

POLICY NOTE

New rules will limit how customers learn about effects of \$15 wage law

by Erin Shannon, Director, WPC's Center for Small Business

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Key Findings

1. *In an effort to offset the cost of increased minimum wage mandates in SeaTac and Seattle, some businesses have added a minimum wage surcharge to customers' bills.*
2. *A minimum wage surcharge policy has the benefit of transparency, showing customers how prices have gone up as a direct result of the new minimum wage laws.*
3. *Guidelines released by Washington Attorney General Bob Ferguson regulating how businesses may use a minimum wage surcharge purport to protect consumers; however, the regulations appear to be primarily designed to discourage business owners from using a minimum wage surcharge and telling their customers about it.*
4. *The Attorney General's rule creates a record-keeping nightmare for employers, who would be forced to make ongoing calculations to determine whether their surcharge is generating any revenue beyond the cost of the increased wages and if so, ensure every extra penny is distributed to employees.*

(Continued on next page.)

Introduction

As employers in SeaTac and Seattle comply with those cities' new \$15 wage laws, some have added a surcharge to their customers' bills to cover the cost of the higher mandated wages.

State Attorney General Bob Ferguson has issued regulations limiting the information the public may receive, directing business on how to charge and what to tell customers, and on how they must spend money collected through the minimum wage surcharge.¹

This Policy Note examines the Attorney General's minimum wage regulations and explores whether they are supported by state law or violate business owners' free speech rights.

Background

In 2013, voters in the city of SeaTac approved Proposition 1, a ballot measure mandating a \$15 minimum wage, as well as other labor mandates, for some employers in the city.² Union workers were exempt.

Effective January 1, 2014, those employers covered by the measure began paying the \$15 wage. One year later, the Seattle City Council passed an ordinance mandating a \$15 minimum wage for all employers, phased in over seven years.³ The first phase of the wage increase took effect April 1, 2015.

In response to the newly increased wages, some employers decided to add a surcharge to customers' bills. Rather than a wholesale increase in the prices of businesses' goods and services, the surcharge is typically a flat percentage of the bill.⁴ This allows the business to offset the increased labor costs while informing customers about why consumer costs have gone up.

1 "Surcharge Guidelines," Office of the Attorney General Consumer Protection Division, June 23, 2015, at http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/News/Press_Releases/2015/Wage%20surcharge%20guidance%20062415.pdf.

2 "Ordinance Setting Minimum Employment Standards for Hospitality and Transportation Industry Employers," City of SeaTac, www.ci.seatac.wa.us/Modules/ShowDocument.aspx?documentid=8233.

3 "Seattle Minimum Wage Ordinance," City of Seattle, at www.seattle.gov/civilrights/labor-standards/minimum-wage.

4 "In SeaTac, everyone pays for the \$15 minimum wage," Erin Shannon, Washington Policy Center, June 2, 2014, at www.washingtonpolicy.org/blog/post/seatac-everyone-pays-15-minimum-wage.

Key Findings

(Continued from last page.)

5. *In making the use of a surcharge difficult for employers, the Attorney General's new rules could be seen as a political effort to restrict speech and suppress criticism of the \$15 wage law, and to prevent people from understanding how the mandate increases consumer prices.*
6. *The most burdensome of the minimum wage surcharge regulations does not appear to be supported by the RCW cited (49.46.160) by the Attorney General regulating "automatic service charges"—a surcharge to offset the costs of paying all workers a higher minimum wage is not the same as a service charge that is added for specific services performed by an individual employee or employees.*
7. *RCW 49.46.160 is targeted narrowly to service charges "related to food, beverages, entertainment, or portage," so employers in all other industries would not be bound to the minimum wage surcharge regulation that restricts how a business may spend surcharge revenues.*

The Office of the Attorney General's Consumer Protection Division "works to secure a marketplace free from deceptive and unfair practices." Using this authority, Washington State Attorney General Bob Ferguson has released a set of regulations dictating how businesses talk about a minimum wage surcharge and how they must spend the revenue it generates.⁵

The Attorney General's new regulations says business owners:

- Must disclose the surcharge;
- Must make the disclosure clear and easy to understand;
- May not characterize the surcharge as a tax or government mandate;
- Must use the funds to pay salary costs mandated by the \$15 wage law.

Policy Analysis

The Attorney General's minimum wage surcharge regulations purport to protect consumers. However, the regulations appear to be primarily designed to discourage business owners from using a minimum wage surcharge and telling their customers about it.

A minimum wage surcharge policy has the benefit of transparency, showing customers how prices have gone up as a direct result of the new minimum wage law. In discouraging use of a surcharge, these rules could be seen as a political effort to restrict speech and suppress criticism of the \$15 wage law, and to prevent people from understanding how the policy mandate increases consumer prices.

According the Attorney General, businesses charging a minimum wage surcharge must follow these rules:⁶

- Any surcharge must be conspicuously disclosed to consumers in advance in a manner that makes it meaningful to consumers. Consider making written or posted disclosure in a font that is legible to the ordinary reader and prominently placing it online and at the point of purchase.
- A surcharge for services provided by employees related to food, beverage, entertainment, or portage must be disclosed in an itemized receipt and on any menu provided to the customer. (RCW 49.46.160)

5 "Surcharge Guidelines," Office of the Attorney General Consumer Protection Division, June 23, 2015, at http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/News/Press_Releases/2015/Wage%20surcharge%20guidance%20062415.pdf.

6 Ibid.

- The disclosure of any surcharge must be clear and unambiguous. Consider writing the disclosure in terms commonly understood by the public so consumers can easily understand the amount of the surcharge and how it will be applied.
- Any surcharge applied at the discretion of the business may not be characterized as a “tax” or in any other way that implies it is a direct government mandate.
- If a surcharge description is provided to consumers, then revenue generated from that surcharge must be used as described. For example, if it is communicated to consumers that a surcharge funds employee health coverage or wages, those funds should not be used for another purpose.

The first two rules are not likely to be a problem for business owners. Employers are only adding the surcharge as a result of the new wage laws, not simply to pad their own profits (which normal market competition wouldn’t allow anyway).

Business owners simply want their customers to understand why prices are going up, as caused by the \$15 wage law.

The third rule is disingenuous and likely a violation of basic free speech rights. The higher minimum wage is a government mandate. A \$15 minimum wage surcharge is the result of that government mandate. It is not a deception to tell the public the surcharge is the result of a change in public policy.

Just because the government does not require employers to charge customers a surcharge to cover the cost of the \$15 minimum wage mandate does not mean employers are being deceptive when they do. Actually, they are just being honest: “You see a surcharge on your bill because of the \$15 minimum wage law.” That is not only a normal use of free speech as a basic civil right, it is being upfront and honest with customers.

The most concerning of the rules from the Attorney General is his last one: “If a surcharge description is provided to consumers, then revenue generated from that surcharge must be used as described. For example, if it is communicated to consumers that a surcharge funds employee health coverage or wages, those funds should not be used for another purpose.”

This provision seems to dictate that the entirety of the surcharge must be used for the purpose for which it is specified; meaning if a business is charging a minimum wage surcharge, all of that surcharge revenue must be passed to the employees. If the surcharge brings in more revenue than needed to cover the increased wages, then that extra revenue must go to employees. As AG Ferguson said in the AGO press release:

*“Businesses are legally permitted to impose surcharges related to minimum wage increases. But if they choose to do so, my office will ensure that workers get the benefit as advertised...”*⁷

Labor union leader David Rolf, the president of the local SEIU 775, is quoted in the press release:

*“The Attorney General’s guidelines are an important reminder that surcharges described as helping cover employee wages or benefits should be going to that purpose.”*⁸

So if an employer fails to pass along every penny of the surcharge to workers (or cannot prove that every penny has been passed along) it seems they could be in the crosshairs of the AG and organized labor. And Rolf gave extra insight into labor’s motive for pushing these guidelines:

*“The Attorney General’s guidelines provide clear principles for business conduct and will help make sure workers are aware of potentially unfair practices.”*⁹

As a union executive, Rolf’s concern for workers over “unfair practices” is hypocritical, since his union pushed for, and got, an exemption from the \$15 minimum wage law in SeaTac.¹⁰ Rolf’s own union members do not benefit from the very mandate he wants to impose on others.

The Attorney General’s rule creates a record-keeping nightmare for employers, who would be forced to make ongoing calculations to determine whether their surcharge is generating any revenue beyond the cost of the increased wages and if so, ensure every extra penny is distributed to employees.

AG Ferguson cites RCW 49.46.160, which governs “automatic service charges,” to support this guideline.¹¹ But a surcharge to offset the costs of paying all workers a higher minimum wage is not the same as a service charge that is added for specific services performed by an individual employee or employees.

According to the RCW, a “service charge” is “a separately designated amount collected by employers from customers that is for services provided by employees...” The law further clarifies that “service charges are in addition to hourly wages paid or payable to the employee or employees serving the customer.”

A minimum wage surcharge is not for the specific services provided to a customer by an employee or employees, nor is it in addition to the hourly wages

7 “AG: Minimum Wage Surcharges Must be Clearly Disclosed,” press release, Office of the Attorney General, June 23, 2015, at www.atg.wa.gov/news/news-releases/ag-minimum-wage-surcharges-must-be-clearly-disclosed.

8 Ibid.

9 Ibid.

10 “Upfront with Marie Choi,” radio interview on 94.1 KPFA, Berkeley, CA, November 8, 2013, at <https://kpfa.org/episode/96934/>.

11 “Automatic Service Charges,” Revised Code of Washington, 49.46.160, at <http://apps.leg.wa.gov/rcw/default.aspx?cite=49.46.160>.



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paid to workers. It simply helps offset the extra cost imposed by the government's own \$15 wage law.

What is more, RCW 49.46.160 is targeted narrowly to service charges "related to food, beverages, entertainment, or portage." Does this mean employers in all other industries are not bound to the minimum wage surcharge "misappropriation" guideline?

Conclusion

Based on the AG's emphasis on ensuring workers "get the benefit"¹² of any minimum wage surcharge, it seems he and union executives are planning to pressure employers to pass along all surcharge revenue to employees.

In making the use of a surcharge difficult for employers, these rules could be seen as a political effort to restrict free speech and suppress criticism of the \$15 wage law. The proposed rules would prevent people from understanding how the \$15 wage mandate increases consumer prices, creating a burden that falls hardest on the poor and on working families.

It is one thing to back a \$15 wage law that sets a price control on labor, but it is something else entirely to use regulatory power to prevent people from talking about the true effects of the mandate once it is in place.

The \$15 wage law makes it illegal for consenting adults to agree to work for \$14.99 or any lower wage. Now it looks like the Attorney General is trying to make it harder for people to learn about how that ban affects workers, business owners and consumers.

¹² "AG: Minimum Wage Surcharges Must be Clearly Disclosed," press release, Office of the Attorney General, June 23, 2015, at www.atg.wa.gov/news/news-releases/ag-minimum-wage-surcharges-must-be-clearly-disclosed.

