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A Faulty Federal Standard: A Call for a Federal Minimum Wage that is Actually “Fair” Under the Fair Labor Standards Act

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A Faulty Federal Standard: A Call for a Federal Minimum Wage that is Actually “Fair” Under the Fair Labor Standards Act

Amanda Rose Kapur*

When the average American works 40 hours a week on the federal minimum wage and their family unit is still under the poverty line, there is something inherently wrong. In America, one has to work 93 hours a week just to accommodate a basic level of living on minimum wage.¹ Working the standard 40 hours a week should grant the worker the right to live above the poverty line.

Section I of this Comment will discuss the need for minimum wage reform by looking at the living wage gap and the benefits of raised minimum wages. This section will also explore the growing social interest in minimum wage reform and the federal gridlock on new minimum wage legislation. Because of this federal gridlock, states and cities across America are taking the lead on raising minimum wages and are reviewed in section II. All of this reform comes at a cost though. Specifically, a cost to businesses in order to comply with new minimum wage laws. These consequences must be considered when enacting minimum wage legislation. Section III will discuss the cost of compliance for businesses and will take a particular look at the unique burden on businesses that hire tipped employees. This section will also look at how businesses have

* Articles & Comments Editor for the University of Miami Business Law Review, Volume 24 (Issues 2-3) & Volume 25; J.D. Candidate 2017, University of Miami School of Law; B.A., 2008, Georgetown University. This Comment is dedicated to my late mother, Geraldine Louise Sandberg, who was a single mother that, at times, had to work minimum wage jobs to support our little family. Through her strength and grace, she taught me how to persevere through life’s challenges and the importance of speaking out on social issues. I would also like to thank my husband Ajit for his continuous support throughout my legal education.

¹ Allyson Fredericksen, *Pay Up! Long Hours and Low Pay Leave Workers at a Loss* at 7, 10, THE JOB GAP ECONOMIC PROSPERITY SERIES, ALLIANCE FOR A JUST SOCIETY (Oct. 2015).

experimented with different approaches in order to survive in today’s market. Finally, in section IV, this Comment will conclude with proposed solutions that will enable minimum wage reform while easing the cost of compliance for businesses.

In finding a fair federal minimum wage, there must be a balance between a living wage and the cost of compliance to businesses.

- I. MINIMUM WAGE REFORM 139
 - A. *THE 50 YEAR PAUSE: THE DIRE NEED FOR MINIMUM WAGE REFORM* 139
 - 1. WHAT GOOD IS THE FLSA IF IT CANNOT KEEP UP?—THE FEDERAL MINIMUM WAGE & THE LIVING WAGE GAP 140
 - 2. TODAY’S SIREN CALL—WHAT MINIMUM WAGE NEEDS TO BE 145
 - 3. ONE SMALL STEP FOR THE FEDERAL GOVERNMENT, ONE GIANT LEAP FOR ALL WORKERS—WHAT RAISED MINIMUM WAGES CAN DO 146
 - B. *SOCIAL MOVEMENT: THE DEMAND FOR MINIMUM WAGE REFORM* 148
 - C. *AN UPHILL BATTLE: ATTEMPTS TO REFORM THE MINIMUM WAGE* 148
 - 1. RECENT CONGRESSIONAL ATTEMPTS THAT ARE NOW A DISTANT MEMORY—RAISE THE WAGE ACT (THE \$12 MEASURE) & THE PAY WORKERS A LIVING WAGE ACT (THE \$15 MEASURE) 149
 - 2. FORMER PRESIDENT OBAMA—WELL-INTENTIONED GESTURES BUT ULTIMATELY INEFFECTIVE 151
 - 3. PRESIDENT TRUMP—THE DEATH KNELL TO ANY ATTEMPT TO RAISE THE FEDERAL MINIMUM WAGE..... 151
- II. LEFT WITH NO CHOICE: STATES AND CITIES LEAD THE WAY TO LIVING WAGES 153
 - A. *NEW YORK, OREGON & CALIFORNIA: THREE TRAILBLAZER STATES, THREE NOVEL APPROACHES* 154
 - B. *TRAILBLAZER CITIES*..... 156
- III. EFFECTS AND CONSEQUENCES OF MINIMUM WAGE

REFORM ON BUSINESSES	158
A. <i>THE COST TO COMPLY</i>	158
B. <i>CASE EXAMPLE: RESTAURANTS AND TIPPED</i> <i>EMPLOYEES</i>	159
C. <i>FORCED TO BE CREATIVE IN ORDER TO SURVIVE:</i> <i>INDUSTRY EXPERIMENTATION</i>	162
1. NO-TIPPING-ALLOWED POLICIES	163
2. RAISING WAGES THEMSELVES	165
3. OTHER MEANS	166
IV. PROPOSED SOLUTIONS: REFORM MINIMUM WAGE WHILE AIDING COMPLIANCE	167
A. <i>PHASE-IN SCHEDULES</i>	168
B. <i>ACCOUNTING FOR INFLATION THROUGH INDEXING</i> ...	168
C. <i>MULTI-MECHANISM SOLUTIONS</i>	169
V. CONCLUSION	170

I. MINIMUM WAGE REFORM

A. *THE 50 YEAR PAUSE: THE DIRE NEED FOR MINIMUM WAGE REFORM*

Let us start by taking a look at what working on minimum wage means for many workers in America.² For Taran, who works at a steakhouse and is a married mother of two young children, it means that she has to work at night so that she does not have to pay for daycare. For Kaitlin, it means being evicted from her apartment after she averaged \$13 a *shift* working as a waitress. For Jacqueline, being a tipped employee means never knowing if she will make enough money to pay her bills. For Reece, it means that she cannot afford her bills and makes only enough to pay for gas, some food, and her phone bill. For Joseph, it means working a full-time job serving people food but going hungry himself. For Colin, it means having to incur debt in order to maintain a living. For Gary, it means struggling to pay for groceries, utilities, or rent. All of these stories share a similar chord—the federal minimum wage is simply not enough. Everyone is struggling on minimum wage. Struggling to maintain a minimum standard of living. Struggling to take care of themselves, let alone dependents. Struggling to make ends meet. This is not what working

² All stories were taken from the website of Restaurant Opportunities Centers United, available at www.rocunited.org.

on minimum wage should look like. These stories should not be common. On the part of the federal government, who is responsible for setting the minimum wage, this is simply inexcusable. All minimum wage workers in our country should be able to live a life above the poverty line. The federal government simply needs to step up and do something, like it did nearly eighty years ago.

1. WHAT GOOD IS THE FLSA IF IT CANNOT KEEP UP?—THE FEDERAL MINIMUM WAGE & THE LIVING WAGE GAP

In 1937, the landmark Supreme Court decision in *West Coast Hotel Co. v. Parrish* upheld minimum wage legislation enacted by the State of Washington and transformed the national conversation from one that minimized regulation of businesses at the cost of worker safety and rights,³ to one that allowed states to protect its own citizens by regulating the workplace.⁴ In *West Coast Hotel Co.*, the Supreme Court held that minimum wage laws were appropriate subjects of legislation and declared that the health and well-being of workers are a community responsibility:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well-being but casts a direct burden for their support upon the communityThe community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.⁵

In 1938, a year after the *West Coast Hotel Co.* decision, Congress passed the Fair Labor Standards Act (the “FLSA”),⁶ which was signed into

³ The *Lochner* Era was a period of time from 1897 to 1937 when the Supreme Court tended to invalidate legislation aimed at regulating business in order to promote a *laissez faire* market. A *laissez faire* market is a market that encourages governments to abstain from interfering with the free market. See *Lochner v. New York*, 198 U.S. 45 (1905).

⁴ *West Coast Hotel v. Parrish* overturned *Lochner*. The landmark case arose from a suit by Elsie Parrish, a chambermaid working at the Cascadian Hotel in Wenatchee, Washington (owned by West Coast Hotel Co.) against the hotel for the difference between what she was paid and the \$14.50 per week of 48 hours established as the minimum wage by Washington State law. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 388 (1937).

⁵ *Id.* at 399-400.

⁶ Fair Labor Standards Act, 29 U.S.C. § 201 (2011) [hereinafter FLSA].

law by President Roosevelt and established the federal minimum wage.⁷ The preamble of the FLSA unequivocally states that its purpose is “to provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.”⁸ One of the “other purposes” is identified in § 202(b) as the purpose “to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.”⁹ The conditions “above referred” are identified as “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”¹⁰ However, the federal government has failed on every account of its stated purpose. The federal minimum wage has not been “fair” for a very long time, the “conditions” have not been corrected or eliminated, and workers are not able to maintain a “minimum standard of living.”

Although the FLSA was a big political win, a real living wage was still a distant promise, as the federal government failed to maintain or enforce a suitable minimum wage in the decades following passage.¹¹ The federal minimum wage reached its historical peak in 1968 and has not risen proportionate to inflation since.¹² Wage growth has essentially been on pause since then which has fueled income inequality and has shrunk the middle class.¹³ Between 1979 and 2009, the federal minimum wage was adjusted upward every now and then, but between these adjustments, its inflation-adjusted value fell as rising prices eroded its nominal value.¹⁴ This would be reasonably expected if the American economy stopped growing in the 1970s, but that simply was not the case. Besides the 2007-2009 recession, the last three decades of American productivity growth has not been shared with workers.¹⁵ Instead, the federal government has done little to nothing to keep the minimum wage proportionate to inflation, something that is easily within its power. In July 2009, the federal

⁷ CONG. BUDGET OFFICE, *The Effects of a Minimum-Wage Increase on Employment and Family Income*, at 4 (Feb. 2014).

⁸ FLSA, *supra* note 7.

⁹ *Id.* at § 202(b).

¹⁰ *Id.* at § 202(a).

¹¹ See William P. Quigley, “A fair day’s pay for a fair day’s work:” *Time to raise and index the minimum wage*, 27 ST. MARY’S L.J. 513, 529-33 (1996).

¹² CONG. BUDGET OFFICE, *The Effects of a Minimum-Wage Increase on Employment and Family Income*, at 4 (Feb. 2014).

¹³ David R. Howell, Bert M. Azizoglu, and Anna Okatenko, *Confronting Low Pay: Minimum Wage Policy and Employment in the U.S. and France*, 1 (UNIV. OF MASS. AMHERST, POL. ECON. RES. INST., Working Paper No. 286, 2012).

¹⁴ CONG. BUDGET OFFICE, *Changes in the Distribution of Workers’ Hourly Wages Between 1979 and 2009*, at 13 (Feb. 2011).

¹⁵ Howell, Azizoglu, and Okatenko, *supra* note 13, at 1.

minimum wage was increased from \$5.15 per hour to \$7.25 per hour, which is the current federal minimum wage.¹⁶ Adjusted for inflation, the minimum wage was higher in 2009 than it had been for more than two decades, but still slightly below its value in 1979.¹⁷

The failure of the government in maintaining a minimum wage that meets inflation has ultimately caused the living wage gap. This is a shame because the first-order purpose of the minimum wage, as originally stated in the FLSA and contained in the voluminous Congressional testimony that preceded its enactment, was to protect what is “fair” and necessary to “maintain a minimum standard of living.”¹⁸ The living wage gap is the gap between the minimum wage and the amount of money needed to maintain a minimum standard of living—a living wage.¹⁹ David Cooper, an economic analyst at the Economic Policy Institute opined,

the failure to regularly and adequately raise the federal minimum wage over the past five decades is one of several policy failures that have denied a generation of American workers more significant improvement in their quality of life and in fact, the erosion of the minimum wage has left low-wage workers today earning significantly less than their counterparts 50 years ago.²⁰

This leaves the question of what, if anything, did the FLSA really do for workers if the federal government failed to live up to the FLSA’s stated and codified purpose. Again, the “Fair” Labor Standards Act cannot be considered “fair” if *any* amount of workers on minimum wage are below the poverty line. As William P. Quigley also stated: “Millions of people are working for a living but not receiving a living wage in return for their work. It is not in the common interest, nor in the interest of justice, for people to work full-time, yet remain mired in poverty.”²¹ Rosemary Haefner, chief human resources officer at CareerBuilder, regarding its

¹⁶ CONG. BUDGET OFFICE, *The Effects of a Minimum-Wage Increase on Employment and Family Income*, at 4 (Feb. 2014).

¹⁷ CONG. BUDGET OFFICE, *Changes in the Distribution of Workers’ Hourly Wages Between 1979 and 2009*, at 14 (Feb. 2011).

¹⁸ FLSA, 29 U.S.C. § 202(a) (2011).

¹⁹ See Bourree Lam, *The Living Wage Gap: State by State*, THE ATLANTIC (Sept. 15, 2015), <https://www.theatlantic.com/business/archive/2015/09/living-wage-calculator-interactive-minimum-wage/404569/>.

²⁰ Rhonda Smith, *EPI: Minimum Wage Hike Would Help 35 Million Workers*, Daily Labor Report, BLOOMBERG BNA (July 2015).

²¹ Quigley, *supra* note 11, at 513-14.

national online survey,²² commented that despite the low federal minimum wage, businesses are having to raise wages themselves to remain competitive:

[A]s big name brands take measures to increase pay for minimum wage workers and the market overall grows more competitive for skilled labor, employers are going to start feeling more wage pressure when trying to attract and retain employees at all levels within the organization.²³

The CareerBuilder/Harris Poll survey found that most employers support the idea of raising the minimum wage. Two-thirds (64%) of employers believe the minimum wage should be increased in their state and only 6% believe that the federal minimum wage is fair.²⁴ Despite this consensus among employers, of workers who currently have a minimum wage job or have held one, two-thirds (65%) answered that they were struggling financially and 49% answered that they had to work more than one job.²⁵ When full-time workers are paid a wage that does not allow them to cover even their most basic of necessities, they are compelled to find a way to work more hours, obtain a second job, or they skip necessities like meals or medicine.²⁶

The Congressional Budget Office projected that there would be 45 million people belonging to families where the household income is below the poverty line in 2016.²⁷ The poverty line number is updated each year by the Census Bureau and issued in the Federal Register by the Department of Health and Human Services.²⁸ The poverty line nationwide varies with family size. The poverty line is \$12,060 for a household of one person, \$16,240 for a household of two persons, \$20,420 for a household of three persons, and \$24,600 for a household of four persons.²⁹ A full-

²² The CareerBuilder/Harris Poll survey included a sample of 2,321 full-time hiring and human resources managers and 3,039 full-time workers in the private sector across industries and company sizes.

²³ Genevieve Douglas, *Most Employers Support Raising Minimum Wage*, Daily Labor Report, BLOOMBERG BNA (Sept. 17, 2015).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Fredericksen, *supra* note 1, at 7.

²⁷ CONG. BUDGET OFFICE, *The Effects of a Minimum-Wage Increase on Employment and Family Income*, at 11 (Feb. 2014).

²⁸ *U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs*, Office of the Assistant Secretary for Planning and Evaluation, U.S. DEP'T OF HEALTH & HUM. SERVICES, (Jan. 25, 2017), <https://aspe.hhs.gov/poverty-guidelines>.

²⁹ *Id.*

time worker (40 hours per week) on minimum wage makes \$15,080 per year.³⁰

Valerie Wilson, economist at the Economic Policy Institute and director of the institute's program on race, ethnicity and the economy; pointed to occupational and industry segregation as part of the problem.³¹ A disproportionate number of women work in service industries, including health care, education, and leisure which tend to have lower wages.³² A Department of Labor report from April 2015 showed that the proportion of minimum wage workers varies by race or ethnicity and by sex and education (majority are women, minorities, and workers without a high school diploma).³³ In 2013, 25.3% of black women and 23.1% of Latinas lived in poverty—more than twice the share of white, non-Hispanic women and more than three times the share of white, non-Hispanic men who lived in poverty.³⁴ Issue briefs submitted by the National Council of La Raza, the National Urban League, and the National Women's Law Center found that a minimum wage hike would help 4.2 million employed Latinas (43% of all working Hispanic women) and 3.1 million employed black women (37% of all working Black women).³⁵ Segregation of workers based on sex, race, and ethnicity is all too common and only highlights the federal government's inability to mandate fair and equal opportunities for all.

Delving further, if a minimum wage hike would help a large portion of women, it would also greatly improve the lives of children by default. American children are in "dire need" of an increase in the minimum wage for their parent workers. Twenty percent of American children live in households that earn less than half of the median household income.³⁶ Wages are key to the economic well-being of individuals and families. Hourly wages and hours worked determine an individual's earnings, and for most nonelderly adults, earnings constitute the bulk of family income.³⁷ Nearly one-third of all American workers are paid very low wages and

³⁰ *What are the annual earnings for a full-time minimum wage worker? Minimum wage basic calculations and its impact on poverty*, CENTER FOR POVERTY RESEARCH, University of California, Davis (updated Aug. 30, 2016).

³¹ Rhonda Smith, *Work and Family Policies Falling Short For Many Female Employees, Speakers Say*, Daily Labor Report, BLOOMBERG BNA (May 14, 2015).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Olga Khazan, *Why Being a Poor Kid in America Is Particularly Awful*, THE ATLANTIC (Sept. 24, 2015), <http://www.theatlantic.com/business/archive/2015/09/childcare-spending/407035/>.

³⁷ CONG. BUDGET OFFICE, *Changes in the Distribution of Workers' Hourly Wages Between 1979 and 2009*, at 1 (Feb. 2011).

remain mired in poverty.³⁸ The United States has a higher proportion of children living in poverty than most other high-income countries, and spends less than 1% of its GDP on benefits for families.³⁹ The United States ranks second-to-last in the percentage of its GDP spent on benefits for families and has one of the highest relative child poverty rates of comparable high-income countries.⁴⁰ This is a shame for such a “first-world” country, a world leader in many other respects. It would require very little to drastically improve the lives of children and families. All that is required of the federal government is to raise and maintain a federal minimum wage that is a true and “fair” living wage. However, it has failed to do just that for decades.

2. TODAY’S SIREN CALL—WHAT MINIMUM WAGE NEEDS TO BE

Workers should be able to live on the wages they earn if they are working full-time on minimum wage. Simply put, a living wage is needed. There have been attempts to concretely define what a “living wage” should be within the legal, social science, and economic fields. One attempt was “compensation for labor . . . sufficient to enable the employee receiving it to maintain himself or herself under conditions consistent with his or her welfare.”⁴¹ Another was: “a wage that will allow the workers involved not to just subsist, but to live in reasonable comfort and to have a little bit left aside as disposable income.”⁴² The Alliance for a Just Society defines a living wage as “one that allows families to meet their basic needs, without public assistance, and that provides them some ability to deal with emergencies and plan ahead—not a poverty or survival wage.”⁴³ All of these definitions may be vague or amorphous but they all are a clear attempt to highlight the shortcomings of the minimum wage. If the minimum wage were sufficient to satisfy a reasonable standard of living, the phrase “living wage” would not need to exist in our vocabulary.

Any definition of a “living wage” must remain open to interpretation.⁴⁴ Amy Glasmeier, an MIT professor of economic geography, developed the “Living Wage Calculator” to look at the cost of living against the minimum wage across all communities in the United States.⁴⁵ In

³⁸ Howell, Azizoglu, and Okatenko, *supra* note 13, at 1.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ John D. Shaw, *What’s in a Wage? The Living Wage Movement and the Effect of a Living Wage on a Minimum Wage Family*, 70 *Miss. L.J.* 1037, 1038 (Spring 2001).

⁴² *Id.* at 1039.

⁴³ Fredericksen, *supra* note 1, at 6.

⁴⁴ Shaw, *supra* note 41, at 1045; Lam, *supra* note 19.

⁴⁵ Lam, *supra* note 19.

opposition to varied minimum wages based on locale, the Alliance for a Just Society argues that a national living wage for a single adult is \$16.87 per hour, based on a weighted average of living wages across the country. The minimum wage not only fails by not keeping up with inflation, but also fails to cover more than a very tiny share of all workers due to exemptions.⁴⁶ The minimum wage should not only be a living wage but it should be the standard for many currently-exempted workers. Any reform should mention the possible options in eliminating some or all of the exemptions. Executive, administrative, and professional employees should not be exempted. Lower-wage jobs like seasonal amusement business, outside sale, casual babysitters, agricultural and seafood workers, small newspapers, retail and service workers should not be exempted either. Danny Meyer, the CEO of Union Square Hospitality Group, who eliminated tipping at his upscale restaurants, believes that a minimum wage should apply to everybody: “I would say that whatever a legislature decides should be the minimum wage should be the minimum wage for everybody. It shouldn’t be for hairdressers, but not for servers. For fast food workers, but not for lawyers. Whatever it is, is what it should be for everybody.”⁴⁷

Exemptions aside, the most important aspect of a minimum wage is its maintenance and adjustment over time. The federal minimum wage should be automatically and annually indexed to adjust for inflation and should not be held back by the requirement of an active congressional vote.⁴⁸ Whether it is adjusted for inflation or indexed to a weighted average, the minimum wage needs to be updated appropriately.

3. ONE SMALL STEP FOR THE FEDERAL GOVERNMENT, ONE GIANT LEAP FOR ALL WORKERS—WHAT RAISED MINIMUM WAGES CAN DO

There are many positives, aside from advancing a living wage, to raising the federal minimum wage. They include:

- Promoting social equality: increases family incomes;⁴⁹ raises individuals above the poverty line;⁵⁰

⁴⁶ Howell, Azizoglu, and Okatenko, *supra* note 13, at 7.

⁴⁷ Clint Rainey, *Danny Meyer Wants All Hospitality Workers to Earn \$15 an Hour*, GRUB STREET (Jan. 14, 2016), <http://www.grubstreet.com/2016/01/danny-meyer-on-15-dollar-wage-for-servers.html>.

⁴⁸ Howell, Azizoglu, and Okatenko, *supra* note 13, at 7.

⁴⁹ Family income average would be increased by about 3%. CONG. BUDGET OFFICE, *The Effects of a Minimum-Wage Increase on Employment and Family Income*, at 3 (Feb. 2014).

⁵⁰ About 900,000 people, on net, would be raised above the federal poverty line. *Id.*

gives women and minorities a more-level playing field;⁵¹

- Creating a better workplace: increases morale;⁵² promotes self-respect among workers;⁵³ increases efficiency and productivity;⁵⁴ increases demand for goods and services;⁵⁵ reduces turnover;⁵⁶ reduces labor costs;⁵⁷
- Expanding local tax bases: as disposable incomes increase, the amount of transfer payments and government benefits will reduce.⁵⁸

⁵¹ Rhonda Smith, *Minimum Wage Hike Would Help Latinas, Black Women*, Daily Labor Report, BLOOMBERG BNA (July 2015) (Katherine Gallagher Robbins, director of research and policy analysis at the National Women’s Law Center: an increase in the federal minimum wage helps “reduce poverty, increase family and economic security, and reduce disparities between women and men as well.”).

⁵² Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 TEX. L. REV. 1543, 1543 (May 2014).

⁵³ *Id.* at 1569-70, 1576. (A case in point is in *Nickel and Dimed: On (Not) Getting by in America*, in which the investigative journalist Barbara Ehrenreich spent a year trying to survive on jobs paying around \$6 or \$7 an hour: “What surprised and offended me most about the low-wage workplace,” Ehrenreich reflected, “was the extent to which one is required to surrender one’s basic civil rights and—what boils down to the same thing—self-respect.” She confronted rules against “gossip” or even against talking to coworkers, mandated drug testing for menial positions, searches of her person or property, and capricious punishment for trivial violations of workplace rules. Such rules were particularly surprising, Ehrenreich writes, because they often seemed economically irrational: drug testing, for example, is quite expensive, particularly for restaurant servers who will be paid around \$3 an hour. “If you are constantly reminded of your lowly position in the social hierarchy, whether by individual managers or by a plethora of impersonal rules, you begin to accept that unfortunate status.”)

⁵⁴ CONG. BUDGET OFFICE, *The Effects of a Minimum-Wage Increase on Employment and Family Income*, at 1 (Feb. 2014).

⁵⁵ *Id.*

⁵⁶ Associated costs for hiring, training, and recruiting.

⁵⁷ CONG. BUDGET OFFICE, *Answers to Questions for the Record Following a Hearing on the Minimum Wage Conducted by the Senate Committee on Health, Education, Labor, and Pensions*, at 2 (May 2014).

⁵⁸ Shaw, *supra* note 41, at 1037.

B. SOCIAL MOVEMENT: THE DEMAND FOR MINIMUM WAGE REFORM

An innovative and unorthodox campaign—the Fight for 15 (underwritten by the Service Employees International Union)⁵⁹—has an ambitious goal of securing a \$15 minimum wage for fast-food workers and is also seeking to unionize.⁶⁰ The biggest battlegrounds for the Fight for 15 are big cities, where the cost of living is much higher than the rest of the country.⁶¹ The movement has had huge success. The movement and allies have persuaded Seattle, San Francisco, Los Angeles, and New York to adopt a \$15 minimum wage; Chicago and Kansas City a \$13 minimum wage; and modest increases elsewhere.⁶² The Fight for 15 also seeks to help more than just fast-food workers. The main goal of the Fight for 15 campaign is to turn low-wage work into a national issue, which will help not just fast-food workers, but home-care aides, janitors, nursing-home workers, security guards, school-cafeteria workers, child-care workers, adjunct professors, and millions of other low-wage workers.⁶³ Last spring, in a National Day of Action for the movement, Governor Cuomo, Hillary Clinton, and Bernie Sanders all spoke at a Fight for 15 rally in Times Square, showing support.⁶⁴

C. AN UPHILL BATTLE: ATTEMPTS TO REFORM THE MINIMUM WAGE

Setting the federal minimum wage requires an active congressional vote.⁶⁵ This is easier said than done. Congress has been in a “prolonged period of inactivity” when it comes to not only the minimum wage, but the federal earned income tax credit and spending on programs such as Temporary Assistance to Needy Families (“TANF”) as well.⁶⁶ Perhaps Congress is in denial of its own responsibilities. Former Chairman of the Senate Committee on Health, Education, Labor and Pensions, Tom

⁵⁹ The union has spent more than \$30 million on the campaign. Steven Greenhouse, *How to Get Low-Wage Workers Into the Middle Class*, THE ATLANTIC (Aug. 19, 2015), <http://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540/>.

⁶⁰ *Id.*

⁶¹ Lam, *supra* note 19.

⁶² Greenhouse, *supra* note 59.

⁶³ *Id.*

⁶⁴ Alex Dobuzinskis, *Thousands march for \$15 hourly wages across the United States*, REUTERS (April 14, 2016), <http://www.reuters.com/article/us-usa-wages-protest-idUSKCNOXC04P>.

⁶⁵ Howell, Azizoglu, and Okatenko, *supra* note 13, at 7.

⁶⁶ Glenn Beamer, *Living Wage Politics in the U.S. States: Understanding Race, Labor, and Party Politics*, at 1, Paper prepared for the Annual Meeting of the American Political Science Association, August 29-September 2, 2013, Chicago, Illinois.

Harkin, was advised by the Congressional Budget Office that raising the minimum wage is Congress' responsibility. At a question and answer session following a hearing on the minimum wage conducted by that committee, the Congressional Budget Office stated, "whether the overall benefits of increasing the minimum wage outweigh the costs is a question for policymakers to decide." When later questioned by then-Ranking Member Lamar Alexander (now current Chairman) if raising the minimum wage would be an effective tool to combat poverty, the Congressional Budget Office again reiterated, "whether raising the minimum wage is an effective tool to combat poverty is a question for policymakers to decide."⁶⁷ Congress has simply failed to follow through.

1. RECENT CONGRESSIONAL ATTEMPTS THAT ARE NOW A DISTANT MEMORY—RAISE THE WAGE ACT (THE \$12 MEASURE) & THE PAY WORKERS A LIVING WAGE ACT (THE \$15 MEASURE)

In April 2015, the Raise the Wage Act⁶⁸ was introduced by Senator Patty Murray (D-Wash.)⁶⁹ and Representative Bobby C. Scott (D-Va.)⁷⁰ which would provide for an increase in the federal minimum wage from \$7.25 per hour to \$12 per hour by 2020 in five steps. First, the proposed legislation would raise the minimum wage to \$8.00 per hour beginning the first day of the third month that begins after the date of enactment of the Raise the Wage Act.⁷¹ During the next four years, the minimum wage would increase by \$1.00 each year ending at \$12 per hour beginning four years after enactment.⁷² Beginning five years after enactment, the minimum wage would be determined by the Labor Secretary and must be based on the median hourly wage of all employees determined by the Bureau of Labor Statistics.⁷³ It would also repeal the separate tipped minimum wage, which has remained at \$2.13 per hour since 1991.⁷⁴ Murray championed, "[h]ere in Congress, I believe we need to act to give

⁶⁷ CONG. BUDGET OFFICE, *Answers to Questions for the Record Following a Hearing on the Minimum Wage Conducted by the Senate Committee on Health, Education, Labor, and Pensions*, at 5 (May 2014).

⁶⁸ Raise the Wage Act, S. 1150, 114th Cong. (2015).

⁶⁹ The ranking Democrat on the Health, Education, Labor and Pensions Committee. Chris Opfer, *Sen. Murray Touts 'Worker Security' Agenda*, Employment Discrimination Report, BLOOMBERG BNA (Aug. 2015).

⁷⁰ The ranking Democrat on the House Education and the Workforce Committee. Chris Opfer, *Sanders, Democrats Unveil \$15 Minimum Wage Measure*, Labor Relations Week, BLOOMBERG BNA (July 2015).

⁷¹ Raise the Wage Act, *supra* note 68, at 2.

⁷² *Id.* at 2.

⁷³ *Id.* at 2-3.

⁷⁴ *Id.* at 4-5.

workers some much needed relief.”⁷⁵ The bill has not moved through Congress since its Senate introduction on April 30, 2015.⁷⁶ Analyzing this proposed legislation, the Economic Policy Institute found that raising the federal minimum wage to \$12 per hour by 2020 would provide 35.1 million of the lowest-paid workers in America with a “small yet long overdue” improvement in their standard of living.⁷⁷ Annual earnings for a full-time minimum wage worker would rise by \$9,500 if the federal minimum wage was increased to \$12 per hour.⁷⁸ And base annual earnings for a full-time tipped worker currently earning \$2.13 per hour would increase by \$19,740 to \$24,000, enough to lift a family of three out of poverty.⁷⁹ But little is likely to happen in the current Republican-controlled Congress.

Democratic Senator Bernie Sanders from Vermont and Democratic Representative Keith Ellison from Minnesota introduced the Pay Workers a Living Wage Act in July 2015. The legislation would increase the minimum wage to \$15 per hour over the course of a four-year phase-in schedule that is more aggressive than the Raise the Wage Act.⁸⁰ The Pay Workers a Living Wage Act would automatically raise the minimum wage to \$9 per hour upon enactment.⁸¹ For the next four years, the minimum wage would increase by \$1.50 each year until it reaches \$15.00 per hour four years after enactment.⁸² Years thereafter would follow the same procedure as the Raise the Wage Act. Each year, the Labor Secretary would determine the minimum wage amount based on the median hourly wage of all employees.⁸³ In November 2015, the legislation was referred to the Subcommittee on Workforce Protections. This measure, like the Raise the Wage Act, is unlikely to reappear in the Republican-controlled Congress.

⁷⁵ Opfer, *supra* note 69.

⁷⁶ *Id.*

⁷⁷ Smith, *supra* note 20.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Pay Workers a Living Wage Act, S. 1832, 114th Cong. (2015); Chris Opfer, *Democrats Unanimously Back \$15 Minimum Wage*, Daily Labor Report, BLOOMBERG BNA (Aug. 2015).

⁸¹ Pay Workers a Living Wage Act, S. 1832, 114th Cong. (2015).

⁸² *Id.*

⁸³ *Id.*

2. FORMER PRESIDENT OBAMA—WELL-INTENTIONED GESTURES BUT ULTIMATELY INEFFECTIVE

Former President Obama called income inequality “the defining challenge of our time” and a violation of “middle-class America’s basic bargain that if you work hard, you have a chance to get ahead.”⁸⁴ Despite the political popularity of minimum wage, not much was done in Obama’s administration to raise the federal minimum wage. In his 2013 State of the Union address, former President Obama called on local governments to raise pay floors but did not succeed in urging Congress to do the same.⁸⁵ Former President Obama did manage to issue Executive Order 13,658 in February 2014 to establish a minimum wage for federal contractors.⁸⁶ In compliance with this Executive Order, the Department of Labor announced that federal contractors would have to pay their employees working on federal contracts at least \$10.15 per hour beginning January 2016 and tipped employees working on federal contracts would have to be paid at least \$5.85 per hour.⁸⁷ This small step, although positive politically and advantageous for a small group of workers, was simply not enough and will likely be undone by President Trump. In his final State of the Union address in January 2016, former President Obama challenged Congress and vowed that he would continue to push to raise the minimum pay floor to \$10.10 per hour.⁸⁸ His “pushes” were ultimately ineffective. Any previous congressional or executive work toward a raise to the federal minimum wage will not be recognized under the new Trump administration.

3. PRESIDENT TRUMP—THE DEATH KNELL TO ANY ATTEMPT TO RAISE THE FEDERAL MINIMUM WAGE

During the campaign, Donald Trump flopped his position on minimum wage more than a few times. At one point, he maintained that the minimum wage should be low to compete with other countries but did

⁸⁴ Rogers, *supra* note 52, at 1544.

⁸⁵ Chris Opfer, *Cities, States Move on Minimum Wage, Sick Leave*, Daily Labor Report, BLOOMBERG BNA (Aug. 2015).

⁸⁶ Proclamation No. 179, 80 Fed. Reg. 13658 (Sept. 16, 2015).

⁸⁷ *Federal Contractor Minimum Wage Rising to \$10.15 an Hour*, Daily Labor Report, BLOOMBERG BNA (Sept. 2015).

⁸⁸ Chris Opfer, *Obama Looks to Future, Touts Past Worker Proposals*, Construction Labor Report, BLOOMBERG BNA (Jan. 2016); Michelle Ye Hee Lee, *Obama’s claim that raising the minimum wage helps low-wage workers ‘make ends meet,’* WASHINGTON POST (Feb. 2, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/02/02/obamas-claim-that-raising-the-minimum-wage-helps-low-wage-workers-make-ends-meet/>

not specify how low.⁸⁹ At another point, he declared that he would like to see an increase “of some magnitude” in the federal minimum wage because “[he does not] know how people make it on \$7.25 an hour.”⁹⁰ But shortly thereafter, he ultimately passed the buck off to state governments.⁹¹ Pressed on the changes in stance, he told ABC’s George Stephanopoulos that his “real minimum wage is going to be – I’m going to bring companies back into this country and they’re going to make a lot more than the \$15 even, they’re going to make a lot more than that.”⁹² Since Donald Trump’s election this past November, it is still unclear what his stance on minimum wage is but there are some definite signals towards inaction given the withdrawal of his first Labor Secretary Pick, Andy Puzder, and his most recent pick, R. Alexander Acosta.

President Trump originally picked Andy Puzder, a fast-food CEO,⁹³ as Labor Secretary of the Department of Labor. Puzder’s background led to staunch opposition by Democrats, most audibly Senator Patty Murray and the National Employment Law Project. Senator Patty Murray, the Ranking Member of the Senate Health, Education, Labor and Pensions Committee met with Puzder, whom she called “uniquely unqualified,”⁹⁴ shortly after his nomination to “make sure the voice and priorities [of working families] are heard loud and clear as [Congress] head[s] into the hearing process on his nomination.”⁹⁵ After looking at Puzder’s record, Senator Murray found it “evident that [he had] benefited from an economy rigged against workers, and that his policies and philosophy would [have made] the challenges working families face today even worse. Democrats were concerned over the pick because Puzder “oppose[d] raising the minimum wage, threaten[ed] to replace restaurant workers with machines,

⁸⁹ Michelle Ye Hee Lee, *Obama’s claim that raising the minimum wage helps low-wage workers ‘make ends meet,’* WASHINGTON POST (Feb. 2, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/02/02/obamas-claim-that-raising-the-minimum-wage-helps-low-wage-workers-make-ends-meet/>.

⁹⁰ David Lawder and Lindsay Dunsmuir, *Trump changes tune on tax hikes for wealthy Americans*, REUTERS (May 9, 2016).

⁹¹ *Id.*; Louis Jacobson, *Donald Trump gets a Full Flop for stance on minimum wage*, POLITIFACT (July 28, 2016).

⁹² Eric Bradner and David Wright, *How Trump clarified his position on taxing the wealthy*, CNN (May 9, 2016), <http://www.cnn.com/2016/05/08/politics/donald-trump-tax-es-wealthy/>.

⁹³ Andy Puzder is CEO of CKE Restaurants, which includes fast-food chain establishments like Carl’s Jr. and Hardee’s. Marianne Levine and Cogan Schneier, *Trump chooses Puzder as labor secretary*, POLITICO (Dec. 8, 2016), <http://www.politico.com/blogs/donald-trump-administration/2016/12/andrew-puzder-labor-secretary-trump-232368>.

⁹⁴ Ben Penn, *Puzder Urged to Disclose Labor History Before Confirmation*, Workplace Law Report, BLOOMBERG BNA (Jan. 6, 2017).

⁹⁵ Press Release, U.S. Senate Committee on Health, Education, Labor & Pensions, *Senator Murray on Meeting with Labor Secretary Nominee Andrew Puzder* (Jan. 5, 2017).

[had] consistently opposed long-standing rules that protect workers and law-abiding employers, and demonstrated that he prize[d] corporate welfare and profits over workers' well-being."⁹⁶ While Puzder's confirmation hearing was delayed four times, reports came out that he employed an undocumented housekeeper.⁹⁷ The rising controversy over Puzder's personal life and his track record as a fast-food CEO led six Republicans to withhold their support for him⁹⁸ and ultimately resulted in Puzder withdrawing his nomination.⁹⁹

Less than a day later, Trump announced his new nominee, former National Labor Relations Board member Alexander Acosta.¹⁰⁰ A stark difference from the record of Puzder, Acosta was on the National Labor Relations Board for eight months before former President George W. Bush appointed him as Assistant Attorney General for Civil Rights.¹⁰¹ He then became a U.S. Attorney for the Southern District of Florida and most recently was the law school dean of Florida International University.¹⁰² Democrats and Republicans have reacted favorably, citing Acosta's public service background and his scholarly approach to the law.¹⁰³ His confirmation hearing went smoothly and he told Senators that he would not allow partisan political considerations or conservative ideologues to shape the Labor Department.¹⁰⁴ It remains to be seen what his firm position on minimum wage will be.

II. LEFT WITH NO CHOICE: STATES AND CITIES LEAD THE WAY TO LIVING WAGES

With the prolonged inactivity of Congress, and now the impending death knell of the Trump administration, state and city governments have been and will have to continue to be aggressive in enacting their own minimum wage measures. As of January 2017, 29 states and the District

⁹⁶ *Id.*

⁹⁷ Terrence Dopp, *Four Republicans Withhold Support for Andy Puzder to Head Labor*, Construction Labor Report, BLOOMBERG BNA (Feb. 16, 2017); Ben Penn & Chris Opfer, *Puzder Withdraws as Labor Secretary Nominee*, Pension & Benefits Reporter, BLOOMBERG BNA (Feb. 21, 2017).

⁹⁸ Terrence Dopp, *Four Republicans Withhold Support for Andy Puzder to Head Labor*, Construction Labor Report, BLOOMBERG BNA (Feb. 16, 2017).

⁹⁹ Penn & Opfer, *supra* note 97.

¹⁰⁰ Ben Penn & Chris Opfer, *Trump Taps Ex-NLRB Member Acosta for Labor Secretary*, Union Labor Report, BLOOMBERG BNA (Feb. 24, 2017).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Yamiche Alcindor, *Alexander Acosta, Labor Nominee, Dismisses Concerns over Political Pressure*, N.Y. TIMES (Mar. 22, 2017).

of Columbia have a minimum wage that is higher than the federal rate.¹⁰⁵ Just recently, nineteen states raised their minimum wages on January 1, with some increases as high as \$1.95 more per hour.¹⁰⁶ In twelve of those states, the minimum wage is adjusted automatically each year with inflation,¹⁰⁷ and in four more, plus the District of Columbia, future increases have already been legislated.¹⁰⁸ About half of all of the workers in the United States live in states where the minimum wage is higher than the federal minimum wage of \$7.25 per hour.¹⁰⁹ The trend of these state and city governments to enact their own minimum wage hikes in order to promote the well-being of their constituents should not go unnoticed. Congress and the Trump administration should take a hint.

A. NEW YORK, OREGON & CALIFORNIA: THREE TRAILBLAZER STATES, THREE NOVEL APPROACHES

To start, Governor Andrew Cuomo announced three increases in the minimum wage in New York that took effect on December 31, 2015.¹¹⁰ Workers in the fast food industry, tipped positions, and all other industries each received a higher wage.¹¹¹ Governor Cuomo also previously raised the minimum wage for state public sector workers to \$15 per hour, the first in the nation to enact a \$15 state public sector minimum wage.¹¹² All of these increases are on a phased-in schedule that allows gradual increases for New York City to 2018 and for the State to 2021.¹¹³ In his biggest, most recent move, Governor Cuomo pushed for and passed a \$15 statewide minimum wage last March that went into effect December 31, 2016 across all industries because “no one who works full-time should

¹⁰⁵ Minimum Wage Laws in the States—January 1, 2017, Wage and Hour Division (WHD), U.S. DEPT. OF LABOR, <http://www.dol.gov/whd/minwage/america.htm>.

¹⁰⁶ Karl Russell, *A Higher Minimum Wage in 2017*, N.Y. TIMES (Jan. 5, 2017), <https://www.nytimes.com/interactive/2017/01/05/business/economy/state-minimum-wages.html>.

¹⁰⁷ Indexed to the Consumer Price Index.

¹⁰⁸ CONG. BUDGET OFFICE, *The Effects of a Minimum-Wage Increase on Employment and Family Income*, at 4 (Feb. 2014).

¹⁰⁹ CONG. BUDGET OFFICE, *Testimony, Increasing the Minimum Wage: Effects on Employment and Family Income*, at 5 (Mar. 2014).

¹¹⁰ Press Release, New York Department of Labor, *Governor Cuomo Announces First Minimum Wage Increase for Fast Food Workers As Result of Wage Board’s Recommendation* (Dec. 30, 2015).

¹¹¹ *Id.* Fast Food Workers in fast food chains will receive \$10.50 per hour in New York City and \$9.75 per hour in the rest of the State. All tipped workers in the hospitality industry (food service workers, service employees) will receive \$7.50 per hour. The overall minimum wage will be increased to \$9 per hour.

¹¹² Press Release, New York Department of Labor, *Governor Cuomo Raises Minimum Wage for State Workers to \$15 Per Hour—Making New York First In Nation to Enact \$15 State Public Sector Minimum Wage* (Nov. 10, 2015)

¹¹³ *Id.*

ever be condemned to a life of poverty” and he was concerned about home health care workers, airport workers, and others being left behind by the current increases.¹¹⁴ But in response to the hiked tipped wages, last year more than 100 restaurant owners around the state signed a letter asking for a five-year tipped wage freeze.¹¹⁵ Many restaurants have had to cut hours, lay off workers, eliminate tips, and replace staff with tablets in order to survive the 50% increase to the tipped wage.¹¹⁶ Using a variety of regulation schemes, New York is a clear leader in minimum wage reform.

Last year, Oregon passed, after a lot of debate, a minimum wage measure that incorporates a six-year plan and raises the minimum wage steadily by 2022 to different levels depending on geography.¹¹⁷ Setting the minimum wage based on geography is a novel approach and first of its kind on the state level. The measure was enacted on July 1, 2016, raising the minimum wage to \$9.75 per hour in urban areas and \$9.50 per hour in lower, rural tiers.¹¹⁸ By 2022, the minimum wage will be maxed out to \$14.75 per hour inside Portland’s urban growth boundary, \$13.25 per hour in midsize counties, and \$12.50 per hour in “frontier” areas.¹¹⁹ Beginning July 1, 2023, the minimum wage will be indexed to inflation based on the Consumer Price Index.¹²⁰

What many see as a political bargain with labor unions, lawmakers in California reached a deal last March to raise the statewide minimum wage to \$10.50 per hour in 2017 and then a gradual increase to \$15 per hour.¹²¹ The legislation incorporates a 50-cent increase in 2018 and then a \$1 per year thereafter.¹²² Recognizing small businesses, the legislation would allow those with fewer than 25 employees an extra year to comply.¹²³ Beyond the first set increases, increases to the minimum wage would be

¹¹⁴ Press Release, New York Department of Labor, *supra* note 112; Jesse McKinley and Vivian Yee, *New York Budget Deal with Higher Minimum Wage Is Reached*, N.Y. TIMES (Mar. 31, 2016), <https://www.nytimes.com/2016/04/01/nyregion/new-york-budget-deal-with-higher-minimum-wage-is-reached.html>.

¹¹⁵ John Herzfeld, *New York Restaurants Seek Five-Year Tipped Wage Freeze*, Daily Labor Report, BLOOMBERG BNA (Jan. 2016).

¹¹⁶ *Id.*

¹¹⁷ Ian K. Kullgren, *Oregon House passes minimum wage hike after turbulent debate, sending it to Kate Brown*, THE OREGONIAN (Feb. 18, 2016), http://www.oregonlive.com/politics/index.ssf/2016/02/oregon_house_passes_minimum_wa.html.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Oregon Minimum Wage Rate Summary*, OREGON GOVERNMENT, <https://www.oregon.gov/boli/WHD/OMW/Pages/Minimum-Wage-Rate-Summary.aspx>

¹²¹ John Myers & Liam Dillon, *Deal reached to boost California’s minimum wage to \$15, avoiding ballot box battle*, L.A. TIMES (Mar. 26, 2016), <http://www.latimes.com/politics/la-pol-sac-minimum-wage-deal-20160326-story.html>.

¹²² *Id.*

¹²³ *Id.*

indexed to inflation but a governor could temporarily block an increase if California is in a state of economic downturn.¹²⁴

B. TRAILBLAZER CITIES

Since 2012, at least 31 cities and counties have approved minimum wages above the federal standard.¹²⁵ Before 2012, only a few local governments had enacted minimum wage measures.¹²⁶ Cities including Los Angeles, Seattle, and San Francisco are set to phase in a \$15 minimum wage in the coming years.¹²⁷ The Los Angeles City Council voted last June to approve a citywide minimum wage increase that would bring the pay floor to \$15 per hour by 2020.¹²⁸ Once delivered to Mayor Eric Garcetti for signature, he affirmed that for the City of Los Angeles, this would be a historic moment because the “minimum wage will no longer be a poverty wage in Los Angeles.” The city, over nine months of deliberation and planning, set the ordinance to raise the minimum wage to \$10.50 per hour immediately and to steadily increase each year until \$15 per hour is achieved in 2020.¹²⁹ Small businesses and certain nonprofits will be given an extra year to phase in the wage increase.¹³⁰ In New York City, Mayor Bill de Blasio announced that the minimum wage would be raised for city employees to \$15 per hour by the end of 2018.¹³¹ New York City is the country’s largest city to make such a move.

In Birmingham, which was the first city in the South to approve a local minimum wage, things did not go as smoothly. The city of Birmingham wanted to rid the federal minimum wage and raise it to \$10.10 per hour.¹³² The state legislature came in and fought with city leaders about who has the authority to set a wage policy.¹³³ They issued and passed a bill that bars cities and counties from requiring that any employer offer a particular

¹²⁴ *Id.*

¹²⁵ Alan Blinder, *When a State Balks at a City’s Minimum Wage*, N.Y. TIMES (Feb. 21, 2016), <https://www.nytimes.com/2016/02/22/us/alabama-moves-to-halt-pay-law-in-birmingham.html>.

¹²⁶ *Id.*

¹²⁷ Opfer, *supra* note 85.

¹²⁸ David McAfee, *Los Angeles City Council Oks Measure Raising Minimum Wage to \$15 by 2020*, Human Resources Report, BLOOMBERG BNA (Jun. 2015).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Adam Sege, *NYC Municipal Workers To Have \$15 Minimum Wage By 2018*, LAW 360 (Jan. 6, 2016), <https://www.law360.com/articles/743428/nyc-municipal-workers-to-have-15-minimum-wage-by-2018>.

¹³² Blinder, *supra* note 125.

¹³³ *Id.*

wage that is not required by state or federal law.¹³⁴ The fight between the state and the city quickly became a racially charged one. An all-white majority of the state legislature along with the state's white governor pushed this bill against the will of the majority-black city of Birmingham.¹³⁵ As a result, the Alabama NAACP filed a federal civil rights lawsuit, which was later dismissed, asserting that the bill violated the Equal Protection clause of the U.S. Constitution.¹³⁶ Alabama is not the first state to block local governments from establishing pay requirements—more than a dozen states have.¹³⁷ Largely unnoticed, North Carolina snuck in a similar provision blocking local minimum wage provisions but hid it within the controversial HB2 legislation package that restricted transgender people from using public, multiple occupancy bathrooms designed for people of the opposite “biological” gender.¹³⁸ Inconsistency or not, the fight between city and state governments has revealed to be one with racial overtones and party politics.

With a particular look at Seattle, the first major city to adopt the \$15 standard in June 2014,¹³⁹ some additional consequences of raising the minimum wage comes to light. The raise in the minimum wage quickly drew litigation. The International Franchise Association sued the City of Seattle to temporarily halt it from treating certain franchisees as “large employers” under the city ordinance, which raised the local minimum wage to \$15 per hour through multiple steps over the course of five years.¹⁴⁰ Under the 2014 ordinance, businesses classified as “large” must start paying at least \$15 per hour by January 1, 2017 while small businesses have until January 1, 2021.¹⁴¹ A federal district court denied the franchise association's motion for preliminary injunction, which was later affirmed by the Ninth Circuit because the franchise association failed to show likelihood of success on the merits and also failed to show that a preliminary injunction was in the public interest.¹⁴² The International

¹³⁴ *Id.*; Teresa Tritch, *Birmingham Fights Back on the Minimum Wage*, N.Y. TIMES (May 2, 2016), <https://takingnote.blogs.nytimes.com/2016/05/02/birmingham-fights-back-on-the-minimum-wage>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Jacob Gershman, *North Carolina 'Bathroom Law' Also Limits Minimum Wage Hikes*, WALL ST. J. L. BLOG (Apr. 20, 2016).

¹³⁹ James Nash, *West Coast Businesses Grapple With \$15 Minimum Wage*, Daily Labor Report, BLOOMBERG BNA (Sept. 2015).

¹⁴⁰ Kevin McGowan, *Franchisees Lose Bid to Slow Seattle Minimum Wage Law*, Daily Labor Report, BLOOMBERG BNA (Sept. 2015).

¹⁴¹ Jeff Zalesin, *Franchises Ask Justices To Take Up Seattle Wage Hike Row*, LAW360 (Jan. 26, 2016), <https://www.law360.com/articles/750775/franchises-ask-justices-to-take-up-seattle-wage-hike-row>.

¹⁴² *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015).

Franchise Association submitted a petition for certiorari to the U.S. Supreme Court arguing that the Ninth Circuit created a circuit split when it allowed the City of Seattle to mandate the implementation of the new minimum wage onto franchisees earlier than independent, small businesses.¹⁴³ That petition was denied review by the U.S. Supreme Court on May 2, 2016.¹⁴⁴

III. EFFECTS AND CONSEQUENCES OF MINIMUM WAGE REFORM ON BUSINESSES

A. THE COST TO COMPLY

It is important to recognize that although minimum wage reform is needed, there are associated costs that businesses must absorb in order to comply with new minimum wage standards. This is an evident concern among the trailblazer states and cities. Each has strategic components built in to their minimum wage legislation that aid business compliance. Whether it is a phase-in schedule or giving small businesses extra time to comply, the trailblazer states and cities have recognized that there is a cost to consider when raising the minimum wage. Some businesses will reduce labor costs by delaying hiring, delaying expansion, reducing hours, or reducing benefits.¹⁴⁵ Others will make up the costs by deferring capital investment or repairs, cutting back on investments in workplace safety, or hiring skilled rather than unskilled workers.¹⁴⁶

Raising the minimum wage will have an inordinate impact on small businesses, which employ nearly half of America's private sector workforce.¹⁴⁷ Small businesses in small towns will feel these costs more intensely. For comparison, in New York City, the proposed increase of \$15 per hour for fast food workers pales in comparison to the increase in the rest of the state where the new \$15 per hour minimum wage will take effect in 2021.¹⁴⁸ In some New York locales, like Binghamton, Buffalo, and Utica, the minimum wage hike could raise the current wage an

¹⁴³ Zalesin, *supra* note 141.

¹⁴⁴ Int'l Franchise Assoc., et al. v. Seattle, WA, et al, 15-958, *cert. denied*, 578 U.S. ___ (May 2, 2016).

¹⁴⁵ Rogers, *supra* note 52, at 1582.

¹⁴⁶ *Id.*

¹⁴⁷ Uccilia Wang, *What a \$15 Minimum Wage Means for U.S. Small Businesses*, THE GUARDIAN (Apr. 15, 2015), <https://www.theguardian.com/business/2015/apr/15/what-a-15-minimum-wage-means-for-us-small-businesses>.

¹⁴⁸ Noam Scheiber, *Raising Floor for Minimum Wage Pushes Economy Into the Unknown*, N.Y. TIMES (July 26, 2015), <https://www.nytimes.com/2015/07/27/business/economy/scale-of-minimum-wage-rise-has-experts-guessing-at-effect.html>.

additional 75% or more—an increase of a huge magnitude on a small business.¹⁴⁹ A Subway franchisee in Albany says labor accounts for 50% or more of her total costs.¹⁵⁰ Larger cities, more expensive cities, like New York City, San Francisco, or Los Angeles are better equipped to swallow this cost because wage is a much smaller part of their overall costs with high rents being a part of their reality.¹⁵¹

Business groups and associations have attempted to ease the pain for small businesses. As mentioned before, the International Franchise Association attempted to protect and defend small business owners in Seattle by requesting a preliminary injunction to halt application of the city's \$15 minimum wage ordinance to franchisees.¹⁵² The claim was centered on the ordinance being discriminatory and unconstitutional as applied to franchisee owners. The Ninth Circuit denied this request but the Eleventh Circuit made the opposite ruling in a similar case and found local restrictions on franchises as unconstitutional under the Commerce Clause.¹⁵³ When looking at the Seattle ordinance, protections for small businesses have been built in by having two schedules for compliance: one for large employers and one for small employers. But the ordinance considers franchisees affiliated with “large networks” as large employers.¹⁵⁴ The definition of what constitutes a small or large business is obviously important when crafting these minimum wage proposals.

B. CASE EXAMPLE: RESTAURANTS AND TIPPED EMPLOYEES

The restaurant industry provides a good case example because the industry is a major employer of low-wage labor—the largest employer of workers at or near the minimum wage.¹⁵⁵ In 2011, the United States restaurant industry employed nearly 9 million workers.¹⁵⁶ A Department of Labor report showed that by occupation, half of all workers paid at or below the minimum wage (50.2%) were employed in food preparation and

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² McGowan, *supra* note 140.

¹⁵³ *Cachia v. Islamorada*, 542 F.3d 839 (11th Cir. 2008).

¹⁵⁴ McGowan, *supra* note 140.

¹⁵⁵ Daniel Aaronson, Eric French, & James MacDonald, *The Minimum Wage, Restaurant Prices, and Labor Market Structure*, 43(3) J. HUMAN RES. 688, 690 (Summer 2008); William E. Even & David A. MacPherson, *The Effect of the Tipped Minimum Wage on Employees in the U.S. Restaurant Industry*, 80(3) S. ECON. J. 633, 633 (June 2013) (noting that because of the sheer size of the industry and the number of its workers that are affected by minimum wage laws, most of the studies on earnings and employment effects of minimum wages are centered on the restaurant industry).

¹⁵⁶ Even & MacPherson, *supra* note 155.

serving jobs and may supplement their hourly wages with tips.¹⁵⁷ More than half (57.2%) of workers earning at or below the minimum wage were employed in the leisure and hospitality industry, which includes restaurants and other food services.¹⁵⁸ Most restaurant employees are low-wage workers with the national median wage for food preparation and service workers being \$9.10 per hour.¹⁵⁹ To maintain an adequate level of living, restaurant workers use food stamps at double the rate of other workers.¹⁶⁰

Tipped workers¹⁶¹ are subject to a special arrangement under the federal minimum wage requirements of the FLSA.¹⁶² The regular minimum wage applies to their compensation including tips, and a lower cash minimum wage applies to their compensation excluding tips.¹⁶³ Employers of tipped employees who claim the tip credit must pay their tipped employees the federal minimum hourly wage of \$2.13 per hour.¹⁶⁴ The maximum tip credit against that minimum wage is \$5.12 per hour.¹⁶⁵ If the employee does not receive tips in the amount of \$5.12 per hour, the employer has to make up the difference in order to satisfy the minimum wage requirement of \$7.25 per hour.¹⁶⁶ The tipped minimum wage has remained at \$2.13 per hour since April 1991.¹⁶⁷ However, 27 states currently have a tipped minimum wage above \$2.13 per hour and seven states require employers to pay tipped employees full state minimum wages before tips.¹⁶⁸

Owners and managers of businesses that employ tipped workers have lamented that discussions regarding minimum wage rarely take into

¹⁵⁷ Larry Swisher, *Share of Minimum Wage Workers Fell in 2014 With Rate Unchanged Since 2009*, Daily Labor Report, BLOOMBERG BNA (Apr. 27, 2015).

¹⁵⁸ *Id.*; Rogers, *supra* note 52, at 1579.

¹⁵⁹ Kawika Pierson & Fred Thompson, *Taxation Without Representation? The Political Economy of State Minimum Wage Levels* at 6, Center for Governance and Public Policy Research, Atkinson Graduate School of Management, Willamette University (June 2014).

¹⁶⁰ Statement by Saru Jayaraman, co-director of Restaurant Opportunities Center United. Gayle Cinquegrani, *Minimum Wage Hike Would Help Economy, Employers as Well as Workers, Speakers Say*, Daily Labor Report, BLOOMBERG BNA (Nov. 2015).

¹⁶¹ The Department of Labor defines tipped employee by a minimum amount of tips received. An employee is a tipped employee if they receive at least \$30 monthly in tips. Minimum Wages for Tipped Employees January 1, 2017, Wage and Hour Division (WHD), U.S. DEPT. OF LABOR, <http://www.dol.gov/whd/state/tipped.htm>.

¹⁶² CONG. BUDGET OFFICE, *The Effects of a Minimum-Wage Increase on Employment and Family Income*, at 4 (Feb. 2014).

¹⁶³ *Id.*

¹⁶⁴ U.S. DEPT. OF LABOR, *supra* note 161.

¹⁶⁵ *Id.*

¹⁶⁶ Even & MacPherson, *supra* note 155, at 633.

¹⁶⁷ U.S. DEPT. OF LABOR, *supra* note 161.

¹⁶⁸ *Id.*

consideration the effect on tipped employees. Karen Heisler, co-owner of Mission Pie Bakery in San Francisco, California put it succinctly:

My concern is that the minimum wage increase doesn't consider the disparity in businesses that have tips and commissioned employees. It's a pitiful aspect of the food industry that there's a pay hierarchy. I think it's hard for people to understand that. Our business is dedicated to providing high quality food at as low a price as we can, but we won't have room to achieve that. The most expensive meal on the menu is \$8.50, a stew with vegetables and rice. Raising the minimum wage will have a huge impact, not this year but ultimately. It will probably require us to hire more experienced and skillful people. We will see a decrease in the number of businesses in the 20-employee range because it's becoming impossible to make it because of the cost of operation.¹⁶⁹

Taking these matters into their own hands, Aunt Mary's Café in Oakland, California instituted a 15% service charge, 60% of which goes to the servers, while 40% goes to the kitchen crew. At the cash register, an additional 3-5% tip is suggested that will go only to your server if you are happy with the service. Starla Garvey, the manager at Aunt Mary's Café, reiterated this reasoning:

I support raising the minimum wage. But the overhead costs has gone up because people in your supply chain have raised their prices in response to the new minimum wage. How can small businesses cover the cost? If we raise the minimum wage often, then we will soon be having \$20 fried chicken . . . What we would like to do is to raise our prices and do away with tips.¹⁷⁰

What is clear is that business owners recognize the need for an increased minimum wage but for those businesses that employ tipped workers, compliance can truly be a struggle.

¹⁶⁹ Wang, *supra* note 147.

¹⁷⁰ *Id.*

C. *FORCED TO BE CREATIVE IN ORDER TO SURVIVE:
INDUSTRY EXPERIMENTATION*

Although there is a mass amount of research on the impact and effects of the minimum wage on employment, there is a scant amount of research about how small businesses react to a raised minimum wage.¹⁷¹ Since small businesses employ nearly half of America's private sector,¹⁷² this gap in research should be on the radar of policymakers and industry insiders. Craig R. Everett of Pepperdine University, in response to this gap, conducted a survey in association with Dun & Bradstreet Credibility Corporation in the second quarter of 2014.¹⁷³ For those companies that indicated that they employ minimum wage workers, they were posed the question, "If there is an increase in the minimum wage, how will you pay for the increase in wages?" and then were given 8 options to rank.¹⁷⁴ These options were: 1) reduction in costs elsewhere; 2) increase prices to my customers; 3) lay-off employees; 4) reduction in employee hours; 5) reduction in profits to owners/investors; 6) reduction in community/charitable giving; 7) labor cost increase will be offset by a productivity increase; and 8) wage increase will be funded by the increase in worker productivity.¹⁷⁵ The majority of small businesses intended to pass the additional costs to their customers by raising prices before resorting to an option that would affect employees.¹⁷⁶

But some small businesses have no choice but to make decisions that will affect employees. This is especially true for West Coast businesses, the first in having to comply with steep \$15 minimum wage laws. They are dealing with higher labor costs by experimenting with no-tip policies, employee ownership, and trimming part-timers' hours by working longer themselves.¹⁷⁷ For a typical restaurant on the West Coast, for example, the higher minimum wage represents an 8% increase in total costs.¹⁷⁸ In the regions of the country that have low minimum wages, businesses are taking action themselves and raising their own internal minimum wages in order to retain employees and reduce the loss of quality employees to local competition.

¹⁷¹ Craig R. Everett, *How Do Small Businesses Pay for a Minimum Wage Increase?*, 3 *ECON. & FIN. REV.* 1 (June 2014).

¹⁷² Wang, *supra* note 147.

¹⁷³ Everett, *supra* note 171.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Nash, *supra* note 139.

¹⁷⁸ *Id.*

1. NO-TIPPING-ALLOWED POLICIES

Some restaurants have cut out tips altogether in order to manage the rising labor costs.¹⁷⁹ Workers are mostly supportive of this radical approach because many of them argue that the culture of tipping undermines social equality by leaving their wages subject to the discretion of a customer rather than requiring restaurants to pay workers a living wage.¹⁸⁰ This can be difficult for consumers to adjust to since tipping has been a deeply embedded and customary part of our culture.¹⁸¹

Leading the path in banishing tips altogether, Danny Meyer, restaurateur and CEO of Union Square Hospitality Group, made headlines in October 2015 by announcing that tipping in his upscale restaurants in New York City and Chicago would be eliminated and would affect nearly 1,800 employees.¹⁸² Many in the upscale restaurant industry saw the move as radical,¹⁸³ but Danny Meyer defended his “Hospitality Included” model on the basis of equality and justice for all workers.¹⁸⁴ And advantageous for him, after eliminating tips, Modern, one of his restaurants, has been more profitable than ever.¹⁸⁵ Realizing the results of his move, he says: “we . . . now have the ability to compensate for all of our employees equitably, competitively, and professionally. And by eliminating tipping, our employees who want to grow financially and professionally [are] able to earn those opportunities based on the merit of their work.”¹⁸⁶ This has resulted in job applications for kitchen positions at his restaurants increasing by 270% and applications for server positions increasing by

¹⁷⁹ Whitney Filloon, *More Restaurants Are Experimenting With No-Tipping Policies*, EATER (Aug. 24, 2015), <http://www.eater.com/2015/8/24/9199057/restaurants-no-tipping-policy-minimum-wage>.

¹⁸⁰ Paul Wachter, *Why Tip?*, N.Y. TIMES MAG. AT 56 (Oct. 9, 2008) (observing that tipping began as an aristocratic practice and the labor movement opposed it for creating a class of workers who relied on “fawning for favors.”).

¹⁸¹ Matthew Finkin, *The Kindness of Strangers’: The Tip and the Minimum Wage in France, Germany, and the United States*, 32 INT’L J. COMP. LAB. L. & INDUS. REL. 3 (Mar. 2016).

¹⁸² Michael Rose, *Union Square Hospitality Group to Eliminate Tipping*, Daily Labor Report, BLOOMBERG BNA (Oct. 2015).

¹⁸³ Ryan Sutton, *Danny Meyer Is Eliminating All Tipping at His Restaurants*, EATER (Oct. 14, 2015), <http://ny.eater.com/2015/10/14/9517747/danny-meyer-no-tipping-restaurants>. (This is the first time zero-gratuity will be the universal policy for a major American restaurant group.); *see also* Jeff Gordinier, *Danny Meyer’s Team Faces a No-Tipping World*, N. Y. TIMES (Nov. 16, 2015), <https://www.nytimes.com/2015/11/18/dining/danny-meyer-no-tips-the-modern.html>.

¹⁸⁴ Chris Crowley, *One of Danny Meyer’s Restaurants Was More Profitable Than Ever After Eliminating Tips*, GRUB STREET (Mar. 10, 2016), <http://www.grubstreet.com/2016/03/the-modern-profitable-hospitality-included.html>.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

215%.¹⁸⁷ Turnover has been reduced as well.¹⁸⁸ But more importantly, he pointed directly to the failure of wage and hour laws. Noting the collective aspect of his workforce, Meyer is compensating for those that are exempted from collecting tips. Meyer declared:

We believe hospitality is a team sport, and that it takes an entire team to provide you with the experience you have come to expect from us. Unfortunately, many of our colleagues—our cooks, reservationists, and dishwashers to name a few—aren't able to share in our guests' generosity, even though their contributions are just as vital to the outcome of your experience at one of our restaurants.¹⁸⁹

In order to have the servers and others who previously were not tipped employees share in guests' generosity, those employees [are] paid an hourly wage rather than a combination of wages and tips.¹⁹⁰ The company has gone as far as modifying credit card slips to no longer show a gratuity line for customers and eliminating tips to bartenders and coat check attendants.¹⁹¹ And Momofuku founder, David Chang, another celebrity chef/upscale restaurant owner that has banned tipping had similar reasoning and said he made the decision because “we want to pay sous chefs, cooks, and dishwashers a living wage,” recognizing that while inflation has risen, their wages have not.¹⁹²

Apart from these radical moves in the upscale restaurant industry, casual chain restaurants have also done away with tips. The first major chain to banish tipping was Joe's Crab Shack in hopes to reduce server turnover.¹⁹³ Servers are paid a wage that starts at \$14 per hour although it varies based on past performance.¹⁹⁴ This ban on tipping and increase in hourly wages is being paid by a 12-15% increase in prices to consumers.¹⁹⁵ Similarly, in Seattle, Bob Donegan, an owner of Ivar's seafood restaurants, added a 21% service charge to customers' bills and told his customers to

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Rose, *supra* note 182.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*; Gordinier, *supra* note 183.

¹⁹² Alexander C. Kaufman, *Momofuku Founder David Chang Banned Tipping At His New Restaurant*, THE HUFFINGTON POST (Jan. 10, 2016), http://www.huffingtonpost.com/entry/momofuku-nishi-tipping_us_5692b9e8e4b0cad15e65343d.

¹⁹³ Peter Romeo, *Joe's Crab Shack Chain Tries No-Tipping*, RESTAURANT BUSINESS (Nov. 9, 2015), <http://www.restaurantbusinessonline.com/news/joe-s-crab-shack-chain-tries-no-tipping>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

stop tipping in order to comply with the new \$15 minimum wage. Frustrated with having to take drastic measures in order to survive, Donegan relayed that “[they] wouldn’t have done this if the city wouldn’t have caused \$15 an hour to happen.”¹⁹⁶

2. RAISING WAGES THEMSELVES

Recently, multiple companies have decided to raise their internal minimum wage to improve employee retention, attract stronger applicants, and reduce staff turnover. In fact, nearly half of all businesses raised workers’ wages and salaries just in the last quarter of 2015.¹⁹⁷ Some say this was in response to an increasingly tight labor market and others say it was in response to mounting pressure from labor groups and politicians.¹⁹⁸ Companies that have raised their minimum wages include: Facebook,¹⁹⁹ Nationwide Mutual Insurance Company,²⁰⁰ IKEA,²⁰¹ Wal-Mart,²⁰² TJX Cos. (the parent company of T.J. Maxx and Marshalls),²⁰³ Target Corp.,²⁰⁴ Ross Stores Inc.,²⁰⁵ and McDonald’s.²⁰⁶ Once an industry leader decides to raise its internal minimum wage, competitors are forced to follow in a domino-like effect in order to retain their workers.²⁰⁷ IKEA disclosed that they use the Massachusetts Institute of Technology Living Wage Calculator, to determine wage rates and adjusts them at individual stores as needed in order to stay competitive.²⁰⁸ Shake Shack announced that it is working to raise hourly pay in all major urban markets in anticipation of pending wage hikes from city governments. The CEO, Randy Garutti

¹⁹⁶ Nash, *supra* note 139; Filloon, *supra* note 179.

¹⁹⁷ Larry Swisher, *Half of Businesses Raise Wages, Most in 15 Years*, Daily Labor Report, BLOOMBERG BNA (Jan. 25, 2016).

¹⁹⁸ Claire Boston, *IKEA Raising Its U.S. Minimum Wage to \$11.87 in Move to Retain Workforce*, Daily Labor Report, BLOOMBERG BNA (June 2015).

¹⁹⁹ Meenal Vamburkar, *Facebook Boosts Minimum Wage, Benefits for Its Contract Workers*, Daily Labor Report, BLOOMBERG BNA (May 2015).

²⁰⁰ Katherine Chiglinsky, *Nationwide Lifts Minimum Pay to \$15 an Hour*, Daily Labor Report, BLOOMBERG BNA (Sept. 2015) (Gale King, chief administrative officer for Nationwide stating that the move “aligns with [their] values” and that the change would have a “significant and positive impact on [their] business and [their] associates”).

²⁰¹ Boston, *supra* note 198 (The chief financial officer of IKEA’s U.S. unit: “Every year we evaluate our wage structure . . . it’s about doing the right thing for our co-workers.”).

²⁰² Shannon Pettypiece, *Wal-Mart Cuts Some Hours After Pay Raise Boosts Costs*, Daily Labor Report, BLOOMBERG BNA (Aug. 2015).

²⁰³ Boston, *supra* note 198.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* (In an effort to keep employees from moving to competitors that have boosted pay recently.).

²⁰⁸ *Id.*

noting: “[w]e know \$12, \$13, \$15 an hour is coming, we’re going to do it now and get ahead of the curve.”²⁰⁹ Or take the owner of Buz and Ned’s—a barbecue joint in Richmond, Virginia, for example. The owner has observed that with the federal minimum wage not being a living wage, he has troubles keeping qualified kitchen talent and often sees his employees holding one or two other jobs just to make ends meet.²¹⁰ He asks, “How do you attract and keep good employees who can’t afford to feed their family?”²¹¹ So he took matters into his own hands and raised pay at his two restaurants to \$12.50 per hour and \$8 per hour for servers who accept tips.²¹² He also provides full-time employees with health care benefits, offers discounted meals to all employees, and gives paid vacation after one year of service.²¹³ With this, he has seen better morale, increased productivity, and reduced turnover.²¹⁴

3. OTHER MEANS

Other businesses have used a variety of other means to remain competitive and comply with new minimum wage laws. In Oakland, a business owner of a Chinatown restaurant said he will make some employees partners in the business but their take-home pay could drop below minimum wage if profits are low a particular month.²¹⁵ Other numerous businesses are utilizing technology to reduce labor costs.²¹⁶ Lloyd Monaco, the owner of Our Town Car Wash in Orangeburg, New York laments that “fifteen is a big number,” and asks “for me to pay a wiper \$15 an hour, do you know what I’d have to charge for a car wash?”²¹⁷ He references what his competition has done to handle the increase—“they’re putting in automatic gates and more drying systems so they have no more labor.”²¹⁸ Others worry about the effect it will have on

²⁰⁹ Rainey, *supra* note 47.

²¹⁰ Buz Grossberg, *Buz and Ned’s: Real Barbecue, Fair Wages*, U.S. DEPARTMENT OF LABOR BLOG (Oct. 3, 2015), <https://blog.dol.gov/2015/10/03/buz-and-ned%E2%80%99s-real-barbecue-fair-wages>.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Nash, *supra* note 139.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁷ Peter D. Kramer, *Businesses fear ripple effect from minimum-wage hike*, USA TODAY (Sept. 7, 2015), <http://www.usatoday.com/story/money/business/2015/09/05/businesses-fe-ar-ripple-effect-minimum-wage-hike/71796178/>.

²¹⁸ *Id.*

²¹⁸ *Id.*

entry-level work. Jane McGinn, owner of Sweet Jane’s frozen desserts in Astoria, New York:

At this point, as a startup, [a \$15 minimum wage] would put me out of business. It would also hurt my employees. Right now, my workers are all high school kids who are cutting their teeth on their first jobs. If the minimum wage went to \$15, I would have to hire someone with management experience, which would take the kids out of the running.²¹⁹

Or a Venice, California-based coffee shop owner worrying that she may have to shut down her business:

Labor is 30% of my overhead. A 50% increase in minimum wage would raise it to 45%. It’s already tough to offer a business to the community and keep my head above the water. Honestly, I’d go under with that kind of increase. For most this is a first time job—they come to me with no experience. Others make tips which supplements their wage.²²⁰

Regardless of the size of the business, business owners and managers are forced to adapt creatively in order to comply with increased minimum wages and to survive in the market. These decisions vary widely, leaving workers across the country with mixed standards of living. If the federal minimum wage was adequate, standards of living for workers would be more consistent across the country and small businesses could focus on thriving, not just surviving. This nationwide inconsistency is hardly what the federal government should allow. If it wanted to, the federal government could easily provide reprieve to this chaos by reforming the federal minimum wage.

IV. PROPOSED SOLUTIONS: REFORM MINIMUM WAGE WHILE AIDING COMPLIANCE

Although state-wide and city-wide reforms are admirable and do help, they cannot achieve what a federal minimum wage can across the board in terms of reducing poverty among the working poor and ensuring compliance among businesses. We currently have a vast and varied patchwork of minimum wage laws that ultimately lead to “unhealthy

²¹⁹ Wang, *supra* note 147.

²²⁰ *Id.*

imbalances in the collection and distribution of taxes.”²²¹ There clearly needs to be a uniform federal standard to promote consistency and to insure a minimum standard of living for all workers that the FLSA was originally intended to serve.

A. PHASE-IN SCHEDULES

As mentioned *supra*, many state and city ordinances have built in phase-in schedules for all businesses and some have even implemented separate phase-in schedules for small businesses. All of the trailblazer jurisdictions mentioned earlier that have high \$15 minimum wages have phase-in schedules over several years.²²² The president of the Washington Restaurant Association confirmed that the two-year phase-in is helping and that most businesses are able to absorb the cost and raise prices steadily to compensate for the increased labor cost over time.²²³ But some small businesses that are exempt from having to comply with a minimum wage law are still forced to raise their wages from a competitive standpoint. Take for example, Anthony Ripani, owner of Calabria Restaurant in Orangeburg, New York who is worried about the ripple effect of the new \$15 minimum wage in the state.²²⁴ Even though he is not required to pay \$15 per hour because he has too few employees, he’ll be forced to increase his wages internally anyhow to retain his cooks and dishwashers.²²⁵ So perhaps what would suit best for all businesses instead of separate phase-in schedules for small business are longer, more lenient phase-in schedules for all, regardless of size or number of employees.

B. ACCOUNTING FOR INFLATION THROUGH INDEXING

It is imperative that the minimum wage be indexed. Over time, minimum wage has not kept up with inflation and is outdated by almost 40 years. Congress sets the minimum wage and must continually reset it with a vote, but with Congress miring itself in federal gridlock and party politics, this is not a viable option. An automatic increase to the minimum

²²¹ “The federal government tends to collect more tax revenue from states with higher minimum wages and send more in federal aid to states with low minimum wages, a transfer that becomes increasingly lopsided without a single, robust federal minimum wage.” The Editorial Board, *What Donald Trump Doesn’t Get About the Minimum Wage*, N.Y. TIMES (Jan. 2, 2017), <https://www.nytimes.com/2017/01/02/opinion/what-donald-trump-doesnt-get-about-the-minimum-wage.html>.

²²² Nash, *supra* note 139.

²²³ *Id.*

²²⁴ Kramer, *supra* note 217.

²²⁵ *Id.*

²²⁵ *Id.*

wage must be built into legislation allowing for annual increases through indexing.

There are other areas of legislation that use an index to inflation such as social security payments, federal pensions, and union contracts.²²⁶ Minimum wage should be no different. With indexing, the wage's value will not be eroded while waiting for an inept Congress to act again in resetting the minimum wage.²²⁷ The most commonly used index is the cost-of-living allowance that triggers raises in union contracts, social security payments, and home mortgages when the consumer price index increases.²²⁸ Whatever the index, the federal minimum wage should never fail to keep up with inflation.

As of January 2017, 29 states and the District of Columbia have a minimum wage that is higher than the federal rate.²²⁹ In twelve of those states, the minimum wage is adjusted automatically each year with inflation.²³⁰ The federal government should follow suit. Indexing the minimum wage has been unsuccessfully proposed in Congress.²³¹ In fact, a bit of progress was made when Congress ordered the Minimum Wage Study Commission to analyze indexing as part of the 1977 amendments to the FLSA.²³² The Commission concluded that regular and predictable increases through indexing would be easier for businesses to adjust to than the irregular increases of the current system.²³³ Despite what the Commission found, Congress failed to act. Indexing the minimum wage annually would prevent minimum wages from instantly being devalued by inflation as soon as they are set and finally voted on by Congress.

C. MULTI-MECHANISM SOLUTIONS

The French have been successful at directly raising wages for the bottom of the wage distribution.²³⁴ By legislating a steadily rising minimum wage through their “*salair minimum de croissance*” (SMIC) in 1970, they have raised the living standard of French workers at the bottom of the labor market by guaranteeing them purchasing power and

²²⁶ Quigley, *supra* note 11, at 549-51.

²²⁷ *Id.*

²²⁸ *Id.* at 551; DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 394-95 (1995).

²²⁹ U.S. DEPT. OF LABOR, *supra* note 105.

²³⁰ *Id.*; CONG. BUDGET OFFICE, *Answers to Questions for the Record Following a Hearing on the Minimum Wage Conducted by the Senate Committee on Health, Education, Labor, and Pensions*, at 4 (May 2014).

²³¹ Quigley, *supra* note 11, at 552.

²³² *Id.* at 553.

²³³ *Id.*

²³⁴ Howell, Azizoglu, and Okatenko, *supra* note 13, at 2.

participation in the economy through a raised minimum wage.²³⁵ Within the SMIC lie three mechanisms that show a possible model for the United States to follow: 1) automatic adjustments for changes in the cost of living; 2) automatic increases reflecting a portion of the inflation-adjusted increase in average blue-collar pay; and 3) the “coup de ponce”—discretionary power by the government to set the SMIC at higher levels.²³⁶ Unlikely to follow a European model for anything, the U.S. federal government should at least consider a multi-mechanism scheme as an option.

V. CONCLUSION

Although some state and local governments have been trailblazers in adjusting their minimum wages to “living” wages, this is not enough. A national standard is needed. The former Labor Secretary Thomas Perez even agrees. At an event commemorating the passage of the FLSA, Perez admitted:

[s]tate and local governments have been leaders in [increasing the minimum wage] but we need a national standard. *What you get paid shouldn't depend on where you live.*²³⁷

The federal minimum wage should be focused on economically protecting the working poor and bringing families above the poverty line as the FLSA was originally intended. If this focus was properly applied, our minimum wage would stay in pace with inflation and promote social equality. At the very least, full-time minimum wage work should result in a living wage that keeps one above the poverty line. The federal minimum wage should be robust, uniform, and truly “fair” under the Fair Labor Standards Act.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Cinquegrani, *supra* note 160 (emphasis added).