The Tipping Point

Millions work for less than the minimum wage, but tips make up the difference for many.

BY JACKSON BRAINERD

There's nothing minimum about the efforts to increase workers' wages over the last couple of years. There were 30 minimum wage increases through either legislation or ballot measures between 2013 and 2016. And last year, four state legislatures passed bills, although only Rhode Island's was signed by the governor.

Illinois Representative Will Guzzardi (D) supported the minimum wage increase "to get Illinois' economy moving again and that begins by putting money in workers' pockets," he said.

Representative Will Guzzardi Illinois

But the governor saw things differently, and vetoed the measure, as did the governors in Nevada and New Mexico to similar bills.

Opponents of wage hikes argue they kill jobs and force merchants to slash workers' hours, raise consumers' prices or both.

Thirty states now have higher hourly minimum wages than the federal government's, which remains at $7.25.

Not as Low as Others

The notion of a minimum wage can be misleading, however, because it is by no means the lowest a wage can go. Millions of workers in jobs not covered by federal and state wage and hour laws receive wages below the minimum.

Several state legislatures are turning their attention to three groups of these subminimum wage workers: those who also make tips, young people (including students and apprentices) and individuals whose earnings or productive capacity are impaired by a physical or mental disability.

The federal Fair Labor Standards Act of 1938 regulates employment wages. It sets the national minimum wage along with exemptions that allow certain groups to be paid less than the minimum. States may establish more protective standards than those set by the FLSA, and they can regulate the wages and hours of employees not subject to the federal act. Most states adopt the exemptions in the federal law; therefore, most recent state legislative action on this front has sought to limit exemptions.

Tipped Minimum Wages

The act was amended in 1966 to allow employers to use tip credits, meaning they can pay less than the minimum wage if the employee earns enough in tips to average at least the federal wage of $7.25. This isn't easy to enforce, however.

Workers in occupations that receive tips are largely in the service industry. They include waiters, bartenders, maître d's, taxi drivers, hotel managers and maids, banquet workers, tattoo artists, casino managers and dealers, beauticians and manicurists, tour guides, sommeliers and more. There are roughly 3.3 million of these workers, and 60 percent of them are waiters and waitresses, according to the National Economic Council.

At least eight states have enacted legislation raising tipped wages in the last few years, but fewer have moved to eliminate the use of the credits. Maine residents tried to.

Voters approved a 2016 referendum raising servers' hourly wages from $3.75 to $12 by 2024 and eliminating the tip credit. But waiters didn't want it. They responded by campaigning

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to overturn the results. They said a higher wage would cause customers to tip less and would actually reduce their take-home pay. The Legislature responded during the 2017 session by reversing the tipped wage hike and keeping the tip credit.

Representative
Joel Stetkis
Maine

Maine Representative Joel Stetkis (R) supported the move to repeal the citizen initiative. He says that, although some argued the waiters were exaggerating the impact of eliminating the tip, "I choose to believe those who are telling us that this new law, as we speak, is hurting their families."

Currently, seven states and Guam require employers to pay the full federal minimum wage of $7.25 before tips. Twenty-five states and Washington, D.C., require employers to pay tipped workers somewhere between the federal minimum cash wage, which has remained at $2.13 since 1996 and the state minimum wage. And, finally, 17 states, Puerto Rico and the Virgin Islands require only the federal minimum cash wage.

Proponents of keeping the tip credit claim that it, along with lower wagers, helps keep mom-and-pop stores and restaurants in business and keeps total wages strong for servers who make more than the minimum wage when tips are factored in.

Others who support increasing subminimum wages or eliminating tip credits note that the federal tipped or cash wage of $2.13 has eroded over time, even more than the regular minimum wage, which has been raised several times.

They also point out that tips are an easy target for tax evaders. The IRS estimates that 40 percent of all tips go unreported. This alone has spurred some states to consider eliminating or reducing the tip credit.

Unfortunately, while research into the employment effects of minimum wage increases is voluminous, there is a dearth of insight into the impacts of changing tipped wages. And much of what exists is contradictory.

Sub and Minimum Wages

By the Numbers

$7.25
The federal minimum hourly wage

1996
Year the federal minimum *cash* wage of $2.13 was last set

3.3 million
U.S. workers who make tips

60%
Portion of tip workers who are waiters and waitresses

40%
The portion of tips the IRS estimates goes unreported

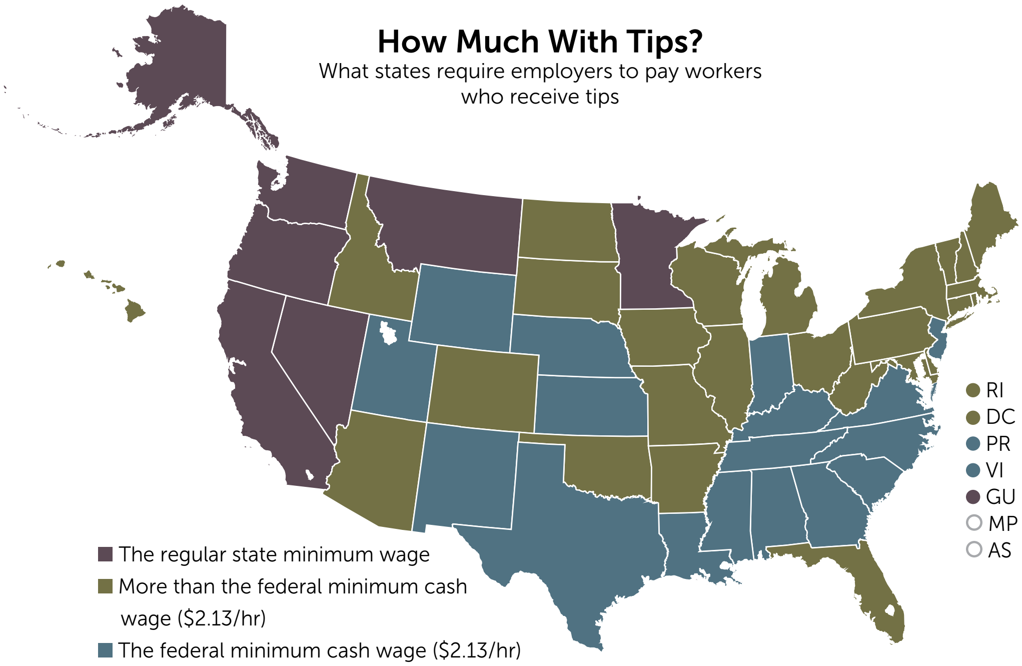
$4.25
The federal youth minimum wage

424,000
Workers with disabilities who are paid subminimum wages

Sources: The National Council on Disability and the National Economic Council

How Much With Tips?

What states require employers to pay workers who receive tips



Source: U.S. Department of Labor, Jan. 1, 2017

CASE STUDIES

Tips Don't Cut It

Many of New Jersey's low-wage workers cheered when the state raised its minimum wage at the beginning of last year. But not Rebecca Fox. For 18 years, the 31-year-old waitress has earned $2.13 per hour, more than $6 an hour less than the state's minimum wage of $8.44 an hour.

Like millions of waiters, bartenders and other workers nationwide, Fox isn't paid the minimum wage because she also earns tips. Federal labor law allows employers to pay such workers a lower wage as long as their total earnings, including tips, add up to at least the minimum wage. If they don't, employers must make up the difference.

Sounds good in theory. But it doesn't always work in practice.

"Let's say your whole night is one big party and that party forgets to tip you for some reason," Fox says. "You're going home with nothing."

Fox waits tables five nights a week. During the day, she assists adults with disabilities at an occupational therapy center, a job that pays just a bit more than the minimum wage. Her husband is a carpenter. But despite working three jobs between them, Fox says the couple, who have one daughter, barely get by.

If she earned a higher tipped minimum wage, Fox says, she could work fewer nights at the diner and spend more time with her family. She would also have a more predictable flow of income. Right now, she can make about $100 a night. "But that's on average," she said. "Some nights I do well, and there are some nights I don't make the minimum wage even with my tips."

—FiveThirtyEight.com

Tips Make All the Difference

Michael Hanson, an accountant and experienced part-time waiter in South Portland, Maine, isn't against raising the minimum wage. But when Mainers voted in 2016 to raise the state's minimum from $7.50 to $12 by 2020, they also eliminated the tip credit.

That's when it got personal.

Hanson says he has averaged about $44,000 a year over the last six years in wages from waiting alone, working roughly 30 hours a week (and provided the tax forms to prove it). If paid $12 an hour with no tips, Hanson would make just $18,720 a year from his second job.

"It's less than half of what I normally make," Hanson said. "Some people may still tip, but even if I made another $18,720 in tips, I still wouldn't reach what I was making before."

Hanson and others in the restaurant industry fault the highly politicized lobbying that surrounded the referendum. They also say more lawmakers need to reach out to Maine's food service workers.

"It's bizarre. If you were making a law to help bus drivers, wouldn't you ask bus drivers what they think about it?" Hanson says.

—Bangor Daily News, WCSH-TV

Youth Wages

The FLSA was amended in 1996 to include workers under age 20. It set the subminimum wage for them at $4.25 for the first 90 days of employment. The goal of these lower wages is similar to that of subminimum wages for people with disabilities and is frequently stated in statute: to prevent the curtailment of employment opportunities.

Some economic studies have shown a correlation between higher wages and lower hiring rates for young people. Opponents of minimum wage hikes argue that allowing subminimum wages during summer break creates more jobs for kids, not fewer.

Critics of keeping youth wages so low contend that the practice benefits only large companies with high turnover rates, not small, local businesses. They say such low pay could prevent teens living in low-income communities from earning a sufficient living.

According to the Manhattan Institute, 15 states have adopted the federal youth minimum wage; another 18 states have youth minimums above the federal level or with other restrictions, such as lower age limits for shorter time periods. Nationwide, however, it doesn't appear that employers use the youth minimum wage very often.

The institute's review of Census Bureau data found that, among teenagers between 16 and 19, only "5.2 percent earn between the rate of $4.25 and the federal standard minimum wage of $7.25." And this number is likely inflated as it does not differentiate between workers who earn a youth wage and those earning a subminimum wage for other reasons (tipped employment, for example).

Around the country, in 2017, lawmakers in Maine, Massachusetts, New Hampshire, New York, Oregon and Rhode Island proposed legislation to create a youth minimum wage. In Idaho, they considered increasing the state's current wage, while in Connecticut, legislators debated eliminating the youth wage. None of these proposals passed.

In 2016, voters in South Dakota overturned the creation of a state subminimum wage for workers under age 18, allowing the $4.25 federal youth wage to remain the standard.

Wages for People With Disabilities

Unlike tipped and youth wages, a subminimum wage for people with disabilities was built into the original Fair Labor Standards Act. Section 14(c) permits an employer to pay a worker with a disability less than the minimum wage after receiving a certificate from the U.S. Department of Labor's Wage and Hour Division stating the disability impairs the worker's productivity.

The department determines the employee's wage, which is reviewed and re-determined at least every six months.

The 14(c) program is primarily used by nonprofit or state-operated social service providers, such as sheltered workshops where employees with disabilities (74 percent have an intellectual disability) work separate from the rest of the workforce. Roughly 5,600 employers pay subminimum wages to 424,000 of these workers nationwide, according to the National Council on Disability. This accounts for about 3 percent of the all employed people with disabilities.

Like tipped and youth wages, the subminimum wage for people with disabilities used to have a statutory floor of 50 percent of the minimum rate, but this was repealed by Congress in 1986. Now, the law requires people with disabilities to be paid simply at a rate "commensurate with those paid to non-handicapped workers" and be "related to the individual's productivity," measured by employers.

Although most states mirror the federal act and leave the determination of the subminimum rate and renewal period to a regulatory authority, a few states set specific subminimum wage floors. Alaska and Delaware, for instance, set it at 50 percent of the state minimum rate, while Colorado requires certified employees to receive at least 85 percent of the state minimum rate.

Funding for Sheltered Workshops

By closing its last sheltered workshop in 2002, Vermont became the first to eliminate the subminimum wage for disabled people. As requested by the U.S. Department of Labor, the state has since ensured that no one with a disability is being paid a subminimum wage.

How has the employment situation fared for people with disabilities since the subminimum wage was eliminated? That depends on how you interpret the available data.

The number of employed Vermonters with disabilities has gradually increased over time. The State Data Report, published in 2014 by the Institute for Community Inclusion (which opposes sheltered employment), found that 61 percent of people with intellectual disabilities found jobs within a year of applying. (The national average is 29 percent.)

In addition, 38 percent of people with disabilities in Vermont worked in jobs alongside people without disabilities in FY 2013, more than twice the national average of 18.6 percent.

According to a 2016 Harvard Civil Rights-Civil Liberties Law Review report, however, "because Vermont no longer has any sheltered employment settings … the remaining 63 percent of people with disabilities in Vermont were not employed in any capacity, and those who had employment were working well under half time."

In other words, the elimination of sheltered employment could result in some people with significant intellectual disabilities no longer working, at least in the short term.

Other State Actions

In 2015, the New Hampshire General Court was the first to explicitly prohibit employing people with disabilities at a lower hourly rate than the federal minimum wage, except for training programs or family businesses.

In 2016, the Maryland General Assembly banned the state commissioner of labor and industry from allowing sheltered workshops to pay subminimum wages to employees with disabilities and set up a phaseout of existing authorizations by October 2019. As part of the phaseout, the legislation required the state Department of Labor, Licensing and Regulation to track wages, unemployment rates and employment status of people with disabilities moving out of sheltered employment settings.

In 2017, legislators introduced proposals to eliminate funding for sheltered workshops or to repeal subminimum wages for workers with disabilities in New Mexico, Oregon and Texas. None passed, but a bill is still pending in California that would require the state to subsidize the difference between the subminimum wage and the minimum wage for certain employers of workers with disabilities.

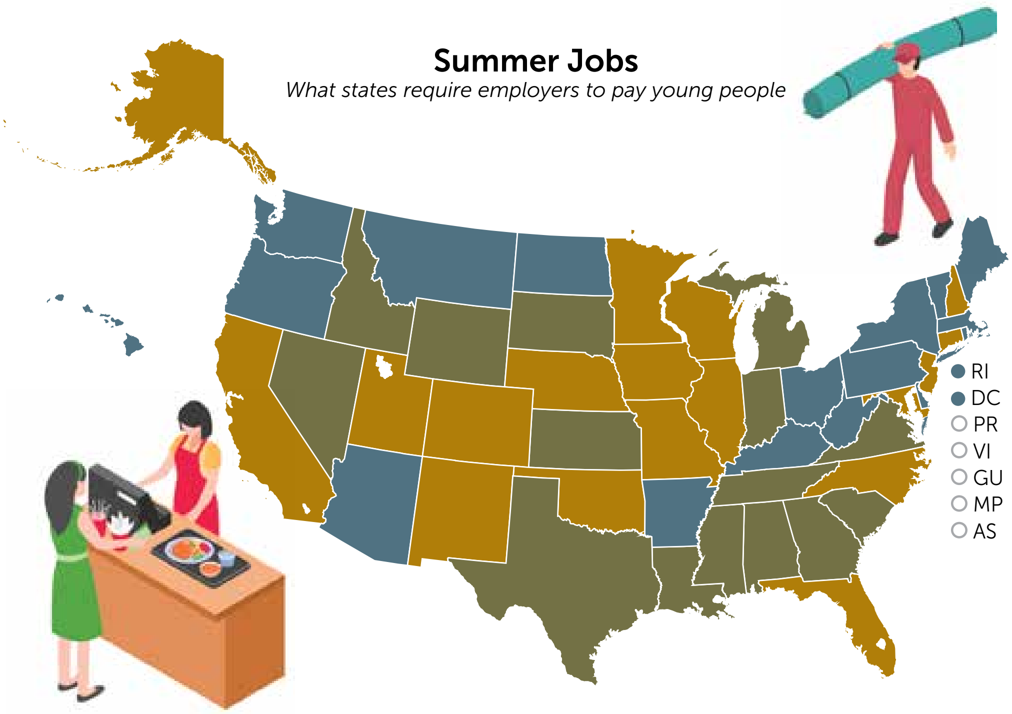
Subminimum in Sum

States weighing changes to subminimum wage policies are doing so within the context of a national discussion on the role and benefits of the minimum wage generally. The same policy questions apply: Is the goal to provide a living wage? Are enforcement mechanisms strong enough? How will required wage increases affect employment opportunities?

Although there are financial concerns for employers who take advantage of subminimum wage programs, the rights and financial well-being of individuals who are paid less than the minimum wage can't be overlooked. It's a balancing act, with conflicting evidence that state legislatures will continue to grapple with in the coming years.

Summer Jobs

What states require employers to pay young people



- At least $4.25, the federal youth minimum wage, up to age 15
- At least $7.25, the federal minimum wage, up to age 18, with restrictions
- Do not require a minimum wage for workers under age 20

Source: U.S. Department of Labor, Jan. 1, 2017