



COUNTY ADVISORY BULLETIN

CAB

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OHIO'S NEW MINIMUM WAGE LAW

**In the General Election of November 2006,
voters adopted a constitutional amendment to raise Ohio's minimum wage;
House Bill 690 of the 126th General Assembly implemented that
constitutional amendment**

Lead Sponsor of H.B. 690: Bill Seitz (R-Cincinnati)

House Co-Sponsors: Tom Brinkman (R-Cincinnati), Courtney Combs (R-Fairfield), David Evans (R-Newark), Larry Flowers (R-Canal Winchester), Bob Gibbs (R-Lakeville), Ron Hood (R-Ashville), Earl Martin (R-Avon Lake), Linda Reidelbach (R-Columbus), Michelle Schneider (R-Cincinnati), Arlene Setzer (R-Vandalia), Shawn Webster (R-Hamilton)

Senate Co-Sponsors: Steve Stivers (R-Columbus), Bill Harris (R-Ashland), Lynn Wachtmann (R-Napoleon), Jeffrey Armbruster (R-North Ridgeville), Robert Schuler (R-Cincinnati)

Revised Code Sections Affected by H.B. 690: 4111.14, newly enacted, and 4111.01, 4111.02, 4111.03, 4111.04, 4111.08, 4111.09, and 4111.10, all amended

Effective Date for Constitutional Amendment: January 1, 2007

Effective Date for H.B. 690: April 4, 2007

SUMMARY OF OHIO'S MINIMUM WAGE LAW

In the General Election of November 2006, Ohio voters adopted a constitutional amendment to raise Ohio's minimum wage (Section 34a of Article II, Ohio Constitution - hereafter referred to as "Section 34a").

After the election in the last days of December 2006, the 126th General Assembly enacted H.B. 690, which implemented Section 34a by amending Chapter 4111. of the Revised Code.

Through a question and answer format, this County Advisory Bulletin explains and compares both of the following:

1. Prior law, which was R.C. Chapter 4111. prior to the adoption of Section 34a (the constitutional amendment);
2. Section 34a (the constitutional amendment) and H.B. 690 (the enabling legislation).

SECTIONS OF THE BULLETIN

1. How much is the minimum wage?
2. To whom does the minimum wage law apply?
3. Does the minimum wage apply to poll workers?
4. What type of records is an employer required to keep concerning the employer's employees?
5. Does an employer have to make an employee's records available to the employee or any other person?
6. Are there any other prohibitions or requirements in the minimum wage law?
7. What remedies are available to an employee, interested party, the Director of Commerce, or the Attorney General against an employer who allegedly violated Ohio's minimum wage law?
8. How must the provisions in Section 34a be construed when ambiguity exists?

1. How much is the minimum wage?

A. Prior law

Under prior minimum wage law, all employers were required to pay a wage rate of not less than the wage rate specified in the federal Fair Labor Standards Act (29 U.S.C. 201 et. seq., hereafter referred to as the "FLSA"). The recently enacted federal Fair Minimum Wage Act of 2007 requires employers subject to the federal minimum wage law to pay the following wages:

\$5.85 per hour beginning July 24, 2007;

\$6.55 per hour beginning July 24, 2008;

\$7.25 per hour beginning July 24, 2009.

The FLSA requires employers to pay tipped employees a minimum cash wage of \$2.13 per hour, plus the amount of tips the employee receives. The total wage an employer

must pay a tipped employee, though, must equal at least the minimum wage. (29 U.S.C. 203, 206.)

B. Current law - Section 34a and H.B. 690

Section 34a requires most employers to pay the following wage rates:

Not less than \$6.85 per hour beginning January 1, 2007;

Not less than \$7.00 per hour beginning January 1, 2008.

While Section 34a does not specifically require \$7.00 per hour, that section requires the Director of Commerce to increase the minimum wage by the rate of inflation, according to the Consumer Price Index for Urban Wage Earners and Clerical Workers (hereafter “CPI-W”) and rounded to the nearest five cents, for the 12-month period prior to that September. The Director began increasing the wage on September 30, 2007, and must increase it on each September 30 thereafter. That increased wage will take effect January 1 following the September in which the new wage was calculated.

However, Section 34a creates all of the following classes of employees who may be paid less than the minimum wage:

1. Just as existed in prior law, employees with mental or physical disabilities that may adversely affect the employees’ opportunities for employment.
2. Employees under the age of 16.
3. Employees of entities with annual gross receipts of \$250,000¹ or less for the preceding calendar year.
4. Tipped employees. (R.C. 4111.02; 29 U.S.C. 203, 206.)

(Note: With the exception of employees with mental or physical disabilities, CCAO recognizes that the above employees likely are not employed by a county. Thus, for a more detailed explanation of all of these special classes of employees, please refer to Appendix A.)

2. To whom does the minimum wage law apply?

In order for an entity, such as a political subdivision, or worker to be subject to Ohio’s minimum wage law, they must fit within Section 34a’s and H.B. 690’s definitions of “employer” or “employee.” If an entity fits within the definition of “employer” and the workers fit within the definition of “employee,” then that entity must pay its workers the minimum wage.

¹ Section 34a also requires that the \$250,000 threshold be increased each year beginning January 1, 2008, in the same manner as the minimum wage is adjusted using the CPI as described above. On January 1, 2008, the threshold will become \$255,000.

A. Who is considered an employer and, thus, must pay the minimum wage?

Under prior minimum wage law, “employer” captured the state, political subdivisions, and all private employers. (Prior R.C. 4111.01.)

Section 34a defines “employer” to have the same meaning as in the FLSA. The FLSA specifies that “employer” includes “any person acting directly or indirectly in the interest of an employer in relation to an employee and ***includes a public agency.***” A public agency includes all of the following:

1. Political subdivisions;
2. The state;
3. The United States government.

The FLSA specifies that an employer who is subject to both the FLSA and a state’s minimum wage law is governed by the law that establishes the higher minimum wage. Because Ohio’s basic minimum wage was increased to \$6.85 per hour in Section 34a, Ohio’s minimum wage is higher than the wage required under the FLSA (\$5.85 per hour). Thus, entities that fit within the definition of “employer” under both the FLSA and Ohio’s law must pay \$6.85 per hour instead of \$5.85 per hour. If the federal minimum wage eventually surpasses Ohio’s minimum wage, then employers who are subject to both the FLSA and Ohio’s minimum wage law must pay the higher federal minimum wage. (29 U.S.C. 218.)

Practically speaking, most employers in Ohio, including a county, are subject to both the state and federal minimum wage laws. Thus, counties must pay at least Ohio’s minimum wage rates unless the federal minimum wage rate exceeds Ohio’s wage rate. If this occurs, then counties must pay the federal minimum wage rate.

(Note: Under the FLSA, the definition of “employer” is not the only determining factor of whether an entity is an “employer.” The FLSA uses other definitions and provisions in addition to the definition of “employer” to determine if an entity is considered an “employer.” Section 34a and H.B. 690 are not clear about whether these other definitions and provisions apply to Ohio entities. (29 U.S.C. 203; R.C. 4111.14(B).))

B. Who is considered an employee and, thus, must be paid the minimum wage?

Under prior minimum wage law, “employee” meant any individual employed by an employer, but did not include certain individuals. (Ex. Persons employed by the United States; outside salespersons; persons employed in a bona fide executive, administrative, or professional capacity; and certain agricultural persons. (Prior R.C. 4111.01.))

Section 34a defines “employee” to mean the same as in the FLSA, except that “employee” does not include both of the following:

1. Workers of a solely family owned and operated business who are family members of the owner. "Family member" means a parent, spouse, child, stepchild, sibling, grandparent, grandchild, or other member of an owner's immediate family;
2. Individuals employed in or about the property of the employer or person's residence on a casual basis. "Casual basis" means employment that is irregular or intermittent and not performed by an individual whose vocation is to be employed in or about the property of the employer or person's residence. (R.C. 4111.14(D).)

The FLSA defines "employee" to be "any individual employed by an employer," with certain exceptions. A worker employed by a public agency, as defined above, is not an "employee" if the individual holds one of various political positions. Examples of these political positions are all of the following:

1. Public elected offices of a political subdivision or the state;
2. Public elected officeholders' personal staff;
3. Policy-making positions appointed by officeholders;
4. Legislative branch employees.

Additionally, "employee" does not include individuals who volunteer to perform services for a political subdivision or state if certain conditions apply or a private nonprofit food bank for humanitarian purposes if the individual receives groceries from the food bank. (29 U.S.C. 203.)

Just as explained above for the term "employer," the definition of "employee" is not the only factor used to determine whether an employee must be paid the minimum wage under the FLSA. Other provisions in the FLSA exempt certain types of employees from the law in addition to the individuals excluded by definition. Examples of these exempted employees are all of the following:

1. Any worker employed in a bona fide executive, administrative, or professional capacity;
2. An employee of an amusement park and organized camp;
3. Various agricultural employees;
4. Any worker employed on a casual basis to provide babysitting or companionship services. (29 U.S.C. 213.)

Section 34a is not clear about whether these other provisions apply to Ohio employees. Section 34a specifies that "only the exemptions set forth in this section shall apply to this section." H.B. 690, however, specifies that those employees exempted from the FLSA in the separate provisions described above also are exempted from Ohio's

minimum wage law. Additionally, H.B. 690 specifies that persons excluded by definition under the FLSA are excluded under Ohio's law. (R.C. 4111.14(B)(1).)

Thus, confusion exists about whether the employees list above that are exempt from the FLSA are exempt from Ohio's law. To add to this confusion, the Director of Commerce seemingly has a different interpretation of the law. Until a court interprets the constitutional provision versus the statute, or the Attorney General issues guidance, whether the above employees are exempt from Ohio's law is unknown.

H.B. 690 also excludes volunteers from being considered employees. The act specifies that "volunteer" has the same meaning as in specified federal regulations. Under those federal regulations, "volunteer" has many different meanings. For example, one federal regulation defines "volunteer" to mean an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons. Yet, when a public employee volunteers for a public employer, certain unusual rules may apply. Thus, if one of your public employees is volunteering for any public employer, consult your county prosecutor for how you should proceed. (R.C. 4111.14(B)(2).)

C. The differences between the written law and the Ohio Department of Commerce's interpretations of who is considered an employer or employee.

Because the Ohio Department of Commerce enforces Ohio's minimum wage law, the Director of Commerce interprets this law to assist in enforcement. The Director has published on the Department's web site guidance for employers and employees. The Director defines "employer" to mean any governmental entity, business association, or person or group of persons acting in the interest of an employer in relation to an employee. The Director does not specify any types of employers that are exempt from having to pay the minimum wage, which differs from Section 34a and H.B. 690 as explained above.

Additionally, the Director defines "employee" to mean any individual employed by an employer, but not including certain persons, such as any individual who volunteers to perform services for a public agency or a hospital or health institution for which compensation is not sought or contemplated, any individual employed by the United States, any individual employed as a baby sitter or live-in companion whose principal duties do not include housekeeping, and any individual who is an employee of a solely family owned and operated business and who is a family member of an owner.

The Director *did not* specify many of the types of employees who are excluded and exempted from the minimum wage law under Section 34a and H.B. 690, as explained above, such as persons employed on a casual basis; executive, administrative, or professional employees; and certain agricultural employees. Thus, it is unclear whether the employees not included on the list above are considered exempt from being paid the minimum wage for purposes of the Director's enforcement of the law. To date, no person has challenged in court the Director's enforcement.

To view the Director's guidance, visit <http://198.234.41.198/w3/webwh.nsf?Opendatabase> and see the links concerning the minimum wage.

3. Does the minimum wage apply to poll workers?

On October 12, 2007, the Attorney General issued, at the request of the Secretary of State, an advisory opinion concerning whether poll workers are required to be paid the new state minimum wage. The opinion concluded that poll workers *who are not otherwise employed by the Secretary of State or a county board of elections* are not subject to Ohio's minimum wage law. (OAG No. 2007-033.)

The Attorney General explained that poll workers who are not otherwise employed by the Secretary or board of elections are considered volunteers under the FLSA, and thus are excluded from the definition of "employee." The federal definition of "employee" excludes "any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered...." Both Section 34a and the Revised Code apply the federal definition of "employee" in Ohio's minimum wage law. The Attorney General concluded that poll workers are volunteers because they provide services for civic or other personal reasons, do not have legal employee-employer relationships, and receive only nominal fees for their services in the context of economic reality. Thus, since volunteers are not employees, they are not required to be paid the minimum wage. (29 U.S.C. 203(e)(4)(A)(i).)

The opinion specifically applies to individuals who are not otherwise employed by the Secretary of State or a board of elections. The opinion suggests that such employees may not be considered volunteers because federal law stipulates that the services an individual volunteers cannot be "the same type of services which the individual is employed to perform for such public agency." If these individuals are not volunteers, and thus excluded from the definition of employee, the wage rules that govern these individuals may be different. These poll workers may be subject to Ohio's minimum wage laws. However, the opinion also concluded that Section 34a did not repeal the current statutory provision that sets poll workers' pay. Using that line of reasoning, poll workers who are employed either by the Secretary or a board of elections may be subject to the same wage guidelines as all other poll workers. Until the Attorney General or Secretary of State issues guidance on wages for these types of poll workers, each county should contact their county prosecutor concerning this issue. (29 U.S.C. 203(e)(4)(A)(ii); R.C. 3501.28.)

Existing Ohio law that governs poll worker pay requires poll workers to be paid an hourly rate that is not less than the hourly rate established in the FLSA and not more than an amount fixed by the Secretary of State as a per diem. The Secretary must establish this per diem in rule and must increase it at the same percentage that the minimum hourly rate is increased under the FLSA. As explained above, effective July 24, 2007, the minimum wage rate under the FLSA increased from \$5.15 to \$5.85 per hour. The last per diem rate established is \$95; however, that rate was based on the \$5.15 per hour wage and, thus, must be increased. (R.C. 3501.28(C) and (D).)

On November 6, the Secretary of State issued an advisory opinion discussing poll worker pay. (Please see Appendix B for the full text of the opinion.) In the opinion, Secretary Brunner explains the Attorney General's guidance, discussed above. The Secretary also explained that because the Attorney General's opinion was not issued until October 15, she did not have adequate time to raise the per diem formally in rule. Thus, until she adopts such rules, she advises each board of elections that it may determine a new per diem that must not exceed \$107.91. This new per diem amount is a 13.59% increase over the \$95 per diem, which is the same percentage that the federal minimum wage increased in July of this year.

However, a board of elections would not be able to increase the per diem from \$95 to \$107.91 for 2007 and 2008 elections without written approval from the board of county commissioners. No board of elections may increase poll worker pay during a calendar year unless the board has given written notice of the proposed increase to the board of county commissioners not later than October 1 of the preceding calendar year. Since a board of elections cannot comply with this notice provision because the federal minimum wage increase was effective July of this year, the board of elections can raise poll worker in this or next calendar year only if the board complies with either of the following:

1. The board of elections may increase poll worker pay without commissioner approval if either of the following occurs:
 - a. The county currently pays poll workers a per diem of between \$85 and \$95 and the increase in the per diem is less than 4.5% of that \$85 to \$95 rate.
 - b. The county currently pays poll workers a per diem of \$85 or less and the increase in the per diem is less than 9% of that \$85 or less rate.
2. The board of elections gets written approval from the board of county commissioners to increase poll worker pay more than the percentages specified above.

If the board of elections chooses to increase the per diem to \$107.91, the board must obtain the written approval of the commissioners because that increase would exceed 4.5% or 9%. (R.C. 3501.28(E).)

A special situation may arise in a county that has been paying poll workers \$5.15 per hour, or the federal minimum wage. Because this wage has increased to \$5.85 per hour, and because the Ohio statute requires a board of elections to pay no less than this hourly rate, a board of elections must increase poll worker pay to this increased rate. However, such an increase exceeds the 9% increase limitation a board of elections may impose without prior approval from commissioners. Thus, a board of elections technically would not be permitted to pay the increased rate this upcoming election because the board did not obtain commissioner approval in October 2006. To remedy this situation, it appears board of county commissioners must enter into a

written agreement with the board of elections so that the board of elections can pay the increased wage, as required under Ohio law.

4. What type of records is an employer required to keep concerning the employer's employees?

Both prior and current minimum wage law require every employer to make and keep a record of all of the following for each of the employer's employees:

1. Name;
2. Home address;
3. Occupation;
4. Rate of pay, which means an employee's base rate of pay or annual salary, but does not include bonuses, stock options, incentives, deferred compensation, or any other similar form of compensation;
5. Each amount paid, which means the total gross wages paid to an employee for each pay period;
6. Hours worked each day, which means the total amount of time an employee works during a day in whatever increments an employer uses for its payroll purposes. (R.C. 4111.14(F)(1), (2), (4), (5).)

Be advised, though, that employers only have to keep records for those individuals who are considered "employees" under the minimum wage law, as described above. Additionally, employers do not have to keep records of "hours worked each day" for certain employees, such as a bona fide executive, administrative, or professional employees. (R.C. 4111.14(F)(4).)

An employer must maintain these records for three years from the date the hours were worked and for three years after the date the employee's employment ends. "Record" means the name, address, occupation, pay rate, hours worked for each day worked, and each amount paid an employee in one or more documents, databases, or other paper or electronic forms of record-keeping an employer maintains. The act specifies all of the following concerning records:

1. No one particular method or form of maintaining records is required under the act.
2. An employer is not required to create or maintain a single record containing only the above described information.
3. An employer must maintain a record from which an employee or person acting on behalf of an employee could reasonably view the above described information. (R.C. 4111.14(F)(3).)

Current law also requires an employer to provide an employee the employer's name, address, telephone number, and other contact information and update such information when it changes. (Section 34a and R.C. 4111.14(E), (F).) H.B. 690 defines all of the following terms used in Section 34a with the following meanings:

"Other contact information" may include, where applicable, the employer's web site address, email address, or fax number, or the name, address, and telephone number of the employer's statutory agent. The act specifies that "other contact information" does not include information about any employee, shareholder, officer, director, supervisor, manager, or other individual employed by or associated with an employer. (R.C. 4111.14(E)(1).)

An employer must provide its employees with a change in its information within 60 business days after the change occurs. The act requires the employer to provide the changed information by using any of its usual methods of communicating with its employees, including, but not limited to, listing the change on the employer's web site, internal computer network, or bulletin board where it commonly posts employee communications, or by inclusion with employees' paychecks or pay stubs. (R.C. 4111.14(E)(2).)

5. Does an employer have to make the employee's records available to the employee or any other person?

Section 34a requires an employer to provide the all of the information required to be maintained in an employee's record, which is listed above, to an employee or person acting on behalf of an employee upon request and without charge. However, the employer does not have to provide that information concerning any other employee of the employer. (R.C. 4111.14(G)(1).)

"Acting on behalf of an employee" means a person acting on behalf of an employee as any of the following:

1. The certified or legally recognized collective bargaining representative for that employee;
2. The employee's attorney;
3. The employee's parent, guardian, or legal custodian.

The act specifies that a person acting on behalf of an employee must be authorized specifically by an employee in order to make a request for that employee's information. (R.C. 4111.14(G)(2).)

Additionally, an employee or person acting behalf of an employee may make a request only for the employee's own information. The employer may require that the employee or person acting on behalf of the employee provide the employer with a written request that the employee has signed, has been notarized, and reasonably specifies the particular information being requested. (R.C. 4111.14(G)(4).)

Under the above requirement, an employer must provide the requested information within 30 business days after the date the employer receives the request, unless either of the following apply:

1. The employer and employee or person acting on behalf of the employee agree to an alternative time period;
2. The 30-day period would cause a hardship on the employer. If the 30-day period causes a hardship, then the employer must provide the information as soon as practicable. (R.C. 4111.14(G)(3).)

6. Are there any other prohibitions or requirements in the minimum wage law?

Section 34a prohibits an employer from discharging or in any other manner discriminating or retaliating against an employee for exercising any right under the section or any law or rule implementing the section. The section also prohibits an employer from discharging or retaliating against any person who assists an employee in exercising the employee's rights.

Additionally, as was required under prior minimum wage law, every employer who is subject to the minimum wage law must keep a summary of the minimum wage law, including rules adopted pursuant to that law, posted in a conspicuous and accessible place in or about the employer's premises.

Under H.B. 690, the Director of Commerce must make this summary available on the web site of the Department of Commerce. The Director also must update the summary as necessary, but not less than annually, in order to reflect changes in the minimum wage rate. Please visit the Department's web site at <http://www.com.ohio.gov/laws/default.aspx>. (R.C. 4111.09.)

7. What remedies are available to an employee, interested party, the Director of Commerce, or the Attorney General against an employer who allegedly violated Ohio's minimum wage law?

A. Complaints filed with the state

Section 34a and H.B. 690 permit an employee, person acting on behalf of one or more employees, and any other interested party to file a complaint with the Director of Commerce for a violation of the section or act. (R.C. 4111.14(H) and (I).) H.B. 690 defines "interested party" to mean a party who alleges to be injured by the employer's alleged violation and who has standing to file a complaint under common law principles of standing. (R.C. 4111.14(H)(3).)

The Director promptly must investigate and resolve the complaint. As under prior minimum wage law, current minimum wage law permits the Director to investigate and ascertain employees' wages, as well as enter and inspect an employer's place of business for various purposes, such as inspecting the employer's books, registers, and payrolls. If an employer prohibits the Director from carrying out these powers, the Director may issue subpoenas and compel attendance of witnesses and production of

papers, books, accounts, payrolls, documents, records, and testimony relating and relevant to the Director's investigation. However, Section 34a requires the Director to keep the employee's name confidential unless disclosure is necessary to resolve the complaint and the employee consents to disclosure. (R.C. 4111.04 and 4111.14(I)(1).)

Additionally, the Director may investigate, on the Director's own initiative, an employer's compliance with Section 34a or H.B. 690. Section 34a requires an employer to make available to the Director any records related to an investigation and other information required for enforcement. The act specifies that these records and information are confidential and not a public record subject to the Public Records Law. The act specifies that, despite this confidentiality requirement, the Director may release to or exchange with other state and federal wage and hour regulatory authorities information related to an investigation. (R.C. 4111.14(I)(1).)

B. Complaints filed with a court

Section 34a permits the Attorney General or an employee or person acting on behalf of an employee or all similarly situated employees to bring an action against an employer in any court of competent jurisdiction, including the common pleas court in the employee's county of residence. If the Attorney General, employee, or person chooses to bring an action, the Attorney General, employee, or person must bring the action within the later of one of the following time frames:

1. Three years of the violation or of when the violation ceased if it was of a continuing nature;
2. One year after the Director notifies the employee of final disposition of a complaint for the same violation. H.B. 690 defines "notification" to mean the date on which the Director sends notice to the employee. (R.C. 4111.14(K).)

Section 34a specifies that only the exhaustion, procedural, pleading, and burden of proof requirements that apply generally to civil suits may apply in minimum wage actions.

H.B. 690 specifies that any agreement between an employer and employee to work for less than the minimum wage is no defense to an action described above.

The act also specifies that nothing in Section 34a affects the rights of an employer and employee to agree to submit a dispute to alternative dispute resolution in lieu of maintaining a civil suit. (R.C. 4111.14(K), (L).)

The act immunizes an employer who provides the information required to be kept under the law from civil liability for injury, death, or loss to person or property that otherwise might be incurred or imposed as a result of providing that information. The act also specifies that an employer is not subject to the Personal Information Systems Law (R.C. Chapter 1347.) or the Consumer Protection Law (R.C. Chapter 1349.) to the extent that those laws would apply. (R.C. 4111.14(M).)

H.B. 690 prohibits an employee from joining as a party plaintiff in any civil action brought under the act by another employee or person unless the joining employee gives written consent to become a party plaintiff and that consent is filed with the court. This provision differs from the Ohio joinder rule for class action lawsuits, which specifies that a party plaintiff automatically is joined as a party plaintiff unless the plaintiff affirmatively declines to be joined. The act stipulates that a civil action for a violation of the minimum wage law may be brought only in accordance with the act. The act does not preclude the joinder in a single civil action of an action for minimum wage violations and an action for overtime violations. (R.C. 4111.14(K) and Ohio Civ. R. Pro. 23.)

Section 34a requires damages to be calculated as an additional two times the amount of the back wages due to the employee.² However, in the case of a violation of an anti-retaliation provision, damages must be sufficient to compensate the employee and deter future violations. Section 34a specifies that damages may not be less than \$150 for each day that a violation continued. H.B. 690 applies this \$150 per day penalty only to situations where an employer violates an anti-retaliation provision. Additionally, Section 34a specifies that an employee is not liable for costs or attorney's fees except upon a finding that the employee's action was frivolous according to the standards applicable generally in civil suits. (R.C. 4111.14(J).)

8. How must the provisions in Section 34a be construed when ambiguity exists?

Section 34a requires the constitutional provision to be "liberally construed in favor of its purposes." The section permits laws to be passed to implement its provisions, create additional remedies, increase the minimum wage rate, and extend the coverage of the section. However, Section 34a prohibits laws that restrict any aspect of the section or the power of municipalities under Article XVIII of the Ohio Constitution (which are the home rule constitutional provisions). Thus, when interpreting Section 34a or H.B. 690, a court may look to this "liberal construction" provision in Section 34a for guidance.

If a court finds that any aspect of H.B. 690, any provision in any other future bill implementing the section, or any interpretation published by the Director of Commerce conflict with Section 34a, a court could use this "liberal construction" provision to invalidate that provision or interpretation.

COMMENTS AND CONTACT INFORMATION

CCAO recognizes that Section 34a and H.B. 690 are very complex and difficult to understand. Because of this complexity, many questions arise concerning the law's practical implementation. The questions addressed above are some of the most frequently asked questions; however, we recognize that many other questions exist. We encourage you to discuss any legal questions you have with your county prosecutor's office. Any errors or omissions made in this bulletin are the sole responsibility of CCAO. For more information on Ohio's minimum wage law, contact Beth Tsvetkoff at 614-220-7996 or btsvetkoff@ccao.org.

² This damages provision differs from prior minimum wage law. Under prior law, any employer who paid an employee less than the wages to which the employee was entitled was liable to the employee for (1) the full amount of the wage rate, less any amount actually paid the employee by the employer, and (2) costs and reasonable attorney's fees.

APPENDIX A

The following is a more detailed explanation of certain classes of employees who may be paid less than the minimum wage. Counties likely do not employ these types of employees, but this information is an effort to provide a comprehensive picture of the new minimum wage law. Employees that may be paid less than Ohio's minimum wage are the following:

1. Employees with mental or physical disabilities that may adversely affect the employees' opportunities for employment may be paid less than the minimum wage rate if the employer obtains a license from the state authorizing payment of a lower wage.

2. Employees under the age of 16 must be paid not less than the minimum wage required under the FLSA. At the end of May 2007, Congress passed and the President signed the Emergency War Supplemental Bill, which included the Fair Minimum Wage Act of 2007. The Fair Minimum Wage Act amended the FLSA to require employers subject to the federal minimum wage law to pay employees the following wages:

\$5.85 per hour beginning July 24, 2007;

\$6.55 per hour beginning July 24, 2008;

\$7.25 per hour beginning July 24, 2009.

Thus, employees under the age of 16 will be paid less than Ohio's minimum wage until at least July 2009, when the federal minimum wage might exceed Ohio's wage. Yet, because Ohio's minimum wage is increased each year based on the CPI-W, Ohio's minimum wage may exceed the federal minimum wage even in July 2009.

3. Employees of entities with annual gross receipts of \$250,000³ or less for the preceding calendar year must be paid not less than the minimum wage required under the FLSA, as explained above for employees under the age of 16. (Note: CCAO recognizes that gross receipts are not a measurement associated with county government, but chose to include this information to provide a comprehensive picture of Section 34a and H.B. 690.)

4. Employees who receive tips that, combined with the employee's wages, are equal to or greater than the minimum wage rate may be paid a lower wage than the minimum wage. However, this wage rate cannot be less than half the minimum wage rate an employer otherwise would be required to pay.

³ Section 34a also requires that the \$250,000 threshold be increased each year beginning January 1, 2008, in the same manner as the minimum wage is adjusted using the CPI as described above. On January 1, 2008, the threshold will become \$255,000.

The following chart illustrates the wages required for tipped employees who are at least 16 years old and whose employer has gross receipts of at \$250,000 annually.

Dates For Which Minimum Wage Effective	Cash Wage	Tips⁴	Total Wage That Must Be Paid
Now through Dec. 31, 2007	\$3.43	\$3.42	\$6.85
Jan. 1, 2008, through Dec. 31, 2008	\$3.50	\$3.50	\$7.00

The following chart shows the wages required for tipped employees if *either* of the following applies:

1. The employee is 15 years old or younger;
2. The employer's gross receipts are less than one of the following:
 - a. \$250,000 through December 31, 2007;
 - b. \$255,000 beginning January 1, 2008 through December 31, 2008.

Dates For Which Minimum Wage Effective	Cash Wage	Tips²	Total Wage That Must Be Paid
Now through July 23, 2008	\$2.13	\$3.72	\$5.85
July 24, 2008, through July 23, 2009	\$2.13	\$4.42	\$6.55
July 24, 2009, and after	\$2.13	\$5.12	\$7.25

(R.C. 4111.02; 29 U.S.C. 203, 206.)

⁴ If an employee's tips are not enough that, when combined with the cash wage, equal the total wage, then the employer must pay a higher cash wage so that the employee is paid at least the total wage amount.

APPENDIX B



JENNIFER BRUNNER
OHIO SECRETARY OF STATE

180 East Broad Street, 15th floor
Columbus, Ohio 43215-3726 USA
Tel.: 1-614-466-2655
Fax: 1-614-644-0649
www.sos.state.oh.us

ADVISORY 2007-09

August 6, 2007

To: All County Board of Elections

Re: Pollworker Compensation

Our office has received inquiries from boards of elections conducting August elections about how much to pay their pollworkers. Please be advised that, on July 24, 2007, the federal minimum wage increased from \$5.15 per hour to \$5.85 per hour. Consequently, from this point forward, all boards of elections are required to pay a pollworker who works a full election day of 14 hours not less than \$81.90.

Last November, Ohioans voted to amend the Ohio Constitution to increase the *Ohio* minimum wage for 2007 to \$6.85 per hour, which means the state minimum wage is currently \$1 per hour more than the federal minimum wage. This difference has prompted questions as to the correct wages for pollworkers in Ohio.

In mid-June, I requested a formal opinion from Attorney General Marc Dann on several questions concerning the effect of the November 2006 constitutional amendment on pollworker pay. One of the questions I asked the Attorney General was, "What is the current minimum compensation that Ohio board of elections are required to pay pollworkers under Ohio and/or federal law." Another question I posed was, "If Article II, section 34a of the Ohio Constitution applied to pollworkers who worked in February and May 2007 elections, what steps, if any, must board of elections take if those pollworkers were paid less than required by amended Article II, section 34a?"

I have not yet received an opinion from the Attorney General but want to reassure you that I will inform all boards of elections of the Attorney General's opinion as soon as I receive it.

In Ohio, pollworker compensation is governed by statute, and R.C. 3501.28(C) provides that pollworkers shall be paid "not less than the minimum hourly rate established by the [federal] Fair Labor Standards Act." Accordingly, this office previously advised boards that payment of the federal minimum wage constituted the minimum amount that boards must pay pollworkers. However, the Ohio Constitution is the supreme law of state of Ohio, and it is not clear that the Ohio Constitution any longer permits payment of wages to pollworkers at the federal minimum wage rate in periods (like the current time) when the Ohio minimum wage is higher than the federal minimum wage.

A board of elections must pay its pollworkers at least the new federal minimum wage of \$5.85 per hour, consistent with the requirements of R.C. 3501.28(C). The Attorney General may subsequently determine that the Ohio Constitutional amendment will control, requiring boards of elections to pay pollworkers the higher rate of \$6.85 per hour. A board may want to consider this for budgetary purposes.

I leave it to each board of elections to determine whether it will pay its pollworkers based on the current federal minimum wage of \$5.85 per hour, or the current state minimum wage of \$6.85 per hour until the Attorney General releases an opinion on the questions posed. Our office will keep you informed as further developments occur.

Sincerely,



Jennifer Brunner