



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

May 1, 2013

The Honorable Ben Ysursa  
Idaho Secretary of State  
Statehouse  
VIA HAND DELIVERY

Re: Certificate of Review  
Proposal to Increase the Minimum Wage

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on April 15, 2013. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." The opinions expressed in this review are limited to those potentially affecting the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative. Similarly, the accuracy of the potential revenue impact to the state budget is beyond the scope of this review.

### BALLOT TITLE

Following the filing of the proposed initiative, this office prepares short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

### MATTERS OF SUBSTANTIVE IMPORT

The purpose of the proposed initiative is to amend Idaho Code § 44-1502 to increase Idaho's minimum wage rate by fixed amounts for calendar years 2015, 2016 and for two consecutive calendar years in 2017 through 2018. If adopted, the initial minimum wage rate would be the same as the current Idaho and federal minimum wage rate of \$7.25 per hour. The minimum wage would increase to \$9.80 per hour through the end of calendar year 2018. After 2018, and for subsequent calendar years, the proposed

initiative would require the Director of the Department of Labor to make annual increases to the minimum wage rate based on the rate of inflation according to the consumer price index for urban wage earners and clerical workers or CPI-W<sup>1</sup>. The proposal would also increase the amount of direct wages an employer must pay to tipped employees from \$3.35 an hour through the end of calendar year 2014, up to \$5.90 an hour for calendar year 2017 and beyond. For the employment of youth, the proposal lowers the age limit employees can receive an initial 90-day training wage of \$4.25 per hour to employees under 18 years of age.

The federal Fair Labor Standards Act of 1938<sup>2</sup> (FLSA) also has minimum wage requirements that include special minimum wage rates for tipped employees and youth employment. For FLSA covered, non-exempt employers, the current federal minimum wage rate is \$7.25 per hour (29 U.S.C. § 206), the amount of direct wages an employer must pay to tipped employees is at least \$2.13 per hour (29 U.S.C. § 203(m))<sup>3</sup>, and the age an employee can receive an initial 90-day training wage of \$4.25 per hour is limited to employees under 20 years of age (29 U.S.C. § 206(g)).

Although the proposed initiative sets higher minimum wage rates and stricter standards for applying the youth minimum wage than the FLSA, the FLSA does not preempt state law. This is because the FLSA contains a savings clause specifically authorizing states to set stricter standards: “No provision of this [Act] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this [Act].” 29 U.S.C. § 218. As a result, states are free to adopt and enforce minimum wage rates that are higher than the minimum wage rates established under federal law. Currently, 19 states have minimum wage rates that are higher than the FLSA.<sup>4</sup>

Regarding the calculation of the adjusted minimum wage rate, the proposed initiative imposes several specific requirements on the Department of Labor. Some of these requirements are clear and straightforward; the calculation is to be made on September 30 of each year to take effect the following January 1; it is to be calculated to the nearest cent; and, the rate of inflation used to make the calculation is determined from the percentage change in the CPI-W over the 12 months prior to September 1 of that year. However, three requirements in the proposed initiative are ambiguous when read together. Proposed Idaho Code § 44-1502(1)(e) directs the Department (1) to use the CPI-W to calculate the adjusted minimum wage rate in Idaho; (2) to maintain employee purchasing power; and, (3) increase the minimum wage rate by the rate of inflation. The requirement to use the CPI-W implies that the minimum wage rate is to follow the CPI-W as it increases or decreases each year. However, the statute directs that the minimum wage rate is to be adjusted by increasing it by the rate of inflation, without any

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<sup>1</sup> “CPI-W” is the abbreviation for the federal consumer price index for urban wage earners and clerical workers, representing expenditures by urban households that derive more than half their income from clerical or hourly wage occupations. See U.S. Dep’t of Labor, *Program Highlights, BLS Fact Sheet 94-1 (Revised): Guide to Available CPI Data*, available at <http://www.bls.gov/cpi/cpifact8.pdf>.

<sup>2</sup> Fair Labor Standards Act of 1938 (FLSA), Pub. L. No. 75-718, 52 Stat. 1060, codified as amended at 29 U.S.C. § 201, *et seq.*

<sup>3</sup> See also U.S. Department of Labor *Wage and Hour Fact Sheet No. 15*, available online at <http://www.dol.gov/whd/reggs/compliance/whdfs15.pdf>.

<sup>4</sup> See U.S. Department of Labor, Wage and Hour Division, *Minimum Wage Laws in the States* (Jan. 2013), available online at <http://www.dol.gov/whd/minwage/america.htm>.

corresponding reference to a decrease in the minimum wage should deflation occur. Further, the explicit objective to be met by adjusting the minimum wage rate is to maintain employee purchasing power, not to increase it or decrease it over time. These three requirements—use the CPI-W, maintain employee purchasing power, and increase the minimum wage rate by the rate of inflation—are in tension with one another, and that tension is not resolved by the plain language of the proposed initiative.

To avoid this ambiguity, it is recommended that language be added to clarify how the minimum wage calculation is to be made. If the proponents of the initiative intend for there to be a direct mathematical relationship between the CPI-W and the minimum wage rate, then the language of the proposed initiative should be changed to indicate that the adjusted minimum wage rate is to rise and fall depending on changes in the CPI-W. However, if the intent of the proposed initiative is to withhold authority from the Department to reduce the minimum wage rate even when the CPI-W declines, then the language of the proposed initiative should be changed to indicate that in the event the CPI-W declines, the minimum wage rate is to remain unchanged and not increase until the actual value of the CPI-W has returned to the level it had reached before it declined.

Giving specific mathematical instructions as to how the minimum wage rate is to be adjusted using the CPI-W will avoid problems administering the proposed initiative should it be adopted.

#### CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Anne Nesse, 854 North Victorian Drive, Coeur d'Alene, Idaho 83814.

Sincerely,



LAWRENCE G. WASDEN  
Attorney General

**Analysis by:**

CRAIG BLEDSOE  
Deputy Attorney General