

ANALYSIS OF MONTANA HOUSE BILL 492

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EXECUTIVE SUMMARY

In November, Montana voters approved Ballot Initiative I-151, which raised and strengthened the state's minimum wage. A bill is now pending in the Montana legislature, Montana House Bill 492 (HB 492), which would change the state's minimum wage protections for tipped workers across the state.

Montana's restaurant industry, which is the chief proponent of HB 492, has characterized the bill as making relatively small changes in minimum wage protections for tipped restaurant servers. However, review of HB 492's actual statutory language and contents reveals that this characterization is not accurate. Rather, HB 492 would significantly weaken Montana's minimum wage protections in the following ways:

- It would permanently freeze Montana's minimum wage for restaurant servers at \$6.15 an hour. In doing so, it would repeal for these workers future minimum wage increases that were approved by Montana voters in November. Most importantly, it would deny them annual cost-of-living increases aimed at ensuring that Montana's minimum wage does not erode in value each year.
- Not only would restaurant servers be denied future minimum wage increases, but HB 492 would actually cut their current minimum pay by more than \$4.00 an hour. HB 492 would change Montana law to allow restaurant servers to be paid 100% in tips and receive no base cash wage whatsoever. It is true that the federal minimum wage would still require tipped restaurant servers to be paid a base cash wage of \$2.13 per hour. But that is a \$4.02 cut in pay from the \$6.15 base cash wage that Montana's current minimum wage requires for tipped workers.
- Finally, HB 492 would cut wages for all tipped workers in the state – not just restaurant servers. HB 492 would do this by creating an interim period during which tipped workers in any industry would be subject to the same cut in the required base cash wage.

If adopted, these changes would lead to economic hardship for Montana's 8,600 restaurant servers, the overwhelming majority of whom are already struggling to make ends meet on very modest incomes. Even after January 1, 2007, when Montana's minimum wage increased to \$6.15 an hour, the median wage for restaurant servers in the state is still projected to be just \$7.32 an hour even after tips are included. This is not nearly enough to enable a full-time restaurant worker to meet his or her basic needs. By cutting the required base cash wage for restaurant servers and denying them future minimum wage increases, HB 492 would make it even harder for these workers to support themselves and their families.

In the report that follows, we begin by summarizing how Montana's minimum wage law currently operates after the voters strengthened it in November 2006 by enacting I-151. Next we briefly outline how HB 492's proponents have described the bill's impact on the

minimum wage law. Then we review the actual text and provisions of HB 492. Based on the bill's language, we explain the changes that it would actually make in Montana's minimum wage protections and discuss the policy consequences of those changes.

I. BACKGROUND: MONTANA'S MINIMUM WAGE LAW AS AMENDED IN 2006 BY BALLOT INITIATIVE I-151

In order to understand how HB 492 would change and weaken Montana's minimum wage law, it is important to review the current law. As noted, Montana voters amended and strengthened the state minimum wage law in November when they approved I-151. The revised law does the following:

First, it sets Montana's minimum wage at \$6.15 per hour as of January 1, 2007.

Second, it provides that, if the federal minimum wage (known as the Fair Labor Standards Act) is ever raised above Montana's \$6.15 minimum wage, then the Montana minimum wage will automatically increase to match the new federal level. The language that does this is Subsection 1 of M.C.A. § 39-3-409 (2007) – the main provision of the minimum wage law. It reads as follows:

- (1) The minimum wage, except as provided in subsection (3), must be the greater of either:
 - (a) the minimum hourly wage rate as provided under the federal Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)), excluding the value of tips received by the employee and the special provisions for a training wage.;
or
 - (b) \$6.15 an hour, excluding the value of tips received by the employee and the special provisions for a training wage.

Subsection 1 of M.C.A. § 39-3-409 (2007)

While Washington ignored the minimum wage for ten years, the new Congress is now attempting finally to raise it. Under its proposal, the federal minimum wage would increase to \$5.85 in 2007, then to \$6.55 in July 2008, and finally to \$7.25 in July 2009. If the federal proposal becomes law, Montana's minimum wage would therefore increase to \$6.55 in July 2008, and to \$7.25 in July 2009 to match the higher federal minimum wage.

Third, it specifies that Montana's minimum wage is to be calculated "excluding the value of tips received by the employee." This requirement, which has been the law in Montana since at least 1991, means that tipped workers such as waiters and waitresses in restaurants must be paid the same base cash minimum wage as all other workers.

Fourth, it specifies that in order to prevent the value of the minimum wage from eroding again in the future, the minimum wage rate will be increased each year to keep up with increases in the cost of living. The provision that establishes this cost-of-living “indexing” is Subsection 2 of M.C.A. § 39-3-409 (2007). It reads as follows:

- (2) (a) The minimum wage is subject to a cost-of-living adjustment, as provided in subsection (2)(b).
- (b) No later than September 30 of each year, an adjustment of the wage amount specified in subsection (1) must be made based upon the increase, if any, from August of the preceding year to August of the year in which the calculation is made in the consumer price index, U.S. city average, all urban consumers, for all items, as published by the bureau of labor statistics of the United States department of labor.
- (c) The wage amount established under this subsection (2):
 - (i) must be rounded to the nearest 5 cents; and
 - (ii) becomes effective as the new minimum wage, replacing the dollar figure specified in subsection (1), on January 1 of the following year.

Subsection 2 of M.C.A. § 39-3-409 (2007)

Because of this important new protection, Montana’s minimum wage will increase slightly each January to keep up with the rising cost of living. Based on current inflation projections, those increases can be expected to be about 10 or 15 cents per year in the coming years.¹ As discussed above, if the federal minimum wage hike noted above is also approved, then Montana’s minimum wage will in addition increase to match it. The

combined effect of these provisions will be that Montana’s minimum wage will increase steadily over the next several years in increments ranging from 10 cents to 55 cents:

<u>Date</u>	<u>Projected Minimum Wage Rate</u>
Jan. 2007	\$6.15
Jan. 2008	\$6.25
July 2008	\$6.55
Jan. 2009	\$6.70
July 2009	\$7.25
Jan. 2010	\$7.40
Jan. 2011	\$7.55

¹ The Congressional Budget Office currently projects inflation as follows: 1.9% in 2007, 2.3% in 2008, and 2.2% in following years. See <http://www.cbo.gov/budget/econproj.pdf>.

These increases will slowly restore some of the minimum wage's eroded value, although they still will not bring it back to its historic level. The minimum wage would have to be increased to \$9.36 in 2007 dollars to give low-wage workers the same purchasing power that the federal minimum wage had in the late 1960's.²

Finally, Montana's minimum wage law establishes a separate lower minimum wage for very small businesses. That provision, Subsection 3, reads as follows:

- (3) The minimum wage rate for a business whose annual gross sales are \$110,000 or less is \$4 an hour.

Subsection 3 of M.C.A. § 39-3-409 (2007)

Significantly, the small business minimum wage is not covered by the cost-of-living increases. This is the case because the cost-of-living indexing provision quoted above – Subsection 2 – specifies that it requires “an adjustment of the wage amount specified in subsection (1).” Subsection 1 is the provision that establishes the general minimum wage. This means that only the general minimum wage is subject to annual cost-of-living indexing.

As a result, the small business minimum wage will be pegged at \$4.00 per hour unless the legislature changes that rate. In the end, however, that limitation is not very significant because very few businesses in the state are small enough to be covered by the small business wage rate.

II. THE RESTAURANT INDUSTRY'S DESCRIPTION OF HB 492

The Montana Restaurant Association is the primary proponent of HB 492. It is clear from the debate over HB 492 that one of the restaurant industry's purposes in proposing HB 492 is to reverse Montana's current policy of excluding tips from being counted towards the minimum wage that must be paid to restaurant servers. Both proponents and opponents acknowledge that HB 492 would permit restaurant employers to claim credit for customers' tips and thereby pay restaurant servers a lower cash wage. This lower cash wage is sometimes referred to as a “sub-minimum wage” or “base cash wage,” because it is lower than the minimum that all other Montana employers must pay. The amount of wages (if any) that an employer is allowed to replace with tips is commonly referred to as a “tip credit.”

In February 2007, Brad Griffin, the Executive Director of and lobbyist for the Montana Restaurant Association, authored an op-ed advocating for the passage of HB 492. In the op-ed, he describes the bill's effects as follows:

² Source: Adjustment of 1968 federal minimum wage of \$1.60 an hour to 2007 dollars using U.S. Department of Labor, Bureau of Labor Statistics, Inflation Calculator (CPI-U) (<http://www.bls.gov/cpi/>).

1. Mr. Griffin suggests that \$1.10 is the maximum amount of wages that restaurant owners will be able to replace with tips under HB 492. (“HB 492 would provide restaurant owners with a tip credit of \$1.10 per hour-the most modest tip credit in the country.”)
2. He suggests that restaurant servers will continue to benefit from any future increases in Montana’s minimum wage. (“Any future increase in the minimum wage would be paid from tips.”)
3. Throughout, he suggests that only tipped restaurant servers’ wages will be lowered by HB 492.

However, review of HB 492’s actual statutory language reveals that these claims are not accurate. Instead, HB 492 would rewrite Montana’s minimum wage law to weaken protections for both tipped restaurant servers and other low-wage workers far more substantially than Mr. Griffin suggests.

III. THE ACTUAL IMPACT OF HB 492

Specifically, HB 492 would significantly weaken Montana’s minimum wage in the following ways. First, it would freeze the minimum wage for restaurant servers at \$6.15 an hour, thereby repealing for these struggling workers two of the new protections approved by voters in November – annual cost-of-living increases, and increases to match the federal minimum wage when it goes up. Second, not only would they be denied future increases, but the required base cash wage for restaurant servers would be slashed from \$6.15 to \$2.13 – a pay cut of more than \$4.00 an hour. Third, the wage roll-backs would not even be limited to restaurant servers. At least for an interim period, tipped workers in any industry would be subject to the same cut in the required base cash wage. The sections that follow walk through the text of HB 492 to explain how it would result in these changes.

A. Freezing the Minimum Wage for Restaurant Servers

The first change that HB 492 would make in Montana’s minimum wage law is that it would freeze minimum wages for restaurant workers at \$6.15 an hour. It would do this by repealing for restaurant servers the new protections that Montana voters approved in November to ensure that Montana’s minimum wage does not erode again in the future: annual cost-of-living increases, and increases to match the federal minimum wage when it goes up. Ironically, this repeal is being proposed just months after Montanans voted by a 73% margin to adopt these new protections.

HB 492 would do this by inserting into Subsection 3 of Montana’s minimum wage law a new minimum wage that applies only to tipped restaurant servers. Recall that

Subsection 3 is the provision that currently establishes the special \$4.00 minimum wage for very small businesses. HB 492 would amend it to read as follows:

(3) The minimum wage rate for:

(a) a business whose annual gross sales are \$110,000 or less is \$4 an hour;

(b) FOOD AND BEVERAGE SERVERS WHO WAIT ON TABLES IN FULL-SERVICE RESTAURANTS is \$6.15 an hour.

In establishing this special minimum wage provision for restaurant servers, HB 492 does not specify that the newly adopted cost-of-living indexing provision of the Montana minimum wage law – Subsection 2 – applies to the new restaurant server minimum wage. The text of Subsection 2 currently specifies that only “the wage amount specified in subsection (1)” – that is, the general state minimum wage provision – will be increased each year for inflation. This means that the new restaurant server minimum wage would not be subject to the annual cost-of-living indexing, since it is not “the wage amount specified in subsection (1).”

HB 492 would also repeal for restaurant workers another source of base cash wage increases that the voters approved in November: the provision saying that Montana’s minimum wage will increase to match any raises in the federal minimum wage. That provision, which is contained in Subsection 1, M.C.A. § 39-3-409(1), applies only to the basic state minimum wage established under Subsection 1. The current minimum wage law says explicitly that the federal match increase does not apply to minimum wages established Subsection 3. See M.C.A. § 39-3-409(1) (“except as provided in subsection 3”). By creating a new minimum wage for restaurant workers and placing it in Subsection 3, HB 492 will mean that, unlike the general state minimum wage, the special restaurant worker minimum wage would not increase if and when the federal minimum wage is raised. The result would be that, unlike all other low-wage workers in the state, the minimum wage for restaurant servers would be frozen permanently at \$6.15 an hour.

While the restaurant industry claims that if HB 492 were to pass, “any future increase in the minimum wage would be paid from tips,” the truth is that the restaurant servers would not be covered at all by any future increase in the state minimum wage.

It is true that even though the state minimum wage would be frozen for restaurant servers, the federal minimum wage would still apply to them. That means that if, as is expected to happen, the federal minimum wage increases to \$6.55 in July 2008 and then to \$7.25 in July 2009, restaurant employers would still have to comply with those higher minimum wages. However, that would result in little if any raise for Montana’s restaurant servers. As discussed in more detail in Section III.B. below, this is because the federal minimum wage law, which is far weaker than Montana’s law, would not actually require restaurant employers to pay servers a higher base cash wage. Instead, employers could simply use customers’ tips to make up for the federal increases.

Moreover, as noted, under HB 492, restaurant servers would still be permanently denied the most important new protection that Montana voters approved in November: annual cost-of-living indexing of the state minimum wage. Cost-of-living indexing does not increase the minimum wage in real terms; instead, it protects working families from becoming worse off over time by preventing the minimum wage from eroding in the future. For example, because it does not have cost-of-living indexing, the real value of the federal minimum wage has fallen by 45% since 1968. By joining the nine other states – including western states such as Washington, Oregon, Nevada, Colorado, and Arizona – that have adopted cost-of-living indexing, Montana is helping to build momentum for the adoption at the national level of this urgently needed yet simple reform.

But just months after the voters approved indexing Montana’s minimum wage, HB 492 seeks to eliminate it for the nearly 10,000 hard-working Montanans who serve food in the restaurant industry – thereby freezing the minimum wage in one of the state’s largest low-wage sectors. If this roll-back becomes law, every year restaurant workers’ real earnings will decrease as inflation erodes the purchasing power of their frozen minimum wage.

B. More than \$4.00 Cut in Base Wage for Restaurant Servers

Freezing the minimum wage for restaurant servers would be bad enough. But HB 492 goes further: it would actually eliminate any base cash wage requirement for restaurant servers under Montana’s minimum wage. This would mean that restaurant employers who currently must pay a base cash wage of at least \$6.15 an hour would be authorized to cut cash wages back to \$2.13 an hour – a more than \$4.00 an hour pay cut for the state’s 8,600 restaurant servers.³

Like the minimum wage freeze discussed above, this more than \$4.00 reduction in the base wage for restaurant servers would be a result of HB 492’s establishment in Subsection 3 of a special minimum wage that applies only to tipped restaurant servers.

In establishing this new minimum wage for restaurant servers, HB 492 omits the crucial language “excluding the value of tips received by the employee” which appears in Subsection 1 – Montana’s main minimum wage provision. As a result, restaurant employers would no longer have to exclude tips from the wages paid to their servers. This would effectively mean that under Montana’s minimum wage, restaurant servers could be paid 100% in tips and receive no base cash wage whatsoever.

It is only federal – not Montana – minimum wage law that would prevent Montana’s restaurants from eliminating cash wages altogether. But under our weak federal minimum wage, restaurant servers need only be paid a base cash wage of just \$2.13 an

³ U.S. Bureau of Labor Statistics, Occupational Employment and Wages, Area: Montana, Occupation: Waiters & Waitresses, May 2005.

hour. This federal base cash wage for restaurant servers has been frozen at this very low level since 1991 – more than 15 years. And, unfortunately, the minimum wage bill now pending in Congress will do nothing to change it.

If HB 492 were to pass, the practical result would be that the base cash wage required for Montana’s restaurant servers would plummet from the current \$6.15 to a meager \$2.13 – a cut in pay of \$4.02 per hour. This radical wage roll-back is almost four times larger than the \$1.10 reduction that the restaurant industry suggests would result from HB 492.

The fact that the restaurant industry has misled the public about the degree to which HB 492 would cut restaurant workers pay by allowing a tip credit is, by itself, cause for concern. However, whether HB 492 creates a tip credit of \$1.10 per hour or \$4.02 per hour, it should be rejected.

The creation of any tip credit would reverse Montana’s longstanding policy of excluding tips from the minimum wage. Moreover, last November Montanans overwhelmingly voted to maintain this policy when 73% approved a minimum wage increase that expressly bars employers from paying a lower minimum wage to tipped workers.

The restaurant industry argues that Montana’s policy of not allowing a sub-minimum wage for tipped workers means that most restaurant workers will earn somewhat more than the minimum wage. While that is true, that is actually all the more reason for keeping Montana’s current policy. This is because the minimum wage is a very low floor. Even working full-time at the new minimum wage of \$6.15 an hour, a minimum wage worker in Montana would earn just \$12,300 a year.

The restaurant industry suggests that most restaurant workers are earning high wages as the result of tips and that therefore the requirement that they be paid the full minimum wage as a base wage is excessive and unnecessary. However, review of federal wage data for Montana’s restaurant workers reveals that that simply is not the case. Most restaurant workers in Montana are earning just a dollar or two more than the \$6.15 minimum wage and are struggling to make ends meet. According to the U.S. Department of Labor, the median hourly wage for waiters and waitresses in Montana was just \$6.32 an hour including tips in 2005.⁴ That wage figure presumably increased about \$1.00 an hour in 2007 when Montana’s minimum wage went from \$5.15 to \$6.15. But even assuming that the median wage in Montana is now \$7.32 for waiters and waitresses (again, including tips), that would translate to just \$15,226 per year for those who are lucky enough to work full-time for 52 weeks. Moreover, the fact that this figure is a median means that 50% of Montana’s waiters and waitresses are actually earning less than that amount.

By any measure, \$15,226 is not a lot of money and is far less than a working individual needs to support even a single adult and a child in Montana. For example, a survey by

⁴ U.S. Bureau of Labor Statistics, Occupational Employment and Wages, Area: Montana, Occupation: Waiters & Waitresses, May 2005.

economists of living costs in Billings, Montana found that the most basic family budget for a Billings household with one adult and one child is \$27,917 per year.⁵

Thus, the fact that excluding tips from wages means that many of Montana's restaurant workers will earn a little more than \$6.15 an hour should be applauded – it simply means that more Montanans may earn enough to support themselves and their families with dignity.

The restaurant industry claims that Montana's current policy of excluding tips is too confusing because it differs from the rules under the federal minimum wage law. But Montana has excluded tips from its minimum wage for over 15 years and there is no evidence that this policy has proven difficult to administer. To the contrary, most experts agree that minimum wage laws that allow tip credits are more difficult to administer and enforce. Consideration of how a tip credit operates makes clear that this is the case. Under a tip credit system, when a tipped worker's tips plus wages fall short of the minimum wage, the law requires his or her employer to make up the difference. However, because tips are unpredictable, complying with this requirement demands complex tracking of tips and subsequent adjustment of payrolls. In light of this complexity, it is unsurprising that many restaurant employers either accidentally or deliberately fail to compensate restaurant servers for such shortfalls, with the result that many restaurant workers end up earning less than the minimum wage. According to the U.S. Department of Labor, this is a typical enforcement problem.

By effectively cutting the required base cash wage for restaurant workers from \$6.15 to \$2.13, HB 492 would cause serious economic hardship for thousands of working Montanans. Historically, Montana has been a national leader in ensuring fair wages for tipped restaurant servers – one of our nation's largest low-wage industries. Montana is one of seven states that exclude tips entirely from their minimum wage (the others are Washington, Oregon, California, Nevada, Minnesota, and Alaska). And it is one of 31 states with protections for tipped workers that are stronger than the federal standard. But if HB 492 is enacted, Montana would switch overnight from being a leader to being one of the worst states in the nation, joining Georgia and Virginia as one of only three states that provide no minimum cash wage protection for tipped servers under their state minimum wage laws.

C. Impact on All Tipped Employees

Finally, HB 492 would cut wages for all tipped workers in the state – not just restaurant servers – by creating an interim period during which tipped workers in any industry would be subject to the same cut in the required base cash wage. HB 492 would do this by deleting the key phrase, “excluding the value of tips,” from Subsection 1(b) of the minimum wage law. As a result, Subsection 1 would read as follows:

⁵ Source: Economic Policy Institute, Family Budget Calculator, updated for 2007 (http://www.epi.org/content.cfm/datazone_fambud_budget).

- (1) The minimum wage, except as provided in subsection (3), must be the greater of either:
 - (a) the minimum hourly wage rate as provided under the federal Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)), excluding the value of tips received by the employee and the special provisions for a training wage.;
or
 - (b) \$6.15 an hour, ~~excluding the value of tips received by the employee and the special provisions for a training wage.~~

This means that should HB 492 pass, any employer – not just restaurants – could replace wages with tips so long as Subsection 1(b) is in effect – that is, until the federal minimum wage rises above \$6.15 per hour. Under current proposals to increase the federal minimum wage, the federal rate would not rise above \$6.15 until July 2008 and possibly later. During that period, tipped workers in other industries – for example, tipped car wash workers or hotel room cleaners – would no longer have to be paid any base cash wage under Montana’s minimum wage. Like restaurant servers, their base pay could be dropped from the currently required \$6.15 to the \$2.13 minimum allowed under the federal minimum wage.

CONCLUSION

In the November 2006 election, the voters overwhelmingly approved strengthening Montana’s minimum wage in order to help working families make ends meet. HB 492 would repeal several of the voter-approved protections for one of the state’s largest groups of low-wage workers: restaurant servers. By freezing the minimum wage for these hardworking Montanans and effectively cutting their required base wage from \$6.15 to \$2.13, HB 492 would defy the will of the state’s voters and cause significant economic hardship for thousands of working families across the state.

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The Brennan Center works at the federal, state and local levels to promote fair wage policies to protect working families.

Appendix 1 – Montana’s Current Minimum Wage Law, M.C.A. § 39-3-409

- (1) The minimum wage, except as provided in subsection (3), must be the greater of either:
 - (a) the minimum hourly wage rate as provided under the federal Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)), excluding the value of tips received by the employee and the special provisions for a training wage.;
or
 - (b) \$6.15 an hour, excluding the value of tips received by the employee and the special provisions for a training wage.
- (2)
 - (a) The minimum wage is subject to a cost-of-living adjustment, as provided in subsection (2)(b).
 - (b) No later than September 30 of each year, an adjustment of the wage amount specified in subsection (1) must be made based upon the increase, if any, from August of the preceding year to August of the year in which the calculation is made in the consumer price index, U.S. city average, all urban consumers, for all items, as published by the bureau of labor statistics of the United States department of labor.
 - (c) The wage amount established under this subsection (2):
 - (i) must be rounded to the nearest 5 cents; and
 - (ii) becomes effective as the new minimum wage, replacing the dollar figure specified in subsection (1), on January 1 of the following year.
- (3) The minimum wage rate for a business whose annual gross sales are \$110,000 or less is \$4 an hour.

Appendix 2 – Changes in Montana’s Minimum Wage Law Proposed in HB 492

- (1) The minimum wage, except as provided in subsection (3), must be the greater of either:
 - (a) the minimum hourly wage rate as provided under the federal Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)), excluding the value of tips received by the employee and the special provisions for a training wage.;
or
 - (b) \$6.15 an hour, excluding ~~the value of tips received by the employee and~~ the special provisions for a training wage.
- (2) (a) The minimum wage is subject to a cost-of-living adjustment, as provided in subsection (2)(b).
 - (b) No later than September 30 of each year, an adjustment of the wage amount specified in subsection (1) must be made based upon the increase, if any, from August of the preceding year to August of the year in which the calculation is made in the consumer price index, U.S. city average, all urban consumers, for all items, as published by the bureau of labor statistics of the United States department of labor.
 - (c) The wage amount established under this subsection (2):
 - (i) must be rounded to the nearest 5 cents; and
 - (ii) becomes effective as the new minimum wage, replacing the dollar figure specified in subsection (1), on January 1 of the following year.
- (3) The minimum wage rate for:
 - (a) a business whose annual gross sales are \$110,000 or less is \$4 an hour;
 - (b) ~~employees who customarily receive tips or gratuities in their employment~~ **FOOD AND BEVERAGE SERVERS WHO WAIT ON TABLES IN FULL-SERVICE RESTAURANTS** is \$6.15 an hour.