

MEMORANDUM

SUBJECT: Minimum Wage for Missouri's Tipped Workers

DATE: March 8, 2007

Last November, Missouri voters overwhelmingly approved Proposition B, which raised the state's minimum wage to \$6.50 per hour as of January 1, 2007, with annual cost-of-living increases thereafter.¹ Recently, however, questions have been raised about how this increase affects workers who receive tips. As law professors and minimum wage law experts, we have reviewed Missouri's minimum wage law and find that it requires employers to pay tipped workers a base cash wage of at least 50% of the minimum wage (\$3.25 per hour), while allowing that the balance of the \$6.50 minimum wage may be provided in the form of tips. The state minimum wage law has been consistently interpreted in this fashion for many years, and this longstanding interpretation is confirmed by the current regulations of the Missouri Department of Labor and Industrial Relations (DOLIR). Nor did anything in the recently approved ballot initiative change these requirements, since the initiative did not amend or alter in any way the statutory provision dealing with tips. We are therefore puzzled as to why DOLIR has posted information on its website suggesting that the 50% base wage requirement for tipped workers has somehow been repealed. Such guidance is both without legal basis and irresponsible as it risks misleading employers. Any employers who have relied upon the mistaken website guidance and who did not begin paying their tipped employees the required base cash wage of at least \$3.25 on January 1 are exposed to significant liability for backpay, liquidated damages, attorneys fees, and court costs.

Background

DOLIR has posted a website to answer frequently asked questions about Missouri's minimum wage law, as amended by Proposition B.² On this website, DOLIR advises employers of tipped employees that they can credit *all* tips received toward the required minimum wage of \$6.50:

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

¹ See Missouri Secretary of State, Official Election Returns, <http://www.sos.mo.gov/enrweb/ballotissueresults.asp?eid=189> (last visited Mar. 8, 2007).

² Missouri Minimum Wage, http://dolir.typepad.com/missouri_minimum_wage/ (last visited Mar. 8, 2007).

workweek to determine whether an employee has been paid correctly under Missouri's Minimum Wage Law.³

But review of the text and historical interpretation of Missouri's minimum wage law reveals that this guidance is clearly incorrect. Instead, the tipped employee provision of Missouri's minimum wage law—which was not altered by the recent ballot initiative⁴—requires tipped employees to be paid a base cash wage of at least 50% of the applicable minimum wage, or \$3.25 per hour at present. This conclusion, which is compelled by the statutory language of the state minimum wage law, is the way that the state law has been interpreted for many years. It is also confirmed by DOLIR's own regulations, and is consistent with longstanding practice under the federal minimum wage and the minimum wages of most other states, which virtually all establish base cash wages for tipped employees.

Missouri's Treatment of Tipped Workers

The Missouri minimum wage law, like many other states' minimum wages, is structured as follows. First, it establishes a general minimum wage (currently \$6.50) for *all* employees covered by the law, including tipped employees:

[E]ffective January 1, 2007, every employer shall pay to each employee wages at the rate of \$ 6.50 per hour

MO. REV. STAT. § 290.502 (2007).

Second, however, it goes on to provide that employers may count a tipped employee's tips toward up to 50% of his or her minimum wage compensation:

No employer of any [tipped employee] is required to pay wages in excess of fifty percent of the minimum wage [specified by this chapter], however, total compensation for such employee shall total at least the minimum wage [specified by this chapter], the difference being made up by the employer.

MO. REV. STAT. § 290.512(1) (2007) (emphasis added).

This provision requires careful reading because it is written in the negative. Section 290.512(1) exempts employers of tipped workers from “pay[ing] wages in excess of fifty percent of the minimum wage.” However, it leaves in place their otherwise applicable obligation under section 290.502 to pay Missouri's \$6.50 minimum wage. As a result, section 290.512(1) effectively exempts employers only from paying the *second* 50% of Missouri's \$6.50 cash

³ Missouri Minimum Wage, http://dolir.typepad.com/missouri_minimum_wage/2006/12/more_answers_to.html (last visited Mar. 8, 2007). DOLIR does advise that employers subject to the federal minimum wage law, the Fair Labor Standards Act, must pay employees a base wage of at least \$2.13 per hour under federal law. *Id.*; 29 U.S.C. § 203(m)(1).

⁴ While Proposition B has not changed the way that Missouri law treats tipped workers, it has expanded the number of tipped workers to whom the state's minimum wage law applies. Before Proposition B, Missouri's minimum wage law did not apply to workers who are covered by the federal minimum wage law, the Fair Labor Standards Act (FLSA). *See* MO. REV. STAT. § 290.500(3)(d) (2006) (exempting any employee who receives a minimum wage pursuant to FLSA) (amended by 2006 Proposition B). Proposition B repealed this limitation to extend the minimum wage to workers who are covered by FLSA—including the vast majority of tipped workers in low-wage industries.

minimum wage, i.e., the portion *above* \$3.25 per hour. Because the exemption 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.

This interpretation is confirmed by a longstanding DOLIR regulation. That regulation, which has been in force since at least 1993—a period spanning four gubernatorial administrations—makes clear that tipped employees must be paid a base cash wage of 50% of the state minimum wage. The regulation provides:

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.⁵

As explained in the regulation, employers of tipped employees 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.”⁶ Employers are left to pay the remaining 50% as a base cash wage.

DOLIR has offered little explanation for its new website guidance that employers of tipped employees are now somehow excused from paying *any* base cash wage at all. Nor has the agency explained how the recent ballot initiative could possibly have changed Missouri’s longstanding base wage requirement for tipped workers when the initiative did not amend or alter in any way the minimum wage law’s tipped worker provision. In fact, the agency has now conceded to the media that its new website guidance conflicts with its own established regulation, which remains in force.⁷

As the Missouri Court of Appeals has explained, courts give no deference to agency 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 regulation.⁸

Thus, until such time as the agency attempts to repeal or amend its regulation, there is no question that the 50% base cash wage requirement remains in force, and employers that are not

⁵ MO. CODE REGS. ANN. Tit. 8, § 30-4.020 (2006) (emphasis added), *available at* <http://www.sos.mo.gov/adrules/csr/current/8csr/8c30-4.pdf> (last visited Mar. 8, 2007).

⁶ *Id.*

⁷ See David A. Lieb, *Minimum-Wage Backers Claim Food Servers Getting Short-Changed*, BELLEVILLE NEWS-DEMOCRAT, Feb. 26, 2007 (“[Department spokeswoman Tammy] Cavender said the state regulation needs to be changed to reflect the department’s interpretation of the law.”), *available at* <http://www.belleville.com/mlid/belleville/news/state/16789308.htm> (last visited Mar. 8, 2007).

⁸ Department of Social Services v. Senior Citizens Nursing Home Dist. Of Ray County, No. WD 66236, 2007 Mo. App. LEXIS 224, at *32-*33 (Mo. Ct. App. Feb. 13, 2007).

complying with it are in violation of Missouri's wage law, and incurring liability for backpay, liquidated damages, attorneys fees, and court costs.

However, even if DOLIR were to attempt to revise its regulation to drop the 50% base cash wage interpretation, it is clear that such a regulation would be invalid since it would conflict with the language of the minimum wage statute. Any attempt to construe the minimum wage statute as not requiring a 50% base cash wage for tipped workers would violate elementary principles of statutory construction. Such a reading would render section 290.512(1)'s language "in excess of fifty percent of the minimum wage" entirely superfluous. The Missouri Supreme Court has instructed on numerous occasions that, when construing statutory language:

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 conflicting⁹

Had the Missouri legislature intended that there be no base cash wage requirement for tipped workers, it could readily have indicated so directly with language such as the following:

No employer of any tipped employee is required to pay any minimum amount of cash wages, however, total compensation for such employee shall total at least the minimum wage [specified by this chapter], the difference being made up by the employer.

But the legislature did not do that. Instead, by including the "in excess of fifty percent of the minimum wage" language, the legislature made clear its intent to establish a base cash wage for tipped employees. Thus, even if DOLIR should in the future attempt to change its regulation along the lines of its new website guidance, that regulation would be inconsistent with the underlying statute and therefore invalid.

Other available sources confirm that the Missouri minimum wage law establishes a base minimum wage. For example, the United States Department of Labor (USDOL) publishes an annual compilation of state minimum wage laws, in which it has long interpreted the Missouri minimum wage as requiring payment of a 50% base cash wage to tipped employees. Specifically, from 2002 through 2006, USDOL's website on state tip credits reported that the "maximum tip credit against the minimum wage" in Missouri was "[u]p to 50%."¹⁰ This year,

⁹ Missouri Pacific Railroad Co. v. Kuehle, 482 S.W.2d 505, 508 (Mo. 1972). See also Hyde Park Hous. Partnership v. Director of Revenue, 850 S.W.2d 82, 84-5 (Mo. 1993) ("It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect.").

¹⁰ State Minimum Wages for Tipped Employees, <http://web.archive.org/web/20021017005718/http://www.dol.gov/esa/programs/whd/state/tipped.htm> (2002) (last visited Mar. 8, 2007), <http://web.archive.org/web/20030801082722/http://www.dol.gov/esa/programs/whd/state/tipped.htm> (2003) (last visited Mar. 8, 2007), <http://web.archive.org/web/20040911085511/http://www.dol.gov/esa/programs/whd/state/tipped.htm> (2004) (last visited Mar. 8, 2007), <http://web.archive.org/web/20050526073546/http://www.dol.gov/esa/programs/whd/state/tipped.htm> (2005) (last visited Mar. 8, 2007), <http://web.archive.org/web/20060524040120/http://www.dol.gov/esa/programs/whd/state/tipped.htm> (2006) (last

USDOL's website was even updated to report that, after the passage of Proposition B, the Missouri base cash minimum wage for tipped employees had increased to \$3.25.¹¹ Later, however, after controversy erupted when DOLIR published its questionable website guidance, USDOL's website was altered without explanation to be more ambiguous, replacing the reference to "50%" with a footnote advising that "[t]otal compensation for tipped employees must total at least \$6.50 per hour."¹²

Finally, interpreting Missouri's minimum wage as establishing a base cash wage for tipped employees is consistent with the approach used under the federal minimum wage law and in the overwhelming majority of other states. Until 1996, the federal minimum wage, the Fair Labor Standards Act, was effectively identical to Missouri law, in that it required that tipped workers receive a base cash wage of at least 50% of the federal minimum wage:

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.¹³

However, in 1996, Congress froze the amount of the base cash wage at its then-current level of \$2.13.¹⁴ But even after that change, the federal law still reflects this standard approach that tipped workers must receive a specified base cash wage, while the balance of the minimum wage can be received in the form of tips or additional wages.

Virtually all other states follow this same approach of requiring a base cash wage for tipped workers.¹⁵ Many of these states, like Missouri, establish a base cash wage that is a percentage of the state minimum wage, with the balance made up in tips. These states include: Arkansas (establishing a base cash wage of 42% of the state minimum wage), Connecticut (71.7%), Idaho (65%), Iowa (60%), Kansas (60%), Maryland (50%), New Hampshire (55%), North Dakota (67%), Ohio (50%), Oklahoma (50%), and West Virginia (80%).¹⁶

By contrast, we know of only two states that have state minimum wage laws that do not establish some sort of base cash minimum wage for tipped workers. One state, Virginia,

visited Mar. 8, 2007). As explained above, though, few employers of tipped employees were covered by this state minimum wage prior to Proposition B. *See supra* note 4.

¹¹ State Minimum Wages for Tipped Employees, <http://www.dol.gov/esa/programs/whd/state/tipped.htm> (Jan. 2007) (archive on file).

¹² State Minimum Wages for Tipped Employees, <http://www.dol.gov/esa/programs/whd/state/tipped.htm> (last visited Mar. 8, 2007).

¹³ 29 U.S.C. § 203(m) (1995) (amended by 109 Stat. 10, Aug. 20, 1996).

¹⁴ Small Business Job Protection Act of 1996, Pub L. No. 104-188, 110 Stat. 1755 (1996) (codified at 29 U.S.C. § 203(m)).

¹⁵ Notable exceptions include the six progressive states that require tipped workers to receive the full minimum wage in cash and four conservative states that have no state minimum wage at all.

¹⁶ *See* State Minimum Wages for Tipped Employees, <http://www.dol.gov/esa/programs/whd/state/tipped.htm> (last visited Mar. 8, 2007).

places no limit on the amount of tips that that may be credited toward a tipped employee's compensation:

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,¹⁷

Another state, Georgia, simply exempts tipped workers from its coverage altogether:

(b) This chapter shall not apply with respect to:

* * *

(5) Any employee whose compensation consists wholly or partially of gratuities;¹⁸

However, as the above language illustrates, these wage laws are explicit in providing that no base cash wage applies to tipped employees in their state. Their language contrasts markedly with the Missouri provision, which expressly references 50% of the minimum wage, thus highlighting just how implausible DOLIR's new website guidance is.

For the above reasons, we conclude that, correctly construed, Missouri's minimum wage law requires that tipped employees should be paid a base cash wage of at least \$3.25 per hour, with the balance of the state's minimum wage received in the form of tips (or additional wages if necessary). The alternative interpretation indicated by DOLIR on its website is not accurate and risks misleading employers about their actual statutory obligations under the law, potentially exposing them to substantial liability for back-pay, liquidated damages, court costs, and attorneys fees should they erroneously rely on the DOLIR guidance.¹⁹

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¹⁷ VA. CODE ANN. § 40.1-28.9(D).

¹⁸ GA. CODE ANN. § 34-4-3.

¹⁹ See MO. REV. STAT. § 290.527 (2007).