



# PAYSTATE UPDATE

The Latest State And Local Payroll Compliance News  
From The American Payroll Association

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## States and Cities Adjust Minimum Wage Rates for Inflation

There are 10 states that adjust their minimum wage rates annually based on the rate of inflation: *Arizona, Colorado, Florida, Missouri, Montana, Nevada, Ohio, Oregon, Vermont, and Washington*. There are also some cities that provide for cost of living increases in the local minimum wage, including *San Francisco, California, and Santa Fe, New Mexico*. The minimum wage rates in these states and cities go into effect on January 1, except in Nevada, where the effective date is July 1.

San Francisco and the states below have announced their minimum wage rates and tip credit amount increases (if applicable), effective January 1, 2011 (this updates *The Payroll Source*®, pp. 2-70 and 2-71). Oregon's minimum wage rate was previously reported (see **PAYSTATE UPDATE, Issue No. 19, Vol. 12**). Colorado has yet to finalize its minimum wage rate for 2011. A public hearing on the minimum wage proposal (see below) is scheduled for November 5. According to a representative at the Santa Fe City Manager's Office, it is anticipated that the city minimum wage rate will remain \$9.85 an hour in 2011. A formal announcement is not expected until January 2011. There is no tip credit.

### Split over interpretation of law in Washington

In September, the Washington State Office of the Attorney General (WAG) issued an opinion letter in response to

questions from the Department of Labor and Industries (DLI) regarding the annual adjustment of the minimum wage (WAG, Opinion No. 7, 9-15-10). According to the WAG, state law requires the DLI to hold the minimum wage steady in the years following a decline in the cost of living, until it returns to its previous peak. After that, the DLI is required to increase the minimum wage. However, the opinion states that the law does not permit the minimum wage to decrease when the cost of living declines. This year there was an overall increase to the Consumer Price Index (CPI), though it is still lower than it was when the state minimum wage was last increased in 2009.

Under the WAG's interpretation of the law, the minimum wage would have remained \$8.55 an hour in 2011. The Washington State Labor Council (WSLC) – the group that sponsored the 1998 voter initiative that based the minimum wage on the CPI – interprets the law to mean that when the CPI increases, the state minimum wage must also increase (WSLC Reports Today, 10-1-10). After reviewing both legal opinions, and the actions of other states with similar laws, the DLI decided to raise the minimum wage to \$8.67 an hour in 2011. The DLI concluded that courts are more likely to follow this interpretation of the law (DLI, News Release, 10-15-10).

State/City	Current Minimum Wage	Minimum Wage Eff. 1-1-11	Current Tip Credit	Tip Credit Eff. 1-1-11
SF, CA	\$9.79	\$9.92	No tip credit	No tip credit
AZ	\$7.25	\$7.35	\$3.00	\$3.00
CO	\$7.24	\$7.36 (proposal)	\$3.02	\$3.02 (proposal)
FL	\$7.25	\$7.25	\$3.02	\$3.02
MO	\$7.25	\$7.25	\$3.625	\$3.625
MT	\$7.25; \$4.00 if annual gross sales are \$110,000 or less	\$7.35; \$4.00 if annual gross sales are \$110,000 or less	No tip credit	No tip credit
OH	\$7.30; \$7.25 if annual gross receipts of \$267,000 or less	\$7.40; \$7.25 if annual gross receipts of \$271,000 or less	\$3.65	\$3.70
OR	\$8.40	\$8.50	No tip credit	No tip credit
VT	\$8.06	\$8.15	\$4.15	\$4.20
WA	\$8.55	\$8.67	No tip credit	No tip credit

## State Conformity to Federal Tax Treatment of Health Care Benefits for Children Under Age 27

The federal Patient Protection and Affordable Care Act (Pub. L. No. 111-148) extends health coverage for adult children under their parent's health plan up to the age of 26 (see **PAYSTATE UPDATE, Issue No. 14, Vol. 12**). Effective March 30, 2010, there is an exclusion from gross income for reimbursements for medical care under an employer-provided accident or health plan to any employee's child who has not attained age 27 as of the end of the taxable year. Many states conform to this federal tax treatment.

### Conforming states

States that use the current version of the Internal Revenue

Code (IRC) automatically adopt changes to the IRC, so the exclusion applies in those states. These states are: *Alabama, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Kansas, Louisiana, Maryland, Michigan, Missouri, Montana, Nebraska, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, and Vermont*.

### California fails to pass conforming legislation

Many states, like *California*, do not conform to the IRC as of the enactment date of the federal health care legislation (March 30, 2010). Therefore, the income exclusion does not apply for those states' tax purposes. California's conformity

## State and Local Payroll Solutions

**Q.** My company recently opened a branch in *Connecticut*. I researched state law and found that employees must be paid weekly. However, the company would like to pay the Connecticut employees on a monthly schedule, to mirror our *New York* employees. Is this permitted?

**A.** Yes. You are correct that Connecticut law requires that employees be paid weekly, within eight days after the end of the pay period (see Conn. Gen. Stat. §31-71b). However, employers are permitted to seek a waiver of the weekly payment requirement. A less frequent pay schedule (such as biweekly) is permitted with the approval of the Labor Commissioner, but employees must be paid at least monthly, on a regularly established schedule (see Conn. Gen. Stat. §31-71i).

According to the Department of Labor (DOL), Division of Wage and Workplace Standards (DWWS), an employer should send a letter to the DWWS Director describing the reason for the change in frequency and the new desired frequency. If your company receives approval, a 30-day notice should be given to all affected employees prior to the change in pay frequency (DOL, DWWS, *FAQs For Employers*, rev. 9-27-10). An online *Employer Request for Waiver of the Weekly Pay Requirement* form is available on the DOL website at [www.ctdol.state.ct.us/wgwkstnd/forms/paywaiver.htm](http://www.ctdol.state.ct.us/wgwkstnd/forms/paywaiver.htm). Note that this form can only be used by employers that wish to switch to a biweekly payroll.

date is January 1, 2009. “For taxable years beginning on or after January 1, 2010, California conforms by reference to IRC §105, relating to exclusions from income for amounts received under accident and health plans, as of the ‘specified date’ of January 1, 2009, with modifications. Because this provision was enacted after the ‘specified date,’ California does not conform to the federal change...” explains the California Franchise Tax Board (see pages 128 and 129 at [www.ftb.ca.gov/law/legis/2010FedHealthCareActs.pdf](http://www.ftb.ca.gov/law/legis/2010FedHealthCareActs.pdf)). A California bill (A.B. 1178) was introduced to conform California law to many of the tax provisions of the federal health care legislation. However, the bill failed to pass during the 2010 legislative session, which ended on September 1, 2010.

### Minnesota withholding not required

*Minnesota* does not follow the current version of the IRC, and like California, it did not enact conforming legislation. However, until the Minnesota legislature has had the opportunity to fully address this issue (it reconvenes on January 4, 2011), the Minnesota Department of Revenue (DOR) will not require employers to withhold taxes from those federally exempt employer-provided benefits. Employees

must still include the benefits as income on their 2010 Minnesota income tax returns. If employees think they will be underwithheld, they may complete Form W-4MN, *Minnesota Employee Withholding Allowance/Exemption Certificate*, to elect additional withholding [DOR, What’s New for Employers for Tax Year 2010?].

### States must follow eligibility requirements

Be advised that many states have their own eligibility requirements for adult children to be covered under their parents’ health insurance plans. Federal law takes precedence over these state laws unless a state has a more *favorable* eligibility entitlement. For example, *Ohio* law permits a child to be covered until age 28. The Ohio Department of Taxation instructs employers that provide health coverage plans – the costs of which are partially excluded under the IRC and partially deductible under the Ohio Revised Code – to report the difference on the Forms W-2 of the affected employees. The employer will show in Box 14, “Other,” the amount the employee paid with taxable wages for health coverage. This will be one of the adjustments made on Line 2 of the Ohio personal income tax return. ■

## TV Chefs, Restaurants Sued for Wage and Hour Violations in New York

On October 12, 2010, 27 current and former employees of the restaurant Del Posto, located in *New York City*, sued the restaurant and its owners, including famous chefs Mario Batali and Lidia Bastianich, for several federal and state wage and hour law violations [*Amastal v. Pasta Resources Inc.*, Case No. 1:10-cv-07748-UA, 10-12-10]. The lawsuit, filed in federal court in Manhattan, alleges that the restaurant failed to pay employees the minimum wage and overtime, improperly pooled tips, and failed to provide spread of hours pay, among other things.

### Tip pooling

The employees allege that Del Posto took advantage of the tip credit allowance (\$2.60 an hour for food service workers in New York) and paid employees the minimum cash wage (\$4.65 an hour for food service workers in New York). The tips were pooled and employees received a percentage of the total amount based on a point system. Captains received six points, bartenders received five points, front waiters and expeditors received four points, food runners received three

points, back waiters received two-and-a-half points, and stockers received two points. According to the employees, the tips were distributed to ineligible employees.

**WHAT THE LAW SAYS** –Though the minimum wage in New York is \$7.25 an hour, 12 NYCRR §137-1.5(e) permits

### Local Payroll Tax Resource Updated for 2011

*APA’s Guide to Local Payroll Taxes* is a comprehensive, yet easy-to-read resource that provides information from all 17 states that have local payroll tax withholding, depositing, and reporting requirements. Newly updated for 2011, it contains explanations of local payroll tax rates, exemptions, return and payment requirements, penalties, recordkeeping requirements, registration requirements, forms, and much more. To order the 2011 edition, call APA Membership Services at 210-224-6406 or visit [www.americanpayroll.org/product/9/108](http://www.americanpayroll.org/product/9/108).

food service employees to be paid at a lower rate (see above) where they make enough in tips to equal or exceed the minimum wage. A food service worker is defined in 12 NYCRR §137-3.4(a) as one who is “primarily engaged in the serving of food or beverages to guests, patrons or customers in the hotel or restaurant industries, including, but not limited to, wait staff, bartenders, captains and bussing personnel; and who regularly receives tips from such guests, patrons or customers.”

N.Y. CL Labor §196-d prohibits employers from retaining any part of a gratuity received by an employee, but expressly states that the law does not prohibit the “sharing of tips by a waiter with a busboy or similar employee.”

Based on the information provided at this stage in the legal proceeding, it appears that stockers would not be considered food service employees, and therefore should not have shared in the tips.

#### **Portion of gratuities retained**

The lawsuit also claims that not all of the tips were given to the tipped employees, and therefore, the restaurant was not entitled to pay a reduced minimum wage by applying the tip credit. Allegedly, the restaurant still retains between 8% and 9% of gratuities from nightly wine sales and previously, from December 2005 through June 2006, retained a percentage of gratuities from nightly chocolate and cheese sales.

#### **Spread of hours**

All 27 employees worked 10 hours per day or more at some point during their employment at Del Posto, and several worked double shifts. Under state regulations, on each day where the spread of hours exceeds 10 (from the start of the day to the end of the day, including meal and break time), an employee must be paid an additional one hour's pay at the regular minimum wage rate (see 12 NYCRR §137-1.7). The employees claim they never received the additional compensation.

#### **Additional allegations**

The employees also allege that Del Posto failed to pay employees for the cost of laundering their uniforms, failed to distribute to employees the proper portion of a 23% service charge paid by banquet clients that was supposed to represent a gratuity, and paid banquet employees a flat fee despite the

number of hours worked in violation of minimum wage and overtime laws.

#### **Other lawsuits**

Over the summer, Batali was sued by waiters at Babbo, another restaurant he owns in New York City, for wage and hour law violations. In that suit, the waiters claimed the restaurant failed to pay the minimum wage and overtime and tips were improperly pooled and shared with management. The case is still pending.

Earlier this year, celebrity chef Bobby Flay settled a lawsuit with staffers at three restaurants he owned – Bar Americain, Mesa Grill, and Bolo Bar and Restaurant (now closed), for over \$800,000. Flay admitted no wrongdoing as part of the settlement, though the staffers alleged minimum wage and tip pooling violations.

#### **Proposed new rules for restaurant, hotel industries**

Perhaps due to these types of lawsuits, and some confusion about the specific rules regarding wage payment in the restaurant industry, the New York Department of Labor (DOL) has proposed a new Minimum Wage Order for the Hospitality Industry, which was printed in the State Register on October 20, 2010. The new proposed wage order would combine the wage orders for the restaurant and hotel industries, and is available on the DOL website at [www.labor.ny.gov/sites/legal/laws/hospitality-industry-report-and-recommendations.page](http://www.labor.ny.gov/sites/legal/laws/hospitality-industry-report-and-recommendations.page). Public comments will be accepted by the DOL until December 4, 2010.

If the proposal is adopted, significant changes to the wage payment rules in the hospitality industry will take effect. The minimum cash wage for food service workers would increase to \$5.00 an hour and the tip credit would decrease to \$2.25 an hour, effective January 1, 2011. Employers would be required to pay all hospitality industry employees at an hourly rate. Tip pooling and tip sharing rules would be more explicitly defined, and would include more extensive employer recordkeeping requirements. Rules regarding written notice requirements to employees, spread of hours pay, call-in time requirements, uniform laundering, and gratuity charges would also be amended, among others. ■

## STATE-BY-STATE

### **CALIFORNIA**

**Disaster relief.** Employers in Imperial County directly affected by the recent storm may request an extension of up to 60 days from the Employment Development Department (EDD) to file state payroll reports and deposit state payroll taxes without penalties or interest. Written requests for the extension must be received within 60 days from the original deadline [EDD, Tax Branch News No. 107, 10-15-10].

**Meal breaks for construction and other employees.** Effective 1-1-11, employers will be exempt from the requirement to provide a 30-minute meal break after five hours of work to employees in the construction industry, those working for an electric corporation, a gas corporation, or a local publicly owned electric utility, and those employed as commercial drivers. The employees must be subject to a valid collective bargaining agreement that expressly provides

for their wages, hours of work, working conditions, and meal periods, among other things [A.B. 569, L. 2010].

**New payroll forms.** The Employment Development Department (EDD) has released answers to frequently asked questions about the 2011 payroll tax reporting changes (see [PAYSTATE UPDATE, Issue No. 17, Vol. 12.](#)). Also, draft versions of the new forms (DE 9, *Quarterly Contribution Return and Report of Wages*, and DE 9C, *Quarterly Contribution Return and Report of Wages (Continuation)*) and print specifications are available. Final versions of the forms will be available in December and registered employers will receive them automatically by mail starting in 2011. Download the FAQs, draft forms, and print specifications at [www.edd.ca.gov/Payroll\\_Taxes/Important\\_Payroll\\_Tax\\_Changes\\_in\\_2011.htm](http://www.edd.ca.gov/Payroll_Taxes/Important_Payroll_Tax_Changes_in_2011.htm) [EDD Tax Branch News No. 108, 10-15-10].

**COLORADO**

**New amended withholding return.** The Department of Revenue (DOR) has created a new Form DR 1094X, *Amended Income Withholding Tax Return*, which will be available online at [www.colorado.gov/cs/Satellite/Revenue/REVX/1199437262981](http://www.colorado.gov/cs/Satellite/Revenue/REVX/1199437262981). The form should only be used if there is an additional tax due for a particular period. Until the form is released, employers should submit Form DR 1094, *Income Tax Withholding Return*, and write “Amended” on the top [DOR, Tax Info Email, 10-21-10].

**ILLINOIS**

**Tax amnesty rules.** The Department of Revenue has adopted emergency rules related to the tax amnesty program, which is in effect from 10-1-10 through 11-8-10 (see **PAYSTATE UPDATE, Issue No. 17, Vol. 12**). The rules provide guidance on which tax debts qualify for amnesty, the procedures for participating in the amnesty program, and the consequences of participation or failure to participate (download at [www.revenue.state.il.us/Amnesty/AmnestyEmergencyRules.pdf](http://www.revenue.state.il.us/Amnesty/AmnestyEmergencyRules.pdf)) [86 Ill. Adm. Code §§520.101, 520.105].

**MINNESOTA**

**Electronic filing of Forms W-2.** Employers with more than 25 Forms W-2 (was more than 50) must file them electronically by 2-28-11. This threshold is reduced to more than 10 for Forms W-2 filed in 2012 and thereafter (see *The Payroll Source*®, p. 8-120). The Department of Revenue (DOR) has new videos on its Withholding Tax Channel on how to submit Forms W-2 using various methods. Go to <http://taxes.state.mn.us/videos/whvideopage.html> and click the “Withholding Tutorials” tab [DOR, Withholding Tax Update, 10-20-10].

**NORTH DAKOTA**

**UI taxable wage base.** Effective 1-1-11, the state unemployment insurance (UI) taxable wage base will increase to \$25,500 from \$24,700 (this updates *The Payroll Source*®, p. 7-25).

**OREGON**

**No payroll to report.** An employer must file Form OQ, *Oregon Quarterly Tax Report*, for all quarters while its payroll withholding account is active, even if it has no payroll to report. This can be done by submitting a “no payroll/no hours worked” report via the Interactive Voice Response System at 503-378-3981. An employer that will not have a payroll for an indefinite amount of time can request that its account be put on inactive status. Quarterly tax reports are not required until employees are hired again. Complete Form 150-211-157, *Change in Status Report*, indicating the current date of the last payroll. To reopen the account, call 503-945-8091, option 2

[DOR, Payroll Tax News ListServ, 10-10].

**Payment coupons and payroll forms.** In mid-December, the Department of Revenue (DOR) will mail the payment tax coupons (Form OTC). However, an employer that is required to use EFTPS (Electronic Federal Tax Payment System) for federal purposes must use electronic funds transfer (EFT) for Oregon purposes. Combined payroll tax booklet and forms will be mailed in mid-February 2011 [DOR, Payroll Tax News ListServ, 10-10].

**Workers’ compensation payroll tax.** For 2011, the workers’ compensation premium assessment rate will increase to 6.4% from 4.6% (the rate for self-insured employers and self-insured employer groups will increase to 6.6% from 4.8%). An employer pays this assessment based on the total premium the employer is charged by its insurer. Insurers collect the assessment and then transfer it to the state. Also, for 2011, the Workers’ Benefit Fund assessment will remain 2.8 cents per hour or partial hour worked by each paid employee provided with workers’ compensation coverage. The rate of 2.8 cents per hour is the employer’s and employee’s rate combined. No more than half of this assessment (1.4 cents an hour) may be deducted from employees’ wages. The other half is paid by the employer. Employers submit the total to the state through the Oregon combined payroll tax reporting system. Employers should receive rate notices during the first week of November [Department of Consumer and Business Services, *2011 Worker’s Compensation Costs Questions and Answers*].

**PENNSYLVANIA**

**New hire reporting.** The Department of Labor and Industry (DLI) has announced that new hire reporting can now be done through the Commonwealth Workforce Development System (CWDS), available online at [www.pacareerlink.state.pa.us](http://www.pacareerlink.state.pa.us). Registered employers can upload new hire data files directly through the CWDS to report new hire information. Employers can enter new hire information manually (for up to 50 records), or via file upload (for file sizes of less than 10 MBs). Large employers can also use Secure File Transfer Protocol (SFTP), which does not place a restriction on file size. CDs and floppy diskettes are no longer accepted. Employers still have the option to report new hires by fax using the new toll free fax line (866-748-4473) or by mail using the standard paper form. Though non-registered employers can report information for up to three new hires at one time using CWDS, the DLI encourages employers to register and create an employer home page so that the system can become more responsive to employer needs [DLI, *UC Issues Update*, Fall 2010].

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