

# Lawyer Insights

September 23, 2015

## **New York's \$15 minimum wage hike: Who's behind it and why — and what may be coming next**

*New York's fast food workers won a major victory last month when the state's Wage Board voted to recommend a substantial increase in their minimum wage.*

*by Kurt G. Larkin*

*Published in InsideCounsel*



New York's fast food workers won a major victory last month when the state's Wage Board voted to recommend a substantial increase in their minimum wage. The decision, which comes in the wake of other recent minimum wage increases in San Francisco, Seattle, Los Angeles, and other cities, provides for a \$15 minimum wage for fast food workers, to be phased in over the next several years. The Wage Board's recommendation will be finalized and published with a 15-day public comment period before being presented to the state's acting labor commissioner.

Reaction to date has been mixed. Many, including Governor Andrew Cuomo (who commissioned the Wage Board that made the recommendation), have hailed the measure as a landmark accomplishment for low-wage workers. Others have cautioned that the increases like the one proposed in New York will have an adverse impact on the small business owners who operate many of the largest national fast-food franchises, or even cause fast food employers to seek long-term cost saving solutions like reducing the numbers of live workers behind the counters. Some in the New York business community have indicated they plan to challenge the recommendation in court once it is finalized and implemented. But fewer have focused on who is driving these wage increases and, more importantly, why. A closer look suggests New York's new wage hike is part of the ongoing push to unionize fast food and other lower wage industries across the United States, and that it is a new and improved tactic from an old but successful playbook.

In recent years, major labor unions like the Service Employees International Union have been loud critics of the nation's major fast food franchises. The SEIU has embarked on a national campaign attacking the nation's major fast food franchises for highly compensating executives while paying employees what the Union calls "poverty" wages. The Union is a heavy backer of "Fight for \$15," a push to raise the national minimum wage to \$15/hour. New York's new minimum wage recommendation appears to be connected with the Union's larger campaign. Indeed, the proposal applies only to "fast food establishments," defined as restaurants at which patrons order and pay for food before eating it. It also applies only to chains of "30 or more establishments nationally." Thus, the recommendation is clearly directed at the nation's largest fast food franchisors, which happen to be in the SEIU's crosshairs. And the authors? The Wage Board that wrote it includes the Secretary-Treasurer of the SEIU, Mike Fishman.

This article presents the views of the author and do not necessarily reflect those of Hunton & Williams LLP or its clients. The information presented is for general information and education purposes. No legal advice is intended to be conveyed; readers should consult with legal counsel with respect to any legal advice they require related to the subject matter of the article, which first appeared in InsideCounsel.com on September 23, 2015.

New York's \$15 minimum wage hike: Who's behind it and why — and what may be coming next  
by Kurt G. Larkin  
InsideCounsel | September 23, 2015

And there is more going on behind the scenes. The push to raise the minimum wage for New York fast food workers comes on the heels of the union's less visible efforts to support fast food worker organizing efforts. For example, the SEIU's 2012 LM-2 financial disclosure filed with the US Department of Labor reflects funding in the amount of over \$2.4 million to a group called New York Communities for Change, for "support for organizing." NYCC advertises itself as a leader in the "campaign to organize fast food workers." Thus, it is evident the SEIU has been laying the groundwork for organizing New York's fast food workers for several years now.

The SEIU's efforts to facilitate the unionization of New York's fast food workers suggests its involvement in the minimum wage hike is no coincidence. Its various activities (both visible and behind the scenes) indicate it is planning something big. But connecting the dots leaves some significant questions unanswered. For instance, how does the union actually plan to organize the nation's major fast food employers? Surely, the SEIU is not interested in organizing one restaurant at a time. And many question whether the Union's push for increased minimum wages actually decreases its chances of success — the New York wage hike means fast food employees in that state don't need a union to win them better pay.

The answer might be found by looking backwards, to Justice For Janitors (JFJ), one of the SEIU's first and most successful attempts at industry organizing. In JFJ, which began in 1985, the Union sought to organize the cleaning industry on a broad, market-by-market basis. To do this, the union focused less on individual employers and more on markets as a whole, bringing workers from different cleaning companies together in a unified (and very large) movement. The union also sought to generate support at both local and national levels through a number of tactics targeting both the cleaning contractors and the building owners that employed them. Locally, the union staged community rallies, civil disobedience, employee walkouts and the like, to raise visibility and foster the idea that janitors in a given market should be treated fairly. This created pressure on major building owners (the end users of the cleaning services) to acknowledge that the market could bear the costs of a unionized cleaning corps. The union also directed more broad-based attacks on the employers symbolic of the industry to help raise national awareness and pressure those employers to the negotiating table to discuss an organizing process. The endgame in most markets was the signing of organizing agreements that allowed the SEIU to unionize multiple employers in a given market simultaneously. Later, those employers would sign master collective bargaining agreements setting wage and benefit standards for all of the unionized employers in the market.

The innovation deployed in JFJ was to pivot away from looking at union organizing as an employer-by-employer endeavor. Why? One of the most commonly cited reasons for employer opposition to unions is that the increased costs of unionization can degrade an employer's ability to compete in the marketplace. Organized labor's time-honored response has always been that unionization takes labor costs out of the equation for all who are unionized, allowing them to compete on other factors. But getting an entire market to that point is a formidable task. Industry organizing accelerates the process, greatly reducing employers' concerns about competition — if all of the employers in a given market are organized at the same time, and all agree to be bound by the same collective bargaining terms, their ability to compete with one another is not nearly as affected by labor costs. Thus, while JFJ's themes and messaging focused on the plight of the workers and the need to win them a better standard of living, its mechanics had more to do with convincing the employers (and the building owners that employed them) that the union could deliver a level playing field and reduced business risk, and therefore that their philosophical opposition to unionization was just a boogeyman.

Industry organizing may be what the SEIU is up to with fast food, and the push for an increase in minimum wages appears to be part of the Union's strategy for mitigating the risk that organizing the major players will hurt their ability to compete. When viewed in that light, the Union's efforts in fast food appear to be a more sophisticated version of Justice for Janitors. The union's push to drive up minimum wages nationally appears to be a hedge on its bet that it can move entire markets of fast food employers at once,

New York's \$15 minimum wage hike: Who's behind it and why — and what may be coming next  
by Kurt G. Larkin  
InsideCounsel | September 23, 2015

like it did in the cleaning industry. The New York wage hike will level the playing field for all fast food employers in New York – even those who do not initially succumb to the union's organizing efforts. This will further mitigate the concerns of those in the market who do sign up with the union – at least they know they will not be paying a higher wage than their nonunion competitors.

In addition to the wage hike strategy, the SEIU and other major unions have taken steps to eliminate legal barriers to organizing multiple franchisees at one time. Organized labor's appeals to the National Labor Relations Board to rewrite the joint employer rules could compel large franchisors to the bargaining table if and when the union organizes franchisees. Indeed, as many predicted the board has just issued a ruling that assigns joint employer liability to any business entity that merely possesses the authority to impact the employment terms of another business entity's employees, even if it does not exercise that authority. The board's general counsel has already signaled an intent to apply this new standard to the franchisor-franchisee model, where franchisors often dictate terms such as staffing ratios, uniform appearance and food preparation and production methods to their franchisees.

Under the board's new test, these actions may be enough to turn the franchisor into a joint employer of the franchisee's employees. This would be a remarkable boon to organized labor. A finding that franchisors and franchisees are single employers would enable unions like SEIU legally to demand that a big fast food franchisor sign an organizing agreement applicable to all of its franchisees – effectively allowing the union to organize the employees of the franchisee establishments from the top down.

The union has buttressed all of these efforts with more visible attacks against the major fast food employers to generate broader support for the notion they mistreat employees, who deserve fair pay, better treatment and (of course) union representation. Just this month, the SEIU began demonstrating against one major franchisor in Brazil, suggesting it plans to take its public pressure tactics global.

Thus, the signs suggest the union's endgame in fast food is to move the industry towards unionization on a broad, market-by-market basis, just like it did in the cleaning industry. But the union can only do so by generating enough national pressure on the major stakeholders to weaken their inclination to resist and convince them to entertain the concept of organizing in a given market. And the union is only going to do that by persuading employers that organizing the major markets will not harm their ability to compete. When such discussions may happen (if ever) is an open question. JFJ played out over many years, so it is likely the union is planning for a long, drawn out struggle. This suggests an increase in national (and international) pressure on the major employers is likely over the coming months and years. New York's new fast food wage appears to be an important step down that path.

Reflecting on the JFJ campaign 25 years later, Steven Lerner (a former SEIU official and campaign architect) recently suggested there was no one magic bullet that tipped the campaign in the union's favor. Rather, it was a combination of factors that meshed together to create the optimum conditions necessary to drive the cleaning industry towards unionization. It seems the union is attempting to create that magic again in the fast food industry, and views the push for a \$15 minimum wage as a key ingredient in the formula for success. Whether the union has calculated correctly remains to be seen.