



Labor Commissioner's Office

New Minimum Wage Phase in Requirement 2017-2023 SB 3 Frequently Asked Questions

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The following Frequently Asked Questions guidance is meant to address specific questions relating to SB 3 (Leno, Chapter 4, Statutes of 2016) and how the phase-in of minimum wage rates will apply. For additional information about general questions regarding the Minimum Wage please see the Labor Commissioner's Minimum Wage Frequently Asked Questions page.

What is the schedule for the new state minimum wage increases created by SB 3 (Leno, Chapter 4, Statutes of 2016)? How will I know what minimum wage rate applies to my workplace?

Date	Minimum Wage for Employers with 25 Employees or Less	Minimum Wage for Employers with 26 Employees or More
January 1, 2017	\$10.00/hour	\$10.50/hour
January 1, 2018	\$10.50/hour	\$11.00/hour
January 1, 2019	\$11.00/hour	\$12.00/hour
January 1, 2020	\$12.00/hour	\$13.00/hour
January 1, 2021	\$13.00/hour	\$14.00/hour
January 1, 2022	\$14.00/hour	\$15.00/hour
January 1, 2023	\$15.00/hour	

Can any of these increases be delayed?

After the first increase on January 1, 2017, the Governor can pause a later scheduled increase for one year if certain economic or budget conditions are met. (These pauses are referred to as “off-ramps”.) The conditions for pausing a scheduled increase are as follows:

- The Governor can pause an increase if the seasonally adjusted statewide job growth for either the prior three or six months is negative and retail sales receipts for the prior 12 months is negative.
- Alternatively, the Governor can pause an increase if it is projected to cause a deficit (defined as a negative operating reserve of more than one percent of annual revenues [currently about \$1.2 billion]) in the current state budget or in the budget forecast for either of the next two fiscal years.*
- On August 1 of each year the Governor will make a preliminary determination on whether the conditions are met for pausing the following year’s increase. A final determination must be made by September 1.

* The budget off-ramp can only be used twice.

How will future increases to the state minimum wage be determined once the minimum wage is \$15 an hour?

After the state minimum wage reaches \$15 an hour for all employees, the rate will be adjusted annually for inflation based on the national consumer price index for urban wage earners and clerical workers (CPI-W). However, the minimum wage cannot be lowered, even if there is a negative CPI, and the highest raise allowed in any one year is 3.5 percent. Also, the Governor will no longer be able to pause a scheduled increase, and the first adjusted increases may be accelerated if the adjusted CPI-W exceeds seven percent in that first year.

Who is considered an employer and who is counted as an employee for purposes of determining which minimum wage rate applies?

Labor Code section 1182.12 defines “employer” as: “any person who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person [and] includes the state, political subdivisions of the state, and municipalities.”

Any individual performing any kind of compensable work for the employer who is not a bona fide independent contractor would be considered and counted as an employee, including salaried executives, part-time workers, minors, and new hires.

The statute does not specify how employers should count employees in order to determine which wage rate applies. The question of how many employees work for an employer will affect those businesses with a workforce that hovers around 25 or that fluctuates above or below the threshold during the course of the year, including employers that use seasonal or intermittent workers. In these situations, a court or the Labor Commissioner likely would focus on the facts during a pay period in which an alleged underpayment occurred. Because this law places no limitation on who gets counted, they would look at whether every employee of that employer was counted (including those exempt from overtime as an executive, administrative, or professional), regardless of the number of hours worked or geographical location.

Courts will ultimately determine whether a counting method is reasonable in view of the purposes of the law and the minimum wage law has long been held to be a basic protection for the benefit of employees. Thus, an

employer must make a reasonable and good faith determination of the size of their workforce, recognizing that (1) when there is an ambiguity in law or facts, the courts generally will look for a reasonable interpretation that is most favorable to workers; and (2) an erroneous decision to pay the lower wage rate could be far more costly in terms of added penalties and interest than paying the higher rate in the first place. The Labor Commissioner recommends that if an employer reaches the threshold of 26 employees at any point in a pay period they compensate their workers at the minimum higher wage rate for the duration of the entire pay period and going forward as long as they have a minimum of 26 employees. This method will best protect employers from liability for unpaid wages and related damages and penalties.

How are employees counted in situations involving a franchise, joint employment, or a multi-employer scenario?

An employer who operates a franchise or has a joint or multi-employer relationship will need to analyze the nature of their employment and franchise agreements and determine whether the franchisor or other contracting entities could be found to be an employer under the Labor Code. As noted above, a person or entity who exercises control over an individual's wages, hours, or working conditions could be found to be the employer of that individual. All individuals under that employer's control would then need to be aggregated and counted as employees for purposes of determining the applicable minimum wage rate.

How are employees counted in situations involving a group of corporations or a business with a parent company and subsidiary?

The law expressly states: "Employees who are treated as employed by a single qualified taxpayer under subdivision (h) of Section 23626 of the Revenue and Taxation Code, as it read on [January 1, 2017], shall be considered employees of that taxpayer for purposes of this [tiered minimum wage requirement]."

This provision applies to companies as defined by the references in subsection (h) of California Revenue and Tax Code section 23626. Those employers should aggregate the number of employees from the applicable corporate entities. Employers with further questions or concerns over whether this provision applies to their business should consult an attorney or tax professional.

What if a worker is employed by a staffing agency or labor contractor?

Employees of a staffing agency or labor contractor are covered by the minimum wage law. The statute does not specify how to count employees when a worker is employed pursuant to an agreement with a staffing agency or a labor contractor. If the staffing agency or labor contractor has more than 25 employees during a pay period, including workers that it dispatches to various worksites, it should apply the higher minimum wage to each of its employees during that pay period. An employer who obtains workers through a staffing agency, labor contractor, or other arrangement should aggregate and count such workers, along with other direct hire workers, as employees for purposes of determining the applicable minimum wage rate.

Which wage rate applies if the number of employees changes during the year?

During the year, an employer may have fewer than 26 employees during some pay periods and 26 or more employees during other pay periods. An employer with 26 or more employees at any time during a pay period should apply the large-employer minimum wage to all employees for that pay period.

The Labor Code and employment contract law require employers to notify workers in advance of the terms of their compensation (please see next question for further detail on notice requirements). If an employer's workforce falls below 26 employees the employer does not need to automatically lower their minimum wage rate. However, if an employer decides to reduce the wage rate because their workforce falls below the threshold of 26 employees, they must notify the affected employees in advance before reducing their wages. The employer would also have to raise the wage rate if new hires or returning workers brought the workforce back up to 26 or more employees.

How do employers give notice to employees of any change between two applicable rates based on a change in the number of employees?

If an employer makes a change to the employee's rate of pay the employer must notify workers in advance and also provide notice to all affected employees in writing or on the worker's pay stub as required by Labor Code 2810.5 (for more information see Labor Code 2810.5 and our Frequently Asked Questions). Employers will not be penalized for paying a wage rate that exceeds what is required. However they may be liable for back wages and penalties if they pay a wage rate that is less than the law requires. Employers can minimize confusion and potential liability by providing adequate notice of any changes in writing and retaining accurate records of such changes. Should an employer drop below the 26 employee threshold in the middle of a pay period and determine they wish to pay the lower minimum wage rate it would not be appropriate to reduce their employee's rate of pay until the following period, and only after the required notice has been provided to their workforce.

What if employees work in a city or county that has a local minimum wage ordinance?

Local entities (cities and counties) are allowed to adopt minimum wage rates for employees working within their jurisdiction. Several local entities have adopted "tiered" minimum wage requirements which are also based on a specified number of employees determined under local rules which may have different thresholds for employer size (number of employees) and requirements for determining the applicable rate. The effect of having different federal, state, and local minimum wage rates governing a particular worker or location is that the employer is required to pay the highest of those rates applicable to the employee at a particular time. In most parts of the state (as of 1/1/17) that will be California's minimum wage rate, but in some cities it will be a higher local minimum wage rate.

The UC Berkeley Labor Center keeps a detailed national list of local minimum wage ordinances. The Department of Industrial Relations does not monitor or verify this list but includes it here as a reference for the public: [UC Berkeley Labor Center Inventory of US City and County Minimum Wage Ordinances](https://www.dir.ca.gov/dlse/SB3_FAQ.htm)