

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 MDC RESTAURANTS, LLC, a
4 Nevada limited liability company;
5 LAGUNA RESTAURANTS LLC, a
6 Nevada limited liability company; and
7 INKA LLC, a Nevada limited liability
8 company,

9 Petitioners,

10 vs.

11 THE EIGHTH JUDICIAL DISTRICT
12 COURT OF THE STATE OF
13 NEVADA in and for the County of
14 Clark and THE HONORABLE
15 TIMOTHY WILLIAMS, District Judge,

16 Respondents,

17 and

18 PAULETTE DIAZ, an individual;
19 LAWANDA GAIL WILBANKS, an
20 individual; SHANNON OLSZYNSKI,
21 an individual; and CHARITY
22 FITZLAFF, an individual, all on behalf
23 of themselves and all similarly-situated
24 individuals

25 Real-Parties-in-Interest.

Electronically Filed
Oct 21 2015 12:36 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Case No.: 67631

Eighth Judicial District Court
Case No.: A701633

26 **REAL PARTIES IN INTEREST’S APPENDIX**

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ALPHABETICAL INDEX TO JOINT APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2015, a true and correct copy of the foregoing **REAL PARTIES IN INTEREST’S APPENDIX** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court’s electronic filing system.

By: /s/ Christie Rehfeld
Christie Rehfeld, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN
& RABKIN, LLP

A-14-701633-C

**DISTRICT COURT
CLARK COUNTY, NEVADA****Other Civil Filing****COURT MINUTES****February 03, 2015**

A-14-701633-C

Paulette Diaz, Plaintiff(s)

vs.

MDC Restaurants LLC, Defendant(s)

February 03, 2015**2:30 PM****Minute Order****Re: Motion for Judgment on the Pleadings
Pursuant to NRCP 12(c) with Respect to All
Claims For Damages Outside the Two-Year
Statute of Limitations****HEARD BY:** Williams, Timothy C.**COURTROOM:** RJC Courtroom 12D**COURT CLERK:** Lorna Shell**PARTIES PRESENT:** None**JOURNAL ENTRIES**

- After a review and consideration of the record, the points and authorities on file herein, and the oral arguments of counsel, the COURT FINDS as follows:

The civil claims and remedies for violations of minimum wage laws under NRS 608.260 and the Nevada Constitution differ significantly in both character and nature. Pursuant to NRS 608.260, the employer may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the amount of minimum wage. Thus, under the Nevada statutory scheme, the employee is solely limited to back pay, i.e., the difference between the amount paid and the amount of the minimum wage. In contrast, the Nevada Constitution, Article 15, 16(B) provides [a]n employee claiming a violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of the section and shall be entitled to all of the remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action under this section shall be awarded his or her attorney fees and costs.

Clearly, the claims for relief and remedies afforded to Nevada employees under the Nevada Constitutional Amendment are expanded and not merely limited to back pay. The COURT FINDS that, by its very nature, the Nevada Constitutional Amendment grants Nevada employees expansive rights, relief and legal remedies available in law or in equity. In addition, the Nevada Constitutional Amendment appears to expand employee rights even further, providing for an entitlement to

PRINT DATE: 02/03/2015

Page 1 of 2

Minutes Date: February 03, 2015

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A-14-701633-C

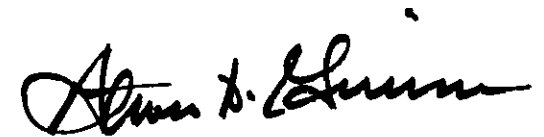
attorney fees and costs should an employee prevail in the prosecution of his or her action.

As such, the COURT FINDS it is of paramount importance to distinguish the limited remedy of back pay available to Nevada employees under NRS 608.260 versus the Constitutional rights, claims, and remedies available to Nevada employees under the Constitutional Amendment, which could include, but are not limited to, back pay, damages, and injunctive relief. Therefore, the COURT FINDS that pursuant to the language of NRS 608.260, the 2 year limitations period applies only to claims for back pay. Consequently, this statutory limitation does not affect or apply to the constitutionally mandated claims, rights, and remedies afforded to claimants under the Constitutional Amendment. It is also important to note that the Nevada Constitutional Amendment is much more expansive in the rights, claims, relief, and remedies available to claimants. As a result, it would be problematic to apply a two year statute of limitations to a claim for back pay and a different limitations period for claims for damages and/or injunctive relief not covered by the statute (NRS 608.260). Clearly, the implication of the expansive Constitutional Amendment effectively supplants, supersedes, and/or repeals the two-year limitations period and the limited civil remedy provisions of NRS 608.260.

Lastly, with respect to the applicable statute of limitations period, this determination is based largely on the allegations and claims for relief asserted in Plaintiffs' Complaint. A review of Plaintiffs' Amended Complaint clearly indicates that Plaintiffs' action is primarily based on Defendants' alleged violations of Nev. Const. art. XV, 16. Furthermore, Plaintiffs' Prayer For Relief is not limited to an award of back pay; rather, Plaintiffs request declaratory relief, unpaid wages, damages, interest, attorney's fees and costs, and other relief necessary and just in law and in equity. Therefore, the COURT FINDS that in this action, the most plausible applicable limitations provision shall be the four-year catch-all limitations period for civil actions pursuant to NRS 11.220.

Based on the foregoing, COURT ORDERED, Defendant's Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations, DENIED; Plaintiff's Countermotion for Summary Judgment RE: Limitation of the Action GRANTED; counsel for the Plaintiffs Pardee shall prepare the appropriate Findings of Fact and Conclusions of Law in accordance with this Minute Order and the record on file herein.

CLERK'S NOTE: A copy of this minute order was faxed and placed in the attorney folder(s) of: Don Springmeyer, Esq. (Wolf, R,R,S & R) 702-341-5300 and Rick Roskelley, Esq. (Littler Mendelson) 702-862-8811./ls 2-3-15



CLERK OF THE COURT

1 **NEO**
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EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

11 **PAULETTE DIAZ, an individual;**
12 **AWANDA GAIL WILBANKS, an**
13 **individual; SHANNON OLSZYNSKI, an**
14 **individual; and CHARITY FITZLAFF, an**
15 **individual, on behalf of themselves and all**
16 **similarly-situated individuals,**

17 **Plaintiffs,**

18 **vs.**

19 **MDC RESTAURANTS, LLC, a Nevada**
20 **limited liability company; LAGUNA**
21 **RESTAURANTS, LLC, a Nevada limited**
22 **liability company; INKA, LLC, a Nevada**
23 **limited liability company; and DOES 1**
24 **through 100, Inclusive,**

25 **Defendants.**

Case No: A701633
Dept. No.: XVI

**NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND
ORDER**

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27 ///

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1 **NOTICE OF ENTRY OF FINDINGS OF FACT,**
2 **CONCLUSIONS OF LAW, AND ORDER**

3 PLEASE TAKE NOTICE that the attached FINDINGS OF FACT, CONCLUSIONS OF LAW
4 AND ORDER was entered by this Court on the 23rd day of February, 2015.

5 DATED this 24th day of February, 2015.

6 **WOLF, RIFKIN, SHAPIRO,**
7 **SCHULMAN & RABKIN, LLP**

8 By: /s/ Daniel Bravo

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2015, a true and correct copy of **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

By: /s/ Lorraine Rillera
Lorraine Rillera, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP



CLERK OF THE COURT

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16 *Attorneys for Plaintiffs*

17 **EIGHTH JUDICIAL DISTRICT COURT**

18 **IN AND FOR CLARK COUNTY, STATE OF NEVADA**

19 PAULETTE DIAZ, an individual;
20 AWANDA GAIL WILBANKS, an
21 individual; SHANNON OLSZYNSKI, an
22 individual; and CHARITY FITZLAFF, an
23 individual, on behalf of themselves and all
24 similarly-situated individuals,

25 Plaintiffs,

26 vs.

27 MDC RESTAURANTS, LLC, a Nevada
28 limited liability company; LAGUNA
RESTAURANTS, LLC, a Nevada limited
liability company; INKA, LLC, a Nevada
limited liability company; and DOES 1
through 100, Inclusive,

Defendants.

Case No: A701633
Dept. No.: XVI

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER**

Date of Hearing: December 4, 2014
Time of Hearing: 9:00 a.m.

On October 1, 2014, Defendants filed their Motion for Judgment on the Pleadings Pursuant to
NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations. On
October 20, 2014, Plaintiffs filed their Opposition to Defendants' Motion and a Countermotion for
Partial Summary Judgment Re: Limitation of the Action. On December 4, 2014, the Court held a
hearing on the competing motions on the applicable statute of limitations.

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1 After a review and consideration of the record, the points and authorities on file herein, and the
2 oral arguments of counsel, the Court finds the following facts and states the following conclusions of
3 law:¹

4 FINDINGS OF FACT

5 The District Court FINDS as follows:

6 1. The civil claims and remedies for violations of minimum wage laws under NRS 608.260
7 and article XV, section 16 of the Nevada Constitution differ significantly in both character and nature.

8 2. Pursuant to NRS 608.260, an employee may, at any time within 2 years, bring a civil
9 action to recover the difference between the amount paid to the employee and the minimum wage
10 amount. Thus, under the Nevada statutory scheme, the employee is solely limited to back pay, i.e., the
11 difference between the amount paid and the amount of the minimum wage. See NRS 608.260.

12 3. In contrast, article XV, section 16(B) of the Nevada Constitution provides that “[a]n
13 employee claiming a violation of this section may bring an action against his or her employer in the
14 courts of this State to enforce the provisions of the section and shall be entitled to all of the
15 remedies available under the law or in equity appropriate to remedy any violation of this section,
16 including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who
17 prevails in any action under this section shall be awarded his or her attorney fees and costs.”
18 Nev. Const. art. XV, § 16(B).

19 4. The claims for relief and remedies afforded to Nevada employees under the Nevada
20 Constitutional Amendment are expanded and not merely limited to back pay.

21 5. By its very nature, the Nevada Constitutional Amendment grants Nevada employees
22 expansive rights, relief and legal remedies available in law or in equity. *Id.* In addition, the Nevada
23 Constitutional Amendment expands employee rights even further, providing for an entitlement to
24 attorney fees and costs should an employee prevail in the prosecution of his or her action. *Id.*

25 6. It is of paramount importance to distinguish the limited remedy of back pay available to
26

27 ¹ If any finding herein is in truth a conclusion of law, or if any conclusion stated is in truth a
28 finding of fact, it shall be deemed so.

1 Nevada employees under NRS 608.260 versus the Constitutional rights, claims, and remedies available
2 to Nevada employees under the Nevada Constitutional Amendment, which could include, but are not
3 limited to, back pay, damages, and injunctive relief.

4 7. Pursuant to the language of NRS 608.260, the two-year limitations period applies only
5 to claims for back pay. *See* NRS 608.260. Consequently, this statutory limitation does not affect or
6 apply to the constitutionally mandated claims, rights, and remedies afforded to claimants under the
7 Constitutional Amendment.

8 8. It is also important to note that the Nevada Constitutional Amendment is much more
9 expansive in the rights, claims, relief, and remedies available to claimants. As a result, it would be
10 problematic to apply a two year statute of limitations to a claim for back pay and a different limitations
11 period for claims for damages and/or injunctive relief not covered by the statute (NRS 608.260).

12 9. Clearly, the implication of the expansive Nevada Constitutional Amendment effectively
13 supplants, supersedes, and/or repeals the two-year limitations period and the limited civil remedy
14 provisions of NRS 608.260.

15 10. Lastly, with respect to the applicable statute of limitations period, this determination is
16 based largely on the allegations and claims for relief asserted in Plaintiffs Complaint. A review of
17 Plaintiffs' Amended Complaint clearly indicates that Plaintiffs' action is primarily based on
18 Defendants' alleged violations of Nev. Const. art. XV, 16. Furthermore, Plaintiffs Prayer For Relief is
19 not limited to an award of back pay; rather, Plaintiffs request declaratory relief, unpaid wages,
20 damages, interest, attorneys' fees and costs, and other relief necessary and just in law and in equity.

21 11. Therefore, the Court finds that in this action, the most plausible applicable limitations
22 provision shall be the four-year catch-all limitations period for civil actions pursuant to NRS 11.220.

23 CONCLUSIONS OF LAW

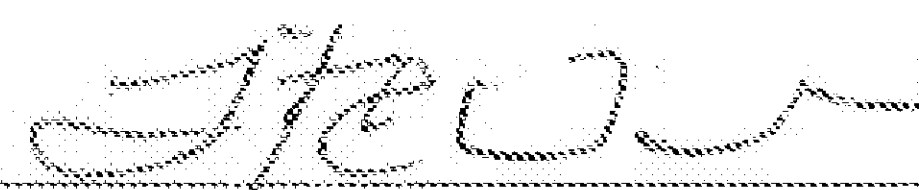
24 Based upon these Findings of Fact, the District Court CONCLUDES AND ORDERS as
25 follows:

26 1. In this action, for alleged violations of article XV, section 16 of the Nevada
27 Constitution, the applicable limitations provision shall be the four-year catch-all limitations period for
28 civil actions pursuant to NRS 11.220.

2. Defendants' Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations is DENIED.

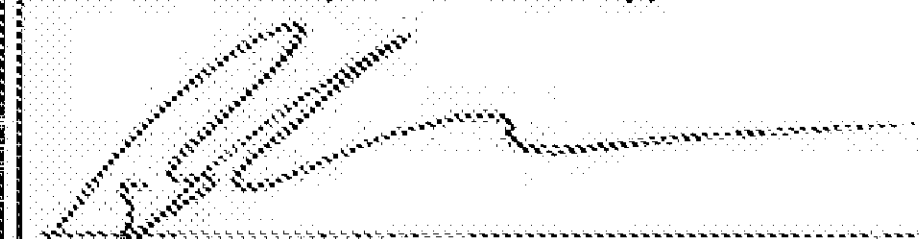
3. Plaintiffs' Countermotion for Summary Judgment Re: Limitation of the Action is GRANTED.

IT IS SO ORDERED this 19th day of February, 2015.

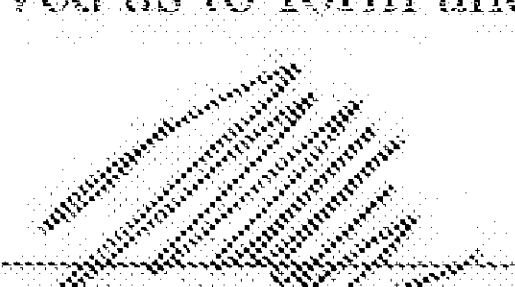

DISTRICT COURT JUDGE K.S.

Submitted by:

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2005 Nev. Op. Atty. Gen. No. 04 (Nev.A.G.), 2005 WL 575568

Office of the Attorney General

State of Nevada
Opinion No. 2005-04
March 2, 2005

BALLOTS; LABOR COMMISSIONER; WAGES:

*1 Notwithstanding the conclusion that the proposed amendment would effect an implied repeal of the provisions for calculation of the minimum wage and minimum wage entitlement found in [NRS 608.250](#), the statutory exclusions from overtime compensation and the provisions of [NRS 608.250](#) relied upon in [NRS 608.018](#), would stand as enacted for purposes of the overtime compensation law.

Michael Tanchek
Nevada Labor Commissioner
Office of the Labor Commissioner
Department of Business and Industry
675 Fairview Drive, Suite 226
Carson City, Nevada 89701

Dear Mr. Tanchek:

As the Nevada Labor Commissioner, you are requesting an opinion regarding the potential effect of the amendment to the Nevada Constitution as proposed by the initiative placing Question No. 6, "Raise the Minimum Wage for Working Nevadans Act," on the 2004 General Election Ballot. Your questions concern the consequences of such an amendment upon Nevada's existing statutory framework for minimum wage and overtime compensation benefits. Notwithstanding the recent introduction of Assembly Bill 87 in the current session of the Nevada Legislature, the issues and conclusions of this opinion should be shared with appropriate legislative committees for consideration of prudent anticipatory statutory amendments to current laws that will be impacted by any passage of Question No. 6 amending the Nevada Constitution.

GENERAL BACKGROUND INFORMATION

Currently under [NRS 608.250](#), certain employees in private employment are entitled to minimum wages at a rate to be established by the Nevada Labor Commissioner in accordance with federal law. Nevada's overtime compensation statute, [NRS 608.018](#), incorporates select provisions of the minimum wage law at [NRS 608.250](#) to delineate which employees are excluded from entitlement to statutory overtime compensation. Complimenting these Nevada laws, the Fair Labor Standards Act of 1938, as amended (FLSA), at [29 U.S.C.A. § 201 et seq.](#), sets forth the minimum wage and overtime compensation benefits required by federal law.¹ Under the FLSA, the general minimum wage rate is set at \$5.15 per hour. [29 U.S.C.A. § 206\(a\)\(1\) \(1998\)](#). In accordance therewith, the Nevada Labor Commissioner has also set Nevada's general minimum wage rate at \$5.15 per hour. [NAC 608.110\(1\)](#).

Ballot Question No. 6, which is aimed at raising Nevada's minimum wage rate, stemmed from an initiative petition. See [Nev. Const. art. 19, § 2](#) (reserving to the people the power to propose, by initiative petition, amendments to the constitution, and to enact or reject them at the polls); [Garvin v. Ninth Judicial Dist. Court ex rel. County of Douglas](#), 118 Nev. 749, 751, 59 P.3d 1180, 1181 (2002) (discussing the initiative power). The initiative proposes to amend Article 15 of the Nevada Constitution to add the following section addressing minimum wages:

Sec. 16. Payment of minimum compensation to employees.

**2 A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents (\$5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents (\$6.15) per hour if the employer does not provide such benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over \$5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.*

B. The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section. An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.

**3 C. As used in this section, "employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period of not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.*

D. If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the remaining provisions and all portions not declared illegal, invalid or inoperative shall remain in full force or effect, and no such determination shall invalidate the remaining sections or portions of the sections of this section.

Compilation of Ballot Questions 2004, Question No. 6, § 3.

A majority of Nevada voters voting on Question No. 6 in the 2004 general election approved the proposed constitutional amendment. However, before the proposed amendment can become effective, the Secretary of State must resubmit the question for its approval by the voters in the 2006 general election. If a majority of the 2006 general election voters also approve the proposed amendment, it will become part of the Nevada Constitution upon certification of the election results. [Nev. Const. art. 19 § 2\(4\)](#); [NRS 295.035](#).

QUESTION ONE

Would the provisions of [NRS 608.250](#) through [NRS 608.290](#) be voided by the successful passage of the proposed amendment?

ANALYSIS

Neither the arguments for or against the initiative's passage nor the text of the proposed constitutional amendment refer directly to the existing minimum wage statutes. See Compilation of Ballot Questions 2004, Question No. 6. Even so, the primary focus of the initiative is on raising the current Nevada minimum wage of \$5.15 per hour, which wage is established pursuant to the statutory scheme. Thus it unmistakably appears that the voters intended for the proposed amendment to transform the existing statutory framework for minimum wages. The extent of the transformation that would actually be affected depends upon the extent of conflict between the proposed amendment and the existing statutes.

A constitutional amendment, ratified subsequent to the enactment of a statute, is controlling on any point covered in the amendment. *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373, 378 (1882). Further, ratification of a constitutional amendment will render void any existing law that is in conflict with the amendment. Op. Nev. Att'y Gen. 08 (May 19, 1908); see also 16 AM. JUR. 2d *Constitutional Law* § 68 (1979) (if there is a conflict between a statute and a subsequently adopted constitutional provision, the statute must give way). We now consider the relevant statutory provisions in turn.

[NRS 608.250](#)

Responsibility for Wage Calculation

*4 [NRS 608.250](#) governs the minimum wage for private employment and provides as follows:

1. Except as otherwise provided in this section, the Labor Commissioner shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees in private employment within the State. The Labor Commissioner shall prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless he determines that those increases are contrary to the public interest.
2. The provisions of subsection 1 do not apply to:
 - (a) Casual babysitters,
 - (b) Domestic service employees who reside in the household where they work.
 - (c) Outside salespersons whose earnings are based on commissions.
 - (d) Employees engaged in an agricultural pursuit for an employer who did not use more than 500 man-days of agricultural labor in any calendar quarter of the preceding calendar year.
 - (e) Taxicab and limousine drivers.
 - (f) Severely handicapped persons whose disabilities have diminished their productive capacity in a specific job and who are specified in certificates issued by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation.
3. It is unlawful for any person to employ, cause to be employed or permit to be employed, or to contract with, cause to be contracted with or permit to be contracted with, any person for a wage less than that established by the Labor Commissioner pursuant to the provisions of this section.

This statute's provisions for calculation of the minimum wage and the responsibility therefor are completely covered by and conflict with the corresponding provisions of the proposed amendment. First, like [NRS 608.250](#), the proposed amendment provides a comprehensive minimum wage calculation method which is applicable to private employment. See Proposed Amendment, § 16(A), (C) (setting forth a minimum wage calculation applicable to “any ... entity that may employ individuals or enter into contracts of employment”).

Second, obvious conflict is revealed when comparing the competing methods of wage calculation. Specifically, [NRS 608.250\(1\)](#) requires that the Labor Commissioner, “in accordance with federal law, establish ... the minimum wage” and “prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless he determines that those increases are contrary to the public interest.” By the terms of these provisions, the minimum wage rate cannot be higher than the federal minimum wage rate (which is currently \$5.15 per hour). However, the proposed amendment sets the minimum wage rate at either \$5.15 or \$6.15 per hour, depending upon whether an employer provides sufficient health benefits. The proposed amendment also vests the Governor or a state agency designated by him with the responsibility of publishing adjustments to the minimum wage and requires those adjustments to be based upon increases in the federal minimum wage or increases in the Consumer Price Index not to exceed 3% per year, whichever is greater. See Proposed Amendment, § 16(A).

*5 Based on this overlapping and contradictory coverage, the existing statutory provisions would not survive the proposed amendment. Instead, the proposed amendment would supplant and repeal by implication the provisions of [NRS 608.250](#) for wage calculation and the responsibility therefor.

Exclusions Based on Employee Type

Also apparent from a comparison of the proposed amendment and statute is the disagreement on the issue of which employees are entitled to minimum wages. [NRS 608.250\(2\)](#) sets forth various exclusions from the statutory minimum wage entitlement for certain types of employees, *i.e.*, casual babysitters, domestic service employees who reside in the household where they work, etc. However, [NRS 608.250](#) does not provide any exclusion which is based on an employee's age,² the nonprofit status of an employer, or training periods of employment. In contrast, the proposed amendment does not exclude from its minimum wage coverage the types of employees listed at [NRS 608.250\(2\)](#), except to the extent that those types of employees may also be “under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days.” Proposed Amendment, § 16(C) (defining “employee” for coverage purposes to exclude certain employees under age eighteen).

The effect of the proposed amendment on the [NRS 608.250](#) exclusions is controlled by two presumptions. First, the voters should be presumed to know the state of the law in existence related to the subject upon which they vote. *Op. Nev. Att'y Gen. 153* (December 21, 1934). Second, it is ordinarily presumed that “[w]here a statute is amended, provisions of the former statute omitted from the amended statute are repealed.” *McKay v. Board of Supervisors*, 102 Nev. 644, 650, 730 P.2d 438, 442 (1986). In keeping with these presumptions, the people, by acting to amend the minimum wage coverage and failing to include the statutory exclusions in the proposed amendment, are presumed to have intended the repeal of the existing exclusions so that the new minimum wage would be paid to all who meet its definition of “employee.” Accordingly, the proposed amendment would effect an implied repeal of the exclusions from minimum wage coverage at [NRS 608.250\(2\)](#).

[NRS 608.260](#)

Civil Court Remedies for Evasion of Minimum Wage Laws

Each competing minimum wage scheme provides a complete civil court remedy for evasion of its requirements. See [NRS 608.260](#) (stating, in part, “[T]he employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage.”); *compare* Proposed Amendment, § 16(B) (an employee may bring an action against his employer in the courts of this state and shall be entitled to all appropriate remedies

available under the law or in equity, including back pay, damages, reinstatement or injunctive relief, and if prevailing, shall be entitled to reasonable attorney's fees and costs). As the proposed amendment has completely covered the topic of a civil court remedy, providing for even greater relief, its remedy would supplant and repeal by implication the existing civil remedy provision at [NRS 608.260](#).

[NRS 608.270\(1\)](#) and [NRS 608.290\(2\)](#)

Administrative Enforcement of Minimum Wage Laws

*6 [NRS 608.270\(1\)\(a\)](#) states that the “Labor Commissioner shall ... [a]dminister and enforce the provisions of [NRS 608.250](#).” In addition, [NRS 608.290\(2\)](#) provides with regard to violations of [NRS 608.250](#) that “[i]n addition to any other remedy or penalty, the Labor Commissioner may impose against the person an administrative penalty of not more than \$5,000 for each such violation.” The presumptive partial repeal of [NRS 608.250](#) notwithstanding, legal authority suggests that the proposed amendment would serve to modify these statutes as necessary to effectuate their continued use in enforcing the new minimum wage law.

The proposed amendment is silent with respect to the administrative enforcement authority of the Labor Commissioner and his imposition of administrative sanctions. Where, as here, “express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute, unless there is such inconsistency or repugnancy [between the laws] as to preclude the presumption, or the [new law] revises the whole subject-matter of the former. [Citations omitted.]” [Ronnow v. City of Las Vegas](#), 57 Nev. 332, 365, 65 P.2d 133, 145 (1937). [Text altered.] The statutes in question here are consistent with the basic provisions of the proposed amendment.

The minimum wage changes proposed by Question No. 6, though materially different in wage outcome, applicability and civil court remedy, essentially create a new method of calculating the wage rate and do not attempt to alter the underlying current statutory basis for administrative enforcement of the new wage by the Labor Commissioner. By providing for a higher minimum wage and a more extensive civil court remedy, the people intended to strengthen an employee's ability to assert his right to the minimum wage. The current administrative enforcement jurisdiction of the Labor Commissioner is well-suited to serve this general purpose, and it merely strengthens what the proposed amendment seeks to guaranty. See [Washington v. State](#), 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001) (statutes must be interpreted consistently with their general purposes); see also [Rogers v. Heller](#), 117 Nev. 169, 176 n.17, 18 P.3d 1034, 1038 n.17 (2001) (recognizing that rules of statutory construction apply to constitutional provisions).

The current minimum wage statutes evidence the Legislature's clear intent that the Labor Commissioner should enforce Nevada's minimum wage law and impose administrative sanctions for violations thereof. Additionally, [NRS 607.160\(1\)\(a\)\(2\)](#) provides that “[t]he Labor Commissioner ... [s]hall enforce *all labor laws* of the State of Nevada ... [t]he enforcement of which is not specifically and exclusively vested in any other officer, board or commission.” [Emphasis added.] [NRS 607.160\(3\)—\(6\)](#) contemplate the Labor Commissioner will impose administrative penalties and pursue administrative and civil actions for violation of Nevada's labor laws. Further, [NRS 607.170\(1\)](#) allows the Labor Commissioner to prosecute claims and commence actions to collect wages for any person who is unable to afford counsel.

*7 The intent behind the administrative enforcement provisions at [NRS 608.270\(1\)\(a\)](#) and [NRS 608.290\(2\)](#), i.e., that the Labor Commissioner shall enforce the state's minimum wage law, is likely to prevail despite the specific references to [NRS 608.250](#) in [NRS 608.270\(1\)\(a\)](#) and [NRS 608.290](#). [McKay](#), 102 Nev. at 650, 730 P.2d at 443 (the intent behind a law will prevail over the literal sense of the words used in the law). However, given the specific references to [NRS 608.250](#) in [NRS 608.270\(1\)\(a\)](#) and [NRS 608.290](#), it is conceivable that a court of law could find the Legislature intended the existing enforcement statutes apply only to the minimum wage as calculated under [NRS 608.250](#), and not recognize the amendment to the Nevada Constitution as merely augmenting the statutes establishing the Labor Commissioner's pre-amendment administrative enforcement authority. If so, the intent behind existing statutes would be upset by allowing them to stand as enforcement tools for the new law, and

the statutes should be treated as repealed. See *City and County of San Francisco v. County of San Mateo*, 896 P.2d 181, 195 (Cal. 1995) (Mosk, J., concurring) (existing statutes must be treated as repealed if the intent behind them would be thwarted by allowing them to stand in the face of a constitutional amendment). On the other hand, the more likely and appropriate conclusion is that the proposed amendment would modify these enforcement statutes to allow for the Labor Commissioner's enforcement of the new minimum wage law. Cf. *Perry v. Consolidated Special Tax Sch. Dist. No. 4*, 103 So. 639, 642 (Fla. 1925) (recognizing that previous statutory provisions, as modified by constitutional amendment, are sufficient to effectuate new constitutional provisions so that new provisions may be enforced even though they are not contained in or contemplated by present statutes).

NRS 608.270(1)(a), (2), NRS 608.280, and NRS 608.290(1) Criminal Enforcement of Minimum Wage Laws

NRS 608.270(1)(a) and (2) establish that the district attorneys will prosecute violations of NRS 608.250 and, for the willful failure to do so, will be subject to a misdemeanor conviction and removal from office. In addition, NRS 608.280 requires the Attorney General to prosecute willful violations of NRS 608.270. Finally, NRS 608.290(1) also makes the violation “of NRS 608.250 or any regulation adopted pursuant thereto” a misdemeanor. For the same reasons given in the preceding section of this opinion (addressing the proposed amendment's effect upon the Labor Commissioner's administrative enforcement authority), it is also likely that a court would find that the proposed amendment only modifies, rather than repeals, the existing criminal enforcement statutes. In short, by enacting these criminal statutes the Legislature plainly intended that criminal sanctions would be used as a tool to enforce the state minimum wage law. Although, as with the provisions discussed in the preceding section, it is possible that a court could determine that the Legislature's intent is ambiguous with respect to application of the criminal enforcement statutes to the new minimum wage law. After considering this risk, the reasonable and fair conclusion is that the legislative intent behind the existing provisions is consistent with using these provisions to enforce the new minimum wage law. The criminal enforcement statutes are also consistent with the proposed amendment's apparent purpose of strengthening an employee's ability to collect minimum wages. The people, by presumption, were aware of the law's provisions when voting in favor of the proposed amendment. See Op. Nev. Att'y Gen. 153 (December 21, 1934). As both the initiative and the proposed amendment are silent as to repeal of the criminal enforcement provisions, these provisions are likely to survive as modified to effectuate their continued use as an enforcement tool for the new minimum wage law. See *Ronnow v. City of Las Vegas*, 57 Nev. at 332, 365, 65 P.2d 133, 145 (1937).

CONCLUSION TO QUESTION ONE

*8 If the proposed constitutional amendment is approved at the 2006 general election as established by certified election results, it would supplant and repeal by implication the wage calculation and coverage provisions of NRS 608.250 and the civil remedy of NRS 608.260. NRS 608.270(1) and NRS 608.290(2) would likely be found to have been modified as necessary to effectuate the Labor Commissioner's enforcement of the new minimum wage. The criminal enforcement provisions of NRS 608.270(1)(b) and (2), NRS 608.280, and NRS 608.290(1) also would likewise be found to be modified to allow for their continued use in enforcing the new minimum wage law.

QUESTION TWO

Would the passage of the proposed amendment require the payment of the minimum wage to those types of employees currently excluded under NRS 608.250(2)?

ANALYSIS

As discussed in response to Question One above, the proposed amendment does not contain any of the exceptions to coverage currently set forth at NRS 608.250(2). The only exception under the proposed amendment is for employees who are “under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days.” Proposed Amendment, § 16(C) (defining “employee” for coverage purposes to exclude certain employees under age eighteen). In light of this, the exclusions under NRS 608.250 are repugnant to the proposed

amendment, the plain wording of which requires payment of the minimum wage regardless of whether an employee is currently excluded under [NRS 608.250\(2\)](#). Consequently, the proposed amendment would effect an implied repeal of the exclusions set forth at [NRS 608.250](#) from minimum wage coverage.

CONCLUSION TO QUESTION TWO

The proposed amendment would require payment of the new minimum wage to employees who are currently excluded under [NRS 608.250\(2\)](#) from entitlement to minimum wages, unless those employees fall outside the amendment's definition of a protected "employee."

QUESTION THREE

Does the language of Section 16(B) of the proposed amendment specifically and exclusively vest the enforcement of the minimum wage provisions with the courts, so as to preempt the enforcement jurisdiction of the Labor Commissioner?

ANALYSIS

Your question alludes to the language of [NRS 607.160\(1\)\(a\)\(2\)](#), which states, "The Labor Commissioner ... [s]hall enforce all labor laws of the State of Nevada ... [t]he enforcement of which is not specifically and exclusively vested in any other officer, board or commission." As discussed in response to Question One above, the provisions of [NRS 607.160](#) and [NRS 607.170](#), as well as the provisions under [NRS 608.270\(1\)\(a\)](#) and [NRS 608.290\(2\)](#), demonstrate the Legislature's intent that the Labor Commissioner enforce Nevada's minimum wage law, even as amended or supplanted by the instant initiative. Therefore, the proposed amendment would likely only modify the existing statutes as needed for such enforcement. The proposed amendment's civil remedy at section 16(B) would supplant the existing statutory civil remedy at [NRS 608.260](#), but this would have no additional affect on the existing statutes providing for the Labor Commissioner's enforcement jurisdiction in other areas.

*9 Moreover, section 16(B) of the proposed amendment provides, in relevant part, that an employee "may bring an action against his or her employer in the courts of this State to enforce the provisions of this section." [Emphasis added.] The use of the word "may" in this context indicates that the remedy is intended to be permissive and it does not indicate exclusivity of the remedy. *D'Angelo v. Gardner*, 107 Nev. 704, 721 n.11, 819 P.2d 206, 217 n.11 (1991); *Ewing v. Fahey*, 86 Nev. 604, 608, 472 P.2d 347, 350 (1970). Indeed, the analogous provision currently set forth in [NRS 608.260](#) states that an "employee may ... bring a civil action," and this remedy coexists with other statutes providing for enforcement by the Labor Commissioner. Thus the proposed amendment's civil remedy at section 16(B) does not specifically and exclusively vest authority elsewhere or divest the Labor Commissioner of all of his jurisdiction.

CONCLUSION TO QUESTION THREE

Section 16(B) of the proposed amendment does not interfere with all of the enforcement jurisdiction of the Labor Commissioner. It is likely that authority not specifically in contradiction to the amendment would survive a legal challenge.

QUESTION FOUR

Would preemption of [NRS 608.250](#) have any effect on the statutory exclusions from entitlement to overtime compensation set forth in [NRS 608.018](#)?

ANALYSIS

The overtime compensation statute, [NRS 608.018](#), should not be affected by the proposed amendment, even though it partially relies on [NRS 608.250](#).

[NRS 608.018](#) provides, in relevant part:

1. Except as otherwise provided in this section, an employer shall pay one and one-half times an employee's regular wage rate whenever an employee works:

(a) More than 40 hours in any scheduled week of work; or

(b) More than 8 hours in any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.

2. The provisions of subsection 1 do not apply to:

(a) Employees who are not covered by the minimum wage provisions of [NRS 608.250](#);

(b) Employees who receive compensation for employment at a rate not less than one and one-half times the minimum rate prescribed pursuant to [NRS 608.250](#);

....

(d) Salesmen earning commissions in a retail business if their regular rate is more than one and one-half times the minimum wage, and more than one-half their compensation comes from commissions;

....

(k) Drivers of taxicabs or limousines;

(l) Agricultural employees;³

As set forth above, [NRS 608.018\(2\)\(a\)](#) incorporates by reference the standard for minimum wage entitlement in [NRS 608.250](#). By this, [NRS 608.018\(2\)\(a\)](#) excludes from entitlement to statutory overtime compensation those employees who are also not entitled to minimum wages. [NRS 608.250\(2\)](#) sets forth a list of employees who are not entitled to minimum wages, including casual babysitters, taxicab and limousine drivers, and certain domestic service employees, outside salespersons, employees engaged in agriculture and severely handicapped persons. [NRS 608.250\(2\)\(a\)—\(f\)](#).

***10** The exclusions at [NRS 608.250\(2\)\(d\)](#) (for employees “engaged in agricultural pursuit for an employer who did not use more than 500 man-days of agricultural labor”) and in [NRS 608.250\(2\)\(e\)](#) (for “[t]axicab and limousine drivers”) are also subsumed in other corresponding statutory exclusions from overtime compensation. In particular, [NRS 608.018\(k\) and \(l\)](#) set forth exclusions which are at least as broad as those at [NRS 608.250\(2\)\(d\) and \(e\)](#) and which do not depend on or refer to [NRS 608.250](#). Accordingly, any question as to the continuing validity of [NRS 608.250\(2\)](#) cannot affect the lack of entitlement to statutory overtime compensation for taxicab and limousine drivers or for agricultural employees.

On the whole, the exclusions from statutory overtime coverage, as incorporated from [NRS 608.250\(2\)](#), are complimentary to the exclusions under the FLSA's overtime compensation provisions.⁴ Hence, it is apparent that the Legislature intended to enact state overtime compensation law that was generally consistent with federal law on the same topic and to exclude from statutory overtime compensation the types of employees identified at [NRS 608.250\(2\)](#). This intent should be respected regardless of changes in the law on the distinct subject matter of minimum wages.

Moreover, [NRS 608.018\(2\)\(a\)](#) does not depend on the aspects of [NRS 608.250](#) that offend the proposed amendment, *i.e.*, the provisions for minimum wage calculation and entitlement. Because the subject of the proposed amendment is the minimum wage and not entitlement to overtime compensation, [NRS 608.018\(2\)\(a\)](#) does not conflict with the organic provisions of the proposed amendment. Therefore, [NRS 608.018\(2\)\(a\)](#), which incorporates the identification of types of employees found in [NRS 608.250\(2\)](#), would survive the limited repeal of [NRS 608.250\(2\)](#) specific to its exclusion from minimum wage coverage for the same types of employees.

In contrast, the exclusions from statutory overtime entitlement set forth at [NRS 608.018\(2\)\(b\) and \(d\)](#) rely on the calculation of the minimum wage under [NRS 608.250](#). Subsection (2)(b) expressly does so, excluding from overtime compensation “[e]mployees who receive compensation for employment at a rate not less than one and one-half times the minimum rate prescribed pursuant to [NRS 608.250](#).” [Emphasis added.] Subsection 2(d) excludes “[s]alesmen earning commissions in a retail business if their regular rate is more than one and one-half times the minimum wage, and more than one-half their compensation comes from commissions.” [Emphasis added.]

The apparent intent behind [NRS 608.018\(2\)\(b\) and \(d\)](#) was to exclude from overtime compensation employees and certain salesmen who earned as a regular rate at least one and one-half times the minimum rate set by the Labor Commissioner - a rate that is limited by the rate provided by federal law. See [NRS 608.250\(1\)](#). In enacting [NRS 608.018\(2\)\(b\) and \(d\)](#), the Legislature could not have anticipated that overtime compensation would be required even though an employee earned more than one and one-half times the rate under federal law and [NRS 608.250](#). Incorporation of the wage calculation at [NRS 608.250](#) into [NRS 608.018](#) reflects the Legislature's determination as to the proper balance of state interests. Amending or supplanting [NRS 608.018\(2\)\(b\) or \(d\)](#) with the higher minimum wage rate of the proposed amendment would prove more costly for employers and would frustrate the apparent intent of the Legislature to tie this variable in the overtime calculation to the federal minimum wage.⁵ For this reason, and even more so because the proposed amendment is not concerned with overtime compensation, it would not effect a repeal or modification of these overtime compensation exclusions linked to [NRS 608.250](#).

***11** The rule that all statutes in force and not inconsistent with the new constitutional provisions shall continue until amended or repealed by the Legislature seems particularly apt here. See [16 AM. JUR. 2d Constitutional Law § 67](#). Under this rule, the minimum wage calculation provisions of [NRS 608.250](#), as incorporated into [NRS 608.018\(2\)\(b\) and \(d\)](#), should continue for the purpose of requiring the Labor Commissioner to establish a wage rate to be used in determining entitlement to statutory overtime compensation under [NRS 608.018\(2\)\(b\) and \(d\)](#).

CONCLUSION TO QUESTION FOUR

Notwithstanding the conclusion that the proposed amendment would effect an implied repeal of the provisions for calculation of the minimum wage and minimum wage entitlement found in [NRS 608.250](#), the statutory exclusions from overtime compensation and the provisions of [NRS 608.250](#) relied upon in [NRS 608.018](#), would stand as enacted for purposes of the overtime compensation law.

Sincere regards,

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Footnotes

- 1 Although states remain free to enact their own laws governing minimum wages and overtime benefits, compliance with state legislation will not excuse noncompliance with the FLSA. [29 U.S.C.A. § 218\(a\) \(1998\)](#); *Alaska Int'l Indus., Inc. v. Musarra*, 602 P.2d 1240, 1246 (Alaska 1979).

- 2 Previously, [NRS 608.250](#) expressly allowed for a minimum wage for minors that was eighty-five percent of the minimum wage for adults; however, the pertinent statutory language was deleted in 2001 when the statute was amended to allow the Labor Commissioner to establish prevailing wages in accordance with federal law. See 2001 Nev. Stat., ch. 90, § 9, at 564-65. Cf. [NAC 608.110\(2\)](#) (setting forth a lesser minimum wage for employees under age eighteen).
- 3 The provisions of [NRS 608.018](#) do not refer to, rely on, or parallel the provisions of [NRS 608.250](#) and would not be affected by the repeal of the [NRS 608.250](#) scheme for minimum wage. Furthermore, it should be noted that [NRS 608.180—608.195](#) provide for civil and criminal enforcement and remedies for violations of [NRS 608.018](#). This enforcement scheme is unrelated to the topic of minimum wage and would likewise remain unaffected by the proposed amendment.
- 4 See, e.g., 29 U.S.C.A. § 213(a)(1) (1998) (addressing outside salespersons); 29 U.S.C.A. § 213(a)(6) (1998) (addressing employees employed in agriculture); 29 U.S.C.A. §§ 213(a)(7), 214(c) (1998) (addressing handicapped workers); 29 U.S.C.A. § 213(a)(15) (1998) (addressing casual babysitters and those engaged in domestic service).
- 5 For example, the current minimum wage rate is \$5.15 per hour. This rate multiplied by one and one-half equals \$7.73 per hour. Thus under [NRS 608.018\(2\)\(b\) and \(d\)](#), statutory overtime compensation is required until an employee or salesman with sufficient commissions earns at least \$7.73 per hour. Under the proposed amendment, assuming no adequate insurance is provided, the minimum wage would be initially set at \$6.15 per hour. This rate multiplied by one and one-half equals \$9.23 per hour. If the calculation from the proposed amendment were incorporated into [NRS 608.018\(2\)\(b\) and \(d\)](#), then an employee would be entitled to statutory overtime compensation until he earned \$9.23 per hour.

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