

LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF WAGE AND HOUR COMPLIANCE

Minimum Wage

Proposed Amendment: N.J.A.C. 12:56-3.1

Authorized By: Harold J. Wirths, Commissioner, Department of Labor and Workforce Development.

Authority: N.J.S.A. 34:1-20 and the New Jersey Constitution, Article I, Paragraph 23.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2014-065.

A **public hearing** on the proposed amendment will be held on the following date at the following location:

Monday, June 16, 2014

10:00 A.M. to 12:00 Noon

New Jersey Department of Labor and Workforce Development

John Fitch Plaza

13th Floor Auditorium

Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 292-2789 if you wish to be included on the list of speakers.

Submit written comments by July 18, 2014, to:

David Fish, Executive Director

Legal and Regulatory Services

New Jersey Department of Labor and Workforce Development

P.O. Box 110 – 13th Floor

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Fax to: (609) 292-8246

The agency proposal follows:

Summary

The Department is proposing amendments to N.J.A.C. 12:56-3.1 in order to implement Article I, Paragraph 23, of the New Jersey Constitution, which states that, (1) every employer shall, beginning January 1, 2014, pay each employee subject to the New Jersey State Wage and Hour Law, P.L. 1966, c. 113 (N.J.S.A. 34:11-56a et seq.), or a successor State statute, a wage rate of not less than the rate required by that act, or \$8.25 per hour, whichever is more, (2) on September 30, 2014, and on September 30 of each subsequent year, the State minimum hourly wage rate shall be increased, effective the following January 1, by any increase during the one-year prior to that September 30 in the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W) as calculated by the Federal government, and (3) if at any time the Federal minimum hourly wage rate set by section 6 of the Federal “Fair Labor Standards Act of 1938” (29 U.S.C. § 206), or a successor Federal law, is raised to a level higher than the State minimum hourly wage rate, then the State minimum hourly wage rate shall be increased to the level of the Federal minimum hourly wage rate and all subsequent increases based on increases in the CPI-W pursuant to Article I, Paragraph 23, of the New Jersey Constitution, shall be applied to the State minimum hourly wage rate as increased to match the Federal minimum hourly wage rate.

Specifically, N.J.A.C. 12:56-3.1, as amended, would include a subsection (a), which would indicate that every employee who is subject to the New Jersey Wage and Hour Law and who is thereby also subject to Article I, Paragraph 23, of the New Jersey Constitution, shall, effective January 1, 2014, be paid not less than \$8.25 per hour, the minimum hourly wage rate set by section 6(a)(1) of the Federal “Fair Labor Standards Act of 1938” (29 U.S.C. § 206(a)(1)), or the rate provided under N.J.S.A. 34:11-56a4, whichever is greatest. N.J.A.C. 12:56-3.1, as amended, would also contain a new subsection (b), which would address the annual minimum hourly wage rate adjustment required by Article I, Paragraph 23, of the New Jersey Constitution. Specifically, new N.J.A.C. 12:56-3.1(b) would state that on an annual basis, on or about September 30, the Department shall revise the minimum hourly wage rate set forth within N.J.A.C. 12:56-3.1(a) based on any percentage increase during the one-year period of August of the prior year through August of the current year of the consumer price index for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics (BLS), and shall publish notice of same in the New Jersey Register. Finally, N.J.A.C. 12:56-3.1, as amended, would contain a new subsection (c), which would require that, no later than September 30 of each year, the Department shall publish a notice of the annual minimum hourly wage rate adjustment for the upcoming year on its website, <http://lwd.dol.state.nj.us/labor>. Thus, suppose that the August 2014 CPI-W, U.S. City Average, is made available by the BLS on or around September 18, 2014. Suppose further that the adjusted minimum hourly wage rate for 2015, based on the percentage increase in the CPI-W, U.S. City Average, during the one-year period of August of the

prior year through August of the current year, is \$8.50. Pursuant to N.J.A.C. 12:56-3.1(c), the Department would as soon as possible following the September 18, 2014, release of the August 2014 CPI-W, U.S. City Average, but no later than September 30, 2014, publish the new \$8.50 minimum wage rate on its website at <http://lwd.dol.state.nj.us/labor>. Concurrent with publication of the new minimum hourly wage rate on the Department's website, the Department would file with the Office of Administrative Law a notice of administrative change, which would (1) substitute \$8.50 for \$8.25 within N.J.A.C. 12:56-3.1(a), and (2) substitute the phrase, "effective January 1, 2015" for the phrase, "effective January 1, 2014" within N.J.A.C. 12:56-3.1(a). Thus, once the administrative change had appeared in the New Jersey Register (approximately three weeks after having been filed by the Department with the Office of Administrative Law, pursuant to the Office of Administrative Law's publication schedule), N.J.A.C. 12:56-3.1(a) would no longer read, "... every employee shall, effective January 1, 2014, be paid not less than \$8.25 per hour, the minimum hourly wage rate set by section 6(a)(1) of the Federal 'Fair Labor Standards Act of 1938' (29 U.S.C. §206(a)(1), or the rate provided under N.J.S.A. 34:11-56a4, whichever is greatest," but would instead read, "... every employee shall, effective January 1, 2015, be paid not less than \$8.50 per hour, the minimum hourly wage rate set by section 6(a)(1) of the Federal 'Fair Labor Standards Act of 1938' (29 U.S.C. §206(a)(1), or the rate provided under N.J.S.A. 34:11-56a4, whichever is greatest." This process whereby the Department would publish the adjusted minimum hourly wage rate on the Department website on or before September 30, followed as soon as possible thereafter with publication of a notice of administrative change in the New Jersey Register substituting the new minimum hourly

wage rate for the old rate within N.J.A.C. 12:56-3.1(a), coupled with a change in the effective date from January 1 of the then current year to January 1 of the following year, would be repeated by the Department each year.

The Department is proposing to use the CPI-W, U.S. City Average, for the following reasons: (1) because Article I, Paragraph 23, of the State Constitution, is silent as to which CPI-W the Department should use; and (2) the United States Social Security Administration (SSA) uses the CPI-W, U.S. City Average, for the adjustment of its rates to account for increases in the cost of living, and it is the Department's belief that the drafters of Article I, Paragraph 23, of the State Constitution, were seeking to replicate the SSA's long-standing practice when they required use of the "CPI-W," with no further explanation. Finally, had the drafters of Article I, Paragraph 23, of the State Constitution, intended for the Department to use either the New York metropolitan or Philadelphia metropolitan regional indices, or an average of the two, for calculation of the annual minimum hourly wage rate adjustment, they could have expressly provided for this within the body of Article I, Paragraph 23, of the State Constitution. They did not. By way of contrast, N.J.S.A. 34:11-56.26(11)(a), which requires an adjustment of the prevailing wage contract threshold amount for public work paid for in whole or in part out of the funds of a municipality, indicates expressly that the contract threshold amount shall be "adjusted on July 1 every five calendar years ... in direct proportion to the rise or fall in the average of the Consumer Price Indices for Urban Wage Earners and Clerical Workers for the New York metropolitan and the Philadelphia metropolitan regions as reported by the United States Department of Labor during the last full calendar year preceding the date upon which the adjustment is made." In the absence

of such clear direction within Article I, Paragraph 23, of the State Constitution, the Department must, with regard to the annual adjustment of the State minimum hourly wage rate, use its reasoned judgment to select the appropriate index from among the available CPI-W indices. For the reasons expressed above, the Department believes that it has made the correct choice.

In addition, the Department has chosen to use an August-to-August comparison of the CPI-W, U.S. City Average, in order to determine the appropriate adjustment to the State minimum hourly wage rate, notwithstanding that Article I, Paragraph 23, of the State Constitution indicates that “on September 30 of each subsequent year,” the State minimum hourly wage rate shall be adjusted to reflect “any increase during the one year prior to that September 30 in the [CPI-W].” As reflected in the example used above, the August CPI-W numbers are generally not available until approximately September 18. Similarly, the September CPI-W numbers are not available until approximately October 18. Consequently, if the Department were to use a September-to-September comparison of the CPI-W, U.S. City Average, as the basis for the annual adjustment to the State minimum hourly wage rate, then the Department would be unable to calculate the new rate and, therefore, would be unable to publish the new rate, on the Department website until well after September 30, not to mention publication of the notice of administrative change in the New Jersey Register, which would not occur until early November. This would run afoul of the prescription within Article I, Paragraph 23, of the State Constitution, that “**on September 30 of each subsequent year ...** the State minimum wage rate shall be increased ...” (emphasis added) Under the circumstances, the Department has determined that an annual August-to-August

comparison, although arguably not in accord with the absolute letter of Article I, Paragraph 23, of the State Constitution, is consistent with the spirit of Article I, Paragraph 23, of the State Constitution, in that it is a full one-year comparison for the preceding year, which when used from year-to-year will capture any fluctuations that occur in the CPI-W, U.S. City Average, including those that occur during the month of September, and it would permit the Department to meet the annual September 30 deadline set by the State Constitution for announcement of the State minimum hourly wage rate for the upcoming calendar year.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements of N.J.A.C. 1:30-3.3(a)5.

Social Impact

The vast majority of what is contained within the proposed amendments – most notably, the initial increase in the State minimum hourly wage rate, the annual adjustment of that rate based on any increase in the CPI-W, and adoption by the State of the Federal minimum hourly wage rate whenever the Federal rate is raised to a level higher than the State minimum hourly wage rate – is expressly mandated by Article I, Paragraph 23, of the State Constitution. Therefore, whatever social impact might be felt, positive or negative, by citizens of the State, including business owners throughout the State, would derive in the first instance from Article I, Paragraph 23, of the State Constitution, not the proposed amendments. As to the remainder of the amendments, it is the Department's belief that they would have a positive social impact in that they would minimize any possible confusion as to when and how the State minimum hourly

wage rate will be established and adjusted pursuant to the State Constitution. For example, as mentioned above in the Summary, because of the way in which Article I, Paragraph 23, of the State Constitution is worded, but for the Department specifying within amended N.J.A.C. 12:56-3.1 that the CPI-W, U.S. City Average, will be used to calculate the annual adjustment in the State minimum hourly wage rate, the citizens of the State would be unaware whether the annual adjustment is to be based on the percentage increase in the CPI-W, U.S. City Average, or based on the percentage increase in the CPI-W for the New York or Philadelphia metropolitan regions, or based on a percentage increase in an average of the two regional CPI-Ws.

Economic Impact

As indicated in the Social Impact above, the vast majority of what is contained in the proposed amendments is necessitated by the recent addition of Article I, Paragraph 23, to the State Constitution. Therefore, whatever economic impact might be felt, positive or negative, by citizens of the State, including business owners throughout the State, would derive in the first instance from the recently amended State Constitution, not from the proposed amendments. As to the remainder of the amendments, again, it is the Department's belief that they would have a positive economic impact in that they would minimize any possible confusion as to when and how the State minimum hourly wage rate will be established and adjusted pursuant to the State Constitution. It is the Department's hope that minimizing confusion as to these issues will avoid costs for employees and employers of unnecessary litigation, which might otherwise result.

Federal Standards Analysis

Section 6 of the Federal "Fair Labor Standards Act of 1938" (29 U.S.C. § 206), contains a minimum hourly wage rate of \$7.25, with no scheduled adjustments, annual or otherwise; whereas N.J.A.C. 12:56-3.1, as amended, would contain a minimum hourly wage rate, effective January 1, 2014, of \$8.25, with an annual cost of living adjustment to that rate based on any increase in the CPI-W, U.S. City Average, during the preceding year. The existence of a minimum hourly wage rate in New Jersey that exceeds the Federal minimum hourly wage rate will most certainly have an economic impact on all of the citizens of this State, whether those citizens are minimum wage earners who will receive a pay raise, business owners who will be required to pay the heightened minimum hourly wage rate to their employees, or citizens of the State who are neither minimum wage earners, nor business owners, who will be impacted in one way or another (whether positively or negatively) by the existence of a minimum hourly wage rate in New Jersey that exceeds the Federal minimum hourly wage rate.

However, as explained in the Social Impact above, the Department has no discretion to deviate from the recently amended State Constitution, which, effective January 1, 2014, increased the State minimum hourly wage rate to \$8.25 and which requires that the rate be adjusted annually to account for increases in the cost of living, as reflected by annual percentage increases in the CPI-W.

Jobs Impact

As explained in the Social and Economic Impact statements above, to the degree that the proposed amendments would have an impact on the generation or loss of jobs within the State, a question much debated with an answer as of yet still unknown, such

impact would result in the first instance from Article I, Paragraph 23, of the State Constitution, which increases the State minimum hourly wage rate and requires an annual adjustment of that rate to account for increases in the cost of living. The Department has no discretion to deviate from the State Constitution.

Agriculture Industry

As explained in the Jobs Impact statement above, to the degree that the proposed amendments might have an impact on the agriculture industry within the State, such impact would result in the first instance from Article I, Paragraph 23, of the State Constitution, which increases the State minimum hourly wage rate and requires an annual adjustment of that rate to account for increases in the cost of living. The Department has no discretion to deviate from the State Constitution.

Regulatory Flexibility Statement

The proposed amendments would impose no reporting or recordkeeping requirements on small businesses, as that term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. As to compliance requirements, again, as indicated above in the Social, Economic, Jobs, and Agriculture Industry Impact statements, the requirement that employers pay covered employees no less than the hourly minimum wage rate described within proposed amended N.J.A.C. 12:56-3.1, is due in the first instance to Article I, Paragraph 23, of the State Constitution, from which the Department has no discretion to deviate. The Department's inclusion within proposed N.J.A.C. 12:56-3.1 of a detailed explanation as to precisely how and when the annually adjusted minimum hourly wage rate will be calculated and announced to the public, should benefit all employers, large and small, in that it should eliminate confusion which might

otherwise have resulted from the recent amendment to the State Constitution. In addition, as explained in the Summary above, the Department is proposing to use an August-to-August CPI-W, U.S. City Average, comparison as the basis for the annual adjustment, thereby ensuring compliance with the constitutional September 30 deadline for announcement of the State minimum hourly wage rate for the upcoming year. Compliance with the constitutional September 30 deadline, which for the reasons explained in the Summary above, would not be possible if the Department were to use a September-to-September CPI-W, U.S. City Average, comparison as the basis for the annual adjustment, should lessen the impact of the annual rate adjustment on all businesses, large and small. That is, businesses will presumably make good use of each day during the period from September 30 through January 1 of each year to plan for implementation of the annual adjustment to the minimum hourly wage rate, whereas if the Department were to use a September-to-September CPI-W, U.S. City Average, comparison as the basis for the annual adjustment, the Department would be unable to announce the new State minimum hourly wage rate until sometime in mid-to-late October of each year.

Housing Affordability Impact Analysis

The proposed amendments will have an insignificant impact on affordable housing in New Jersey and there is an extreme unlikelihood that the rule would evoke a change in the average costs associated with housing because, as indicated in each of the above impact statements, to the degree that the proposed amendments might have an impact on the average costs associated with housing, such impact would result in the first instance from Article I, Paragraph 23, of the State Constitution, which increases the State

minimum hourly wage rate and requires an annual adjustment of that rate to account for increases in the cost of living. The Department has no discretion to deviate from the State Constitution.

Smart Growth Development Impact Analysis

The proposed amendments will have an insignificant impact on smart growth and there is an extreme unlikelihood that the rules would evoke a change in housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan in New Jersey because, as indicated in each of the above impact statements, to the degree that the proposed amendments might evoke a change in the housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plans, such impact would result in the first instance from Article I, Paragraph 23, of the State Constitution, which increases the State minimum hourly wage rate and requires an annual adjustment of that rate to account for increases in the cost of living. The Department has no discretion to deviate from the State Constitution.

Full text of the proposal follows (additions indicated with boldface **thus**; deletions indicated in brackets [thus]):

12:56-3.1 Statutory minimum wage rates for specific years

(a) Except as provided in N.J.A.C. 12:56-3.2, **every** employee[s] shall, **effective January 1, 2014**, be paid not less than **\$8.25 per hour**, the minimum hourly wage rate set by section 6(a)(1) of the Federal “Fair Labor Standards Act of 1938” (29 U.S.C.

[§206(a)(1)] **§ 206(a)(1)**), or the rate provided under N.J.S.A. 34:11-56a4, whichever is [greater] **greatest**.

(b) On an annual basis, on or about September 30, the Department shall revise the minimum hourly wage set forth in (a) above based on any percentage increase during the one-year period of August of the prior year through August of the current year of the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics. Annually, the Department shall, through a public notice published in the New Jersey Register, provide the new CPI-W, U.S. City Average, adjusted minimum hourly wage.

(c) The Department shall, no later than September 30 of each year, publish a notice, as set forth in (b) above, on the Department's website, <http://wd.dol.state.nj.us/labor>.