doe lives in the city of Los Angeles and works from home one day a week, it would appear that under the city of Los Angeles’ local ordinance, Employee Doe meets the requirements of a covered “employee,” who performs at least two hours of work within the geographic boundaries of the city within a particular week. Therefore, if Doe’s employer has more than 25 covered employees Doe would be entitled to a minimum wage rate of \$10.50 under the local ordinance for each day working from home.

Allocation and employee morale issues aside, this creates potential enforcement issues for the employer. Now, the XYZ Company will fall under the regulatory purview of the Los Angeles city Wage Enforcement Division Ordinance, being regulated by a neighboring city. Additionally, if Employee Doe brings a claim before the DLSE, we do not know whether that

employee can claim waiting time penalties, which can be very costly for employers, if the employer has complied with California's minimum wage law but failed to comply with a local ordinance. This simple and foreseeable example is just one case that California employers must consider when choosing where to do business, as well as any flexibility of locale of employees. These concerns and potential issues are exacerbated when considering other aspects of the local ordinances, such as paid sick leave, initial disclosures, posting requirements or other local requirements.

The patchwork of local wage ordinances confronts employers with myriad compliance and enforcement issues. At a minimum, individualized compliance and enforcement considerations are likely to increase the number of enforcement entities and create disjointed and erratic enforcement diminishing the effectiveness of existing regulatory authorities, and creating more work, expenses and distractions for employers.

Possible Conflicts with California's Fair Pay Act

For many years, the California Equal Pay Act has prohibited employers from paying employees less than other employees of the opposite sex for equal work. On Oct. 6, 2015, Gov. Jerry Brown signed the California Fair Pay Act, which has the effect of strengthening and broadening the Equal Pay Act. Under California's Fair Pay Act, equal pay is required for employees who perform "substantially similar work." Additionally, this comparison has been further broadened by eliminating the requirement that the employees being compared work at the "same establishment." Every employer's burden is heightened, making it more difficult for an employer to defend this practice by asserting pay differences to a "bona fide factor other than sex."

While different gender-based pay rates continue to be unlawful, one aspect of California's Fair Pay Act may at times place wage comparisons among employees at odds with local wage ordinances. For example, when making the comparison of "substantially similar" work, employers may look to other employees in different geographical areas. However, under the local wage ordinances themselves, geography is by its very nature one of the primary distinguishing factors for determining the minimum wage requirements for a particular employee. Therefore, it is foreseeable to have a situation where two employees who perform the same or substantially similar work but are of different genders have different minimum wage requirements and thus may be paid different minimum wage amounts as a result of complying with local wage ordinances.

An argument advanced in favor of local wage ordinances is that different cities and counties with higher cost of living demands based on geographic location should ensure that minimum wage earners can provide for themselves. Under California's Fair Pay Act, however, geographic differences are now part of the "substantially similar" comparison and, therefore, employees of the opposite sex may have colorable arguments for diminishing the underlying premise of many of the local wage ordinances.

Presumably, paying compliant minimum wages in accordance with a local wage ordinance will be considered to be a "bona fide factor other than sex" for an employer to attribute different pay rates among employees of the opposite sex. However, until there is case law on point, no clear direction for employers exists.

While the California Equal Pay Act and local wage ordinances are not necessarily in conflict, they do support different underlying interests that may, at times, be at odds. Combined with additional direct costs of higher minimum wages statewide and indirect costs associated with compliance concerns, local wage ordinances may incentivize companies to not enter a certain market as a result. Alternatively, employers desiring to enter and operate in various locations under different local wage ordinances, may be effectively required to adhere to the highest of such minimum wage rates in order to not run afoul of the California Equal Pay Act.

Consequently, this may create a "race to the top" situation where employers looking to do business across various local wage ordinance locales minimize legal and compliance risks by paying the highest minimum wage rate or choosing not to enter certain markets. In either scenario, the concerns of cutting jobs and hours, increasing consumer pricing, utilizing labor-saving technologies such as technological automation, relocating, outsourcing or some combination thereof that are believed to be a result of California's minimum wage increase will likely only be greatly exacerbated when considering the interplay and possible conflicts between the geographically driven local wage ordinances and the geographically neutral Equal Pay Act.

Conclusion

The support to increase California's minimum wage to \$15 per hour by 2023 has also driven many localities and municipalities to implement their own wage rates, timelines and other job security protections. California employers already facing increased direct labor costs

must not only scrutinize the decision to do business in California, but also where in California to do business. The patchwork effect of local ordinances will compound escalating indirect costs, potential expenses and, thus, further increase the rate at which minimum wage positions are being relocated.

Furthermore, the costs of implementation and enforcement among the smaller municipalities may be too taxing for effective regulation. To reduce the uncertainty of differing wage rates, compliance and enforcement, future statewide legislation should be enacted to curb the patchwork wage laws before they cripple California employers.

—By Dan M. Forman and Brian E. Cole II, [Carothers DiSante & Freudenberger LLP](#)

Dan Forman is managing partner at Carothers DiSante in Los Angeles. He is chairman of the firm's unfair competition and trade secret practice group and has nearly 30 years of experience representing clients before a range of state and federal courts, as well as regulatory agencies such as California's Labor Commissioner, the Department of Fair Employment and Housing, the Employment Development Department, the U.S. Equal Employment Opportunity and similar agencies.

Brian Cole II is an associate at Carothers DiSante in Los Angeles where he focuses on wage and hour class action litigation. He also has experience prosecuting and defending trade secret matters, and has successfully represented clients in administrative proceedings and alternative dispute resolution forums.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Effective Jan. 1, 2016, the District of Columbia increased its minimum wage to \$10.50 per hour, to progressively increase to \$15 by July 1, 2020. Massachusetts' minimum wage is \$10 per hour, with future rates set to automatically increase by 10 cents above the rate set in the Fair Labor Standards Act if the federal minimum wage equals or becomes higher than Massachusetts' minimum wage rate. <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx>

[2] http://www.heritage.org/research/reports/2016/05/californias-unprecedented-minimum-wage-increase-will-hurt-vulnerable-workers#_ftn19

[3] http://www.heritage.org/research/reports/2016/05/californias-unprecedented-minimum-wage-increase-will-hurt-vulnerable-workers#_ftn19

[4] <http://www.latimes.com/business/la-fi-garment-manufacturing-la-20160416-story.html>

[5] The Ninth Circuit recently held that preemption was inapplicable and denied an employer's request to stop the city of Los Angeles' wage ordinance which provides for increased minimum wages for large hotels compared to smaller hotels and some smaller hotels near the [Los Angeles International Airport](#). *American Hotel and Lodging Assoc., et al. v. City of Los Angeles*, No. 15-55909 (9th Cir. Aug. 23, 2016).

[6] http://www.dir.ca.gov/dlse/faq_minimumwage.htm.

[7] <https://bca.lacity.org/site/pdf/lwo/Los%20Angeles%20Minimum%20FAQ.pdf>