

## Effects of State Wage Board's Move to Raise Fast Food Minimum Wage

**O**n July 31, 2015, the State's Wage Board finalized a 25-page report and recommendation to the New York State Commissioner of Labor that would increase the state minimum wage for the fast-food industry to \$15 per hour. Such an increase means that fast-food workers in New York state will earn more than double the federal minimum wage.



**ROBERT  
WHITAKER**  
*Viewpoint*

In support of its recommendation, the Wage Board essentially argues that the fast-food industry is so profitable that it should be forced to pay higher wages. The Wage Board justifies its decision in part on the "enormous compensation" paid to CEOs in

the industry, and on the fact that the top 14 publicly traded fast food chains in New York had profits exceeding \$9.3 billion in 2014 and paid out about \$10.8 billion in dividends and share buybacks.

While the Wage Board's recommendation is still subject to review by the Acting Commissioner of Labor Mario Musolino, its impact could reach far beyond the large-profit, publicly traded fast-food chains. Unless better clarified, it may affect small-business owners — those who own just one or perhaps a few fast-food franchise locations. Also, because of certain ambiguities in the recommendation, it could impact many industries beyond what most people would consider fast food.

The recommendation would apply to any "fast food establishment", a term that is broadly defined to include "any establishment in the state" which is part of a chain or franchise with 30 or more locations nationwide that serves food or drink items: (a) where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out, or delivered to the customer's location; (b) which offers limited service; (c) which is part of a chain; and (d) which is one of 30 or more establishments nationally.

Unfortunately, what constitutes "limited service" is not defined. Presumably, this term is intended to restrict the definition, to exclude restaurants and other enterprises that also

happen to provide limited takeout options. Under this broad definition, however, the statute could affect other industries, including gas stations, grocery stores, and restaurants.

Many grocery stores sell takeout food such as subs, pizza and other snack food and drinks. Some gas stations also offer a variety of takeout food, including subs and pizza, and some even deliver. A number of chain restaurants sell takeout food and require consumers to pay before eating. These businesses would seemingly qualify as fast-food establishments under the Wage Board's current language.

For a business that qualifies as a fast-food establishment, payroll will increase dramatically, as the wage increase is not limited to those serving food. Rather, it applies to any employee working for such an establishment whose job duties include customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning or routine maintenance. In effect, anyone who works for a fast food establishment will be entitled to a \$15 minimum wage.

In our area, Wegmans can be used as an example of the potential effect of the recommendation, if approved as written. Wegmans maintains a Market Café and sub shop, both of which require the customer to order and pay before eating and sell food that can be taken out or eaten on site. Wegmans is, of course, a chain with more than 30 locations, so arguably it would be subject to the wage increase. Although presumably only a minority of Wegmans employees provide services directly related to its Market Café and sub shop, the recommendation would seem to require Wegmans to pay virtually all of its employees the increased minimum wage. It is hard to imagine that this is the intent of the Wage Board, but it might well be the end-result unless clarified by the acting commissioner.

What about the family or individual small business owner who has invested in one or a few fast-food franchise locations? At first glance, the 30-location requirement would appear to exempt such small-business owners. In fact, the Wage Board stated its intent to exclude small chains. Under the recommendation, however, "fast food establishment" applies to franchises where the franchisor and franchisee own or operate in the aggregate 30 or more establishments nationwide. This definition would seem to include franchisees who,

while they own fewer than 30 franchises, are affiliated with a large franchisor. For example, although you may only own and operate one McDonald's franchise location, because McDonald's Corporation is the franchisor, the wage increase would apply to you.

This is particularly significant since many fast-food chains nationwide are franchised to families or small groups of investors who own one or perhaps a few locations in a geographic area. In fact, according to the Wage Board's recommendation, 97 percent of the top nine fast-food chains in New York are owned by franchisees. The large increase in minimum wage and the corresponding additional payroll taxes will present a serious challenge for these small-business owners.

One positive for business owners is that the wage increase would be incremental. Outside New York City, the minimum wage for this industry would increase to \$9.75 on Dec. 31, 2015, rise to \$10.75 on Dec. 31, 2016, move to \$11.75 on Dec. 31, 2017, reach \$12.75 on Dec. 31, 2018, rise to \$13.75 on Dec. 31, 2019, hit \$14.50 on Dec. 31, 2020, and end up at \$15 on July 1, 2021.

In New York City, the minimum wage would increase to \$10.50 on Dec. 31, 2015, \$12 on Dec. 31, 2016, \$13.50 on Dec. 31, 2017, and finally \$15 on Dec. 31, 2018.

Businesses still have some opportunity to be heard on this issue before the increase takes effect. Once the Wage Board publishes a notice of filing of its recommendation, a 15-day public comment period will commence. The acting commissioner, who may accept, reject or modify the Wage Board's recommendations, has 45 days to act.

Concerned business owners and individuals should use this opportunity to provide comments to the acting commissioner, who is otherwise expected to adopt the Wage Board's recommendation. Comments can be submitted directly or through legal counsel. Given the ambiguity in the current recommendation and its potential broad impact, it is expected that many businesses and franchise owners will request exemptions or clarification. ■

*Robert C. Whitaker, Jr. is a partner in the Labor & Employment Practice of Hancock Estabrook, LLP. Contact him at [rwhitaker@hancockclaw.com](mailto:rwhitaker@hancockclaw.com).*