of supervisors and state tax commission, respectively. It may be derived from a process of sampling, such as that described in

Kingsford Chem. Co. v. *City of Kingsford* (1956), 347 Mich 91, 104.

There is no requirements at law, nor a practical possibility, that county and state equalization should be based only upon an actual appraisal of all of the individual properties within the county or state, respectively.

4. If in the aggregate individual property has been assessed at less than 50% of true cash value, the use of a factor to attribute the adjustments in value by the processes of equalization to individual properties does not violate any constitutional or statutory provision.

5. After completion of the local assessment function on or before the first Monday in March, the assessment rolls are submitted to the boards of review, which hold their meetings and hear complaints of aggrieved taxpayers during March.[5] A taxpayer's complaint or "appeal" to the local board of review constitutes a remedy to any taxpayer whose property is assessed at a proportion of true cash value other than the supposedly uniform proportion of true cash value at which all other property in the district is assessed. The function of the local board of review is the alteration and ultimate execution of an assessment roll for the assessing district upon which property is valued at a uniform proportion of its true cash value. The board of review is an instrument to fulfill the uniformity of taxation specified by constitutional provision at the standard of value specified by law. Thus, there appears to be no constitutional infirmity in the legislatively prescribed timetable for individual assessment appeal and equalization.

FRANK J. KELLEY,
Attorney General.

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LABOR: Female Workers.

CIVIL RIGHTS: Discrimination Based upon Sex.

The Federal Civil Rights Act of 1964 barring discriminatory employment practices based upon sex supersedes Michigan law limiting the working hours of women. However, as the federal act covers only employers with twenty-five or more employees, Michigan law limiting working hours of women is applicable to employers with less than twenty-five employees.

No. 4687 December 30, 1969.

Senator Coleman A. Young
State Senate
Capitol Building
Lansing, Michigan

You have requested my opinion as to the effect of an apparent conflict between the Federal Civil Rights Act of 1964, specifically Title VII[1]

[5] Secs. 28-33 of the general property tax act, as amended, supra.

[1] 42 U.S.C. §§ 2000e-2000e-15.

thereof, which prohibits discriminatory employment practices against women and the Michigan statute which limits the number of hours a woman may work.

Section 703(a) of said Title VII (42 USC Section 2000e-2a) provides:

> "(a) It shall be an unlawful employment practice for an employer —
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The Michigan statute regulating the working hours of women is Section 9 of Act 285, PA 1909,[2] as amended (MCLA §408.59; MSA 1960 Rev Vol §17.19), which, in part, provides as follows:

> "* * * no female shall be employed, permitted or suffered to work * * * for a period longer than an average of 9 hours a day or 54 hours in any week nor more than 10 hours in any one day * * *."

The conflict is readily apparent. Section 703(a) of the federal statute expresses a prohibition against any employment practice which discriminates against employees with respect to compensation, terms, conditions and privileges of employment because of their sex; whereas, under current Michigan law, an employer must not permit a woman to work longer than 10 hours a day or 54 hours a week. Since Michigan has no law limiting the number of hours a man may work, a woman is denied the same rights to overtime compensation as her male counterpart in direct violation of the federal act.

Section 703(a) also prohibits an employer from limiting, segregating or classifying his employees in any way which deprives or tends to deprive them of employment opportunities because of their sex. In Michigan, the law provides a rigid classification applicable to all women which must be followed by employers. This limitation on the number of hours a woman may work tends to prevent the promotion of women to supervisory positions which might require longer hours than the state law permits. Any denial of employment opportunities on the basis of sex alone constitutes a violation of the federal law.

In the opinion of this office, there is an irreconcilable conflict between the two and, when such conflicts exists, it is a fundamental principle of constitutional law based on the supremacy clause of the United States Constitution (Article VI, Clause 2) that the federal act will prevail over

[2] This act was repealed by Section 18 of Act 282, P.A. 1967, but Section 9 remains in effect until the commission promulgates new standards. See O.A.G. 1967-68, p. 210.

the state act to the extent that it preempts it. *Gibbons v. Ogden* (1842), 9 Wheat 1 (6 L. ed. 23); *Pennsylvania v. Nelson* (1956), 350 US 497 (76 S. Ct. 477, 100 L. ed. 640); *Cooper v. Aaron* (1958), 358 U.S. 1 (78 S. Ct. 1401, 3 L. ed. 2d 5).

My conclusion on this point is supported by *Rosenfeld v. Southern Pacific Co.* (1968, C.D. Cal), 293 F. Supp. 1219, which held:

> "The California hours and weights legislation violates the provisions of the Civil Rights Act of 1964. Accordingly, such legislation is contrary to the Supremacy Clause (Article VI, Clause 2) of the United States Constitution and, therefore, is void, and of no force or effect."

Rosenfeld, supra, has been followed or quoted with approval in *Richards v. Griffith Rubber Mills* (1969, DC Ore), 300 F. Supp. 338; *Bowe v. Colgate-Palmolive Co.* (1969, CA 7), 416 F2d 711; and *Weeks v. Southern Bell Telephone & Telegraph Co.* (1969, CA 5), 408 F2d 228.

The Attorneys General of both North Dakota and South Dakota have also written opinions to the same effect. Only the Attorney General of Kentucky has upheld state protective legislation in the face of the federal statute, and this opinion was based on two cases, one of which has since been reversed by a higher court and one which did not decide this issue.

It is also necessary to consider whether Michigan's hours of work restrictions could be upheld under Section 703(e) of the federal statute (42 U.S.C. §2000e-2e) which permits discrimination in hiring where sex "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Section 703(e) provides as follows:

> "Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, * * *."

In *Rosenfeld, supra,* the court held:

> "The California hours and weights legislation does not create or constitute a bona fide occupational qualification within the meaning of Section 703(e) of Title VII of the Civil Rights Act of 1964 * * *."

The Equal Employment Opportunity Commission, which administers the federal act, has answered this question in its guidelines on sex as a "bona fide occupational qualification." Section 1604.1, as last amended August 19, 1969 (34 FR 13367), provides, in part, as follows:

> "(b)(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among

these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, or for more than a specified number of hours per day or per week.

"(2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception."

These guidelines promulgated by a federal agency are, of course, entitled to considerable weight. *Udall v. Tallman* (1965), 380 U.S. 1 (85 S. Ct. 792, 13 L. ed. 2d 616).

The court in *Weeks, supra,* rejected any broad interpretation of the bona fide occupational qualification exception which would subvert the provisions of Section 703(a) which were intended to prevent discriminatory employment practices on the basis of sex. At page 235 the court stated:

"We agree with the Commission that the broad construction of the bona fide occupational qualification in *Bowe v. Colgate-Palmolive Co.,* supra,[3] is inconsistent with the purpose of the Act—providing a foundation in law for the principal of nondiscrimination. Construed that broadly, the exception will swallow the rule. We conclude that the principle of nondiscrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."

To the same effect *Cheatwood v. South Central Bell Telephone* (1969 MD, Ala.), . . . F. Supp. . . . (2 FEP Cases 33). See also *Bowe v. Colgate-Palmolive Co., supra,* and *Richards, supra.*

In view of the foregoing, it is my opinion that the provisions of Title VII of the Civil Rights Act of 1964 barring discriminatory employment practices with respect to women workers have superseded Michigan's law limiting the working hours of women employed by "employers" subject to said act.

It should be noted, however, that Title VII of the Civil Rights Act of 1964 does not cover all employers. Section 701(b) of the federal act de-

[3] This reference is to the decision of the District Court for the Southern District of Indiana, reported in 272 F Supp. 332 (1967), which decision on the issue here involved was reversed in 1969 by the Court of Appeals for the 7th Circuit for the reasons stated in *Weeks.*

fines coverage to include employers engaged in interstate commerce with twenty-five or more employees for each working day in each of twenty or more calendar weeks of the year. Thus, the federal law preempts and will prevail over Michigan's provision governing the working hours of women to the extent that it covers a particular Michigan employer. It is evident that Congress did not intend to occupy the entire field. In Section 1104[4] of Title XI of the Civil Rights Act of 1964, it is provided as follows:

> "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

In this regard, Section 708[5] of Title VII also provides as follows:

> "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title."

Apart from the foregoing statutory provisions which acknowledge state regulatory power where the state law on the subject is not inconsistent with the federal law, Title VII also yields to the state regulation of those employers not specifically defined as employers under Section 701(b) of the federal act. See *Hanna Mining Company v. Marine Engineers, District 2* (1965), 382 U.S. 181 (86 S. Ct. 327, 15 L. ed. 2d 254).

It is a well settled principle of constitutional law that where a state's statute stands as an obstacle to realization of the objects of a federal statute, federal law prevails. *Florida Lime & Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132, 141 (83 S. Ct. 1210, 10 L. ed. 2d 248); *Cloverleaf Butter Co. v. Patterson* (1942), 315 U.S. 148, 155 (62 S. Ct. 491, 86 L. ed. 754); *Jerome v. United States* (1943), 318 U.S. 101, 104 (63 S. Ct. 483, 87 L. ed. 640); and *NLRB v. Hearst Publications, Inc.* (1944), 322 U.S. 111, 123 (64 S. Ct. 851, 88 L. ed. 1170). In such cases the principal test for the application of the supremacy doctrine is presence of actual or potential conflict, for conflict is the touchstone of federal supremacy. A state law clearly conflicts with a federal enactment when a person incurs the penalties of one by obeying the other. Obedience to Section 9, Act 285, P.A. 1909, by employing entities, which are not employers as defined in Section 701(b), obviously would not subject them to federal sanctions as there is no clear collision between the state and federal law as applied to them. *Kesler v. Department of Safety* (1962), 369 U.S. 153, 172 (82 S. Ct. 807, 7 L. ed. 2d 641); and *Hanna, supra.* Clearly, therefore, insofar as this area of employment is concerned, the state law is not preempted by Title VII. It was not intended that Title VII would

[4] 42 U.S.C. § 2000h-4.
[5] 42 U.S.C. § 2000e-7.

exclude harmonious state action or completely occupy its field. As Title VII has no general effect upon Section 9, Act 285, P.A. 1909, it overrules it only to the extent to which it contravenes it. *Hamm v. City of Rock Hill* (1964), 379 U.S. 306 (85 S. Ct. 384, 13 L. ed. 2d 300).

Those employers not covered by the federal act will therefore remain subject to the hours limitations of Michigan law in view of the statutory provisions of the Civil Rights Act of 1964 quoted above.

In reaching the foregoing conclusion, I am not unmindful of the Michigan Fair Employment Practices Act[6] which also prohibits discriminatory employment practices on the basis of sex and would seemingly include those employers not covered by the federal act. It was held in *Longacre v. State* (1968, Wyo), 448 P2d 832, that the enactment of a state employment practices act constituted an implied repeal of state protective legislation because the two acts could not stand together.

It appears that Section 3a of the Michigan Fair Employment Practices Act, however, differs from the Wyoming law in that it provides the following exception:

> "* * * Any such refusal to hire or discrimination *shall not be an unfair employment practice if based on law,* regulation * * *." (emphasis supplied)

Therefore, it is concluded that a refusal to hire or other discriminatory act based on the Michigan law regulating women's working hours would not be an unfair employment practice under the Michigan Fair Employment Practice Act and that the state act must be enforced against employers *not covered by the Federal Civil Rights Act of 1964.*

FRANK J. KELLEY,
Attorney General

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[6] Act 251, P.A. 1955 (M.C.L.A. § 423.301, et seq; M.S.A. 1968 Rev. Vol. § 17.458(6) et seq).