

1 already receiving a reduced hourly wage.

2 Furthermore, it was the voters' intent that the 10% provision's calculation be limited to the
3 hourly wage paid by the employer. The voters who enacted the Amendment are "presumed to know
4 the state of the law in existence related to the subject upon which they vote." 2005 Nev. Op. Atty.
5 Gen. No. 04 (Mar. 2, 2005). At both times that the voters approved the measure, Nevada's statutes
6 defined "employer" as "every person having control or custody of any employment, place of
7 employment or any employee." N.R.S. 608.011. Thus, when the initiative limited the income
8 exposed to the 10% calculation to the "income from the employer," this Court presumes that the
9 voters knew who they meant, that the calculations and consequences flowing from that were
10 intended, and that the Amendment excluded gratuities from the buying public.

11 Because the Minimum Wage Amendment is a remedial measure, the Court construes it
12 liberally so that it falls in line with its discernible policy and purpose. The stated policy of the
13 Amendment is to protect minimum wage earners and their incomes, and to provide comprehensive,
14 low-cost health insurance to the state's lowest-paid workers. The Commissioner's reading of the
15 10% provision is not in line with these priorities and purposes, and thus N.A.C. 608.104(2) is
16 invalid.

17 4. The Commissioner's February 2015 Opinion

18 In January of 2015, in an effort to resolve a portion of this litigation and to clarify the
19 regulations in question, Plaintiff requested the Commissioner pass upon the validity of
20 N.A.C. 608.104(2), pursuant to the mechanism available in N.R.S. 233B.110.¹⁰ See Office of the
21 Labor Commissioner, "Order Affirming Validity of N.A.C. Sections 608.102(3) and 608.104(2)"
22 (Feb. 17, 2015), attached as **Exhibit 12**.

23 ///

24
25 ¹⁰ The request also entailed asking the Commissioner to pass upon the validity of
26 N.A.C. 608.102(3), the regulation identified herein as adding the concept of income "attributable to
27 the employer" to the Administrative Code for purposes of including tips in the allowable premium
28 cost calculation.

1 The subsequent opinion issued by the Commissioner's office ignored entirely the plain
2 language of the Amendment, and failed to wrestle with the term "from the employer." Instead, the
entire focus of the opinion affirming the regulations, in the two brief paragraphs it devoted to
substantive analysis, centered upon the use of the term "gross taxable income" in the Amendment.
The Commissioner's reasoning was that because Nevada has no state income tax, and therefore
lacks a state-level definition of "gross taxable income," her office would revert to the definition of
that term per federal tax law, and the Internal Revenue Service considers tips and gratuities to be
included in the "gross taxable income" of the employee. *See Ex. 12* at 5. This approach, of course,
is inappropriate and misses the import of the language of the Amendment entirely. No one is
10 arguing that tips and gratuities do not constitute gross taxable income for Plaintiff or any other
11 tipped employee under federal law. The argument, which the Commissioner's opinion blithely
12 ignores, is over the *source* of income that can form the basis of calculating maximum premium
13 costs under the Minimum Wage Amendment. Focusing upon an expansive notion of "gross taxable
14 income" rather than "from the employer" is an impermissible liberty with the language and
15 command of the provisions of the Amendment, and renders the Opinion incorrect and the
16 regulation invalid.
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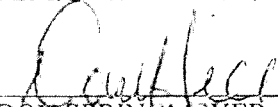
1 IV. CONCLUSION

2 The language of the Minimum Wage Amendment is plain on its face. It requires employers
3 to "provide" employees insurance before they are entitled to pay the lower-tier minimum wage—
4 not merely to "offer" it. Similarly, the Amendment limits an employee's share of the insurance
5 premium to 10% of his "income from the employer," which, by definition, excludes tips. The
6 Commissioner's regulations establishing otherwise, in both contexts, impermissibly conflict with
7 the constitutional provisions they were promulgated to implement. Therefore, Plaintiff respectfully
8 requests this Court to grant him summary judgment on his claims for declaratory relief, and declare
9 N.A.C. 608.100(1) and 608.104(2) invalid.

10 DATED this 11th day of June, 2015.

11 WOLF, RIFKIN, SHAPIRO,
12 SCHULMAN & RABKIN, LLP

13 By:

 12773
DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Attorneys for Plaintiffs

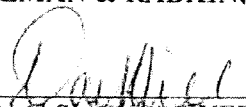
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AFFIRMATION

The undersigned does hereby affirm that the preceding document filed in this Court does not contain the social security number of any person.

DATED this 11th day of June, 2015.

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

By:  12773
D. N. SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Attorneys for Plaintiffs

1 CERTIFICATE OF SERVICE

2 I hereby certify that on this 11th day of June, 2015, a true and correct copy of
3 **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** was placed in an envelope, postage
4 prepaid, addressed as stated below, in the basket for outgoing mail before 4:00 p.m. at WOLF,
5 RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP. The firm has established procedures so that
6 all mail placed in the basket before 4:00 p.m. is taken that same day by an employee and deposited
7 in a U.S. Mail box.

8 Scott Davis, Esq.
9 Deputy Attorney General
10 Nevada State Bar No. 10019
11 555 E. Washington Ave., # 3900
12 Las Vegas, NV 89101
13 (702) 486-3894

*Attorneys for State of Nevada ex rel. Office of the Labor Commissioner;
Office of the Labor Commissioner and Commissioner Thoran Towler*

14
15 By:



Dannielle Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP

Exhibit 1

Exhibit 1

1 DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
2 BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
3 DANIEL BRAVO, ESQ.
Nevada State Bar No. 13078
4 **WOLF, RIFKIN, SHAPIRO,**
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7 Email: bschrager@wrslawyers.com
Email: dbravo@wrslawyers.com
8 *Attorneys for Plaintiffs*

9
10 **THE FIRST JUDICIAL DISTRICT COURT**
IN AND FOR CARSON CITY, NEVADA

11
12 CODY C. HANCOCK, an individual and
resident of Nevada,

13 Plaintiff,

14 vs.

15 THE STATE OF NEVADA ex rel. THE
OFFICE OF THE NEVADA LABOR
16 COMMISSIONER; THE OFFICE OF THE
NEVADA LABOR COMMISSIONER; and
17 SHANNON CHAMBERS, Nevada Labor
Commissioner, in her official capacity,

18 Defendants.
19

CASE NO.: 14 OC 00080 1B
DEPT. NO.: II

**DECLARATION OF DAN HILL, ESQ. IN
SUPPORT OF PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

20 **DECLARATION OF DAN HILL, ESQ.**

21 I, DAN HILL, ESQ., under penalty of perjury, hereby declare as follows:

22 1. I am a partner with the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP,
23 duly admitted to practice law in the state of Nevada, and counsel for Plaintiff in the above-captioned
24 action. I make this Declaration in support of Plaintiff's Motion for Summary Judgment. I have personal
25 knowledge of the facts set forth herein, and if called upon to testify, I could and would testify
26 competently thereto.

27 2. Attached, as Exhibit 2, is a true and accurate copy of the Affidavit of Cody Hancock.

28 3. Attached, as Exhibit 3, is a true and correct copy of the State of Nevada Statewide

1 Ballot Questions, Secretary of State, Question No. 6 (2006).

2 4. Attached, as **Exhibit 4**, is a true and correct copy of the Labor Commissioner's
3 Proposed Emergency Regulations (Nov. 29, 2006).

4 5. Attached, as **Exhibit 5**, is a true and correct copy of the Labor Commissioner's
5 Proposed Temporary Regulations (Feb. 2007).

6 6. Attached, as **Exhibit 6**, is a true and correct copy of the Legislative Counsel Bureau,
7 Research Division, *Policy and Program Report: Labor and Employment* (Apr. 2014).

8 7. Attached, as **Exhibit 7**, is a true and correct copy of the Legislative Counsel Bureau,
9 *Fact Sheet: Minimum Wage in Nevada* (Mar. 2015).

10 8. Attached, as **Exhibit 8**, is a true and correct copy of the Nevada Department of Business
11 and Industry, *Press Release* (Mar. 31, 2015).

12 9. Attached, as **Exhibit 9**, is a true and correct copy of Fisher & Phillips, LLP, *Labor*
13 *Alert: Question 6 Passes! New Nevada Minimum Wage Takes Effect November 28, 2006*
14 (Nov. 21, 2006).

15 10. Attached, as **Exhibit 10**, is a true and correct copy of Heinz, Von S., *Money, Money,*
16 *Money: Minimum Wage Increase Dates*, 12 No. 11 Nev. Emp. L. Letter 6 (Aug. 2007).

17 11. Attached, as **Exhibit 11**, is a true and correct copy of Guide to Employment Law and
18 Regulations, § 49.7 (Mar. 2015).

19 12. Attached, as **Exhibit 12**, is a true and correct copy of Office of the Labor
20 Commissioner, "Order Affirming Validity of N.A.C. Sections 608.102(3) and 608.104(2)"
21 (Feb. 17, 2015).

22 Under penalties of perjury under the laws of the United States and the State of Nevada, I
23 declare that the foregoing is true and correct to my own knowledge, except as to those matters stated on
24 information and belief, and that as to such matters I believe them to be true.

25 DATED this 11th day of June, 2015.

26 By: DA. Hill 12773
27 DA. HILL, ESQ.
28

Exhibit 2

Exhibit 2

1 DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
2 BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
3 DANIEL BRAVO, ESQ.
Nevada State Bar No. 13078
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7 Email: bschrager@wrslawyers.com
Email: dbravo@wrslawyers.com
8 Attorneys for Plaintiffs

9 THE FIRST JUDICIAL DISTRICT COURT
10 IN AND FOR CARSON CITY, NEVADA

11 CODY C. HANCOCK, an individual and
12 resident of Nevada,

13 Plaintiff,

14 vs.

15 THE STATE OF NEVADA ex rel. THE
16 OFFICE OF THE NEVADA LABOR
COMMISSIONER; THE OFFICE OF THE
17 NEVADA LABOR COMMISSIONER; and
THORAN TOWLER, Nevada Labor
Commissioner, in his official capacity,

18 Defendants.
19

CASE NO.: 14 OC 00080 1B
DEPT. NO.: II

AFFIDAVIT OF CODY HANCOCK IN
SUPPORT OF PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

20 AFFIDAVIT OF CODY HANCOCK

21 I, CODY HANCOCK, under penalty of perjury, hereby declare as follows:

22 1. I am over eighteen years of age and I am the Plaintiff in the above-captioned case. I
23 have personal knowledge of the facts set forth herein, except as to those stated on information and
24 belief and, as to those, I am informed and believe them to be true. If called upon to testify before this
25 Court I would do so to the same effect.

26 2. I am currently a resident of Nevada.

27 ///

28 ///

1 3. For the past three years, I have been an hourly employee of a national restaurant chain
2 with locations in Nevada. For the entirety of my employment there, I have been paid an hourly wage
3 of \$7.25

4 4. I have never enrolled in any plan of health insurance coverage during this three-year
5 period of employment, nor have I been offered a qualifying health insurance plan.

6 5. Once each year during this this-year period my employer has presented me with a health
7 insurance plan, but it is consistently far too expensive for me to afford. Additionally, each time a
8 health insurance plan has been presented to me, my employer has informed me that I am ineligible to
9 enroll.

10 6. On information and belief, my employer has always included the tips I have received or
11 a projection of the tips I may or may not receive in its calculation of what my share of any insurance
12 premium costs would be.

13 I declare under penalty of perjury, under the laws of the State of Nevada, that the foregoing is
14 true and correct.

15 DATED this 11th day of June 2015.

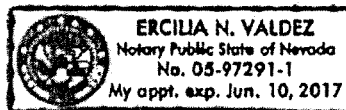
16
17 By: _____

CODY HANCOCK

18 State of Nevada

19 County of Clark

} s.s.



20 SUBSCRIBED and SWORN to before me this 11th day of June, 2015 by CODY HANCOCK.

21
22 *ERCILIA N. VALDEZ*
23 _____
24 Notary Public
25
26
27
28

Exhibit 3

Exhibit 3

State of Nevada

**Statewide
Ballot Questions**

2006



**To Appear on the November 7, 2006
General Election Ballot**

**Issued by
Dean Heller
Secretary of State**

DEAN HELLER
Secretary of State

STATE OF NEVADA

CHARLES E. MOORE
Securities Administrator

KIM A. HUES
*Chief Deputy Secretary
of State*



SCOTT W. ANDERSON
*Deputy Secretary
for Commercial Recordings*

PAMELA A. RUCKEL
*Deputy Secretary for
Southern Nevada*

ELIUCK C. HSU
*Deputy Secretary
for Elections*

OFFICE OF THE
SECRETARY OF STATE

STACY M. WOODBURY
*Deputy Secretary
for Operations*

Dear Fellow Nevadan:

You will soon be taking advantage of one of your most important rights as an American citizen: the right to vote! As Secretary of State and the state's Chief Election Officer, I take the job of informing the public about various statewide ballot questions very seriously. An informed and knowledgeable electorate is a cornerstone to fair and just elections.

With that in mind, the Secretary of State's office has prepared this booklet detailing the statewide questions that will appear on the 2006 General Election Ballot. The booklet contains "Notes to Voters," a complete listing of the exact wording of each question, along with a summary, arguments for and against each question's passage, and, where applicable, a fiscal note. Any fiscal note included in this booklet explains only adverse impacts and does not note any possible cost savings.

I encourage you to carefully and thoughtfully review the ballot questions listed in the booklet. As a voter, your actions on these ballot questions can create new laws, amend existing laws or amend the Nevada Constitution.

On the 2006 General Election Ballot, there are ten statewide questions. Ballot Question Numbers 8, 9, 10 and 11 appear on the ballot through the actions of the Nevada State Legislature. Ballot Question Numbers 2, 4, 5, and 7 qualified for this year's ballot through the initiative petition process. Ballot Question Numbers 1 and 6 also qualified through the initiative petition process, passed at the 2004 General Election and appear for the second and last time on the 2006 General Election Ballot. Ballot Question Number 3 was removed from the Ballot by the Nevada Supreme Court.

You can also view these ballot questions on the Secretary of State's web site at www.secretaryofstate.biz. If you require further assistance or information, please feel free to contact my office at 775-684-5705.

Respectfully,

A handwritten signature in cursive script that reads "Dean Heller".

DEAN HELLER
Secretary of State

LAS VEGAS OFFICE
515 E. Washington Avenue
RECEPTION Suite 3200
Las Vegas, Nevada 89101
Telephone (702) 486-1440
Fax (702) 486-2651

MAIN OFFICE
101 N. Carson Street, Suite 3
Carson City, Nevada 89701-4756
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Fax (775) 684-5725

CORPORATE SATELLITE OFFICE
302 N. Carson Street
Carson City, Nevada 89101
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Fax (775) 684-5725

2006
STATEWIDE BALLOT QUESTIONS
SUMMARY

Question #	Title	Originated	If passed in 2006
1	Education First	Initiative Petition	Becomes Law
2	Nevada Property Owner's Bill of Rights (PISTOL)	Initiative Petition	Will Go Onto The 2008 General Election Ballot
3	Tax and Spending Control for Nevada (TASC)	Initiative Petition	Removed by the Nevada Supreme Court
4	Responsibly Protect Nevadans from Second Hand Smoke	Initiative Petition	Becomes Law
5	Clean Indoor Air Act	Initiative Petition	Becomes Law
6	Raise the Minimum Wage for Working Nevadans	Initiative Petition	Becomes Law
7	Regulation of Marijuana	Initiative Petition	Becomes Law
8	Sales and Use Tax of 1955	Legislature AB 554 of the 73 rd Session Including Note To Voters	Becomes effective January 1, 2007

9	Board of Regents	Legislature AJR 11 of the 72 nd Session	Becomes effective January 1, 2008
10	Legislators Call Special Session	Legislature AJR 13 of the 72 nd Session	Becomes effective upon canvass
11	Legislators Paid Every Day of Session	Legislature SJR 11 of the 72 nd Session	Becomes effective upon canvass

QUESTION NO. 6

Amendment to the Nevada Constitution

CONDENSATION (Ballot Question)

Shall the Nevada Constitution be amended to raise the minimum wage paid to employees?

Yes..... ☐

No..... ☐

EXPLANATION (Ballot Question)

The proposed amendment, if passed, would create a new section to Article 15 of the Nevada Constitution. The amendment would require employers to pay Nevada employees \$5.15 per hour worked if the employer provides health benefits, or \$6.15 per hour worked if the employer does not provide health benefits. The rates 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 measured by the Consumer Price Index (CPI), with no CPI adjustment for any one-year period greater than 3%.

The following arguments for and against and rebuttals for Question No. 6 were prepared by a committee as required by Nevada Revised Statutes (NRS) 293.252.

ARGUMENT IN SUPPORT OF QUESTION NO. 6

All Nevadans will benefit from a long-overdue increase in the state's minimum wage through a more robust economy, a decreased taxpayer burden and stronger families.

Low-income workers who do not currently earn enough to cover the basic costs of living for their families – housing, health care, food and child care – will clearly benefit. Many low-income Nevada families live in poverty even though they have full-time jobs. A Nevada worker at the current minimum wage for 40 hours per-week — every week, all year — makes only \$10,712. If the minimum wage had been increased to keep up with rising prices over the last 25 years, it would now bring in \$15,431 per-year — not \$10,712. At the current \$5.15 an hour, many minimum wage workers in Nevada have incomes below the federal poverty line. We want to encourage people to work and be productive members of society. It's economic common sense.

Taxpayers will benefit as an increased minimum wage allows low-income working families to become more financially able to free themselves from costly taxpayer-provided services such as welfare, childcare and public health services.

Our state's economy will benefit as we develop a workforce that will earn more spendable income and put dollars directly into local stores and businesses.

Raising the minimum wage one dollar affirms Nevada's beliefs that we value work, especially the difficult jobs performed by nursing home employees, childcare workers, and restaurant employees.

Minimum wage workers are not just teenagers working part-time to pay for movies, CDs and fast food. The vast majority of minimum wage workers in Nevada are adults (79% are 20 and older). Most work full-time. Six out of 10 minimum wage earners are women. Twenty-five percent are single mothers. And altogether they are the parents of 25,000 children. The paycheck these workers bring home accounts for about half of their families' earnings.

No matter what special interests and big corporations who oppose a fair minimum wage tell you, virtually every reputable economic study has found that workers don't get fired when minimum wages are passed or increased. In fact, employment increases. Eight of the eleven states that had a minimum wage above the federal level in 2003 are producing more jobs than the United States as a whole.

Raising the minimum wage makes sense for *all* of Nevada. Cast a vote for Nevada working people, Nevada taxpayers, Nevada values and a stronger Nevada economy.

The above argument was submitted by the Ballot Question Committee composed of citizens in favor of this question as provided for in NRS 293.252

REBUTTAL TO ARGUMENT IN SUPPORT OF QUESTION NO. 6

Contrary to claims by those eager to change Nevada's constitution, the most credible economic research for over 30 years has shown that minimum wage hikes hurt, rather than help, low-wage workers.

A recent example is the study, *The Effects of Minimum Wages Throughout the Wage Distribution*, by David Neumark, National Bureau of Economic Research; Mark Schweitzer, Federal Reserve Bank of Cleveland; and William Wascher, Board of Governors of the Federal Reserve - Division of Research and Statistics: "The evidence indicates that workers initially earning near the minimum wage are adversely affected by minimum wage increases. . . . Although wages of low-wage workers increase, their hours and employment decline, and the combined effect of these changes is a decline in earned income." *National Bureau of Economic Research, Working Paper 7519, 5/8/2000.*

The same year, Stanford University's Thomas MaCurdy & Frank McIntyre showed that the effect of a minimum wage increase is very similar to a "sales tax levied only on selective commodities" and conclude: "... three in four of the poorest workers *lose* from shouldering the costs of higher prices resulting from the wage increase. When these benefits and costs are considered, the minimum wage is *ineffective* as an anti-poverty policy."

The above argument was submitted by the Ballot Question Committee composed of citizens opposed to this question as provided for in NRS 293.252

ARGUMENT AGAINST QUESTION NO. 6

This constitutional amendment would actually *increase* poverty in Nevada, rather than fight it.

Suffering the most would be single mothers with little education, and other unskilled workers who are just entering the job market.

Today, such entry-level employees are paid not just with wages, but also the chance to learn new job skills. With those new skills—and the work habits they learn—they are able to climb the job ladder and make better lives for themselves and their families.

But if government forces entry-level wages artificially higher, fewer businesses will be able to hire these unskilled workers. That's because their *total* cost to the company—their pay, plus their training costs—will often be greater than these workers contribute to the company. So some workers will be let go, and others will never be hired.

Nevada has long been known as a state where businesses enjoy economic opportunities they cannot find elsewhere. But this constitutional amendment would end all that.

It would suddenly place Nevada at a big economic disadvantage to many other states—states without these high wage requirements. Under this amendment, wages paid in Nevada must, from now on, exceed the federal minimum wage by about \$1 an hour. This would seriously damage Nevada businesses—especially small mom and pop businesses, which usually have fewer resources to work with.

This proposal also would discriminate against non-union companies—which means against the great majority of small businesses in Nevada. It would give labor union officials the power, under the law, to permit *union* companies to hire new employees at rates *below* the new minimum wage. This is unfair to both companies and union members. It is also a virtual invitation to union corruption.

The key to fighting poverty—and to achieving higher wages for *all* workers—is long-term economic growth. Artificially higher wages imposed by government will only obstruct such growth.

This proposed constitutional amendment should be rejected.

Fiscal impact: Negative.

Environmental impact: Neutral.

Public health, safety and welfare impact: Negative.

The above argument was submitted by the Ballot Question Committee composed of citizens opposed to this question as provided for in NRS 293.252

REBUTTAL TO ARGUMENT AGAINST QUESTION NO. 6

Raising the minimum wage in Nevada will decrease poverty as it increases people's participation in the State's economy. If increased wages actually made people poorer – as the special interests opposed to this amendment ridiculously claim – *nobody* in Nevada would ever ask for a raise.

Single mothers, as well as anyone else working a minimum wage job, will see an increase in their wages that will actually allow them to pay for housing, healthcare, food and childcare.

All available economic studies show that *everyone* wins when the minimum wage is increased. Low-income workers earn more, become less dependent on welfare and other public programs which eases the burden on taxpayers, and have more money to spend on local goods and services -- which strengthens the economy and generates more jobs.

There is *nothing* in the amendment to raise the minimum wage that would exempt union companies – it's a federal minimum that all companies must follow.

Raise low-income workers' wage. Spur Nevada's economic growth. Generate more buying power to support Nevada businesses. Create jobs. Move low-wage workers away from dependence on public programs and ease taxpayers' burden.

You can achieve *all* of these goals by voting YES on the minimum wage amendment.

The above argument was submitted by the Ballot Question Committee composed of citizens in favor of this question as provided for in NRS 293.252

FISCAL NOTE

FINANCIAL IMPACT – CANNOT BE DETERMINED

Although the proposal to amend the *Nevada Constitution* to increase the minimum wage in Nevada could result in additional costs to Nevada's businesses, the impact on a particular business would depend on the number of employees working at a wage below the new requirement, the amount by which the wages would need to be increased and any actions taken by the business to offset any increased costs associated with the increased wage requirement.

The proposal would, however, result in beneficial financial impacts for employees who receive a wage increase as a result of the proposal and who are not impacted adversely by any actions taken by the business to offset the increased costs associated with the increased wage requirement.

In addition, if the proposal results in an increase in annual wages paid by Nevada's employers, revenues received by the State from the imposition of the Modified Business Tax would also increase.

FULL TEXT OF THE MEASURE

RAISE THE MINIMUM WAGE FOR WORKING NEVADANS

EXPLANATION -- Matter in *bolded italics* is new; matter between brackets [bracketed material] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA DO ENACT AS FOLLOWS:

Section 1. Title.

This Measure shall be known and may be cited as "The Raise the Minimum Wage for Working Nevadans Act."

Section 2. Findings and Purpose

The people of the State of Nevada hereby make the following findings and declare their purpose in enacting this Act as follows:

1. No full-time worker should live in poverty in our state.
2. Raising the minimum wage is the best way to fight poverty. By raising the minimum wage from \$5.15 an hour to \$6.15 an hour, a full-time worker will earn an additional \$2,000 in wages. That's enough to make a big difference in the lives of low-income workers to move many families out of poverty.
3. For low-wage workers, a disproportionate amount of their income goes toward cost of living expenses. Living expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada's working families.
4. In our state, 6 out of 10 minimum wage earners are women. Moreover 25 percent of all minimum wage earners are single mothers, many of whom work full-time.
5. At \$5.15 an hour, minimum wage workers in Nevada make less money than they would on welfare. When people choose work over welfare, they become productive members of society and the burden on Nevada taxpayers is reduced.
6. Raising the minimum wage from \$5.15 an hour to \$6.15 an hour affirms Nevadan's beliefs that we value work, especially the difficult jobs performed by hotel maids, childcare workers, and nursing home employees. We need to make sure the workers who are the backbone of our economy receive fair paychecks that allow them and their families to live above the poverty line.

Section 3.

Article 15 of the Constitution of the State of Nevada is hereby amended by adding thereto a new section to read as follows:

Sec. 16. Payment of minimum compensation to employees.

- 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.
- 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 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.

Exhibit 4

Exhibit 4

PROPOSED EMERGENCY REGULATIONS OF THE
LABOR COMMISSIONER
NOVEMBER 29, 2006

EXPLANATION- Matter that is underlined is new; matter in brackets [omitted material] is material to be omitted.

AUTHORITY: §§1-13, NRS 607.160(1)(b), NRS 608.270, NRS 608.018, NRS 233B.0613.

Section 1. Chapter 608 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 12, inclusive, of this regulation. This regulation shall expire at the end of 120 days from filing with the Secretary of State or upon the filing of a temporary or permanent regulation whichever should occur first.

- Sec.2. Nevada has established a two-tiered minimum wage.
- A. The first tier, lower tier, is from \$5.15 to \$6.14 per hour for employers who provide qualified health insurance benefits.
 - B. The second tier, upper tier, is \$6.15 per hour for employers who do not provide qualified health benefits.
- Sec.3. The minimum wage may be adjusted annually.
- A. These rates will be adjusted annually to include increases in the federal minimum wage and a yearly cost of living adjustment as set forth in Article 15, Section 16 of the Constitution of Nevada.
 - B. The annual adjustments will be announced in April and become effective on July 1 of each year.
 - C. Each minimum wage tier will increase by the same dollar amount as the federal rate increase.
- Sec. 4. A. The minimum wage applies to all employees in Nevada.
- B. The minimum wage exemptions codified at NRS 608.250(2) conflict with Article 15, Section 16 of the Constitution of Nevada and are no longer applicable.
 - C. People under the age of 18, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days are not considered employees for the purpose of compliance with the minimum wage.
 - D. There is no distinction between whether an employee is full-time, permanent, part-time, or temporary.
- Sec. 5. In order to qualify for the lower minimum wage tier an employer must comply with all of the following:
- A. Health insurance coverage must be made available to the employee and the employees dependents; and

- B. The employee's share of the cost of the premium cannot exceed 10% of the employee's gross income as defined under the Internal Revenue Code for the time interval between the premium payments; and
- C. The health insurance must be a policy, contract, certificate or agreement offered or issued by a carrier authorized by the Nevada Insurance Commissioner to provide, deliver, arrange for, pay for or reimburse any of the costs of health care services or, in the alternative, any federally approved self-funded plans established under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, except that medical discount plans as defined by NRS 695H.050 and workers compensation insurance do not qualify as health insurance.

Sec. 6. If an employee declines coverage under a qualified health insurance plan offered by the employer, the employee may be paid in the lower minimum wage tier, however, the employer must document that the employee has declined coverage and declining coverage may not be a term or condition of employment.

Sec. 7. If an employer offers qualified health insurance, but for some reason the employee is not eligible to receive the coverage provided by the employer or there is a delay before the coverage can become effective, the employee must be paid the upper tier wage until such time as the employee becomes eligible and is offered coverage or when the insurance becomes effective.

Sec. 8. For the purposes of complying with the overtime provisions of NRS 608.018(1),

- A. An employer who qualifies for the lower tier minimum wage shall pay all employees with a base hourly rate of \$7.725 per hour or less overtime whenever the employee works more than eight hours in a workday.
- B. An employer who is required to pay the upper tier minimum wage shall pay all employees with a base hourly rate of \$9.225 per hour or less overtime whenever the employee works more than eight hours in a workday.

Exhibit 5

Exhibit 5

Chapter 608 of NAC

LCB File No. T004-07

**PROPOSED TEMPORARY REGULATION
OF THE LABOR COMMISSIONER**

EXPLANATION- Matter that is *italicized* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: § § 1-10; Article 15, Section 16, the constitution of the State of Nevada, NRS 607.110, NRS 607.160.

Section 1. Chapter 608 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 9, inclusive, of this regulation.

Sec. 2. *Definition of minimum wage tiers.*

1. *The lower tier is from \$5.15 to \$6.14 per hour for employees who offered qualified health insurance benefits.*
2. *The upper tier is \$6.15 per hour for employees who are not offered qualified health benefits.*
3. *An employer must pay the upper tier rate unless the employee qualifies for the lower tier rate.*
4. *These rates may change based on the annual adjustments as set forth in Article 15, Section 16 of the Constitution of Nevada.*

Sec. 3. *Applicability of Minimum Wage.*

1. *The minimum wage applies to all employees in Nevada.*
2. *The only exceptions to the minimum wage are*
 - (a) Persons under the age of 18; or*
 - (b) Persons employed by a nonprofit organization for after school or summer employment; or*
 - (c) Persons employed as trainees for a period not longer than ninety (90) days as interpreted by the U. S. Department of Labor pursuant to Section 6(g) of the Fair Labor Standards Act; or*
 - (d) Persons employed under a valid collective bargaining agreement where Article 15, Section 16 of the Nevada Constitution relating to minimum wage, tip credit or other provisions included therein have been waived in clear and unambiguous terms.*
3. *There is no distinction between full-time, permanent, part-time, probationary, or temporary employees.*

Sec. 4. *In order to qualify for the lower minimum wage tier an employer must comply with all of the following:*

1. *Qualified health insurance coverage must be made available to the employee and the employee's dependents, if any. For the purposes of this section, qualified health insurance coverage is "available to the employee and employee's dependents" when an employer contracts for and maintains qualified health insurance for the class of employees of which the employee is a member, subject only to fulfillment of the conditions required to complete the coverage which are applicable to all similarly-situated employees within this class, unless the waiting period exceeds 120 days; and*
2. *The employee's share of the cost of the premium cannot exceed 10% of the employee's gross taxable income attributable to the employer as defined under the Internal Revenue Code;*
 - (a) *"Gross Taxable Income" attributable to the employer means the amount specified on the employee's W-2 issued by the employer and includes tips, bonuses or other compensation as required for purposes of federal individual income tax.*
 - (b) *To determine whether the employee's share of the premium does not exceed 10% of the employee's gross taxable income, the employer may:*
 - I. *For an employee for whom the employer has issued a W-2 for the immediately preceding year, divide the gross taxable income from the employer into the projected employee's share of the premiums for qualified health insurance for the current year;*
 - II. *For an employee for which the employer has not issued a W-2 and has payroll information for the four prior quarters, divide the combined total of gross taxable income normally calculated from this payroll information from these four quarters into the projected employee's share of the premiums for qualified health insurance for these four quarters;*
 - III. *For an employee for which there is less than an aggregate year of payroll information, the employer shall*
 - 1) *take the total payroll information available for the employee determine the combined total of gross taxable income normally calculated from this payroll information; and*
 - 2) *After dividing it by the number of weeks it represents and multiplying it by 52, divide this annualized number into the projected employee's share of the premiums for qualified health insurance for the current year;*
 - IV. *For a new employee or an employee who turns eighteen years of age during employment, the employer shall wait until the employee has completed two normal payroll periods and then utilize this payroll information as set forth in subsection 3 above relating to an employee for which there is less than a complete year of employment; and*
3. *Offers a health benefit plan that meets one of the following requirements:*
 - (a) *The plan covers only those categories of health care expenses that are generally deductible by employees on their individual federal income tax returns pursuant to the provisions of 26 U.S.C. Sec. 213 and any federal*

regulations relating thereto, if those expenses had been borne directly by those employees; or

(b) Provides health benefits pursuant to a Taft-Hartley trust which:

I. Is formed pursuant to 29 U.S.C. Sec. 186(c)(5); and

II. Qualifies as an employee welfare benefit plan under the Internal Revenue Service guidelines; or

(c) Is a qualified employee welfare benefit plan pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1001 et seq.

Sec. 5. An employer may decide to pay the maximum wage rate for minimum wage currently applicable in lieu of making any determination under this regulation that the employee may be paid the lower minimum wage rate.

Sec. 6. If a determination is made that the employee's share of the premium does not exceed 10% of the employee's gross taxable income from the employer, the employer may pay the employee through the end of the calendar year for which the determination has been made either:

- 1. The lowest minimum wage rate currently applicable; or*
- 2. Any amount within the lower minimum wage tier currently applicable.*

Sec. 7. If an employee declines coverage under a qualified health insurance plan offered by the employer, the employee may be paid in the lower minimum wage tier, however, the employer must document that the employee has declined coverage and the documentation must include the employee's signed waiver of coverage. Declining coverage may not be a term or condition of employment.

Sec. 8. If an employer offers qualified health insurance with a standard waiting period of no more than 6 months, the employee may be paid at the lower tier wage rate. If an employer does not offer a qualified health insurance plan or the health benefit plan is not available or the health benefit plan is not provided within 6 months of employment, the employee must be paid the upper tier wage rate until such time as the employee becomes eligible and is offered coverage or when the insurance becomes effective.

Sec. 9. For the purposes of complying with the daily overtime provisions of NRS 608.018(1), an employer shall pay overtime based on the minimum wage tier for which that employee is qualified.

Sec. 10. NAC 608.110 is hereby repealed

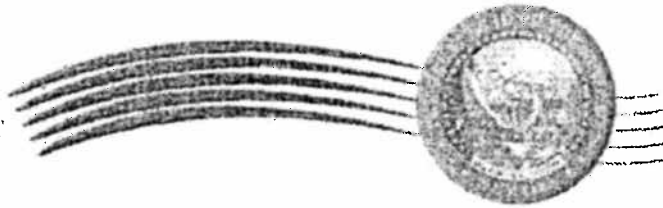
~~[NAC 608.110 Minimum wage. (NRS 608.250) The minimum wage for an employee in private employment who:~~

~~1. Is 18 years of age or older is \$5.15 per hour.~~

~~2. Is under 18 years of age is \$4.38 per hour.]~~

Exhibit 6

Exhibit 6



LABOR AND EMPLOYMENT

INTRODUCTION

The employment of workers is a cornerstone of any economy and a fundamental subject of governmental oversight. The State of Nevada has a long history of involvement in employment issues. The first miners' unions in the western United States formed on the Comstock in the early 1800s. Chapter 613 ("Employment Practices") of *Nevada Revised Statutes* (NRS) dates to 1911. In 1915, Nevada's Legislature created the Office of Labor Commissioner, giving the Commissioner primary responsibility to enforce the State's labor laws, particularly those related to wages and hours.

At the national level, the Wagner Act of 1935, also known as the National Labor Relations Act, provided federal support for unionization and collective bargaining. In 1947, the Taft-Hartley Act shifted federal policy toward a more neutral position on unionization. The Landrum-Griffin Act of 1959, known as the Labor-Management Reporting and Disclosure Act, created a bill of rights for union members.

The following sections of this report outline some important aspects of labor and employment policy in Nevada, including the concepts of at-will employment, the minimum wage, the right to work, unemployment insurance, workers' compensation, and other subjects.

AT-WILL EMPLOYMENT

At-will employment is a legal doctrine that defines an employment relationship in which either the employer or employee may break off the relationship with no liability, provided that the employee has no contract for a definite term or that the employer has not recognized a labor union. Nevada is an at-will employment state.

TABLE OF CONTENTS

Introduction	1
At-Will Employment	1
Employment of Minors	2
Minimum Wage	3
Occupational Health and Safety	4
Right to Work	5
Unemployment Insurance	5
Workers' Compensation (Industrial Insurance)	7
Additional References	9
Research Staff Contacts	9

Business and Labor

In most states, including Nevada, an employer may not fire an employee if the firing would violate the state's public policies (against discrimination, for example) or a state or federal statute. Also, an employee with an implied contract may not be fired without liability on the part of the employer. Eleven states, again including Nevada, also recognize a breach of an implied covenant of good faith and fair dealing as an exception to at-will employment.

In 1989, in the case of *Vancheri v. GNLV Corporation* (105 Nev. 417, 777 P.2d 366 [1989]), the Supreme Court of Nevada considered at-will employment, saying, "Employment 'at-will' is a contractual relationship and thus governed by contract law. An employer can dismiss an at-will employee with or without cause, so long as the dismissal does not offend a public policy of this state."

Similarly, in the 1990 case of *American Bank Stationery v. Furner* (106 Nev. 693, 799 P.2d 1100 [1990]), the Court said, "All employees in Nevada are presumed to be at-will employees. An employee may rebut this presumption by proving by a preponderance of the evidence that there was an expressed or implied contract between his employer and himself that his employer would fire him only for cause."

EMPLOYMENT OF MINORS

In the early 1900s, the numbers of child laborers in the U.S. peaked. Minors worked in agriculture, industry, as newsboys and messengers, and in other jobs. In 1938, the U.S. government regulated for the first time minimum ages of employment and hours of work for children, in the Fair Labor Standards Act.

Nevada restricts the employment of minors under the age of 16 and between the ages of 16 and 18. No person under 16 years of age may be legally employed to work in any capacity in connection with:

- The preparation of compounds using dangerous or poisonous acids;
- The manufacture of colors, paints, or white lead;
- Dipping, drying, or packing matches;
- The manufacture of goods for immoral purposes;
- A coal breaker, glass furnace, mine, ore reduction works, quarry, or smelter;
- A cigar factory, tobacco warehouse, or other factory where tobacco is prepared;
- A laundry;
- A brewery, distillery, or other establishment where malt or alcoholic liquors are bottled, manufactured, or packed;

- The outside erection or repair of electric wires;
- Running or managing elevators, hoists, or lifts or oiling dangerous or hazardous machinery in motion;
- Gate tending, track repairing, or switch tending;
- Acting as a brakeman, conductor, engineer, fireman, or motorman on any railroad; or
- Establishments where explosives are manufactured or stored.

The Labor Commissioner may also declare other employment to be dangerous or injurious to the health or morals of persons under 16 years of age, thus prohibiting the employment of children in those lines of work as well. No person under the age of 16 may work more than 48 hours a week or 8 hours a day, with certain exceptions, and no person under the age of 14 may be employed without written permission from a district court judge or other person authorized by a judge.

Except for employment as a performer in a motion picture, no person may employ any child under the age of 14 during the hours when school is in session, unless the child has been excused by the school district or the order of the juvenile court.

For persons between the ages of 16 and 18, Nevada has fewer restrictions. They may not work in bars or casinos or in occupations dangerous to health. In incorporated cities and towns, no person under the age of 18 may be employed to deliver goods or messages before 5 a.m. or after 10 p.m. on any day.

In 2003, Nevada amended its laws to provide for judicial approval of a contract involving a minor rendering artistic, athletic, creative, or intellectual property services. If the court grants its approval, it must immediately appoint a special guardian to receive and hold a specific percentage of the minor's earnings. When the contract is terminated, the earnings must be transferred to the minor, if emancipated, or to the minor's guardian.

MINIMUM WAGE

Both federal laws and the laws of the State of Nevada require an employer to pay a minimum wage. The current federal minimum wage, pursuant to the Fair Labor Standards Act (FLSA), is \$7.25 per hour, effective July 24, 2009. The FLSA does not supersede any state or local law that is more favorable to employees. Therefore, in a state with a higher minimum wage, the employer must pay the higher rate.

In 2004 and 2006, Nevada's voters approved an amendment to the *Nevada Constitution* (Article 15, Section 16) adding a new section regarding minimum wages. An employer must pay a certain wage to any employee for whom the employer provides health care benefits or a higher wage to any employee

who does not receive health care benefits. The minimum wage is adjusted annually to the level of the federal minimum wage or by the cumulative increase in the cost-of-living index, whichever results in the higher amount. The adjustment, if any, is announced on April 1 by the Office of Labor Commissioner and is effective on July 1. Effective July 1, 2013, the State minimum wage is \$7.25 per hour for employees who receive health care benefits and \$8.25 for employees who do not receive health care benefits. "Health benefits" mean a health insurance plan that is available to the employee and the employee's dependents at a total cost to the employee of not more than 10 percent of his or her gross taxable income from that employer.

An employee under the age of 18 who is employed by a nonprofit corporation for after-school or summer employment, or as a trainee, for not more than 90 days is exempt from Nevada's minimum wage rules. And in 2007, the Legislature clarified the relationship between clients and providers of rehabilitation services and training programs for handicapped persons. Such a relationship is not considered employment for purposes related to the minimum wage.

OCCUPATIONAL HEALTH AND SAFETY

To prevent work-related illnesses, injuries, and occupational fatalities, federal and State laws set standards and establish enforcement programs for workplace health and safety. These laws address such subjects as asbestos exposure, blood-borne pathogens, exposure to other chemicals, guards on moving parts, hazard communication, and work in confined spaces.

The federal Occupational Safety and Health Act of 1970 created the Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH), a research agency. The law authorizes states to develop approved health and safety plans, if they cover public employees and provide protection equivalent to federal regulations. Nevada's laws are found in Chapter 618 ("Occupational Safety and Health") of NRS.

In response to a number of serious worker safety issues—including 12 fatalities in southern Nevada in 2008—the Legislature passed two measures in 2009 to promote safety on construction sites and to assist families affected by fatal construction accidents.

Assembly Bill 148 (Chapter 432, *Statutes of Nevada 2009*) required construction workers and their supervisors to take construction safety courses and obtain completion cards, or be subject to suspension or termination by their employers. A nonsupervisory construction worker must complete an approved 10-hour course in construction industry safety and health hazard recognition and prevention, known as an "OSHA-10 course." A supervisory construction worker must complete a similar 30-hour course, known as an "OSHA-30 course." The employee must present a completion card within 15 days of his or her employment date. If the employee does not present the card, the employer must suspend or terminate the employee.

Through December 31, 2010, a construction worker had the option of completing an alternative course offered by the employer. The employer's safety committee must approve the alternative course and it must meet or exceed federal guidelines. However, an employee who satisfied the requirements

of A.B. 148 by completing an alternative course must nevertheless complete an OSHA-10 or OSHA-30 course, as applicable, not later than January 1, 2011. The bill does not apply to workers performing maintenance on property for which a certificate of occupancy has been issued, or to Nevada's Department of Transportation and its employees in the performance of their duties.

Senate Bill 288 (Chapter 216, *Statutes of Nevada*) of the 2009 Session addressed workplace fatalities and workers' families. It required the Division of Industrial Relations (DIR) of Nevada's Department of Business and Industry (DBI), after investigating a fatal accident, to offer to discuss any citation it issues with the employee's immediate family. The measure also required the Division to provide the family's contact information to the Occupational Safety and Health Review Board, in the event that the employer contests any citation or fine related to the accident.

RIGHT TO WORK

Nevada is a right-to-work state. Right-to-work laws prohibit agreements between labor unions and employers making membership in a union, or payment of union dues, a condition of employment. Fewer than half of the 50 states have such laws.

The federal Taft-Hartley Act authorizes individual states to adopt an "open shop" rule, under which an employee cannot be compelled to join a union or pay the equivalent of dues to a union, nor can the employee be fired if he or she joins the union. In other words, the employee has the right to work.

Nevada's right-to-work law is found in NRS 613.230 through NRS 613.300. The law was enacted by an initiative of the people and became effective in 1953. In the 1950s, voters defeated three initiatives aimed at repealing the law, and a fourth initiative failed for lack of a sufficient number of signatures. Since 1959, the Legislature has considered and rejected at least ten measures to amend or repeal the law, and in 1994, an initiative to repeal the law did not gain enough signatures to be placed on the ballot.

UNEMPLOYMENT INSURANCE

The federal Social Security Act of 1935 created the unemployment insurance (UI) system, which provides workers with partial replacement of wages lost as a result of involuntary unemployment. The UI system helps to dampen economic fluctuations by replacing a portion of workers' wages during troughs in the business cycle, drawing on reserves built up during more favorable periods.

The UI system is a shared federal-state program financed jointly by federal and state payroll taxes. The Federal Unemployment Tax Act (FUTA) authorizes a tax to cover the costs of administering UI programs and a portion of the costs of extended UI benefits. The U.S. Department of Labor administers the federal components of the system.

Business and Labor

Nevada's Legislature enacted the Unemployment Compensation Law in 1937, declaring, "Economic insecurity due to unemployment is a serious menace to the health, welfare, and morals of the people of this state." The Employment Security Division (ESD), DBI, administers the system in Nevada.

To qualify for benefits, a person must be fully or partially unemployed, must have earned enough wages to qualify, and must be unemployed through no fault of his or her own. A claimant must be able to work, available for work, and actively seeking work. The amount of benefits depends on the wages the worker earned during a base period, usually defined as the first four of the last five completed calendar quarters preceding the claim. The maximum benefit is set at 50 percent of the statewide annual average weekly wage, and it is based on past earnings, up to a maximum of \$407 per week. The duration of benefits is generally limited to 26 weeks unless extended by law.

An employer who pays wages of \$225 or more during any calendar quarter for services performed in Nevada must register with the ESD and pay quarterly unemployment taxes. (Employees do not pay UI taxes.) The tax rate for new employers is 2.95 percent of a worker's taxable wages, plus 0.05 percent for the Career Enhancement Program, a training program to foster job creation and provide more skilled workers. After being in the system for a minimum of 14 quarters, an employer receives an experience rating, which is a function of the excess of taxes paid over benefits charged to the employer's account. The employer's tax rate is then based on that rating, varying from 0.25 percent to 5.4 percent of taxable wages. In 2014, an individual's taxable wages are capped at \$27,400.

During the economic downturn in 2008 and 2009, both in Nevada and the nation as a whole, contributions from employers were not sufficient to cover the cost of providing benefits to the unemployed. As a result, in October 2009 the State began borrowing from the U.S. Department of the Treasury to continue payment of unemployment insurance benefits. As of June 2013, the outstanding balance on this loan was \$560 million. To repay the principal, employers have been paying additional charges as required by the FUTA. The State General Fund has funded the interest on the loan.

To help limit the impact on the State General Fund, the Nevada Legislature enacted A.B. 482 (Chapter 367, *Statutes of Nevada 2013*), which levies a temporary assessment on employers to pay the interest on the loan. The ESD sent out a press release in June 2013 with details about the assessment, which will occur annually as long as it is necessary. According to the ESD, the average employer will pay approximately \$25 per employee in temporary assessments.

To reduce the cost of this debt over the long term, the Legislature also approved S.B. 515 (Chapter 450, *Statutes of Nevada 2013*), which enables the ESD to issue bonds to finance the outstanding loan principal and interest. If bonds are sold, the temporary assessment imposed under A.B. 482 and the FUTA charges would be discontinued, and employers would instead pay special bond contributions to repay the bonds. This would result in lower costs for most employers.

WORKERS' COMPENSATION (INDUSTRIAL INSURANCE)

The concept of compensating workers for on-the-job injuries is an ancient one, dating to ancient Arab, Chinese, Greek, and Roman law. The Code of Hammurabi, 1750 B.C., provided rewards for specific injuries (Guyton, G.P., 1999, "A Brief History of Workers' Compensation," in *The Iowa Orthopaedic Journal* 1999, 19: 106-110). In the U.S., Wisconsin passed the first comprehensive industrial insurance law in 1911. Nevada passed its Industrial Insurance Act in 1913. The purpose of these laws revolves around economic efficiency and social justice.

The workers' compensation system is a no-fault insurance system. Employers either purchase insurance or set up self-insurance accounts. Injured workers receive compensation to replace wages ("indemnity payments") and to cover medical and rehabilitation costs. Second-injury funds, which cover benefits when a second injury proves incapacitating, are important in maintaining the employability of partially impaired workers. In exchange for covering all work-related injuries and occupational diseases, regardless of fault, employers are protected by the exclusive remedy provision, under which an injured worker cannot sue an employer in tort, even if the employer was in fact responsible.

Nevada authorized self-insurance for qualified employers in 1979. Prior to that time, the Nevada Industrial Commission (NIC) was the only provider of workers' compensation insurance in Nevada. In 1981, the Legislature enacted laws replacing the NIC with the State Industrial Insurance System (SIIS), which began operation as a State-run insurance carrier in July 1982. At the same time, the DIR became the primary regulator of the State's workers' compensation program.

Prior to the 1993 Session, the Legislature learned that SIIS was insolvent, with an unfunded \$2.2 billion liability. To address this problem, the Legislature enacted a comprehensive reform measure and adopted cost-savings provisions, including implementation of a managed care program, imposition of employer deductibles, and aggressive pursuit of fraud. The measure also reduced injured workers' benefits by limiting stress as a compensable injury, limiting eligibility and compensation amounts for rehabilitation, and making other changes.

In 1995, the Legislature prohibited civil lawsuits against an insurer or third-party administrator (TPA) who in bad faith violates the workers' compensation laws. Rather than allowing bad-faith lawsuits, the Legislature created a benefit penalty to be paid directly to an injured worker, and authorized the Commissioner of Insurance to withdraw the self-insurance certificate of an employer for violations of laws intended to protect injured workers from unreasonable acts.

In 1999, the Legislature authorized privatization of SIIS, and in January 2000, SIIS became a private domestic mutual insurance company doing business as Employers Insurance Company of Nevada. Then, in 2007, the company converted to a publicly traded stock company and operates in Nevada under the name "Employers."

Research Division, Legislative Counsel Bureau
Policy and Program Report, April 2014

Business and Labor

The Commissioner of Insurance reviews and approves premium rates and must certify self-insured employers and associations that meet statutory requirements. The Commissioner also regulates managed care organizations and TPAs of self-insured programs.

The Office of the Nevada Attorney for Injured Workers, a State agency, represents claimants free of charge at appeals before the Hearings Division of Nevada's Department of Administration. In selected cases, the office also represents claimants in the district courts and the Supreme Court of Nevada.

Benefits under Nevada's workers' compensation system fall into three general categories: indemnity payments, medical benefits, and rehabilitation expenses.

Indemnity payments replace a portion of lost wages in temporary or permanent cases of partial or total disability. *Nevada Revised Statutes* establishes eligibility requirements and the amount and duration of benefits.

For permanent and temporary total disability (PTD and TTD), the benefit is generally two-thirds of the person's wages at the time of his or her injury, not to exceed 150 percent of the average weekly wage, for the duration of the disability.

For permanent and temporary partial disability (PPD and TPD), the primary factor in determining the indemnity benefit amount is the extent of the injury. How this determination is made has been a major issue in workers' compensation laws nationwide. Pursuant to S.B. 195 (Chapter 500, *Statutes of Nevada*) of the 2009 Session, the DIR must adopt regulations providing that the American Medical Association's *Guides to the Evaluation of Permanent Impairment, Fifth Edition*, must be applied to all PPD examinations.

When an injured worker is permanently and totally disabled (PTD) from an occupational injury or disease and can no longer work, he or she receives cash payments, based on wages at the time of the injury, for life (as long as the disability continues to exist). This benefit recognizes not only the inability to earn income, but also the inability to contribute to a pension fund or accumulate savings for retirement.

When a worker is killed as the result of an accident in the course and scope of employment, Nevada law provides burial benefits and benefits to surviving spouses and dependents. Until 2007, the surviving spouse of the deceased worker received monthly compensation payments until death or remarriage. Senate Bill 3 (Chapter 214, *Statutes of Nevada*) of the 2007 Session removed the so-called "remarriage penalty" for a surviving spouse of a firefighter or police officer who remarries on or after October 1, 2007, and S.B. 363 (Chapter 503, *Statutes of Nevada*) of the 2009 Session removed the "remarriage penalty" for any surviving spouse who remarries on or after the same date.

The insurer pays medical benefits for all medically necessary procedures and devices related to the injured worker's claim, with no deductible or copayment. A health care provider may not seek payment from the injured worker for any portion of the medical costs.

The insurer also pays *rehabilitation expenses* when the nature of the injury prevents the injured worker from returning to pre-injury employment. Rehabilitation plans may include educational or vocational training, compensation payments (known as rehabilitation maintenance), or a lump sum payment in lieu of rehabilitation.

ADDITIONAL REFERENCES

Employment Security Division website: <http://detr.state.nv.us/esd.htm>.

Division of Industrial Relations website: <http://dirweb.state.nv.us/>.

Office of Labor Commissioner website: <http://www.laborcommissioner.com/>.

Office of the Nevada Attorney for Injured Workers website: <http://naiw.nv.gov/>.

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Exhibit 7

Exhibit 7



Fact Sheet

MINIMUM WAGE IN NEVADA

PREPARED BY KRISTIN ROSSIER
RESEARCH DIVISION
LEGISLATIVE COUNSEL BUREAU

MARCH 2015

ESTABLISHMENT AND AUTHORITY

The *Nevada Constitution* establishes a minimum wage for the State of Nevada in Article 15, Section 16(A). The provisions require the minimum wage to be adjusted yearly based on the Consumer Price Index (CPI). *Nevada Revised Statutes* (NRS) 608.250 establishes the Office of Labor Commissioner as the agency designated by the Governor to make the minimum wage calculation each year and publish the bulletin announcing the rates.

The federal Fair Labor Standards Act (FLSA) requires employers to pay nonexempt employees at least a minimum wage for all hours they work. The FLSA establishes a minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments. At the time the FLSA was enacted in 1938, the minimum wage was set at \$0.25 per hour. The FLSA does not supersede any state or local laws that are more favorable to employees. Therefore, if a state has a minimum wage that is higher than the federal minimum, employers are obligated to pay the higher rate to employees working in that state.

CURRENT MINIMUM WAGE

The federal minimum wage is currently \$7.25 and was put into effect in 2009. The federal minimum wage does not increase automatically. Congress must pass a bill, which the President signs into law, in order for the minimum wage to go up. Effective July 1, 2014, Nevada's minimum wage for employees who received qualified health benefits from their employers is \$7.25 per hour, and the minimum wage for employees who do not receive health benefits is \$8.25 per hour.

BACKGROUND AND HISTORY

Nevada enacted a statewide minimum wage law in 1937, a year before the federal minimum wage was set. The 1937 legislation regulated the wage, hours, and working conditions only of females employed in private industry. In 1965, the law was amended to add males and minors in private employment to the minimum wage provisions. In 1989, Nevada's minimum wage law was amended to require the Labor Commissioner to prescribe increases in the minimum wage in accordance with those prescribed by federal law.

An amendment to the *Nevada Constitution* to raise the minimum wage paid to employees in Nevada was approved by Nevada voters in 2004 and was reaffirmed in 2006. The 2006 voter approved

Minimum Wage Amendment to the *Nevada Constitution* requires the minimum wage to be recalculated each year. The rates are adjusted annually by comparing the amount of increases in the federal minimum wage or, if greater, by the cumulative increase in the cost of living. Any increases take effect on July 1 of each year.

MINIMUM WAGE AMENDMENT TO THE *NEVADA CONSTITUTION*

Ballot Question Results		
Year	Yes Votes	No Votes
2004	545,490	252,162
2006	355,367	180,695

PROCESS FOR AMENDMENT

Because provisions governing the minimum wage rate are included in the *Nevada Constitution*, any changes to the minimum wage provisions require a constitutional amendment. There are two ways to amend the *Nevada Constitution*. One way is through the citizen initiative process. Citizen initiatives for constitutional amendments must be approved in identical form in two consecutive general elections. This is the process that enacted the current minimum wage requirements in the *Nevada Constitution*. The second way to amend the *Constitution* is through the legislative process. The Senate or Assembly may propose a constitutional amendment, which must pass in identical form with a majority of members of both houses in two consecutive biennial sessions. After that, the proposal must pass a popular vote during the next general election.

COMPARISON WITH OTHER STATES

The following table provides a comparison of Nevada's current minimum wages with those of other western states. Across the nation, nine states had increased their minimum wage rates on January 1, 2015, because of indexed increases in their state laws.

Comparison of Minimum Wages Across Select Western States						
	2009	2010	2011	2012	2013	2014
California	\$8.00	\$8.00	\$8.00	\$8.00	\$8.00	\$9.00
Idaho	\$6.35	\$7.25	\$7.25	\$7.25	\$7.25	\$7.25
Nevada (No Insurance)	\$6.85	\$7.55	\$8.25	\$8.25	\$8.25	\$8.25
Nevada (Health Insurance)	\$6.55	\$6.95	\$7.25	\$7.25	\$7.25	\$7.25
Oregon	\$8.40	\$8.40	\$8.50	\$8.80	\$8.95	\$9.10
Utah	\$6.55	\$7.25	\$7.25	\$7.25	\$7.25	\$7.25
Washington	\$8.55	\$8.55	\$9.07	\$9.04	\$9.19	\$9.32

Resources for Additional Information

Detailed information on the minimum wage: <http://www.dol.gov/dol/topic/wages/minimum-wage.htm>

For a history of the increases in minimum wage by year since 1938: <http://www.dol.gov/whd/minwage/chart.pdf>

Exhibit 8

Exhibit 8

Growing Business In Nevada

[American Jobs Act](#) [About Nevada](#)

[HOME](#) | [BUSINESS SERVICES](#) | [CONSUMER ASSISTANCE](#) | [HOMEOWNER HELP](#) | [ABOUT](#) | [NEWS/MEDIA](#) | [CONTACT US](#)

NEVADA'S MINIMUM WAGE AND DAILY OVERTIME RATES REMAIN UNCHANGED FOR 2015

Carson City, NV - March 31, 2015

The Office of the Labor Commissioner today released the annual bulletin for Nevada's minimum wage and daily overtime requirements that will take effect July 1, 2015. The 2008 Minimum Wage Amendment to the Nevada Constitution requires the minimum wage to be recalculated and adjusted each year based on increases in the federal minimum wage, or, if greater, by the cumulative increase in the cost of living.

Contact:

Teri Williams
Public Information Officer
(702) 486-0407
twilliams@business.nv.gov

The rates will remain unchanged from the previous year. The minimum wage for employees who receive qualified health benefits from their employers will remain at \$7.25 per hour; the minimum wage for employees who do not receive health benefits will remain at \$8.25 per hour.

The rate for daily overtime will also remain the same. Employees who receive qualified health benefits from their employer and earn less than \$10.875 per hour, and employees earning less than \$12.375 per hour who do not receive qualified health benefits must be paid overtime whenever they work more than 8 hours in a 24-hour period. Nevada is one of a few states with a daily overtime requirement in addition to the requirement to pay overtime for more than 40 hours in a workweek. Employees that are exempt from overtime under Nevada state law are not subject to these requirements.

Additional information regarding the minimum wage and daily overtime rates is available from the Office of the Labor Commissioner at (702) 486-2660 in Las Vegas or (775) 687-4850 in Carson City. The Annual Bulletin containing the rates are available online from the Office of the Labor Commissioner's website at www.laborcommissioner.com or in hard copy form by request to the Office of the Labor Commissioner.

About the Office of the Labor Commissioner

The Office of the Labor Commissioner is a division of the Department of Business and Industry. The Labor Commissioner strives to ensure that all workers are treated fairly under the law by investigating complaints of non-payment of wages, State minimum wage, overtime, and prevailing wage disputes. The office also monitors youth employment standards, including work hours and safe, non-hazardous working conditions.

###

Exhibit 9

Exhibit 9

[Back to web Version](#)

Question 6 passes! New Nevada Minimum Wage Takes Effect November 28, 2006

November 21, 2006

With a majority of voters voting yes on Question 6 last election day, the Constitution of the State of Nevada has been amended to include a new minimum wage standard. Beginning on November 28, 2006, employers in Nevada will be required to pay a minimum wage of either \$5.15 or \$6.15 per hour depending on whether health insurance benefits are provided to employees. But the new amendment will have a greater impact on Nevada wage and hour law than simply raising the minimum wage – it will also lead to changes in administration and enforcement.

New Requirements

Do You Provide Health Benefits?

On November 28, all Nevada employers who do not provide "health benefits" for their employees will be required to pay each employee at least \$6.15 per hour. An employer provides "health benefits" if it provides family health insurance coverage at a cost to an employee of no more than 10% of the employee's gross taxable income received from the employer. Those employees receiving health insurance benefits according to this standard can still be paid at a rate of \$5.15 per hour.

What happens if an employer does provide "health benefits" as defined above, but will not allow an employee to participate in a company insurance plan until the completion of his or her probationary period? The new constitutional amendment provides that an employer must make health insurance available to the employee and his or her dependents. During a probationary period, health benefits are not typically "available" to the employee, even if participation will commence at the conclusion of the probationary period. Therefore, Nevada employers should pay probationary employees the higher minimum wage of \$6.15 per hour. Once an employee completes the probationary period, and the employer makes health benefits available to the employee, the employer is free to reduce the hourly minimum wage to \$5.15 per hour.

Employers in the hospitality industry should note that the Nevada Labor Commissioner has taken the position that an employee's gross taxable income "received from the employer" does not include any gratuities, because gratuities are not "received" from the employer. Therefore, a calculation of whether an employee's cost of insurance meets the 10% threshold should include only base wages an employee receives through payroll. Nevada's new minimum wage does not change the prohibition on Nevada employers taking a tip credit against minimum wage. Additionally, the Nevada Labor Commissioner is currently advising that the calculation of the 10% of the employee's gross taxable income must be done on a per pay period basis.

Here is an example of how the new law will work for tipped employees. –

Bill works at the Moonglow Restaurant 6 hours a day, 5 days a week for \$5.15 per hour plus tips. Moonglow has a bi-weekly pay period, and Bill earns a gross wage of \$309.00 per pay period, not including tips. For Bill to continue to be compensated at a rate of \$5.15 per hour, Moonglow must provide insurance that will not cost Bill more than \$30.90 per pay period (10% of \$309.00) for both Bill and his dependents.

The result is the same whether or not Bill actually elects to accept the insurance coverage for himself or his dependents. Note that in any pay period where Bill works less than the regularly scheduled number of hours, Moonglow needs to recalculate whether the cost for available family coverage exceeds 10% of Bill's gross

income in that pay period. If the cost of available insurance exceeds the 10% cap, the employee is entitled to the higher \$6.15 minimum wage for that pay period.

So far, the Nevada Labor Commissioner has not issued guidance as to what types or levels of health insurance coverage will be necessary for an employer to avail itself of the lower, \$5.15 minimum wage rate.

Employee Defined

What may have been missed by many voters is that the new amendment provides a new definition of "employee" for purposes of entitlement to minimum wage. Prior to Question 6's passage, the statutory definition of a covered "employee" specifically exempted certain job classifications from minimum wage requirements, including: casual babysitters; live-in, domestic service employees; outside salespersons earning commissions; certain agricultural workers; taxi and limousine drivers; and severely handicapped workers. Now, under the newly-ratified amendment, an "employee" is any person employed by an "employer." Only one exemption from minimum wage requirements is identified in the amendment, that being any individual "under eighteen 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."

Because Question 6 has become part of the Nevada Constitution, it effectively repeals the previous statutory definition of employee for purposes of minimum wage payment. Likewise, all the exemptions from minimum wage payment provided under Nevada statutory law no longer exist.

Nevada's Minimum Wage Tied To Federal Minimum Wage or CPI

In general, Nevada's minimum wage is now tied to increases in the federal minimum wage, which currently is \$5.15 per hour. For example, a dollar increase in the federal minimum wage will also mean an increase in Nevada's minimum wage to either \$6.15 or \$7.15 per hour. In addition, Nevada's minimum wage will also be permanently tied to increases in the cost of living index. If the cumulative increase in the cost of living for a given year is greater than any increase in the federal minimum wage, Nevada's minimum wage will increase by the percentage of the cumulative increase in the cost of living. The cost of living increase will be measured by the percentage increase as of December 31 of any year over the level of the consumer price index (CPI) of December 31, 2004. The Bureau of Labor Statistics, U.S. Department of Labor, currently publishes the CPI. A cost of living adjustment in Nevada's minimum wage cannot exceed 3% over the previous year's minimum wage.

Nevada employers will not need to worry about complicated calculations over the percentage increase in the cost of living from one year to the next. Nevada's Governor, or an agency designated by the Governor, is obligated under the new amendment to publish the adjusted rate by April 1 each year. The adjusted rate will then take effect the following July 1. In order to receive the adjusted rate bulletin, you must file a request with the Governor, or the agency designated by the Governor.

Union Employees

The minimum wage provisions now part of the Nevada Constitution may not be waived by an individual employee. However, the new provisions may be waived in a bona fide collective bargaining agreement (CBA). The waiver in the CBA must be explicitly set forth in the CBA in "clear and unambiguous terms." Any unilateral implementation of the terms and conditions of employment by either party to a CBA is not a waiver of any of the provisions of the new amendment.

Remedies

Currently, the Nevada minimum wage statute permits an employee to recover owed wages by either filing a claim with the Nevada Labor Commission or by filing a lawsuit. Under the new amendment, an employee may directly file suit against his or her employer. The remedies available to an employee who brings a lawsuit under Nevada's Constitution include back pay, damages, reinstatement, and injunctive relief. Additionally, employees prevailing on minimum wage claims will be entitled to their attorney's fees. Employers will not be able to recover attorney's fees even if they present a successful defense to an employee's claim. Finally, under the new amendment, employers are prohibited from discharging, reducing the compensation of, or otherwise discriminating against employees for using civil remedies to enforce their rights to minimum wages.

More disconcerting for Nevada employers is the potential scope of backpay that may now be awarded to an employee who successfully brings a claim under the new amendment. Nevada statutory law previously dictated that any claim would apply only to the two years of employment preceding the date of the employee's claim. The new amendment

provides no discernible statute of limitations, and a claim could cover a period of employment for greater than two years.

Labor Commissioner's Enforcement Capabilities

The Nevada Labor Commissioner currently enforces minimum wage laws, which state that the "Labor Commissioner shall enforce the provisions of the law and may impose, in addition to other remedies or penalties, an administrative penalty of no more than \$5,000 for each violation. With the Constitution's repeal of this law, there is a question as to whether the Labor Commissioner retains the power to levy civil penalties with respect to an employer's failure to pay an appropriate minimum wage. In any event, any alteration in the Labor Commissioner's enforcement authority will apply to minimum wage violations only. The Labor Commissioner is still empowered to enforce the state's general labor laws under other sections of Nevada statutory law, including enforcement of overtime requirements.

Overtime Considerations

Prior to November 28, if an employee earned less than one-and-a-half times the current minimum wage (i.e., \$7.73 per hour), Nevada law required that the employee receive an overtime premium for any hours worked beyond the normal eight-hour day. The effect the new minimum wage mandates will have on this daily overtime requirement remains unclear.

The Nevada Labor Commissioner has taken the position that the dual-rate minimum wage established by the new amendment also creates a dual standard under Nevada's daily overtime requirement. In other words, if you offer adequate health benefits to your employees, then employees will be entitled to daily overtime premiums if they earn less than \$7.73 per hour. But if the \$6.15 minimum wage applies to particular employees, (because their health insurance costs them more than 10% of their gross income), then those employees earning less than \$9.23 will be entitled to daily overtime premiums. In essence, the Labor Commissioner's opinion may lead to an expansion of the number of Nevada employees receiving daily, rather than weekly, overtime pay.

The Nevada Attorney General previously issued a formal opinion stating that the new amendment does not affect Nevada's daily overtime requirements, and that employees are only entitled to daily overtime if they earn less than \$7.73 per hour. But until the Labor Commissioner's and the Attorney General's opinions are reconciled, our advice is to pay your employees according to the Labor Commissioner's position, given that it is the broader of the two.

Likewise, Nevada's daily overtime requirements do not apply to any employee working an agreed-upon four, ten hour day work week. In such cases, Nevada employers should continue to pay that employee 40 hours at his or her regular rate of pay.

Actions You Should Take

Nevada employers should take the following steps immediately:

Identify which employees are currently being paid wages of less than \$6.15 per hour. Don't forget piece rate employees – they are also covered by the minimum wage provisions.

Identify any employees that were exempt from minimum wage requirements but will now be covered as of November 28. Again, these include:

Casual babysitters

Domestic service employees residing in the household where they work

Outside salespersons paid by commission

Agricultural employees

Taxi-cab and limousine drivers

Severely handicapped individuals working under government issued certificates

Supervisory, administrative or professional employees you have considered exempt from overtime but whose hourly rate (derived by dividing the weekly salary by the number of hours actually worked in a workweek) is less than \$6.15

Identify part time employees who are being paid less than \$6.15 per hour. Consider offering health insurance or modifying health insurance premiums for those employees in order to avoid paying the higher minimum wage.

Analyze to whom, when, and at what cost health insurance is being offered at your company. Consider offering low-cost health insurance for employees and their dependents as a way to avoid the higher minimum wage.

Identify which employees will become eligible for daily overtime. Consider formalizing voluntary arrangements for 4/10 schedules.

Begin compliance with the new minimum wage obligations on November 25. Note: The Labor Commissioner has informally taken the enforcement position that employers who cannot implement the changes by November 25 will not be penalized provided that they come into compliance as quickly as possible and make retroactive payments to employees for the period they were not in compliance.

This Labor Alert is intended to provide a brief overview of the significant portions of this new law. It is not intended to serve as, nor should it be construed as, advice for any particular legal situation. If you would like more information, contact any attorney in our Las Vegas office at 702.252.3131.

Exhibit 10

Exhibit 10

12 No. 11 Nev. Emp. L. Letter 6

Nevada Employment Law Letter

August 2007

Minimum Wage

MONEY, MONEY, MONEY: MINIMUM WAGE INCREASE DATES

Von S. Heinz

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In our July 2007 newsletter, Suzanne Martin told you about the recent increase in the minimum wage (see "Up, up, and away! Nevada's minimum wage to increase at least once this year," page 4). We received lots of questions about compliance, so here's more information to help you on this crucial issue.

Mark these dates on your calendar now

For those of you who are governed by your desk timer and keep important dates marked on the calendar months, even years ahead, here are not-to-be-missed dates to place in ink on your calendar now:

July 1, 2007 (Nevada). By the time you read this article, you already should have implemented the increase in Nevada's minimum wage, which was announced earlier by Labor Commissioner Mike Tanchek. Our state's minimum wage increased effective July 1, for a cost-of-living adjustment to \$5.30 per hour (with qualified health plan) and \$6.33 per hour (without qualified health plan). We know, you just raised your company's minimum wage six months ago and now you had to do it again on July 1. And there's still one more increase to mark on the calendar in July!

July 24, 2007 (federal). So you just made all those payroll adjustments for the increase in the minimum wage commanded by the state. Now, effective July 24, the first federal minimum wage increase took place, raising the federal minimum wage to \$5.85 per hour. If at that time you were paying only the Nevada lower minimum wage of \$5.30 per hour, you had to increase that wage to the new federal minimum wage of \$5.85 per hour. Even though Nevada's lower minimum wage will officially remain at \$5.30 per hour, Silver State employers still are required to comply with the federal rate. Nevada's higher minimum wage will continue to be \$6.33 per hour.

July 1, 2008 (Nevada). Next summer, another round of minimum wage increases go into effect. On July 1, 2008, both Nevada minimum wages will increase by 70 cents per hour (the difference between the old and new federal minimum wage). The lower Nevada wage will rise to \$6 per hour (with a qualified health plan) and \$7.03 per hour (without a qualified health plan).

July 24, 2008 (federal). Just as with the two increases that took place in July 2007, mark your calendar for another state increase. On July 24, 2008, the second increase in the federal minimum wage will go into effect, bringing it to \$6.55 per hour. On that date, if you pay your employees the lower Nevada minimum wage, you'll need to increase that pay scale to the higher federal minimum wage of \$6.55 per hour. The higher Nevada minimum wage will continue to be \$7.03 per hour.

July 1, 2009 (Nevada). By now, you've got the system mastered. Effective July 1, 2009, the state minimum wages will increase to \$6.70 per hour (with a qualified health plan) and \$7.73 per hour (without a qualified health plan).

July 24, 2009 (federal). And when three weeks have passed from the July 1, 2009, date for increasing minimum wages to comply with state law, the final step of the federal minimum wage increases will take effect on July 24. On that date, if you pay

your employees the lower Nevada minimum wage, you'll need to increase that pay scale to the higher federal minimum wage of \$7.25 per hour. The higher Nevada minimum wage will continue to be \$7.73.

July 1, 2010 (Nevada). But you're not done yet. Even though the final increase in the federal minimum wage went into effect nearly one year earlier, the Nevada minimum wage has yet another adjustment to go. Silver State minimum wages will be adjusted on July 1, 2010, to reflect the final federal minimum wage increase. That will cause the lower Nevada wage to rise to \$7.40 per hour (with a qualified health plan) and \$8.43 per hour (without a qualified health plan).

And the story keeps rolling along

The yearly increases in our state's minimum wages won't stop in 2010, when the last of the increases in the federal minimum wage have been put in place. Nevada will continue to assess annual adjustments to the minimum wage, with any adjustment taking effect on July 1 of that year. The adjustments to the Nevada minimum wages will likely cause our state's minimum wages to go up every year. Unless Congress acts in the meantime -- and keep in mind how many years it took to gather enough votes to support the most recent increase in the federal minimum wage -- the only difference is that when July rolls around, you won't need to mark both July 1 and July 24 on the calendar for special attention in payroll.

And if charts are your thing

Some of us keep important dates on multiple calendars and still have a difficult time grasping upcoming deadlines. The Las Vegas Chamber of Commerce has put together a chart that clearly expresses all upcoming deadlines for minimum wage adjustments. It can be found at www.lvchamber.com. Even better, you can download the chart and print it poster-size to adorn your office wall or reduce it to wallet-size so you'll never be without the very handy resource.

Keep the calendar handy!

As Suzanne's article last month wisely counseled, there are many repercussions associated with the minimum wage, including how overtime pay is calculated. Refer to her article frequently to be sure that your employees are compensated according to law.

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Exhibit 11

Exhibit 11

Guide to Employment Law and Regulation § 49:7

Guide to Employment Law and Regulations

Database updated March 2015

Part VIII. STATE LABOR LAWS

Chapter 49. Nevada

Summary:

§ 49:7. Minimum wage law

Minimum wage. Effective November 28, 2006, the state constitution was amended to create a two-tiered minimum wage, \$5.15 per hour with health benefits or \$6.15 per hour without.⁵⁰ The labor commissioner has the authority to adjust the minimum wage:¹ effective July 1, 2008, minimum wage was set at \$5.85 per hour with health benefits and \$6.85 per hour without, and effective July 1, 2009, minimum wage was set at \$6.55 per hour with health benefits and \$7.55 per hour without, and effective July 1, 2010, minimum wage will be \$7.25 per hour with health benefits and \$8.25 per hour without.^{1 50}

Exceptions. Casual babysitters, domestics residing in the household where they work, commissioned outside salespersons, agricultural employees of employers who have not used more than 500 man-days of agricultural labor in any quarter of the preceding calendar year, and taxi and limousine drivers are exempt from minimum wage coverage. The minimum wage requirement does not apply to severely handicapped persons whose disabilities have diminished their productive capacities in a specific job and who have been issued special certificates by the rehabilitation division of the Department of Employment, Training and Rehabilitation.²

Tip and meal credits. Tips cannot be confiscated by an employer or credited as wages in determining compliance with the law.³ Part of the wages or compensation may consist of a meal if mutually agreed upon by employee and employer in the contract of employment. The maximum value for meals cannot be computed at more than \$1.50 per day, and in no case may the maximum value of specific meals be computed or valued at more than: 35¢ for breakfast; 45¢ for lunch; and 70¢ for dinner. The meals must actually be consumed for an employer to take the credit.⁴

Uniforms. Uniforms or accessories distinctive in style, color or material must be furnished without cost. If a special cleaning process is required, and the uniforms or accessories cannot easily be laundered by an employee, the employer must clean them without cost to the employee.⁵

Overtime. Time and one-half an employee's regular wage rate must be paid whenever an employee works more than 40 hours in any scheduled week of work, or more than eight hours in any scheduled workday *unless* by mutual agreement, the employee works a scheduled 10-hour day for four days within any scheduled week of work.⁶

Exceptions. Employees not covered by the above minimum wage provisions; employees paid not less than one and one-half the above minimum wage rates; outside buyers; retail commission salespersons if their regular rate is more than one and one-half the minimum wage, and more than one-half their pay comes from commissions; bona fide executives, administrators and professionals; employees covered by collective bargaining agreements that otherwise provide for overtime; drivers, drivers' helpers, loaders and mechanics under the Motor Carrier Act of 1935; railroad employees; air carrier employees; drivers or drivers' helpers making local deliveries who are paid on a trip-rate basis or other delivery payment plan; taxi and limousine drivers; agricultural employees; employees of businesses with a gross sales volume of less than \$250,000; and any salesman or mechanic primarily engaged in selling or servicing cars, trucks or farm equipment.⁷

Posting. Every employer must post on the premises where any person is employed a printed abstract of the law furnished by the Labor Commissioner.⁸

Enforcement. Any employee paid less than the minimum wage may sue the employer within two years for difference between wages paid and the minimum wage. No contract to accept a lesser wage or any acceptance of a lesser wage by the employee will bar such action.⁹

Equal pay law. No employee can be paid a wage less than that paid an employee of the opposite sex in the same establishment for equal work requiring equal skill, effort and responsibility and which is performed under similar working conditions.¹⁰

Exceptions. This provision does not apply where wages are paid pursuant to a seniority system; merit system; compensation system under which wages are determined by the quality or quantity of production; or a wage differential based on factors other than sex. An employer who violates the provision may not reduce the wages of any employee in order to comply with it.¹¹

Penalties. Violations of any of the payment of wages and benefits laws of the Nev. Rev. Stat. §§ 608.005 to 608.190 are misdemeanors.¹²

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150 Nev. Const. Article 15, § 16.

1 Nev. Rev. Stat. § 608.250.

150 <http://www.laborcommissioner.com/>

2 Nev. Rev. Stat. § 608.250.

3 Nev. Rev. Stat. § 608.160.

4 Nev. Rev. Stat. § 608.155.

5 Nev. Rev. Stat. § 608.165.

6 Nev. Rev. Stat. § 608.018.1.

7 Nev. Rev. Stat. § 608.018.2.

8 Nev. Rev. Stat. § 608.080.

9 Nev. Rev. Stat. § 608.260.

10 Nev. Rev. Stat. § 608.017.1.

11 Nev. Rev. Stat. § 608.017.2.

12 Nev. Rev. Stat. § 608.195.

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Exhibit 12

Exhibit 12

1 BEFORE THE NEVADA STATE LABOR COMMISSIONER

2 CARSON CITY, NEVADA

3 FILED

4 FEB 17 2015

5 NEVADA
LABOR COMMISSIONER - CC

6 REQUEST TO PASS ON NEVADA)
ADMINISTRATIVE CODE (NAC))
7 SECTIONS 608.102(3) AND 608.104(2))

8 SUBMITTED PURSUANT TO NEVADA)
REVISED STATUTES (NRS) SECTION)
9 233B.110)

ORDER AFFIRMING VALIDITY OF
NAC SECTIONS 608.102(3) AND
608.104(2)

10 CODY C. HANCOCK V. STATE OF)
NEVADA THE OFFICE OF THE LABOR)
COMMISSIONER)

11 INTRODUCTION

12 Pursuant to Nevada Revised Statutes (NRS) Section 607.160(1)(a), the Labor
13 Commissioner shall enforce all labor laws of the State of Nevada. This section also provides
14 the authority for the Labor Commissioner to enact regulations to enforce the labor laws of the
15 State of Nevada under subdivision (1)(b). In 2006, the Nevada voters approved Question #6,
16 an Initiative Petition on the Statewide Ballot to raise the minimum wage. The Minimum
17 Wage Amendment was codified in the Nevada Constitution as Article 15, Section 16. After
18 the passage of the Minimum Wage Amendment, the Office of the Labor Commissioner
19 began the administrative rulemaking process to implement the provisions of Article 15,
20 Section 16, of the Nevada Constitution. After a series of public workshops and the
21 submission of written comments, the Office of the Labor Commissioner adopted Nevada
22 Administrative Code (NAC) sections 608.100 through 608.108, which became effective on
23 October 31, 2007. These regulations were approved by the Legislative Commission, and
24 have remained in effect since adoption.

25 A person can petition the Labor Commissioner for a Declaratory Order concerning the
26 applicability of a statute, regulation or decision of the Commissioner pursuant to
27 NAC 607.670. A petition can also be filed with the Labor Commissioner for the adoption,
28 filing, amendment or repeal of a regulation pursuant to NAC 607.680. A request to pass upon

1 the validity of a regulation or regulations is also set forth in NRS 233B.110, and provides an
2 agency, such as the Office of the Labor Commissioner, with the opportunity to pass upon the
validity of regulations being enforced by the agency.

The Plaintiff in the matter of *Cody C. Hancock v. The State of Nevada ex rel. The
Office of the Labor Commissioner* has requested the Office of the Labor Commissioner to
pass upon the validity of NAC sections 608.102(3) AND 608.104(2).

SCOPE OF REQUEST PURSUANT TO NRS 233B.110(1)

On April 16, 2014, counsel for Plaintiff in the above-referenced lawsuit submitted a
letter to the Labor Commissioner requesting that the Office of the Labor Commission pass
10 upon the validity of NAC sections 608.100, 608.102, 608.104, and NAC 608.10(1)8 pursuant
11 to NRS 233B.110. (Exhibit 1). On May 7, 2014, the Labor Commissioner sent a letter to
12 Plaintiff's counsel seeking additional information and clarification about the request.
13 (Exhibit 2). On April 30, 2014, the Plaintiff filed a lawsuit in the First Judicial Court, Carson
14 City (Case No. 14 OC 00080 1B) seeking the following: (1) Declaratory Relief pursuant to
15 NRS 233B.110; (2) Injunctive Relief pursuant to NRS 33.010; and (3) Writ of Mandamus
16 pursuant to NRS 34.160. On May 13, 2014, Plaintiff's counsel responded to the May 7,
17 2014, letter from the Labor Commissioner indicating that their April 16, 2014, letter was
18 intended to satisfy the provisions of NRS 233B.110(1). (Exhibit 3).

19 A Motion to Dismiss the above referenced lawsuit was filed on June 27, 2014, by the
20 Office of the Attorney General ("Attorney General"), counsel for the Office of the Labor
21 Commissioner, and the defendants in the lawsuit. The litigation was subsequently stayed
22 pending the initiation of the rulemaking process. On January 20, 2015, counsel for Plaintiff
23 sent a letter to the Attorney General inquiring about the status of the rulemaking process,
24 and proposing a revised request to pass pursuant to NRS 233B.110(1). (Exhibit 4). On
25 January 21, 2015, the Attorney General sent a letter to Plaintiff's counsel requesting
26 confirmation of the revised request to pass pursuant to NRS 233B.110(1). (Exhibit 5). By
27 letter dated January 22, 2015, Plaintiff's counsel responded confirming that the revised

28 ///

1 request to pass pursuant to NRS 233B.110(1) would be limited to NAC sections 608.102(3)
2 and 608.104(2). (Exhibit "6").

3 APPLICABLE LAWS AND FINDINGS

4 Section A of Article 15, Section 16, of the Nevada Constitution sets forth as follows:

5 A. Each employer shall pay a wage to each employee of not less
6 than the hourly rates set forth in this section. The rate shall be five
7 dollars and fifteen cents (\$5.15) per hour worked, if the employer
8 provides health benefits as described herein, or six dollars and
9 fifteen cents (\$6.15) per hour if the employer does not provide such
10 benefits. Offering health benefits within the meaning of this section
11 shall consist of making health insurance available to the employee
12 for the employee and the employee's dependents at a total cost to
13 the employee for premiums of not more than 10 percent of the
14 employee's gross taxable income from the employer. These rates of
15 wages shall be adjusted by the amount of increases in the federal
16 minimum wage over \$5.15 per hour, or, if greater, by the cumulative
17 increase in the cost of living. The cost of living increase shall be
18 measured by the percentage increase as of December 31 in any
19 year over the level as of December 31, 2004 of the Consumer Price
20 Index (All Urban Consumers, U.S. City Average) as published by the
21 Bureau of Labor Statistics, U.S. Department of Labor or the
22 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.

23 By enacting this amendment, the voters approved a different minimum wage if the
24 employer chose to offer health benefits. If the employer offered qualifying health insurance,
25 the cost of premiums for the health insurance could not be more than 10 percent of the gross
26 taxable income from the employer.

27 In order to implement this amendment, the Office of the Labor Commissioner
28 sought to adopt regulations pursuant to NRS 607.160(b), which states in relevant part:

1 NRS 607.160 Enforcement of labor laws; imposition and
2 collection of administrative penalties; cumulative nature of penalties
and remedies; claims for wages or commissions; prosecution of
claims by Attorney General.

1. The Labor Commissioner:

(a) Shall enforce all labor laws of the State of Nevada:

(1) Without regard to whether an employee or worker is
lawfully or unlawfully employed; and

(2) The enforcement of which is not specifically and exclusively
vested in any other officer, board or commission.

(b) May adopt regulations to carry out the provisions of
paragraph (a).

In 2007, at the conclusion of the rulemaking process, including, public workshops and
the submission of written comments, NAC sections 608.100 through NAC 608.108 were
10 enacted on October 31, 2007.

11 Nevada Administrative Code (NAC) section 608.102(3) states in relevant part:

12 NAC 608.102 Minimum wage: Qualification to pay lower rate to
13 employee offered health insurance. To qualify to pay an employee
the minimum wage set forth in paragraph (a) of subsection 1 of
14 NAC 608.100 an employer must meet each of the following
requirements:

15 3. The share of the cost of the premium for the health insurance
16 plan paid by the employee must not exceed 10 percent of the
gross taxable income of the employee attributable to the employer
17 under the Internal Revenue Code, as determined pursuant to the
provisions of NAC 608.104.

18 Nevada Administrative Code (NAC) section 608.104(2) states in relevant part:

19 NAC 608.104 Minimum wage: Determination of whether
20 employee share of premium of qualified health insurance exceeds
10 percent of gross taxable income.

21 2. As used in this section, "gross taxable income of the employee
22 attributable to the employer" means the amount specified on the
Form W-2 issued by the employer to the employee and includes,
23 without limitation, tips, bonuses or other compensation as required
for purposes of federal individual income tax.

24
25 Plaintiff alleges that NAC 608.102(3) and NAC 608.104(2) blur the requirements set
26 forth in Article 15, Section 16, of the Nevada Constitution in that gross taxable income is
27 based on the Internal Revenue Code definition as required for federal income tax purposes.

28 ///

1 Plaintiff alleges that Article 15, Section 16, of the Nevada Constitution explicitly excludes tips
2 or gratuities from calculation of the minimum wage.

It is undisputed that the State of Nevada does not impose a State income tax upon its citizens pursuant to Article 10, Section 1, Clause 9, of the Nevada Constitution. Therefore, there is no State definition of gross taxable income. The Internal Revenue Service through the Internal Revenue Code defines and enforces federal tax law. The Internal Revenue Code is applicable to all Nevada employers. The definition of gross taxable income is defined in 26 U.S.C. Section 61, and includes to an extent income from tips and bonuses.

Article 15, Section 16, of the Nevada Constitution specifically references gross
10 taxable income when calculating the 10% amount for health insurance premiums, not the
11 wages required in this amendment. In implementing this express language based on the
12 authority to enact regulations to enforce labor laws pursuant to NRS 607.160(1)(b), the
13 Office of the Labor Commissioner implemented the provisions of Article 15, Section 16, of
14 the Nevada Constitution, and adopted the federally required definition of gross taxable as
15 defined by the Internal Revenue Code in NAC sections 608.102(3) and 608.104(2).

16 CONCLUSION

17 The provisions of NAC sections 608.102(3) and 608.104(2) are consistent with the
18 requirements of Article 15, Section 16, of the Nevada Constitution, and the requirements of
19 federal tax law as set forth in the Internal Revenue Code, 26 U.S.C. Section 61
20 NAC sections 608.102(3) and 608.104(2) remain valid and enforceable by the Labor
21 Commissioner pursuant to (NRS) Section 607.160(1)(a).

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

THEREFORE IT IS SO ORDERED;

1. The request to pass submitted pursuant to NRS 233B.110(1) and declare NAC sections 608.102(3) and 608.104(2) invalid is denied for the reasons set forth above.
2. NAC sections 608.102(3) and 608.104(2) shall remain valid and enforceable by the Labor Commissioner.

Dated this 17th day of February, 2015.


Shannon M. Chambers
Labor Commissioner
State of Nevada

CERTIFICATE OF MAILING

I, Rosiland M. Hooper, do hereby certify that I mailed a true and correct copy of the foregoing ORDER AFFIRMING VALIDITY OF NAC SECTIONS 608.102(3) AND 608.104(2), via the United States Postal Service, Carson City, Nevada, in a postage-prepaid envelope to the following:

Bradley S. Schrager
WOLF RIFKIN SHAPIRO SCHULMAN &
RABKIN, LLP
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120-2234

Scott Davis, DAG
Office of the Attorney General
Grant Sawyer Building
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101

Dated this 17th day of February, 2015.

Rosiland M. Hooper, an employee of the
Nevada State Labor Commissioner

EXHIBIT #1

EXHIBIT #1

RECEIVED

APR 16 2014

NEVADA
LABOR COMMISSIONER-UC

LAW OFFICES

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

Bradley S. Schrager
bschrager@wrsllawyers.com

April 16, 2014

VIA FACSIMILE (775) 687-6402Mr. Theron Towler, Commissioner
Office of the Labor Commissioner
Nevada Department of Business & Industry
675 Fairview Drive, Suite 226
Carson City, Nevada 89701Re: Request Pursuant to N.R.S. 233B.110(1)

Dear Commissioner Towler:

This law firm represents Mr. Cody C. Hancock, an individual and resident of the State of Nevada whose legal rights are, or are threatened to be, interfered with or impaired by the regulations indicated herein. Therefore, pursuant to N.R.S. 233B.110(1), please accept this letter as a request that your agency pass upon the validity of the following regulations:

N.A.C. 608.100, N.A.C. 608.102, N.A.C. 608.104, and N.A.C. 608.108

These regulations appear to conflict with or contravene Article 15, Section 16 of the Nevada Constitution and/or exceed the statutory and/or constitutional authority of the agency and/or are otherwise arbitrary and capricious. According to our analysis,

N.A.C. 608.100 does not require Nevada employers to provide qualifying health benefits in order to compensate workers at the reduced minimum wage rate, in contravention of constitutional requirements per Nev. Const. Art. 15, Sec. 16;

N.A.C. 608.102(3) employs an unlawful definition of "gross taxable income of the employee attributable to the employer" from N.A.C. 608.104(2), and the provisions of N.A.C. 608.102(2) pertaining to the conditions under which your office will consider employer health insurance plans as qualifying a particular employer to pay the reduced minimum wage rate to its employees suffer the same constitutional infirmities as N.A.C. 608.104, and furthermore are themselves in contravention of constitutional requirements per Nev. Const. Art. 15, Sec. 16;

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JA 0226

Mr. Thoran Towler, Commissioner
April 16, 2014
Page 2

N.A.C. 608.104 allows employers to compute the acceptable premium costs to minimum wage employees and their dependents (for purposes of qualification by employers to compensate workers at the reduced minimum wage rate) at a level exceeding that permitted by Nev. Const. Art. 15, Sec. 16; and

N.A.C. 608.108 allows a waiting period of up to six months for provision of health benefits, while permitting payment to employees at the reduced minimum wage rate during the interim, in contravention of constitutional requirements per Nev. Const. Art. 15, Sec. 16.

Thanks very much for your cooperation. Please do not hesitate to contact me should you wish to discuss this request. I remain—

Sincerely yours,

Bradley S. Schrager
Wolf Rifkin Shapiro
Schulman & Rifkin

EXHIBIT #2

EXHIBIT #2

STATE OF NEVADA

BRIAN SANDOVAL
GOVERNOR

BRUCE BREWSLOW
DIRECTOR

THORAN TOWLER
LABOR COMMISSIONER



OFFICE OF THE LABOR COMMISSIONER
555 E. WASHINGTON AVENUE, SUITE 4100
LAS VEGAS, NEVADA 89101
PHONE: (702) 486-2650
FAX: (702) 486-2660

OFFICE OF THE LABOR COMMISSIONER
675 FAIRVIEW DRIVE, SUITE 226
CARSON CITY, NV 89701
PHONE: (775) 687-4850
FAX: (775) 687-6409

Department of Business & Industry
OFFICE OF THE LABOR COMMISSIONER
www.LaborCommissioner.com

May 7, 2014

Bradley Schrager
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 E. Russell Road, 2nd Floor
Las Vegas NV 89120

Re: Request pursuant to NRS 233B.110(1)

Mr. Schrager:

I am in receipt of your letter dated April 16, 2014 requesting my office pass upon the validity of NAC 608.100, NAC 608.102, NAC 608.104, and NAC 608.108 pursuant to NRS 233B.110(1). I am requesting further information and clarification so that I may respond appropriately.

First, I am unclear as to what you are asking my office to do. NRS 233B.110 creates a cause of action for a District Court to review the validity of a regulation. While NRS 233B.110 allows the Labor Commissioner to petition a District Court to determine the validity of its own regulation, it does not give the Labor Commissioner authority to make that determination for itself. If you were seeking such a determination from my office, a petition for declaratory order pursuant to NAC 607.670 would be the more appropriate procedure. Please provide some clarification regarding what exactly you are seeking from my office so that I may respond appropriately.

Next, you allege that NAC 608.100 is in contravention of Article 15, Section 16 of the Nevada Constitution because it does not require Nevada employers to provide qualifying health benefits in order to compensate workers at the reduced minimum wage rate. However, you provide no further explanation as to why it is your belief and/or analysis that this is in contravention of the Nevada Constitution. Therefore, I am unable to respond to this allegation without further information.

Next, you allege that NAC 608.102(3) is in contravention of Article 15, Section 16 of the Nevada Constitution because it employs an unlawful definition of gross taxable income of the employee attributable to the employer pursuant to NAC 608.104(4) and NAC 608.102(2). However, you provide no further explanation as to why it is your belief and/or analysis that this is in contravention of the Nevada Constitution. Therefore, I am unable to respond to this allegation without further information.

Next, you allege that NAC 608.104 is in contravention of Article 15, Section 16 of the Nevada Constitution because it allows employers to compute the acceptable premium costs to minimum wage employees and their dependents at a level exceeding that permitted by the Nevada Constitution. However, you provide no further explanation as to why it is your belief and/or analysis that this is in contravention of the Nevada Constitution. Therefore, I am unable to respond to this allegation without further information.

Finally, you allege that NAC 608.108 is in contravention of Article 15, Section 16 of the Nevada Constitution because it allows for a waiting period of up to six months for provision of health benefits, while permitting payment to employees at the reduced minimum wage rate during the interim. However, you provide no further explanation as to why it is your belief and/or analysis that this is in contravention of the Nevada Constitution. Therefore, I am unable to respond to this allegation without further information.

Please provide further information and clarification so that I may properly respond to your request.

Sincerely,



Thoran Towler
Labor Commissioner

EXHIBIT #3

EXHIBIT #3

RECEIVED

MAY 15 2014

NEVADA
LABOR COMMISSIONER.CC

LAW OFFICES

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

Bradley S. Schrager
bschrager@wrslawyers.com

May 13, 2014

Mr. Thoran Towler, Commissioner
Office of the Labor Commissioner
Nevada Department of Business & Industry
675 Fairview Drive, Suite 226
Carson City, Nevada 89701

Re: Request Pursuant to N.R.S. 233B.110(1)

Dear Commissioner Towler:

Thanks for your response of May 7, 2014 to my correspondence of April 16, 2014.

The purpose of our original letter was to satisfy the provision of N.R.S. 233B.110(1) which states that "A declaratory judgment [regarding the validity of any regulation] may be rendered after the plaintiff has first requested the agency to pass upon the validity of the regulation in question." We consider our April 16, 2014 correspondence to have met the requirement therein.

To your point regarding N.A.C. 607.670, our client was not asking your office for a declaratory order on the applicability of any of the subject regulations, so that process would have been inapposite.

Thanks very much for your cooperation. I remain—

Sincerely yours,



Bradley S. Schrager
Wolf Rifkin Shapiro
Schulman & Rabkin

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JA 0232

EXHIBIT #4

EXHIBIT #4



LAW OFFICES

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

FACSIMILE TRANSMISSION

January 20, 2015

NAME/COMPANY	TELEPHONE	FACSIMILE
Mr. Scott R. Davis, Esq. Deputy Attorney General State of Nevada	(702) 486-3894	(702) 486-3416

FROM: Bradley S. Schrager

RE: Hancock, Nevada Labor Commissioner

FILE NO.: LV4167-002

PAGES: 52 (including cover page)

If you do not receive all pages, please contact Sia O'Dell at extension 5136

MESSAGE:

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LAW OFFICES
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

Bradley S. Schragar
bschragar@wrslawyers.com

LV4167-002

January 20, 2015

VIA FACSIMILE : (702) 486-3416

Mr. Scott R. Davis, Esq.
Deputy Attorney General
State of Nevada
555 East Washington Avenue
Suite 3900
Las Vegas, NV 89101

Re: Hancock v. Nevada Labor Commissioner

Dear Counsel:

Thank you for your e-mail correspondence of earlier today regarding the above-entitled matter. As I indicated in my response, the timeframe you discuss on behalf of the Labor Commissioner is not satisfactory under the circumstances. This suit was filed initially in May of 2014, and stayed by mutual agreement while the previous Labor Commissioner pursued the possibility of regulatory amendments to the challenged provisions of the N.A.C.

That process—slow in any event—has been further delayed first by the succession of Commissioners since that time and second by the current Commissioner's position as stated in your email. As we have stated in previous correspondence, we consider this matter of some urgency, as the present regulations operate, every hour of every day, to permit employers to avoid the mandates of the Nevada Constitution where minimum wage workers are concerned. In that vein, we here notify you of the steps we intend to take in furtherance of the lawsuit.

We note that the Commissioner's office has now been in possession of our stated concerns regarding all of the challenged regulations for approximately eight months. This was followed up with extensive comments on each regulation and the legal deficiencies of each, in comments provided to that office last August. As your motion to dismiss the pending lawsuit decried the Commissioner's inability to engage in meaningful review of the challenged regulations, we here request that the Commissioner pass upon their validity now, pursuant to N.R.S. 233B.110. We still believe that our original request was adequate under law, but in the interest of accommodating your concerns, we here make it again.

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Mr. Scott R. Davis, Esq.
January 20, 2015
Page 2

It cannot now be seriously contended that the Commissioner is not adequately informed of the bases for the requests, as the lawsuit, its amended version, and the written comments supply ample material for her consideration. We here attach copies of our original 233B.110 request of April 16, 2014, the amended complaint in this case, and the written comments for your consideration, and we incorporate their contents into the present reiterated request. We are also of the opinion that the First Judicial District will be persuaded that your client has now had more than enough time to provide the requested determination regarding the validity of these regulations, rendering moot protestations that there was no "meaningful opportunity to pass on the validity of N.A.C. 608.100, 104, and 108 before plaintiff can proceed in ... Court."

We do not credit the argument, apparently made in your motion to dismiss, that N.A.C. 607.650 or 607.670 apply to this circumstance. Those regulations—and it is not clear whether you were claiming they do, in fact, apply, or were merely making an analogy regarding a similar administrative procedure—deal with advisory opinions regarding whether or how a particular "regulation, statute, or decision of the Commissioner" may apply to a set of offered facts. Our client's request is not so made. We do not seek an advisory opinion pursuant to N.A.C. 607.250 or 607.270 on the *applicability* of the regulations at issue, but seek to have the Labor Commissioner pass, pursuant to N.R.S. 233B.110, upon the *validity* of those regulations—a very different legal and administrative inquiry. Even if, *arguendo*, we concede that the original request did not meet your stated standards for a 233B.110 request, the instant request surely achieves that.

We ask that you provide the agency's determination regarding our request within 30 days of this correspondence, or February 19, 2015. We also here notify your client that we will, on the next day following and pursuant to the terms of our stipulation and order, move the First Judicial District Court to lift the litigation stay and re-commence the action. We will be in touch at that time to arrange a meet and confer with you, also pursuant to our stipulation and order, regarding the appropriate next steps in the proceeding.

Thanks very much for your attention to this matter, and I remain—

Sincerely yours,

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP



BRADLEY S. SCHRAGER

BSS:so
Attachments

EXHIBIT #5

EXHIBIT #5



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89119

ADAM PAUL LAXALT
Attorney General

WESLEY K. DUNCAN
Assistant Attorney General

NICHOLAS A. TRUTANICH
Chief of Staff

January 21, 2015

Via Facsimile

Bradley Schrager, Esq.
Wolf Rifkin Shapiro Schulman Rabkin, LLP
3556 East Russell Rd. 2nd Floor
Las Vegas, NV 89120
(702) 341-5300 (fax)

Re: Hancock v. Labor Commissioner

Dear Mr. Schrager:

I am in receipt of your correspondence of January 20, 2015 regarding the above-referenced matter. I am writing in the hope of clarifying one point in your correspondence.

Your correspondence indicated that the reason for your client wishing to move forward with the lawsuit was that the timeframe for rulemaking that I had mentioned in my earlier email was unacceptable. That timetable was not artificially created by the Labor Commissioner. It is premised upon the strictures imposed by the Nevada Administrative Procedures Act which dictate that an agency may not move to adopt a permanent administrative regulation until after July 1st of an odd-numbered year. NRS 233B.063(3) and 233B.064; Nev. Admin. Rulemaking Manual, p. 12. Nor is it new. Neither Commissioner Towler, Acting Commissioner Bailey nor Commissioner Chambers understood that the rulemaking process would aim at something less than a permanent change to the regulations.

At present, the only available option for adopting a change to the existing regulations is to do so on a temporary basis. This has been the case since August 1, 2104, shortly after the stay of litigation was entered. Temporary regulations bypass the legislative commission, and therefore lack assurances that they can be converted to permanent regulations when reviewed by members of the legislature.

Telephone: 775-684-1100 • Fax: 775-684-1108 • Web: ag.nv.gov • E-mail: aginfo@ag.nv.gov
Twitter: @NevadaAG • Facebook: /NVAttorneyGeneral • YouTube: /NevadaAG

Bradley Schrager, Esq.
1/21/15
Page 2

Your correspondence rejects the contemplated timetable that would result in permanent regulatory changes, but does not indicate whether a different timetable would be acceptable to maintain the stay of litigation.

Therefore, please clarify whether an accelerated rulemaking process that would result in quicker but temporary regulatory changes would be acceptable in order to maintain the current stay of litigation. As I indicated above the Labor Commissioner had not contemplated a temporary change to the regulations, but in light of your correspondence is willing to re-evaluate that possibility. As such, this clarification will greatly assist the Labor Commissioner in responding to your request.

Sincerely,

ADAM PAUL LAXALT
Attorney General



Scott Davis
Deputy Attorney General
Business & Taxation Division
(702) 486-3894

cc: client

Mr. Scott R. Davis, Esq.
January 22, 2015
Page 3

We presume, and please correct us if we are in error, that a determination by the Labor Commissioner of the invalidity of these regulatory provisions would operate as outright repeal, and would serve to direct any future temporary or permanent rulemaking procedure to avoid such error. As the Constitution's plain language—"gross wages from the employer"—may stand as the final word on this discrete issue without agency guidance, we do not see any potential negative effects of repeal of these provisions while a temporary or permanent rulemaking process is ongoing.

To summarize, therefore, we are prepared to forestall lifting the litigation stay upon clarification from you regarding the temporary rulemaking timeline and process, and upon assurances that the agency will pass upon the validity of N.A.C. 608.102(3) and 608.104(2) within the timeframe noted in our letter of January 20, 2015. We also reserve, obviously, the right to act promptly upon a determination of validity with which we disagree on the tip-exclusion issue.

We look forward to working with the Labor Commissioner on these matters, and I remain—

Sincerely yours,

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP



BRADLEY S. SCHRAGER

BSS:so

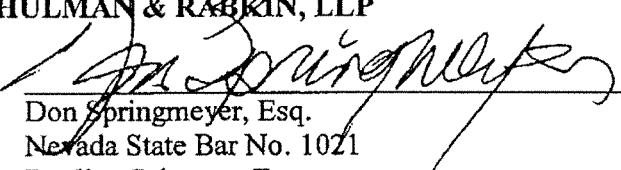
1 WHEREAS Plaintiff and all Defendants seek good-faith resolution of the regulatory issues
2 raised by the Amended Complaint, if possible without the employment of judicial resources but
3 without admissions or concessions regarding the currently-stated positions of any party to this suit
4 as described in any current pleading or motion, do:

5 All parties to this suit STIPULATE and AGREE that the present action will be stayed as of
6 the date of this agreement, so that the parties may attempt to resolve the issues of the suit through
7 the Nevada Administrative Procedures Act's process of public hearings and administrative
8 reconsideration of the current regulatory regime regarding Nev. Const. art. XV, § 16.

9 The parties further STIPULATE and AGREE that any party shall have the right to ask the
10 Court to lift the stay with seven (7) court days' written notice to the other parties in the case, and
11 that the parties shall, at that time, meet and confer regarding the appropriate next steps in the case.

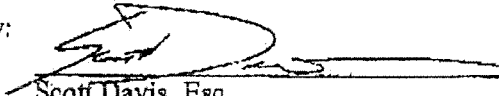
12 Dated this 16th day of July, 2014

13 WOLF, RIFKIN, SHAPIRO,
14 SCHULMAN & RABKIN, LLP

15 By: 

16 Don Springmeyer, Esq.
17 Nevada State Bar No. 1021
18 Bradley Schrager, Esq.
19 Nevada State Bar No. 10217
20 Daniel Bravo, Esq.
21 Nevada State Bar No. 13078
22 3556 E. Russell Road, Second Floor
23 Las Vegas, Nevada 89120
24 (702) 341-5200
25 *Attorneys for Plaintiff*
26
27
28

1 CATHERINE CORTEZ MASTO,
2 Nevada Attorney General

3 By: 

4 Scott Davis, Esq.
5 Deputy Attorney General
6 Nevada State Bar No. 10019
7 555 E. Washington Ave., # 3900
8 Las Vegas, NV 89101
9 (702) 486-3894
*Attorneys for State of Nevada ex rel. Office of the
Labor Commissioner; Office of the Labor
Commissioner and Commissioner Thoran Towler*

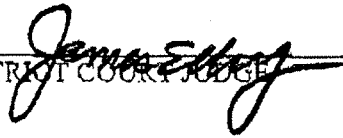
10 Based upon the foregoing, and good cause appearing therefore:

11 IT IS HEREBY ORDERED that the present action will be stayed as of the date of this
12 agreement, so that the parties may attempt to resolve the issues of the suit through the process of
13 public hearings and administrative reconsideration of the current regulatory regime regarding Nev.
14 Const. art. XV, § 16.

15 IT IS FURTHER ORDERED that any party shall have the right to ask the Court to lift the
16 stay with seven (7) court days' written notice to the other parties in the case, and that the parties
17 shall, at that time, meet and confer regarding the appropriate next steps in the case.

18 IT IS HEREBY ORDERED that the foregoing Stipulation is GRANTED.

19 DATED this 18 day of July, 2014

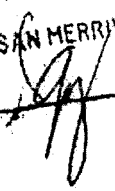
20
21 
22 DISTRICT COURT JUDGE
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25
26
27
28

1 Don Springmeyer, Esq.
Nevada State Bar No. 1021
2 Bradley Schrager, Esq.
Nevada State Bar No. 10217
3 Daniel Bravo, Esq.
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SUSAN MERRIWETHER
CLERK

BY  DEPUTY

10 **THE FIRST JUDICIAL DISTRICT COURT**
11 **IN AND FOR CARSON CITY, NEVADA**
12

13 CODY C. HANCOCK, an individual and
14 resident of Nevada,

15 Plaintiff,

16 vs.

17 THE STATE OF NEVADA ex rel. THE
18 OFFICE OF THE NEVADA LABOR
COMMISSIONER; THE OFFICE OF THE
19 NEVADA LABOR COMMISSIONER; and
THORAN TOWLER, Nevada Labor
20 Commissioner, in his official capacity,

21 Defendants.

CASE NO: 14 OC 00080 1B

DEPT. NO: II

**~~PROPOSED~~ ORDER LIFTING
TEMPORARY STAY**

22 WHEREAS, the Parties to this action had entered into a stipulation regarding, and this
23 Court had ordered, a temporary stay of this matter on July 18, 2014; and

24 WHEREAS, the stipulation contained provision for any party to ask the Court to lift the
25 temporary stay upon 7 court days' notice to the other parties; and

26 WHEREAS Plaintiff, having made the appropriate notice to the other parties in this matter,
27 now asks this Court to list the temporary stay,

28 ///

1 ORDER

2 Based upon the foregoing, and good cause appearing therefore:

3 IT IS HEREBY ORDERED that Plaintiff's motion to lift the temporary stay of this action
4 is GRANTED;

5 IT IS FURTHER ORDERED that the parties shall meet and confer regarding the
6 appropriate next steps in this case, and submit a joint status report within 14 days of the entry of
7 this order.

8
9 DATED this 4th day of

10 March, 2015.

11
12 for J. R. Russell
13 DISTRICT COURT JUDGE
14
15
16

17 Submitted by:

18
19 [Signature]
20 Don Springmeyer, Esq.
Nevada State Bar No. 1021
21 Bradley Schrager, Esq.
Nevada State Bar No. 10217
22 Daniel Bravo, Esq.
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28 Attorneys for Plaintiff

1 Don Springmeyer, Esq.
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9 *Attorneys for Plaintiff*

10 **THE FIRST JUDICIAL DISTRICT COURT**
11 **IN AND FOR CARSON CITY, NEVADA**
12

13 CODY C. HANCOCK, an individual and
resident of Nevada,

14 Plaintiff,

15 vs.
16

17 THE STATE OF NEVADA ex rel. THE
OFFICE OF THE NEVADA LABOR
18 COMMISSIONER; THE OFFICE OF THE
NEVADA LABOR COMMISSIONER; and
19 THORAN TOWLER, Nevada Labor
Commissioner, in his official capacity,
20

21 Defendants.

CASE NO: 14 OC 00080 1B

DEPT. NO: II

JOINT STATUS REPORT

22 Pursuant to the Court's Order of March 4, 2015, lifting the stay in this action, the parties
23 here submit their Joint Status Report.

24 Following a meet and confer to discuss outstanding issues in this case, the parties have
25 agreed to delimit portions of the operative complaint to maximize the efficiency of judicial and
26 party resources.

27 ///

28 ///

1 Plaintiff has agreed to voluntarily dismiss several of his claims, including that for
2 mandamus, and to file a Second Amended Complaint containing only two claims regarding
3 substantive challenges to the constitutionality of two sets of the Labor Commissioner's
4 administrative regulations, as well as a claim for injunctive relief to effect enforcement in the event
5 he prevails in the action. Plaintiff will submit the remainder of his regulatory concerns to the
6 rulemaking process at this time.

7 Defendants have agreed to withdraw their currently-pending motion to dismiss the
8 Amended Complaint upon filing of the Second Amended Complaint, and to stipulate to the filing of
9 Plaintiff's Second Amended Complaint, delimited as agreed between the parties.

10 The parties have agreed to a schedule for response to the Second Amended Complaint, and
11 have also agreed that it would best serve judicial economy and the aims of the parties to disclaim,
12 for the moment, discovery in this action, while reserving their rights to revisit that matter should the
13 necessity arise. The parties intend at this time to frame the determinative questions within
14 dispositive motions for the Court's consideration.

15 ///

16 ///

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1 The substantive agreements of the parties with regards to the above are also set forth in a
2 stipulation and proposed order filed concurrently herewith.

3 Dated this 6 day of March, 2015.

4 **WOLF, RIFKIN, SHAPIRO,**
5 **SCHULMAN & RABKIN, LLP**

6
7 By: _____

8 DON SPRINGMEYER, ESQ.

9 Nevada State Bar No. 1021

10 BRADLEY SCHRAGER, ESQ.

11 Nevada State Bar No. 10217

12 DANIEL BRAVO, ESQ.

13 Nevada State Bar No. 13078

14 Attorneys for Plaintiff

15
16 **ADAM PAUL LAXALT,**
17 **Nevada Attorney General**

18
19 By: _____

20 SCOTT DAVIS, ESQ.

21 Nevada State Bar No. 10019

22 Deputy Attorney General

23 *Attorneys for State of Nevada ex rel. Office of the*
24 *Labor Commissioner; Office of the Labor*
25 *Commissioner and Commissioner Thoran Towler*
26
27
28

1 CERTIFICATE OF SERVICE

2 I hereby certify that on this ____ day of March, 2015, a true and correct copy of the **JOINT**
3 **STATUS REPORT** was placed in an envelope, postage prepaid, addressed as stated below, in the
4 basket for outgoing mail before 4:00 p.m. at WOLF, RIFKIN, SHAPIRO, SCHULMAN &
5 RABKIN, LLP. The firm has established procedures so that all mail placed in the basket before
6 4:00 p.m. is taken that same day by an employee and deposited in a U.S. Mail box.

7 Scott Davis, Esq.

8 Deputy Attorney General

9 Nevada State Bar No. 10019

555 E. Washington Ave., # 3900

Las Vegas, NV 89101

10 (702) 486-3894

Attorneys for State of Nevada ex rel. Office of the Labor Commissioner;

11 *Office of the Labor Commissioner and Commissioner Thoran Towler*

12
13
14 By: _____

15 Dannielle R. Fresquez, an Employee of
16 WOLF, RIFKIN, SHAPIRO, SCHULMAN &
17 RABKIN, LLP
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Attorneys for Plaintiff

THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR CARSON CITY, NEVADA

CODY C. HANCOCK, an individual and
resident of Nevada,

Plaintiff,

vs.

THE STATE OF NEVADA ex rel. THE
OFFICE OF THE NEVADA LABOR
COMMISSIONER; THE OFFICE OF THE
NEVADA LABOR COMMISSIONER; and
SHANNON CHAMBERS, Nevada Labor
Commissioner, in her official capacity,

Defendants.

CASE NO: 14 OC 00080 1B

DEPT. NO: II

SECOND AMENDED COMPLAINT FOR

- 1) DECLARATORY RELIEF
PURSUANT TO N.R.S. 233B.110;
AND
- 2) INJUNCTIVE RELIEF PURSUANT
TO N.R.S. 33.010.

CODY C. HANCOCK (hereinafter "Plaintiff"), through undersigned counsel, complains and
alleges as follows:

INTRODUCTION

1. This lawsuit seeks declarations of this Court invalidating a number of regulations
promulgated by the Nevada Labor Commissioner purporting to implement Nevada Constitution Article
XV, Section 16, as well as a mandatory injunction barring Defendants from enforcing the
administrative regulations that are the subject of this Second Amended Complaint.

///

1 PARTIES

2 **A. Plaintiff**

3 2. Plaintiff Cody C. Hancock is a resident of the State of Nevada. He is employed as a
4 minimum wage worker at a national restaurant chain with locations in Nevada. He has, within the last
5 three years, been compensated at \$7.25 per hour for work he has performed for his employer, despite
6 not receiving qualifying health benefits from his employer at the time. The regulations described
7 herein, or their applications, interfere with or impair, or threaten to interfere with or impair, his legal
8 rights or privileges. As a current minimum wage worker, he has a direct and beneficial interest in an
9 appropriate regulatory regime enforcing the guarantees of provisions of the Nevada Constitution
10 enacted for his benefit.

11 **B. Defendants**

12 3. Defendant the State of Nevada is sued upon relation of the Office of the Nevada Labor
13 Commissioner.

14 4. Defendant the Office of the Nevada Labor Commissioner is charged with enforcing all
15 labor laws of the State of Nevada, and is sued in its own right pursuant to N.R.S. 233B.110.

16 5. Defendant Shannon Chambers is the current Labor Commissioner of the State of
17 Nevada, and is sued in her official capacity.

18 JURISDICTION AND VENUE

19 6. This Court has subject matter jurisdiction over this action, and venue is proper, pursuant
20 to N.R.S. 41.031 and N.R.S. 233B.110.

21 GENERAL ALLEGATIONS

22 **A. The 2006 Minimum Wage Amendment**

23 7. At the 2006 General Election Nevada voters approved, for the second time, a
24 constitutional amendment regarding the minimum wage to be paid to all Nevada employees.¹ The
25 amendment became effective on November 28, 2006, and was codified as new Article XV, Section 16
26 of the Nevada Constitution (the "Minimum Wage Amendment" or the "Amendment").

27
28 ¹ See Exhibit 1, here attached, a true and correct copy of the text of Nev. Const. art. XV, § 16.

1 8. The Minimum Wage Amendment guaranteed to each Nevada employee, with very
2 narrow and few exceptions, a particular hourly wage: "Each employer shall pay a wage to each
3 employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and
4 fifteen cents (\$5.15) per hour worked, if the employer provides health benefits as described herein, or
5 six dollars and fifteen cents (\$6.15) per hour if the employer does not provide such benefits." Nev.
6 Const. art. XV, § 16(A).

7 9. The Amendment contained an indexing/increasing mechanism, such that by 2015, the
8 current Nevada minimum wage level is \$7.25 per hour worked, if the employer provides health
9 benefits, or \$8.25 per hour, if the employer does not provide such benefits. This means employees
10 earning the lower amount per hour make more than 12% less than minimum wage workers paid at the
11 \$8.25 level.

12 10. Pursuant to the Amendment, employers must qualify for the privilege of paying their
13 minimum wage workers at the reduced wage level for every hour worked. In order to do so, employers
14 must provide qualifying health insurance benefits to their employees.

15 11. Furthermore, the premiums for the health insurance benefit plans provided to
16 employees—and all his or her dependents—may not exceed "10 percent of the employee's gross
17 taxable income from the employer." Nev. Const. art. XV, § 16(A).

18 12. The public policy and intent underlying the Amendment was to benefit Nevada's
19 minimum wage employees, and to incentivize the provision of low-cost, comprehensive health
20 insurance benefits to the state's lowest-paid workers, in exchange for a reduction in hourly pay.

21 13. Under the Amendment, employers of minimum wage-level workers faced a fairly
22 simple economic choice: Pay at the lower wage rate but arrange for qualifying health insurance at
23 capped cost levels, knowing that any excess premium costs would come out of the employers' pockets,
24 or simply pay the upper-tier rate and avoid the issues involved in contracting for and maintaining
25 health insurance for employees.

26 14. The problem that developed over the last decade, however, is that from that originally-
27 intended simple economic choice, employers have been permitted to devise a game they cannot lose,
28 and minimum wage employees cannot win.

1 15. Today, tens of thousands of Nevada minimum wage workers are being paid at the lower
2 rate (between \$7.25 and \$8.24 per hour) yet have no health insurance provided by their employer.

3 16. Since 2014, these employees have had to purchase insurance from state or federal
4 exchanges, at rates much higher than 10% of their income from their employer, or face I.R.S. tax
5 penalties under the Affordable Care Act, and they must do so with less money in their paychecks
6 because employers claim the privilege of underpaying the upper-tier minimum wage.

7 17. Currently, there are at least a dozen class action cases making their ways through
8 Nevada state and federal courts seeking back pay and damages against employers who offered their
9 workers the worst type of “junk insurance”—limited-benefits plans, fixed-indemnity plans, even mere
10 discount plans that do not even meet basic legal standards as health insurance—while paying below the
11 upper-tier wage, or employers who pay no heed to the 10% cap on premium costs when “offering”
12 health insurance plans to their employees.²

13 18. Furthermore, the vast majority of employees like Plaintiff being paid less than \$8.25 per
14 hour do not actually have health insurance benefits from their employer; the employer merely “offers”
15 the substandard insurance and then claims the right to pay down to \$7.25 for having done so.³

16 19. Employers, pursuant to unlawful regulation, also are calculating the 10% cap on
17 premium costs on income figures that include tips and gratuities, rather than wages actually paid by the
18 employer.

19 ///

20 ² See *Tyus et al. v. Wendy's of Las Vegas, Inc. et al.*, U.S. District Court, District of Nevada, 2:14-cv-
21 00729-GMN-VCF; *Hanks et al. v. Briad Restaurant Group, LLC*, U.S. District Court, District of
22 Nevada, 2:14-cv-00786-GMN-PAL; *Diaz et al. v. MDC Restaurants, LLC et al.*, Eighth Judicial
23 District Court, A701633; *Williams et al. v. Claim Jumper Acquisition Company, LLC*, Eighth Judicial
24 District Court, A702048; *McLaughlin v. Deli Planet, Inc.*, Eighth Judicial District Court, A703656;
25 *Perry et al. v. Terrible Herbst, Inc.*, Eighth Judicial District Court, A704428, *Lopez et al. v. Landry's*
26 *Inc. et al.*, Eighth Judicial District Court, A706449; *Smith v. Dee Lee Inc.*, Eighth Judicial District
27 Court, A710226; *Niedecker et al. v. Nevada Restaurant Services, Inc.*, Eighth Judicial District Court,
28 A713709; *Perera v. Western Cab Company*, Eighth Judicial District Court, A707425; *Gemma v. Boyd*
Gaming Corporation et al., Eighth Judicial District Court, A703790; *Cobb et al. v. Outback*
Steakhouse of Florida, LLC, Eighth Judicial District Court, A713623.

³ In the cases noted above, rates of enrollment in the offered sub-standard health insurance benefits
plans by employees paid less than the full \$8.25 wage rate run between 1% and 5% of eligible
workers.

1 20. These employers' conduct was made possible, in large part, by a regulatory regime that
2 implements the Minimum Wage Amendment in ways incompatible with its text, purpose, or meaning;
3 enforces no compliance by employers; engages in no monitoring of employers who pay less than \$8.25
4 per hour; and provides no scrutiny of the quality or substance of health insurance benefit plans
5 purportedly offered to minimum wage employees.

6 **B. The Nevada Labor Commissioner's Regulatory Scheme**

7 21. As the state officer charged with enforcing Nevada's labor laws, the Labor
8 Commissioner had two clear duties regarding the Amendment: 1) Promulgate regulations faithfully
9 implementing the Amendment; and 2) Construct a compliance scheme that would ensure that Nevada
10 workers received the benefits of the Amendment's protections.

11 22. In 2006, immediately after the effective date of the amendment approved at the 2006
12 general election but before the formal rulemaking process, the Nevada Labor Commissioner
13 promulgated emergency regulations (the "Emergency Regulations") intended to implement the newly
14 enacted Amendment.⁴

15 23. Thereafter, in April of 2007, the Labor Commissioner adopted a set of temporary
16 regulations (the "Temporary Regulations") intended to implement the Amendment.⁵

17 24. Finally, towards the end of 2007, the Labor Commissioner enacted permanent
18 regulations intended to implement the Minimum Wage Amendment (the "Permanent Regulations").
19 The Permanent Regulations, now found at N.A.C. 608.100 through 608.108, became effective on
20 October 31, 2007, and have remained unchanged since that time.⁶

21 25. The Permanent Regulations promulgated in 2007, and still in force, demonstrate that
22 Labor Commissioner made impermissible policy choices in setting the enforcement standards for the
23 Minimum Wage Amendment, and they are in direct conflict with the text, meaning, and/or public
24 policy of the constitutional amendment.

25
26 ⁴ See **Exhibit 2**, here attached, true and accurate copies of the 2006 Emergency Regulations.

27 ⁵ See **Exhibit 3**, here attached, true and accurate copies of the 2007 Temporary Regulations.

28 ⁶ See **Exhibit 4**, here attached, true and accurate copies of the Permanent Regulations, in their
current form.

1 i) "Providing" Benefits versus "Offering" Benefits: N.A.C. 608.100(1)

2 26. An overriding error of the regulatory regime implementing the Minimum Wage
3 Amendment was the Labor Commissioner's determination that if an employee declined health
4 insurance coverage offered by an employer, for whatever reason, the employer nonetheless could pay
5 the employee at the reduced minimum wage rate.

6 27. In other words, according to the regulations, an employee need not be "provided" with
7 health insurance benefits in order for an employer to take advantage of the lower wage rate, but merely
8 must be "offered" those benefits.⁷

9 28. N.A.C. 608.100(1) states:

10 Except as otherwise provided in subsections 2 and 3, the minimum wage for an
11 employee in the State of Nevada is the same whether the employee is a full-time,
permanent, part-time, probationary or temporary employee, and:

12 (a) If an employee is offered qualified health insurance, is \$5.15 per hour; or

13 (b) If an employee is not offered qualified health insurance, is \$6.15 per hour.

14 N.A.C. 608.100(1) (emphasis supplied).

15 29. The text of the Minimum Wage Amendment, however, states that "[t]he rate shall be
16 five dollars and fifteen cents per hour worked, if the employer provides health benefits as described
17 herein, or six dollars and fifteen cents per hour if the employer does not provide such benefits."

18 ⁷ The 2006 Emergency Regulations stated this policy choice by the Labor Commissioner in stark
19 terms (see **Exhibit 2**):

20 Sec. 6. If an employee declines health coverage under a qualified health
21 insurance plan offered by the employer, *the employee may be*
22 *paid in the lower minimum wage tier*, however the employer
23 must document that the employee has declined coverage and
declining coverage may not be a term or condition of
employment.

24 However, the Emergency Regulations had also stated, in Sec. 2, that "provision" of qualifying
benefits was required.

25 Sec. 2 Nevada has established a two-tiered minimum wage.

26 A. The first tier, lower tier, is from \$5.15 to \$6.14 per hour for
employers who provide qualified health insurance benefits.

27 B. The second tier, upper tier, is \$6.15 per hour for employers who
28 do not provide qualified health benefits.

1 (emphasis supplied).⁸ The meaning of the Amendment's language is plain on its face, and is directly
2 contradicted by N.A.C. 608.100(1).

3 30. By purporting to permit employers to pay less than the full minimum wage without
4 actually providing health insurance benefits to employees, N.A.C. 608.100(1) turns the incentives
5 inherent in the Minimum Wage Amendment on their heads.

6 31. Under the regulation, the greatest fiscal advantage to the employer is to "offer" but not
7 "provide" employees the low-premium, comprehensive health insurance benefits mandated under the
8 Amendment, and thus avoid the administrative or overhead issues associated with provision of benefits.

9 32. Not only is this interpretation contrary to the Amendment, the development from the
10 2006 Emergency Regulations, through the 2007 Temporary Regulations, and resulting in the 2007
11 Permanent Regulations demonstrates that the Labor Commissioner undertook a conscious set of policy
12 decisions to interpret and enforce the Amendment in a manner unsupported by and incompatible with
13 its text.

14 33. The Labor Commissioner's determination that the Amendment only requires employers
15 to "offer" or "make available" qualified health insurance benefit plans, rather than provide them, in
16 order to pay workers at the lower minimum wage rate also affects parts of N.A.C. 608.102(1) and (2),
17 N.A.C. 608.106, and N.A.C. 608.108, which follow from and incorporate the decision evident in
18 N.A.C. 608.100(1) to mandate only the "offering" of benefits.

19 34. Because the Minimum Wage Amendment requires provision of qualifying health
20 benefits in order to pay employees like Plaintiff below the full upper-tier minimum wage, N.A.C.
21 608.100(1) and its associated regulatory provisions are in conflict with and are not authorized by the
22 Nevada Constitution, and are therefore invalid.

23 ii) **Health Insurance Premium Costs: N.A.C. 608.102(3) and 608.104(2)**

24 35. The Minimum Wage Amendment requires provision of health insurance benefits "for
25 the employee and the employee's dependents at a total cost to the employee for premiums of not more
26 than 10 percent of the employee's gross taxable income from the employer," if the employer desires to
27

28 ⁸ See **Exhibit 1**, Nev. Const. art. XV, § 16(A).

1 compensate workers at the reduced minimum wage rate.⁹

2 36. The Labor Commissioner, instead of hewing to the clear and unmistakable language of
3 the Amendment, created and substituted a new regulatory concept: Employers could qualify to pay a
4 dollar less per hour if premiums amounted to "10 percent of the gross taxable income of the employee
5 attributable to the employer under the Internal Revenue Code."¹⁰

6 37. The Labor Commissioner further determined that "'gross taxable income of the
7 employee attributable to the employer' means the amount specified on the Form W-2 issued by the
8 employer to the employee and includes, without limitation, tips, bonuses or other compensation as
9 required for purposes of federal individual income tax."¹¹

10 38. In simple terms, the Labor Commissioner's regulations unlawfully permit employers to
11 figure in gratuities paid by the public in their calculations of the 10% health insurance premium cap for
12 sub-minimum wage employees.

13 39. For tipped employees like Plaintiff, some two-thirds of whose income can come from
14 gratuities paid by restaurant patrons rather than from the employer, this regulatory determination by the
15 Labor Commissioner both raises the amount Plaintiff could be made to pay for qualifying health
16 insurance coverage and renders employers offering more expensive plans than the constitutional
17 amendment contemplated eligible to pay their workers at the reduced minimum wage rate.

18 40. Nevada law does not permit a tip credit against minimum wage payments. N.R.S.
19 608.160(1)(b).¹² Nevada employers must pay at least the full minimum wage for every hour worked by
20 their employees. The Labor Commissioner, however, through N.A.C. 608.608.104(2), effectively
21 created by regulation a tip credit for purposes of calculating the allowable premium costs for health
22 insurance benefit plans, with no textual authorization to do so.

23 ⁹ See **Exhibit 1**, Nev. Const. art. XV, § 16(A) (emphasis supplied).

24 ¹⁰ See **Exhibit 4**, N.A.C. 608.102(3) (emphasis supplied). The 2006 Emergency Regulations, also
25 unlawfully, had based the 10% cap on premium costs to covered employees upon "the employee's
gross income as defined under the Internal Revenue Code." See **Exhibit 2**, Section 5(B).

26 ¹¹ See **Exhibit 4**, N.A.C. 608.104(2) (emphasis supplied).

27 ¹² Furthermore, the Amendment itself includes the following mandate: "Tips or gratuities received by
28 employees shall not be credited as being any part of or offset against the wage rates required by this
section." Nev. Const. art. XV, § 16(A)

1 41. As a result, current N.A.C. 608.102(3) and N.A.C. 608.104(2) allow employers to pay
2 employees at the lower minimum wage rate based upon merely having offered health insurance benefit
3 plans at calculated premium cost levels higher than is permitted by the Minimum Wage Amendment.

4 42. The premium cost calculation method allowed by N.A.C. 608.102(3) and N.A.C.
5 608.104(2) is in conflict with and is not authorized by the Nevada Constitution, and is therefore invalid.

6 **D. The Impact Upon Plaintiff and Other Nevada Minimum Wage Workers**

7 43. Upon information and belief, thousands of Nevada employees like Plaintiff are being
8 and have been paid at the reduced minimum wage rate, yet enjoy no qualifying health insurance
9 benefits provided by their employer, or only have access to plans that are not within clear guidelines
10 mandated by the Minimum Wage Amendment.

11 44. For more than eight years, since the approval and effective date of Article XV,
12 Section 16 of the Nevada Constitution, Nevada workers have logged, upon information and belief,
13 hundreds of thousands—millions, certainly—of hours at the reduced minimum wage rate, unlawfully,
14 due to regulations promulgated by the Nevada Labor Commissioner that are in conflict with
15 constitutional mandates and, therefore, in excess of his proper authority. Plaintiff himself has worked
16 many hundreds of hours at this wage level under such unlawful regulations.

17 **FIRST CLAIM FOR RELIEF**

18 **Declaratory Relief: Invalidity of N.A.C. 608.100(1)**

19 45. Plaintiff repeats and re-alleges each and every paragraph above as though they were
20 fully set forth at length herein.

21 46. N.A.C. 608.100 does not require Nevada employers to provide qualifying health
22 benefits in order to compensate workers at the reduced minimum wage rate, in contravention of Article
23 XV, Section 16 of the Nevada Constitution.

24 47. N.A.C. 608.100 violates constitutional provisions and/or exceeds the authority of the
25 Labor Commissioner to promulgate and enforce.

26 48. It is necessary for the Court to determine the legal rights of Plaintiff and Defendants
27 regarding promulgation and enforcement of the subject regulations.

28 *///*

1 49. Plaintiff has been forced to retain the services of an attorney to prosecute this action,
2 and is entitled to his reasonable attorney fees and costs of the action per order of the Court.

3 **SECOND CLAIM FOR RELIEF**

4 **Declaratory Relief: Invalidity of N.A.C. 608.102(3) and N.A.C. 608.104(2)**

5 50. Plaintiff repeats and re-alleges each and every paragraph above as though they were
6 fully set forth at length herein.

7 51. N.A.C. 608.102(3) and N.A.C. 608.104(2) permit calculation of allowable health
8 insurance benefit premium costs to minimum wage employees at a rate exceeding that permitted by
9 Article XV, Section 16 of the Nevada Constitution.

10 52. N.A.C. 608.102(3) and N.A.C. 608.104(2) violate constitutional provisions and/or
11 exceed the authority of the Labor Commissioner to promulgate and enforce.

12 53. It is necessary for the Court to determine the legal rights of Plaintiff and Defendants
13 regarding promulgation and enforcement of the subject regulations.

14 54. Plaintiff has been forced to retain the services of an attorney to prosecute this action,
15 and is entitled to his reasonable attorney fees and costs of the action per order of the Court.

16 **THIRD CLAIM FOR RELIEF**

17 **Injunctive Relief**

18 55. Plaintiff repeats and re-alleges each and every paragraph above as though they were
19 fully set forth at length herein.

20 56. The regulations that constitute the subjects of Plaintiff's First and Second Claims for
21 Relief, if continued to be enforced by the State of Nevada, the Labor Commissioner, or the Nevada
22 Department of Business & Industry, threaten ongoing violation of and damage to Plaintiff's rights
23 respecting the subject of the present action, and would tend to render judgment ineffectual.

24 57. The Court, therefore, should immediately and permanently enjoin and prohibit
25 Defendants from enforcing the subject regulations.

26 58. Plaintiff has been forced to retain the services of an attorney to prosecute this action,
27 and is entitled to his reasonable attorney fees and costs of the action per order of the Court.

28

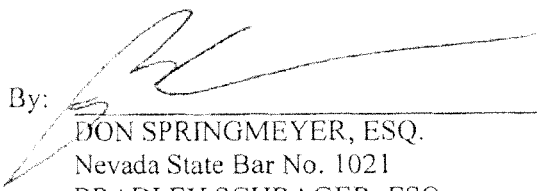
1 PRAYER FOR RELIEF

2 WHEREFORE, Plaintiff requests that this Court:

- 3 A. Declare and adjudge N.A.C. 608.100(1), 608.102(3), and 608.104(2) invalid as
4 indicated herein;
- 5 B. Issue a mandatory injunction against Defendants prohibiting them from enforcing said
6 regulations henceforth;
- 7 C. Grant all other relief of any variety deemed necessary and proper by the Court to
8 effectuate its judgment and remedy claims of Plaintiff; and
- 9 D. Award Plaintiff his reasonable attorney fees and costs of suit.

10 DATED this 17 day of March, 2015.

11 **WOLF, RIFKIN, SHAPIRO,**
12 **SCHULMAN & RABKIN, LLP**

13
14 By: 

15 DON SPRINGMEYER, ESQ.

16 Nevada State Bar No. 1021

17 BRADLEY SCHRAGER, ESQ.

18 Nevada State Bar No. 10217

19 DANIEL BRAVO, ESQ.

20 Nevada State Bar No. 13078

21 3556 E. Russell Road, Second Floor

22 Las Vegas, Nevada 89120

23 *Attorneys for Plaintiff*

1 CERTIFICATE OF SERVICE

2 I hereby certify that on this 19th day of March, 2015, a true and correct copy of this
3 **SECOND AMENDED COMPLAINT FOR 1) DECLARATORY RELIEF PURSUANT TO**
4 **N.R.S. 233B.110; AND 2) INJUNCTIVE RELIEF PURSUANT TO N.R.S. 33.010** was placed in an
5 envelope, postage prepaid, addressed as stated below, in the basket for outgoing mail before 4:00 p.m.
6 at WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP. The firm has established procedures
7 so that all mail placed in the basket before 4:00 p.m. is taken that same day by an employee and
8 deposited in a U.S. Mail box.

9
10 Scott R. Davis, Esq.
11 State of Nevada
12 Office of the Attorney General
13 555 E. Washington Avenue, Ste. 3900
14 Las Vegas, NV 89101
15 *Attorney for Office of the Labor Commissioner*

16 By: Dannielle Fresquez
17 Dannielle Fresquez, an Employee of
18 WOLF, RIFKIN, SHAPIRO, SCHULMAN &
19 RABKIN, LLP
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EXHIBIT “1”

Nev. Const. Art 15, Sec. 16.

Payment of minimum compensation to employees.

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.

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 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.

EXHIBIT “2”

PROPOSED EMERGENCY REGULATIONS OF THE
LABOR COMMISSIONER
NOVEMBER 29, 2006

EXPLANATION- Matter that is underlined is new; matter in brackets [omitted material] is material to be omitted.

AUTHORITY: §§1-13, NRS 607.160(i)(b), NRS 608.270, NRS 608.018, NRS 233B.0613.

Section 1. Chapter 608 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 12, inclusive, of this regulation. This regulation shall expire at the end of 120 days from filing with the Secretary of State or upon the filing of a temporary or permanent regulation whichever should occur first.

- Sec.2. Nevada has established a two-tiered minimum wage.
- A. The first tier, lower tier, is from \$5.15 to \$6.14 per hour for employers who provide qualified health insurance benefits.
 - B. The second tier, upper tier, is \$6.15 per hour for employers who do not provide qualified health benefits.
- Sec.3. The minimum wage may be adjusted annually.
- A. These rates will be adjusted annually to include increases in the federal minimum wage and a yearly cost of living adjustment as set forth in Article 15, Section 16 of the Constitution of Nevada.
 - B. The annual adjustments will be announced in April and become effective on July 1 of each year.
 - C. Each minimum wage tier will increase by the same dollar amount as the federal rate increase.
- Sec. 4. A. The minimum wage applies to all employees in Nevada.
- B. The minimum wage exemptions codified at NRS 608.250(2) conflict with Article 15, Section 16 of the Constitution of Nevada and are no longer applicable.
 - C. People under the age of 18, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days are not considered employees for the purpose of compliance with the minimum wage.
 - D. There is no distinction between whether an employee is full-time, permanent, part-time, or temporary.
- Sec. 5. In order to qualify for the lower minimum wage tier an employer must comply with all of the following:
- A. Health insurance coverage must be made available to the employee and the employees dependents; and

- B. The employee's share of the cost of the premium cannot exceed 10% of the employee's gross income as defined under the Internal Revenue Code for the time interval between the premium payments; and
- C. The health insurance must be a policy, contract, certificate or agreement offered or issued by a carrier authorized by the Nevada Insurance Commissioner to provide, deliver, arrange for, pay for or reimburse any of the costs of health care services or, in the alternative, any federally approved self-funded plans established under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, except that medical discount plans as defined by NRS 695H.050 and workers compensation insurance do not qualify as health insurance.

Sec. 6. If an employee declines coverage under a qualified health insurance plan offered by the employer, the employee may be paid in the lower minimum wage tier, however, the employer must document that the employee has declined coverage and declining coverage may not be a term or condition of employment.

Sec. 7. If an employer offers qualified health insurance, but for some reason the employee is not eligible to receive the coverage provided by the employer or there is a delay before the coverage can become effective, the employee must be paid the upper tier wage until such time as the employee becomes eligible and is offered coverage or when the insurance becomes effective.

Sec. 8. For the purposes of complying with the overtime provisions of NRS 608.018(1),

- A. An employer who qualifies for the lower tier minimum wage shall pay all employees with a base hourly rate of \$7.725 per hour or less overtime whenever the employee works more than eight hours in a workday.
- B. An employer who is required to pay the upper tier minimum wage shall pay all employees with a base hourly rate of \$9.225 per hour or less overtime whenever the employee works more than eight hours in a workday.

EXHIBIT “3”

Chapter 608 of NAC

LCB File No. T004-07

**ADOPTED TEMPORARY REGULATION OF THE
OFFICE OF THE LABOR COMMISSIONER**

Filed with the Secretary of State on April 10, 2007

EXPLANATION- Matter that is *italicized* is new; matter in brackets ~~[omitted material]~~ is material to be omitted.

AUTHORITY: § § 1-10; Article 15, Section 16, the constitution of the State of Nevada, NRS 607.110, NRS 607.160.

Section 1. Chapter 608 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 9, inclusive, of this regulation.

Sec. 2. *Definition of minimum wage tiers.*

1. *The lower tier is from \$5.15 to \$6.14 per hour for employees who offered qualified health insurance benefits.*
2. *The upper tier is \$6.15 per hour for employees who are not offered qualified health benefits.*
3. *An employer must pay the upper tier rate unless the employee qualifies for the lower tier rate.*
4. *These rates may change based on the annual adjustments as set forth in Article 15, Section 16 of the Constitution of Nevada.*

Sec. 3. *Applicability of Minimum Wage.*

1. *The minimum wage applies to all employees in Nevada.*
2. *The only exceptions to the minimum wage are*
 - (a) Persons under the age of 18; or*
 - (b) Persons employed by a nonprofit organization for after school or summer employment; or*
 - (c) Persons employed as trainees for a period not longer than ninety (90) days as interpreted by the U. S. Department of Labor pursuant to Section 6(g) of the Fair Labor Standards Act; or*
 - (d) Persons employed under a valid collective bargaining agreement where Article 15, Section 16 of the Nevada Constitution relating to minimum wage, tip credit or other provisions included therein have been waived in clear and unambiguous terms.*
3. *There is no distinction between full-time, permanent, part-time, probationary, or temporary employees.*

Sec. 4. *In order to qualify for the lower minimum wage tier an employer must comply with all of the following:*

1. *Qualified health insurance coverage must be made available to the employee and the employee's dependents, if any. For the purposes of this section, qualified health insurance coverage is "available to the employee and employee's dependents" when an employer contracts for or otherwise maintains qualified health insurance for the class of employees of which the employee is a member, subject only to fulfillment of the conditions required to complete the coverage which are applicable to all similarly-situated employees within this class, unless the waiting period exceeds six months; and*
2. *The employee's share of the cost of the premium cannot exceed 10% of the employee's gross taxable income attributable to the employer as defined under the Internal Revenue Code;*
 - (a) *"Gross Taxable Income" attributable to the employer means the amount specified on the employee's W-2 issued by the employer and includes tips, bonuses or other compensation as required for purposes of federal individual income tax.*
 - (b) *To determine whether the employee's share of the premium does not exceed 10% of the employee's gross taxable income, the employer may:*
 - I. *For an employee for whom the employer has issued a W-2 for the immediately preceding year, divide the gross taxable income from the employer into the projected employee's share of the premiums for qualified health insurance for the current year;*
 - II. *For an employee for which the employer has not issued a W-2 and has payroll information for the four prior quarters, divide the combined total of gross taxable income normally calculated from this payroll information from these four quarters into the projected employee's share of the premiums for qualified health insurance for these four quarters;*
 - III. *For an employee for which there is less than an aggregate year of payroll information, the employer shall*
 - 1) *take the total payroll information available for the employee determine the combined total of gross taxable income normally calculated from this payroll information; and*
 - 2) *After dividing it by the number of weeks it represents and multiplying it by 52, divide this annualized number into the projected employee's share of the premiums for qualified health insurance for the current year;*
 - IV. *For a new employee, promoted employee, or an employee who turns eighteen years of age during employment, the employer shall wait until the employee has completed two normal payroll periods and then utilize this payroll information as set forth in subsection 3 above relating to an employee for which there is less than a complete year of employment; and*
3. *Offers a health benefit plan that meets one of the following requirements:*
 - (a) *The plan covers only those categories of health care expenses that are generally deductible by employees on their individual federal income tax returns pursuant to the provisions of 26 U.S.C. Sec. 213 and any federal*

- regulations relating thereto, if those expenses had been borne directly by those employees; or*
- (b) Provides health benefits pursuant to a Taft-Hartley trust which:*
- I. Is formed pursuant to 29 U.S.C. Sec. 186(c)(5); and*
 - II. Qualifies as an employee welfare benefit plan under the Internal Revenue Service guidelines; or*
- (c) Is a qualified employee welfare benefit plan pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1001 et seq.*

Sec. 5. An employer may decide to pay the maximum wage rate for minimum wage currently applicable in lieu of making any determination under this regulation that the employee may be paid the lower minimum wage rate.

Sec. 6. If a determination is made that the employee's share of the premium does not exceed 10% of the employee's gross taxable income from the employer, the employer may pay the employee through the end of the calendar year for which the determination has been made either:

- 1. The lowest minimum wage rate currently applicable; or*
- 2. Any amount within the lower minimum wage tier currently applicable.*

Sec. 7. If an employee declines coverage under a qualified health insurance plan offered by the employer, the employer must document that the employee has declined coverage. Declining coverage may not be a term or condition of employment.

Sec. 8. If an employer offers qualified health insurance with a waiting period of no more than 6 months, the employee may be paid at the lower tier wage rate. If an employer does not offer a qualified health insurance plan or the health benefit plan is not available or the health benefit plan is not provided within 6 months of employment, the employee must be paid the upper tier wage rate until such time as the employee becomes eligible and is offered coverage or when the insurance becomes effective. The term of the waiting period may be modified in a bona fide collective bargaining agreement, but only if the modification is explicitly set forth in such agreement in clear and unambiguous terms.

Sec. 9. For the purposes of complying with the daily overtime provisions of NRS 608.018(1), an employer shall pay overtime based on the minimum wage tier for which that employee is qualified.

Sec. 10. NAC 608.110 is hereby repealed

~~[NAC 608.110-Minimum wage. (NRS 608.250) The minimum wage for an employee in private employment who:~~

- ~~1-Is 18 years of age or older is \$5.15 per hour.~~
- ~~2-Is under 18 years of age is \$4.38 per hour.]~~

NOTICE OF ADOPTION OF TEMPORARY REGULATION
LCB File No. T004-07

The Office of the Labor Commissioner adopted temporary regulations assigned LCB File No. T004-07 which pertain to chapter 608 of the Nevada Administrative Code on March 6, 2007.

INFORMATIONAL STATEMENT

Pursuant to NRS 233B.066, the Office of the Labor Commissioner provides the following information concerning newly adopted temporary regulations for NAC 608.

(a) A description of how public comment was solicited, a summary of the public response, and an explanation how other interested persons may obtain a copy of the summary.

Public comment on the proposed rule was solicited on the agency website, posted notices, e-mail, direct mail to persons on the agency 233B mailing list, public workshops, and press releases. Copies of the summary are available through the agency website or upon request from the agency.

(b) The number of persons who:

(1) Attended each hearing:

Forty-four people attended the hearing, twenty-five in Las Vegas and nineteen in Carson City.

(2) Testified at each hearing:

Seven individuals testified at the hearing.

(3) Submitted to the agency written statements:

Written comments were received from six individuals and organizations.

Andrea McHenry of Administaff and Cecilia Renn Kurzweg of ADP Total Source submitted comments concerning health insurance provided by professional employer organizations (PEO) who sponsor and maintain benefit plans for clients pursuant to "co-employment relationships."

Gary Reed a Nevada casino dealer submitted comments concerning the 10% gross taxable income requirement.

Tom Haynie representing Manpower Inc. of Southern Nevada and the Nevada Staffing Association submitted questions concerning the insurance requirements.

Jen Sarafina of the Kamer, Zucker & Abbott law firm submitted comments concerning the insurance requirements.

Samuel McMullen representing the Nevada Restaurant Association, Retail Association of Nevada, and Las Vegas Chamber of Commerce submitted language related to trainees as defined in section 3(2)(c) of the regulation.

(c) A description of how comment was solicited from affected businesses, a summary of their response, and an explanation how other interested persons may obtain a copy of the summary:

Comments were solicited through posted notices, by direct mail to organizations and individuals on the agency mailing list, posting on the agency website, by e-mail, press releases and workshops.

(d) If the regulation was adopted without changing any part of the proposed regulation, a summary of the reasons for adopting the regulation without change:

Several changes were made in the proposed regulation. Section 4(1) the language concerning contracting for and maintaining health insurance was changed to accommodate other types of health insurance. Section 4(1) was also changed to reflect a standard waiting period of 6 months. Section 4(2)(b)(IV) was changed to include employees who are promoted. A change was suggested to Section 4, which would give the labor commissioner discretion to consider other types of health benefits, however, the change was not adopted because the labor commissioner felt that the office currently lacks the expertise to make such determinations. Section 7 was changed to eliminate the requirement for a signed waiver of coverage. Section 8 was changed to reflect that the standard six month waiting period could be waived in a collective bargaining agreement.

(e) The estimated economic effect of the regulation on the businesses which it is to regulate and on the public.

Impact on businesses that are regulated:

(1) Both adverse and beneficial effects:

The constitutional amendment itself may generate both adverse and beneficial effects however those effects have yet to be identified and quantified. The regulations are intended to clarify the constitutional requirements in order to minimize adverse effects from confusion over the requirements conversely a clearer understanding of the requirements provides a benefit to businesses attempting to attain compliance.

(2) Both immediate and long-term effects:

The immediate effect of the regulations is to provide a clearly understanding of the requirements of the constitutional amendment related to minimum wage in order to apprise employers and employees of their rights and responsibilities. Over the long term it will make it easier for employers to understand what they need to do to stay in compliance.

Impact on the public:

(1) Both adverse and beneficial effects:

The regulation should be neutral in terms of impacts on the public, however the effect of the constitutional amendment itself should be significant but cannot be assessed at this time.

(2) *Both immediate and long-term effects:*

The regulation should be neutral in terms of short-term and long-term effects on the public.

(f) *The estimated cost to the agency for enforcement of the proposed regulation:*

We anticipate that there will be additional costs to the agency for enforcement primarily related to increased claims and complaints related to enforcement of the state's daily overtime requirements.

(g) *A description of any regulations of other state or government agencies which the proposed regulation overlaps or duplicates and a statement explaining why the duplication or overlapping is necessary. If the regulation overlaps or duplicates a federal regulation, the name of the regulating federal agency:*

Nevada's minimum wage parallels the federal minimum wage as set forth in the Fair Labor Standards Act. Because the FLSA is not a preemptive statute there are instances where regulation duplicates federal regulations. For example, section 3(2)(c) which adopts the federal standards for trainees duplicates the federal regulation in order to ensure that there is no gap in coverage for employees who otherwise may not be included under either regulation.

(h) *If the regulation includes provisions which are more stringent than a federal regulation which regulates the same activity, a summary of such provisions:*

Because the constitutional amendment establishes a more stringent minimum wage requirement than currently exists under federal law the regulations are necessarily more stringent than the federal requirements, with the exception of those provisions such as section 3(2)(c), described above, which are intended to harmonize state and federal requirements wherever possible.

(i) *If the regulation provides a new fee or increases an existing fee, the total annual amount the agency expects to collect and the manner in which the money will be used:*

No new fees are involved.

Submitted this 10th day of April 2007

MICHAEL TANCHEK
LABOR COMMISSIONER

EXHIBIT “4”

NAC 608.100 Minimum wage: Applicability; rates; annual adjustments.
(Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

1. Except as otherwise provided in subsections 2 and 3, the minimum wage for an employee in the State of Nevada is the same whether the employee is a full-time, permanent, part-time, probationary or temporary employee, and:
 - (a) If an employee is offered qualified health insurance, is \$5.15 per hour; or
 - (b) If an employee is not offered qualified health insurance, is \$6.15 per hour.
2. The rates set forth in subsection 1 may change based on the annual adjustments set forth in Section 16 of Article 15 of the Nevada Constitution.
3. The minimum wage provided in subsection 1 does not apply to:
 - (a) A person under 18 years of age;
 - (b) A person employed by a nonprofit organization for after-school or summer employment;
 - (c) A person employed as a trainee for a period not longer than 90 days, as described by the United States Department of Labor pursuant to section 6(g) of the Fair Labor Standards Act; or
 - (d) A person employed under a valid collective bargaining agreement in which wage, tip credit or other provisions set forth in Section 16 of Article 15 of the Nevada Constitution have been waived in clear and unambiguous terms.
4. As used in this section, "qualified health insurance" means health insurance coverage offered by an employer which meets the requirements of NAC 608.102.

(Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

NAC 608.102 Minimum wage: Qualification to pay lower rate to employee offered health insurance. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

To qualify to pay an employee the minimum wage set forth in paragraph (a) of subsection 1 of NAC 608.100, an employer must meet each of the following requirements:

1. The employer must offer a health insurance plan which:
 - (a) Covers those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213 and any federal regulations relating thereto, if such expenses had been borne directly by the employee; or
 - (b) Provides health benefits pursuant to a Taft-Hartley trust which:
 - (1) Is formed pursuant to 29 U.S.C. § 186(c)(5); and
 - (2) Qualifies as an employee welfare benefit plan:
 - (I) Under the guidelines of the Internal Revenue Service; or
 - (II) Pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.
2. The health insurance plan must be made available to the employee and any dependents of the employee. The Labor Commissioner will consider such a health insurance plan to be available to the employee and any dependents of the employee when:
 - (a) An employer contracts for or otherwise maintains the health insurance plan for the class of employees of which the employee is a member, subject only to fulfillment of conditions required to complete the coverage which are applicable to all similarly situated employees within the same class; and
 - (b) The waiting period for the health insurance plan is not more than 6 months.
3. The share of the cost of the premium for the health insurance plan paid by the employee must not exceed 10 percent of the gross taxable income of the employee attributable to the employer under the Internal Revenue Code, as determined pursuant to the provisions of NAC 608.104.

(Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

NAC 608.104 Minimum wage: Determination of whether employee share of premium of qualified health insurance exceeds 10 percent of gross taxable income. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

1. To determine whether the share of the cost of the premium of the qualified health insurance paid by the employee does not exceed 10 percent of the gross taxable income of the employee attributable to the employer, an employer may:

- (a) For an employee for whom the employer has issued a Form W-2 for the immediately preceding year, divide the gross taxable income of the employee paid by the employer into the projected share of the premiums to be paid by the employee for the health insurance plan for the current year;
- (b) For an employee for whom the employer has not issued a Form W-2, but for whom the employer has payroll information for the four previous quarters, divide the combined total of gross taxable income normally calculated from the payroll information from the four previous quarters into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year;
- (c) For an employee for whom there is less than 1 aggregate year of payroll information:
 - (1) Determine the combined total gross taxable income normally calculated from the total payroll information available for the employee and divide that number by the number of weeks the total payroll information represents;
 - (2) Multiply the amount determined pursuant to subparagraph (1) by 52; and
 - (3) Divide the amount calculated pursuant to subparagraph (2) into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year; and
- (d) For a new employee, promoted employee or an employee who turns 18 years of age during employment, use the payroll information for the first two normal payroll periods completed by the employee and calculate the gross taxable income using the formula set forth in paragraph (c).

2. As used in this section, "gross taxable income of the employee attributable to the employer" means the amount specified on the Form W-2 issued by the employer to the employee and includes, without limitation, tips, bonuses or other compensation as required for purposes of federal individual income tax.

(Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

NAC 608.106 Minimum wage: Declination by employee of coverage under health insurance plan. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

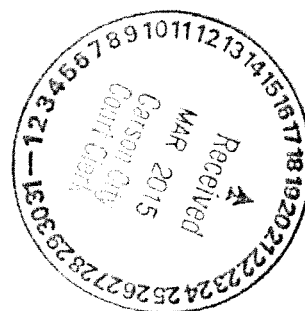
If an employee declines coverage under a health insurance plan that meets the requirements of NAC 608.102 and which is offered by the employer, the employer must maintain documentation that the employee has declined coverage. Declining coverage may not be a term or condition of employment.

(Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

NAC 608.108 Minimum wage: Requirements for payment at higher rate;
modification of term of waiting period. (Nev. Const. Art. 15,
§ 16; NRS 607.160, 608.250)

If an employer does not offer a health insurance plan, or the health insurance plan is not available or is not provided within 6 months of employment, the employee must be paid at least the minimum wage set forth in paragraph (b) of subsection 1 of NAC 608.100 until such time as the employee becomes eligible for and is offered coverage under a health insurance plan that meets the requirements of NAC 608.102 or until such a health insurance plan becomes effective. The term of the waiting period may be modified in a bona fide collective bargaining agreement if the modification is explicitly set forth in such agreement in clear and unambiguous terms.

(Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)



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SUSAN HERRIWEATHER

CLERK

BY *[Signature]* DEPUTY

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15 *Attorneys for Plaintiff*

10 **THE FIRST JUDICIAL DISTRICT COURT**
11 **IN AND FOR CARSON CITY, NEVADA**

13 CODY C. HANCOCK, an individual and
14 resident of Nevada,

15 Plaintiff,

16 vs.

17 THE STATE OF NEVADA ex rel. THE
18 OFFICE OF THE NEVADA LABOR
19 COMMISSIONER; THE OFFICE OF THE
20 NEVADA LABOR COMMISSIONER; and
21 THORAN TOWLER, Nevada Labor
Commissioner, in his official capacity,

Defendants.

CASE NO: 14 OC 00080 1B

DEPT. NO: II

22 **STIPULATION AND PROPOSED**
23 **ORDER WITHDRAWING MOTION TO**
24 **DISMISS AND PERMITTING LEAVE TO**
25 **FILE SECOND AMENDED COMPLAINT**

22 WHEREAS, Plaintiff in the above-entitled matter filed his Amended Complaint on June 6,
23 2014; and

24 WHEREAS Defendants filed their Motion to Dismiss the Amended Complaint on or about
25 June 24, 2014; and

26 ///

27 ///

28 ///

1 WHEREAS, after the recent stay period and in consideration of administrative attention to
2 aspects of Plaintiff's allegations, the parties have agreed to delimit portions of the litigation that
3 may be addressed through the administrative rulemaking procedures and proceed in this action only
4 with certain other agreed-upon claims; and

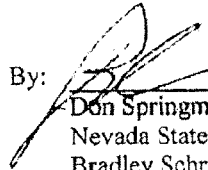
5 WHEREAS, the parties currently represent that discovery will not be a required component
6 of this litigation, and that motions and potentially cross-motions on matters of law may satisfy the
7 requirements of the litigants;

8 All parties to this suit STIPULATE and AGREE that Defendants' Motion to Dismiss
9 Plaintiff's Amended Complaint, filed on June 24, 2014, is withdrawn.

10 The parties further STIPULATE and AGREE that Plaintiff shall be permitted to file a
11 Second Amended Complaint within ten days of the entering of the proposed Order herein.

12 Dated this 16 day of March, 2015.

13 **WOLF, RIFKIN, SHAPIRO,**
14 **SCHULMAN & RABKIN, LLP**

15 By: 

16 Don Springmeyer, Esq.
17 Nevada State Bar No. 1021
18 Bradley Schrager, Esq.
19 Nevada State Bar No. 10217
20 Daniel Bravo, Esq.
21 Nevada State Bar No. 13078
22 *Attorneys for Plaintiff*

23 **ADAM PAUL LAXALT,**
24 **Nevada Attorney General**

25 By: _____

26 Scott Davis, Esq.
27 Nevada State Bar No. 10019
28 Deputy Attorney General
*Attorneys for State of Nevada ex rel. Office of the
Labor Commissioner; Office of the Labor
Commissioner and Commissioner Thoran Towler*

1 WHEREAS, after the recent stay period and in consideration of administrative attention to
2 aspects of Plaintiff's allegations, the parties have agreed to delimit portions of the litigation that
3 may be addressed through the administrative rulemaking procedures and proceed in this action only
4 with certain other agreed-upon claims; and

5 WHEREAS, the parties currently represent that discovery will not be a required component
6 of this litigation, and that motions and potentially cross-motions on matters of law may satisfy the
7 requirements of the litigants;

8 All parties to this suit STIPULATE and AGREE that Defendants' Motion to Dismiss
9 Plaintiff's Amended Complaint, filed on June 24, 2014, is withdrawn.

10 The parties further STIPULATE and AGREE that Plaintiff shall be permitted to file a
11 Second Amended Complaint within ten days of the entering of the proposed Order herein.

12 Dated this 16 day of March, 2015.

13 **WOLF, RIFKIN, SHAPIRO,**
14 **SCHULMAN & RABKIN, LLP**

15 By: _____

16 Don Springmeyer, Esq.
17 Nevada State Bar No. 1021
18 Bradley Schrager, Esq.
19 Nevada State Bar No. 10217
20 Daniel Bravo, Esq.
21 Nevada State Bar No. 13078
22 *Attorneys for Plaintiff*

23 **ADAM PAUL LAXALT,**
24 **Nevada Attorney General**

25 By: _____

26 Scott Davis, Esq.
27 Nevada State Bar No. 10019
28 Deputy Attorney General
*Attorneys for State of Nevada ex rel. Office of the
Labor Commissioner; Office of the Labor
Commissioner and Commissioner Thoran Towler*

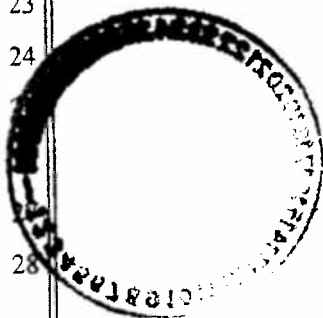
1 Based upon the foregoing, and good cause appearing therefore:

2 IT IS HEREBY ORDERED that the Parties' Stipulation is GRANTED as follows:

- 3 (1) Plaintiff shall have leave to file the Second Amended Complaint attached to
4 the parties' Stipulation within ten days of the entry of this Order.
5 (2) Defendants shall file any answer to the Second Amended Complaint within
6 20 days of the date on which the Complaint is filed.
7 (3) Upon the filing of Plaintiff's Second Amended Complaint, Defendants'
8 June 24, 2014, Motion to Dismiss shall be deemed withdrawn.

9 Do this 19 day of March, 2015.

10
11 
DISTRICT COURT JUDGE



ADAM PAUL LAXALT
Attorney General
Scott Davis, #10019
Deputy Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
(702) 486-3894
(702) 486-3416 (fax)
sdavis@ag.nv.gov
*Attorneys for Defendants State of Nevada
ex rel. Office of the Labor Commissioner,
Office of the Labor Commissioner and
Thoran Towler*

REC'D & FILED

2015 APR 10 PM 4:24

SUSAN MERRIWETHER
CLERK

BY J. HIGGINS DUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

CODY C. HANCOCK, an individual,
Plaintiffs,

vs.

THE STATE OF NEVADA *ex rel.* THE
OFFICE OF THE LABOR
COMMISSIONER; THE OFFICE OF THE
LABOR COMMISSIONER; and THORAN
TOWLER, Nevada Labor Commissioner in
his official capacity,

Defendants.

Case No.: 14 OC 00080 1B

Dept No.: 2

ANSWER TO SECOND AMENDED COMPLAINT

COMES NOW Defendant the STATE OF NEVADA *ex rel.* OFFICE OF THE LABOR
COMMISSIONER, the OFFICE OF THE LABOR COMMISSIONER and SHANNON
CHAMBERS in her official capacity as the Labor Commissioner of Nevada (collectively "Labor
Commissioner" or "Defendant"), by and through counsel of record ADAM PAUL LAXALT,
Attorney General of the State of Nevada, and Scott Davis, Deputy Attorney General and

1 hereby answers the Second Amended Complaint filed by Plaintiff Cody C. Hancock as
2 follows:

3 1. Answering paragraph 1 of Plaintiff's Second Amended Complaint, Defendant
4 alleges that the allegations in paragraph 1 state a legal conclusion and thus no answer is
5 required. To the extent that paragraph 1 alleges any factual allegations, Defendant is without
6 sufficient knowledge or information upon which to form a belief as to the truth or falsity of the
7 allegation and, upon that basis, denies the same.

8 2. Answering paragraph 2 of Plaintiff's Second Amended Complaint, Defendant is
9 without sufficient knowledge or information upon which to form a belief as to the truth or falsity
10 of the allegation and, upon that basis, denies the same.

11 3. Answering paragraph 3 of Plaintiffs' Second Amended Complaint, Defendant
12 admits the allegations contained therein.

13 4. Answering paragraph 4 of Plaintiffs' Second Amended Complaint, Defendant
14 denies the allegations contained therein.

15 5. Answering paragraph 5 of Plaintiffs' Second Amended Complaint, Defendant
16 admits the allegations contained therein.

17 6. Answering paragraph 6 of Plaintiffs' Second Amended Complaint, Defendant
18 admits the allegations contained therein.

19 7. Answering paragraph 7 of Plaintiffs' Second Amended Complaint, Defendant
20 admits the allegations contained therein.

21 8. Answering paragraph 8 of Plaintiff's Second Amended Complaint, Defendant
22 alleges that the allegations in paragraph 8 state a legal conclusion and thus no answer is
23 required. To the extent that paragraph 8 alleges any factual allegations, Defendant admits that
24 Plaintiff accurately quotes a portion of the language of Nev. Const. Art XV, §16(A) and denies
25 any other factual allegation stated within paragraph 8.

26 9. Answering paragraph 9 of Plaintiff's Second Amended Complaint, Defendant
27 admits that the current Nevada minimum wage is \$7.25 per hour worked if the employer
28

1 provides qualifying health benefits and is \$8.25 per hour if the employer does not provide such
2 benefits. Defendant alleges that the remaining allegations in paragraph 9 state a legal
3 conclusion and thus no answer is required. To the extent that paragraph 9 alleges any factual
4 allegations, Defendant is without sufficient knowledge or information upon which to form a
5 belief as to the truth or falsity of the allegation and, upon that basis, denies the same.

6 10. Answering paragraph 10 of Plaintiff's Second Amended Complaint, Defendant
7 alleges that the allegations in paragraph 10 state a legal conclusion and thus no answer is
8 required.

9 11. Answering paragraph 11 of Plaintiff's Second Amended Complaint, Defendant
10 alleges that the allegations in paragraph 11 state a legal conclusion and thus no answer is
11 required. To the extent that paragraph 11 alleges any factual allegations; Defendant admits
12 that Plaintiff accurately quotes the language of Nev. Const. Art XV, §16(A) and denies all other
13 factual allegations stated within paragraph 11.

14 12. Answering paragraph 12 of Plaintiff's Second Amended Complaint, Defendant is
15 without sufficient knowledge or information to form a belief as to the truth of the allegations in
16 paragraph 12 and, on that basis, denies the same.

17 13. Answering paragraph 11 of Plaintiff's Second Amended Complaint, Defendant
18 alleges that the allegations in paragraph 11 state a legal conclusion and thus no answer is
19 required. To the extent that paragraph 11 alleges any factual allegations, Defendant admits
20 the same.

21 14. Answering paragraph 14 of Plaintiffs' Second Amended Complaint, Defendant
22 denies the allegations contained therein.

23 15. Answering paragraph 15 of Plaintiff's Second Amended Complaint, Defendant is
24 without sufficient knowledge or information upon which to form a belief as to the truth or falsity
25 of the allegation and, upon that basis, denies the same.

1 16. Answering paragraph 16 of Plaintiff's Second Amended Complaint, Defendant is
2 without sufficient knowledge or information upon which to form a belief as to the truth or falsity
3 of the allegation and, upon that basis, denies the same.

4 17. Answering paragraph 17 of Plaintiff's Second Amended Complaint, Defendant is
5 without sufficient knowledge or information upon which to form a belief as to the truth or falsity
6 of the allegation and, upon that basis, denies the same.

7 18. Answering paragraph 18 of Plaintiff's Second Amended Complaint, Defendant is
8 without sufficient knowledge or information upon which to form a belief as to the truth or falsity
9 of the allegation and, upon that basis, denies the same.

10 19. Answering paragraph 19 of Plaintiff's Second Amended Complaint, Defendant
11 denies the same.

12 20. Answering paragraph 20 of Plaintiff's Second Amended Complaint, Defendant
13 denies the same.

14 21. Answering paragraph 21 of Plaintiff's Second Amended Complaint, Defendant
15 alleges that the allegations in paragraph 21 state a legal conclusion and thus no answer is
16 required.

17 22. Answering paragraph 22 of Plaintiffs' Second Amended Complaint, Defendant
18 admits the allegations contained therein.

19 23. Answering paragraph 23 of Plaintiffs' Second Amended Complaint, Defendant
20 admits the allegations contained therein.

21 24. Answering paragraph 24 of Plaintiffs' Second Amended Complaint, Defendant
22 admits the allegations contained therein.

23 25. Answering paragraph 25 of Plaintiff's Second Amended Complaint, Defendant
24 alleges that the allegations in paragraph 25 state a legal conclusion and thus no answer is
25 required. To the extent an answer to this allegation is required, Defendant denies the same.

26 26. Answering paragraph 25 of Plaintiff's Second Amended Complaint, Defendant
27 alleges that the allegations in paragraph 25 state a legal conclusion and thus no answer is
28

1 required. To the extent an answer to this allegation is required, Defendant admits that it has
2 adopted a regulation allowing for an employer to pay the lower-tier minimum wage if an
3 employee properly declines qualifying health insurance offered by the employer. Defendant
4 denies all other allegations stated in paragraph 26.

5 27. Answering paragraph 27 of Plaintiff's Second Amended Complaint, Defendant
6 alleges that the allegations in paragraph 27 state a legal conclusion and thus no answer is
7 required. To the extent an answer to this allegation is required, Defendant admits the same.

8 28. Answering paragraph 28 of Plaintiff's Second Amended Complaint, Defendant
9 alleges that the allegations in paragraph 28 state a legal conclusion and thus no answer is
10 required. To the extent an answer to this allegation is required, Defendant admits that the
11 allegations in paragraph 28 accurately quote NAC 608.100(1).

12 29. Answering paragraph 29 of Plaintiff's Second Amended Complaint, Defendant
13 alleges that the allegations in paragraph 29 state a legal conclusion and thus no answer is
14 required. To the extent an answer to this allegation is required, Defendant admits that the
15 allegations accurately quote a portion of the minimum wage amendment, but denies all other
16 allegations stated in paragraph 29.

17 30. Answering paragraph 30 of Plaintiff's Second Amended Complaint, Defendant
18 alleges that the allegations in paragraph 30 state a legal conclusion and thus no answer is
19 required. To the extent an answer to this allegation is required, Defendant denies the same.

20 31. Answering paragraph 31 of Plaintiff's Second Amended Complaint, Defendant
21 denies the same.

22 32. Answering paragraph 32 of Plaintiff's Second Amended Complaint, Defendant
23 denies the same.

24 33. Answering paragraph 33 of Plaintiff's Second Amended Complaint, Defendant
25 alleges that the allegations in paragraph 33 state a legal conclusion and thus no answer is
26 required. To the extent an answer to this allegation is required, Defendant denies the same.

1 34. Answering paragraph 34 of Plaintiff's Second Amended Complaint, Defendant
2 denies the same.

3 35. Answering paragraph 35 of Plaintiff's Second Amended Complaint, Defendant
4 alleges that the allegations in paragraph 35 state a legal conclusion and thus no answer is
5 required. To the extent that paragraph 35 alleges any factual allegations, Defendant admits
6 that Plaintiff accurately quotes a portion of the language of Nev. Const. art XV, §16(A) and
7 denies any other factual allegation stated within paragraph 35.

8 36. Answering paragraph 36 of Plaintiff's Second Amended Complaint, Defendant
9 admits that the allegations accurately quote a portion of NAC 608.102(3), but denies any other
10 factual allegation stated within paragraph 36.

11 37. Answering paragraph 37 of Plaintiff's Second Amended Complaint, Defendant
12 admits the same.

13 38. Answering paragraph 38 of Plaintiff's Second Amended Complaint, Defendant
14 alleges that the allegations in paragraph 38 state a legal conclusion and thus no answer is
15 required.

16 39. Answering paragraph 39 of Plaintiff's Second Amended Complaint, Defendant is
17 without sufficient knowledge or information upon which to form a belief as to the truth or falsity
18 of the allegation and, upon that basis, denies the same.

19 40. Answering paragraph 40 of Plaintiff's Second Amended Complaint, Defendant
20 alleges that the allegations in paragraph 40 state a legal conclusion and thus no answer is
21 required. To the extent that an answer is required, Defendant admits that NRS 608.160(1)(b)
22 does not permit a tip credit against minimum wage payments and that Nevada employers
23 must pay at least the full minimum wage for every hour worked by their employees.
24 Defendant denies all other allegations stated in paragraph 40.

25 41. Answering paragraph 41 of Plaintiff's Second Amended Complaint, Defendant
26 denies the same.

1 42. Answering paragraph 42 of Plaintiff's Second Amended Complaint, Defendant
2 denies the same.

3 43. Answering paragraph 43 of Plaintiff's Second Amended Complaint, Defendant
4 is without sufficient knowledge or information upon which to form a belief as to the truth or
5 falsity of the allegation and, upon that basis, denies the same.

6 44. Answering paragraph 44 of Plaintiff's Second Amended Complaint, Defendant is
7 without sufficient knowledge or information upon which to form a belief as to the truth or falsity
8 of the allegation and, upon that basis, denies the same.

9 45. Answering paragraph 45 of Plaintiff's Second Amended Complaint, this
10 Defendant repeats and realleges its answers to Paragraphs 1 through 44, inclusive, as though
11 fully set forth at this point and incorporated herein by reference.

12 46. Answering paragraph 46 of Plaintiff's Second Amended Complaint, Defendant
13 denies the same.

14 47. Answering paragraph 47 of Plaintiff's Second Amended Complaint, Defendant
15 denies the same.

16 48. Answering paragraph 48 of Plaintiff's Second Amended Complaint, Defendant
17 denies the same.

18 49. Answering paragraph 49 of Plaintiff's Second Amended Complaint, Defendant
19 denies the same.

20 50. Answering paragraph 50 of Plaintiff's Second Amended Complaint, this
21 Defendant repeats and realleges its answers to Paragraphs 1 through 49, inclusive, as though
22 fully set forth at this point and incorporated herein by reference.

23 51. Answering paragraph 51 of Plaintiff's Second Amended Complaint, Defendant
24 denies the same.

25 52. Answering paragraph 52 of Plaintiff's Second Amended Complaint, Defendant
26 denies the same.

3 54. Answering paragraph 54 of Plaintiff's Second Amended Complaint, Defendant
4 denies the same.

5 55. Answering paragraph 55 of Plaintiff's Second Amended Complaint, this
6 Defendant repeats and realleges its answers to Paragraphs 1 through 54, inclusive, as though
7 fully set forth at this point and incorporated herein by reference.

8 56. Answering paragraph 56 of Plaintiff's Second Amended Complaint, Defendant
9 denies the same.

57. Answering paragraph 57 of Plaintiff's Second Amended Complaint, Defendant denies the same.

12 58. Answering paragraph 58 of Plaintiff's Second Amended Complaint, Defendant
13 denies the same.

14 59. Defendant denies any allegation stated in Plaintiff's Second Amended Complaint
15 that is not expressly admitted herein.

18 1. Defendant is entitled to all immunities, defenses, exemptions and limitations granted
19 by law.

20 2. Plaintiff fails to state a claim upon which relief may be granted against Defendant.

21 3. Plaintiff's claims are barred, in whole or in part, by the principles of waiver, estoppel
22 and/or laches.

23 4. Plaintiff's claims are barred by the applicable statute of limitations.

24 5. Pursuant to NRS 607.190, Defendant is statutorily exempt from any adverse award of
25 costs or fees.

26 6. To the extent that Plaintiff seeks damages, Defendant is immune from any claim for
27 damages pursuant to immunity granted by NRS Chapter 41.

1 7. At the time of this filing, all possible affirmative defenses may not have been alleged
2 inasmuch as insufficient facts and other relevant information may not have been
3 available after reasonable inquiry, and therefore Defendant reserves the right to amend
4 this Answer to allege additional affirmative defenses if subsequent investigation
5 warrants the same.

6
7 **PRAYER FOR RELIEF**

8 WHEREFORE, the Labor Commissioner prays as follows:

- 9 1. That the Petitioner take nothing by way of its petition herein; and
10 2. That the Petition be denied and dismissed with prejudice; and
11 3. For such other and further relief as the Court may deem just and proper.

12 DATED this 06 day of April, 2015.

13 ADAM PAUL LAXALT
14 Attorney General

15 By: 

16 Scott Davis, # 10019
17 Deputy Attorney General
18 555 E. Washington Ave., # 3900
19 Las Vegas, NV 89101
20 (702) 486-3894
21 *Attorneys for Defendants State of Nevada*
22 *ex rel. Office of the Labor Commissioner,*
23 *Office of the Labor Commissioner and*
24 *Shannon Chambers*
25
26
27
28

AFFIRMATION

The undersigned does hereby affirm that the preceding document filed in this court does not contain the social security number of any person.

DATED this 06 day of April, 2015.

ADAM PAUL LAXALT
Attorney General

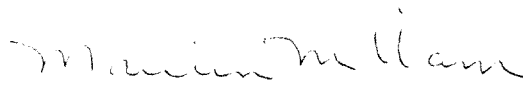
By: 

Scott Davis, # 10019
Deputy Attorney General
*Attorneys for Defendants State of Nevada
ex rel. Office of the Labor Commissioner,
Office of the Labor Commissioner and
Shannon Chambers*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada Office of the Attorney General and that on the 6th day of April, 2015 I served the foregoing ANSWER TO SECOND AMENDED COMPLAINT by serving a copy via U.S. Mail, first-class, postage-paid, as follows:

Don Springmeyer, Esq.
Bradley Schrager, Esq.
Daniel Bravo, Esq.
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120
Attorneys for Plaintiff


An Employee of the Attorney General's Office

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

ADAM PAUL LAXALT
Attorney General
Scott Davis, #10019
Deputy Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
(702) 486-3894
(702) 486-3416 (fax)
sdavis@ag.nv.gov
*Attorneys for Defendants State of Nevada
ex rel. Office of the Labor Commissioner,
Office of the Labor Commissioner and
Shannon Chambers*

REC'D & FILED
2015 MAY 26 PM 1:55
SUSAN HERRINGTON
BY V. Alegria CLERK
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

CODY C. HANCOCK, an individual,

Plaintiffs,

vs.

THE STATE OF NEVADA *ex rel.* THE
OFFICE OF THE LABOR
COMMISSIONER; THE OFFICE OF THE
LABOR COMMISSIONER; and THORAN
TOWLER, Nevada Labor Commissioner in
his official capacity,

Defendants.

Case No.: 14 OC 00080 1B

Dept No.: 2

STIPULATION AND PROPOSED ORDER TO SET BRIEFING SCHEDULE

WHEREAS, the parties to this litigation have previously stipulated that discovery will not be a required component of this litigation, and that motions and potentially cross-motions on matters of law may satisfy the requirements of the litigants;

Plaintiff CODY C. HANCOCK, by and through his counsel Bradley Schrager, Esq. of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP and Defendants the STATE OF NEVADA *ex rel.* OFFICE OF THE LABOR COMMISSIONER, the OFFICE OF THE LABOR

1 COMMISSIONER and SHANNON CHAMBERS in her official capacity as the Labor
2 Commissioner of Nevada by and through counsel of record Adam Paul Laxalt, Attorney
3 General of the State of Nevada, and Scott Davis, Deputy Attorney General now jointly
4 stipulate as follows:

5 1. That the requirement for an Early Case Conference be suspended by this Court
6 as permitted under NRCP 16.1(b)(1); and

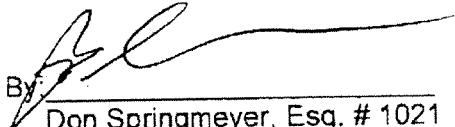
7 2. That the following briefing schedule for motions of law be adopted for this case:

- 8 - Deadline for dispositive motions of law: June 15, 2015;
9 - An opposing party shall have 30 days after service of the moving party's
10 motion within which to serve and file an opposition to the motion;
11 - The moving party shall have 15 days after service of the opposition to file
12 and serve a reply to the opposition;
13

14 3. The parties request a hearing date during the month of August, 2015 on the
15 contemplated motions. The parties will separately contact the Court after entry of this
16 stipulation and order to schedule the hearing.
17

18 DATED this 15th day of May, 2015

19
20 WOLF, RIFKIN, SHAPIRO,
21 SCHULMAN & RABKIN, LLP

22 By: 

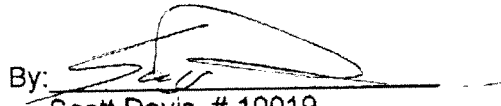
23 Don Springmeyer, Esq. # 1021
24 Bradley Schrager, Esq. # 10217
Daniel Bravo, Esq. # 13078
Attorneys for Plaintiff

25 ///

26 ///

27 DATED this 18 day of May, 2015

28 ADAM PAUL LAXALT
NEVADA ATTORNEY GENERAL

By: 

Scott Davis, # 10019
Deputy Attorney General
Attorneys for Defendants

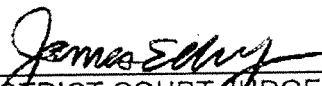
Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

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ORDER

It is so ordered.

Dated this 26 day of May, 2015


DISTRICT COURT JUDGE

1 DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
2 BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
3 **WOLF, RIFKIN, SHAPIRO,**
SCHULMAN & RABKIN, LLP
4 3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120-2234
5 Telephone: (702) 341-5200/Fax: (702) 341-5300
Email: dspringmeyer@wrslawyers.com
6 Email: bschrager@wrslawyers.com
Attorneys for Plaintiff
7

8 **THE FIRST JUDICIAL DISTRICT COURT**
9 **IN AND FOR CARSON CITY, NEVADA**

10 CODY C. HANCOCK, an individual and
11 resident of Nevada,

12 Plaintiff,

13 vs.

14 THE STATE OF NEVADA ex rel. THE
OFFICE OF THE NEVADA LABOR
15 COMMISSIONER; THE OFFICE OF THE
NEVADA LABOR COMMISSIONER; and
16 SHANNON CHAMBERS, Nevada Labor
Commissioner, in her official capacity,

17 Defendants.
18

CASE NO.: 14 OC 00080 1B
DEPT. NO.: II

**PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT**

19 Plaintiff CODY C. HANCOCK ("Plaintiff"), by and through his attorneys of record, files
20 this Motion for Summary Judgment, pursuant to N.R.C.P. 56, on Plaintiff's claims for declaratory
21 relief. This motion is based on the Memorandum of Points and Authorities below, all papers and
22 exhibits on file herein¹, and any oral argument this Court sees fit to allow at hearing on this matter.

23 ///

24 ///

25 ///

26 _____
27 ¹ See Declaration of Dan Hill, Esq., attached as **Exhibit 1**.
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. SUMMARY**

3 **THE TOP LINE:** The Court is asked to invalidate certain regulations of the Nevada Labor
4 Commissioner purporting to implement article XV, section 16 of the Nevada Constitution, but, in
5 reality, N.A.C. 608.100(1) and 608.104(2) are in direct conflict with clear Constitutional
6 commands.

7 **THIS IS IMPORTANT BECAUSE:** Employers have been withholding up to a dollar for
8 every hour worked by minimum wage employees based upon merely “offering” junk insurance
9 benefits, at premium costs far exceeding the constitutional maximum, so that tens of thousands of
10 Nevada workers are being denied the benefits of an amendment enacted by popular vote in 2006.

11 **II. INTRODUCTION**

12 This lawsuit seeks declarations invalidating two regulations promulgated by Defendant
13 Nevada Labor Commissioner (the “Commissioner”) purporting to implement article XV, section 16
14 of the Nevada Constitution (the “Minimum Wage Amendment” or the “Amendment”), as well as
15 an injunction barring Defendants from enforcing the subject regulations.

16 In 2004 and 2006, the people of Nevada overwhelmingly passed the Amendment, which
17 established a two-tiered minimum wage structure:

18 Each employer shall pay a wage to each employee of not less than the hourly rates
19 set forth in this section. The rate shall be five dollars and fifteen cents (\$5.15) per
20 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.

21 Nev. Const. art. XV, § 16(A).² The provision permits an employer to pay the lower-tier minimum

22
23
24 ² The Minimum Wage Amendment is subject to an indexing mechanism, such that by July 1,
25 2010, the upper-tier rate for employees who are not provided qualifying health insurance benefits
26 was raised to \$8.25 per hour, and the lower-tier rate for employees who are provided qualifying
27 health insurance benefits was raised to \$7.25 per hour. *See* State of Nevada, Minimum Wage, 2010
Annual Bulletin, April 1, 2010, http://www.laborcommissioner.com/min_wage_overtime/4-1-10
(accessed Apr. 30, 2015). The upper-tier and lower-tier rates have remained unchanged since that
28 time.

1 wage to those employees to whom it “*provides* health insurance benefits,” but if an employer “does
2 *not provide* such benefits” to an employee, it must pay that employee the upper-tier minimum
3 wage—a difference currently of more than 12%. *Id.* (emphasis supplied). The Amendment also
4 contains a cost cap concerning the premiums of health insurance plans provided by employers
5 attempting to pay employees less than the full, upper-tier minimum hourly wage:

6 Offering health benefits within the meaning of this section shall consist of making
7 health insurance available to the employee for the employee and the employee’s
8 dependents at a total cost of not more than 10 per cent of the employee’s gross
 taxable income from the employer.

9 *Id.*

10 In the weeks and months after the Minimum Wage Amendment became effective in
11 November of 2006, the Labor Commissioner promulgated, in succession, Emergency, Temporary,
12 and finally Permanent Regulations purporting to implement the provisions of the Amendment. The
13 focus in this case is upon two such regulations—N.A.C. 608.100(1) and 608.104(2)—which
14 conflict with the Nevada Constitution, and interfere with or impair, or threaten to interfere with or
15 impair, Plaintiffs’ legal rights pursuant to N.R.S. 233B.110.

16 Specifically, N.A.C. 608.100(1) purports to permit employers merely to “offer” health
17 benefits rather than “provide” them—a significant difference, obviously, and one that can only be
18 resolved by a close interpretation of the text and public policy of the Minimum Wage Amendment
19 itself. *See* N.A.C. 608.100(1).

20 Similarly, the Commissioner’s N.A.C. 608.104(2) alters the basis upon which employers
21 calculate the cap on premium costs to the employee when paying below the full, upper-tier
22 minimum hourly wage. Where the Amendment speaks of “gross taxable income *from the*
23 *employer*,” N.A.C. 608.104(2) allows inclusion of tips and gratuities, which come from consumers,
24 to determine the maximum costs of health insurance premiums. *Compare* Nev. Const. art. XV,
25 § 16(A) *with* N.A.C. 608.104(2). Again, the practical difference between the plain language of the
26 Amendment and the Commissioner’s interpretation is significant, as it can double or triple what
27 employers may charge workers for insurance while still paying them all the way down to \$7.25 per
28 hour. This is not authorized by the clear text of the Amendment.

1 As demonstrated herein, the Commissioner's interpretations of the Minimum Wage
2 Amendment, embodied in these regulations, contradict the plain language of the Amendment and
3 fail to implement and enforce the Amendment's terms and commands in a manner consistent with
4 its remedial purpose. For these reasons, Plaintiff asks the Court to enter an order invalidating the
5 subject regulations and enjoining their enforcement henceforth.

6 **III. ARGUMENT**

7 **A. Legal Standard**

8 Summary judgment under N.R.C.P. 56(a) is "appropriate and shall be rendered forthwith
9 when the pleadings and other evidence on file demonstrate that no genuine issue as to any material
10 fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Wood v.*
11 *Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (internal quotations omitted). "While the
12 pleadings and other proof must be construed in a light most favorable to the nonmoving party, that
13 party bears the burden to do more than simply show that there is some metaphysical doubt as to the
14 operative facts in order to avoid summary judgment being entered in the moving party's favor." *Id.*
15 at 732, 121 P.3d at 1031. The nonmoving party "must, by affidavit or otherwise, set forth specific
16 facts demonstrating the existence of a genuine issue for trial or have summary judgment entered
17 against him." *Id.*; see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505,
18 2511 (1986); *United States v. Arango*, 670 F.3d 988, 992 (9th Cir. 2012).³ Because partial
19 summary judgment allows a court "to isolate and dispose of factually unsupported claims or
20 defenses," the court construes the evidence before it "in the light most favorable to the opposing
21 party." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986).
22 N.R.C.P. 56(a) specifically permits the Court to entertain issues on partial summary judgment on
23 part of a claim or defense, and partial summary judgment can be useful for courts in focusing the
24 issues to be litigated, thus conserving judicial resources.

25
26 ³ Federal cases interpreting the Federal Rules of Civil Procedure "are strong persuasive
27 authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal
28 counterparts." *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990).

1 Pursuant to N.R.S. 233B.110, "The court shall declare the [challenged] regulation invalid if
2 it finds that it violates constitutional or statutory provisions or exceeds the statutory authority of the
3 agency." N.R.S. 223B.110.

4 **B. Undisputed Facts**

5 The undisputed facts are as follows:

- 6 1. The people of Nevada approved, at the general election of 2006, Question 6,
7 now codified at Article XV, Section 16 of the Nevada Constitution. The text
8 of that provision speaks for itself.
- 9 2. Plaintiff has filed suit, praying for declaratory and injunctive relief in the
10 form of invalidating N.A.C. 608.100 and N.A.C. 608.104 and enjoining
11 Defendants from enforcing the regulations. *See* Pl's. 2nd Amend. Compl.
- 12 3. Plaintiff is a resident of Nevada and a minimum-wage employee of a
13 national restaurant chain with locations in Nevada, where for the last three
14 years he has been compensated at an hourly rate of \$7.25. *See* Aff. Cody
15 Hancock ¶¶ 2-3, attached as **Exhibit 2**.
- 16 4. Plaintiff never, at any time during his employment, has enrolled in or has
17 been provided with qualifying health insurance benefits from his employer.
18 *See id.* ¶¶ 4-5.
- 19 5. Plaintiff has never been offered qualifying health benefits that comport with
20 Article XV, Sec. 16 of the Nevada Constitution, because his employer
21 figures in tips and gratuities that inflate the income basis upon which his
22 employer calculates allowable premium levels. *See id.* ¶¶ 4-6.

23 **C. Background, Context, And Interpretation Of Popularly-Enacted Measures**

24 Currently, there are more than a dozen cases pending before Nevada state and federal courts
25 alleging that employers failed to provide qualifying health insurance benefits to their workers while
26 paying them less than the full, upper-tier minimum hourly wage.⁴ Most of them allege that the
27

28 ⁴ *See Tyus et al. v. Wendy's of Las Vegas, Inc. et al.*, D. Nev., Case No. 2:14-cv-00729-GMN-VCF; *Hanks et al. v. Briad Restaurant Group, LLC*, D. Nev., Case No. 2:14-cv-00786-GMN-PAL; *Diaz et al. v. MDC Restaurants, LLC et al.*, Eighth Judicial District Court, Case No. A701633; *Gemma v. Boyd Gaming Corporation et al.*, Eighth Judicial District Court, Case No. A703790; *Leoni et al. v. Terrible Herbst, Inc.*, Eighth Judicial District Court, Case No. A704428; *Lopez et al. v. Landry's Inc. et al.*, Eighth Judicial District Court, Case No. A706449; *Perera v. Western Cab Company*, Eighth Judicial District Court, Case No. A707425; *Smith v. Dee Lee, Inc. d/b/a/ Marie Callender's Restaurant*, Eighth Judicial District Court, Case No. A710226; *Neidecker v. Nevada Restaurant Services, Inc.*, Eighth Judicial District Court, Case No. A713709; *Garcia v. Firefly West, LLC*, Eighth Judicial District Court, Case No. A717966; *Skadowski et al. v. Run Restaurants*,

(footnote continued on next page)

1 benefits plans made available by employers are of such low quality with regards to coverage that
2 they are basically worthless, and therefore do not comply with the mandates of the Minimum Wage
3 Amendment, or that the premium cost cap contained the Amendment had been exceeded.⁵ A
4 further component of these actions has been the establishment, through discovery, of the incredibly
5 low rates of acceptance and enrollment in employer-offered benefits plans being used by employers
6 to justify paying down to \$7.25 per hour. In the case of *Tyus et al v. Wendy's of Las Vegas, Inc. et*
7 *al.*, for example, more than 98% of current employees being paid less than \$8.25 per hour reject the
8 offered insurance; only ten out of approximate 600 sub-minimum wage Wendy's employees in Las
9 Vegas have accepted the insurance.⁶ This is largely because the coverage is very poor, there are no
10 out-of-pocket maximums, and the plans do not satisfy the Affordable Care Act's requirements
11 regarding minimum essential benefits, meaning even those employees who enroll still have to
12 purchase real, comprehensive health insurance on the state exchange or pay the tax penalty
13 imposed by the Internal Revenue Service.⁷ This is the context for the current suit questioning the
14 regulations which have played a role in permitting this situation to develop—a situation in which
15 employees statewide, including Plaintiff, are being paid a sub-minimum wage, without seeing any
16 of the benefits that were intended by the Minimum Wage Amendment.

17 The Amendment, obviously, was and remains an intensely remedial act of the people.
18 Where a statute or constitutional provision is remedial in nature, courts will liberally construe it to

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20
21 *LLC*, Eight Judicial District Court, Case No. A716660; *Nagy-Szakal v. Nevada Restaurant*
22 *Services, Inc.*, Eighth Judicial District Court, Case No. A716354; *Perry v. Terrible Herbst, Inc.*,
23 *Nevada Supreme Court*, Case No. 68030; *Williams v. District Court (Claim Jumper Acquisition*
Co., LLC), Nevada Supreme Court, Case No. 66629; *MDC Restaurants, LLC v. District Court*
(Diaz), Nevada Supreme Court, Case No. 67631.

24 ⁵ See, e.g., *Leoni et al. v. Terrible Herbst, Inc.*, *supra*, 2nd Amend. Compl. ¶¶ 22-32 (filed
Mar. 15, 2015); *Tyus et al. v. Wendy's of Las Vegas, Inc. et al.*, *supra*, ECF Doc. 3 at ¶¶ 29-30.

25 ⁶ See *Tyus et al. v. Wendy's of Las Vegas, Inc. et al.*, *supra*, ECF Doc. 48 at 3 n. 3.

26 ⁷ See *Tyus et al. v. Wendy's of Las Vegas, Inc. et al.*, *supra*, ECF Doc. 45 at 5-6; see also *Diaz et*
27 *al. v. MDC Restaurants, LLC et al.*, *supra*, Pl.'s Reply to Opp. to Mot. for P.S.J. at 18-20 (filed Jun.
28 6, 2015).

1 ensure the intended benefit for the intended beneficiaries. *See, e.g., Washoe Med. Ctr., Inc. v.*
2 *Reliance Ins. Co.*, 112 Nev. 494, 496, 915 P.2d 288, 289 (1996); *Colello v. Adm'r of Real Estate*
3 *Div. of State of Nev.*, 100 Nev. 344, 347, 683 P.2d 15, 17 (1984) (“Statutes with a protective
4 purpose should be liberally construed in order to effectuate the benefits intended to be obtained.”).
5 *See also Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951, 954 (2014),
6 *reh'g denied* (Jan. 22, 2015) (“Particularly where, as here, remedial statutes are in play, a putative
7 employer’s self-interested disclaimers of any intent to hire cannot control the realities of an
8 employer relationship.”). As detailed exhaustively below, the plentiful materials accompanying the
9 Amendment’s presentation to the voters who enacted it emphatically announce that its purpose was
10 to protect Nevada’s lowest wage earners by raising the minimum wage. Under the liberal
11 construction of remedial measures, this Court must resolve any ambiguities—should it perceive
12 any, or see that the regulations in question here rely upon any such ambiguities—in favor of the
13 persons the Amendment was designed to protect—the minimum wage employee, not the business
14 owners that employ them.

15 Interpreting a constitutional amendment by referendum such as this one requires a court to
16 inquire into the drafters’ and voters’ intent as gleaned from the history, policy, and purpose of the
17 constitutional provision. *See Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d
18 518, 608 (2014), *reh'g denied* (Sept. 24, 2014) (“The goal of constitutional interpretation is to
19 determine the public understanding of a legal text leading up to and in the period after its
20 enactment or ratification.”); *see also City of Sparks v. Sparks Mun. Court*, 129 Nev. Adv. Op. 38,
21 302 P.3d 1118, 1126 (2013) (“In the face of [an] ambiguity, we look beyond the language of the
22 provision to determine the intent of the voters in approving the amendment[.]”). Courts determine
23 the drafters’ and voters’ intent by construing the statute in a manner that conforms to reason and
24 public policy. *See Nevada Attorney for Injured Workers v. Nevada Self-Insurers Ass’n*, 126 Nev.
25 Adv. Op. 7, 225 P.3d 1265, 1271 (2010). Courts should use the authors’ construction
26 contemporaneous with the provision’s drafting and passage rather than any post hoc construction.
27 *See 6 Treatise on Const. L. § 23.32* (cited with approval by *Strickland v. Waymire*, 126 Nev. Adv.
28 Op. 25, 235 P.3d 605, 608-09 (2010)).

1 **D. The Boundaries of Regulatory Authority**

2 The principle of constitutional supremacy provides that a constitutional amendment is the
3 supreme law of the land and controlling over conflicting statutes or regulations addressing the same
4 issue. *See Thomas, supra*, 327 P.3d at 521 (constitutional supremacy prevents Nevada legislature—
5 and even more so Nevada agencies or regulators—from “creating exceptions to the rights and
6 privileges protected by Nevada’s constitution”). A constitution must not be construed according to
7 statutes or regulations; statutes or regulations instead must be construed consistent with a
8 constitution. *See Foley v. Kennedy*, 110 Nev. 1295, 1300, 885 P.2d 583, 586 (1994) (“The
9 constitution may not be construed according to a statute enacted pursuant thereto; rather, statutes
10 must be construed consistent with the constitution and, where necessary, in a manner supportive of
11 their constitutionality.”); *see also State, Div. of Ins. V. State Farm Mut. Auto. Ins. Co.*, 116 Nev.
12 290, 293, 995 P.2d 482, 485 (2000) (observing that “a court will not hesitate to declare a regulation
13 invalid when the regulation violates the constitution, conflicts with existing statutory provisions or
14 exceeds the statutory authority of the agency or is otherwise arbitrary and capricious.”).

15 Constitutional supremacy applies with even greater vigor to regulations promulgated by an
16 administrative agency such as the Labor Commission. It is not within the Commissioner’s power or
17 authority to construe statutes or constitutional provisions, as that is the province of the judiciary.⁸
18 The Commissioner merely is charged with enforcing—not altering—the labor laws of this state,
19 and may only adopt regulations which enable her to carry out such enforcement. *See*
20 N.R.S. 607.160; *Nevada Attorney for Injured Workers, supra*, 225 P.3d at 1271 (quoting *Jerry’s*
21 *Nugget v. Keith*, 111 Nev. 49, 54, 888 P.2d 921, 924 (1995)) (“We have established that
22 ‘administrative regulations cannot contradict the statute they are designed to implement.’”). *See*
23 *also Roberts v. State*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988) (“Administrative regulations

24 ⁸ *See Nev. Const. art. III, § 1* (“The powers of the Government of the State of Nevada shall be
25 divided into three separate departments, the Legislative, the Executive and the Judicial; and no
26 persons charged with the exercise of powers properly belonging to one of these departments shall
27 exercise any functions appertaining to either of the others, except in the cases expressly directed or
28 permitted in this constitution.”).

1 cannot contradict or conflict with the statute they are intended to implement.”). Neither will courts
2 defer to an agency’s interpretation of a statute or constitutional provision if the regulation “conflicts
3 with existing statutory provisions or exceeds the statutory authority of the agency.” *Nevada*
4 *Attorney for Injured Workers*, 225 P.3d at 1271.⁹

5 Here, the Commissioner’s regulations are in conflict with the Amendment. They cannot
6 withstand judicial scrutiny under the principles of constitutional supremacy and the limits of
7 regulatory authority, and are therefore invalid.

8 **E. “Providing” Health Insurance Versus Merely “Offering” It**

9 The Amendment’s plain language requires that employers *provide* qualifying health
10 insurance benefits to an employee—and not merely *offer* health insurance as the Commissioner’s
11 regulations suggest—before paying that employee the lower-tier minimum wage. *See* Nev. Const.
12 art. XV, § 16(A). Assuming, for the sake of argument, that the Amendment’s language is not clear
13 on its face, its history and intent, as well as sound statutory construction, yield the same conclusion.
14 This renders N.A.C. 608.100(1) invalid, as it impermissibly delimits and denies the benefits of the
15 Minimum Wage Amendment to Plaintiff and similarly-situated low-wage workers.

16 **1. N.A.C. 608.100(1) contradicts the Amendment’s plain language**

17 The Amendment states as follows:

18 Each employer shall pay a wage to each employee of not less than the hourly rates
19 set forth in this section. The rate shall be five dollars and fifteen cents (\$5.15) per
20 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.

21 Nev. Const. art. XV, § 16(A) (hereinafter, “the wage provision”). The meaning of the
22 Amendment’s two-tiered wage provision is unambiguous: an employer’s entitlement to pay the
23 lower-tier wage is predicated upon the employer’s actual furnishing of qualifying health insurance

24 ⁹ *See also Clark County Soc. Serv. Dept. v. Newkirk*, 106 Nev. 177, 179-80, 789 P.2d 227, 228
25 (1990), in which the Nevada Supreme Court invalidated a county regulation limiting welfare
26 benefits because it contradicted its statutory mandate: “[A]dministrative regulation obviously
27 cannot countermand the statutory mandate. Administrative regulations cannot contradict or conflict
28 with the statute they are intended to implement.” *Id.*

1 coverage to the employee. *Id.* Because the meaning of the provision is clear, this Court need not
2 look beyond the plain language of the Amendment.

3 When interpreting a statute, courts first look to the plain language of the statute, giving
4 every word, phrase, and sentence its usual, natural, and ordinary import and meaning, unless doing
5 so would violate the statute's spirit. *See McKay v. Bd. Of Sup'rs of Carson City*, 102 Nev. 644,
6 648, 730 P.2d 438, 441 (1986). When a constitutional provision is susceptible to only one natural
7 or honest construction, that alone is the construction that courts can give it. *See Washoe Med. Ctr.,*
8 *Inc., supra*, 112 Nev. at 496, 915 P.2d at 289 (citing *Building & Constr. Trades v. Public Works*,
9 108 Nev. 605, 610, 836 P.2d 633, 636 (1992)). Plain language controls unless it would lead to
10 absurd results. *See Harris Associates v. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532,
11 534 (2003). Furthermore, courts assume that the language employed by a statute or provision's
12 drafters was intentional and its ordinary meaning accurately expresses the drafters' purpose. *See,*
13 *e.g., Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009).

14 Here, the pertinent language of the wage provision states that employers may pay the lower
15 wage only if "the employer provides health benefits as described herein." Nev. Const.
16 art. XV, § 16. The ordinary and everyday meaning of "provide" is "to supply *for use*," not merely
17 to offer for potential use. *See Merriam-Webster's Dictionary and Thesaurus* at 838 (Merriam-
18 Webster, Inc. 2006) (emphasis supplied). Synonyms of "provide" include "deliver", "give",
19 "hand", "hand over", "supply", and "furnish[.]" *Id.* Likewise, *Black's* definition of "provide" is "an
20 act of furnishing or supplying a person with a product." *Black's Law Dictionary* (Online, 2d ed.);
21 *see also Black's Law Dictionary* (5 ed. 1979) (defining "furnish" as interchangeable with
22 "provide"—"To supply, provide, or equip, for accomplishment of a particular purpose.").

23 Nevada courts also have used "provide" interchangeably with the word "furnish" to connote
24 a transfer of possession from one to another, as opposed to making something merely available. In
25 *State v. Powe*, 55909, 2010 WL 3462763 at *1 (Nev. July 19, 2010), the district court, interpreting
26 a criminal statute's use of "furnish," found as a matter of law that "furnishing" calls for actual
27 delivery by one person to another. Reviewing that interpretation *de novo*, the Nevada Supreme
28 Court affirmed. *Id.*

1 By contrast, “to offer” is merely “to present for acceptance.” Merriam-Webster’s, *supra*, at
2 733. Synonyms for “offer” include “extend”, “pose”, “proffer”, and “suggest”, but notably not
3 “provide”, “furnish”, or “supply[.]” *Id.* at 734. Neither does *Merriam-Webster* list “offer” as
4 synonymous with “provide.” *Id.* at 838. Thus, “offer,” which carries no connotation of transference
5 of possession, patently is not synonymous or interchangeable with “provide” in the wage provision
6 of the Amendment, or in any other context.

7 Despite the apparent meaning of the Amendment’s language, however, the Commissioner
8 promulgated regulations that make mere “offering” of health insurance the core requirement of the
9 Minimum Wage Amendment. N.A.C. 608.100(1) states:

10 Except as otherwise provided in subsections 2 and 3, the minimum wage for an
11 employee in the State of Nevada is the same whether the employee is a full-time,
permanent, part-time, probationary or temporary employee, and:

- 12 (a) If an employee is ff qualified health insurance, is \$5.15 per hour; or
13 (b) If an employee is not ff qualified health insurance, is \$6.15 per
hour.

N.A.C. 608.100(1) (emphasis supplied). According to the Commissioner, therefore, employers
15 presently are free to *offer* employees an insurance policy and, regardless of whether an employee
16 accepts or rejects it, pay that employee up to 12% less simply for having done so. The employee,
17 obviously, has no role in selecting the policy—its type, quality, or coverage—but is thereupon
18 forced to live with the consequences of having rejected a plan that does not meet his or her needs.
19 Those consequences include having to buy real insurance anyway under federal law, and having
20 significantly less money in the pay envelope with which to do so. In this way, N.A.C. 608.100(1)
21 permits employers to skirt the commands of the Amendment and, as discussed more fully below,
22 tends to destroy the provision’s entire purpose. The Commissioner’s swapping of “provide” with
23 “offer” in its regulations imparts, in practical terms, a completely different meaning than the text of
24 the Amendment itself. It is clear that the operative word “provide” in the constitutional text means
25 something more than simply suggesting or proposing a health plan.

26 The only textual approach lending any credence to “offer” over “provide” as the animating
27 verb of the Amendment’s health insurance provisions is to rely upon the second sentence of
28 section A of the provision: “Offering health benefits within the meaning of this section shall consist

1 of making health insurance available to the employee for the employee and the employee's
2 dependents at a total cost of not more than 10 percent of the employee's gross taxable income from
3 the employer." Nev. Const. art. XV, § 16(A).

4 This sentence, however, is not the *command* of the Amendment; that role is filled in the
5 previous sentence by "provide." The second sentence acts primarily to inform the first: employers
6 must provide health benefits to pay a certain wage in the first sentence, and those benefits must—
7 according to the second sentence—be "health insurance" (a term with particular statutory meaning
8 under N.R.S. Chapter 57) rather than the more general term "benefits" (which could mean
9 something as paltry as a pharmacy discount card). *See id.* In no way does the use of "offering" in
10 the succeeding sentence operate to reach back and alter or diminish the meaning of "provide" as
11 employed in the initial sentence.

12 Neither can the two words or concepts mean the same thing. In other words, "offering"
13 cannot, under appropriate canons of construction, be considered synonymous with "provide."
14 Where a provision uses "one term in one place, and a materially different term in another ... the
15 presumption is that the different term denotes a different idea." *Lorton v. Jones*, 130 Nev. Adv. Op.
16 8, 322 P.3d 1051, 1056 (2014), *reh'g denied* (Mar. 5, 2014) (citing Antonin Scalia & Bryan A.
17 Garner, *Reading Law: The Interpretation of Legal Texts*, 170 (2012)).

18 The Court should assume that the Amendment's drafters, and the voters who twice
19 approved it, intentionally employed and approved of the ordinary meaning of the plain language of
20 the text, including the requirement to "provide" health insurance before cutting wages. *See, e.g.,*
21 *Gross*, 557 U.S. at 175. If the drafters of the Amendment had meant for "provide" to mean "offer,"
22 there were limitless opportunities to make that its expressly clear and inevitable command. Instead,
23 "provide" is the command and the keystone for qualifying to pay less than the full minimum hourly
24 wage, while "offering" is used to describe elements of the provision of the required benefits.

25 **2. N.A.C. 608.100(1) contradicts the history, policy, and purpose of the**
26 **Amendment**

27 Let us assume, *arguendo*, that the Court finds the use of the terms "provide" and "offering"
28 ambiguous in construing the mandates of the Minimum Wage Amendment. If so, the rules of

1 statutory and constitutional construction will compel the same conclusion—that the Amendment
2 requires employers actually to furnish health insurance before they are entitled to pay a lower wage
3 and that, therefore, N.A.C. 608.100(1) is an invalid exercise of regulatory authority.

4 The history of the Amendment indicates it was designed and implemented to require
5 employers either to insure their employees or to pay them a higher wage. The question posed to
6 Nevada’s voters in 2004 and 2006 was, “Shall the Nevada Constitution be amended *to raise the*
7 *minimum wage* paid to employees?” See State of Nevada Statewide Ballot Questions, Secretary of
8 State, Question No. 6 (2006), attached hereto as **Exhibit 3** at 31 (emphasis supplied). The ballot
9 question offered the following explanation:

10 The proposed amendment, if passed, would create a new section to Article 15 of the
11 Nevada Constitution. The amendment would require employers to pay Nevada
12 employees \$5.15 per hour worked if the employer provides health benefits, or \$6.15
per hour worked if the employer does not provide health benefits.

13 *Id.* (emphasis supplied). The title of the actual ballot initiative was “RAISE THE MINIMUM
14 WAGE FOR WORKING NEVADANS.” *Id.* at 35. The initiative further stated that the “people of
15 the State of Nevada hereby make the following findings and declare their purpose in enacting this
16 Act as follows:”

- 17 1. No full-time worker should live in poverty in our state.
- 18 2. Raising the minimum wage is the best way to fight poverty. By raising the
19 minimum wage from [sic.] \$5.15 to \$6.15 an hour, a full-time worker will
20 earn an additional \$2,000 in wages. That’s enough to make a big difference
21 in the lives of low-income workers to move many families out of poverty.
- 22 3. For low-wage workers, a disproportionate amount of their income goes
23 toward cost of living expenses. Living expenses such as housing, healthcare,
24 and food have far outpaced wage levels for Nevada’s working families.
- 25 4. In our state, 6 out of 10 minimum wage earners are women. Moreover 25
26 percent of all minimum wage earners are single mothers, many of whom
27 work full-time.
- 28 5. At \$5.15 an hour, minimum wage workers in Nevada make less money than
they would on welfare. When people choose work over welfare, they
become productive members of society and the burden on Nevada taxpayers
is reduced.
6. Raising the minimum wage from \$5.15 an hour to \$6.15 an hour affirms
Nevadan’s beliefs that we value work, especially the difficult jobs performed
by hotel maids, childcare workers, and nursing home employees. We need to
make sure the workers who are the backbone of our economy receive fair
paychecks that allow them and their families to live above the poverty line.

1 *Id.*

2 Again assuming for the sake of argument that the Amendment's plain language is
3 ambiguous, the ballot initiative's question, title, findings, and purpose make it obvious—to
4 implement a widespread increase in the minimum wage. At the time of passage, Nevada's
5 minimum hourly wage was \$5.15—the same as the Amendment's original lower-tier wage. Despite
6 this fact, the exclaimed purpose of the ballot initiative was to *raise wages*. What is equally clear,
7 then, is that the drafters and voters did *not* intend the minimum wage to stagnate at the lower-tier,
8 without a wage-increase substitute—namely, the provision of qualifying health insurance. For
9 Plaintiff, and for the tens of thousands of employees represented by the putative Classes in the
10 actions listed above, wages right now remain at the lower tier—the federal minimum—yet they
11 have no employer-provided qualifying health insurance.

12 Additionally, the written arguments both for *and against* the Amendment given to the
13 voters clearly stated that if the measure passed, wages would go up. *Id.* at 31-34. The proponents,
14 for example, began, “All Nevadans will benefit from a long-overdue increase in the state's
15 minimum wage through a more robust economy, a decreased taxpayer burden and stronger
16 families.” *Id.* at 31. The initiative's opponents' also operated on the premise of higher wages in
17 positing that “the most credible economic research over the last 30 years has shown that minimum
18 wage hikes hurt, rather than help, low-wage workers.” *Id.* at 32. The opponents continued that
19 under the Amendment, “wages paid in Nevada *must*, from now on, *exceed the federal minimum*
20 *wage by about \$1 an hour.*” *Id.* at 33 (emphasis supplied). Although the proponents and opponents
21 disagreed about the measure's policy and fiscal impact, they both emphatically agreed that, as
22 proposed, the Amendment would mean an increase in Nevada's minimum wage.

23 Although not controlling, the early interpretations of the wage provision by Nevada
24 agencies and others familiar with Nevada labor laws after the Amendment's passage may assist in a
25 proper determination of the meaning of the wage structure of the Amendment, as well as its
26 mandatory requirements. *Strickland*, 235 P.3d at 609-10 (“The goal of constitutional interpretation
27 is ‘to determine the public understanding of a legal text’ leading up to and ‘in the period after its
28 enactment or ratification.’”); *see also* 6 Treatise on Const. L. § 23.32 (“[T]he court may examine a

1 variety of legal and other sources—all post-enactment—to seek to determine the public
2 understanding of a legal text in the period after its enactment or ratification. That sort of inquiry is
3 a critical tool of constitutional interpretation.”) (internal quotations omitted).

4 The first such set of understandings come, perhaps surprisingly, from the Labor
5 Commissioner. The initial Emergency Regulations, proposed and implemented immediately upon
6 passage in late 2006, assigned the Amendment its plain meaning in accordance with its widely
7 demonstrated purpose and intent. They stated as follows:

8 Nevada has established a two-tiered minimum wage. (A) The first tier, lower tier, is
9 from \$5.15 per hour to \$6.14 per hour for employers who provide qualified health
10 insurance benefits. (B) The second tier, upper tier, is \$6.15 per hour for employers
who do not provide qualified health benefits.

11 See Proposed Emergency Regulations (Nov. 29, 2006), attached hereto as **Exhibit 4** at 1 (emphasis
12 supplied). The Commissioner’s initial understanding of the new constitutional wage provision,
13 then, was that the higher wage was to be paid unless employers actually provided an employee
14 qualified health insurance. The Commissioner at the time, Michael Tanchek, then immediately
15 reaffirmed this reading during a hearing at the Nevada Legislature, testifying that the newly-passed
16 Amendment established “two minimum wage rates for Nevada ... \$5.15 and \$6.15 per hour
17 *depending on whether insurance benefits are provided*.” Nev. S. Comm. Min., Comm. On
18 Commerce and Labor, 74th Session (2007) (emphasis supplied).

19 Emergency regulations, by their nature, are for meeting immediate statutory or
20 constitutional exigencies, do not require public comment, and expire by their terms so that
21 temporary and permanent regulations may succeed them through the rulemaking process.
22 Temporary and permanent regulations, therefore, are subject to significantly greater public input—
23 including, yes, persuasion by interests amounting to *lobbying*.

24 Therefore, in the Commissioner’s Temporary Regulations, issued in the wake of the
25 Emergency Regulations and after the then-Commissioner’s legislative testimony, the
26 Commissioner diverged from the initial understanding of the Amendment’s mandates. The
27 Temporary Regulations stated as follows:

28 Sec. 2(1): The lower tier is from \$5.15 to \$6.14 per hour for employees who [are]

1 offered qualified health insurance benefits. (2) The upper tier is \$6.15 per hour for
2 employees who are not offered qualified health benefits.

3 See Temporary Regulations (Feb. 2007), attached hereto as **Exhibit 5** at 5. It was this concept, after
4 further input from interested parties, that the Commissioner ultimately codified into N.A.C.
5 608.100(1), which has remained un-amended ever since.

6 Other Nevada agencies and authorities have, both contemporaneously and over time,
7 demonstrated understandings and interpretations of the commands of the Amendment that reflect
8 Plaintiff's, not the Commissioner's, positions here. In April of 2014, the Legislative Counsel
9 Bureau ("LCB") reported that "the State minimum wage is \$7.25 per hour [the new rate per the
10 Amendment's variable formula] for employees who receive health care benefits and \$8.25 for
11 employees who do not receive health care benefits." LCB, Research Division, *Policy and Program*
12 *Report: Labor and Employment* (Apr. 2014), attached as **Exhibit 6**. The LCB reiterated its
13 interpretation just three months ago, that "Nevada's minimum wage for employees who received
14 qualified health benefits from their employers is \$7.25 per hour, and the minimum wage for
15 employees who do not receive health benefits is \$8.25 per hour." LCB, *Fact Sheet: Minimum Wage*
16 *in Nevada* (Mar. 2015), attached as **Exhibit 7**.

17 The Nevada Department of Business and Industry states it the same way: "The minimum
18 wage for employees who received health benefits from their employers is \$7.25 per hour, and the
19 minimum wage for employees who do not receive health benefits will remain at \$8.25 per hour."
20 Nev. Dept. of Business and Industry, *Press Release* (Mar. 31, 2015), attached as **Exhibit 8**.

21 Other sources and experts summarized the Amendment similarly:

- 22 • "[E]mployers in Nevada will be required to pay a minimum wage of either
23 \$5.15 or \$6.15 per hour depending on whether health insurance benefits *are*
24 *provided to employees[.]* Those employees *receiving* health insurance
25 benefits according to this standard can still be paid at a rate of \$5.15 per
26 hour." Fisher & Phillips, LLP, *Labor Alert: Question 6 Passes! New Nevada*
27 *Minimum Wage Takes Effect November 28, 2006* (Nov. 21, 2006) (emphasis
28 supplied), attached as **Exhibit 9**.
- 26 • "Our state's minimum wage increased effective July 1, for cost-of-living
27 adjustment to \$5.30 per hour (*with qualified health plan*) and \$6.33 per hour
28 (*without qualified health plan*)." Heinz, Von S., *Money, Money, Money:*
27 *Minimum Wage Increase Dates*, 12 No. 11 Nev. Emp. L. Letter 6 (Aug.
28 2007) (emphasis supplied), attached as **Exhibit 10**.

- “Effective November 28, 2006, the state constitution was amended to create a two-tiered minimum wage, \$5.15 per hour *with health benefits*, or \$6.15 per hour *without*.” 3 Guide to Employment Law and Regulations, § 49.7 (Mar. 2015) (emphasis supplied), attached as **Exhibit 11**.

The public understanding of the Amendment is thus well-established by contemporary and later documentation.

Although the Minimum Wage Amendment was passed twice to *raise the minimum wage*, the Commissioner’s regulations allow employers to keep wages at the lower-tier level without providing employees like Plaintiff with the benefit of the constitutional bargain—qualifying health insurance. Furthermore, how much easier would the regulatory process be, if instead of more than a dozen lawsuits to determine whether being “offered” substandard health benefits qualifies an employer to pay the lower-tier wage, the standard was—as it ought to have been all along—who among your employees has the insurance you provided them?

Because N.A.C. 608.100(1) violates both the plain language and the intent of the Amendment, Plaintiff is entitled to summary judgment on his first claim for relief, and this Court should declare N.A.C. 608.100(1) invalid.

F. N.A.C. 608.104(2) Permits An Income Basis For Calculation Of Allowable Premium Rates Far In Excess Of The Constitutional Maximum

The Minimum Wage Amendment establishes a 10% premium cost cap for insurance in order to qualify employers to pay the lower minimum wage rate—a cap effective not just for employees, but for all their dependents as well. *See Nev. Const. art. XV, § 16(A)*. The plain language of the Amendment makes it abundantly clear that the cost cap applies at 10% of the gross compensation *paid by the employer*. *See id.* The Commissioner’s regulations, however, permit the employer to include an employee’s tips from customers in calculating the percentage the employee may be forced to pay for qualifying health insurance. *See N.A.C. 608.104*. Like the regulations purporting to implement the wage provision discussed above, the Commissioner’s regulation conflicts with the text and policy of the Amendment, and should be ruled invalid.

///

///

1 **1. The practical implications of N.A.C. 608.104(2)**

2 Determining whether tips and gratuities are includable in a calculation of a minimum-wage
3 employee's premium cost cap under the Amendment is no small matter. Many tipped employees
4 make as much as two-thirds of their total income in gratuities. An example:

5 Employee A earns \$7.25 per hour as a tipped employee, and works 30 hours per week (or
6 60 hours per two-week pay period). His gross income *from the employer*, therefore, is \$435.00
7 during a typical pay period, and \$11,310 per annum (26 x \$435.00). His allowable premium costs
8 under the Nevada Constitution, if his employer seeks to pay him at the \$7.25 rate, should be no
9 more than **\$43.50** per pay period, for a total of **\$1,131** per year.

10 Let us assume Employee A makes \$600.00 per pay period in tips and gratuities, a
11 proportion entirely typical in, for example, the food service industry. Including tips in the income
12 basis for calculating premium costs now sets his income at \$1,035.00 per pay period, and \$26,910
13 for the year. On that basis, an employer may arrange health insurance with a premium cost of
14 **\$103.50** per pay period, and **\$2,691.00** per year. The increase to the employee, in contravention to
15 the text of the Constitution, is **2.4 times** the allowable rate without including tips.

16 The regulations permitting such a wide variation in the allowable premium costs should be
17 unquestionably and unambiguously authorized by the text and meaning of the state constitution.
18 N.A.C. 608.104(2) does not meet that interpretive threshold.

19 **2. N.A.C. 608.104(2) contradicts the Amendment's plain language**

20 As set forth more fully above, when interpreting a statute or a constitutional provision,
21 courts first look to the plain language of the statute, giving every word, phrase, and sentence its
22 usual, natural, and ordinary import and meaning. *See McKay*, 102 Nev. at 648, 730 P.2d at 441.
23 Courts assume that the language employed by a provision's drafters was intentional and its
24 ordinary meaning accurately expresses the drafters' purpose. *See, e.g., Gross*, 557 U.S. at 175.
25 Courts also construe each sentence, phrase, and word of a statute or constitutional provision to give
26 meaning to all of its parts. *See Bd. Of County Com'rs of Clark County v. CMC of Nevada, Inc.*, 99
27 Nev. 739, 744, 670 P.2d 102, 105 (1983); *see also Arguello v. Sunset Station, Inc.*, 127 Nev. Adv.
28 Op. 29, 252 P.3d 206, 210 (2011) ("Under well-established canons of statutory interpretation, we

1 must not render any of the phrases of [a statute] superfluous"). The meaning of the 10% provision
2 is self-evident, and hinges on the ordinary meaning of "from the employer" and, as used later in the
3 same paragraph as the 10% provision, "tips or gratuities." See Nev. Const. art. XV, § 16(A).

4 The Amendment indicates that the employee's cost for qualifying health insurance is
5 capped at 10% of the wages his employer pays him, *not* 10% of his total income from the place of
6 employment providing insurance. *Black's* defines employer as "[a] person who controls and directs
7 a worker under an express or implied contract of hire and who pays the worker's salary or wages."
8 *Black's Law Dictionary* at 240 (3d ed. 2006). Ten percent of the income from *that* person is the
9 cost limit of qualifying health insurance under the Amendment. The text itself defines "employer"
10 as "any ... entity that may employ individuals." Nev. Const. art. XV, § 16(C). Additionally,
11 "employer" carried—and still carries—a statutory definition within the minimum wage framework
12 at the time the Amendment was enacted. Since 1985, Nevada's wage and hour statutes have
13 defined "employer" as "every person having control or custody of any employment, place of
14 employment or any employee." N.R.S. 608.011. The Commissioner's own regulations elsewhere
15 adopt and continue to use this statutory definition. See N.A.C. 608.070 ("Employer" has the
16 meaning ascribed to it in N.R.S. 608.011.').

17 The common and everyday meanings of "tips" and "gratuities" underscore that they are
18 excluded from the 10% calculation. As discussed more fully below, the Amendment provides that
19 "[t]ips or gratuities received by employees shall not be credited as being any part of or offset
20 against the wage rates required by [the Amendment]." Nev. Const. art. XV, § 16(A). "Tip" is
21 defined as a "gratuity" or a "gift or small sum given for a service performed or anticipated."
22 Merriam-Webster's Dictionary, *supra*, at 1079. "Gratuity," in turn, is defined as "something given
23 voluntarily or beyond obligation." *Id.* at 472.

24 Nevada is not a tip-credit state. Some states, and the federal Fair Labor Standards Act, 29
25 U.S.C. § 203(m)(2), permit a credit to be taken against wages in the amount of tips and gratuities
26 earned by the employee, for purposes of ensuring the employee receives the minimum wage rate
27 set by law. Nevada is not, and has never been, among those states. N.R.S. 608.160 makes it
28 "unlawful for any person to ... [a]pply as a credit toward the payment of the statutory minimum

1 hourly wage established by any law of this State any tips or gratuities bestowed upon the
2 employees of that person.” N.R.S. 608.160(1)(b). The Amendment here carries the same
3 prohibition, in article XV, section 16(A): “Tips or gratuities received by employees shall not be
4 credited as being any part of or offset against the wage rates required by this section.” Nev. Const.
5 art. XV, § 16(A). Indeed, both the Amendment and N.R.S. 608.160 comport with the long Nevada
6 tradition of excluding tips as credit against minimum wage, beginning in 1939. *See, e.g.,* Section 1
7 of Chapter 17 of Laws 1939; NCL (1931), § 2826; *Jane Roe Dancer I-VII v. Golden Coin, Ltd.*,
8 124 Nev. 28, 33, 176 P.3d 271, 275 (2008) (“[Nevada’s wage and hour law] has established a
9 higher minimum wage than that required under the FLSA by prohibiting a tip credit.”). Here, by
10 promulgating N.A.C. 608.104(2), the Commissioner has, by fiat, established a tip credit against the
11 allowable premium costs permitted by the Constitution, with no basis or authority to do so.

12 Put simply, in the service industry employment context and operating under common
13 understanding, customers are not employers, and customers leave the tips. Consequently, tips do
14 not come “from the employer.” It is the employer—the one who controls and pays wages—and the
15 employee—the one who is controlled and receives wages—that the Amendment addresses in
16 capping the cost of qualifying health insurance. The Amendment does not state, contemplate, or
17 even imply the involvement of any party or income outside of this relationship in its 10%
18 provision. Rather, it states in straight forward fashion that qualifying insurance cannot cost the
19 employee (the hourly wage payee) any more than 10% of his income “from the employer” (the
20 hourly wage payor). Nev. Const. art. XV, § 16 (emphasis supplied). It does not say, “from the place
21 of employment,” or “from *that job*,” or “*but for* the employment with that employer,” or any other
22 such formulation. It says exactly what it says: “from the employer.”

23 Nevertheless, the Commissioner’s regulations, in instructing employers how to calculate
24 that 10% share, play fast and loose with the Amendment. First, in N.A.C. 608.102(3), the
25 regulations state:

26 The share of the cost of the premium for the health insurance plan paid by the
27 employee must not exceed 10 percent of the gross taxable income of the employee
28 *attributable to the employer* under the Internal Revenue Code, as determined
pursuant to the provisions of NAC 608.104.

1 N.A.C. 608.102(3). The insertion of the phrase “attributable to the employer” immediately diverges
2 from the constitutional text, and sets up the later terms of N.A.C. 608.104 itself:

3 1. To determine whether the share of the cost of the premium of the qualified health
4 insurance paid by the employee does not exceed 10 percent of the gross taxable
income of the employee attributable to the employer, an employer may:

5 (a) For an employee for whom the employer has issued a Form W-2 for the
6 immediately preceding year, divide the gross taxable income of the
employee **paid by the employer** into the projected share of the premiums to
7 be paid by the employee for the health insurance plan for the current year;

8
9 (c) For an employee for whom there is less than 1 aggregate year of payroll
information:

10 (1) Determine the combined total gross taxable income normally
11 calculated from the total payroll information available for the
employee and divide that number by the number of weeks the total
12 payroll information represents;

13 (2) Multiply the amount determined pursuant to subparagraph (1) by
52; and

14 (3) Divide the amount calculated pursuant to subparagraph (2) into
the projected share of the premiums to be paid by the employee for
qualified health insurance for the current year; and

15 (d) For a new employee, promoted employee or an employee who turns 18
16 years of age during employment, use the payroll information for the first two
normal payroll periods completed by the employee and calculate the gross
taxable income using the formula set forth in paragraph (c).

17
18 2. As used in this section, “*gross taxable income of the employee attributable to the*
19 *employer*” means the amount specified on the Form W-2 issued by the employer
to the employee and includes, without limitation, tips, bonuses or other
compensation as required for purposes of federal individual income tax.

20 N.A.C. 608.104 (emphasis supplied). Here, even before we arrive at Subsection 2 including “tips”
21 in the income calculation, we have some internal inconsistency when the regulations say “*paid by*
22 *the employer*” in subsection 1(a). *See id.* (emphasis supplied). The definition, in subsection 2, of
23 “gross taxable income of the employee attributable to the employer,” however, is a distortion—it
24 takes the term “attributable to the employer” from Subsection 1(a) and extends it to re-define that
25 tips and gratuities may be included in the premium cost calculation. *See id.*

26 A plain language analysis of the Minimum Wage Amendment makes clear that tips—even
27 if “attributable to the employer” per the Internal revenue Service (and, yes, Plaintiff concedes that
28 tips and gratuities are, in fact, taxable income to him)—are not permitted to form any part of the

1 premium cost calculations, and therefore N.A.C. 608.104(2) is invalid as it conflicts with the
2 Nevada Constitution.

3 **3. N.A.C. 608.104(2) contradicts the history, policy, and purpose of the**
4 **Amendment**

5 Assuming, again for the sake of argument, that the 10% provision's language is ambiguous
6 and open to interpretation, N.A.C. 608.104(2) still fails because it contradicts the Minimum Wage
7 Amendment's policy and purpose, as well as voters' intent.

8 The liberal construction of remedial measures alone is sufficient to resolve the instant
9 question. Indeed, the necessarily liberal construction requires that the Court construe the
10 Amendment as limiting the income subject to the 10% calculation of an employee's cost to the
11 hourly wage paid by the employer. To read the Amendment any other way—thereby allowing
12 employers to cost-shift based on gratuities left by consumers—would benefit the employer over the
13 employee and violate well-established rules of statutory construction.

14 The regulation's inclusion of tips in the 10% calculation is an income-syphoning windfall
15 for the employer in a number of ways. Most obviously, it allows employers to pay a smaller share
16 of the offered insurance—if any at all—by charging employees more. The example above of
17 Employee A makes clear the impact upon the minimum wage worker. The more tips an employee
18 receives, the more the employer can escape paying for that employee's insurance, and shift that
19 burden onto the employee who, let us remember, is being paid a dollar less per hour worked by
20 virtue of having been “offered” the health insurance benefit in the first instance.

21 Employers also improperly benefit from the ebb and flow of gratuities under the current
22 regulatory scheme. It is uncontested that the amount of tips an employee receives from customers
23 is in constant flux. Yet, N.A.C. 608.104(a) and (d) direct employers to use the previous year's tips,
24 or even the past four weeks' tips for new employees, purportedly to project the entire next year's
25 tips and cost of insurance allocable to the employee. Because insurance premiums are fixed
26 annually but gratuity amounts vary by definition year to year, month to month, week to week, and
27 even hour to hour, the tip projection N.A.C. 608.104 permits could have employees paying far
28 more than 10% of their *actual* tips—on top of 10% of their hourly wage—for insurance, all while

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8
9 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
10 **IN AND FOR CARSON CITY**

11 CODY C. HANCOCK, an individual and
12 resident of Nevada; KWOK YEN MOY, an
13 individual and resident of Nevada,

14 Plaintiffs,

15 vs.

16 NEVADA DEPARTMENT OF BUSINESS &
INDUSTRY; OFFICE OF THE NEVADA
LABOR COMMISSIONER,

17 Defendants.
18
19

Case No.: *14 OC 00080 / B*

Dept. No.: *2*

COMPLAINT FOR:

1) DECLARATORY RELIEF
PURSUANT TO N.R.S. 233B.110;

2) INJUNCTIVE RELIEF PURSUANT
TO N.R.S. 33.010; AND

3) WRIT OF MANDAMUS PURSUANT
TO N.R.S. 34.160

20 CODY C. HANCOCK and KWOK YEN MOY (hereinafter "Plaintiffs"), through
21 undersigned counsel, complain and allege as follows:

22 **INTRODUCTION**

23 1. This lawsuit seeks declarations of this Court invalidating a number of regulations
24 promulgated by the Nevada Labor Commissioner purporting to implement Nevada Constitution
25 Article XV, § 16; injunctive relief ordering the Nevada Labor Commissioner to cease enforcement
26 of the regulations indicated herein, as written; and further, a writ of mandamus to compel the
27 Office of the Labor Commissioner to comply with the duties of office and take all necessary
28 regulatory steps to enforce and to ensure proper compliance with Nev. Const. art. XV, § 16 in

COMPLAINT

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ALAN GLOYER
BY *[Signature]* CLERK
DEPUTY

1 order to serve its appropriate textual, remedial, and public policy purposes for the benefit of
2 Nevada's lowest-paid workers.

3 **PARTIES**

4 **A. Plaintiffs**

5 2. Plaintiff Cody C. Hancock is a resident of the State of Nevada. He is employed as a
6 minimum wage worker at a national restaurant chain with locations in Nevada. He has, within the
7 last year, been compensated at \$7.25 per hour for work he has performed for his employer, despite
8 not having health benefits from his employer at the time, not having qualifying benefits available
9 to him at the time, and/or currently not having such benefit plan available. The regulations
10 described herein, or their applications, interfere with or impair, or threaten to interfere with or
11 impair, his legal rights or privileges. As a current minimum wage worker, he has a direct and
12 beneficial interest in an appropriate regulatory regime enforcing the guarantees of provisions of
13 the Nevada Constitution enacted for his benefit.

14 3. Plaintiff Kwok Yen Moy is a resident of the State of Nevada. She was formerly
15 employed as a minimum wage worker at a national restaurant chain with locations in Nevada. She
16 has, within the last four years, been compensated at \$7.25 per hour for work she performed for her
17 employer, despite not having health benefits from her employer at the time, and not having
18 qualified health insurance benefits available to her at allowable premium cost levels. The
19 regulations described herein, or their applications, interfered with or impaired her legal rights or
20 privileges. As a former minimum wage worker with the potential to become one again, she has a
21 direct and beneficial interest in an appropriate regulatory regime enforcing the guarantees of
22 provisions of the Nevada Constitution enacted for her benefit.

23 **B. Defendants**

24 4. Defendant the Nevada Department of Business & Industry is an executive agency
25 of the State of Nevada, which includes the Office of the Nevada Labor Commissioner.

26 5. Defendant the Office of the Nevada Labor Commissioner is charged with enforcing
27 all labor laws of the State of Nevada.

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1 Nevada's minimum wage employees, and to incentivize the provision of low-cost, comprehensive
2 health insurance benefits to the state's lowest-paid workers.

3 **The Nevada Labor Commissioner's Regulatory Scheme**

4 13. As the state officer charged with enforcing Nevada's labor laws, the Nevada Labor
5 Commissioner had two clear duties with regard to Art. XV, § 16: to promulgate regulations that
6 would protect minimum wage workers from abuse and violation of rights to the minimum wage
7 under the constitutional amendment, and to construct a regulatory scheme that would ensure
8 compliance with the amendment's terms by Nevada employers. In both regards, the Labor
9 Commissioner has not complied.

10 14. In 2007, the Labor Commissioner enacted permanent regulations intended to
11 implement Art. XV, § 16. These regulations, found at N.A.C. 608.100 through 608.108, became
12 effective on October 31, 2007, and have remained unchanged since that time. *See Exhibits 2-6*
13 here attached, true and accurate copies of the permanent regulations, in their current—and thus far,
14 static—form.²

15 15. The permanent regulations promulgated in 2007, and in force currently,
16 demonstrate that Labor Commissioner made impermissible policy choices by the Labor
17 Commissioner in interpreting new Art. XV, § 16, and the regulations themselves are in conflict
18 with the text, meaning, and/ or public policy of the constitutional amendment.

19 **a) Providing Benefits vs. Offering Benefits**

20 16. An overriding error affecting the entirety of the regulatory regime implementing
21 Art. XV, § 16, is the Labor Commissioner's determination that if an employee declined health
22 insurance coverage, for whatever reason, the employer could pay the employee at the reduced
23 minimum wage rate. In other words, an employee need not be "provided" with health insurance
24

25 ² In November 2006, immediately after the effective date of the amendment approved at the
26 2006 General Election but before proposing and enacting permanent regulations, the Nevada
27 Labor Commissioner promulgated emergency regulations intended to implement new Art. XV, §
28 16. *See Exhibit 7* here attached, a true and accurate copy of these emergency regulations,
hereinafter the "Emergency Regulations."

1 benefits in order for an employer to take advantage of the lower wage rate.³

2 17. This interpretation, and the regulatory regime that supports it, is in conflict with the
3 text, meaning, and policy underlying Art. XV, § 16, and is therefore invalid.

4 18. N.A.C. 608.100 states:

5 Minimum wage: Applicability; rates; annual adjustments.

6 1. Except as otherwise provided in subsections 2 and 3, the
7 minimum wage for an employee in the State of Nevada is the
8 same whether the employee is a full-time, permanent, part-time,
9 probationary or temporary employee, and:

10 (a) If an employee is *offered* qualified health insurance, is \$5.15
11 per hour; or

12 (b) If an employee is not *offered* qualified health insurance, is
13 \$6.15 per hour.⁴ (emphasis supplied).

14 19. This turned the incentives and benefits mandated by Art. XV, § 16 on their heads,
15 as the greatest fiscal advantage to the employer would be to “offer” but not “provide” employees
16 the low-premium, comprehensive health insurance benefits mandated under Art. XV, § 16, and the
17 employee would be left with neither health insurance coverage nor the full, upper-tier minimum
18 wage per hour.

19 ³ The 2006 Emergency Regulations had stated this policy choice by the Labor Commissioner in
20 stark terms (*see* Exhibit 7):

21 Sec. 6 If an employee declines health coverage under a qualified health
22 insurance plan offered by the employer, *the employee may be
23 paid in the lower minimum wage tier*, however the employer
24 must document that the employee has declined coverage and
25 declining coverage may not be a term or condition of
26 employment. (emphasis supplied).

27 ⁴ The 2006 Emergency Regulations, in contrast, had stated (*see* Exhibit 7):

28 Sec. 2 Nevada has established a two-tiered minimum wage.

A. The first tier, lower tier, is from \$5.15 to \$6.14 per hour for
employers who *provide* qualified health insurance benefits.

B. The second tier, upper tier, is \$6.15 per hour for employers who
do not *provide* qualified health benefits. (emphasis supplied).

1 20. Not only is this interpretation contrary to Art. XV, § 16, the difference and
2 development between the 2006 Emergency Regulations and the 2007 permanent regulations
3 demonstrates that the Labor Commissioner was aware of the underlying policy decision such a
4 determination represented and its potential effects upon Nevada's minimum wage employees. The
5 current regulatory scheme demonstrates an administrative decision to implement the interpretation
6 least advantageous to the supposed beneficiaries of the constitutional amendment—minimum
7 wage workers.

8 21. The Labor Commissioner's interpretation of Art. XV, § 16 that its terms only
9 require employers to "offer" or "make available" qualified health insurance benefit plans, rather
10 than provide them, in order to pay workers at the lower minimum wage rate also forms part of
11 N.A.C. 608.102(1) & (2), 608.106, and 608.108.

12 **b) Allowable Costs of Health Insurance Benefit Premiums**

13 22. As noted, Art. XV, § 16 requires provision of health insurance benefits "for the
14 employee and the employee's dependents at a total cost to the employee for premiums of not more
15 than 10 percent of the employee's gross taxable income *from the employer*," if the employer elects
16 to compensate workers at the reduced minimum wage rate. Nev. Const. art. XV, § 16(A)
17 (emphasis supplied).

18 23. The Labor Commissioner, instead of hewing to the clear and unmistakable
19 language of Art. XV, § 16 in this regard, created and substituted a new regulatory concept:
20 employers could qualify to pay a dollar less per hour if premiums amounted to "10 percent of the
21 gross taxable income of the employee *attributable to the employer under the Internal Revenue*
22 *Code*." N.A.C. 608.102(3) (emphasis supplied).⁵

23 24. The Labor Commissioner further determined that "gross taxable income of the
24 employee attributable to the employer" means the amount specified on the Form W-2 issued by the
25

26 ⁵ The 2006 Emergency Regulations, also unlawfully, had based the 10% cap on premium costs
27 to covered employees upon "the employee's gross income as defined under the Internal Revenue
28 Code." See Exhibit 7, Emerg. Regs., § 5(B).

1 employer to the *employee and includes, without limitation, tips, bonuses or other compensation as*
2 *required for purposes of federal individual income tax.*" N.A.C. 608.104(2) (emphasis supplied).

3 25. For tipped employees like Plaintiffs, much of whose income comes from restaurant
4 patrons rather than their employer, this regulatory determination by the Labor Commissioner both
5 raised the amount a minimum wage employee could be made to pay for qualifying health
6 insurance coverage and rendered employers offering more expensive plans than the constitutional
7 amendment contemplated eligible to pay their workers at the reduced minimum wage rate.

8 26. Nevada law does not permit a tip credit against minimum wage levels. N.R.S.
9 608.160(1)(b).⁶ The Labor Commissioner, however, through N.A.C. 608.608.104(2), created by
10 regulation a tip credit for purposes of calculating the allowable premium costs for health insurance
11 benefit plans in making employers eligible to pay employees at the reduced minimum wage level.

12 27. As a result, current N.A.C. 608.102(3) and 608.104(2) allow employers to pay
13 employees at the lower minimum wage rate based upon merely having offered health insurance
14 benefit plans at calculated premium cost levels higher than is permitted by Art. XV, § 16. This is
15 improper and unlawful on its face, and likely has discouraged acceptance of health insurance
16 benefit plans due to the inflated allowable premium costs—which in turn has resulted in minimum
17 wage workers losing a dollar per hour for their work yet not gaining low-cost comprehensive
18 health insurance as contemplated by the constitutional provision.

19 28. The premium cost calculation method allowed by N.A.C. 608.102(3) and
20 608.104(2) are in conflict with and are not authorized by Art. XV, § 16, and are therefore invalid.

21 29. Additionally, the Labor Commissioner, in N.A.C. 608.104(1), permitted a further
22 improper method of determining an employee's income for purposes health insurance benefit
23 premium cost limits that conflicts with Art. XV, § 16.

24 30. For four classes of minimum wage employees (employees for whom employers
25

26 ⁶ Furthermore, Art. XV, § 16 itself includes the following mandate: "Tips or gratuities received
27 by employees shall not be credited as being any part of or offset against the wage rates required by
28 this section." Nev. Const. art. XV, § 16(A).

1 have issued a W-2 for the previous year; employees for whom four quarters of payroll information
2 is available but no W-2 has been issued; employees for whom less than one year of payroll is
3 available; and new employees), N.A.C. 608.104(1) provides the method by which employers may
4 determine allowable premium costs for purposes of paying employees at the reduced minimum
5 wage level.

6 31. In the case of each class of employee, and each method of determining allowable
7 premium cost levels, the Labor Commissioner has not required that premium cost limits reflect
8 current wages of employees. There is no mechanism in regulation by which current pay forms the
9 baseline from which the maximum health insurance benefit premium is set.

10 32. N.A.C. 608.104(1) does not require employers to maintain eligibility to pay
11 workers at the reduced minimum wage level based on current income of their employees. Instead,
12 N.A.C. 608.104(1) relies upon samples or extrapolations of employee income records for past
13 periods, which—given the employer’s control of working hours and scheduling—may have no
14 correlation with pay for any particular pay period.

15 33. Art. XV, § 16 does not contemplate any period during which an employee may be
16 paid the reduced minimum wage rate without being provided health insurance benefits at a
17 maximum premium cost for the employee and his or her dependents of 10% of gross income from
18 the employer. N.A.C. 608.104(1), therefore, is in conflict with constitutional requirements, and is
19 invalid.

20 **c) Unauthorized 6-Month Grace Period to Pay Reduced Minimum Wage**

21 34. The Labor Commissioner further reduced the effectiveness of Art. XV, § 16’s
22 benefit to Nevada minimum wage employees by creating a 6-month grace period for employers to
23 begin paying the upper-tier wage rate.

24 35. N.A.C. 608.108 states:

25 Minimum wage: Requirements for payment at higher
26 rate; modification of term of waiting period.

27 If an employer does not offer a health insurance plan, *or the health*
28 *insurance plan is not available or is not provided within 6 months*
of employment, the employee must be paid at least the minimum
wage set forth in paragraph (b) of subsection 1 of NAC 608.100

1 until such time as the employee becomes eligible for and is offered
2 coverage under a health insurance plan that meets the requirements
3 of NAC 608.102 or until such a health insurance plan becomes
4 effective. The term of the waiting period may be modified in a bona
 fide collective bargaining agreement if the modification is explicitly
 set forth in such agreement in clear and unambiguous terms.
 (emphasis supplied).

5 36. Art. XV, § 16 states "Each employer shall pay a wage to each employee of not less
6 than the hourly rates set forth in this section."⁷ While Art. XV, § 16 does permit exceptions
7 regarding summer or trainee workers for a fixed and circumscribed period of time, nowhere does it
8 authorize a 6-month regulatory abeyance from its mandate regarding minimum wage pay to
9 employees generally.

10 37. N.A.C. 608.108 allows a period where employees are not paid at the rates set forth
11 in the constitutional provision, without authorization or justification for such regulation, and is
12 therefore invalid.

13 **Inadequate Enforcement and Compliance Regime of the Nevada Labor Commissioner**

14 38. The regulatory regime of the Nevada Labor Commissioner is inadequate to the task
15 of ensuring minimum wage workers their rights under law and enforcing compliance by Nevada
16 employers of minimum wage standards under Art. XV, § 16.

17 39. The Nevada Labor Commissioner maintains no database or list of employers who
18 claim eligibility to pay employees at the reduced minimum wage rate.

19 40. The Nevada Labor Commissioner maintains no database and collects no data on
20 health insurance plans or benefit contracts purportedly provided or offered or maintained by
21 Nevada employers for the purposes of claiming eligibility to pay employees at the reduced
22 minimum wage rate.

23

24 ⁷ By contrast, the 2006 Emergency Regulations had stated (*see* Exhibit 7):

25 Sec. 7 If an employer offers qualified health insurance, but for some reason
26 the employee is not eligible to receive the coverage provided by the
27 employer or there is a delay before the coverage can become effective,
28 *the employee must be paid the upper tier wage until such time as the
 employer becomes eligible and is offered coverage or when the insurance
 becomes effective.* (emphasis supplied).

1 41. The Nevada Labor Commissioner maintains no database or list of employees who
2 have been or are currently paid at the reduced minimum wage rate.

3 42. The Nevada Labor Commissioner, over the more than seven years the
4 constitutional amendment has been effective, has never issued an opinion regarding whether any
5 specific health benefit plan or contract qualifies an employer to pay employees at the reduced
6 minimum wage rate.

7 43. The Nevada Labor Commissioner, over the more than seven years the
8 constitutional amendment has been effective, has never undertaken an enforcement action against
9 an employer for paying an employee or employees at the reduced minimum wage rate in violation
10 of Art. XV, § 16 or its associated regulations, N.A.C. 608.100 – 608.108.

11 44. The Nevada Labor Commissioner never enacted regulations requiring ongoing
12 access to comprehensive health insurance benefit plans as a condition for employer eligibility to
13 pay employees at the reduced minimum wage rate. Therefore, an employee who declined benefits
14 for any reason in 2008, for example—including because the premium level was unlawfully
15 inflated by the improper calculation method established by the Labor Commissioner—is not
16 provided the regulatory benefit of demanding such coverage now from his or her employer, and
17 the employer continues to pay wages at the reduced minimum level.

18 45. The Nevada Labor Commissioner never enacted regulations requiring recalculation
19 of permissible health insurance premium levels for employees whose income from the employer
20 changes over time due to fluctuations in hours worked.

21 46. Even under the flawed regulations that have been in place for more than seven
22 years, effectively there is no enforcement or regulatory regime functioning in any manner to
23 ensure that employers who are paying workers at the reduced minimum wage rate are doing so
24 lawfully.

25 **The Impact Upon Plaintiffs and Other Nevada Minimum Wage Workers**

26 47. Upon information and belief, thousands of Nevada employees like Plaintiffs are
27 being and have been paid at the reduced minimum wage rate, yet have no comprehensive health
28 insurance benefits provided by their employer, no access to such benefits plans, or only have

1 access to plans that are not within guidelines mandated by Art. XV, § 16.

2 48. For more than seven years, since the approval and effective date of Art. XV, § 16
3 of the Nevada Constitution, Nevada workers have logged, upon information and belief, hundreds
4 of thousands of hours at the reduced minimum wage rate, unlawfully, due to regulations
5 promulgated by the Nevada Labor Commissioner that are in conflict with constitutional mandates
6 and, therefore, in excess of his proper authority. Plaintiffs themselves have worked many hundreds
7 of hours at this wage level under such unlawful regulations.

8 49. The Labor Commissioner has not enforced the labor laws of the State of Nevada in
9 any systematic fashion that would uphold the text and meaning of the 2006 constitutional
10 amendment. Upon invalidation of the current regulations identified herein, the Court should
11 exercise its extraordinary powers to direct the Labor Commissioner, via writ of mandamus, to
12 enforce proper employer compliance with Art. XV, § 16 by all necessary means.

13 **FIRST CLAIM FOR RELIEF**

14 **Declaratory Relief: Invalidity of N.A.C. 608.100**

15 50. Plaintiffs repeat and re-allege each and every paragraph above as though they were
16 fully set forth at length herein.

17 51. N.A.C. 608.100 does not require Nevada employers to provide qualifying health
18 benefits in order to compensate workers at the reduced minimum wage rate, in contravention of
19 Nev. Const. art. XV, § 16.

20 52. N.A.C. 608.100 violates constitutional provisions and/or exceeds the authority of
21 the Labor Commissioner to promulgate and enforce.

22 53. It is necessary for the Court to determine the legal rights of Plaintiffs and
23 Defendants regarding promulgation and enforcement of the subject regulations.

24 54. Plaintiffs have been forced to retain the services of an attorney to prosecute this
25 action, and are entitled to their reasonable attorney fees and costs of the action per order of the
26 Court.

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1 65. Plaintiffs have been forced to retain the services of an attorney to prosecute this
2 action, and are entitled to their reasonable attorney fees and costs of the action per order of the
3 Court.

4 **FOURTH CLAIM FOR RELIEF**

5 **Injunctive Relief**

6 66. Plaintiffs repeat and re-allege each and every paragraph above as though they were
7 fully set forth at length herein.

8 67. The regulations here the subjects of Plaintiffs' First through Third Claims for
9 Relief, if continued to be enforced by the Labor Commissioner or the Nevada Department of
10 Business & Industry, threaten ongoing violation and damage to Plaintiffs' rights respecting the
11 subject of the present action, and would tend to render judgment ineffectual.

12 68. The Court, therefore, should immediately and permanently enjoin and prohibit
13 Defendants from enforcing the subject regulations.

14 69. Plaintiffs have been forced to retain the services of an attorney to prosecute this
15 action, and are entitled to their reasonable attorney fees and costs of the action per order of the
16 Court.

17 **FIFTH CLAIM FOR RELIEF**

18 **Extraordinary Relief: Writ of Mandamus**

19 70. Plaintiffs repeat and re-allege each and every paragraph above as though they were
20 fully set forth at length herein.

21 71. Defendant the Nevada Labor Commissioner is compelled as a duty resulting from
22 office, trust, or station to enforce Nevada's labor laws.

23 72. This duty requires that the Labor Commissioner promulgate lawful and appropriate
24 regulations, and enact compliance safeguards and measures, sufficient to ensure that Nevada's
25 minimum wage employees receive the intended benefits of Art. XV, § 16 of the Nevada
26 Constitution, and that employers comply on an ongoing basis with its mandates.

27 73. The current regulatory regime implementing Art. XV, § 16 is inadequate and
28 unlawful, and cannot fulfill the duties of the Labor Commissioner under law.

74. Mandamus is necessary to compel the Labor Commissioner to comply with the duties of office and take all necessary regulatory steps to enforce and to ensure proper compliance with Nev. Const. art. XV, § 16, per appropriate order of the Court, to effectuate the meaning and purpose of the Nevada Constitution, including immediate promulgation of appropriate emergency regulations and maintenance of a purposeful compliance regime.

75. Plaintiffs have no plain, speedy, and adequate remedy at law apart from mandamus to compel performance of Defendants' legal duties.

76. Plaintiffs have been forced to retain the services of an attorney to prosecute this action, and are entitled to their reasonable attorney fees and costs of the action per order of the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

A. Declare and adjudge N.A.C. 608.100, 608.104, and 608.108 invalid insofar as indicated herein;

B. Issue a mandatory injunction against Defendants prohibiting them from enforcing said regulations henceforth;

Issue a writ of mandamus compelling the labor Commissioner to perform the duties of the office and take all necessary regulatory steps to enforce and to ensure proper compliance with Nev. Const. art. XV, § 16, per appropriate order of the Court, to effectuate the meaning and purpose of the Nevada Constitution, including immediate promulgation of appropriate emergency regulations and maintenance of a purposeful and effective compliance regime;

C. Grant all other relief of any variety deemed necessary and proper by the Court to effectuate its judgment and remedy claims of Plaintiffs; and

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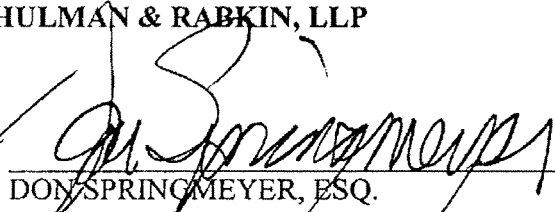
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D. Award Plaintiffs their reasonable attorney fees and costs of suit.

DATED this 29th day of April, 2014

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: 

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INDEX OF EXHIBITS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
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- Exhibit 1 Nev. Const. art. XV, § 16 – 3 Pages
Exhibit 2 N.A.C. 608.100 – 1 Page
Exhibit 3 N.A.C. 608.102 – 1 Page
Exhibit 4 N.A.C. 608.104 - 1 Page
Exhibit 5 N.A.C. 608.106 – 1 Page
Exhibit 6 N.A.C. 608.108 – 1 Page
Exhibit 7 Proposed Emergency Regulations of the Labor Commissioner – 2 Pages

EXHIBIT 1

EXHIBIT 1

Nev. Const. Art 15, Sec. 16.

Payment of minimum compensation to employees.

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.

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 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.

EXHIBIT 2

EXHIBIT 2

NAC 608.100 Minimum wage: Applicability; rates; annual adjustments.
(Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

1. Except as otherwise provided in subsections 2 and 3, the minimum wage for an employee in the State of Nevada is the same whether the employee is a full-time, permanent, part-time, probationary or temporary employee, and:
 - (a) If an employee is offered qualified health insurance, is \$5.15 per hour; or
 - (b) If an employee is not offered qualified health insurance, is \$6.15 per hour.
2. The rates set forth in subsection 1 may change based on the annual adjustments set forth in Section 16 of Article 15 of the Nevada Constitution.
3. The minimum wage provided in subsection 1 does not apply to:
 - (a) A person under 18 years of age;
 - (b) A person employed by a nonprofit organization for after-school or summer employment;
 - (c) A person employed as a trainee for a period not longer than 90 days, as described by the United States Department of Labor pursuant to section 6(g) of the Fair Labor Standards Act; or
 - (d) A person employed under a valid collective bargaining agreement in which wage, tip credit or other provisions set forth in Section 16 of Article 15 of the Nevada Constitution have been waived in clear and unambiguous terms.
4. As used in this section, "qualified health insurance" means health insurance coverage offered by an employer which meets the requirements of NAC 608.102.

(Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

EXHIBIT 3

EXHIBIT 3

NAC 608.102 Minimum wage: Qualification to pay lower rate to employee offered health insurance. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

To qualify to pay an employee the minimum wage set forth in paragraph (a) of subsection 1 of NAC 608.100, an employer must meet each of the following requirements:

1. The employer must offer a health insurance plan which:
 - (a) Covers those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213 and any federal regulations relating thereto, if such expenses had been borne directly by the employee; or
 - (b) Provides health benefits pursuant to a Taft-Hartley trust which:
 - (1) Is formed pursuant to 29 U.S.C. § 186(c)(5); and
 - (2) Qualifies as an employee welfare benefit plan:
 - (I) Under the guidelines of the Internal Revenue Service; or
 - (II) Pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.
2. The health insurance plan must be made available to the employee and any dependents of the employee. The Labor Commissioner will consider such a health insurance plan to be available to the employee and any dependents of the employee when:
 - (a) An employer contracts for or otherwise maintains the health insurance plan for the class of employees of which the employee is a member, subject only to fulfillment of conditions required to complete the coverage which are applicable to all similarly situated employees within the same class; and
 - (b) The waiting period for the health insurance plan is not more than 6 months.
3. The share of the cost of the premium for the health insurance plan paid by the employee must not exceed 10 percent of the gross taxable income of the employee attributable to the employer under the Internal Revenue Code, as determined pursuant to the provisions of NAC 608.104.

(Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

EXHIBIT 4

EXHIBIT 4

NAC 608.104 Minimum wage: Determination of whether employee share of premium of qualified health insurance exceeds 10 percent of gross taxable income. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

1. To determine whether the share of the cost of the premium of the qualified health insurance paid by the employee does not exceed 10 percent of the gross taxable income of the employee attributable to the employer, an employer may:

(a) For an employee for whom the employer has issued a Form W-2 for the immediately preceding year, divide the gross taxable income of the employee paid by the employer into the projected share of the premiums to be paid by the employee for the health insurance plan for the current year;

(b) For an employee for whom the employer has not issued a Form W-2, but for whom the employer has payroll information for the four previous quarters, divide the combined total of gross taxable income normally calculated from the payroll information from the four previous quarters into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year;

(c) For an employee for whom there is less than 1 aggregate year of payroll information:

(1) Determine the combined total gross taxable income normally calculated from the total payroll information available for the employee and divide that number by the number of weeks the total payroll information represents;

(2) Multiply the amount determined pursuant to subparagraph (1) by 52; and

(3) Divide the amount calculated pursuant to subparagraph (2) into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year; and

(d) For a new employee, promoted employee or an employee who turns 18 years of age during employment, use the payroll information for the first two normal payroll periods completed by the employee and calculate the gross taxable income using the formula set forth in paragraph (c).

2. As used in this section, "gross taxable income of the employee attributable to the employer" means the amount specified on the Form W-2 issued by the employer to the employee and includes, without limitation, tips, bonuses or other compensation as required for purposes of federal individual income tax.

(Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

EXHIBIT 5

EXHIBIT 5

NAC 608.106 Minimum wage: Declination by employee of coverage under health insurance plan. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

If an employee declines coverage under a health insurance plan that meets the requirements of NAC 608.102 and which is offered by the employer, the employer must maintain documentation that the employee has declined coverage. Declining coverage may not be a term or condition of employment.

(Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

EXHIBIT 6

EXHIBIT 6

NAC 608.108 Minimum wage: Requirements for payment at higher rate; modification of term of waiting period. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

If an employer does not offer a health insurance plan, or the health insurance plan is not available or is not provided within 6 months of employment, the employee must be paid at least the minimum wage set forth in paragraph (b) of subsection 1 of NAC 608.100 until such time as the employee becomes eligible for and is offered coverage under a health insurance plan that meets the requirements of NAC 608.102 or until such a health insurance plan becomes effective. The term of the waiting period may be modified in a bona fide collective bargaining agreement if the modification is explicitly set forth in such agreement in clear and unambiguous terms.

(Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

EXHIBIT 7

EXHIBIT 7

PROPOSED EMERGENCY REGULATIONS OF THE
LABOR COMMISSIONER
NOVEMBER 29, 2006

EXPLANATION- Matter that is underlined is new; matter in brackets [omitted material] is material to be omitted.

AUTHORITY: §§1-13, NRS 607.160(1)(b), NRS 608.270, NRS 608.018, NRS 233B.0613.

Section 1. Chapter 608 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 12, inclusive, of this regulation. This regulation shall expire at the end of 120 days from filing with the Secretary of State or upon the filing of a temporary or permanent regulation whichever should occur first.

- Sec.2. Nevada has established a two-tiered minimum wage.
- A. The first tier, lower tier, is from \$5.15 to \$6.14 per hour for employers who provide qualified health insurance benefits.
 - B. The second tier, upper tier, is \$6.15 per hour for employers who do not provide qualified health benefits.
- Sec.3. The minimum wage may be adjusted annually.
- A. These rates will be adjusted annually to include increases in the federal minimum wage and a yearly cost of living adjustment as set forth in Article 15, Section 16 of the Constitution of Nevada.
 - B. The annual adjustments will be announced in April and become effective on July 1 of each year.
 - C. Each minimum wage tier will increase by the same dollar amount as the federal rate increase.
- Sec. 4. A. The minimum wage applies to all employees in Nevada.
- B. The minimum wage exemptions codified at NRS 608.250(2) conflict with Article 15, Section 16 of the Constitution of Nevada and are no longer applicable.
 - C. People under the age of 18, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days are not considered employees for the purpose of compliance with the minimum wage.
 - D. There is no distinction between whether an employee is full-time, permanent, part-time, or temporary.
- Sec. 5. In order to qualify for the lower minimum wage tier an employer must comply with all of the following:
- A. Health insurance coverage must be made available to the employee and the employees dependents; and

- B. The employee's share of the cost of the premium cannot exceed 10% of the employee's gross income as defined under the Internal Revenue Code for the time interval between the premium payments; and
- C. The health insurance must be a policy, contract, certificate or agreement offered or issued by a carrier authorized by the Nevada Insurance Commissioner to provide, deliver, arrange for, pay for or reimburse any of the costs of health care services or, in the alternative, any federally approved self-funded plans established under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, except that medical discount plans as defined by NRS 695H.050 and workers compensation insurance do not qualify as health insurance.

Sec. 6. If an employee declines coverage under a qualified health insurance plan offered by the employer, the employee may be paid in the lower minimum wage tier, however, the employer must document that the employee has declined coverage and declining coverage may not be a term or condition of employment.

Sec. 7. If an employer offers qualified health insurance, but for some reason the employee is not eligible to receive the coverage provided by the employer or there is a delay before the coverage can become effective, the employee must be paid the upper tier wage until such time as the employee becomes eligible and is offered coverage or when the insurance becomes effective.

Sec. 8. For the purposes of complying with the overtime provisions of NRS 608.018(1),

- A. An employer who qualifies for the lower tier minimum wage shall pay all employees with a base hourly rate of \$7.725 per hour or less overtime whenever the employee works more than eight hours in a workday.
- B. An employer who is required to pay the upper tier minimum wage shall pay all employees with a base hourly rate of \$9.225 per hour or less overtime whenever the employee works more than eight hours in a workday.

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ALAN GLOVER
 V. ALLEGIERE
 BY _____ DEPUTY

10 **THE FIRST JUDICIAL DISTRICT COURT**
 11 **IN AND FOR CARSON CITY, NEVADA**

12 **CODY C. HANCOCK**, an individual and
 13 resident of Nevada.

14 Plaintiff,

15 vs.

16 **THE STATE OF NEVADA** ex rel. **THE**
 17 **OFFICE OF THE NEVADA LABOR**
 18 **COMMISSIONER; THE OFFICE OF THE**
 19 **NEVADA LABOR COMMISSIONER; and**
 20 **THORAN TOWLER**, Nevada Labor
 Commissioner, in his official capacity,

21 Defendants.

CASE NO: 14 OC 00080 1B

DEPT. NO: II

22 **AMENDED COMPLAINT FOR**

1) **DECLARATORY RELIEF PURSUANT**
TO N.R.S. 233B.110;

2) **INJUNCTIVE RELIEF PURSUANT**
TO N.R.S. 33.010; AND

3) **WRIT OF MANDAMUS PURSUANT**
TO N.R.S. 34.160

23 **CODY C. HANCOCK** (hereinafter "Plaintiff"), through undersigned counsel, complains
 24 and alleges as follows:

25 **INTRODUCTION**

26 1. This lawsuit seeks declarations of this Court invalidating a number of regulations
 27 promulgated by the Nevada Labor Commissioner purporting to implement Nevada Constitution
 28 Article 15, Section 16; injunctive relief ordering the Nevada Labor Commissioner to cease

1 enforcement of the regulations indicated herein, as written; and further, a writ of mandamus to
2 compel the Office of the Labor Commissioner to comply with the duties of office and take all
3 necessary regulatory steps to enforce and to ensure proper compliance with Nev. Const. Art. 15,
4 Sec. 16 in order to serve its appropriate textual, remedial, and public policy purposes for the
5 benefit of Nevada's lowest-paid workers.

6 **PARTIES**

7 **A. Plaintiff**

8 2. Plaintiff Cody C. Hancock is a resident of the State of Nevada. He is employed as a
9 minimum wage worker at a national restaurant chain with locations in Nevada. He has, within the
10 last year, been compensated at \$7.25 per hour for work he has performed for his employer, despite
11 not having health benefits from his employer at the time, not having qualifying benefits available
12 to him at the time, and/or currently not having such benefit plan available. The regulations
13 described herein, or their applications, interfere with or impair, or threaten to interfere with or
14 impair, his legal rights or privileges. As a current minimum wage worker, he has a direct and
15 beneficial interest in an appropriate regulatory regime enforcing the guarantees of provisions of
16 the Nevada Constitution enacted for his benefit.

17 **B. Defendants**

18 3. Defendant the State of Nevada is sued upon relation of the Office of the Nevada
19 Labor Commissioner.

20 4. Defendant the Office of the Nevada Labor Commissioner is charged with enforcing
21 all labor laws of the State of Nevada. And is sued in its own right pursuant to N.R.S. 233B.110.

22 5. Defendant Thoran Towler is the current Labor Commissioner of the State of
23 Nevada, and is sued in his official capacity.

24 **JURISDICTION AND VENUE**

25 6. This Court has subject matter jurisdiction over this action, and venue is proper,
26 pursuant to N.R.S. 41.031 and 233B.110.

GENERAL ALLEGATIONS

The 2006 Minimum Wage Constitutional Amendment

7. At the 2006 General Election Nevada voters approved, for the second time, a constitutional amendment regarding the minimum wage to be paid to all Nevada employees.¹ The amendment became effective in November, 2006, and was codified as new Article 15, Section 16 of the Nevada Constitution.

8. The 2006 amendment guaranteed to each Nevada employee, with very few exceptions, a particular hourly wage: "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."

9. The amendment contained an indexing/increase mechanism, such that by 2014 the Nevada minimum wage level is \$7.25 per hour worked, if the employer provides health benefits or \$8.25 per hour if the employer does not provide such benefits. Currently, this means employees earning the lower amount per hour make over 12% less than minimum wage workers paid at the \$8.25 level.

10. Pursuant to the constitutional amendment, employers must qualify for the privilege of paying their minimum wage workers at the reduced wage level for every hour worked. In order to qualify to pay employees at the reduced minimum wage rate, health insurance benefit premiums of the employee and his or her dependents may not exceed "10 percent of the employee's gross taxable income from the employer." Art. 15, Sec. 16.

11. The public policy underlying the minimum wage amendment was to benefit Nevada's minimum wage employees, and to incentivize the provision of low-cost, comprehensive health insurance benefits to state's lowest-paid workers.

¹ See Exhibit 1 here attached, a true and correct copy of the text of Nev. Const. Article 15, Section 16.

1 **The Nevada Labor Commissioner's Regulatory Scheme**

2 12. As the state officer charged with enforcing Nevada's labor laws, the Nevada Labor
3 Commissioner had two clear duties here: to promulgate regulations that would protect minimum
4 wage workers from abuse and violation of rights to the minimum wage under the constitutional
5 amendment, and to construct a regulatory scheme that would ensure compliance with the
6 amendment's terms by Nevada employers. In both regards, the Labor Commissioner has not
7 complied.

8 13. In 2007, the Labor Commissioner enacted permanent regulations intended to
9 implement Art. 15, Sec. 16. These regulations, found at N.A.C. 608.100 through 608-108, became
10 effective on October 31, 2007 and have remained unchanged since that time. *See Exhibits 2*
11 *through 6* here attached, true and accurate copies of the permanent regulations, in their current—
12 and thus far, static—form.²

13 14. The permanent regulations promulgated in 2007, and in force currently,
14 demonstrate that Labor Commissioner made impermissible policy choices by the Labor
15 Commissioner in interpreting new Art. 15, Sec. 16, and the regulations themselves are in conflict
16 with the text, meaning, and/ or public policy of the constitutional amendment.

17 **a) Providing Benefits vs. Offering Benefits**

18 15. An overriding error affecting the entirety of the regulatory regime implementing
19 Art. 15, Sec. 16, is the Labor Commissioner's determination that if an employee declined health
20 insurance coverage, for whatever reason, the employer could pay the employee at the reduced
21 minimum wage rate. In other words, an employee need not be "provided" with health insurance
22 benefits in order for an employer to take advantage of the lower wage rate.³

23 ² In November 2006, immediately after the effective date of the amendment approved at the
24 2006 General Election but before proposing and enacting permanent regulations, the Nevada
25 Labor Commissioner promulgated emergency regulations intended to implement new Art. 15, Sec.
26 16. *See Exhibit 7* here attached, a true and accurate copy of these emergency regulations,
hereinafter the "Emergency Regulations."

27 ³ The 2006 Emergency Regulations had stated this policy choice by the Labor Commissioner in
stark terms (*see Exhibit 7*):

28 Sec. 6. If an employee declines health coverage under a qualified health

16. This interpretation, and the regulatory regime that supports it, is in conflict with the text, meaning, and policy underlying Art. 15, Sec. 16, and is therefore invalid.

17. N.A.C. 608.100 states:

Minimum wage: Applicability; rates; annual adjustments.

1. Except as otherwise provided in subsections 2 and 3, the minimum wage for an employee in the State of Nevada is the same whether the employee is a full-time, permanent, part-time, probationary or temporary employee, and:
 - (a) If an employee is *offered* qualified health insurance, is \$5.15 per hour; or
 - (b) If an employee is not *offered* qualified health insurance, is \$6.15 per hour.⁴

18. This turned the incentives and benefits mandated by Art. 15, Sec. 16 on their heads, as the greatest fiscal advantage to the employer would be to "offer" but not "provide" employees the low-premium, comprehensive health insurance benefits mandated under Art. 15, Sec. 16, and the employee would be left with neither health insurance coverage nor the full, upper-tier minimum wage per hour.

19. Not only is this interpretation contrary to Art. 15, Sec. 16, the difference and development between the 2006 Emergency regulations and the 2007 permanent regulations demonstrates that the Labor Commissioner was aware of the underlying policy decision such a determination represented and its potential effects upon Nevada's minimum wage employees. The

insurance plan offered by the employer, *the employee may be paid in the lower minimum wage tier*, however the employer must document that the employee has declined coverage and declining coverage may not be a term or condition of employment.

⁴ The 2006 Emergency Regulations, in contrast, had stated (see Exhibit 7):

Sec. 2 Nevada has established a two-tiered minimum wage.

- A. The first tier, lower tier, is from \$5.15 to \$6.14 per hour for employers who *provide* qualified health insurance benefits.
- B. The second tier, upper tier, is \$6.15 per hour for employers who do not *provide* qualified health benefits.

1 current regulatory scheme demonstrates an administrative decision to implement the interpretation
2 least advantageous to the supposed beneficiaries of the constitutional amendment—minimum
3 wage workers.

4 20. The Labor Commissioner's interpretation of Art. 15, Sec. 16 that its terms only
5 require employers to "offer" or "make available" qualified health insurance benefit plans, rather
6 than provide them, in order to pay workers at the lower minimum wage rate also forms part of
7 N.A.C. 608.102(1) & (2), 608.106, and 608.108.

8 **b) Allowable Costs of Health Insurance Benefit Premiums**

9 21. As noted, Art. 15, Sec. 16 requires provision of health insurance benefits "for the
10 employee and the employee's dependents at a total cost to the employee for premiums of not more
11 than 10 percent of the employee's gross taxable income *from the employer*," if the employer elects
12 to compensate workers at the reduced minimum wage rate.

13 22. The Labor Commissioner, instead of hewing to the clear and unmistakable
14 language of Art. 15, Sec. 16 in this regard, created and substituted a new regulatory concept;
15 employers could qualify to pay a dollar less per hour if premiums amounted to "10 percent of the
16 gross taxable income of the employee *attributable to the employer under the Internal Revenue*
17 *Code*." N.A.C. 608.102(3) (emphasis supplied).⁵

18 23. The Labor Commissioner further determined that "gross taxable income of the
19 employee attributable to the employer" means the amount specified on the Form W-2 issued by the
20 employer to the *employee and includes, without limitation, tips, bonuses or other compensation as*
21 *required for purposes of federal individual income tax.*" N.A.C. 608.104(2) (emphasis supplied).

22 24. For tipped employees like Plaintiff, much of whose income comes from restaurant
23 patrons rather than their employer, this regulatory determination by the Labor Commissioner both
24 raised the amount a minimum wage employee could be made to pay for qualifying health
25 insurance coverage and rendered employers offering more expensive plans than the constitutional

26 ⁵ The 2006 Emergency Regulations, also unlawfully, had based the 10% cap on premium costs
27 to covered employees upon "the employee's gross income as defined under the Internal Revenue
28 Code." See Exhibit 7, Emerg. Regs., Section 5(B).

1 amendment contemplated eligible to pay their workers at the reduced minimum wage rate.

2 25. Nevada law does not permit a tip credit against minimum wage levels. N.R.S.
3 608.160(1)(b).⁶ The Labor Commissioner, however, through N.A.C. 608.608.104(2), created by
4 regulation a tip credit for purposes of calculating the allowable premium costs for health insurance
5 benefit plans in making employers eligible to pay employees at the reduced minimum wage level.

6 26. As a result, current N.A.C. 608.102(3) and 608.104(2) allow employers to pay
7 employees at the lower minimum wage rate based upon merely having offered health insurance
8 benefit plans at calculated premium cost levels higher than is permitted by Art. 15, Sec. 16. This is
9 improper and unlawful on its face, and likely has discouraged acceptance of health insurance
10 benefit plans due to the inflated allowable premium costs—which in turn has resulted in minimum
11 wage workers losing a dollar per hour for their work yet not gaining low-cost comprehensive
12 health insurance as contemplated by the constitutional provision.

13 27. The premium cost calculation method allowed by N.A.C. 608.102(3) and
14 608.104(2) are in conflict with and are not authorized by Art. 15, Sec. 16, and are therefore
15 invalid.

16 c) Unauthorized 6-Month Grace Period to Pay Reduced Minimum Wage

17 28. The Labor Commissioner further reduced the effectiveness of Art. 15, Sec. 16's
18 benefit to Nevada minimum wage employees by creating an unauthorized 6-month grace period
19 for employers to pay the upper-tier wage rate.

20 29. N.A.C. 608.108 states:

21 Minimum wage: Requirements for payment at higher
22 rate; modification of term of waiting period.

23 If an employer does not offer a health insurance plan, *or the health*
24 *insurance plan is not available or is not provided within 6 months of*
25 *employment*, the employee must be paid at least the minimum wage set
26 forth in paragraph (b) of subsection 1 of NAC 608.100 until such time
27 as the employee becomes eligible for and is offered coverage under a
28 health insurance plan that meets the requirements of NAC 608.102 or

26 ⁶ Furthermore, Art. 15, Sec. 16 itself includes the following mandate: "Tips or gratuities
27 received by employees shall not be credited as being any part of or offset against the wage rates
28 required by this section." Art. 15, Sec. 16(A)

until such a health insurance plan becomes effective. The term of the waiting period may be modified in a bona fide collective bargaining agreement if the modification is explicitly set forth in such agreement in clear and unambiguous terms.

30. Art. 15, Sec. 16 states "Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section."⁷

31. The provision permits only a single, narrow exception with two sub-exceptions, to its mandate that all Nevada employees be paid at the required rate: "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 not longer than ninety (90) days."⁸ Nev. Const. art. XV,

32. N.A.C. 608.108, however, creates and allows a period where employees are not paid at the rates set forth in the constitutional provision, without authorization or justification for such regulation, and is therefore invalid.

⁷ By contrast, the 2006 Emergency Regulations had stated (see Exhibit 7):

Sec. 7 If an employer offers qualified health insurance, but for some reason the employee is not eligible to receive the coverage provided by the employer or there is a delay before the coverage can become effective, *the employee must be paid the upper tier wage until such time as the employer becomes eligible and is offered coverage or when the insurance becomes effective.*

⁸ Here, as well, the Labor Commissioner's regulations have diminished the 2006 constitutional amendment. Instead of following the text of the provision and recognizing that the only exception, for a non-union employee, was for a worker under eighteen years old who was either employed by a nonprofit for summer or after-school work or as a trainee for 90 days, the Commissioner created three separate exceptions to the application of the minimum wage law:

N.A.C. 608.100

...

3. The minimum wage provided in subsection 1 does not apply to:

- (a) A person under 18 years of age;
- (b) A person employed by a nonprofit organization for after-school or summer employment; [or]
- (c) A person employed as a trainee for a period not longer than 90 days, as described by the United States Department of Labor pursuant to section 6(g) of the Fair Labor Standards Act.

Inadequate Enforcement and Compliance Regime of the Nevada Labor Commissioner

33. The regulatory regime of the Nevada Labor Commissioner is inadequate to the task of ensuring minimum wage workers their rights under law and enforcing compliance by Nevada employers of minimum wage standards under Art. 15, Sec. 16. See Exhibit 8 here attached, a true and correct copy of an April 7, 2014 response of the Office of the Labor Commissioner to a comprehensive public records request of April 3, 2014.

34. The Nevada Labor Commissioner maintains no database or list of employers who claim eligibility to pay employees at the reduced minimum wage rate. See Exhibit 8, Response a.

35. The Nevada Labor Commissioner maintains no database and collects no data on health insurance plans or benefit contracts purportedly provided or offered or maintained by Nevada employers for the purposes of claiming eligibility to pay employees at the reduced minimum wage rate. See Exhibit 8, Response b.

36. The Nevada Labor Commissioner maintains no database or list of employees who have been or are currently paid at the reduced minimum wage rate. See Exhibit 8, Response c.

37. The Nevada Labor Commissioner, over the more than seven years the constitutional amendment has been effective, has never issued an opinion regarding whether any health benefit plan or contract qualifies an employer to pay employees at the reduced minimum wage rate. See Exhibit 8, Response f.

38. The Nevada Labor Commissioner, over the more than seven years the constitutional amendment has been effective, has never undertaken an enforcement action against an employer for paying an employee or employees at the reduced minimum wage rate in violation of Art. 15, Sec. 16 or its associated regulations, N.A.C. 608.100 – 608.108. See Exhibit 8, Response g.

39. The Nevada Labor Commissioner never enacted regulations requiring ongoing access to comprehensive health insurance benefit plans as a condition for employer eligibility to pay employees at the reduced minimum wage rate. Therefore, an employee who declined benefits for any reason in 2008, for example—including because the premium level was unlawfully

1 inflated by the improper calculation method established by the Labor Commissioner—is not
2 provided the regulatory benefit of demanding such coverage now from his or her employer, and
3 the employer continues to pay wages at the reduced minimum level.

4 40. The Nevada Labor Commissioner never enacted regulations requiring recalculation
5 of permissible health insurance premium levels for employees whose income from the employer
6 changes over time due to fluctuations in hours worked.

7 41. Even under the flawed regulations that have been in place for more than seven
8 years, effectively there is no enforcement or regulatory regime functioning in any manner to
9 ensure that employers who are paying workers at the reduced minimum wage rate are doing so
10 lawfully.

11 **The Impact Upon Plaintiff and Other Nevada Minimum Wage Workers**

12 42. Upon information and belief, thousands of Nevada employees like Plaintiff are
13 being and have been paid at the reduced minimum wage rate, yet have no comprehensive health
14 insurance benefits provided by their employer, no access to such benefits plans, or only have
15 access to plans that are not within guidelines mandated by Art. 15, Sec. 16.

16 43. For more than seven years, since the approval and effective date of Art. 15, Sec. 16
17 of the Nevada Constitution, Nevada workers have logged, upon information and belief, hundreds
18 of thousands—millions, certainly—of hours at the reduced minimum wage rate, unlawfully, due to
19 regulations promulgated by the Nevada Labor Commissioner that are in conflict with
20 constitutional mandates and, therefore, in excess of his proper authority. Plaintiff himself has
21 worked many hundreds of hours at this wage level under such unlawful regulations.

22 44. The Labor Commissioner has not enforced the labor laws of the State of Nevada in
23 any systematic fashion that would uphold the text and meaning of the 2006 constitutional
24 amendment. Upon invalidation of the current regulations identified herein, the Court should
25 exercise its extraordinary powers to direct the Labor Commissioner, via writ of mandamus, to
26 enforce proper employer compliance with Art. 15, Sec. 16 by all necessary means.

27

28

1 FIRST CLAIM FOR RELIEF

2 Declaratory Relief: Invalidity of N.A.C. 608.100

3 45. Plaintiff repeats and re-alleges each and every paragraph above as though they were
4 fully set forth at length herein.

5 46. N.A.C. 608.100 does not require Nevada employers to provide qualifying health
6 benefits in order to compensate workers at the reduced minimum wage rate, in contravention of
7 Nev. Const. Art. 15, Sec. 16.

8 47. N.A.C. 608.100 violates constitutional provisions and/or exceeds the authority of
9 the Labor Commissioner to promulgate and enforce.

10 48. It is necessary for the Court to determine the legal rights of Plaintiff and
11 Defendants regarding promulgation and enforcement of the subject regulations.

12 49. Plaintiff has been forced to retain the services of an attorney to prosecute this
13 action, and is entitled to his reasonable attorney fees and costs of the action per order of the Court.

14 SECOND CLAIM FOR RELIEF

15 Declaratory Relief: Invalidity of N.A.C. 608.104

16 50. Plaintiff repeats and re-alleges each and every paragraph above as though they were
17 fully set forth at length herein.

18 51. N.A.C. 608.104 permits calculation of allowable health insurance benefit premium
19 costs to minimum wage employees at a rate exceeding that permitted by Nev. Const. Art. 15, Sec.
20 16.

21 52. N.A.C. 608.104 violates constitutional provisions and/or exceeds the authority of
22 the Labor Commissioner to promulgate and enforce.

23 53. It is necessary for the Court to determine the legal rights of Plaintiff and
24 Defendants regarding promulgation and enforcement of the subject regulations.

25 54. Plaintiff has been forced to retain the services of an attorney to prosecute this
26 action, and is entitled to his reasonable attorney fees and costs of the action per order of the Court.

27 ///

1 **THIRD CLAIM FOR RELIEF**

2 **Declaratory Relief: Invalidity of N.A.C. 608.108**

3 55. Plaintiff repeats and re-alleges each and every paragraph above as though they were
4 fully set forth at length herein.

5 56. N.A.C. 608.108 permits a grace period of up to 6 months for provision of health
6 insurance benefits, while permitting payment to employees the reduced minimum wage rate in the
7 interim, in contravention of Nev. Const. Art. 15, Sec. 16.

8 57. N.A.C. 608.108 violates constitutional provisions and/or exceeds the authority of
9 the Labor Commissioner to promulgate and enforce.

10 58. It is necessary for the Court to determine the legal rights of Plaintiff and
11 Defendants regarding promulgation and enforcement of the subject regulations.

12 59. Plaintiff has been forced to retain the services of an attorney to prosecute this
13 action, and is entitled to his reasonable attorney fees and costs of the action per order of the Court.

14 **FOURTH CLAIM FOR RELIEF**

15 **Injunctive Relief**

16 60. Plaintiff repeats and re-alleges each and every paragraph above as though they were
17 fully set forth at length herein.

18 61. The regulations here the subjects of Plaintiff's First through Third Claims for
19 Relief, if continued to be enforced by the Labor Commissioner or the Nevada Department of
20 Business & Industry, threaten ongoing violation and damage to Plaintiff's rights respecting the
21 subject of the present action, and would tend to render judgment ineffectual.

22 62. The Court, therefore, should immediately and permanently enjoin and prohibit
23 Defendants from enforcing the subject regulations.

24 63. Plaintiff has been forced to retain the services of an attorney to prosecute this
25 action, and is entitled to his reasonable attorney fees and costs of the action per order of the Court.

26 ///

27 ///

28

FIFTH CLAIM FOR RELIEF**Extraordinary Relief: Writ of Mandamus**

64. Plaintiff repeats and re-alleges each and every paragraph above as though they were fully set forth at length herein.

65. Defendant the Nevada Labor Commissioner is compelled as a duty resulting from office, trust, or station to enforce Nevada's labor laws.

66. This duty requires that the Labor Commissioner promulgate lawful and appropriate regulations, and enact compliance safeguards and measures, sufficient to ensure that Nevada's minimum wage employees receive the intended benefits of Art. 15, Sec. 16 of the Nevada Constitution, and that employers comply on an ongoing basis with its mandates.

67. The current regulatory regime implementing Art. 15, Sec. 16 is inadequate and unlawful, and cannot fulfill the duties of the Labor Commissioner under law.

68. Mandamus is necessary to compel the Labor Commissioner to comply with the duties of office and take all necessary regulatory steps to enforce and to ensure proper compliance with Nev. Const. Art. 15, Sec. 16, per appropriate order of the Court, to effectuate the meaning and purpose of the Nevada Constitution, including immediate promulgation of appropriate emergency regulations and maintenance of a purposeful compliance regime.

69. Plaintiff has no plain, speedy, and adequate remedy at law apart from mandamus to compel performance of Defendants' legal duties.

70. Plaintiff has been forced to retain the services of an attorney to prosecute this action, and is entitled to his reasonable attorney fees and costs of the action per order of the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court:

A. Declare and adjudge N.A.C. 608.100, 608.104, and 608.108 invalid as indicated herein;

B. Issue a mandatory injunction against Defendants prohibiting them from enforcing said regulations henceforth;

- 1 C. Issue a writ of mandamus compelling the Labor Commissioner to perform the
2 duties of the office and take all necessary regulatory steps to enforce and to ensure
3 proper compliance with Nev. Const. Art. 15, Sec. 16, per appropriate order of the
4 Court, to effectuate the meaning and purpose of the Nevada Constitution, including
5 immediate promulgation of appropriate emergency regulations and maintenance of
6 a purposeful and effective compliance regime.
- 7 D. Grant all other relief of any variety deemed necessary and proper by the Court to
8 effectuate its judgment and remedy claims of Plaintiff, and
- 9 E. Award Plaintiff his reasonable attorney fees and costs of suit.

10
11 DATED this 5th day of June, 2014.

12 WOLF, RIFKIN, SHAPIRO,
13 SCHULMAN & RABKIN, LLP

14 By: 

15 Don Springmeyer, Esq.
16 Nevada State Bar No. 1021
17 Bradley Schrager, Esq.
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19 Daniel Bravo, Esq.
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21 3556 E. Russell Road, Second Floor
22 Las Vegas, Nevada 89120
23 Attorneys for Plaintiff
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2014, a true and correct copy of was placed in an envelope, postage prepaid, addressed as stated below, in the basket for AMENDED COMPLAINT FOR 1) DECLARATORY RELIEF PURSUANT TO N.R.S. 233B.110; 2) INJUNCTIVE RELIEF PURSUANT TO N.R.S. 33.010; AND 3) WRIT OF MANDAMUS PURSUANT TO N.R.S. 34.160 outgoing mail before 4:00 p.m. at WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP. The firm has established procedures so that all mail placed in the basket before 4:00 p.m. is taken that same day by an employee and deposited in a U.S. Mail box.

Scott R. Davis, Esq.
State of Nevada
Office of the Attorney General
555 E. Washington Avenue, Ste. 3900
Las Vegas, NV 89101

Attorney for Office of the Labor Commissioner

By


Christie Rehfeld, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP

INDEX OF EXHIBITS

- 1 Exhibit 1 Nev. Const. art. XV, § 16 – 3 Pages
2 Exhibit 2 N.A.C. 608.100 – 1 Page
3 Exhibit 3 N.A.C. 608.102 – 1 Page
4 Exhibit 4 N.A.C. 608.104 – 1 Page
5 Exhibit 5 N.A.C. 608.106 – 1 Page
6 Exhibit 6 N.A.C. 608.108 – 1 Page
7 Exhibit 7 Proposed Emergency Regulations of the Labor Commissioner – 2 Pages
8 Exhibit 8 April 7, 2014 response of the Office of the Labor Commissioner – 2 Pages
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
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EXHIBIT "1"

EXHIBIT "1"

Nev. Const. Art 15, Sec. 16.**Payment of minimum compensation to employees.**

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.

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 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.

EXHIBIT "2"

EXHIBIT "2"

NAC 608.100 Minimum wage: Applicability; rates; annual adjustments.
(Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

1. Except as otherwise provided in subsections 2 and 3, the minimum wage for an employee in the State of Nevada is the same whether the employee is a full-time, permanent, part-time, probationary or temporary employee, and:
 - (a) If an employee is offered qualified health insurance, is \$5.15 per hour; or
 - (b) If an employee is not offered qualified health insurance, is \$6.15 per hour.
2. The rates set forth in subsection 1 may change based on the annual adjustments set forth in Section 16 of Article 15 of the Nevada Constitution.
3. The minimum wage provided in subsection 1 does not apply to:
 - (a) A person under 18 years of age;
 - (b) A person employed by a nonprofit organization for after-school or summer employment;
 - (c) A person employed as a trainee for a period not longer than 90 days, as described by the United States Department of Labor pursuant to section 6(g) of the Fair Labor Standards Act; or
 - (d) A person employed under a valid collective bargaining agreement in which wage, tip credit or other provisions set forth in Section 16 of Article 15 of the Nevada Constitution have been waived in clear and unambiguous terms.
4. As used in this section, "qualified health insurance" means health insurance coverage offered by an employer which meets the requirements of NAC 608.102.

(Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

EXHIBIT "3"

EXHIBIT "3"

NAC 608.102 Minimum wage: Qualification to pay lower rate to employee offered health insurance. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

To qualify to pay an employee the minimum wage set forth in paragraph (a) of subsection 1 of NAC 608.100, an employer must meet each of the following requirements:

1. The employer must offer a health insurance plan which:
 - (a) Covers those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213 and any federal regulations relating thereto, if such expenses had been borne directly by the employee; or
 - (b) Provides health benefits pursuant to a Taft-Hartley trust which:
 - (1) Is formed pursuant to 29 U.S.C. § 186(c)(5); and
 - (2) Qualifies as an employee welfare benefit plan:
 - (I) Under the guidelines of the Internal Revenue Service; or
 - (II) Pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.
2. The health insurance plan must be made available to the employee and any dependents of the employee. The Labor Commissioner will consider such a health insurance plan to be available to the employee and any dependents of the employee when:
 - (a) An employer contracts for or otherwise maintains the health insurance plan for the class of employees of which the employee is a member, subject only to fulfillment of conditions required to complete the coverage which are applicable to all similarly situated employees within the same class; and
 - (b) The waiting period for the health insurance plan is not more than 6 months.
3. The share of the cost of the premium for the health insurance plan paid by the employee must not exceed 10 percent of the gross taxable income of the employee attributable to the employer under the Internal Revenue Code, as determined pursuant to the provisions of NAC 608.104.

(Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

EXHIBIT "4"

EXHIBIT "4"

NAC 608.104 Minimum wage: Determination of whether employee share of premium of qualified health insurance exceeds 10 percent of gross taxable income. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

1. To determine whether the share of the cost of the premium of the qualified health insurance paid by the employee does not exceed 10 percent of the gross taxable income of the employee attributable to the employer, an employer may:

(a) For an employee for whom the employer has issued a Form W-2 for the immediately preceding year, divide the gross taxable income of the employee paid by the employer into the projected share of the premiums to be paid by the employee for the health insurance plan for the current year;

(b) For an employee for whom the employer has not issued a Form W-2, but for whom the employer has payroll information for the four previous quarters, divide the combined total of gross taxable income normally calculated from the payroll information from the four previous quarters into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year;

(c) For an employee for whom there is less than 1 aggregate year of payroll information:

(1) Determine the combined total gross taxable income normally calculated from the total payroll information available for the employee and divide that number by the number of weeks the total payroll information represents;

(2) Multiply the amount determined pursuant to subparagraph (1) by 52; and

(3) Divide the amount calculated pursuant to subparagraph (2) into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year; and

(d) For a new employee, promoted employee or an employee who turns 18 years of age during employment, use the payroll information for the first two normal payroll periods completed by the employee and calculate the gross taxable income using the formula set forth in paragraph (c).

2. As used in this section, "gross taxable income of the employee attributable to the employer" means the amount specified on the Form W-2 issued by the employer to the employee and includes, without limitation, tips, bonuses or other compensation as required for purposes of federal individual income tax.

(Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

EXHIBIT "5"

EXHIBIT "5"

NAC 608.106 Minimum wage: Declination by employee of coverage under health insurance plan. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

If an employee declines coverage under a health insurance plan that meets the requirements of NAC 608.102 and which is offered by the employer, the employer must maintain documentation that the employee has declined coverage. Declining coverage may not be a term or condition of employment.

(Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

EXHIBIT "6"

EXHIBIT "6"

NAC 608.108 Minimum wage: Requirements for payment at higher rate; modification of term of waiting period. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

If an employer does not offer a health insurance plan, or the health insurance plan is not available or is not provided within 6 months of employment, the employee must be paid at least the minimum wage set forth in paragraph (b) of subsection 1 of NAC 608.100 until such time as the employee becomes eligible for and is offered coverage under a health insurance plan that meets the requirements of NAC 608.102 or until such a health insurance plan becomes effective. The term of the waiting period may be modified in a bona fide collective bargaining agreement if the modification is explicitly set forth in such agreement in clear and unambiguous terms.

(Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

EXHIBIT "7"

EXHIBIT "7"

PROPOSED EMERGENCY REGULATIONS OF THE
LABOR COMMISSIONER
NOVEMBER 29, 2006

EXPLANATION- Matter that is underlined is new; matter in brackets [omitted material] is material to be omitted.

AUTHORITY: §§1-13, NRS 607.160(1)(b), NRS 608.270, NRS 608.018, NRS 233B.0613.

Section 1. Chapter 608 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 12, inclusive, of this regulation. This regulation shall expire at the end of 120 days from filing with the Secretary of State or upon the filing of a temporary or permanent regulation whichever should occur first.

- Sec.2. Nevada has established a two-tiered minimum wage.
- A. The first tier, lower tier, is from \$5.15 to \$6.14 per hour for employers who provide qualified health insurance benefits.
 - B. The second tier, upper tier, is \$6.15 per hour for employers who do not provide qualified health benefits.
- Sec.3. The minimum wage may be adjusted annually.
- A. These rates will be adjusted annually to include increases in the federal minimum wage and a yearly cost of living adjustment as set forth in Article 15, Section 16 of the Constitution of Nevada.
 - B. The annual adjustments will be announced in April and become effective on July 1 of each year.
 - C. Each minimum wage tier will increase by the same dollar amount as the federal rate increase.
- Sec. 4. A. The minimum wage applies to all employees in Nevada.
- B. The minimum wage exemptions codified at NRS 608.250(2) conflict with Article 15, Section 16 of the Constitution of Nevada and are no longer applicable.
 - C. People under the age of 18, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days are not considered employees for the purpose of compliance with the minimum wage.
 - D. There is no distinction between whether an employee is full-time, permanent, part-time, or temporary.
- Sec. 5. In order to qualify for the lower minimum wage tier an employer must comply with all of the following:
- A. Health insurance coverage must be made available to the employee and the employees dependents; and

- B. The employee's share of the cost of the premium cannot exceed 10% of the employee's gross income as defined under the Internal Revenue Code for the time interval between the premium payments; and
- C. The health insurance must be a policy, contract, certificate or agreement offered or issued by a carrier authorized by the Nevada Insurance Commissioner to provide, deliver, arrange for, pay for or reimburse any of the costs of health care services or, in the alternative, any federally approved self-funded plans established under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, except that medical discount plans as defined by NRS 695H.050 and workers compensation insurance do not qualify as health insurance.

Sec. 6. If an employee declines coverage under a qualified health insurance plan offered by the employer, the employee may be paid in the lower minimum wage tier, however, the employer must document that the employee has declined coverage and declining coverage may not be a term or condition of employment.

Sec. 7. If an employer offers qualified health insurance, but for some reason the employee is not eligible to receive the coverage provided by the employer or there is a delay before the coverage can become effective, the employee must be paid the upper tier wage until such time as the employee becomes eligible and is offered coverage or when the insurance becomes effective.

Sec. 8. For the purposes of complying with the overtime provisions of NRS 608.018(1),

- A. An employer who qualifies for the lower tier minimum wage shall pay all employees with a base hourly rate of \$7.725 per hour or less overtime whenever the employee works more than eight hours in a workday.
- B. An employer who is required to pay the upper tier minimum wage shall pay all employees with a base hourly rate of \$9.225 per hour or less overtime whenever the employee works more than eight hours in a workday.

EXHIBIT "8"

EXHIBIT "8"

STATE OF NEVADA

BRIAN SANDOVAL
GOVERNOR

BRUCE BREWSLOW
DIRECTOR

THORAN TOWLER
LABOR COMMISSIONER



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Department of Business & Industry
OFFICE OF THE LABOR COMMISSIONER

www.LaborCommissioner.com

April 7, 2014

Bradley S. Schrager
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3588 E. Russell Road, 2nd Floor
Las Vegas NV 89120

RE: Public Records Request - Payment of Reduced Rate Minimum Wage

Mr. Schrager:

The Office of the Labor Commissioner is in receipt of your public records request dated April 3, 2014. Please accept this letter and any accompanying documentation as response to your request.

Pursuant to NRS 239, you requested documents reflecting our office's regulation of employers and employees affected by the portions of Article 15, Section 18 of the Nevada Constitution and associated regulations that permit the payment of a minimum wage at a reduced rate under certain conditions pertaining to the provision of health benefits to workers.

Specifically, you requested the following categories of documents, if they exist:

- a) Any databases or lists of employers who purport to have paid any employees the reduced hourly minimum wage rate because the employer claims to provide or offer, or to have provided or offered, qualifying health benefits as described in NAC 608.102.

After a review of our records, our office has found no records responsive to this request.

- b) Any databases or collection of health plans your office has required employers that claim to provide or offer, or to have provided or offered, qualifying health benefits as described in NAC 608.102, to submit for purposes of verifying compliance constitutional or regulatory provisions permitting payment of employees at the reduced minimum wage rate.

After a review of our records, our office has found no records responsive to this request.

- c) Any databases or lists of employees who have been or are currently paid at the reduced hourly minimum rate because the employer claims to provide or offer, or to have provided or offered, qualifying health benefits per NAC 608.102.

After a review of our records, our office has found no records responsive to this request.

- d) All documents representing and/or reflecting the systemic manner, if any, in which your office enforces and verified compliance by Nevada employers regarding those employers' eligibility to pay employees at the reduced hourly minimum rate because the employer claims to provide or offer, or to have provided or offered, qualifying health benefits as described in NAC 608.102.

Please see the document(s) accompanying this letter.

- e) All documents reflecting and/or describing actual changes, or contemplated changes, as a result of the enactment of the Patient Protection and Affordable Care Act, in the enforcement of the provisions of Nevada Constitution Article 15, Section 16, and associated regulations promulgated by your office at NAC 608.102 - 608.108, regarding the payment of a minimum wage rate by employers offering qualifying health benefits.

After a review of our records, our office has found no records responsive to this request.

- f) Requests for opinions to your office, and subsequent opinions by your office, regarding whether specific health benefits qualify a particular employer to pay employees at the reduced minimum wage rate per NAC 608.102.

After a review of our records, our office has found no records responsive to this request.

- g) Documents reflecting enforcement actions undertaken by your office since January 1, 2007 against an employer in Nevada for violation of either Nevada Constitution Article 16, Section 16, and associated regulations promulgated by your office at NAC 608.102 - 608.108, regarding the payment of a minimum wage rate by employers offering qualifying health benefits.

After a review of our records, our office has found no records responsive to this request.

- h) Copies of all written public comments received by your office regarding Adopted Regulation R055-07 or Temporary Regulation T004-07 during 2007.

Please see the document(s) accompanying this letter.

NRS 239.052 allows our office to charge a fee for providing copies of public records. Except for extraordinary requests, the fee cannot exceed the actual cost to the government entity in compiling and providing the copies. The actual cost to our office in providing copies of public records is \$0.10 per page. The cost of extraordinary requests is \$0.50 per page. Our office has chosen to waive the actual cost in compiling this request.

Sincerely,



Audra L. Parton
Chief Assistant to the Labor Commissioner



LAW OFFICES
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

Bradley S. Schrager
bschrager@wrslawyers.com

LV4167-002

August 28, 2014

VIA FACSIMILE (775) 687-6409

Office of the Nevada Labor Commissioner
675 Fairview Drive, Suite 226
Carson City, Nevada 89701

**Re: Comments of Bradley Schrager and the Law Firm of Wolf Rifkin Shapiro
Schulman & Rabkin to the Office of the Nevada Labor Commissioner,
Regarding N.A.C. 608.100 - 608.108**

Dear Commissioner:

Thank you for the opportunity to address comments to your office as part of a reconsideration of the permanent regulations promulgated seven years ago to implement Nev. Const. art. XV, § 16, Nevada's constitutional Minimum Wage Amendment.

The Minimum Wage Amendment, passed by the voters as Question 6 in both 2004 and 2006 was designed to raise the state's base minimum wage, remove previous exceptions, provide expanded civil remedies for employees, and incentivize employers to provide comprehensive, low-cost health insurance benefits to their workers.

It promised Nevada's lowest-paid workers a pretty good deal: an improved upper-tier minimum hourly wage, or a slightly reduced hourly wage with comprehensive benefits for themselves and all their dependents, provided by their employer, at a cost of no more than 10% of their wages from that employer. The last eight years, however, have not witnessed what we would consider a fulfillment of that promise, and part of that is due to a regulatory scheme that has not furthered the purpose of the Minimum Wage Amendment.

The current permanent regulations enacted in 2007 by the previous Labor Commissioner are hampered by gaps, exceptions, and loopholes allowing employers to avoid wage and benefit responsibilities to their workers. Neither does there appear to be a functioning compliance regime in place that would alert this office, or the public, to violations of the Minimum Wage Amendment. We don't know which employers are paying less than the full minimum wage, or on what basis they claim the privilege to do so.

The Commissioner's Office has the authority and responsibility to correct these longstanding flaws in the regulatory scheme, and we urge it to do so at the earliest possible moment.

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Office of the Nevada Labor Commissioner
August 28, 2014
Page 2

1. N.A.C. 608.100

The central issue with 608.100 is its establishment of the principle that employers need only "offer" rather than "provide" qualifying health benefits in order to pay below the upper-tier hourly rate. The Minimum Wage Amendment itself is not very artfully drafted in this regard. Also, nothing in 608.100, or any other subsequent regulation, makes it clear that an employer needs to offer a qualifying health plan more than once, either back in 2006 or at subsequent time of hire. Some employees have reported, for example, that they had declined coverage once, in 2010, and have been making \$7.25 ever since without further opportunity to obtain qualifying health plan benefits. Their employer sees no need to make benefits available every quarter, or every year, or on an ongoing basis. That should be a clear aspect of the regulatory implementation of the Minimum Wage Amendment, but it is not.

A further problem with 608.100 is its creation, at Subsections 3(a)-3(c), of multiple exceptions not included or authorized in the constitution. The confusion may be in the specific grammatical usage in the Minimum Wage Amendment, but it seems clear when you lay out the text of the provision that there is but one exception to the definition of "employee" in the amendment—one exception with two potential subpart: a worker who is under 18 years old, and who either works for a nonprofit in after-school or summer employment or who is a trainee for 90 days or less. In any case, only workers who are under 18 can fit into either subpart of the exception.

608.100(3)(a)-(3)(c), instead, creates three separate exceptions: one for all workers under 18 years of age; another for any employee of a nonprofit organization for after-school or summer work; and another for any worker employed as a trainee 90 days or less. These exceptions are not supported by the law. Nevada does not have a blanket minimum wage exception for workers under 18. Nor does it, or logically could it, except all employees of nonprofits engaged in after-school or summer work—that doesn't even make sense for workers older than school-age. And the last regulatory exception—the trainee exception—opens space for employers to pay lower wages for a period at the commencement of employment, even for older workers. Adding to the confusion, 608.100(3)(c) directs employers to Section 6(g) of the Fair Labor Standards Act, a section of federal law which includes a trainee exception to the federal minimum wage but only for employees under 20 years of age.

The regulations need to be written in a manner faithful to the constitution, and that means a closer reading and interpretation of the exceptions to the definition of "employee" to recognize that those established by 608.104(3)(a)-(3)(c) are unlawful.

Suggestions for revision of N.A.C. 608.100 might include:

NAC 608.100 Minimum wage: Applicability; rates; annual adjustments. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

1. Except as otherwise provided in subsections 2 and 3, the minimum wage for an employee in the State of Nevada is the same whether the employee is a full-time, permanent, part-time, probationary or temporary employee, and:

- (a) If an employee is ~~offered~~ **provided** qualified health insurance, is ~~is~~ **\$7.25** per hour; or
- (b) If an employee is not ~~offered~~ **provided** qualified health insurance, is ~~is~~ **\$8.25** per hour.

Office of the Nevada Labor Commissioner
August 28, 2014
Page 3

2. The rates set forth in subsection 1 may change based on the annual adjustments set forth in Section 16 of Article 15 of the Nevada Constitution.

3. The minimum wage provided in subsection 1 does not apply to:

(a) A person under 18 years of age ~~who~~:

(1) Is employed by a nonprofit organization for after-school or summer employment; or

(2) Is employed as a trainee for a period not longer than 90 days.

~~(b) A person employed by a nonprofit organization for after-school or summer employment;~~

~~(c) A person employed as a trainee for a period not longer than 90 days, as described by the United States Department of Labor pursuant to section 6(g) of the Fair Labor Standards Act; or~~

~~(d) (b) A person employed under a valid collective bargaining agreement in which wage, tip credit or other provisions set forth in Section 16 of Article 15 of the Nevada Constitution have been waived in clear and unambiguous terms.~~

4. As used in this section, "qualified health insurance" means health insurance coverage offered by an employer which meets the requirements of NAC 608.102.

The proposed regulation clarifies that (i) an employer must provide qualified health insurance in order to pay and employee the lower-level minimum wage; and (ii) eliminates the unauthorized three separate exceptions and keeps to a faithful interpretation of the Minimum Wage Amendment's sole exception with its two sub-parts.

2. N.A.C. 608.102

The definition of a qualifying health insurance plan under 608.102 is appropriate, as it requires truly comprehensive coverage in order to allow an employer the privilege of paying below the upper-tier hourly rate.

The problems with 608.102 are that it introduces two concepts that cause tremendous problems in subsequent regulations: the six-month grace or waiting period for health insurance in Subsection 2(b), and the phrase "gross taxable income of the employee *attributable to the employer*" for purposes of calculating lawful limits on allowable premium costs to the employee. Neither of those concepts are in any way authorized by the text or meaning of the Minimum Wage Amendment.

Suggestions for revision of N.A.C. 608.102 might include:

NAC 608.102 Minimum wage: Qualification to pay lower rate to employee offered health insurance. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250) To qualify to pay an employee the minimum wage set forth in paragraph (a) of subsection 1 of NAC 608.100, an employer must meet each of the following requirements:

1. The employer must ~~offer~~ *provide* a health insurance plan which:

(a) Covers those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213 and any federal regulations relating thereto, if such expenses had been borne directly by the employee; or

(b) Provides health benefits pursuant to a Taft-Hartley trust which:

(1) Is formed pursuant to 29 U.S.C. § 186(c)(5); and

Office of the Nevada Labor Commissioner
August 28, 2014
Page 4

- (2) Qualifies as an employee welfare benefit plan:
(I) Under the guidelines of the Internal Revenue Service; or
(II) Pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.

2. The health insurance plan must be made available to the employee and any dependents of the employee. The Labor Commissioner will consider such a health insurance plan to be available to the employee and any dependents of the employee when:

(a) An employer contracts for or otherwise maintains the health insurance plan for the class of employees of which the employee is a member, subject only to fulfillment of conditions required to complete the coverage which are applicable to all similarly situated employees within the same class. ~~and~~

~~(b) The waiting period for the health insurance plan is not more than 6 months.~~

3. The share of the cost of the premium for the health insurance plan paid by the employee must not exceed 10 percent of the *employee's* gross taxable income *from* ~~{of the employee attributable to}~~ the employer ~~under the Internal Revenue Code, as determined pursuant to the provisions of NAC 608.104.~~

4. *If the employee accepts the provided health insurance plan benefits from the employer, the employee must be paid at the minimum wage set forth in paragraph (b) of subsection 1 of NAC 608.100 until he or she becomes eligible for and actually receives the benefits.*

The proposed regulation eliminates (i) the six-month grace period for health insurance; and (ii) clarifies the lawful limits on allowable premium costs to the employee explained in N.A.C. 608.104.

3. N.A.C. 608.104

608.104 sets out procedures for calculating whether premium costs to an employee and all of his or her dependents exceeds the 10% cap mandated by the state constitution. Most problematically, it does so in a manner that allows employers to charge workers far in excess of what the Minimum Wage Amendment actually allows.

608.104(1) repeats the term "gross taxable income ... *attributable to the employer*," which is then defined in 608.104(2), as "the amount specified on the Form W-2 issued by the employer to the employee and includes, without limitation, tips, bonuses or other compensation as required for purposes of federal individual income tax."

This portion of 608.104 is flatly illegal. The text of the Minimum Wage Amendment itself states that the benefits plan must be "available ... at a total cost to the employee of not more than 10 percent of the employee's gross taxable income *from the employer*." It cannot be argued that tips or gratuities come "from the employer"—they come from patrons and the public. Nowhere in the Constitution is there support for the creation by the Labor Commissioner of a tip credit for employers in calculating the allowable premium costs for qualifying plans provided to employees. Nevada law does not allow a tip credit against its minimum wage, a point expressly confirmed in the text of the Minimum Wage Amendment itself. The invention of such a credit in the premium cost context, dropped into the regulations in the definition of "income ... attributable to the employer" does not comport with—and in truth, totally inverts—the law of this state.

Office of the Nevada Labor Commissioner
August 28, 2014
Page 5

As an easily-understood example of the impact of this unlawful regulation, let us assume a server at a sit-down restaurant in Nevada. In a typical pay period of two weeks, he or she makes \$500 in hourly wages from the employer in wages, and a further \$500 in tips. This scenario is quite typical. Under the plain text of the Minimum Wage Amendment, the employer should not be able to pay me less than \$8.25 unless it provides comprehensive health insurance to the employee and all dependents for, at most, \$50 per pay period—10% of the \$500 earned from the employer. Under the regulations now in place, however, the employer can charge the employee in question \$100 per pay period—10% on the total gross income, including tips. The regulation, therefore, has allowed the employer in the example to double allowable premium costs, absolutely contrary to the state constitution.

Furthermore, the methods of calculating whether premiums exceed 10% of income are themselves deeply flawed. 608.104(1)'s methods appear to have been constructed back in 2007 to meet only the immediate question of how employers, at that moment struggling to implement their new responsibilities, would initiate compliance. As guides for how, seven years later, employers make the necessary calculations, 608.104 is now inadequate.

Each manner of calculation in 608.104 is forward-looking, those for longtime, current, and for new employees. They project future premium costs into past wages earned, or multiply a few weeks' worth of paychecks to arrive at an expected income over time. But 608.104 demonstrates no recognition of the basic fact of the employer-employee relationship: The employer controls the employee's hours. The notion that one could project, from two pay periods of work, all of a new hourly employee's future income, and compare that with the "projected share of premiums" going forward is simply not realistic, and does not protect minimum wage workers from either outright abuse or simple over-charging. In other words, the projections and payroll info used to base an offer of health insurance can end up being wildly off a short time later, and employees can wind up paying far more than 10% of their wages in premium costs.

Because of the instability of employee pay and hours, no employee being paid less than \$8.25 should, at any time, be paying more than 10% of any pay period's wages for their qualifying health benefits premiums. If an employer cannot comply with that mandate, pay period by pay period, the employer must pay the full, upper-tier minimum wage rate.

Suggestions for revision of N.A.C. 608.104 might include:

NAC 608.104 Minimum wage: Determination of whether employee share of premium of qualified health insurance exceeds 10 percent of gross taxable income. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)

1. To determine whether the share of the cost of the premium of the qualified health insurance paid by the employee does not exceed 10 percent of the *employee's* gross taxable income *from [of the employee attributable to] the employer*, an employer may:

(a) *Calculate the 10 percent share of the premium to be paid by the employee for qualified health insurance for each payroll period completed by the employee. [For an employee for whom the employer has issued a Form W-2 for the immediately preceding year, divide the gross taxable income of the employee paid by the employer into the projected share of the premiums to be paid by the employee for the health insurance plan for the current year;*

~~(b) For an employee for whom the employer has not issued a Form W-2, but for whom the employer has payroll information for the four previous quarters, divide the combined total of~~

Office of the Nevada Labor Commissioner
 August 28, 2014
 Page 6

~~gross taxable income normally calculated from the payroll information from the four previous quarters into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year;~~

~~—(c) For an employee for whom there is less than 1 aggregate year of payroll information:~~

~~—(1) Determine the combined total gross taxable income normally calculated from the total payroll information available for the employee and divide that number by the number of weeks the total payroll information represents;~~

~~—(2) Multiply the amount determined pursuant to subparagraph (1) by 52; and~~

~~—(3) Divide the amount calculated pursuant to subparagraph (2) into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year; and~~

~~—(d) For a new employee, promoted employee or an employee who turns 18 years of age during employment, use the payroll information for the first two normal payroll periods completed by the employee and calculate the gross taxable income using the formula set forth in paragraph (c).]~~

2. As used in this section, *"employee's gross taxable income of the employee attributable to from the employer"* cannot include tips or gratuities from customers. Only wages, as defined by NRS 608.012, shall be used in computing employee income from the employer for purposes of this section [means the amount specified on the Form W-2 issued by the employer to the employee and includes, without limitation, tips, bonuses or other compensation as required for purposes of federal individual income tax].

The proposed regulation follows closely the Minimum Wage Amendment's language for calculating the lawful limits on allowable premium costs to the employee. Further, the method for calculating an employee's premium for each pay period eliminates any over-calculations by eliminating the unstable methods of the current regulation.

4. N.A.C. 608.106

608.106 requires documentation that an employee has declined qualifying health insurance. This provisions has utility, with the caveat that it is not clear that employees who decline should be allowed to be paid at the reduced minimum wage rate.

More to the point, documentation of this type will be most necessary when it becomes required by this Office to make qualifying health benefits constantly available to minimum wage employees, or requires quarterly or yearly re-offerings to employees whom have previously declined. The constitution absolutely does not support the idea that a single declination of benefits may sentence a minimum wage worker to a reduced wage in perpetuity, and that aspect of the regulations should be corrected.

Suggestions for revision of N.A.C. 608.106 might include:

NAC 608.106 Minimum wage: Declination by employee of coverage under health insurance plan. (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250) If an employee declines coverage under a health insurance plan that meets the requirements of NAC 608.102 and which is [offered] *provided* by the employer, *the employee shall be paid at least the minimum wage*

Office of the Nevada Labor Commissioner
August 28, 2014
Page 7

set forth in paragraph (a) of subsection 1 of NAC 608.100 until the employee accepts and receives the benefit of the health insurance plan. {the} The employer must maintain documentation that the employee has declined coverage for that time period of enrollment, and must demonstrate declination at each and every offering of the health insurance plan to the employee. Declining coverage may not be a term or condition of employment.

The proposed regulation clarifies whether an employer may pay an employee the lower-level minimum wage if that employee declines the qualified health insurance benefits, and requires documentation, for each period of possible enrollment, whether an employee has declined qualifying health insurance.

5. N.A.C. 608.108

608.108 establishes an unauthorized grace or waiting period of six months for employers, involving a mix of provision, eligibility, and other delays in benefits for employees. It is certainly understood that oftentimes there are open enrollment or waiting periods before benefits become usable by employees. That does not, however, authorize an employer to pay the employee up to 12% less per hour during the interim. The basic *quid pro quo* bargain of the Minimum Wage Amendment is a lower wage rate in exchange for health insurance benefits. The lower wage rate should not begin until the benefits actually have been received. If there is a waiting period during which benefits legitimately cannot be provided, the employee should be paid at the upper-tier hourly rate during that time.

In fact, the Emergency regulations promulgated in late 2006, just after the passage of the Amendment, stated exactly that. It was only in the later Temporary and Permanent Regulations that the previous Labor Commissioner decided the six month waiting period should become a windfall for the employer rather than a time during which the employee should receive the full fruits of the state constitution's mandates. At any rate, this window of disadvantage for minimum wage employees ought to be done away with under new regulations.

Compliance and Enforcement

Of course, none of this matters without a useful and effective compliance regime. At present, it is difficult for this Office to confront the range of approaches to the Minimum Wage Amendment by employers, and to place potential violators on its radar screen.

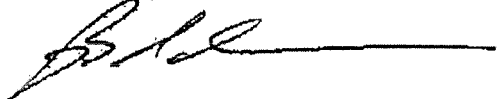
The first step, therefore, is to build a radar screen: Require employers who intend to pay any worker less than \$8.25 per hour to declare that fact, at least annually, on a form devised and disseminated by your Office. That, at the very least, would provide a publicly-accessible database of employers claiming eligibility to pay reduced minimum wages. Thereafter, ensure that employers who declare their intent to pay below the upper tier minimum wage must provide employees with specific information regarding what constitutes "qualifying health insurance benefit plans"—detailing coverage requirements, premium cost caps, lawful exceptions, the appropriate process of offering, accepting, and declining benefits, and the rights and procedures for remedying alleged violations. One of the problems we have seen is that employees simply do not know what is and is not lawful, and therefore cannot make reasonable choices regarding their treatment in the workplace. This Office needs to provide the tools necessary for employees and employers to share a common understanding of the law.

Office of the Nevada Labor Commissioner
August 28, 2014
Page 8

Again, thank you very much for the opportunity to address and submit comments to your Office on this important statewide matter. Please feel free to contact us at any time to discuss these comments and suggestions, and we look forward to a process of reconsideration that will update the current regulations in a manner faithful to and in furtherance of the 2006 Minimum Wage Amendment to the Nevada Constitution.

Sincerely yours,

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP


BRADLEY S. SCHRAGER

BSS:lr

cc: Richard McCracken, Esq.
Danny Thompson, Nevada, AFL-CIO
Scott R. Davis, Deputy Attorney General

1729135.1



LAW OFFICES
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

FACSIMILE TRANSMISSION

August 28, 2014

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Richard McCracken, Esq.		702-386-9848
Danny Thompson, Nevada AFL-CIO		702-967-5201
Scott R. Davis, Deputy Attorney General		702-486-3416

FROM: Lorraine Rillera for
Bradley S. Schrager, Esq.

RE: Comments of Bradley Schrager and the Law Firm of Wolf, Rifkin, Shapiro,
Schulman & Rabkin, LLP to the Office of the Nevada Labor Commissioner re
N.A.C. 608.100-608.108.

FILE NO.: LV4167-002

PAGES: 9 (including cover page)

If you do not receive all pages, please contact Lorraine at 702-341-5200, ext. 5124

MESSAGE: Please contact Mr. Schrager with any comments or questions you may have.

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WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

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August 28, 2014

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FROM: Lorraine Rillera for
Bradley S. Schrager, Esq.

RE: Comments of Bradley Schrager and the Law Firm of Wolf, Rifkin, Shapiro,
Schulman & Rabkin, LLP to the Office of the Nevada Labor Commissioner re
N.A.C. 608.100-608.108.

FILE NO.: LV4167-002

PAGES: 9 (including cover page)

If you do not receive all pages, please contact Lorraine at 702-341-5200, ext. 5124

MESSAGE: Please contact Mr. Schrager with any comments or questions you may have.

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JUL 18 PM 2:10

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10 **THE FIRST JUDICIAL DISTRICT COURT**
11 **IN AND FOR CARSON CITY, NEVADA**
12

13 CODY C. HANCOCK, an individual and
resident of Nevada,

14
15 Plaintiff,

16 vs.

17 THE STATE OF NEVADA ex rel. THE
OFFICE OF THE NEVADA LABOR
18 COMMISSIONER; THE OFFICE OF THE
NEVADA LABOR COMMISSIONER; and
19 THORAN TOWLER, Nevada Labor
Commissioner, in his official capacity,

20
21 Defendants.

CASE NO: 14 OC 00080 1B

DEPT. NO: II

**STIPULATION AND PROPOSED
ORDER STAYING ACTION**

22 WHEREAS, Plaintiff in the above-entitled matter filed his Amended Complaint on June 6,
23 2014; and

24 WHEREAS Defendants filed their Motion to Dismiss the Amended Complaint on or about
25 June 24, 2014; and

26 WHEREAS, Defendant the Nevada Labor Commissioner has set time and date for a public
27 workshop, scheduled for July 18, 2014, at 9:00 a.m., to solicit comments on the regulations which
28 comprise the subject matter of the present suit; and

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

Electronically Filed
Nov 30 2015 03:42 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

STATE OF NEVADA, *ex rel.* OFFICE OF
THE LABOR COMMISSIONER; and
SHANNON CHAMBERS in her official
capacity as Labor Commissioner of Nevada,

Supreme Court No. 68770

District Court Case No.: 14 OC 00080 1B

Appellants,

VS.

CODY C. HANCOCK,

Respondent.

JOINT APPENDIX

VOLUME I of II

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Attorneys for Appellants

Attorney for Respondent

Comes now the Appellants, STATE OF NEVADA, EX REL. OFFICE OF THE LABOR COMMISSIONER; AND SHANNON CHAMBERS IN HER OFFICIAL CAPACITY AS LABOR COMMISSIONER OF NEVADA, by and through its undersigned attorneys, ADAM PAUL LAXALT, Attorney General, and SCOTT DAVIS, Deputy Attorney General, and Respondent CODY C. HANCOCK, by and through his attorney, BRADLEY SCHRAGER, Esq., and hereby submit their Joint Appendix as follows:

PLEADING	VOL.	BATES #
Complaint for 1) Declaratory Relief Pursuant to NRS 233B.110; 2) Injunctive Relief Pursuant to NRS 33.010; and 3) Writ of Mandamus Pursuant to NRS 34.160, filed April 30, 2014	I	JA0000-JA0033
Amended Complaint for 1) Declaratory Relief Pursuant to NRS 233B.110; 2) Injunctive Relief Pursuant to NRS 33.010; and 3) Writ of Mandamus Pursuant to NRS 34.160, filed June 6, 2014	I	JA0034-JA0079
Stipulation and Proposed Order Staying Action, filed July 18, 2014	I	JA0080-0082
Order Lifting Temporary Stay, filed March 4, 2015	I	JA0083-JA0084
Joint Status Report, dated March 6, 2015	I	JA0085-JA0088
Second Amended Complaint for 1) Declaratory Relief Pursuant to NRS 233B.110; and 2) Injunctive Relief Pursuant to NRS 33.010, filed March 20, 2015	I	JA0089-JA0121
Stipulation and Order Withdrawing Motion to Dismiss and Permitting Leave to File Second Amended Complaint, filed March 20, 2015	I	JA0122-JA0125
Answer to Second Amended Complaint, filed April 10, 2015	I	JA0126-JA0135

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1	Stipulation and Proposed Order to Set Briefing	I	JA0136-JA0138
2	Schedule, filed May 26, 2015		
3	Plaintiff's Motion for Summary Judgment, dated	I	JA0139-JA0244
4	June 11, 2015		
5	Motion for Summary Judgment, filed June 12, 2015	II	JA0245-JA0337
6	Plaintiff's Response to Defendant's Motion for	II	JA0338-JA0356
7	Summary Judgment, dated July 10, 2015		
8	Opposition to Plaintiff's Motion for Summary	II	JA0357-JA0381
9	Judgment, filed July 14, 2015		
10	Errata to Opposition to Plaintiff's Motion for	II	JA0382-JA0384
11	Summary Judgment, filed July 27, 2015		
12	Defendants' Reply in Support of Motion for	II	JA0385-JA0406
13	Summary Judgment, filed July 31, 2015		
14	Decision and Order, Comprising Findings of Fact	II	JA0407-JA0416
15	and Conclusions of Law, filed August 14, 2015		
16	Notice of Entry of Order, filed August 18, 2015	II	JA0417-JA0430
17	Notice of Appeal, filed September 4, 2015	II	JA0431-JA0444
18	Order Granting Defendants' Motion to Stay Order	II	JA0445-JA0448
	Pending Appeal, filed October 12, 2015		

DATED this 30th day of November, 2015.

ADAM PAUL LAXALT
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