

MEMORANDUM

To: Interested Parties
From: National Employment Law Project
Subject: Precedents for Indexing Labor Standards to Average Wages
Date: June 4, 2009 - Updated

The National Employment Law Project and the Economic Policy Institute have proposed that the federal minimum wage should be raised to 50% of the average worker's hourly wage and then updated each year based on annual changes in average wages. As background for that proposal, we have prepared this memorandum reviewing precedents for using average wages in labor standards.

Several key state and federal labor standards have long been benchmarked to average wages, reflecting recognition that average wages are in many cases the appropriate reference point for labor market policy. In particular:

- State Unemployment Insurance (UI) programs generally set minimum or maximum benefits levels as a percentage of average wages and adjust those levels each year based on the latest average wage data.
- The federal Longshore and Harbor Workers' Compensation Act and the vast majority of state Workers Compensation laws similarly use average wages to set minimum or maximum benefits levels and adjust those levels each year based on the latest average wage data.
- Social Security uses a formula based on average wages to determine benefits levels. However, once an individual retires, it then adjusts the benefits level each year based on changes in prices.

This memorandum provides more background on these policies.

Unemployment Insurance

State unemployment insurance (UI) programs generally provide unemployed workers with benefits that replace a share of their previous wages, but then set a statutory maximum benefit level. If these maximum benefit levels are set as flat dollar amounts and not updated regularly, UI benefits will represent a declining portion of workers' wages each year.

In response, many states have indexed their UI maximum benefit levels to increases in state average weekly wages. This practice ensures that these caps are not artificially low. Today, this approach has effectively become the norm because thirty-five states and the District of Columbia all index their maximum benefit levels to their state average weekly wages.

States implement this indexing in one of two ways. The vast majority – thirty-three states and the

District of Columbia – have simply defined the maximum benefit level as a specified percentage of the state’s average weekly wages and then recalculate that amount annually – e.g., Massachusetts (57.5%), New Jersey (56.67%), and Pennsylvania (66.67%). This approach would be analogous to defining the minimum wage as 50% of average wages, and then simply updating that calculation each year when the new average wage data are released.

Two states – Ohio and Vermont – use a different approach. They previously established a base maximum benefit level and now index that figure each year based on the year-over-year percentage increase in the state average weekly wage. This approach would be analogous to defining the minimum wage as 50% of average wages in year 1, and then indexing that figure beginning in year 2 and in future years based on the year-over-year percentage increase in the state average weekly wage.

Please see the attached fact sheet for more information on this practice and a complete list of states that have indexed their maximum weekly benefits.

Workers’ Compensation

Federal and state workers’ compensation laws provide benefits for workers who are temporarily or permanently disabled by on-the-job injuries. As with UI, the vast majority of workers’ compensation programs establish the minimum or maximum benefit level as a percentage of average wages, and update those figures each year based on the latest average wage data.

At the federal level, the Longshore and Harbor Workers’ Compensation Act – a federal workers’ compensation program for those who work on navigable waters often outside state jurisdictions – sets the maximum compensation for covered workers who are totally disabled at 200% of the national average weekly wage – using the same data set that the BLS uses to calculate the “average hourly wage” series that we are proposing, just using the weekly series rather than the hourly series since these are weekly benefits. *See* 33 U.S.C. §§ 902(19), 906(b)(1). The same law sets a benefits floor of at least 50% of the national average weekly wage. *Id.* at § 906(b)(2). The law provides that floors and ceilings are recalculated annually as well based on the new average wage rates. *Id.* at § 906(b)(3).

At the state level, 45 states’ workers’ compensation laws similarly use state average wages to establish maximum and/or minimum compensation rates for workers who are totally and/or partially disabled on the job. *See* Ala. Code § 25-5-68 (maximum and minimum); Alaska Stat. § 23.30.175 (maximum and minimum); Ariz. Rev. Stat. § 23-1041 (maximum); Ark, Code § 11-9-501(d)(2)(B) (maximum); Cal. Labor Code § 4453(10) (maximum and minimum); Colo. Rev. Stat. § 8-47-106 (maximum); Del. Code Ann. tit. 19, §§ 2324-25 (maximum and minimum); Fla. Stat. § 440.12 (maximum); Haw. Rev. Stat. §§ 386-32 (maximum and minimum); Idaho Code § 72-409 (maximum and minimum); 820 Ill. Comp. Stat. § 305/8(2) (maximum); Iowa Code Ann. § 85.37 (maximum and minimum); Kan. Stat. Ann. § 44-510c (maximum); Ky. Rev. Stat § 342.730 (maximum and minimum); La. Rev. Stat. § 1202 (maximum and minimum); Me. Rev. Stat. Ann. tit. 39-A, § 211 (maximum); Md. Code, Lab. & Empl. § 9-637 (maximum); Mass. Gen. Laws ch. 152, §§ 1, 34, 34A (maximum and minimum); Mich. Comp. Laws §§ 418.351, 355 (minimum and maximum, respectively); Minn. Stat. § 176.101 (maximum); Miss Code § 71-3-13 (maximum); Mo. Rev. Stat. §§ 287.170, 287.180, 287.190 (maximum); Mont. Code Ann §§ 39-71-701-02

(maximum); Neb. Rev. Stat. § 48-121.01 (maximum); Nev. Rev. Stat. §§ 616C.500, 616A.065 (maximum); N.H. Rev. Stat. § 281-A:28 (maximum); N.J. Rev. Stat. § 34:15-12 (maximum or minimum); N.M. Stat. Ann. §§ 52-1-41, 52-3-14 (maximum); N.Y. Workers' Comp. Law § 15(6) (maximum); N.C. Gen. Stat. § 97-29 (maximum); N.D. Cent. Code § 65-05-09 (maximum and minimum); Ohio Rev. Code § 4123.56-58, 4123.62-63, 4121.67 (maximum and minimum); Okla. Stat. tit. 85, § 22 (maximum); Or. Rev. Stat. § 656.206, 656.210 (maximum and minimum); Pa. Stat. Ann. tit. 77, §§ 25.2, 511-512 (maximum); R.I. Gen. Laws § 28-33-17 (maximum); S.C. Code Ann. §§ 42-9-10, 42-9-20, 62-4-3 (maximum); Tenn. Code Ann. § 50-6-102 (maximum and minimum); Tex. Labor Code Ann. §§ 408.061(a), 408.062(a) (maximum and minimum, respectively); Utah Code Ann. § 34A-2-410 (maximum); Vt. Stat. Ann. tit. 21, §§ 601, 642, 646, 648 (maximum and minimum); Va. Code Ann. § 65.2-500; Wash. Rev. Code § 51.32.090 (maximum and minimum); Wis. Stat. § 102.11 (maximum); Wyo. Stat. Ann. § 27-14-403 (maximum and minimum).

Social Security

Federal Social Security benefits are adjusted using a combination of wage and price-based approaches, though recent projections highlight the advantages of indexing to wages rather than prices. The Social Security program establishes a retiree's base benefits upon retirement based in part on the Social Security Administration's calculation of a national average wage. This measure is distinct from, but analogous to, the average wage series that we have proposed as a benchmark for the minimum wage. *See* 42 U.S.C. § 415. Each year, the starting benefit for new retirees is recalculated to reflect the new average wage. *See id.* at § 409(k). As a result, if living standards go up over time – as measured by average wages – then new retirees receive a larger base retirement benefit.

But once a retiree starts collecting benefits, his or her base benefits are given a “cost of living adjustment” (COLA) each year to keep up with changes in prices – specifically, the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W). *Id.* at § 415(i). While the COLA ensures that a retiree's base wages maintain the same purchasing power – so that retirees can afford to purchase a comparable basket of goods each year – it does not increase their benefits to reflect rising living standards over time occurring in the active workforce.

This year the difference between these two approaches is substantial. The Congressional Budget Office has projected no increase in benefits for existing retirees in 2010 – and possibly no increase until 2013 – because the CPI-W has actually *decreased* since the last COLA was made in the fall of 2008, and it may take years to make up that lost ground. *See* Director of the Congressional Budget Office, “Why CBO Projects No Social Security COLA for 2010 to 2012 Under Current Law” (Apr. 22, 2009), at <http://cboblog.cbo.gov/?p=235>. This circumstance highlights the volatility of price-based indices like the CPI-W, which owes much of its recent decline to falling energy prices.

By contrast, the CBO projects that new retirees' benefits – which are linked in part to average wages rather than prices – “will continue to rise each year.” *Id.* Because wages are less volatile – in part because they do not increase or decrease directly with changing energy costs – they provide a more stable and reliable mechanism for ensuring annual increases.

For more information on the Social Security system's hybrid indexing model, please see Patrick Purcell, Laura Haltzel, and Neela Ranade, CRS Report to Congress: Indexing Social Security Benefits: The Effects of Prices and Wage Indexes (May 2005), http://assets.opencrs.com/rpts/RL32900_20050512.pdf.

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We would be happy to discuss these examples at anytime. Please contact Paul Sonn at 212-285-3025 ext. 351 for more information.



National Employment Law Project

Indexing Maximum Benefit Amounts: Keeping Pace with Growth in Wages

By indexing maximum weekly benefit amounts to wage growth, states can ensure that jobless workers are provided sufficient benefits to cover their critical daily expenses. Generally, without indexing, workers receive benefits that “replace” a smaller share of their average weekly wages. Although many states have benefit formulas that provide that a worker receives half of her or his previous weekly wage, maximum benefits levels are set as a statutory cap. When this cap is set too low, workers on average will receive benefits that cover a lesser portion of their previous wages.

Indexing provides a solution to insufficient benefits. With indexing, benefit caps are kept in line with wage growth, meaning that workers across the board will receive benefits that replace a more sustainable portion of their wages. Workers are then better able to meet their basic needs with unemployment benefits that adjust for changes in cost of living.

Currently, without indexing, Indiana’s maximum weekly benefit amount of \$390 replaces about 54% of state average weekly wages; an average worker, however, receives benefits that replace only about 40.5% of weekly wages.¹

The bipartisan Advisory Council on Unemployment Compensation recommends that maximum weekly benefits amounts are equal to two-thirds of a state’s average weekly wage. By indexing maximum benefits to this amount, low- and moderate-wage workers receive fair unemployment benefits, and the core function of the unemployment insurance program – to provide jobless workers with supplementary income, thus stabilizing local economies through increased household spending – is kept intact.

As the table shows, thirty-two (32) states currently have indexed their maximum weekly benefit amounts to wages; most have done so using an index of 60% or greater of the average state weekly wage.

Model Legislation: North Carolina

N.C.GEN.STAT.§96-12

(b)(2) Each August 1st, the Agency shall calculate the maximum weekly benefit amount available to an individual. The maximum weekly benefit amount is sixty-six and two-thirds percent (66 2/3%) of the average weekly insured wage rounded, if the amount is not a whole dollar, to the next lower whole dollar. The maximum weekly benefit amount set on August 1 of a year applies to an individual whose benefit year begins on or after that date and before August 1 of the following year.

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States with Indexed Maximum Weekly Benefits

State	Percentage of State Average Weekly Wages
Arkansas	66 2/3%
Colorado	55%
Connecticut	60%
Washington DC	66 2/3%
Hawaii	75%
Idaho	60%
Illinois	49.50%
Iowa	53%
Kansas	60%
Kentucky	62%
Louisiana	66 2/3%
Maine	52%
Massachusetts	57 1/2%
Minnesota	66 2/3%
Montana	67 1/2%
Nevada	50%
New Jersey	56 2/3%
New Mexico	53 1/2%

State	Percentage of State Average Weekly Wages
North Carolina	66 2/3%
North Dakota	62%
Ohio	Tracks % Increase in State AWW*
Oklahoma	Ranges from 60% to 50% of AWW**
Oregon	64%
Pennsylvania	66 2/3%
Puerto Rico	50%
Rhode Island	67%
South Carolina	66 2/3%
South Dakota	50%
Texas	47.60%
Utah	62 1/2%
Vermont	Tracks % Increase in State AWW
Virginia	50%
Washington	70%
West Virginia	66 2/3%
Wisconsin	66 2/3%
Wyoming	55%

* OH also pays dependency allowance only to those eligible for maximum Weekly Benefit Amount.

** Maximum varies depending upon OK trust fund balance and tax schedule in effect.

Source: US DOL *Comparison of State Unemployment Insurance Laws* (2008) Table 3-6, supplemented by NELP legal research

¹ Maximum weekly benefit amount from Indiana Department of Workforce Development. Average replacement rate taken from *UI Data Summary Third Quarter CY 2008*, Division of Fiscal and Actuarial Services, Office of Workforce Security, US Department of Labor.