STATE OF MISSOURI
NINETEENTH JUDICIAL CIRCUIT
COUNTY OF COLE, MISSOURI

G.R. RESTAURANT, INC., d/b/a GRANNY SCHAFFER'S FAMILY RESTAURANT and J.J. GROUP, INC., d/b/a JOHNNY'S BEANERY,	)	
Plaintiffs,	)	
v.	)	Cause No. 07AC-CC00276
MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS,	)	Division IV
Defendant.	)	

BRIEF OF AMICI CURIAE ST. LOUIS AREA JOBS WITH JUSTICE, JOINED BY HEARTLAND PRESBYTERY AND MISSOURI ACORN, IN SUPPORT OF DEFENDANT MISSOURI DEPARTMENT OF LABOR

I. INTRODUCTION

In November 2006, 76% of Missourians voted for Proposition B, a ballot initiative to raise the state's minimum wage to $6.50 per hour, giving our state's lowest-paid workers their first raise in a decade. Among them, tens of thousands of tipped workers were promised their first raise in base pay in nearly sixteen years, from $2.13 to $3.25 per hour. Now, Plaintiffs, two Missouri restaurants, are asking this Court to permit them to reach into the pockets of these tipped workers and take back their raise, in contravention of the text of Missouri's minimum wage law, longstanding agency regulations, and the will of nearly 1.6 million Missouri voters.

Proposition B did not change how Missouri's minimum wage law treats tips. Since Missouri enacted its state minimum wage law in 1990, employers have been allowed to pay tipped employees a base cash wage of fifty percent of the minimum

wage – which after Proposition B amounts to $3.25 per hour – as long as the employees make no less than the full minimum wage after tips are counted. This longstanding construction of the statute is confirmed by existing state regulations and is the approach followed by virtually all other minimum wage laws in the United States. It represents good policy for Missouri's tipped workers and for the state's economy. And, Plaintiffs articulate no reason to reject it now and deprive tipped workers of a raise that they desperately need to take care of themselves and their families.

Plaintiffs ask this Court to overlook these controlling authorities – the longstanding construction of the statute, duly enacted agency rules, and the will of the people – as they rely instead on a web posting that never had the force of law and that has been abandoned by its authors as erroneous. This Court should dismiss the Petition and allow the Missouri Department of Labor and Industrial Relations ("the Department") to advise employers to pay their tipped employees at least $3.25 per hour, prospectively and retroactive to January 1, 2007, as the law requires.

II. STATEMENT OF INTEREST OF AMICI CURIAE

Amici are several organizations, led in this brief by St. Louis Area Jobs with Justice, that helped form the "Give Missourians a Raise" campaign, which coordinated last year's minimum wage ballot initiative. Amici and their members and supporters – including many tipped workers – spent countless evenings and weekends asking friends and neighbors to sign petitions to put the minimum wage initiative on the ballot. Afterwards, they continued reaching out to coworkers, neighbors, classmates, and congregations to help pass Proposition B so that working families like theirs would have an easier time making ends meet.

Amicus curiae St. Louis Area Jobs with Justice ("Jobs with Justice") is a coalition of community, labor, student and religious organizations committed to working for economic justice in St. Louis and across Missouri. The St. Louis chapter was officially formed in 2002, and is part of a national network in more than 40 cities in the United States.

Jobs with Justice is an action-oriented organization. Since the ballot initiative passed, it has led the Save Our Tips campaign, advocating for employers to follow the law and pay tipped workers at least $3.25 per hour in wages. Jobs with Justice circulated petitions asking for the law to be properly implemented, and it reached out to hundreds of restaurant servers. *See* Save Our Tips, www.saveourtips.com (last visited May 1, 2007).

Amicus curiae Missouri ACORN is an organization of more than 10,000 low- and moderate- income families from across Missouri who work at the local and state levels to advocate for neighborhood improvements, raising wages, and affordable housing. ACORN was also a leader of Give Missourians a Raise and the Save Our Tips campaign, reaching out to restaurant servers in western Missouri in particular.

Amicus curiae the Heartland Presbytery is the governing body for 108 churches in Western Missouri and parts of Kansas, affiliated with the Presbyterian Church USA nationally. The Heartland Presbytery and its congregations were deeply involved in supporting the minimum wage initiative to raise wages, including for restaurant servers.

Amicus curiae Stetin Center for Law & Social Change is not-for-profit legal foundation founded in 2006 that is dedicated to advancing social justice. As part of this work, the Stetin Center has partnered with St. Louis Area Jobs with Justice to advance

the legal rights of workers in Missouri, including the rights of restaurant employees.

III. BACKGROUND

A. Minimum Wage Laws and Tipped Employees

Missouri's workers are protected by both federal and state minimum wage laws. The federal minimum wage law, the Fair Labor Standards Act (FLSA), establishes an absolute wage floor for all covered workers. But it expressly allows states and even cities to establish higher minimum wage rates as well. 29 U.S.C. § 218(a). As a practical matter, workers who are covered by both federal and state law must be paid at whichever rate is higher.

FLSA allows employers of tipped workers (like restaurant servers) to pay them a minimum cash wage (or "base cash wage") less than the full minimum wage, as long as they earn at least the full minimum wage once tips are included. *See* 29 U.S.C. § 203(m). For decades, FLSA required employers to pay tipped employees a base cash wage of at least 50% of the applicable minimum wage rate.[1] The relevant provision specified as follows:

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of . . . 50 percent of the applicable minimum wage rate after March 31, 1991, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee.

[1] FLSA first set the base cash wage at 50% of the full minimum wage in 1974. *See* P.L. 93-259, 88 Stat. 5 (1974) ("[T]he amount paid [a tipped employee] shall be deemed to be increased . . . not by an amount in excess of 50 per centum of the applicable minimum wage rate."). From 1979 through 1991, Congress raised the base cash wage to 55% of the federal minimum wage. *See* P.L. 95-151, 91 Stat. 1245 (1977). In 1989, Congress lowered the base cash wage back to 50%, effective in 1992. *See* P.L. 101-157, 103 Stat. 938 (1989).

29 U.S.C. § 203(m) (1995) (emphasis added). In other words, if an employer paid a base cash wage of 50% of the full minimum wage, it could count a worker's tips as a "credit" toward the remainder of their minimum wage obligation.

Unfortunately, Congress weakened this protection in 1996 when it froze the base cash wage for tipped employees at $2.13 per hour. Pub L. No. 104-188, 110 Stat. 1755 (1996). As a consequence, tipped workers did not fully benefit when Congress raised the minimum wage for other workers in 1996. Nor will they see an increase in the base cash wage if and when the minimum wage increase now pending in Congress is approved. *See* H.R. 2, 110th Cong. (2007).

The Missouri General Assembly enacted the state's first Minimum Wage Law in 1990. 1990 Mo. H.B. 1881; 1990 Mo. Ann. Legis. Serv. 1881. The state minimum wage was initially established at the same rate as the federal minimum wage, though it excluded any employee receiving a minimum wage pursuant to FLSA. Mo. Rev. Stat. §§ 290.500(3)(d), 290.502 (1991). At the time that Missouri's minimum wage was enacted, the federal minimum wage was $3.80 per hour. *See* U.S. Department of Labor, History of Changes to the Minimum Wage Law, http://www.dol.gov/esa/minwage/coverage.htm. Like some other states, Missouri's law thus filled in gaps by covering some workers who were exempt from FLSA at the same minimum wage rate.

In terms of tipped employees, the Missouri law again borrowed from federal law. Following the approach that was used under FLSA at that time, the Missouri law established the base cash wage as 50% of the regular minimum wage. Specifically, Section 290.512 of the Missouri minimum wage law provided as follows:

> 1. No employer of any employee who receives and retains compensation in the form of gratuities in addition to wages is required to pay wages in excess of fifty percent of the minimum wage rate specified in sections 290.500 to 290.530, however, total compensation for such employee shall total at least the minimum wage specified in sections 290.500 to 290.530, the difference being made up by the employer.

Mo. Ann. Stat. § 290.512(1) (1990) (emphasis added).

After the minimum wage law was enacted, the Department then proceeded to implement it. In 1992, following notice in the Missouri Register and an opportunity for public comment, the Department duly adopted a rule explaining the calculation of tips as credit toward payment of the minimum wage, citing Section 290.512 as its authorizing statute. In relevant part, the Department's rule has at all times provided as follows:

> (4) Tipped employees shall receive at least the applicable minimum wages as set forth in this rule, except that the employer may claim gratuities as a credit toward the payment of the required minimum wage. The maximum amount of the gratuities as a credit that the employer can claim as a credit is fifty percent (50%) of the applicable minimum wage rate. . . .[2] In no event shall the amount of wages and gratuities equal less than the applicable minimum wage, with the difference between the gratuities and the minimum wage being paid by the employer.

Mo. Code. Regs. Ann. tit. 8, § 30-4.020(4). A copy of the regulation, from the Department's rules, is attached hereto as Exhibit 1.

[2] When it was initially enacted, the rule also included the following illustration, consistent with the text of the statute: "For example, if after April 1, 1991 a tipped employee is entitled to a minimum wage of three dollars and sixty-two cents an hour ($3.62) and receives in one (1) day the equivalent of two dollars ($2) per hour in tips, the employer can claim up to fifty percent (50%) of the minimum wage one dollar and eighty-one cents ($1.81) as tip credit, and shall be required to pay the employee one dollar and eighty-one cents ($1.81) per hour in wages for that day." In 2003, the Department amended the rule to remove the illustration, given the outdated wage amounts. Minimum and Subminimum Wage Rate, 28 MoReg 2031 (November 17, 2003).

Consistent with the text of the statute, the Department provides that employers may claim "gratuities as a credit toward payment of the required minimum wage," but only up to the "maximum amount of . . . fifty percent (50%) of the applicable minimum wage rate." Employers must pay the remaining 50% as a base cash wage.

When Congress froze the federal base cash wage at $2.13 in 1996, Missouri did not change its law. Nor did the Department amend the substance of its rule setting the maximum tip credit at 50% of the applicable minimum wage.

In November 2006, Missouri voters approved Proposition B, a ballot initiative to amend Missouri's Minimum Wage Law. Proposition B established the state minimum wage "at the rate of $6.50 per hour, or wages at the same rate set under the provisions of federal law as the prevailing minimum wage . . . ," "whichever rate per hour is higher." It also deleted Section 290.500(3)(d), which had previously exempted workers who qualify for the federal minimum wage from state minimum wage protection. Proposition B did not, however, alter Section 290.512's requirements regarding treatment of gratuities under the Missouri minimum wage. A copy of Proposition B's amendments to Missouri's minimum wage law, as posted on the Missouri Secretary of State's website, is attached hereto as Exhibit 2.

Following passage of Proposition B, the Department posted a Frequently Asked Questions "blog" page ("FAQ") on its website stating that the new state Minimum Wage Law required no base cash wage as long as tipped employees earned the full minimum wage after tips. Missouri Department of Labor, Missouri Minimum Wage, http://dolir.typepad.com/missouri_minimum_wage/ (as posted on Mar. 8, 2007), attached hereto as Exhibit 3. The Department cited no authority for this FAQ. In fact,

press reports indicated that a spokesperson for the Department conceded that the FAQ conflicted with the state's duly adopted formal rule. *See* David A. Lieb, Minimum-Wage Backers Claim Food Servers Getting Short-Changed, Belleville News-Democrat, Feb 26, 2007 ("[Spokeswoman Tammy] Cavendar said the state regulation needs to be changed to reflect the department's interpretation of the law.").

On March 14, 2007, Governor Matt Blunt ordered the Department to drop the position outlined in the FAQ and make clear that tipped workers are owed a minimum base cash wage. Governor Blunt directed the Department "to comply with the minimum wage law passed by voters in November and increase the base wage for tipped employees to $3.25." "Blunt Steps in to Protect Workers, Directs Employers to Increase Base Wages for Tipped Employees," Press Release, March 14, 2007, at http://www.gov.mo.gov/press/Wages031407.htm (last visited May 1, 2007).

Plaintiffs filed this Petition on March 29, 2007, seeking to have the Court declare that Section 290.512 of Missouri's minimum wage law creates a ceiling establishing the *maximum* base cash wage, not the *minimum*, that an employer is required to pay tipped employees. (Pet. at ¶ 32.) Plaintiffs thereby argue that Missouri's minimum wage law does not require employers to pay tipped employees any cash wage at all, as long as the employees earn a total of $6.50 per hour after tips are counted.

B. The Economic Realities of Working For Tips.

Tens of thousands of tipped workers in Missouri are depending on a minimum wage increase to help make ends meet. While workers in a range of occupations and industries are paid in part in tips, restaurant servers represent the largest single group of tipped workers.[3]

Nearly 54,000 Missourians work as restaurant servers according to the best available data, which is based on a national employer survey conducted by the federal Bureau of Labor Statistics. *See* May 2005 State Occupational Employment and Wage Estimates, http://stats.bls.gov/oes/current/oes_mo.htm. In that survey, employers reported that the average hourly wage for Missouri's restaurant servers was only $7.21 per hour or $14,990 per year – *including tips*. And their median hourly wage of $6.50 was even lower. *Id.* Nationwide, only the top ten percent of restaurant servers earned more than $11.61 per hour – $24,150 per year – after tips; and, many of these top earners are likely to be in states like Alaska, California, Oregon, and Washington that have minimum wages well over $7.00 per hour that apply equally to restaurant servers. *See* United States Department of Labor, Minimum Wages for Tipped Employees, http://www.dol.gov/esa/programs/whd/state/tipped.htm (last visited May 1, 2007). In short, most restaurant servers in Missouri are working for extremely low wages even after accounting for tips. Contrary to assertions by some lobbying groups, these workers desperately need a minimum wage increase.

[3] Importantly, other tipped workers may be affected by the outcome of this litigation, including, for example, car wash attendants and valets. Unfortunately, there is less economic data available to characterize these jobs, many of which are likely to be even lower paying.

Restaurant servers who work full-time have a hard time earning enough to take care of their families. The Economic Policy Institute has calculated that a single parent raising a child in Joplin, Missouri realistically needs a budget of roughly $26,300 just to make ends meet. *See* Economic Policy Institute, Basic Family Budget Calculator for 2004, http://www.epinet.org/content.cfm/datazone_fambud_budget (last visited May 1, 2007), adjusted for inflation by Bureau of Labor Statistics, Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited May 1, 2007). In Columbia, the same family needs an estimated $28,270, and in St. Louis, $33,590 – over double what the data shows an average restaurant server earns each year, accounting for inflation. *Id.*

Proposition B promised these workers their first increase in base pay in more than 15 years. The federal base cash wage for tipped workers – just $2.13 per hour – has been stuck at that level since April 1991. *See* 29 U.S.C. § 203(m) (1995); Pub. L. No. 104-188, 110 Stat. 1755 (1996). For Missouri's restaurant servers, a raise in the base cash wage from $2.13 to $3.25 per hour will be substantial, representing a 17% raise for the median worker (around $2,350 per year for a server working full-time). While that amount might not pull these families out of poverty, it would certainly bring them closer to making ends meet.

A base minimum wage for tipped workers also serves an especially important function. In reality, few restaurant servers get to take home the full after-tax value of their tips, since many are required to participate in tip pooling or tip splitting schemes through which they contribute a portion of their tips to other workers. *See* United States Department of Labor, Tipped Employees Under the Fair Labor Standards Act, at http://www.dol.gov/esa/regs/compliance/whd/whdfs15.htm (last visited May 1, 2007).

Restaurant servers often must turn a portion of their tips over to other employees, including hosts, bartenders, and bussers. For each of these categories of workers, their base pay provides an important portion of their earnings precisely because it is dependable and insulated from miscalculations.

Similarly, while Missouri law requires restaurant servers to be paid the full minimum wage after tips, that requirement is often very difficult to enforce as a practical matter. Restaurant servers face daunting challenges in calculating whether they earned the proper minimum wage, let alone marshaling the resources to press claims that they earned less than the minimum wage after tips. Restaurants that require tip-pooling and tip-splitting arrangements make these calculations even more difficult, especially when restaurants include managers or other non-servers in the tip pool illegally. *See* 29 U.S.C. § 203(m) (providing that employers may only pay a lower tip wage if "all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips") (emphasis added). In a recent study, for example, 19 percent of restaurant workers surveyed in New York City reported that management takes a share of their tips – a practice that is plainly illegal under federal law. *See* Restaurant Opportunities Center of New York, Behind the Kitchen Door 14 (2005), at http://www.rocny.org/documents/RocNY_final_compiled.pdf. For tipped workers, their base cash wage is simpler to calculate and claim, if needed, and provides a dependable source of wages even in an industry with pervasive wage violations.

Meanwhile, economic research continues to indicate that raising the minimum

wage – including the tip wage – has no adverse economic effects. Last fall, leading economists who considered Missouri's pending minimum wage increase concurred that the policy makes economic sense. In a letter released last October, 650 economists (including five Nobel Laureates) agreed that a minimum wage increase like Missouri's – including a tip wage increase – "can significantly improve the lives of low-income workers and their families, without the adverse effects that critics have claimed." *See* Economic Policy Institute, "Hundreds of Economists Say: Raise the Minimum Wage," Oct. 2006, at http://www.epi.org/minwage/epi_minimum_wage_2006.pdf.

IV. ARGUMENT

A. Missouri's Minimum Wage Law Plainly Requires Employers to Pay Tipped Employees a Base Cash Wage of at Least 50% of the Minimum Wage.

Missouri's appellate courts have long instructed that the purpose of statutory interpretation is to determine the legislature's intent from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. *Appleby v. Director of Revenue*, 851 S.W.2d 540, 541 (Mo. Ct. App. 1993). While the first source in ascertaining legislative intent is to examine the language used, "a proper analysis also considers the context in which the words are used and, importantly, the problem the legislature sought to address with the statute's enactment." *Id.* (citing *Fowler v. Director of Revenue*, 823 S.W.2d 134, 135 (Mo. App. 1992)).

A careful reading of the Missouri minimum wage law demonstrates the legislature intended to protect tipped employees by ensuring that they receive a minimum base cash wage of 50% of the full minimum wage. Section 290.512(1) provides in full:

> 1. No employer of any employee who receives and retains compensation in the form of gratuities in addition to wages is required to pay wages in excess of fifty percent of the minimum wage rate specified in sections 290.500 to 290.530, however, total compensation for such employee shall total at least the minimum wage specified in sections 290.500 to 290.530, the difference being made up by the employer.

The first step in any case involving a statute is to start with the statute itself; and, because Section 290.512(1) is so central to this litigation, it is worth walking through its text in some detail. This Section is written in the negative

because it establishes a partial "shield" or exemption for employers of tipped employees. Absent this Section, employers of tipped employees would be required by Section 290.502 – the main minimum wage provision – to pay cash wages of no less than the full minimum wage of $6.50 per hour.

Under Section 290.512(1), employers of tipped workers are exempted from "pay[ing] wages in excess of fifty percent of the minimum wage." This effectively shields employers from paying the *second* 50% of Missouri's $6.50 cash minimum wage, *i.e.*, the portion *above* $3.25 per hour, so long as the employees make at least the full minimum wage once tips are included. But, because Section 290.512(1) applies only to wages "in excess of fifty percent of the minimum wage," it *does not* shield employers of tipped workers from having to pay the *first* 50% of Missouri's minimum wage, *i.e.*, the portion up to $3.25 per hour. In this fashion, Section 290.512(1) effectively establishes a base cash wage requirement of 50% of the minimum wage. It is a floor.

Plaintiffs try to mischaracterize Section 290.512(1)'s language as a "sword," claiming that it somehow establishes a "maximum cash wage an employer is required to pay tipped employees." (Pet. at ¶ 32.) But, the statute provides no support for such an unprecedented interpretation and nowhere authorizes employers to pay less than fifty percent of the minimum wage under any circumstance.

Plaintiffs' reading contravenes the most basic canons of statutory interpretation. "It is an elementary and cardinal rule of construction that effect must be given, if possible, to every word, clause, sentence, paragraph, and

section of a statute, and a statute should be so construed that effect may be given to all of its provisions, so that no part, or section will be inoperative, superfluous, contradictory, or conflicting . . . ." *Missouri Pacific Railroad Co. v. Kuehle*, 482 S.W.2d 505, 508 (Mo. 1972). Section 290.512(1) is divided into two clauses. The Section's first clause states: "no employer of any [tipped employee] is required to pay wages in excess of fifty percent of the minimum wage." The second part of the Section states: "total compensation for such employee shall total at least the minimum wage [specified by this chapter], the difference being made up by the employer." Plaintiffs' suggested interpretation that an employer does not need to pay 50% of the full minimum wage, and can meet the law's minimum wage requirement with any amount of tips, gives effect only to the Section's second clause. In other words, Plaintiffs' reading renders the first clause superfluous. If it is enough to meet the second clause's total compensation requirement entirely with tips, then the first clause adds nothing.

By contrast, the Department's current interpretation—that employers must pay a base cash wage of at least 50% of the applicable minimum wage—gives both clauses meaning. Under this interpretation, the first clause sets a base cash wage requirement, while the second clause goes on to ensure that if employees' base cash wages plus tips do not total the full minimum wage, then the employer must make up the difference.

Had the General Assembly intended to create an unlimited credit for tips, as Plaintiffs argue, it could have done so far more clearly as it did in the immediately following subsection of the minimum wage law, Section 290.512(2).

The General Assembly provides in the subsection that an employer may compensate an employee with goods and services, and is "required to pay only the difference between the fair market value of the goods and services and the minimum wage." This subsection contains no limiting language comparable to the "in excess of" language of Section 290.512(1). As a result, it makes clear that employers may pay employees solely with goods and services without limit. If, as Plaintiffs argue, the General Assembly intended Section 290.512(1) to permit an employer to compensate a tipped employee with tips alone (notwithstanding federal law), as an employer may do with goods and services under Section 290.512(2), the legislature knew how to draft such language. That the General Assembly used the limiting "in excess of" language (as was also used in the FLSA at the time) indicates that it intended to do something different – to set a base cash wage requirement for tipped employees.

Plaintiffs' interpretation also contravenes the canon of statutory interpretation that exemptions from remedial legislation – and minimum wage protections in particular – must be narrowly construed. The United States Supreme Court established that rule with respect to the federal minimum wage law in *Phillips Inc. v. Walling*, 324 U.S. 490, 493 (1945), holding that "[a]ny exemption from such humanitarian and remedial legislation must therefore be narrowly construed . . . ." The Missouri Supreme Court applies a similar rule in narrowly construing exceptions to other remedial legislation, for example, rules establishing eligibility for unemployment insurance benefits. *See Missouri Division of Employment Security v. Labor & Industrial Relations Comm'n*, 651

S.W.2d 145, 148 (Mo. 1983) ("[D]isqualifying provisions of the law are to be strictly construed against the disallowance of benefits to unemployed but available workers."); *accord Kroger v. Industrial Comm'n of Missouri*, 314 S.W.2d 250 (Mo. App. 1958) (*citing Walling*, 324 U.S. at 490). The state minimum wage law is clearly remedial legislation of the same sort as the federal minimum wage law and the state unemployment insurance law. Section 290.512 should therefore be narrowly construed to exempt employers from only half the minimum wage, not the whole minimum wage.

Reading Section 290.512(1) as a shield also comports with the underlying purpose of Missouri's minimum wage law. Missouri courts construe statutes in light of the purposes the legislature intended to accomplish and the evils it intended to cure. *Appleby v. Director of Revenue*, 851 S.W.2d 540, 541 (Mo. Ct. App. 1993). (citing *Gannett Outdoor Co. v. Missouri Highway & Transportation Comm'n*, 710 S.W.2d 504, 506 (Mo. Ct. App. 1986)). In this case, the purpose of a minimum wage is to establish a wage floor, or a base wage below which employers cannot pay. *See Phillips Inc. v. Walling*, 324 U.S. 490, 493 (1945) (discussing the federal minimum wage law's purpose); *Long v. Interstate Ready Mix, L.L.C.*, 83 S.W.3d 571 (W.D. Mo. App. 2002) (finding that the state Prevailing Wage Act "appears to be based on" the federal Davis-Bacon Act, thus the state law's purpose may be inferred from the purpose of the federal law). Section 290.512 establishes that, for tipped employees, this floor should be set at 50% of the full minimum wage. Interpreting Section 290.512 to exempt tipped employees *in full* is contrary to the purpose of setting a floor. It is also contrary

to the will of Missouri's voters. The ballot language for Proposition B stated that a "yes" vote will "increase the state minimum wage," and drew no distinction between different types of employees. Seventy-six percent of Missouri voters voted to give a raise to the state's minimum wage employees, including tipped employees.

By contrast, it is impossible to reconcile this purpose of establishing a wage floor with the unheard of idea of a "maximum cash wage." Wherever possible, Missouri courts avoid construing statutes in a manner that leads to an "unreasonable, oppressive, or absurd result." *Tribune Pub. Co. v. Curators of University of Missouri*, 661 S.W.2d 575, 583 (Mo. Ct. App. 1983). In this case, construing Missouri's wage law as establishing a "maximum cash wage" would be utterly unprecedented. In fact, were it not for the protections of the federal minimum wage law, Plaintiffs' interpretation would mean that Missouri employers could pay no cash wages at all as long as tipped employees made at least $6.50 per hour in tips. This runs contrary to the very idea of a minimum wage, which aims to set a baseline standard for employer pay, rather than leaving employees wholly dependent on customers or others for their livelihood.

This is especially true for a law like Missouri's that initially mirrored federal minimum wage. As discussed in more detail below, the federal minimum wage similarly establishes a base cash wage requirement for tipped employees and, at the time that the Missouri law was enacted, set that base cash wage at 50% of the full minimum wage. *See* Section IV, Part D, *infra*. Plaintiffs' interpretation would make Missouri's law one of the only minimum wages in the nation not to

establish a base cash wage requirement for tipped employees – a result that it is difficult to imagine the legislature intended given the language used.

Finally, Plaintiffs' interpretation also defies the clear intent of the statute because it is internally inconsistent. Plaintiffs assert that Section 290.512(1) sets some sort of "maximum cash wage." (Pet. at ¶32.) But, they readily concede that at times, when tips do not total $3.25 per hour, restaurant owners are required to pay more than 50% of the minimum wage to make up the shortfall. *Id.* For instance, if an employee averages only $1.00 per hour in tips, an employer must pay that employee $5.50 per hour in wages. This leads to the absurd result, per Plaintiffs' reading, that the "most" an employer must pay is $3.25 per hour – except when the employer must pay more. The better, internally consistent interpretation is that the fifty percent base cash wage is a minimum, because if tips do not equal the other 50% of the full minimum wage, then the employer must, per the statute, make up the difference.

Accordingly, from the minimum wage law's text and purpose, the intent of the General Assembly is clear. Section 290.512(1) sets a floor. It requires employers of tipped employees to pay a base cash wage of at least 50% of the applicable minimum wage rate. Currently, that means that employers must pay their tipped employees at least $3.25 per hour. If wages plus tips do not total at least $6.50 per hour, employers must make up the difference.

B. Plaintiffs' Interpretation Relying on an Abandoned FAQ is Due No Deference Because It Is Contrary to Missouri's Minimum Wage Law and Inconsistent with Existing Regulations.

In their Petition, it appears that Plaintiffs rely entirely on the Department's now abandoned FAQ for support. They argue that the Court should give deference to the

Department's FAQ absent a showing that the Department acted in an arbitrary or capricious manner. (Pet. at ¶ 33-34.) This suggestion turns administrative law on its head. First, where, as here, the intent of the General Assembly is clear from a statute's text, structure and purpose, courts have no need to turn to administrative interpretations at all.[1] But second, to the degree that a court does consult administrative sources, it is duly adopted rules, not informal statements on a website, that control.

As explained above, a plain reading of the statute requires employers to guarantee tipped employees a base cash wage of at least 50% of the minimum wage. By contrast, the now-abandoned FAQ, which attempted to reinterpret the Missouri law to absolve employers of any obligation to pay cash wages to their tipped employees, runs counter to accepted canons of statutory interpretation in that it renders statutory language superfluous, is inconsistent with the purpose of a minimum wage law, and suffers from fatal internal inconsistencies. Quite simply, the FAQ is erroneous, which is why Governor Matt Blunt directed the Department to abandon it.

Moreover, the FAQ is not a duly adopted rule, and therefore warrants no deference at all. It was not published in the Missouri Register or otherwise promulgated pursuant to Missouri's administrative rulemaking process established under Section 536.021. Instead, it simply appeared on the Department's website "blog" sometime in December 2006, without any public comment.

[1] The mere fact that the Department briefly published the FAQ suggesting a contrary interpretation of the statute does not make the statute ambiguous. The language of the statute itself must be ambiguous. *See Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 600 (Mo. 1977) (statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that expressed in clear and unambiguous language in the statute).

In *United Pharmacal Co. v. Missouri Board of Pharmacy*, 159 S.W.3d 361 (Mo. 2005), the Missouri Supreme Court specifically ruled that an FAQ published on an agency website, just like the one here, was not a rule for the same reason – because the agency failed to follow rulemaking procedures. *Id.* at 365 ("Not everything that is written or published by an agency constitutes as administrative rule."). Moreover, the Missouri Supreme Court instructed that "failure to follow rulemaking procedures renders void purported changes in statewide policy." *Id.* (citing *NME Hosps. Inc. v. Dept. of Soc. Serv.*, 850 S.W.2d 71, 74-75 (Mo. 1993)). Thus, per *United Pharmcal Co.*, the FAQ is irrelevant. Because it was not properly promulgated, it has no effect and did not serve to change policy.

In contrast to the Department's now-abandoned FAQ, the Department in fact has a properly promulgated regulation, Mo Code Regs. Ann. tit. 8, § 30-4.020 (2006), that outlines the Missouri minimum wage law requirements for tipped employees. Surprisingly, Plaintiffs make no mention of this regulation in their Petition. That regulation was duly adopted in 1992 pursuant to the Missouri Administrative Procedures Act, after being published in the Missouri Register and subject to pubic comment. *See* Section 536.021, R.S. Mo. (setting procedure for proper rulemaking). If there is any question as to the meaning of Section 290.512(1), the Court should defer to the Department's existing regulation on tips. *See Chevron United States Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that courts have a duty to respect regulations, absent congressional intent to the contrary); *Moses v. Carnahan*, 186 S.W.3d 889 (Mo. Ct. App. 2006) (holding that principles of *Chevron* are no less applicable to state regulations interpreting state statutes).

In relevant part, that Department's duly promulgated regulation provides that: "The maximum amount of gratuities that the employer can claim as credit is fifty percent (50%) of the applicable minimum wage rate." Mo Code Regs. Ann. tit. 8, § 30-4.020. By limiting the amount of tips that an employer may credit towards the minimum wage to 50%, the regulation effectively requires employers to pay a base cash wage of at least 50% of the full minimum wage – currently $3.25 per hour. While the Missouri minimum wage law was not extended to cover all tipped workers until this year, the regulation nonetheless provides the Department's longstanding, duly adopted interpretation of how Missouri's minimum wage applies to tipped workers.

It is unfortunate that the erroneous FAQ appeared on the Department's web site. But, this error does not render the Department's existing regulation on gratuities no longer controlling nor somehow arbitrary or capricious. Because the FAQ was never subject to notice and public comment, nor was the product of a formal adjudication, it warrants no deference. *See* Section 536.021, R.S. Mo. (establishing a procedure for proper rulemaking). As the Missouri Court of Appeals for the Western District recently held, agencies are due no deference for interpretations that conflict with an existing regulation: "[I]t would be inappropriate for a court to defer to an agency's interpretation of its own regulation that was in any way expanding upon, narrowing, or otherwise inconsistent with the plain and ordinary meaning of the words used in the regulations." *Department of Social Services v. Senior Citizens Nursing Home Dist.*, No. WD 66236, 2007 Mo. App. LEXIS 224, at *32-*33 (Mo. Ct. App. Feb. 13, 2007). Likewise here, Plaintiffs cannot invoke the now-abandoned FAQ as a license for ignoring the statutory requirements of the Missouri minimum wage or the controlling agency regulation.

C. The Department's Reading of the Minimum Wage Law Is Consistent with Both the Federal Minimum Wage Law and Those of the Overwhelming Majority of States, and Is Neither Arbitrary Nor Capricious.

The Department's existing interpretation of the Missouri minimum wage law as establishing a base cash wage requirement for tipped employees is consistent with both the federal minimum wage law and those of virtually all other states. As described above, for decades the federal FLSA has established that the base cash wage requirement for tipped employees. *See* Section III, Part A, *supra*. And for most of that period, including 1990 when the Missouri minimum wage statute was first enacted, the federal base cash wage was set to be 50% of the full minimum wage. *See* P.L. 101-157, 103 Stat. 938 (1989). In enacting its minimum wage, Missouri followed the FLSA approach by adopting the same 50% standard. In fact, while the structure of the two statutes differs in some regards, the Missouri General Assembly and Congress employed similar language with regard to the treatment of tips. Both Section 290.512, R.S. Mo. and FLSA Section 203(m), as it existed in 1990, used the phrase "in excess of" 50 percent in describing the obligations of employers of tipped workers. This language is further indication of the General Assembly's intent to follow the federal approach of establishing a base cash wage requirement for tipped employees.

It is true that some years later Congress modified the formula for calculating the federal base cash wage and froze it at $2.13 per hour, P.L. 104-188, 110 Stat. 1755. However, despite that change, federal law still establishes a base cash wage for tipped employees. Moreover, Missouri did not change its law in response, nor did the Department alter its regulation. Thus, the Missouri statute should be interpreted to be consistent with the analogous federal statute at the time of its adoption in 1990. *Cf.*

Long v. Interstate Ready Mix, L.L.C., 83 S.W.3d 571 (W.D. Mo. App. 2002) (finding that the state Prevailing Wage Act "appears to be based on" the federal Davis-Bacon Act, thus the state law's purpose may be inferred from the purpose of the federal law). Accordingly, as it follows the well-established approach for tipped-worker wages used under the analogous federal minimum wage, the Department's regulation could be neither arbitrary nor capricious.

Likewise, the Department's current reading of the statute is also consistent with the approach used under the vast majority of other state minimum wage laws, nearly all of which establish a base cash wage requirement for tipped employees. Six states actually require all tipped employees to receive the full minimum wage as a cash wage without any credit for tips. *See* United States Dept. of Labor, Minimum Wages for Tipped Employees, http://www.dol.gov/esa/programs/whd/state/tipped.htm (last visited May 1, 2007). Virtually all of the remaining states, like Missouri, use a tip credit system to establish a minimum base cash wage that employers must pay to all tipped employees. *Id.* And many of them follow Missouri's approach by setting the base cash wage as a percentage of the state's full minimum wage. Examples of states that use this approach include: Connecticut (70.7%), Idaho (65%), Iowa (60%), Kansas (60%), Maryland (50%), New Hampshire (55%), North Dakota (67%), Ohio (50%), Oklahoma (50%), and West Virginia (80%). The fact that virtually all states establish a base cash wage requirement, and many of them set it as a percentage of the full minimum wage, underscores the appropriateness of Missouri's approach, dispelling any suggestion that it is arbitrary or capricious.

Indeed, only three states take the approach urged by Plaintiffs and establish no

base cash wage requirement for tipped employees under their minimum wage laws. However, examination of the statutory language used by those three states simply reinforces the Department's interpretation of the Missouri law. In the three states that have elected to provide no base cash wage protection for tipped employees, they have done so in plain and unambiguous terms. *See* Ga. Code. Ann. § 34-4-3 (b)(5) (exempting from all minimum wage protections "[a]ny employee whose compensation consists wholly or partially of gratuities"); N.J. Stat. § 34:11-56a1(d) (defining wages to include, without limitation, "any gratuities received by an employee"); Va. Ann. Code § 40.1-28.9 (establishing a tip credit with no limiting language). Their language contrasts markedly with the Missouri law's express reference to 50% of the minimum wage, thus highlighting just how implausible Plaintiffs' interpretation is.

D. Plaintiffs Relied on the Department's FAQ at Their Own Peril, and Must Pay Their Tipped Employees $3.25 Per Hour Retroactive to January 1, 2007.

In Count II of their Petition, Plaintiffs seek an order that they were entitled to rely on the Department's erroneous FAQ, and that accordingly they are not required to pay their tipped employees the higher wage retroactive to January 1, 2007. In this astonishing request, Plaintiffs ask the Court to absolve them of their responsibility for paying their low-wage employees the voter-approved raise that, by statute, took effect on January 1.

Plaintiffs appear to argue that some form of estoppel shields them from liability because they reasonably relied on the Department's now-abandoned FAQ. It is well-established, however, that estoppel does not ordinarily obtain against governmental bodies. Claiming that they relied on the government's advice is not enough. Rather, in order to be entitled to estoppel, Plaintiffs must also show that the governmental action

on which they relied amounted to affirmative misconduct. *See, e.g., Farmers' and Laborers' Cooperative Ins. Assoc. v. Director of Revenue*, 742 S.W.2d 141, 143-44 (Mo. 1987) (Director of Revenue's failure to enforce tax law for nine years, where plain language of the statute made plaintiff subject to tax does not amount to misconduct and plaintiff cannot use failure to evade paying taxes); *Lynn v. Director of Revenue*, 689 S.W.2d 45, 49 (Mo. 1985) (holding that a statement of Revenue employee does not absolve taxpayer from liability). Here, Plaintiffs do not allege and offer no evidence of affirmative misconduct. While the Department's FAQ was a mistake, there is no suggestion that the Department intentionally posted mistaken information.

Nor can Plaintiffs establish other grounds for estoppel such as manifest injustice. They and their counsel had access to Missouri's minimum wage law and the Department's longstanding regulations, and in any event are charged with knowledge of the applicable laws. *Farmer's and Laborers' Cooperative Ins. Assoc.*, 742 S.W.2d at 143. Indeed, because it was proposed through a ballot initiative, Missouri's minimum wage increase was debated in a uniquely high-profile forum. In fact, the restaurant industry was one of the most active and vocal opponents of the ballot initiative, making the questionable argument that restaurants in the state could not afford to pay their staff a higher minimum wage. *See* National Restaurant Association, News Release, New Restaurant Operator Survey Shows Concludes Wage Hikes Will Result in Lost Jobs, Reduced Benefits, Increased Prices, http://www.restaurant.org/pressroom/pressrelease.cfm?ID=1337 (last visited May 2, 2007). It tests the boundaries of the imagination for restaurants to now claim surprise that the new law does in fact require them to pay a base cash wage.

Nor can Plaintiffs rightfully claim that they reasonably relied on the FAQ. The Missouri Department of Labor's website expressly indicates that information on the website may not be accurate, including a disclaimer:

> **Disclaimer**
> The Missouri Department of Labor and Industrial Relations provides access to resources and other information on this Web site as a public service. Although reasonable efforts have been made to ensure that all electronic information made available is current, complete and accurate, the Missouri Department of Labor and Industrial Relations does not warrant or represent that this information is current, complete and accurate. All information is subject to change on a regular basis, without notice.

Missouri Department of Labor, Policies, http://www.dolir.mo.gov/policies.htm (last visited May 1, 2007). These disclaimers are not mere boilerplate. Unlike duly adopted rules that are subject to notice and public comment, the Department's informal website postings have not been so tested. Plaintiffs were accordingly on notice that the website FAQ was not warranted to be "current, complete and accurate."

Nor is there evidence that the Plaintiffs or other employers of tipped employees in the purported class actually relied on the Department's FAQ. Plaintiffs' Petition alleges only that they "reasonably relied on [the Department's] original advice and interpretation," (Pet. at ¶ 41), but fails to specify how they came to know of the advice, whether other purported class members read the FAQ, whether Plaintiffs and other purported class members heard about the FAQ from someone else, or whether they ever heard about it at all. The Petition thus lacks support for issuing such relief to the Plaintiffs, let alone to the entire class of employers of tipped employees that they purportedly represent.

Accordingly, the Court should dismiss Plaintiffs' Count II, and hold that tipped

employees are not barred from enforcing their right to the wages that they have been owed since January 1, 2007.

V. CONCLUSION

For the foregoing reasons, amicus St. Louis Area Jobs with Justice respectfully requests that this court dismiss Plaintiffs' Petition with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby states that on this 3rd day of May 2007, a copy of the foregoing Motion was mailed via first-class mail, postage prepaid to:

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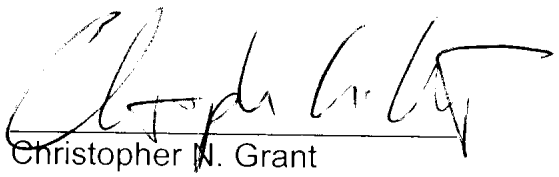

Christopher N. Grant

8 CSR 30-4.020

MISSOURI CODE OF STATE REGULATIONS

* THIS DOCUMENT REFLECTS ALL REGULATIONS IN EFFECT AS OF JANUARY 29, 2007 *

TITLE 8 - DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DIVISION 30 - DIVISION OF LABOR STANDARDS
CHAPTER 4 - MINIMUM WAGE AND OVERTIME RULES

8 CSR 30-4.020 (2007)

30-4.020 Minimum and Subminimum Wage Rates

(1) Effective August 28, 1990 employers who employ individuals who are covered under the Missouri minimum wage law are required to pay to each such individual wages at the same rate as established as the federal minimum wage under the Fair Labor Standards Act (FLSA).

(2) Learners and apprentices shall be paid the same rate as established under the provisions of federal law as the federal subminimum wage applicable to new workers. The Fair Labor Standards Amendments of 1996 to the FLSA established training wages for certain eligible workers.

(3) An individual whose earning capacity is impaired by physical or mental deficiency, and who is unable to maintain a production level within the limits required of those employees who are receiving minimum or subminimum wages set forth in section (1) or (2) of this rule, may be paid at a minimum wage as established by the director which may be lower than the minimum and subminimum wage rates set forth in this rule. Employment of individuals at these lower wage rates shall be permitted as provided under 8 CSR 30-4.040.

(4) **Tipped** employees shall receive at least the applicable minimum wages as set forth in this rule, except that the employer may claim gratuities as a credit toward the payment of the required minimum wage. The maximum amount of gratuities that the employer can claim as a credit is fifty percent (50%) of the applicable minimum wage rate. In no event shall the amount of wages and gratuities equal less than the applicable minimum wage, with the difference between the gratuities and the minimum wage being paid by the employer.

AUTHORITY: sections 290.512, 290.515 and 290.517, RSMo 2000.*

*Original authority: 290.512, RSMo 1990; 290.515, RSMo 1990; and 290.517, RSMo 1990.

Original rule filed July 22, 1992, effective Feb. 26, 1993. Amended: Filed Oct. 8, 2003, effective April 30, 2004.

NOTES:
PURPOSE: This rule establishes the minimum wage rates to be paid to certain qualifying employees and describes generally the allowance of gratuities as a credit toward payment of the minimum wage.

Exhibit 1

Missouri Secretary of State, Robin Carnahan

2006 Ballot Measure
Proposition B

Statutory Amendment to RSMo 290 – Raising Minimum Wage

THE PROPOSED AMENDMENT

Be it enacted by the people of the State of Missouri:

Chapter 290 of the Revised Statutes of Missouri, 2005, is amended to read as follows:

§ 290.500. Definitions
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", [an] 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 who receives a minimum wage pursuant to the Fair Labor Standards Act of 1938, as amended, including individuals employed by an employer covered by 29 U.S.C. 203, or other applicable federal law;]

([e] 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;

([f] 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;

([g] f) Any individual employed on or about a private residence on an occasional basis for six hours or less on each occasion;

([h] g) Any handicapped person employed in a sheltered workshop, certified by the department of elementary and secondary education;

([i] h) Any person employed on a casual basis [in domestic service employment] to provide baby-sitting services[, any person employed in the domestic service of any family or person at his home, and any employee employed in domestic service employment to provide companionship services for individuals who because of age or infirmity are unable to care for themselves];

([j] i) Any individual employed by an employer subject to the provisions of [Part I of the Interstate Commerce Act] part A of subtitle IV of title 49, United States Code, 49 U.S.C. §§ 10101 et seq.;

([k] j) Any individual employed on a casual or intermittent basis as a golf caddy, newsboy, or in a similar occupation;

([l] 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;

([m] l) Any individual [subject to the minimum wage provisions of applicable federal law or any individual] who is employed in any government position defined in 29 U.S.C. §§ 203(e)(2)[(c)(i)] (C)(i)-(ii);

Exhibit 2

([n] 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;

([o] n) Any individual who is an offender, as defined in section 217.010, RSMo, 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, RSMo;

([p] o) Any individual described by the provisions of section 29 U.S.C. 213(a) (8);

(4) "Employer", any [individual, partnership, association, corporation, business, business trust, or any] person [or group of persons]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.

§ 290.502. Minimum wage rate

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 [of his employees] 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.

§ 290.505. Overtime compensation, applicable number of hours, exceptions

1. No employer shall employ any of his employees for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

2. Employees of an amusement or recreation business that meets the criteria set out in 29 U.S.C. § 213(a) (3) must be paid one and one-half times their regular compensation for any hours worked in excess of fifty-two hours in any one-week period.

3. With the exception of employees described in subsection (2), the overtime requirements of subsection (1) shall not apply to employees who are exempt from federal minimum wage or overtime requirements pursuant to 29 U.S.C.§§ 213(a)-(b).

§ 290.507. Agriculture, law not applicable to small farmers

Sections 290.500 to 290.530 shall not apply to any employee or employer engaged in agriculture, as defined in section 290.500 (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agriculture labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) 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, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, 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, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate

as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock.

§ 290.510. Director may investigate to prove compliance

The director shall have authority to investigate and ascertain the wages of persons employed in any occupation included within the meaning of sections 290.500 to 290.530.

§ 290.512. Gratuities, goods or services as part of wages, effect on minimum wage requirements

1. No employer of any employee who receives and retains compensation in the form of gratuities in addition to wages is required to pay wages in excess of fifty percent of the minimum wage rate specified in sections 290.500 to 290.530, however, total compensation for such employee shall total at least the minimum wage specified in sections 290.500 to 290.530, the difference being made up by the employer.

2. If an employee receives and retains compensation in the form of goods or services as an incident of his employment and if he is not required to exercise any discretion in order to receive the goods or services, the employer is required to pay only the difference between the fair market value of the goods and services and the minimum wage otherwise required to be paid by sections 290.500 to 290.530. The fair market value of the goods and services shall be computed on a weekly basis. The director shall provide by regulation a method of valuing the goods and services received by any employee in lieu of the wages otherwise required to be paid under the provisions of sections 290.500 to 290.530. He shall also provide by regulation a method of determining those types of goods and services that are an incident of employment the receipt of which does not require any discretion on the part of the employee.

§ 290.515. Physical or mental deficiency of employee, wage rate, determined by director, how

After a public hearing at which any person may be heard, the director shall provide by regulation for the employment in any occupation of individuals whose earning capacity is impaired by physical or mental deficiency at wages lower than the wage rate applicable under sections 290.500 to 290.530. The individuals shall be employed as the director finds appropriate to prevent curtailment of opportunities for employment, to avoid undue hardship, and to safeguard the wage rate applicable under sections 290.500 to 290.530, except that no individual who maintains a production level within the limits required of other employees shall be paid less than the wage rate applicable under sections 290.500 to 290.530. Employees affected or their guardians shall be given reasonable notice of this hearing.

§ 290.517. Learners and apprentices, wage rate, determined by director, how

After a public hearing of which individual employees affected must be given reasonable notice, the director shall provide by regulation for the employment in any occupation, at wages lower than the wage rate applicable under sections 290.500 to 290.530, of such learners and apprentices as he finds appropriate to prevent curtailment of opportunities for employment. Such wage rate for learners and apprentices shall be [the same rate or rates set under the provisions of federal law as the prevailing federal subminimum wage applicable to new workers] not less than 90 cents less than the minimum wage established by sections 290.500 to 290.530. At no time may this provision be used for the purpose of evading the spirit and meaning of sections 290.500 to 290.530.

§ 290.520. Employer to keep records--director may inspect, records to be confidential

Every employer subject to any provision of sections 290.500 to 290.530 or any regulation issued under sections 290.500 to 290.530 shall make and keep for a period of not less than three years on or about the premises wherein any employee is employed or at some other premises which is suitable to the employer, a record of the name, address and occupation of each of his employees, the rate of pay, the amount paid each pay period to each employee, the hours worked each day and each workweek by the employee and any goods or services provided by the employer to the employee as provided in section 290.512. The records shall be open for inspection by the director by appointment. Where the records required under this section are kept outside the state, the records shall be made available to the director upon demand. Every such employer shall furnish to the director on demand a sworn statement of time records and information upon forms prescribed or approved by the director. All the records and information obtained by the department of labor and industrial relations are confidential and shall be disclosed only on order of a court of competent jurisdiction.

§ 290.522. Summary of law and wage rate, employer to post, how

Every employer subject to any provision of sections 290.500 to 290.530 or of any regulations issued under sections 290.500 to 290.530 shall keep a summary of sections 290.500 to 290.530, approved by the director, and copies of any applicable wage regulations issued under sections 290.500 to 290.530, or a summary of the wage regulations posted in a conspicuous and accessible place in or about the premises wherein any person subject thereto is employed. Employers shall be furnished copies of the summaries and regulations by the state on request without charge.

§ 290.525. Violations--penalty

Any employer who hinders the director in the performance of his duties in the enforcement of sections 290.500 to 290.530 by any of the following acts is guilty of a class C misdemeanor:

(1) Refusing to admit the director to any place of employment;

(2) Failing to make, keep and preserve any records as required under the provisions of sections 290.500 to 290.530;

(3) Falsifying any record required under the provisions of sections 290.500 to 290.530;

(4) Refusing to make any record required under the provisions of sections 290.500 to 290.530 accessible to the director;

(5) Refusing to furnish a sworn statement of any record required under the provisions of sections 290.500 to 290.530 or any other information required for the proper enforcement of sections 290.500 to 290.530 to the director upon demand;

(6) Failing to post a summary of sections 290.500 to 290.530 or a copy of any applicable regulation as required;

(7) Discharging or in any other manner discriminating against any employee who has notified the director that he has not been paid wages in accordance with the provisions of sections 290.500 to 290.530, or who has caused to be instituted any proceeding under or related to sections 290.500 to 290.530, or who has testified or is about to testify in any such proceeding;

(8) Paying or agreeing to pay wages at a rate less than the rate applicable under sections 290.500 to 290.530. Payment at such rate for any week or portion of a week constitutes a separate offense as to each employee;

(9) Otherwise violating any provisions of sections 290.500 to 290.530.

Each day of violation constitutes a separate offense.

§ 290.527. Action for underpayment of wages, employee may bring--limitation

Any employer who pays any employee less wages than the wages to which the employee is entitled under or by virtue of sections 290.500 to 290.530 shall be liable to the employee affected for the full amount of the wage rate and an additional equal amount as liquidated damages, less any amount actually paid to the employee by the employer and for costs and such reasonable attorney fees as may be allowed by the court or jury. The employee may bring any legal action necessary to collect the claim. Any agreement between the employee and the employer to work for less than the wage rate shall be no defense to the action. All actions for* the collection of any deficiency in wages shall be commenced within two years of the accrual of the cause of action.

§ 290.528. Law not to supersede more favorable existing law

Any standards relating to minimum wages, maximum hours, overtime compensation or other working conditions in effect under any other law of this state on August 28, 1990, which are more favorable to employees than those applicable to employees under sections 290.500 to 290.530 or the regulations issued under sections 290.500 to 290.530, shall not be deemed to be amended, rescinded, or otherwise affected by sections 290.500 to 290.530 but shall continue in full force and effect and may be enforced as provided by law.

§ 290.530. Law not to interfere with collective bargaining rights

Nothing in sections 290.500 to 290.530 shall be deemed to interfere with, impede, or in any way diminish the right of employees to bargain collectively with their employers through representatives of their own choosing in order to establish wages or other conditions of work in excess of the applicable minimum under the provisions of sections 290.500 to 290.530.

A: The only exception for commission sales persons in Missouri's new Minimum Wage Law is in 290.500.3(k). This exception is limited to employees whose hours and places of employment are not substantially controlled by the employer. Therefore, while some commission sales persons will be exempted under Missouri law, not all will be. Any commission sales person, whose hours and places of employment are not substantially controlled by their employer, would not be subject to the provisions of Missouri law. In other words, if an individual in this capacity is free to come and go as they please, is not required to be at the place of business at any certain time or for any established period of time, they would not be covered and the $6.50 per hour rate would not apply to them. Any commission sales person whose hours and place of employment are established and controlled by the employer is covered by the law.

Q: Are there any overtime provisions in Missouri's new Minimum Wage Law similar to that which is in Section 7(j) of the Fair Labor Standards Act pertaining to nurses?

A: There are no specific references to nurses in Missouri's new Minimum Wage Law. However, Section 290.500(3)(a) exempts bona fide professionals. Registered Nurses (RN's), based on their advanced knowledge, are considered professionals and would not be subject to the provisions of the law. However, Licensed Practical Nurses (LPN's) do not qualify for the professional exemption and are subject to the provisions of the law.

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More answers to minimum wage questions you might have

Q: I own a restaurant. Do I have to pay my wait staff 50% of the new Missouri minimum wage of $6.50 per hour if they also receive gratuities?

A: No. However, total compensation for employees in this capacity must total at least $6.50 per hour. You are required to make up the difference. For example, if an employee in this capacity receives tips averaging $4.25 per hour you must pay them $2.25 per hour to meet the minimum wage of $6.50 per hour. If they receive tips averaging $2.50 per hour you must pay them $4.00 per hour to meet the minimum wage of $6.50 per hour. If you are subject to the federal Fair Labor Standards Act you must pay them at least $2.13 per hour, regardless of the amount of tips they receive, to be in compliance with federal law. The Division of Labor Standards will look at the number of hours worked during the established workweek to

determine whether an employee has been paid correctly under Missouri's Minimum Wage Law.

Q: I am a waitress/waiter at a restaurant. Is my employer required to pay me 50% of the new $6.50 per hour minimum wage that is effective January 1, 2007?

A: No. However, your total compensation must total at least $6.50 per hour with the difference being made up by the employer. For example, if you receive tips averaging $4.25 per hour your employer must pay you $2.25 per hour to meet the minimum wage of $6.50 per hour. If you receive tips averaging $2.50 per hour your employer must pay you $4.00 per hour to meet the minimum wage of $6.50 per hour. If your employer is subject to the federal Fair Labor Standards Act they must pay you at least $2.13 per hour, regardless of the amount of tips you receive, to be in compliance with federal law. The Division of Labor Standards will look at the number of hours worked during the established workweek to determine whether you have been paid correctly under Missouri's Minimum Wage Law.

Q: Can deductions be made from an employees' paycheck?

A: Yes, but any deduction can not take an employees' wages below the state minimum wage of $6.50 per hour.

Q: Are employees of state and local government covered by the new Minimum Wage Law?

A: Yes. There are no provisions in the new Minimum Wage Law excluding routine government employees. Therefore, employees of a state or local government, who are not excluded from coverage as an executive, administrative or professional employee, are subject to the new minimum wage of $6.50 per hour.

Q: Are government employees required to be paid overtime at one and one-half times their regular rate for all hours worked over forty in a work week?

A: The law requires that employees working longer than forty hours in a work week receive compensation at a rate not less than one and one-half the regular rate of compensation. There is nothing in the law that requires that government employees be paid cash as compensation for the overtime. Government employees always have received compensatory time which is considered payment when the time off is taken or when paid in cash upon separation from employment. Since government employees will receive payment at one and one-half times their salary, use of compensatory time does not violate the provisions of Missouri's Minimum Wage Law.

Q: Are all government employees subject to the new minimum wage law?