ground of difference having a fair and substantial relationship to the object of the legislation. See *Reed, supra.* In this particular case, the classification is arbitrary, not based on a substantial distinction, and not germane to the purposes of 1974 PA 301, *supra.*

It is my opinion that 1974 PA 301, § 6(4), *supra,* is violative of both the Equal Protection Clauses of US Const, Am XIV and Const 1963, art 1, § 2. Therefore, 1974 PA 301, § 6(4), *supra,* should not be enforced.

760325

FRANK J. KELLEY,
Attorney General.

LABOR AND EMPLOYMENT: Equal employment opportunity

CIVIL RIGHTS: Sex discrimination in employment

A rule of the Department of Labor prohibiting employment of female minors 16 and 17 years of age in occupations requiring the lifting of more than 35 pounds while allowing the employment of male minors in such occupations is invalid.

Opinion No. 4945 March 25, 1976.

Ms. N. Lorraine Beebe, Chairwoman
Michigan Women's Commission
230 North Washington Avenue
Lansing, Michigan 48933

You have requested my opinion as to the effect of an apparent conflict between discrimination guidelines promulgated by the Equal Employment Opportunity Commission (EEOC) and regulations promulgated by the Michigan Department of Labor affecting the employment of female, but not male, minors in occupations which involve the lifting of more than 35 pounds.

Your questions may be restated as follows:

1. Are the federal EEOC guidelines for determining a bona fide occupational qualification applicable to employers with respect to their minor and adult employees?

2. Are the Department of Labor regulations valid despite the fact that they treat employees differently based on their sex and regardless of whether the affected class is composed of adults or of minors?

3. Under the Michigan Department of Labor regulations may an employer hire a minor male or female without testing, via validated testing procedures, whether that individual can lift the maximum allowable weight?

You have also inquired as to the procedures to be utilized to effectuate changes in the regulations of the Department of Labor.

The rule to which you have reference is rule 408.204(15)[1] of the Administrative Code which prevents minors from employment at:

[1] 1969 AACS, R 408.204(15).

> "Any occupation requiring lifting of more than 50 pounds for males 16 and 17 years of age, 35 pounds for males 14 and 15, and 35 pounds for females."

This rule was adopted by the Department of Labor pursuant to the Hittle Juvenile Employment Act. MCLA 409.1 *et seq;* MSA 17.701 *et seq* and more specifically, MCLA 409.12; MSA 17.712.

The Federal Civil Rights Act of 1964, 42 USC § 2000e-2(a) makes it an unlawful employment practice for an employer to fail or refuse to hire or otherwise discriminate against an individual because of sex. Under the provisions of the rule of the Department of Labor, females 16 and over are treated differently than males of the same age and do not have the same opportunity for employment. There is presented a clear conflict between the Federal law and the State rule unless the Federal Act provides for some exception.

There is in the Federal Act, in relation to sex discrimination in employment, a proviso stating that it is not a violation thereof for an employer to refuse to hire based on sex where sex constitutes a bona fide occupational qualification (BFOQ), 42 USC § 2000-2(e). The EEOC has issued guidelines[2] defining the BFOQ concept as it relates to sex discrimination in employment and more specifically as it relates to a rule or regulation of the kind here under review. Title 29 CFR, Chapt XIV, Part 1604.2(2)(b)(2) provides that:

> ". . . State laws and regulations which discriminate on the basis of sex with regard to the employment of minors are in conflict with and are superseded by Title VII to the extent that such laws are more restrictive for one sex. Accordingly, restrictions on the employment of minors of one sex over and above *those imposed on minors of the other sex* will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of an exception." (emphasis added)

There being no exception applicable to the Department of Labor rule it is my opinion that said rule is in irreconcilable conflict with the Federal law. When there is such a conflict between the State and Federal law it is a fundamental concept of our Constitutional system of government that the Federal Act prevails over the State act *to the extent that it preempts it.* OAG 1969-70, No. 4687, p 111.

The preemption of the Federal act is limited by the definition of an "employer" as:

> ". . . a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . ." Civil Rights Act of 1964, § 701(b), 78 Stat 253 (1964), 42 USC 2000e(b), as amended by Civil Rights Act of 1964, § 2, 86 Stat 193 (1972), 42 USC 2000e(b).

[2] On September 26, 1972 the Michigan Civil Rights Commission adopted the several employment discrimination guidelines theretofore published by the EEOC, including the one set forth above.

It is thus apparent that employers having less than 15 employees are not covered by Title VII and would be bound by the rule unless the rule is invalid under the Michigan Fair Employment Practices Act which also prohibits discriminatory employment practices on the basis of sex or is constitutionally invalid under the Equal Protection clause of the State and Federal Constitutions.

As was stated in OAG 1969-70, No. 4687, p 111, Section 3a of the Michigan Fair Employment Practices Act specifically provides that any refusal to hire or other discriminatory act shall not be an unfair employment practice if based on law or regulations. The Department of Labor rule would therefore remain valid and enforceable as to employers of less than 15 employees in Michigan unless the rule is found otherwise constitutionally infirm because of the gender-based distinction which classifies female and male minors between the ages of 16-18 differently.

This difference in treatment compels an analysis of the weight lifting rule in light of the Equal Protection clause of both the State and Federal Constitutions. Traditionally the Supreme Court of the United States has applied two tests when a legislative classification of seemingly similar groups has been treated differently. The so-called "compelling state interest" test is applied in cases involving certain classifications denominated "inherently suspect" such as a classification which treats persons differently because of race, *Bolling* v *Sharpe,* 347 US 497, 74 S Ct 693; 98 L Ed 2d 884 (1954), *Loving* v *Virginia,* 388 US 1; 87 S Ct 1817; 18 L Ed 2d 1010 (1967); alienage, *Graham v Richardson,* 403 US 365; 91 S Ct 1848; 29 L Ed 2d 534 (1971); national origin, *Oyama* v *California,* 332 US 633; 68 S Ct 269; 92 L Ed 249 (1948); *Korematsu* v *United States,* 323 US 214; 65 S Ct 193; 189 L Ed 194 (1944), reh den, 324 US 885; 65 S Ct 674; 89 L Ed 1435 (1945), and in cases affecting fundamental rights, *Shapiro* v *Thompson,* 394 US 618; 89 S Ct 1322; 22 L Ed 2d 600 (1969).

Such classifications are subject to strict judicial scrutiny and will only be sustained when the State bears the burden of demonstrating that the challenged legislation serves overriding or compelling state interests that cannot be achieved either by a more carefully tailored legislative classification or by the use of a feasible less drastic means.

The second test which the Court has applied in the area of social welfare, economics and other legislative classifications is the so-called "rational basis" test which is less stringent and requires only that the challenged legislation promote legitimate governmental interests.

With regard to sex based classifications, such as the one here relating to female minors, it is not clear which, if either, of the two traditional tests are applicable. In *Reed* v *Reed,* 404 US 71; 92 S Ct 251; 30 L Ed 2d 225 (1971), the Court struck down a classification based upon sex, holding invalid an Idaho statute which gave a mandatory preference to a male over a female for appointment as administrator of an estate when both were equally qualified and within the same entitlement class. In describing the test of validity, the Court said pp 75-76:

> "The Equal Protection Clause (denies) to states the power to legislate that different treatment be accorded to persons placed by a

> statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a *fair and substantial* relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike . . .' (citation omitted). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of (the statute)." (emphasis supplied)

It has been suggested in a lower Federal court decision[3] that *Reed, supra,* indicates the emergence of an intermediate test for gender-based classifications which lies between "rational basis" and "compelling interest" and is prescribed as a "fair and substantial" relation between the basis of the classification and the objects of the classification. The Ninth Circuit has interpreted *Reed, supra,* and *Frontiero, infra,* as suggesting "that a classification based on sex will have to be justified by more than the traditional 'rational' connection between the classification and some valid legislative purpose."[4]

In *Frontiero* v *Richardson,* 411 US 677; 93 S Ct 1764; 36 L Ed 2d 583 (1973), sex based classifications of members of the uniformed services for purposes of dependents' benefits were held to be unjustifiably discriminatory. While no opinion commanded a majority, a plurality of four justices believed that classifications based on sex, like classifications based upon race, alienage and national origin, are inherently suspect and must therefore be subjected to close scrutiny.

Justice Brennen speaking for the plurality in *Frontiero* stated pp 686-687:

> "Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility' . . . *Weber v Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."

In *Geduldig v Aiello,* 417 US 484; 94 S Ct 2485; 41 L Ed 2d 256 (1974), the majority of the Court held the exclusion of pregnancy from the disabilities covered by the California disability insurance system not to be violative of the Equal Protection Clause. The dissenters argued that the classification was sex-based and should be subjected to the strict scrutiny

[3] *Eslinger* v *Thomas,* 476 F 2d 225 (CA 4, 1973).

[4] *Berkelman* v *San Francisco Unified School Dist.,* 501 F 2d 1264 (CA 9, 1974).

test and invalidated, but the majority speaking through Mr. Justice Stewart did not view the classification as sex-based and, in a footnote, distinguished *Reed* and *Frontiero, supra,* as involving discrimination based upon gender as such. (p 496 n. 20)

In the more recent case of *Weinberger* v *Wiesenfeld,* . . . . US . . . ., 95 S Ct .... (1975); 43 L Ed 2d 514, a classification in the Social Security Act which allowed survivor's benefits to a widow but denied such benefits to a surviving male similarly situated, the Court held, p 528 L Ed:

> "Since the gender-based classification of § 402(g) cannot be explained as an attempt to provide for the special problems of women, it is indistinguishable from the classification held invalid in Frontiero. Like the statutes there, '[b]y providing dissimilar treatment for men and women who are . . . similarly situated, the challenged section violates the [Due Process] Clause.' Reed v Reed, 404 US 71, 77, 30 L Ed 2d 225, 92 S Ct 251 (1971)"

Although the precise terms of the test ultimately to be evolved by the United States Supreme Court cannot be predicted, it is clear that gender-based classifications will be subjected to a review of somewhat greater intensity than the traditional "rational basis" test.

In my opinion, the classification in R 408.204(15) which prohibits the employment of female minors 16 and 17 years of age in occupations requiring the lifting of more than 35 pounds, but not male minors, is invalid under the Equal Protection Clause of the State and Federal Constitutions. This conclusion is compelled under either the "rational basis," "compelling state interest" or the intermediate "fair and substantial" tests in that the classification relegates the whole class of female minors to an inferior legal status without regard to the capabilities or characteristics of its individual members.

In reaching this conclusion, I am not unmindful of *Prince* v *Massachusetts,* 321 US 158, 168-169; 64 S Ct 438; 88 L Ed 645 (1943) wherein the Court stated:

> "The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt the legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action."

Also see *People* v *Ciocarlan,* 317 Mich 349; 26 NW 2d 904 (1947); *cert den* 332 US 758; 685 S Ct 57; 92 L Ed 344 (1947). Unquestionably, the states have considerable latitude under the police power to regulate

the activities of minors and to protect their health and safety. In my opinion, the authority of states over minors as a class does not justify discriminatory classifications as to the employment opportunities available to female members of the class.

In OAG No. CV 71/65 (May 8, 1974), the Attorney General of the State of California was asked to consider whether state legislation prohibiting the employment of all minor females in certain street trades but prohibiting similar employment only to minor males under 10 met constitutional muster. Applying the equal protection rational basis test, the opinion determined that the purpose of the legislation was to protect minor females from the social dangers sometimes inherent in so-called street trades. While recognizing the legitimacy of the State's authority to regulate in this area, the opinion found no rational basis, i.e. no greater need, for protecting minor females from the dangers attendant to street trades than for minor males. The opinion thus concludes the legislation to be invalid when viewed in light of the requirements of the equal protection clause.[5]

Although these and other authorities differ as to the validity of the prohibition against female minors engaging in the so-called "street trades," there seems to be much less justification for arbitrarily denying job opportunities to female minors based on preconceived standards which do not take into consideration the weight lifting capabilities of each individual. The State's interest in protecting the health and safety of minors could be achieved by a rule which prescribed the limitations on weight lifting for all minors without an arbitrary and discriminatory classification applicable only to female minors.

This conclusion means that Michigan employers must not refuse to hire female minors between the ages of 16 and 17 based on the Department of Labor rule. The employer's decision should be based on the requirements of the job in relation to the individual abilities of the applicant and may be the subject of a test which is job related. The remainder of the rule which prohibits the employment of both female and male minors between the ages of 14 and 15 in occupations requiring lifting of more than 35 pounds remains valid and enforceable. *Coffman* v *State Board of Examiners in Optometry*, 331 Mich 582; 50 NW 2d 322 (1951).

Specifically, the answers to your questions are as follows:

1. The federal EEOC guidelines for determining a bona fide occupational qualification are applicable to employers who have 15 or more employees with respect to their minor and adult employees alike. Since the Michigan Civil Rights Commission has adopted the federal EEOC guidelines, these adopted guidelines are applicable to Michigan employers of less than 15 employees with respect to minors and adults subject to any valid Michigan law or regulations.

---

[5] A contrary result was reached in the Wisconsin Supreme Court in *Warshafsky* v *The Journal Co.*, 7 EPD 9264 (1974), which held the difference in treatment between minor males and minor females as to "street trades" occupations valid under Title VII and the Equal Protection Clauses of the Wisconsin and United States Constitutions. The statute upheld in *Warshafsky* was amended effective April 19, 1974, to refer to both sexes. (Wis. Stats Sec. 102.23(1)).

2. The Department of Labor regulation pertaining to weight lifting by female minors between the ages of 17 and 18 is constitutionally invalid thereby placing jurisdiction of questions relating to refusal to hire or other discriminatory acts based on sex with the appropriate state or federal agency depending on the number of employees an employer has.

3. There is no requirement in the regulations of the Michigan Department of Labor which requires that an employer must test the weight lifting capabilities of either a male or a female applicant. Similarly, there is no requirement under Title VII, the EEOC guidelines or the Michigan Fair Labor Practices Act that a test be given for any purpose, but if a test is administered it must be reasonably related to the abilities required on the offered job. *Griggs* v *Duke Power Co.*, 401 US 424; 91 S Ct 849; 28 L Ed 2d 158 (1971).

You also inquired as to the procedures necessary to amend the regulations of the Department of Labor. This procedure is set forth in MCLA 24.238; MSA 3.560(136) and provides:

"A person may request an agency to promulgate a rule. Within 90 days after filing a request, the agency shall initiate the processing of a rule or issue a concise written statement of its principal reasons for denial of the request. The denial of a request is not subject to judicial review."

Your opinion request was limited to R 408.204(15) pertaining to the restrictions on weight lifting by female minors. However, since the conclusions reached in this opinion are equally applicable to other statutory provisions and another Department of Labor rule which relates to females only, it is considered advisable to consider the validity of these provisions as a part of this opinion.

Sections 18 and 23 of the Hittle Juvenile Employment Act provide in pertinent part:

". . . No female of less than 18 years of age shall be employed, permitted or suffered to work in a manufacturing establishment during the hours from 6:00 p.m. to 6:00 a.m. . . ." MCLA 409.18; MSA 17.718.

". . . No female under 18 years of age shall be employed, permitted or suffered to work in the public streets as a messenger in the distribution or delivery of goods or messages for any person, firm or corporation engaged in the business of transmitting or delivery of goods or messages." MCLA 409.23; MSA 17.723.

Rule 408.204(11) prohibits the employment of:

"11. Females on general messenger service."

In my opinion, each of these provisions is invalid under the Equal Protection Clause of both the State and Federal Constitutions for the reasons previously set forth in this opinion with regard to R 408.204(15).

FRANK J. KELLEY,
Attorney General.