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LABOR AND EMPLOYMENT: Minimum wage law.

CIVIL SERVICE: State Civil Service Commission's jurisdiction over rates of compensation in the state classified service.

OFFICERS AND EMPLOYEES: Minimum wages.

CIVIL RIGHTS: Equal pay provisions of minimum wage law.

FEDERAL-STATE RELATIONS: Preemption of federal minimum wage law.

UNITED STATES CONSTITUTION: Supremacy clause of Art 6, § 2.

LEGISLATION: Incorporation of existing federal statutes, rules and regulations by reference.

The minimum wage and overtime provisions of the Federal Fair Labor Standards Act do not apply to state and local governmental employees engaged in governmental activities.

The equal pay provisions of the Federal Fair Labor Standards Act apply to state and local governmental employees.

The provisions of the Michigan minimum wage and overtime compensation act do not apply to employees in the state classified civil service.

The provisions of the Michigan act providing for minimum wages and overtime compensation do apply to employees of local governmental units.

A Federal act prevails over the Constitution or laws of a state where Congress has acted within its Constitutional powers.

Statutes which incorporate existing federal statutes, rules and regulations by reference are valid.

Opinion No. 5115 December 16, 1976.

Mr. Keith Molin, Director
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You have requested my opinion with respect to the effect of the recent United States Supreme Court decision in *National League of Cities* v *Usery*, ... US ...; ... S Ct ...; 49 L Ed 2d 245 (1976) on the minimum wage, compensation for overtime and equal pay provisions of the Michigan minimum wage law of 1964, hereinafter the Michigan Act, (1964 PA 154; MCLA 408.381 *et seq;* MSA 17.255(1) *et seq*).

In *National League of Cities,* the Court has held that the minimum wage and overtime provisions of the Fair Labor Standards Act, hereinafter FLSA (29 USC 201 *et seq*), cannot constitutionally be applied to state and local government employees who are engaged in traditional governmental activities. Thus, the Court not only invalidated the 1974 Fair Labor Standards Amendments extending minimum wage and overtime provisions to such

employees, but also expressly overruled its decision in *Maryland* v *Wirtz*, 392 US 183; 88 S Ct 2017; 20 L Ed 2d 1020 (1968) wherein it had upheld the 1966 extension of minimum wage and overtime provisions to employees of state hospitals, institutions and schools.

In view of the Court's decision removing state and local government employees from the application of the minimum wage and overtime compensation provisions of the FLSA, it is necessary to determine the extent of coverage of this class of employees under the Michigan Act, the applicability of the Michigan Act to employees in the State classified civil service in view of Const 1963, art 11, § 5 and, most importantly, whether references in the Michigan Act to definitions, exclusions and exceptions in the FLSA have continued applicability in Michigan.

In this context you have asked the following questions:

"(1) Does Michigan's act now cover state and local governmental unit employees, state school, hospital and nursing home employees with respect to minimum wage?

(2) Are the same employees covered under state overtime provisions (Section 4a enacted 4-1-75 with immediate effect) and equal pay provisions?

(3) In our overtime coverage, Section 4a, we have no Administrative, Executive and Professional exemptions for certain employees but referral is made to the FLSA for guidelines in determining the qualifications for exemptions in this area. Since Michigan's act does not include special provisions for governmental employees and the Court's decision excludes these employees from the FLSA, does this mean that all state and local government, school, hospital and nursing home employees are entitled to overtime benefits, currently for hours worked in excess of 44, with no exemptions for Administrative, Executive and Professional employees?"

The answers to these questions require a separate analysis of the minimum wage, equal pay and overtime compensation provisions of the Michigan Act to determine the effect of the Court's decision on employees in the classified state civil service and other state and local governmental employees.

Classified State Civil Service Employees

Before considering the specific effect of the Court's decision on the minimum wage, equal pay and overtime compensation provisions of the Michigan Act as to employees of the state and its political subdivisions in general, it is necessary to recognize the unique status of classified state civil service employees.

Prior to the decision in *National League of Cities, supra*, the provisions of the FLSA were construed to be applicable with respect to the payment of minimum wages and overtime compensation to state and local governmental employees, including employees in the state classified civil service, because Michigan's minimum wage rate and overtime provisions were the same as those provided by the FLSA, and, accordingly, the Michigan Act was preempted pursuant to Section 218(a) of the FLSA, 29 USC 218(a), which states:

"No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter."

The Michigan Act recognizes this preemption in Section 14 (MCLA 408.394; MSA 17.255(14) which, in pertinent part, provides:

"The provisions of this act shall not apply to any employer who is subject to the minimum wage provisions of the federal fair labor standards act of 1938, as amended, except in any case where application of such minimum wage provisions would result in a lower minimum wage than provided in this act. * * *"

In addition, it is a fundamental principle of constitutional law based on the Supremacy Clause, US Const, art VI, § 2, that a federal act will prevail over the constitution or laws of any state to the extent that it preempts it. *People* v *Andrews*, 21 Mich App 731; 176 NW 2d 460 (1970); *Reynolds* v. *Sims*, 377 US 533, 583; 84 S Ct 1362; 12 L Ed 2d 506 (1963).

The removal of the FLSA coverage of state and local governmental employees by the Court's decision means that the preemption provisions of the FLSA and the U. S. Constitution no longer apply as to this class of employee. The application of the minimum wage and overtime compensation provisions to state and local governmental employees now depends exclusively on Michigan law which would include provisions of the FLSA and Federal regulations validly incorporated by reference.

Under Michigan law the provisions of the Michigan Act providing for minimum wages and overtime compensation cannot be applied to employees in the state classified civil service because of the plenary power granted to the Civil Service Commission by Const 1963, art 11, § 5 to fix rates of compensation for classified state employees.

Const 1963, art 11, § 5 provides, in pertinent part, as follows:

"The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service."

In *Robinson* v *Dept. of State,* 20 Mich App 231, 234-235; 173 NW 2d 799 (1969), the Court reaffirmed the constitutional power of the Civil Service Commission, as follows:

"The civil service commission is vested with *plenary* power in its sphere of authority. It regulates all conditions of employment in the classified service. Const 1963, art 11, § 5; *Plec* v. *Liquor Control Commission* (1948), 322 Mich 691. *Groehn* v. *Corporation & Securities Commission* (1957), 350 Mich 250."

Accordingly, it is my opinion that the provisions in the Michigan Act providing for minimum wages and overtime compensation have no application to employees in the state classified civil service. The Civil Service Commission under Const 1963, art 11, § 5 has plenary power to fix rates of compensation, including minimum wages and overtime compensation for employees in the state classified civil service.

Minimum Wages

Minimum wage coverage for employees of state and local governmental units, with the exception of state employees in the classified civil service, will now depend exclusively on the provisions set forth in the Michigan Act.

The definition of "employee" and "employer" in the Michigan Act clearly includes employees of the state and its political subdivisions, agencies and instrumentalities.

An "employee" for the purpose of the Michigan Act is defined in Section 2(b) (MCLA 408.382(b); MSA 17.255(2), as follows:

"'Employee' means an individual between the ages of 18 and 65 years *employed by an employer* on the premises of the employer or at a fixed site designated by the employer, or a minor employed under section 23 of Act No. 157 of the Public Acts of 1947, being section 409.23 of the Michigan Compiled Laws." (Emphasis supplied)

And in Section 2(c) (MCLA 408.382(c); MSA 17.255(2)), "employer" is defined:

"'Employer' means any person, firm, or corporation, *including the state and its political subdivisions, agencies and instrumentalities,* and any person acting in the interest of such employer, who employs 4 or more employees at any one time within any calendar year. Such employer shall be subject to this act during the remainder of such calendar year." (Emphasis supplied)

Unlike the provisions in Section 4a of the Michigan Act relating to overtime compensation, *infra,* there are no definitions, exemptions or exclusions incorporated by reference from the FLSA with respect to the payment of minimum wages in the Michigan Act.

For this reason, the administration of the minimum wage law as to state and local governmental employees must be based entirely on the Michigan Act.

It is, therefore, my opinion that the minimum wage provisions of the Michigan Act now cover state and local governmental unit employees, including the employees of hospitals, schools and nursing homes operated by

the state, its political subdivisions, agencies and instrumentalities, *except for employees in the state classified civil service.* The definitions, exclusions, exemptions or other provisions of the FLSA formerly applicable in the administration of the Federal law are not referred to in the Michigan Act and have no applicability with respect to the administration of the minimum wage provisions of the Michigan Act.

Equal Pay

Section 206(d) of the FLSA, 29 USC 206(d), provides in pertinent part for equal pay for equal work, as follows:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality or production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

Section 17 of the Michigan Act (MCLA 408.397; MSA 17.255(17)) also provides for equal pay for equal work in language almost identical to that of the FLSA.

It is my opinion that coverage under the equal pay for equal work provisions of the FLSA remains effective with respect to employees in the state classified civil service as well as other state and local employees by virtue of the Fourteenth Amendment and the supremacy clause in the United States Constitution, art VI, § 2. In this connection see *Usery* v *Bettendorf Community School District,* ... F Supp ... (Idaho, 1976), in which the court held that *National League of Cities, supra,* does not apply to an equal pay claim against a public school district.

Overtime Compensation

The decision in *National League of Cities, supra,* holding that the FLSA overtime compensation provisions do not apply to state and local governmental employees means that the payment of overtime compensation to these employees, other than employees in the state classified civil service, will be controlled by Section 4a of the Michigan Act (MCLA 408.384a; MSA 17.255(4a), which provides:

> "(1) An employee shall receive compensation at not less than 1½ times the regular rate at which the employee is employed for employment in any workweek in excess of:
>
> (a) 48 hours beginning November 1, 1974.
>
> (b) 46 hours beginning May 1, 1975.

(c) 44 hours beginning May 1, 1976.

(d) 40 hours beginning May 1, 1977.

"(2) Subsection (1) shall not apply to an employee:

(a) Who is not an employee as defined by the federal fair labor standards act of 1938, as amended, being 29 U.S.C. sections 201 to 219.

(b) Who is exempt from the maximum hours provisions of the federal fair labor standards act, pursuant to section 13 of that act, being 29 U.S.C. section 213, unless the employee is:

(i) An employee of a hotel, motel, or restaurant other than an employee of a hotel, motel, or restaurant who is exempt from the maximum hours provisions of the federal fair labor standards act, under section 13(a)(1) of that act, as amended, being 29 U.S.C. section 213.

(ii) An employee of a retail or service establishment other than an employee of a retail or service establishment who is exempt from the maximum hours provisions of the federal fair labor standards act, being 29 U.S.C. 213.

(c) Who is subject to sections 7(b) to 7(n) of the federal fair labor standards act, being 29 U.S.C. section 207(b) to 207(n)."

The Michigan Legislature has seen fit to incorporate by reference certain definitions, exclusions and exceptions from the FLSA into the Michigan Act. The administration of the Michigan overtime compensation provisions with respect to state and local governmental employees, other than state employees in the classified civil service, depends on whether the references in Section 4a to the definitions, exclusions and exceptions of the FLSA were validly incorporated by reference and remain effective.

The law in Michigan with respect to the validity of a reference statute such as Section 4a of the Michigan Act is well settled. In *People* v *Urban*, 45 Mich App 255, 262-263; 206 NW 2d 511 (1973), the Court summarized the general rules and case law supporting those rules, as follows:

"To succinctly state the general rule, statutes which incorporate existing Federal statutes, rules, and regulations by reference are valid and constitutional. *Pleasant Ridge* v *Governor*, 382 Mich 225, 243 (1969); 16 CJS, Constitutional Law, § 133, p 563.

"But state legislation which adopts by reference *future* legislation, rules, or regulations, or amendments thereof, which are enacted, adopted, or promulgated by another sovereign entity, constitutes an unlawful delegation of legislative power. *Lievense* v *Unemployment Compensation Commission*, 335 Mich 339, 341-342 (1952); *Dearborn Independent, Inc.* v *Dearborn*, 331 Mich 447, 454 ff (1951); *Colony Town Club* v *Michigan Unemployment Compensation Commission*, 301 Mich 107, 113-114 (1942); *People* v *De Silva*, 32 Mich App 707, 713-714 (1971); see also Const 1963, art 4, § 1; *Coffman* v *State Board of Examiners in Optometry*, 331 Mich 582, 587-589 (1951); *G F Redmond & Co* v *Michigan Securities Commission*, 222 Mich 1, 5 (1923);

> *In re Brewster Street Housing Site*, 291 Mich 313, 340 (1939); *People v Collins*, 3 Mich 343, 344-345 (1854); *Minor Walton Bean Co. v Unemployment Compensation Commission*, 308 Mich 636, 653-654 (1944)."

The issues before the Court in *Urban* are analogous to the issues presented for this opinion. In *Urban*, the reference statute made the possession of certain drugs unlawful "unless in accordance with the federal food, drug and cosmetics act." At the time the Michigan reference statute was enacted the Federal statute provided exceptions if the prohibited drugs were (1) for the personal use of himself or of a member of his household or (2) for administration to an animal owned by him or a member of his household. In addition, a Federal regulation promulgated to implement the federal food, drug and cosmetic act also excepted religious use by members of the Native-American Church. Two years after the Michigan statute was passed, the Federal law was amended to delete the first two exceptions and four years after the Michigan enactment another Federal amendment deleted the third exception.

Applying the general rule already stated, the Court held that the Michigan reference statute should be read as containing the two exceptions in the Federal statute and the one exception in the Federal regulations which were in existence at the time of the enactment of the Michigan statute. The later amendments to the Federal act had no application under the rule prohibiting the adoption by reference of future legislation.

In my opinion, Section 4a of the Michigan Act has validly incorporated by reference the definitions, exclusions and exemptions set forth in the referenced sections of the FLSA in existence on April 1, 1975 which was the effective date of Section 4a relating to compensation for overtime. It is my further opinion, based on the *Urban* decision, that any Federal regulations in existence on April 1, 1975 interpreting the referenced sections of the FLSA are also applicable in Michigan.

Thus, since state and local governmental employees were defined as employees by the FLSA as of April 1, 1975, the decision in *National League of Cities* has two principal effects on the application of the overtime compensation provisions in Michigan (1) the responsibility for the enforcement of overtime compensation for state and local governmental employees becomes exclusively Michigan's utilizing the exemptions and exclusions incorporated by reference from the FLSA, and (2) the overtime compensation provisions of the Michigan Act will not be applicable to state employees in the state classified civil service in the absence of Federal coverage because of the exclusive constitutional authority of the Civil Service Commission to fix rates of compensation.

In summary, it is my opinion that:

> (1) The decision in *National League of Cities* removing state and local governmental employees from coverage under the minimum wage and overtime compensation provisions of the FLSA terminated the Federal statutory and constitutional preemption over Michigan law as to this class of employee. Consequently, employees in the state classified civil service are no longer subject to the minimum wage or over-

time provisions of either the FLSA or the Michigan Act because of the plenary constitutional authority of the Civil Service Commission in fixing compensation under Const, art 11, § 5.

(2) Except for employees in the state classified civil service, the minimum wage provisions of the Michigan Act are exclusively applicable to employees of the state, its political subdivisions, agencies, and instrumentalities, without regard to the provisions of the FLSA or regulations promulgated thereunder.

(3) The equal pay provisions of the FLSA were not considered by the Court in *National League of Cities* and remain applicable to public employees, including employees in the state classified civil service, because of the Supremacy Clause, (US Const, art VI, § 2).

(4) Except for employees in the state classified civil service, state and local governmental employees will now be covered exclusively by the overtime compensation provisions of Section 4a of the Michigan Act in accordance with the referenced exclusions and exceptions in existence in either the FLSA or applicable Federal regulations on April 1, 1975.

Before concluding this opinion, a *caveat* should be inserted noting that the majority decision in *National League of Cities, supra,* held the minimum wage and overtime provisions of the FLSA unconstitutional only insofar as the application extended to state and local governmental employees involved in "integral operations in areas of traditional governmental functions." The determination as to which services of state and governmental employees are not performed in "areas of traditional governmental functions" must necessarily be decided on a case by case basis by the federal administrators of the FLSA and, ultimately, by court decisions.

FRANK J. KELLEY,
Attorney General.

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CIVIL SERVICE COMMISSION: Firemen and fire departments.

CIVIL SERVICE COMMISSION: Police.

POLICE: Civil Service Commission.

FIREMEN AND FIRE DEPARTMENTS: Civil Service.

A civil service commission established by 1935 PA 78 may not grant payment for back pay to a person who served in a position that was underclassified.

A civil service commission established under 1935 PA 78 is not authorized to make determinations of the classification of policemen and firemen nor to determine the duties required of the rank of detective.

The primary role of a civil service commission established by 1935 PA 78 is to conduct examinations for employment and promotion and its other functions described in the Act.

Pursuant to Madison Heights City Charter, the city manager is the appointing officer for the purpose of 1935 PA 78.

Opinion No. 5018 December 17, 1976.

Honorable Bill S. Huffman
State Senator, 16th District
The Capitol
Lansing, Michigan 48902

You have asked for my opinion on several questions relative to the powers of the Madison Heights Civil Service Commission for policemen and firemen which operates under the powers established by 1935 PA 78, MCLA 38.501 *et seq;* MSA 5.3351 *et seq.*

The situation out of which your questions arose may be summarized as follows: The duties of a juvenile officer for the Madison Heights Police Department are assigned to a police officer with the rank of patrolman. Contending that the juvenile officer performs "detective duties," a grievance was filed with the Civil Service Commission asking (a) that the position of juvenile officer be classified at the rank of detective; (b) that the Commission grant the individual retroactive pay.

You have asked for my opinion on five questions which I will answer individually.

"1. Does the Civil Service Commission have the authority to grant a man back pay; [i.e.] the difference between Detective and Patrolman pay?"

1935 PA 78, *supra,* in relevant part provides:

". . . No member of any fire or police department within the terms of this act shall be removed, discharged, reduced in rank or pay, suspended or otherwise punished except for cause, and in no event until he shall have been furnished with a written statement of the charges and the reasons for such actions, . . . In every case of charges