

Summer 2007

Boxing Out the Big Box Retailers: The Legal and Social Impact of Big Box Living Wage Legislation, 40 J. Marshall L. Rev. 1339 (2007)

Christine Niemczyk

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Business Organizations Law Commons](#), [Constitutional Law Commons](#), [Consumer Protection Law Commons](#), [Fourteenth Amendment Commons](#), [Government Contracts Commons](#), [Labor and Employment Law Commons](#), [Law and Economics Commons](#), [Law and Society Commons](#), [Legislation Commons](#), [Social Welfare Law Commons](#), [State and Local Government Law Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Christine Niemczyk, *Boxing Out the Big Box Retailers: The Legal and Social Impact of Big Box Living Wage Legislation*, 40 J. Marshall L. Rev. 1339 (2007)

<https://repository.law.uic.edu/lawreview/vol40/iss4/18>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

BOXING OUT BIG BOX RETAILERS: THE LEGAL AND SOCIAL IMPACT OF BIG BOX LIVING WAGE LEGISLATION

CHRISTINE NIEMCZYK*

I. FULL-TIME AND STILL BELOW THE POVERTY LINE

As of July 1, 2007, an employee working at Target in downtown Chicago *could have* been making \$9.25 per hour and receiving \$1.50 per hour in additional benefits.¹ Or, he *could have* been completely out of a job.² Instead, that employee is still working at Target, making ends meet with a \$7.50 per hour paycheck³ – one of the highest minimum wage salaries in the nation.⁴

* J.D., May 2008, The John Marshall Law School. The author would like to thank, first and foremost, her parents for their constant love, guidance, and encouragement throughout law school's challenges. Immense gratitude is also extended to Michael Fiscella for his support and creativity, which were instrumental in the development of this Comment. Finally, the author thanks the editors and staff of The John Marshall Law Review for their hard work and dedication.

1. See CHICAGO, ILL., MUN. CODE § 4.404.010(d) (2006) (requiring businesses with 90,000 or more square feet of retail space or more than \$1 billion in annual revenues pay their employees a higher wage than the state minimum); CHICAGO, ILL., MUN. CODE § 4.404.020(b)-(c) (setting the wage for large retailers to \$9.25 with \$1.50 per hour in benefits starting in July of 2007, then to \$9.50 with \$2.00 in benefits in July of 2008, then to \$9.75 with \$2.50 in benefits in July of 2009, and finally, to \$10.00 with \$3.00 in benefits by July of 2010; thereafter the wage and benefit rates would be raised annually by any increase in the cost of living in Chicago).

2. See Gary Washburn, *Daley Slams Visitors Who Tout Wage Laws; 'You Manage Your City,' Mayor Says of 2 Leaders*, CHI. TRIB., Aug. 18, 2006, at 4 (discussing concerns that businesses would compensate for the extra payroll distributed to employees through layoffs at existing stores); see also *Wal-Mart Opens Its First Chicago Store*, AFX NEWS LTD., Sept. 27, 2006 [hereinafter *First Chicago Store*] (finding community residents would rather have a job paying the state minimum wage than no job at all).

3. See 820 ILL. COMP. STAT. 105/4 (Supp. 2007) (raising the minimum wage in Illinois to \$7.50 in July of 2007 and increasing the wage by \$0.25 per year until reaching \$8.25 in 2010).

4. See Jeffrey Meitrodt, *Hourly Wages Going up to \$7.50*, CHI. TRIB., July 1, 2007, at 1 (acknowledging that the raise increase makes Illinois one of the highest paying states for entry-level workers).

In July of 2006, Chicago passed what became known as the Big Box Ordinance, which mandated that large retailers pay employees a living wage of \$13 per hour in salary and benefits by July of 2010.⁵ Although ultimately vetoed by Mayor Richard M. Daley,⁶ the ordinance served as an attempt by local government to compensate employees for a then-stagnant federal minimum wage and hold retail giants responsible for providing their employees a living wage.⁷

Until late May of 2007, the federal minimum wage had remained stagnant at \$5.15 per hour for almost ten years.⁸ Even with the increase to \$5.85,⁹ an American worker earning minimum wage will only gross \$11,700 working full-time for fifty weeks.¹⁰ The Department of Health and Human Services has placed the 2007 poverty line at \$13,690 for a family of two.¹¹ That means any individual with a child or spouse to support cannot do so simply by working a full-time, minimum wage job. These individuals are forced also to rely upon government assistance.¹²

5. CHICAGO, ILL., MUN. CODE § 4.404.020(b)-(c).

6. See Mark Schoeff Jr., *Chicago Big-Box Law Rejected; Proponents Look to Election*, WORKFORCE MANAGEMENT, Sept. 25, 2006, at 3 (stating Chicago Mayor Richard M. Daley vetoed the ordinance September 11, 2006).

7. Fay Hansen, *A Crazy Quilt of Wage Laws: Micromanaging the Minimum Wage; Myriad Minimum Set by States, Cities Are a Compensation Headache for Firms*, WORKFORCE MANAGEMENT, Aug. 28, 2006, at 2; Jack McMillin, *Always Low Wages, Always*, DAILY ILLINI, Sept. 27, 2006.

8. 29 U.S.C. § 206(a)(1) (2006); Richard Simon, *Minimum Pay Bill Advances; House OKs Measure, Senate May Add Tax Cut*, CHI. TRIB., Jan. 11, 2007, at 3; see also Jesse Holland, *Congress OKs Raise or Minimum-Wage Workers*, CHI. TRIB., May 25, 2007, at 4 (drawing attention to the federal government's failure to raise the minimum wage). This represents the longest period without an increase since the federal minimum wage was introduced in 1938. *Id.*

9. 29 U.S.C. § 206(a)(1)(A) (Supp. 2007). On May 24, 2007, President George W. Bush approved the first increase in the federal minimum wage since 1997. Holland, *supra* note 8. The new measure will increase the wage to \$5.85 per hour 60 days following the enactment of the bill, and then to \$6.55 one year later, and then finally, in 2009, over two years after the bill was signed into law, it will be raised to \$7.25. 29 U.S.C. § 206(a)(1)(C).

10. See Jon Gertner, *What Is a Living Wage?*, N.Y. TIMES, Jan. 15, 2006, at 38 (stating that at least sixty percent of Americans have earned the minimum wage at one point in their lives).

11. See U.S. Dept. of Health and Hum. Servs., 2007 Federal Poverty Guidelines, <http://aspe.hhs.gov/poverty/07poverty.shtml> (last visited July 12, 2007) [hereinafter DHHS] (charting the national poverty lines for the forty-eight contiguous states and the District of Columbia, Alaska, and Hawaii by members in a family unit).

12. Angela Yvonne Jones, *Bittersweet Victory: Non-Enforcement of Detroit's Living Wage Ordinance Plagues the Community's Living Wage Standard*, 5 J. L. SOC'Y 617, 622 (2004); see also Rachel Harvey, *Challenges to the Living Wage Movement: Obstacles in a Path to Economic Injustice*, 14 U. FLA. J. L. & PUB. POL'Y 229, 230 (2003) (noting taxpayers cover food stamps, emergency medical care, housing subsidies, and other social services when employers fail

Because of the federal government's continuing lack of adequate wage regulation and assistance,¹³ many states and local municipalities have taken matters into their own hands, demanding wages and health care benefits above what is federally mandated.¹⁴ With the economy back on the rise and productivity levels at all-time highs,¹⁵ over 140 state and local governments have enacted living wage ordinances to help ensure the average American worker is compensated for his or her contributions.¹⁶

Unfortunately for large retailers such as Wal-Mart and Target, big box businesses are the next focus for the living wage movement.¹⁷ Initially, living wage laws applied only to companies

to pay their employees a living wage); Jonathan Birchall and Holly Yeager, *Big-Box Politics: Wal-Mart Takes the Fight to Its Critics*, FINANCIAL TIMES (LONDON EDITION), Aug. 17, 2006, at 11 (quoting 2008 presidential candidate John Edwards, "[e]very consumer should know when they walk into Wal-Mart their tax dollars are going to provide health care for Wal-Mart workers . . . while the people who own Wal-Mart are making billions of dollars."); Mcmillin, *supra* note 7 (citing Robert Greenwald's film "Wal-Mart: The High Cost of Low Prices," which states that Wal-Mart costs \$1.5 billion in taxpayer support and managers give their employees lists of government aid programs). *But see* Fran Spielman, *Target Threatens To Leave City If 'Big-Box' Wage Rule Passes*, CHI. SUN TIMES, July 14, 2006, at 6 (finding most Chicago area Wal-Mart employees average \$10.99 per hour, with only a few employees starting at \$7.25).

13. Jones, *supra* note 12, at 625. *But see* Gertner, *supra* note 10 (determining that an increase in the federal minimum wage to \$7.25 would only affect about seven percent of the American workforce); Harvey, *supra* note 12, at 246 (quoting a study on the relationship between poverty and minimum wage which found "[t]he connection between minimum wage and poverty is even less direct, because most people who live in poverty are non-workers, and the minimum wage can affect only families with workers").

14. *See* Jones, *supra* note 12, at 625 (stating that the living wage movement has looked to local governments to promote fair wages); Holland, *supra* note 8 (determining over twenty-four states and the District of Columbia currently have minimum wage laws demanding more than the new federal minimum wage).

15. Ralph Martire, *If Economy Is Growing, Why Aren't Workers' Wages Growing?*, CHI. SUN TIMES, Sept. 2, 2006, at 10. While the economy has been growing for the past five years, corporate profits have "hit their highest point since the 1960s." *Id.* However, the majority of American wages have since "stagnated or declined;" eighty percent of annual incomes have consequently declined on an inflation-adjusted basis. *Id.* Additionally, 1.3 million Americans became uninsured in 2005 because health care costs have skyrocketed to three times the rate of wage growth. *Id.*

16. LAWRENCE MISHLE ET AL., THE STATE OF WORKING AMERICA 2006/2007 (Cornell U. Press 2007), available at http://www.stateofworkingamerica.org/intro_exec.html; *see also* D. Chad Anderton and Stephanie Seay Kelly, *Chicago's Living Wage Ordinance: A Sign of What's to Come?*, MONDAQ BUSINESS BRIEFING (U.S.), Aug. 10, 2006 (defining a living wage as "the wage a full-time worker would need to earn to support a family of three to four people above the federal poverty line").

17. Hansen, *supra* note 7. Big box retailers are targeted because they are best able to "absorb increased labor costs." *Id.* However, retail giants are

receiving city contracts and, therefore, taxpayers' money.¹⁸ Now, local governments and living wage activists are targeting large retailers due to continuing claims that those companies pay their employees impoverished wages while charging too much for company-sponsored health benefits.¹⁹ Consequently, while big box retailers are grossing billions of dollars in profits, they are also receiving "massive taxpayer subsidies," covering the health care and living expenses they fail to provide for their employees.²⁰ In the words of Robert Reich, former Clinton labor secretary, "[t]he whole system has aspects that seem grossly immoral to average working people."²¹

Chicago was the first city to propose a new breed of living wage legislation,²² which would demand retailers with over 90,000 square feet and \$1 billion in sales,²³ pay their employees a minimum hourly wage of \$9.25 and an additional \$1.50 in benefits starting July 2007.²⁴ By 2010, the wage would increase to \$10 per hour with \$3 in benefits and would continue to increase thereafter based on inflation and Chicago's cost of living.²⁵ Washington, D.C. is also considering a big box bill which would require retailers with at least 75,000 square feet to pay a minimum wage of 115 percent of the federal poverty level for a family of four, plus an additional

actually unlikely targets for living wage regulation since the retail industry accounts for only nine percent of American workers earning the federal minimum wage, while the food service industry accounts for more than sixty percent. *Id.* Additionally it seems unfair to single out a portion of an industry merely because it has successfully pursued economies of scale. *Id.* But see Jeremy Caplan, *Where to Get a Pay Raise*, TIME, Aug. 21, 2006, at 51 (acknowledging that "[i]n real terms, wages for nonmanagerial retail workers has fallen 18% since 1975.").

18. See Gertner, *supra* note 10 (listing garbage collection, security services, and home health care as tasks which local governments typically outsource to private companies through city contracts).

19. George Lefcoe, *The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes Between Wal-Mart and the United Food and Commercial Workers Union*, 58 ARK. L. REV. 833, 837 (2006).

20. Schoeff, Jr., *supra* note 6; see also Birchall and Yeager, *supra* note 12 (quoting former presidential candidate John Kerry, "[i]t's unconscionable . . . that five of the ten richest people in America are Wal-Mart stockholders from the same family – worth double-digit billions each – but they can't find the money to secure health coverage for their own workers and their families.").

21. See Gertner, *supra* note 10 (quoting Robert Reich, former labor secretary during the Clinton administration).

22. Spielman, *supra* note 12.

23. CHICAGO, ILL., MUN. CODE § 4.404.010(d).

24. CHICAGO, ILL., MUN. CODE § 4.404.020(b)-(c); see also Gary Washburn and Dan Mihalopoulos, *Daley Vetoes 'Big-Box' Law*, CHI. TRIB., Sept. 12, 2006, at 1 (noting the Chicago ordinance would affect forty existing retail stores).

25. CHICAGO, ILL., MUN. CODE § 4.404.020(b)-(c); Michael Higgins and Gary Washburn, *'Big-Box' Law Faces Test; City Lawyers Advised Before Vote that Measure Legally Suspect*, CHI. TRIB., July 28, 2006, at 1.

\$3 per hour in benefits.²⁶ Because big box ordinances like those proposed in Chicago and Washington, D.C., are the first of their kind, the government, retailers, and citizens are concerned with the economic, social, and legal consequences of such regulations, particularly in a large urban environment.²⁷

This comment will discuss the progression of the living wage movement and the legal and social consequences of its latest legislative proposals. Specifically, Part II will discuss the history of the living wage, including the social and economic forces that created the movement. This section will also examine the development of minimum wage regulation and current living wage legislation.

Part III will detail the legal and social implications of living wage ordinances aimed at big box retailers. Further, it will analyze big box ordinances' conflict with state laws and home rule powers, as well as possible preemption by the federal Employee Retirement Income Security Act (ERISA). This section will also discuss the rights of retail giants under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Last, Part III will evaluate the social and economic impact of big box-focused ordinances on the large urban areas where they are being considered.

Finally, Part IV will suggest alternatives to the current big box ordinances to satisfy the economic need for a living wage without singling out certain retailers. This section will propose a federal mandate applicable to all public businesses. When accompanied by an *adequate* increase in the federal minimum wage, this mandate will provide American workers with the

26. Hansen, *supra* note 7. San Francisco and several counties in Maryland have proposed prohibiting stores over 120,000 square feet from even building in the downtown area. *Id.* But see Gregory Meyer, *Here Comes Wal-Mart; With Big-Box Veto, Retailer Eyes Five New Locations in Chicago*, CRAIN'S CHI. BUS., Sept. 18, 2006, at 1 (noting building construction of 75,000 square feet or more in Chicago requires alderman backing; suggesting aldermen opposed to big retailer operations may act on a local level to deny them new locations).

27. See *Big Box Rebellion*, WALL ST. J., Aug. 16, 2006, at A10 (finding the Big Box Ordinance is likely to result in (1) "higher property taxes to compensate for lost sales-tax revenue once stores leave" or fail to build as planned, (2) lost retail jobs, and (3) "less access to low-cost goods" as large retailers stay in the suburbs); Higgins and Washburn, *supra* note 25 (suggesting legal concerns involve home rule status, the equal protection clauses of the state and U.S. constitutions, and interference with existing federal employee benefit laws); see also Adam Doster, *Bigger Salaries for Big Box Workers?*, IN THESE TIMES, Aug. 2006, at 11 (quoting Annette Bernhardt, law professor at New York University School of Law, and Nik Theodore, University of Illinois at Chicago professor, "[h]aving built up in rural areas and suburbs to the point of overcapacity and stagnant sales, retailers are now hungrily eyeing cities.").

income and health benefit opportunities they need to support themselves and their families.

II. A LIVING WAGE: MEETING THE BASIC NEEDS OF THE AVERAGE HOUSEHOLD

A. Legislative Development of the Minimum Wage

At the beginning of the twentieth century, state governments began to regulate the increasingly abusive and substandard labor force.²⁸ Nonetheless, state legislatures were initially met with judicial opposition.²⁹ The United States Supreme Court “halted the movement for wage regulation on the state level in 1923”³⁰ when it held in *Adkins v. Children’s Hospital*,³¹ that the District of Columbia’s minimum wage law violated the Fifth Amendment because it interfered with an individual’s right to contract.³² The Court struck down the wage regulation, determining that “the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.”³³

State legislatures eventually demonstrated that wage regulation of the local workforce was a valid exercise of their police powers.³⁴ In *West Coast Hotel Co. v. Parrish*,³⁵ the Supreme Court upheld a Washington minimum wage law finding *Adkins* to be “a

28. See Harvey, *supra* note 12, at 234-35 (finding long work hours, child labor, and an increasing rate of industrial accidents demanded regulated labor reform through increased wages, limited hours, and safer working conditions).

29. See *Lochner v. New York*, 198 U.S. 45, 53, 57 (1905) (holding a New York statute limiting the number of hours a baker may work unconstitutional because it violated the right to contract protected by the Fourteenth Amendment with “no reasonable ground for interfering with the liberty of person . . .”). *But see Muller v. Oregon*, 208 U.S. 412, 421 (1908) (holding that the right to contract “is not absolute and extending to all contracts, and that a State may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many respects the individual’s power of contract”). The Court in *Muller* determined women were a special class in need of government protection, and therefore limiting the hours a woman could work constituted a legitimate and reasonable state interest. *Id.* at 422-23.

30. Harvey, *supra* note 12, at 236.

31. 261 U.S. 525 (1923).

32. *Id.* at 545. The Court distinguished this case from its decision in *Muller* by noting that “[a] law forbidding work to continue beyond a given number of hours leaves the parties free to contract about wages and thereby equalize whatever additional burdens may be imposed upon the employer as a result of the restrictions as to hours, by an adjustment in respect of the amount of wages.” *Id.* at 554.

33. *Id.* at 561.

34. Darin M. Dalmat, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 COLUM. J.L. & SOC. PROBS. 93, 97 (2005).

35. 300 U.S. 379 (1937).

departure from the true application of the principles governing the regulation by the State of the relation of employer and employed.³⁶ As early as the 1930s, legislatures and judiciaries were expressing their concerns with the poor working conditions and the inadequate pay suffered by working class individuals.³⁷

Following *West Coast Hotel*, the federal government emerged with its own wage regulation known as the Fair Labor Standards Act (FLSA or “the Act”).³⁸ The Act provided a national minimum wage,³⁹ and though insufficient as to constitute a living wage,⁴⁰ it limited the work week to forty hours, required time-and-a-half for overtime hours,⁴¹ and prohibited child labor.⁴² The FLSA withstood constitutional scrutiny in *United States v. Darby*,⁴³ where the Court found the Act was “directed at the suppression of a method or kind of competition in interstate commerce,” which was unfair.⁴⁴

Despite its shortcomings as a living wage mandate, the FLSA was the first step toward establishing a national living wage.⁴⁵ For the Act’s first four decades, Congress amended the FLSA as needed to prevent the minimum wage from falling below the federal poverty line for a family of three.⁴⁶ However, even at that, “poverty line wages [were] not really living wages.”⁴⁷ In 1982, the federal minimum wage dropped below the poverty line and has not since been amended to keep up with inflation and cost of living

36. *Id.* at 397.

37. *Id.* at 399. “Exploitation of a class of workers . . . is not only detrimental to their health and well being but casts a direct burden for their support upon the community.” *Id.* The Court continued by noting that it is unfair for taxpayers to make up for the denial of a living wage. *Id.* “The bare cost of living must be met.” *Id.*

38. 29 U.S.C. §§ 201-19 (2006); *see also* Dalmat, *supra* note 34 (noting that the first legislative bill for wage regulation was offered in 1937 and, after some modification, enacted one year later).

39. 29 U.S.C. § 206 (2006).

40. Harvey, *supra* note 12, at 238. The details of the FLSA of 1938 mandated an hourly wage of \$0.25 to be incrementally increased to \$0.40 per hour by 1945. *Id.* The FLSA fell short of the ideals of a living wage since the minimum wage established was well below that which most workers were able to achieve through collective bargaining. *Id.*

41. 29 U.S.C. § 207 (2006).

42. 29 U.S.C. § 212 (2006); *see also* Dalmat, *supra* note 34 (noting the three main components to the FLSA: minimum wage, maximum hours and overtime, and prohibition of child labor).

43. 312 U.S. 100 (1941).

44. *Id.* at 122; *see also* Harvey, *supra* note 12, at 237 (stating that the Commerce Clause of the United States Constitution therefore gave Congress the authority to enact the FLSA).

45. Harvey, *supra* note 12, at 238.

46. Dalmat, *supra* note 34, at 98.

47. STEPHANIE LUCE, *FIGHTING FOR A LIVING WAGE* 48 (Cornell U. Press 2004).

increases.⁴⁸ Congress has called for a national living wage since the enactment of the minimum wage; yet, in almost seventy years, no such modification has been made to the FLSA to allow for one.⁴⁹

B. *The Move for More: History of the Living Wage Movement*

The living wage movement is a response to two current forces: (1) the federal government's failure to maintain a minimum wage above the national poverty line, and (2) the business industry's trend toward outsourcing.⁵⁰ One of the goals of the movement is to eliminate poverty⁵¹ by demanding businesses pay a moral wage.⁵² "The concept behind any living wage campaign is simple: Our limited public dollars should not be subsidizing poverty-wage work."⁵³

The Association of Community Organizations for Reform Now (ACORN) has led the national living wage movement with its National Campaign to Raise the Minimum Wage through state and city governments.⁵⁴ The movement first gained momentum in 1994 after Baltimore, Maryland, passed the first living wage

48. Dalmat, *supra* note 34, at 98. Federal poverty levels are not adjusted for region in terms of the cost of living, or for family size. LUCE, *supra* note 47. They are also unrealistic in the assumed budget for food. *Id.* at 48. More accurate thresholds, according to scholars commissioned by the federal government, should be "between 125 and 150 percent of the current poverty levels." *Id.*

49. Harvey, *supra* note 12, at 240. Even the recent federal minimum wage increase does not provide for a living wage. Simon, *supra* note 8. With the minimum wage set at \$5.85 through most of 2007, it will still fall short of the national poverty level by \$1,990 for a family of two, and by \$5,470 for a family of three, the standard at which Congress used to maintain the federal minimum wage. DHHS, *supra* note 11; Dalmat, *supra* note 34, at 98; *see also* Dalmat, *supra* note 34, at 100-01 (discussing how "the history of minimum wage regulation has come full circle" by states initially attempting to control the exploitation of the working class at the turn of the twentieth century, the federal government then stepping in to establish the FLSA during the middle of the century, and now state and local governments once again hold the power for "progressive economic reform").

50. Harvey, *supra* note 12, at 242; *see also id.* at 231 (defining outsourcing as local governments contracting out government services to private firms which pay lower wages and consequently can offer the government a lower bid).

51. *Id.* at 243.

52. *See* Gertner, *supra* note 10 (suggesting the argument for a living wage is not an economic one but a moral one – it is immoral to pay a person a wage on which they cannot survive).

53. Harvey, *supra* note 12, at 230. "When subsidized employers are allowed to pay their workers less than a living wage, taxpayers end up footing the double bill . . ." *Id.*

54. *See* The Living Wage Resource Center: Introduction, <http://www.livingwagecampaign.org> (last visited July 12, 2007) (suggesting ACORN's efforts led to statewide minimum wage increases in five states which affected about 850,000 workers).

ordinance requiring city service contractors to provide a living wage to its employees.⁵⁵ Since then, over a hundred local municipalities, ranging from large metropolises to small rural towns, have passed similar ordinances.⁵⁶

Following success on the minimum wage requirement front, ACORN started promoting additional benefits to living wage legislative proposals such as “health benefits, vacation days, community hiring goals, public disclosure, community advisory boards, environmental standards, and language that supports union organizing.”⁵⁷ As standard living wage ordinances spread among cities and counties, they were altered to expand their reach to include other industries. For example, in July 2000, Santa Monica, California passed a living wage ordinance that applied to all large private businesses, such as hotels, restaurants, and retailers that operated in the downtown district.⁵⁸ The ordinance was the first of its kind in setting requirements for businesses that held “no direct financial relationship with the city.”⁵⁹

The movement’s greatest success in this area came in 2003 when Santa Fe, New Mexico, and San Francisco, California, passed citywide living wage laws.⁶⁰ Santa Fe’s current ordinance requires all businesses operating within the city with twenty-five or more employees to “pay a wage of \$8.50 per hour starting in 2004, to go up in increments to \$10.50 by 2008, and then to be

55. The Living Wage Resource Center: Introduction, <http://www.livingwagecampaign.org> (last visited July 12, 2007). The Baltimore living wage ordinance, “the first of its kind in the United States,” went into effect in July of 1995 and established an hourly minimum wage of \$6.10 for individuals under city contract. Harvey, *supra* note 12, at 229. This wage was set to increase incrementally until the income of a full-time worker was ninety percent of the federal poverty level for a family of four. *Id.* The wage reached this level in 1999 and was thereafter indexed to inflation. *Id.*; see also The Living Wage Resource Center: Living Wage Impact Research Summaries and Citations, <http://www.livingwagecampaign.org/index.php?id=1953> (last visited July 12, 2007) (detailing a study conducted in Baltimore a year after the living wage ordinance was enacted which concluded businesses did not leave the city or cut staff levels; additionally, the ordinance only cost taxpayers seventeen cents per person per year).

56. See LUCE, *supra* note 47, at 32 (naming New York, Los Angeles, Chicago, San Francisco, and Boston as a few of the major cities adopting living wage ordinances for city contracts).

57. *Id.*

58. *Id.* at 33. The living wage was stated at \$10.50 per hour in addition to benefits. *Id.* However, the Santa Monica Chamber of Commerce had the ordinance rescinded in November of 2002 after a “hotly contested” campaign. *Id.*

59. The Living Wage Resource Center: Living Wage Successes, <http://www.livingwagecampaign.org/index.php?id=1958#camp153> (last visited July 12, 2007) [hereinafter Living Wage Successes].

60. LUCE, *supra* note 47, at 34.

indexed for inflation.”⁶¹ San Francisco’s ordinance establishes a wage of \$8.50 per hour, indexed for inflation, for all workers employed in the city at companies with ten or more employees.⁶² Businesses are also required to offer an additional \$1.60 per hour for health care benefits.⁶³

Currently, the movement is backing unions struggling with retail giants who fight union organization and, according to the unions, fail to provide their employees with a living wage and necessary health care benefits.⁶⁴ Although large retailers may refuse to build in or may even move out of neighborhoods with a living wage mandate,⁶⁵ proponents of a living wage argue that communities are better off without these businesses exploiting their residents.⁶⁶ On the other hand, retailers argue that wages and benefits are a consideration for new store construction as they account for a majority of a retailer’s operating costs.⁶⁷ Retailers also assert that a company cannot be viewed as detrimental to the community when it brings hundreds of jobs for thousands of

61. *Id.*

62. *Id.*

63. *Id.* Since the enactment of the citywide living wage ordinances, “the sky has not fallen” in either Santa Fe or San Francisco. Washburn, *supra* note 2. In fact, officials from Santa Fe and San Francisco assured Chicago aldermen that the living wage ordinance had no negative effects on their communities. *Id.* But see Schoeff, Jr., *supra* note 6 (citing a study finding that the Santa Fe unemployment rate rose sixteen percent, affecting primarily low-skilled workers).

64. The Living Wage Resource Center: Living Wage Press Releases, <http://www.livingwagecampaign.org/index.php?id=1950> (last visited July 12, 2007). Unions are looking to state legislatures and local county boards to increase wages and health care benefits where companies resist organized labor. Schoeff, Jr., *supra* note 6. “They’re trying to do through government mandate what they can’t do in the marketplace,” according to Mike Flynn, legislative director at the Employment Policies Institute. *Id.* But local aldermen in Chicago, where the latest big box ordinance was proposed, feel that “[i]t’s a union issue, but the unions need to get off their behinds and organize instead of coming to the City Council to try to get us to organize them.” Washburn and Mihalopoulos, *supra* note 24.

65. See Spielman, *supra* note 12 (suggesting Wal-Mart has considered running free shuttle buses to the suburban stores to avoid the living wage and allow urban citizens access to their stores).

66. See *Big Box Rebellion*, *supra* note 27 (contrasting the living wage proponents belief that retailers will come despite the living wage with aldermen’s concerns that the stores will not only not come, but will leave the stores they do operate within the city); see also Washburn and Mihalopoulos, *supra* note 24 (citing Mayor Daley’s reasons for vetoing the bill in Chicago, “I do not believe that this ordinance, well intentioned as it may be, would achieve [a decent wage for all Chicagoans.] Rather, I believe it would drive jobs and businesses from our city, penalizing neighborhoods that need additional economic activity the most.”).

67. Nichole Monroe Bell, *Lowe’s May Shelve Plans in Chicago, Report Says: City Officials Say at Least One Store on Hold as Retailer Awaits Veto of Big-Box Wage Law*, CHARLOTTE OBSERVER, Aug. 10, 2006.

applying residents.⁶⁸ This struggle has resulted in the recent debate over big box-oriented proposals, which have flooded city councils and county boards across the nation.⁶⁹ Likewise, these proposals highlight, most significantly, the legal and social strife that is central to the living wage movement.⁷⁰

III. CAN BIG BOX LEGISLATION SURVIVE JUDICIAL AND PUBLIC SCRUTINY?

The consequences of big box-oriented living wage legislation reach from the courtroom to the home of every individual in the community enforcing the law.⁷¹ Specifically, the legal challenges facing big box ordinances appear on both the federal and state levels.⁷² The social impact, on the other hand, affects the local level, altering the economic state of the community and its neighboring cities.⁷³

68. *First Chicago Store*, *supra* note 2. Recently, 15,000 people applied for 400 jobs at the newest Chicago Wal-Mart. *Id.* The Austin store which opened in Chicago in November of 2006 employs over 443 local residents and has produced \$2 million in state and local taxes, including \$500,000 in city sales taxes. *Big-Box Ordinance Is Best Left on Shelf*, CHI. SUN TIMES, Apr. 20, 2007, at 41; *see* Schoeff, Jr., *supra* note 6 (quoting Jim Hendricks, partner at Fisher & Phillips, “[y]ou don’t see Wal-Mart employees complaining about what they have. . . . If they wanted to organize, they would. It’s not that difficult.”).

69. *See* Anderton and Kelly, *supra* note 16 (discussing how Chicago’s Big Box Ordinance has already influenced similar efforts in other cities and the continued pursuance of such retail-oriented legislation should be expected); Caplan, *supra* note 17 (noting a similar legislative push for a big box living wage ordinance like the one in Chicago also found in Washington, D.C. and Boston).

70. *See Chicago, Take a Look at Maryland*, CHI. TRIB., July 22, 2006, at 18 (comparing Chicago’s proposed big box ordinance with Maryland’s newest attempt to regulate health care benefits for Wal-Mart employees; Maryland’s ordinance was recently struck down by a federal judge).

71. *See generally* Elliot Zwiebach, *Legal Obstacles: Wal-Mart Stores Inc.*, SUPERMARKET NEWS, Aug. 7, 2006, at 18 (discussing the legal struggles and social impacts other living wage legislation has had on the local environment).

72. Higgins and Washburn, *supra* note 25. Chicago’s Law Department advised the City Council that there would be “significant risk” that a federal court would invalidate the law. *Id.* “We are going to end up in one of two places, either the state courthouse or the federal courthouse,” noted the president of the Illinois Retail Merchants Association, David Vite. *Id.* The state courthouse would debate the home rule issue as well as the equal protection clause of the state constitution. *Id.* The federal courts would hear claims of violation of the United States Constitution’s Equal Protection Clause and the ordinance’s preemption by federal law on employee benefits. *Id.*

73. *See Big Box Rebellion*, *supra* note 27 and accompanying text.

A. Legal Challenges

1. The Struggle with the State's Home Rule Authority

Large retailers challenging living wage ordinances assert that local municipalities enacting these laws have exceeded their power under home rule authority.⁷⁴ Home rule refers to the state's statutory or constitutional grant of power to local governments over matters of local concern.⁷⁵ This "broad delegation of authority"⁷⁶ allows city councils and county boards to determine the best structure to satisfy the needs of the community and to regulate the environment in which it operates.⁷⁷

One of the only limits to home rule authority lies in preemption by state law.⁷⁸ Consequently, legal challenges to home

74. Higgins and Washburn, *supra* note 25.

75. Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. REV. 1983, 1985 (2006).

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. . . . The State, therefore, at its pleasure may modify or withdraw all such powers

Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907); *see also Jones, supra* note 12, at 630 (discussing the importance of home rule governments and the depth and breadth of the powers given to local municipalities under home rule).

76. Bluestein, *supra* note 75.

77. Jones, *supra* note 12, at 630; *see also* Bluestein, *supra* note 75, at 1990 (detailing the two dimensions of home rule authority: first, the broad authority granted which does not require state permission before taking government action on local affairs; and second, limited interference by the state legislature in matters only affecting the local community).

78. *New Mexicans for Free Enterprise v. City of Santa Fe*, 126 P.3d 1149, 1158 (N.M. Ct. App. 2005); *see also Dalmat, supra* note 34, at 117 (citing the other limitation upon home rule authority, legislated in only eight states, is the private law exception). In *New Mexicans for Free Enterprise*, the Court of Appeals of New Mexico defined a two prong test for determining the permissiveness of regulation of a private relationship:

[A]s long as the intrusion into the private relationship is [1] in pursuit of the public interest and clearly within the independent municipal power, that is sufficient to permit the municipality to pass a private or civil law regulating that relationship [2] as long as the law does not generate non-uniformity issues.

126 P.3d at 1163. The court compared wage regulation to other ordinances regulating public health and safety. *Id.* The court also found the city's pursuit of a public program which seeks to ensure workers can meet their basic needs and not burden the community to be a valid and reasonable purpose in regulating private relationships. *Id.* While non-uniformity of the law was a matter of great concern for the court, it determined that the ordinance would not "generate confusion" as the ordinance is "high-profile" and employees and employers can reasonably be expected to be aware of it.

rule powers generally involve conflicts between state law and local law, where local law “overrides a state law on the same subject.”⁷⁹ If the state directly denies local municipalities the power to regulate wages, or reserves that power to the state alone, then local governments cannot pass legislation that would violate the intent of the state’s general assembly.⁸⁰

While home rule laws vary among the states,⁸¹ living wage ordinances, like the one enacted in Santa Fe, have withstood judicial scrutiny of the city’s home rule powers.⁸² Similarly in *New Mexicans for Free Enterprise v. City of Santa Fe*,⁸³ the Court of Appeals of New Mexico upheld the city’s living wage ordinance against claims that it was beyond the scope of the home rule municipality.⁸⁴ Because the Minimum Wage Act did not expressly deny local government the power to enact a wage higher than that provided in the state legislation, the court held there was no preemption by the state’s Minimum Wage Act and the living wage ordinance was found valid under home rule authority.⁸⁵

Because states vary in whether the state law must expressly deny municipalities the power to regulate or if that denial may be inferred from the intent or actual application of the act, it is difficult to predict whether living wage legislation would be upheld under home rule powers in every state.⁸⁶ In Illinois, where the first big box ordinance was proposed, the state constitution dictates that, “[p]owers and functions of home rule units shall be construed liberally,” limited only where state legislature has restricted those powers.⁸⁷ Illinois’ Minimum Wage Law does not expressly prohibit local governments from enacting a higher wage.⁸⁸ Had Chicago’s Big Box Ordinance not been vetoed by

Id. at 1164.

79. Bluestein, *supra* note 75, at 1992.

80. *See* Dalmat, *supra* note 34, at 117 (examining the primary grounds under which local minimum wage laws face preemption by state law).

81. Bluestein, *supra* note 75, at 1991. Virginia and North Carolina are the only states that have no home rule authority delegated to them through the state constitutions or state legislature. *Id.* at 1989. Although the language of home rule powers vary by state, they share many common elements such as the general power to regulate local actions so long as it is “not inconsistent with the laws of the General Assembly.” *Id.* at 1991 (quoting IOWA CONST. art. III, § 38A).

82. *See generally* the holding in *New Mexicans for Free Enterprise* regarding home rule powers over wage legislation. 126 P.3d 1149.

83. 126 P.3d 1149, 138 N.M. 785 (N.M. Ct. App. 2005).

84. *Id.* at 1160.

85. *Id.* at 1173. While the state’s Minimum Wage Act provided for a minimum wage for “all” workers, the Court determined that such language was not intended to force the Act’s wage to be the only possible wage permitted. *Id.* at 1159.

86. *Id.*

87. ILL. CONST. art. VII, § 6; Bluestein, *supra* note 75, at 1994.

88. 820 ILL. COMP. STAT. 105/4 (2006).

Mayor Daley,⁸⁹ it too would have likely withstood judicial scrutiny under the first limit to home rule authority.⁹⁰

2. Federal Rights and Regulations

a. Equal Protection Claims

In addition to raising claims against home rule authority, big box retailers may also challenge an ordinance's violation of the Equal Protection Clause of both the United States and individual state constitutions.⁹¹ Because the argument for both constitutions requires the same analysis, this discussion will focus on the United States Constitution's Equal Protection Clause.⁹²

The Fourteenth Amendment prohibits the states from denying "any person within its jurisdiction the equal protections of the laws."⁹³ Retailers argue that by singling out not only one industry, but a portion of that industry, big box legislation is violating equal protection under the law.⁹⁴

The judiciary, however, gives the law-enacting body the benefit of the doubt when it comes to the constitutionality of such laws.⁹⁵ "Any reasonably conceivable state of facts, or any rational basis for the classification, will suffice" because minimum wage regulation involves social and economic policy and therefore does not target a suspect class or impinge upon a fundamental right.⁹⁶ No justification is required for social and economic legislation "as long as the classification is rationally related to a legitimate government purpose."⁹⁷

89. See Washburn and Mihalopoulos, *supra* note 24 (noting the Big Box Ordinance was the first application of Chicago Mayor Richard Daley's veto power in seventeen years).

90. See generally *New Mexicans for Free Enterprise*, 126 P.3d 1149 (providing an analysis on home rule authority).

91. Spielman, *supra* note 12.

92. See Higgins and Washburn, *supra* note 25 (detailing the extent of Santa Fe's ordinance). The argument will also focus on the decision in *New Mexicans for Free Enterprise* because it reflects similar legal analysis as would be necessary for big box legislation since Santa Fe has the most expansive living wage legislation to date.

93. U.S. CONST. amend. XIV, § 1.

94. Hansen, *supra* note 7.

95. See Lefcoe, *supra* note 19, at 850 (noting that "[t]he standard of equal protection judicial review for economic regulation is minimal").

96. See *id.* at 851 (stating courts treat land control regulation as rationally related to social and economic goals and therefore withstand equal protection challenges); *New Mexicans for Free Enterprise*, 126 P.3d at 1167 (concluding businesses are not a suspect class and such businesses are not being deprived of a fundamental right, therefore only minimum scrutiny of the ordinance is required).

97. See *New Mexicans for Free Enterprise*, 126 P.3d at 1167 (opining that wage regulation falls under social and economic legislation).

In *New Mexicans for Free Enterprise*, the court determined that local governments do have a legitimate interest in minimum wage regulation.⁹⁸ New Mexican businesses failed to convince the court that the ordinance created an arbitrary division that exempted smaller businesses from the ordinance.⁹⁹ The court concluded the twenty-five or more employees' exemption was "classic line-drawing in legislative policy."¹⁰⁰ The court refused to conclude that an exemption based on business size was irrational.¹⁰¹ Instead, it found that the legislature's decision to study the effects of the ordinance on a single group before applying it to others was completely reasonable.¹⁰²

The big box retailers will likely experience the same result in an equal protection claim against the local government. For example, Illinois courts would use the same rational basis test to determine the validity of the ordinance proposed in Chicago.¹⁰³ The City Council could rationally apply the ordinance to only a segment of the industry operating within city limits under the purpose of guaranteeing a minimum level of wages and benefits.¹⁰⁴ Although the Big Box Ordinance distinguishes employers based upon store size and company revenues, the legislature and judiciary could draw a parallel to the Illinois General Assembly's frequent classification of businesses by employee population.¹⁰⁵ Consequently, Chicago's Big Box Ordinance would pass the rational basis test and be found constitutionally valid, defeating retailers' equal protection claims based upon the state constitution.¹⁰⁶

98. *Id.* at 1168.

99. *Id.* Plaintiffs relied on precedent stating that "classification, in order to be legal, must be . . . founded upon real differences of situation or condition . . . and reasonably justify a different rule." *Id.* (quoting *Burch v. Foy*, 62 N.M. 219, 224 (Ct. App. 1957)).

100. *Id.* at 1167. The court further emphasized it is the plaintiff's burden to show flaws in the classification. *Id.*

101. *Id.* at 1168.

102. *Id.*

103. *See Nevitt v. Langfelder*, 623 N.E.2d 281, 285 (Ill. 1993) (noting that without a suspect class or effect on a fundamental right, legislation (the Public Employee Disability Act of Illinois in that case) only need withstand the rational basis test to determine whether the classification is rationally related to a legitimate state interest).

104. *See id.* at 285-86 (finding the protection and regulation of a minimal level of disability benefits constituted a legitimate government purpose).

105. *Id.* at 286. "In legislation affecting wages and benefits, the General Assembly has frequently distinguished among employees on the basis of their employer's population." *Id.*

106. *See id.* at 287 (finding the legislative classification of the Public Disability Act valid because of the claimant's failure to meet the burden of demonstrating the irrationality of the law). Additionally, the court held that classification determined by population size was rationally related to the need to set minimum standards for disability benefits. *Id.*; *see also* *People ex. rel.*

b. ERISA

Finally, where big box ordinances attempt to regulate employee benefits in addition to wages, the legislation may be invalid because of preemption by federal law. ERISA preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA.¹⁰⁷

Recently, the District Court for the District of Maryland invalidated big box legislation because it required certain retailers¹⁰⁸ to spend a specific percentage of total wages on health insurance costs for its employees.¹⁰⁹ Citing to ERISA’s main objective, to ensure national uniformity of employee benefit plans,¹¹⁰ the court determined Maryland’s regulation of benefits was directly preempted by ERISA.¹¹¹ The state statute directly and expressly “relate[d] to”¹¹² ERISA employee benefit plans because the statute affected an area of regulation where ERISA’s preemption is essential to the uniformity and functionality of the law in that area.¹¹³

Chicago’s Big Box Ordinance attempted to avoid ERISA preemption through strategic wording. The ordinance defined benefits as payments made for “any bonafide fringe benefits,” not limiting such benefits to health care coverage, but, rather, broadening the scope to include any type of benefit.¹¹⁴ However,

Moshier v. Springfield, 19 N.E.2d 598, 601-02 (Ill. 1939) (holding that the setting of different minimum wage standards for firemen depending on local population was rationally related to the general welfare and supporting the present costs of living in that area).

107. 29 U.S.C. § 1144(a) (2006). Employee welfare benefit plan refers to “any plan, fund, or program . . . established or maintained by an employer or by an employee organization . . . for the purpose of providing for its participants . . . through the purchase of insurance or otherwise.” 29 U.S.C. § 1002(1) (2006).

108. See Retail Indus. Leaders Ass’n v. Fielder, 435 F. Supp. 2d 481, 485 (Md. 2006) (acknowledging that, in practice, as anticipated by the General Assembly, the ordinance only applied to Wal-Mart).

109. *Id.* at 484. The Fair Share Act of Maryland required non-government employers with over 10,000 workers to spend at least eight percent of its total payroll on health care coverage or contribute the difference between that eight percent and what the employer currently pays for health care coverage to the Secretary of State. *Id.* The Secretary was then to use the funds to support the state Medicaid fund. *Chicago, Take a Look at Maryland, supra* note 69.

110. *Fielder*, 435 F. Supp. 2d at 494. Preemption by ERISA prevents employers not only from facing fifty different state requirements but the limitless number of municipal regulations as well. *Id.* at 494 n.13.

111. *Id.* at 495. When considering the consequences of such a regulation, the court concluded Wal-Mart would be forced to structure its spending differently for its Maryland employees. *Id.*

112. 29 U.S.C. § 1144(a).

113. *Fielder*, 435 F. Supp. 2d at 494 n.12.

114. CHICAGO, ILL. MUN. CODE § 4.404.010(i); see also Hansen, *supra* note 7 (quoting the analysis of John Raudabaugh, partner at Chicago law firm Baker

the Supreme Court has held ERISA preemption to be widely expansive,¹¹⁵ encompassing not only acts that “relate to” ERISA plans,¹¹⁶ but also those acts that have a “connection with”¹¹⁷ or “reference to” covered ERISA plans.¹¹⁸ It is unlikely that the Big Box Ordinance’s precise language would prevent preemption because of ERISA’s strong uniformity policy.¹¹⁹ Should a federal judge find the ordinance to be outside the scope of ERISA’s preemption, that decision would result in the legislative and business-operative chaos that Congress and the courts seek to avoid.¹²⁰

B. Social Impact and Reaction

Living wage legislation can have a positive and dramatic impact on the local community where it is enacted.¹²¹ A living wage makes a significant difference in the lives of low-wage workers battling poverty.¹²² Because wages make up seventy-five percent of a family’s total income,¹²³ a living wage allows people to meet the rising costs of living and adequately provide for themselves and their families.¹²⁴

Arguably, a living wage only costs companies a small percentage of profits.¹²⁵ A recent study shows that while companies have experienced a growth of productivity of 33.4

& McKenzie).

115. *Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001).

116. 29 U.S.C. § 1144(a).

117. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).

118. *Dist. of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130 (1992).

119. See generally *Fielder*, 435 F. Supp. 2d at 493-96 (discussing the governing importance of ERISA among the states and local municipalities).

120. *Id.* at 494; see also *Shaw*, 463 U.S. at 99 (quoting in part 120 Cong. Rec. 29197 (1974), “[w]ith the preemption of the [employee benefits] field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation,” stated U.S. Representative Charles Dent).

121. See *Harvey*, *supra* note 12, at 242 (stating some positive effects arguably caused by living wage legislation include lowered poverty levels and increased urban development); *Big-Box Ordinance Is Best Left on Shelf*, *supra* note 68 (finding Menards, CVS Pharmacy, Panera Bakery, Aldi’s, and Bank of America have all committed to building in the community around Chicago’s first Wal-Mart).

122. *Id.* at 233.

123. *MISHEL*, *supra* note 16.

124. See *Harvey*, *supra* note 12, at 248 (discussing how workers being paid higher wages can get better health care, increased credit, and the ability to invest in basic necessities such as a home or car); *Doster*, *supra* note 27 (describing a Chicagoan who spent many years earning poverty-level wages and the difficulty she experienced in keeping up with the cost of living in Chicago).

125. *Harvey*, *supra* note 12, at 233.

percent over the last ten years, workers' wages and health care benefits remain stagnant.¹²⁶ If companies apply some of the extra profits to payroll, workers will be more inclined to continue to increase productivity and growth for the company.¹²⁷ Employees who receive higher wages perform better at work and are less likely to be absent or to quit.¹²⁸ Therefore, a living wage results in an increased standard of living for employees and provides companies with a higher quality workforce.¹²⁹

Big box-oriented living wage legislation does, however, have a number of potentially detrimental effects on the local community. Living wage restrictions place local businesses at a competitive disadvantage, encouraging companies to move outside the city limits or raise prices to compensate for increased labor costs.¹³⁰ In Santa Fe, the living wage ordinance, applicable only to businesses with twenty-five or more employees, stunted growth and encouraged businesses to stay under twenty-five workers to maintain exemption.¹³¹ With living wage legislation targeting big box retailers alone, those businesses will remain on the outskirts of cities,¹³² making their low-cost goods, but not their hundreds of jobs, available to the legislating city.¹³³

While living wage ordinances increase the wages of low-income families, they also remove these families from government assistance programs.¹³⁴ This actually creates a disincentive for poor families because, often, those individuals can better support their families with slightly below-poverty level wages and added government assistance, rather than with slightly above-poverty level income.¹³⁵

126. MISHEL, *supra* note 16. Productivity in the workplace has risen drastically since 2000, increasing by 3.1 percent every year from 2000-2005. *Id.* An increase in productivity generally relates to an increase in living standards, and therefore has a positive effect on the economy. *Id.* However, between 2000 and 2004 the average family income fell by three percent, about \$1600 in 2004 dollars. *Id.*

127. *See* Harvey, *supra* note 12, at 248 (finding employees are more motivated when paid higher wages).

128. *See id.* (noting when a company offers its employees higher wages, the result is improved employee morale, lower absenteeism, less turnover, and higher-quality applicants).

129. MISHEL, *supra* note 16.

130. Gertner, *supra* note 10.

131. *Id.*

132. *See supra* note 65 and accompanying text.

133. *See* Zwiebach, *supra* note 71 (quoting Michael Lewis, senior vice president of store operations at Wal-Mart, "[j]ust as every business weighs the costs and complications associated with each potential location, we will try to provide Chicago residents with the savings, choices and jobs they clearly want, without subjecting ourselves to a discriminatory marketplace and a competitive disadvantage.>").

134. Harvey, *supra* note 12, at 246.

135. *Id.*

Finally, employers are more likely to hire high-skilled workers over low-skilled workers where wages are likely to be equal.¹³⁶ With an increase in high-skilled workers, employers may cut jobs and place more responsibility on fewer employees, thereby creating fewer jobs and a more competitive job market, unlikely to help the low-income job-seekers.¹³⁷ Consequently, big box legislation may completely backfire socially, hurting the families it seeks to help and backing the working community, not the large retailers, into an economically distressed corner.¹³⁸

IV. A TIME FOR CHANGE: A FEDERAL SOLUTION

Just as marginally raising the federal minimum wage is an inadequate response to the realistic, day-to-day needs of the average American worker,¹³⁹ big box ordinances are also an incomplete answer because their specific mandates only apply to a small section of an industry and an even smaller section of working America.¹⁴⁰ A well-rounded federal law—applicable to all public businesses in all industries—is necessary to fill the gaps in employee wages and benefits without overburdening businesses, big and small alike.¹⁴¹

136. *Id.* at 248.

137. *Id.* *But see id.* at 250 (suggesting that studies have consistently shown that wage increases do not cause unemployment levels to rise).

138. *See* Spielman, *supra* note 12 (noting Wal-Mart threatened to cancel the proposed building of twenty stores in Chicago if the ordinance was passed, while Target threatened to cancel three); Bell, *supra* note 67 (finding that Lowe's put at least one store building on hold pending the veto of the Big Box Ordinance). *But see* Bell, *supra* note 67 (stating Home Depot and Menards intended to continue with construction despite the ordinance); Caplan, *supra* note 17 (discussing how Costco already meets the Chicago ordinance's requirements).

139. *See* Gertner, *supra* note 10 (stating that even the eventual federal minimum wage increase to \$7.25 in 2009 would not adequately meet the needs of many workers living in cities with a much higher cost of living).

140. *See* Hansen, *supra* note 7 and accompanying text. Illinois Governor Rod Blagojevich recently presented his Tax Fairness Plan to the Illinois House of Representatives; *see Illinois Tax Implosion*, WALL ST. J., May 14, 2007, at A16 (noting the bill was shut down in a House vote 107-0). The bill was intended to provide the state with additional funds to put toward establishing universal health care for Illinois' 1.4 million uninsured residents. Robert Manor, *Groups Line up on Health Plan*, CHI. TRIB., Mar. 6, 2007, at 3. The tax plan would have required businesses with more than \$5 million in revenue pay an additional two percent tax on all gross receipts and a three percent payroll tax for those companies that do not offer health insurance. *Id.* The funds collected would go to the state treasury to fund health care, education, and other state programs. *Id.*; *Illinois Tax Implosion*, *supra* note 139.

141. *See* Hansen, *supra* note 7 (finding big box retailers are "more likely to offer benefits than smaller retailers or companies in the food service industry").

Foremost, the federal minimum wage must be raised to an adequate level.¹⁴² Currently, the national poverty level is set at \$13,690 for a family of two;¹⁴³ therefore, in order to allow working class families to earn above the poverty line, the federal minimum wage should immediately be set to \$6.85 per hour for 2007.¹⁴⁴ The minimum wage needs to constitute a living wage, adequately providing for a family of three.¹⁴⁵ The national poverty level for a family of three is \$17,170, requiring a living wage of \$8.59 an hour for 2007.¹⁴⁶

The federal minimum wage should also follow the path of many living wage ordinances demanding the wage be indexed to account for inflation.¹⁴⁷ This will ensure the national poverty level and minimum-wage annual income are always balanced so as not to allow the federal minimum wage to become stagnant, and subsequently wholly inadequate, again.¹⁴⁸

Of course, some states and local municipalities will retain the power to provide higher wages to the employees working in their districts.¹⁴⁹ Exercising this power allows local governments to

142. Economic Policy Institute: Minimum Wage Issue Guide: FAQs, http://www.epinet.org/content.cfm/issueguides_minwage_minwagefaq (last visited July 12, 2007) [hereinafter EPI]. Approximately 14.9 million workers, eleven percent of the American workforce, earn the federal minimum wage and would benefit from its increase. *Id.* Of these workers, 6.6 million would receive direct raises to the mandated minimum while 8.3 million would receive raises “due to the spillover effect” where employers would raise even those wages above the federal minimum in order to maintain their “internal wage structure.” *Id.*

143. DHHS, *supra* note 11. However, many economists find the federal poverty line is an inadequate measure of what families need to support themselves. EPI, *supra* note 141. Many families receive government support, such as federal Earned Income Tax Credits (EITCs) and food stamps, which results in an inflated reported income. *Id.*

The national poverty level should also be adjusted to more accurately reflect exactly how much income an individual requires to meet their basic needs. *Id.* Recent studies indicate the national poverty line is actually closer to \$23,000 to \$46,000, depending on location. *Id.*; see also Lefcoe, *supra* note 19, at 849 (finding an income double that of the national poverty level would be required to support a family of four). *But see* EPI, *supra* note 141 (noting that a family of three is the most appropriate level to consider so as to cover a single parent with two children, or only one working parent and a single child).

144. See EPI, *supra* note 141 (finding \$7.25 per hour would increase a family’s income, including EITCs and food stamps, to \$18,326).

145. See Anderton and Kelly, *supra* note 16 (defining a living wage as that which meets the basic needs of a family of three).

146. DHHS, *supra* note 11.

147. See LUCE, *supra* note 47, at 34 (detailing the latest ordinances demanding minimum wage be indexed to inflation). See generally Living Wage Successes, *supra* note 59 (describing every living wage ordinance in the United States).

148. See *supra* notes 8-9 and accompanying text.

149. See Dalmat, *supra* note 34, at 101 (discussing how it is difficult to

better assess the poverty level in their area, as compared to the national poverty level, taking into account the local work climate and costs of living.¹⁵⁰ While states, municipalities, and local city boards may be able to more generously compensate the local workforce,¹⁵¹ they will nonetheless be subject to the following federal legislation.

All public companies must, on a quarterly basis,¹⁵² distribute to all employees eight percent¹⁵³ of their quarterly gross profit¹⁵⁴ in

predict the power of local municipalities to create minimum wage legislation because the power conferred to local governments varies by state).

150. See Washburn, *supra* note 2 (noting how Chicago Mayor Daley “scuffed at any comparison between Chicago and the much smaller and more affluent western cities” when examining how the living wage functioned in San Francisco and Santa Fe).

151. See Holland, *supra* note 8 (stating over two dozen states and the District of Columbia have minimum wages higher than the federal wage); Living Wage Successes, *supra* note 59 (noting 140 local governments have enacted living wage legislation).

152. Quarterly basis was selected so as to coincide with the businesses filing of the SEC-mandated 10-Q form which will provide the necessary accounting information to calculate the wage bonus.

153. Eight percent was selected according to Maryland’s proposed benefit legislation demanding eight percent of payroll be contributed to a benefit program or state Medicaid fund. *Chicago, Take a Look at Maryland*, *supra* note 69. Eight percent was also selected as a proportionate number of profits considering gross profit provided over the last four quarters and total employees. *Id.*

The reported gross profits of several companies, including Wal-Mart, Target, McDonald’s, Yum! Brands (which includes KFC, Pizza Hut, Taco Bell, Long John Silver, and A&W All-American Food Restaurants), and Marriott International, were evaluated to determine an appropriate bonus in lieu of company benefits. Wal-Mart Stores, Inc., Quarterly Report (Form 10-Q), at 2 (period ending Apr. 30, 2007); Target Corporation, Quarterly Report (Form 10-Q), at 2 (period ending May 5, 2007); McDonald’s Corporation, Quarterly Report (Form 10-Q), at 4 (period ending Mar. 31, 2007); Yum! Brands Inc., Quarterly Report (Form 10-Q), at 3 (period ending Mar. 24, 2007); Marriott International, Inc., Quarterly Report (Form 10-Q), at 2 (period ending Mar. 23, 2007).

In the first quarter of 2007, eight percent of gross profits of those companies range from \$1103.41 (Target) to \$184.86 (Marriott). NOTE: Employee totals used in calculations were taken from Yahoo! Finance reports which only account for full-time employees. Yahoo! Finance: WMT: Profile for Wal-Mart Stores, <http://finance.yahoo.com/q/pr?s=WMT> (last visited July 12, 2007); Yahoo! Finance: TGT: Profile for Target CP, <http://finance.yahoo.com/q/pr?s=TGT> (last visited July 12, 2007); Yahoo! Finance: MCD: Profile for McDonald’s CP, <http://finance.yahoo.com/q/pr?s=MCD> (last visited July 12, 2007); Yahoo! Finance: YUM: Profile for Yum Brands Inc., <http://finance.yahoo.com/q/pr?s=YUM> (last visited July 12, 2007); Yahoo! Finance: MAR: Profile for Marriott Int. CLA, <http://finance.yahoo.com/q/pr?s=MAR> (last visited July 12, 2007). Therefore, most companies are likely to have many more employees over which to distribute the percentage of profits.

154. Gross profit is determined by total revenue less costs of sales. BLACK’S LAW DICTIONARY 1246 (8th ed. 2004).

the form of a bonus. Gross profits will be determined by the total revenue less the cost of goods or services as found in each business's quarterly 10-Q filed with the Securities Exchange Commission (SEC).¹⁵⁵ This percentage will be distributed according to the number of hours worked by each employee over the quarter.¹⁵⁶ Employees receiving adequate health benefits, as determined by ERISA¹⁵⁷ from a company-sponsored program, will be excluded from the mandatory bonus. The distinction made between employees with and without benefits is important because employers will retain those bonuses which would otherwise be distributed to employees with benefits.¹⁵⁸ Each eligible employee shall receive their bonus check within thirty days of the 10-Q filing with the SEC. Further, there is no requirement as to how this bonus must be used by the employee so

155. All company SEC filings are public record and available at <http://www.sec.gov/> under Filings and Forms (EDGAR).

156. The bonus will be computed by taking eight percent of the reported quarterly gross profit and dividing it among each employee according to number of hours worked that quarter. More specifically, the eight percent will be distributed to the employees based on the amount of hours worked per employee as a percentage of the total number of hours expended by the company. The formula is given below:

$$\frac{0.08(\text{Gross Profit})}{\text{Total payroll hours}} \times \frac{\text{Total hours worked by}}{\text{individual employee}}$$

157. See 29 U.S.C. §§ 1002-1191 (2006) (detailing all regulations permitted and mandates required under ERISA). ERISA should also be modified to provide funding requirements and minimum contribution standards for welfare benefit plans offered by the companies; see also Michael I. Richardson, *Employee Benefits Law: Securing Employee Welfare Benefits Through ERISA*, 61 NOTRE DAME L. REV. 551 (1986) (discussing the gap within "ERISA's remedial framework" which provides different vesting and funding standards for pensions and welfare benefit plans).

158. Using the formula in *supra* note 155, companies may add up all the bonuses which would otherwise be distributed to individual employees receiving benefits and retain those bonuses.

This proposal is distinguishable from the bill set forth by Illinois Governor Blagojevich in two important respects. First, the percentage is deducted from gross profit, not gross revenue, thereby allowing companies to avoid distributing funds when they may be operating at a loss. See Manor, *supra* note 139 (finding employers under the Illinois tax plan would be responsible for paying the gross receipts tax "whether they were highly profitable, barely breaking even or losing money"); *Illinois Tax Implosion*, *supra* note 139 (noting that a gross receipts tax hits hardest the small and medium-sized firms with healthy sales volumes but narrow profit margins). Second, and most important, the funds get distributed into the corporation either through retained bonuses for employees covered by company health insurance, or directly to the employees through the bonus. Through this plan, the corporation reaps the benefits of the distribution through increased employee loyalty and productivity. See *infra* notes 160-61 and accompanying text.

as to give more latitude to low-income families in determining the specific and immediate needs of the household.¹⁵⁹

Overall, employees should be receiving the benefits of increased productivity.¹⁶⁰ This legislation provides businesses with two ways of distributing those benefits: health care benefits or quarterly bonuses. These options, however, impact large and small businesses in different ways, providing different incentives and benefits to each.

Larger companies will be encouraged to provide health care benefits to their employees so as to avoid distributing a portion of their large profits to the workforce.¹⁶¹ The overall costs to these companies in providing health care benefits may be much less than the percentage of gross profit which would be distributed to employees without benefits.¹⁶² Additionally, employee benefits are tax deductible for a company, whereas bonuses are fully taxable.¹⁶³ That alone is a good incentive for businesses to allocate resources toward employee benefits.

Smaller businesses, on the other hand, may find it more financially advantageous to share their percentage of profits with their employees.¹⁶⁴ As health care costs grow increasingly beyond

159. Although no requirement, such as health care, is placed on the bonus, as more states consider mandating health insurance for all adults, more employees may opt for the employer-sponsored health care or apply their bonus toward a separate health plan. See, e.g., Julie Jette, *Survey Backs Massachusetts Health Care Law*, PATRIOT LEDGER, Nov. 15, 2006, at 16 (Massachusetts); Richard Brown, *The Governor's Plan Uncovers the Middle Class*, L.A. TIMES, Jan. 17, 2007, at A17 (California); Luis Fabregas, Brad Bumsted, & Debra Erdley, *Health Proposal Is Major Operation*, PITTSBURG TRIB. REV., Jan. 18, 2007 (Pennsylvania).

160. See MISHEL, *supra* note 16 (noting the disconcerting disconnect between productivity growth and stagnant wages, as well as the halt in benefits and pensions).

161. Wal-Mart's gross profit in the first quarter of 2007 was \$21.1 billion; eight percent of that equals \$1.69 billion being distributed to their employees. Wal-Mart Stores, Inc., Quarterly Report (Form 10-Q), at 2 (period ending Apr. 30, 2007).

162. Large companies may be more inclined to establish benefit programs because they retain the portion of profit that would otherwise be distributed to every employee who is receiving benefits. Therefore, if a company were to offer all of its employees' benefits, it would retain the entire eight percent profit.

Companies that fall into the middle in terms of profit, or companies which are not achieving desired profitability levels, can determine whether it would be more financially advantageous to establish a benefit program for most, if not all, of its employees, or distribute the small percentage of their profits.

163. EMPLOYEE BENEFIT RESEARCH INSTITUTE, *Fundamentals of Employee Benefit Programs, Part One: Overview*, 7-9 (2005), available at <http://www.ebri.org/publications/books/index.cfm?fa=fundamentals>.

164. Consider Caribou Coffee Company Inc. whose gross profit in the first quarter of 2007 was \$36.3 million; the eight percent mandate would require

the financial resources of smaller companies,¹⁶⁵ this legislation provides a more reasonable means for these businesses to provide additional support for their employees. Further, the bill will incorporate the recently proposed Small Business Health Plan which permits small employers to band together across state lines to purchase group health insurance for their workers.¹⁶⁶ Small businesses will then have the option of providing health care benefits if a group insurance plan would be more financially feasible than profit distribution.¹⁶⁷

This federal legislation will also alleviate many of the social concerns that accompany big box ordinances. Some critics of big box legislation fear a marginally higher wage would take employees out of eligibility for government subsidies, such as welfare, without adequately providing for basic needs.¹⁶⁸ However, a higher minimum wage indexed to inflation and representative of a realistic poverty level, along with benefits or additional quarterly bonuses, should provide an income sufficient to meet those needs.¹⁶⁹ This legislation would end the taxpayer subsidies indirectly given to those companies which do not properly compensate their employees, thereby forcing those employees to supplement their income with government programs.¹⁷⁰ It shifts the burden of adequate employee compensation back to the employer, where it has always belonged.¹⁷¹

Companies will also experience benefits from this bill as well. Employees have great incentives to work hard either to gain employer-sponsored benefits or to achieve higher productivity (which would likely result in more work hours), ultimately resulting in a larger bonus check at the end of the quarter.¹⁷² This

only \$2.9 million be distributed to employees. Caribou Coffee Company, Inc., Quarterly Report (Form 10-Q), at 3 (period ending Apr. 1, 2007). However, for the last four quarters Caribou operated at a loss. Yahoo! Finance: CBOU Income Statement, Quarterly Data, <http://finance.yahoo.com/q/is?s=CBOU> (last visited July 12, 2007). With unsteady income, Caribou would be more likely to distribute a small portion of its profits than establish a constant benefit program.

165. See Jeffrey Gangemi, *A Small Biz Health-Care Headache*, BUS. WK. ONLINE, Nov. 6, 2006 (mentioning Keith Ensinger who pays \$25,000 a year on health insurance coverage for his company's two employees).

166. *Id.*

167. See *id.* (noting Keith Ensinger could reduce his insurance costs to approximately \$10,000 a year if allowed to pool with other small businesses).

168. See *supra* note 133-35 and accompanying text.

169. See EPI, *supra* notes 141-43 and accompanying text.

170. See *supra* note 12 and accompanying text.

171. See *Wal-Mart Battles Better Pay*, OUR TIMES, Aug./Sept. 2006, at 8 (noting Wal-Mart is taking on the burden of a reformed health care plan with a more affordable premium).

172. See *supra* note 155 (calculating how the number of hours an employee works directly factors into the amount of bonus received).

motivation will also result in lower turnover as employees have an incentive to stay with employers for the entire quarter.¹⁷³ Finally, businesses and local communities do not have to worry about forum shopping since this legislation will be a federal mandate.¹⁷⁴ All public businesses will be on a level playing field regardless of location.¹⁷⁵ Similar to the purpose of ERISA,¹⁷⁶ the legislation aims to provide uniform regulations to all businesses.¹⁷⁷ Businesses should not have to face a limitless number of wage and benefit regulations depending on the state or municipality.¹⁷⁸

Ultimately, this legislative proposal will support the needs of the minimum wage workforce without prejudicing individual industries or businesses mastering economies of scale.¹⁷⁹ It will hit hardest the companies, in all industries,¹⁸⁰ that profit from providing inadequate wages and indirectly utilizing government subsidies to support their payroll.¹⁸¹ Finally, the proposed bill will achieve the social aims of big box legislation on a broader, more widely applicable, and legally stable level.

V. CONCLUSION

The aims of the living wage movement and recent big box legislation have been to increase the wages and benefits for employees of companies that reap profits while their employees fail to make ends meet.¹⁸² While the goals of such ordinances are

173. See Susan J. Lambert, *Long-term Damage to Business: A Risk of Keeping Wages Low*, CRAIN'S CHI. BUS., Oct. 16, 2006, at 28 (determining companies that short employees on wages and benefits are likely to experience "high turnover, low productivity, worker discontent and poor customer service" in the long-run). "When jobs are unpredictable, so are workers." *Id.*

174. See *Fielder*, 435 F. Supp. 2d at 495 (noting how legislature like the Maryland Fair Share Health Care Fund Act demanding a national employer to segregate its expenditures depending on location, is an unfair practice).

175. See Hansen, *supra* note 7 (stating how variations among states and local governments have made business compliance burdensome and unmanageable).

176. See *Fielder*, 435 F. Supp. 2d at 494 ("[T]he main objective of ERISA's preemption clause is 'to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.'" (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 657 (1995))).

177. See *Fielder*, 435 F. Supp. 2d at 495 n.13 (discussing how nationwide employers would be subject to a limitless number of regulations by all local governments across the states if the purpose of ERISA is not adhered to).

178. *Id.*

179. Hansen, *supra* note 7.

180. See *id.* (noting the Chicago Big Box Ordinance targeted a small segment of one industry).

181. See *supra* note 12 and accompanying text.

182. See *supra* note 25 (describing Chicago's Big Box Ordinance's demands for wage and benefit increases); see also *supra* note 12 (discussing how large retailers such as Wal-Mart inadequately provide for their employees requiring

admirable, limiting the legislation to one section of one industry is simply not enough.¹⁸³ The proposed legislation will affect *all* public businesses and *all* their employees, mandating higher wages and better benefits.¹⁸⁴ It will meet the needs of the average American worker by providing an adequate income to support a family,¹⁸⁵ and it will benefit the company by increasing worker productivity and loyalty.¹⁸⁶ Further, the company will be able to choose from options in supporting its employees, so the business can do what is best for its financial structure.¹⁸⁷ A prompt federal solution is necessary for the big box problem since this is only “the tip of the iceberg” in legislating and litigating this issue.¹⁸⁸ Thus, this proposed legislation will satisfy the needs of the employee and the employer without the social or legal strife predicted to follow big box ordinances.

them to rely upon government programs for additional support).

183. See Hansen, *supra* note 7 and accompanying text.

184. See *supra* note 140 and accompanying text.

185. See *supra* note 143 and accompanying text.

186. Lambert, *supra* note 172.

187. See *supra* note 161 and accompanying text.

188. Mark Mansen, *Big-Box in the Early Rounds*, 93 A.B.A.J. 14 (2007) (quoting Jim Hendricks Jr., a Chicago labor and employment defense lawyer); see also Schoeff, Jr., *supra* note 6 (discussing how Chicago Mayor Daley’s September 11, 2006 veto of the ordinance and subsequent September 13th City Council re-vote which officially laid the ordinance to rest has not discouraged proponents); Washburn and Mihalopoulos, *supra* note 24 (quoting Chicago Alderman Freddrenna Lyle, “We are going to write another ordinance.”).