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IN THE FIRST JUDICIAL DISTRCT 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

ERRATA TO OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Respondents 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 Nevada Labor Commissioner (collectively "Labor Commissioner"), hereby files this errata to the Opposition to Plaintiff's Motion for Summary Judgment. The original opposition on page 6 contained an incorrect citation to the Labor Commissioner's statutory enforcement and rulemaking authority as NRS 706.160(1)(a) and (b). The correct citation for

the Labor Commissioner's statutory enforcement and rulemaking authority is NRS 607.160(1)(a) and (b).

DATED this 21 day of July, 2015

ADAM PAUL LAXALT
Attorney General

By: _____
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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 21 day of July, 2015.

ADAM PAUL LAXALT
Attorney General

By: _____
Scott Davis, # 10019
Deputy Attorney General
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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 22nd day of July, 2015 I served the foregoing ERRATA TO OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT by serving a copy via U.S. Mail, first-class, postage-paid, as follows:

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

CODY C. HANCOCK, an individual,

Plaintiff,

vs.

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

Defendants.

Case No.: 14 OC 00080 1B

Dept. No.: 2

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants 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 Nevada Labor Commissioner (collectively "Labor Commissioner"), by and through counsel of record ADAM PAUL LAXALT, Attorney General of the State of Nevada, and Scott Davis, Deputy Attorney General and pursuant to FJDCR 15(4) and the stipulated briefing schedule previously adopted in this matter and hereby replies to Plaintiff's Response to Defendants' Motion for Summary Judgment.

POINTS AND AUTHORITIES

I. INTRODUCTION

This is not a difficult case, despite Plaintiff's best attempts to muddy the waters of constitutional interpretation. The touchstone of this Court's analysis should be the well-established rule that each part of the constitutional text should be given meaning. This cannot be achieved in a manner that conflicts with the Labor Commissioner's regulations. In opposing to the Labor Commissioner's motion, Plaintiff fails to articulate a cogent or coherent reading of the constitutional text that conflicts with the regulations. Plaintiff bears a heavy burden of proof in this case to show a clear conflict between the regulations and the minimum wage amendment, and as he cannot meet that burden the Court should grant summary judgment to the Labor Commissioner.

II. "OFFER" VERSUS "PROVIDE"

A. Plaintiff's Proposed Application of "Offer" Versus "Provide" Would Undermine the Amendment's Lower-Tier Wage Rate

As stated in the Labor Commissioner's motion for summary judgment, NAC 608.100 and 608.102 are intended to answer the question of "what happens if the employee declines health insurance?" No party to this case has suggested that the minimum wage amendment should be interpreted in a way that strips an employee of the ability to decline an employer's offer of health insurance if the employee so desires. In opposition to the motion, Plaintiff argues that if an employee declines an offer of health insurance then the insurance is not being sufficiently "provided" under the amendment and hence the employer must pay the higher wage rate.

Yet Plaintiff still asserts that the minimum wage amendment must offer a real choice between health insurance coverage and the higher-tier minimum wage. Plaintiff states that "...there was a bargain, a set of choices by both employees and employers, inherent in the minimum wage amendment." (Resp. p. 6). This is true. The minimum wage amendment, and

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the lower-tier exception in particular, do strike a bargain between employers and employees. The problem with Plaintiff's approach to mandate the higher-tier wage rate where an employee rejects an offer of insurance is that it would effectively deny employers the benefit of that bargain. For example, if an employer complies with the minimum wage amendment and makes qualifying health insurance available to its employees and Employee A accepts the health insurance then the minimum wage amendment allows the employer to pay Employee A the lower-tier wage rate. But if Employee B performs the same job and happens to decline the health insurance then, under Plaintiff's reading, the employer would be obligated to pay a different wage rate to Employee B.

The practical effect of Plaintiff's proposed approach would be that employers would inevitably be faced with a scenario where employees are paid different wages for equal work. The precariousness of this scenario should be self-evident. If Employee A happens to be of the opposite sex than Employee B, then this circumstance alone is enough to hand Employee A a *prima facie* case of pay discrimination under the federal Equal Pay Act. *Corning Glass Works v. Brennan*, 417 U.S. 188, 197 (1974). While an employer may be able to rebut such a case of pay discrimination in some cases, the legal framework that has developed under the Equal Pay Act clearly places an employer on the defensive and under a "heavy burden" to prove non-discrimination.[1] Plaintiff's approach would allow employees to dictate different wage rates but still leave the employer legally responsible under other law for wage rate disparities. The bargain inherent in the minimum wage amendment was not intended to lead to this unnecessary exposure.

In order to avoid the scenario that Plaintiff envisions where employees would receive different wages for equal work, the employer would have to raise the wages of Employee A to the higher-tier wage rate, despite meeting every condition specified in the minimum wage

[1] The Equal Pay Act is codified at 29 U.S.C. § 206(d). The statutory exceptions are viewed as an affirmative defense that must be pled and proved by an employer. Establishing a legitimate affirmative defense is described as a "heavy burden." *Odomes v. Nucare, Inc.*, 653 F.2d 246, 251 (6th Cir. 1981); *see also Cooke v. United States*, 85 Fed. Cl. 325, 342 (2008) (discussing the analytical framework for claims under the Equal Pay Act). Nevada has adopted the Equal Pay Act into state law at NRS 608.017.

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amendment to pay the lower-tier wage rate. This outcome effectively eliminates the benefit of the bargain that is reflected in the minimum wage amendment's lower-tier wage rate and acknowledged by Plaintiff in his opposition. Plaintiff's proposed approach should be rejected outright. While the minimum wage amendment is a remedial act and is primarily intended to raise wages, this abstract purpose does not provide free license to nullify the lower-tier exception or re-write the bargain inherent in the amendment by requiring the higher-tier wage rate if an employee voluntarily rejects an offer of insurance.

B. "Offer" and "Provide" Are Synonymous Under the Amendment

In moving for summary judgment, the Labor Commissioner pointed out that the terms "offer" and "provide" as used in the amendment are synonymous. In opposition Plaintiff does not raise any legitimate dispute otherwise, and the Labor Commissioner is entitled to summary judgment.

It is not difficult to conclude that "offer" and "provide" are synonymous because each term under the amendment has been given the same meaning. That meaning is the definition that is stated in the amendment itself: "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." Nev. Const. Art. 15 § 16(A).

The difference between Plaintiff's approach and the Labor Commissioner's approach is that the Labor Commissioner looks to the definition provided in the constitutional text to supply the meaning of these terms whereas Plaintiff looks outside the constitutional text to extrinsic sources such as dictionaries and thesauruses.

Where a statutory, or in this case constitutional, definition is provided within the law itself then it is that definition that controls over any dictionary definition. This is the central holding of the Nevada Supreme Court's decision in *State, Dep't of Bus. & Indus. v. Check City*, 130 Nev. _____, 337 P.3d 755 (Adv. Op. 90, 2014). Under the express definition provided in the amendment, "offer" and "provide" have the same meaning: "...making health insurance

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available..." This is not a battle of dictionaries. The amendment's text trumps any dictionary definition offered by Plaintiff. Plaintiff's argument that the Court should settle the meaning of these terms by looking outside the amendment's text to dictionary and thesaurus offerings is an invitation for this Court to commit the same error for which the district court was reversed in *Check City*. It is an invitation that this Court should decline. Instead the Court should follow *Check City* and look to the definition provided in the amendment itself.

Even if this were a battle of the dictionaries, then the Labor Commissioner would still be entitled to summary judgment. The flaw in Plaintiff's reasoning is that even in a battle of dictionaries Plaintiff is looking to the definition of "provide" and searching for the specific term "offer." Instead, Plaintiff should be looking to the meaning of "provide" and looking for a substantive meaning similar to "make available" because making available is the substantive meaning of "offer" under the amendment. When this course correction is made to Plaintiff's reasoning, Plaintiff's position that distinguishes between "offer" and "provide" crumbles. This is because the ordinary dictionary definition of the term "provide" is indeed "to make available." *Webster's New World College Dictionary*, 1155 (4th ed. 2002); *Merriam-Websters Collegiate Dictionary* 941 (10th ed. 1999) (defining "provide" as "to make something available to"). The meaning of "offer" as used in the amendment is to make health insurance available. Nev. Const. art. 15 § 16(A); NAC 608.102(2). In this case "offer" and "provide" each mean the same thing: to make health insurance available. As each term has the same meaning under the amendment, they are synonymous in this case.

Because the amendment's text provides an actual definition Plaintiff cannot rely upon *Lorton v. Jones,* 130 Nev. ___, 322 P.3d 1051, 1056 (2014) and the general presumption that a different term denotes a different idea. *Lorton* did not concern a constitutional provision that included a specific definition as the minimum wage amendment does in this case. The presumption discussed in *Lorton* is overcome by the principle followed in *Check City* that a specific definition stated in the law supplies the controlling meaning of term. In this case the

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constitutional text assigns the same meaning to both "offer" and "provide" and the presumption discussed in *Lorton* is inapplicable.

C. The Amendment Does Not Make Sense if "Offer" and "Provide" Are Not Accepted as Synonymous

There is no getting around the constitutional definition that assigns the same meaning to "offer" and "provide." Plaintiff argues in opposition that the definition of "offering health insurance" is the predicate act to complying with the amendment's command to provide health insurance. This does not make a tremendous amount of sense, nor is it faithful to the constitutional text.

If "offer" and "provide" really are segregated to the extent Plaintiff claims then the 10 percent cost cap is rendered illusory, as the cost cap is integral to the definition of "offering health benefits," but the supposed command to provide health benefits makes no mention of the 10 percent cost cap. If the definition of "offering health benefits" is only a predicate act and does not translate to the amendments supposed command to "provide" health insurance then neither will the 10 percent cost cap. Under Plaintiff's reading of the text an employer's offer of insurance is subject to the 10 percent cost cap, but because offering does not equate to providing health insurance an employer need not actually provide health insurance that satisfies the 10 percent cost cap in order to pay the lower-tier wage rate. This interpretation would do much more to render the higher tier wage rate illusory than anything that the Plaintiff has accused the Labor Commissioner of having done through regulation. The only way to mitigate this consequence is by committing the same error that taints Plaintiff's entire approach to the minimum wage amendment- selectively emphasizing the beneficial portions of the constitutional text and simply disregarding the portions of the text that do not benefit Plaintiff's position.

These self-contradictions in Plaintiff's position only highlight the impossibility of achieving a cogent and coherent reading of the constitutional text that differs from the interpretation reflected in the Labor Commissioner's regulations. There is no such difficulty if

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the Court simply follows the amendment's plain text and the Labor Commissioner's adopted regulations, as well as common sense, by ascribing the same meaning under the amendment to the terms "offer " and "provide." That meaning is plainly stated as "making health insurance available." Nev. Const. art. 15 § 16(A); NAC 608.102(2).

D. This Court Has Authority to Address the Constitutional Question

Finally, in opposition Plaintiff points to an order from a judge in the Eighth District Court, ostensibly for the information of this Court, in which a judge of that court apparently made a partial decision about an employer's offer of health insurance. The Labor Commissioner does not object to Plaintiff's request for judicial notice of this order; however it should also be judicially noticed that this order is not the only decision coming out of the Eighth District Court addressing the minimum wage amendment. A decision from Department 31 of the same Eighth District Court in the case of *McLaughlin v. Deli Planet, Inc.*, Eighth Judicial District Court, Case No. A703656 appears to have reached a different conclusion. In that case the District Court found and concluded as follows:

> The Minimum Wage Amendment requires employers like Defendant to offer health benefits as described in the minimum wage amendment in order to pay employees less than the higher minimum wage rate.
>
> The Minimum Wage Amendment defines offering health benefits as "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." The Minimum Wage Amendment does not address the quality of insurance that an employer must offer to pay lower minimum wage rate.
>
> (Exhibit 9, pp.4-5).

Even if this Court considers the order offered by Plaintiff, the Court should recognize that the decisions coming out of the Eighth District Court have not been consistent on this point.

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But this case should not be should not be decided based upon the dueling decisions from Clark County judges. As a procedural matter, neither of these decisions could directly confront the validity of the Labor Commissioner's regulations under the constitution as neither case had complied with the procedural requirements of NRS 233B.110. (Exhibit 10). These dueling decisions, to the extent they are even considered by this Court, are not legally capable of anything more than speaking only to the peripheries of this case.

This case is the case, rather than the private wage disputes in Las Vegas, in which a proper consideration of the constitutionality of the administrative regulations can be made as a matter of first impression. In deciding this case, the Court should undertake its own analysis of the minimum wage amendment. As set forth above, the administrative regulations that view "offer" and "provide" as synonymous do not conflict with the text of the amendment. The Labor Commissioner is therefore entitled to summary judgment and the Court should not hesitate to grant it.

III. IT IS NOT UNCONSTITUTIONAL FOR THE LABOR COMMISSIONER TO LOOK TO FEDERAL TAX LAW TO MEASURE AN EMPLOYEE'S GROSS TAXABLE INCOME

A. Plaintiff's Box 3 Solution is Not Faithful to the Constitutional Text

The 10 percent cost cap is based upon an "employee's gross taxable income from the employer." Nev. Const. art. 15 § 16(A). NAC 608.104 provides that when this cost cap is applied, tips are counted as part of the employee's gross taxable income from the employer. This issue does not present a difficult question either, as only the federal government can establish income tax requirements that apply to Nevada employers. Under the Internal Revenue Code tips are plainly counted as taxable income. 26 U.S.C. § 3401(f). In opposition, Plaintiff does not dispute that tips are taxable income, nor does Plaintiff dispute that state law is incapable of supplying the measure of an employee's income tax. But Plaintiff's proposed solution is to look at Box 3 rather than Box 1 on the employees Form W-2.

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Plaintiff's proposed Box 3 solution is at best only a partial solution, and as with each of Plaintiff's proposed approaches to the constitutional text it fails because it violates the principle that each term in the constitution must be given meaning.

The amendment bases the cost cap on the employee's "gross taxable income." Nev. Const. art. 15 § 16(A). Box 3 of the W-2 reflects a subset of the employee's taxable income, but does not reflect the gross amount of the employee's taxable income. Gross income means "total income from all sources before deductions, exemptions, or other tax restrictions." Blacks Law Dictionary "gross income" (under "income") (10th ed. 2014); 26 U.S.C. § 61(a) ("...gross income means all income from whatever source derived..."). Gross taxable income includes tips. *Roberts v. Comm'r of Internal Revenue*, 176 F.2d 221 (9th Cir. 1949).

In order to give effect to each word in the phrase "gross taxable income," the 10 percent cost cap must be based upon the gross amount of an employee's income that is subject to income tax. Plaintiff's Box 3 solution fails to do this because it is based upon a subset rather than the gross amount of the employee's taxable income.

As explained in the Labor Commissioner's opposition to Plaintiff's motion for summary judgment, this still gives meaning the term "from the employer" because tips are income gained by the employee from his labor and services to the employer. *See Roberts,* 176 F.2d at 225 ("Any monies which come to the taxpayer as the fruits of his labor are 'income'"). It further clarifies that the amount is based upon the gross taxable income that is earned in connection with a particular employer rather than gross taxable income from any other source. If the amendment had read only "gross taxable income" and did not then specify "from the employer" then conceivably the 10 percent cost cap could be based on income unrelated to employment. *See* 26 U.S.C. § 61(a) (income such as rents, dividends and alimony is counted as gross income). The "from the employer" tag indicates that these other sources of gross income are not part of the 10 percent cost cap equation.

By directing employers to base the cost cap upon the gross taxable income amount of the Form W-2, rather than a subset of the taxable income, the Labor Commissioner gives

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effect to the amendment's entire clause as the information reflected in Box 1 of the Form W-2 does provide the gross amount of the employees taxable income and is limited to gross income earned in connection with the employment with an individual employer.

B. Plaintiff's Approach Creates A Disparity Between Tipped and Non-Tipped Employees

In opposition Plaintiff also argues that the Labor Commissioner's approach equates to a 137% increase in allowable monthly premiums for Employee Z, whose W-2 was attached to the opposition. This is true, but rather unremarkable as Employee Z's gross taxable income is approximately 137% of Employee Z's base wages alone.

The amendment calls for a cost cap that is proportional to the employee's gross taxable income. The Labor Commissioner's approach stipulates that the proportional rate is the same regardless of whether an employee is a tipped employee or a non-tipped employee- a flat 10% of the employee's gross taxable income. NAC 608.104. Plaintiff's approach would tilt the amendment in favor of tipped employees by capping the premium costs at a lower percentage of gross taxable income than would apply to non-tipped employees. In order to adopt this approach this Court must implicitly find that the amendment intended to create this disparity, despite no reference to this effect in the constitutional text itself. As there is no textual basis to ground such an interpretation, the Court should reject this approach.

The drafters of the amendment did provide a benefit in favor of tipped employees elsewhere in the amendment, by requiring that tips cannot be credited toward satisfaction of the minimum wage rate. Nev. Const. art. 15 § 16. But nothing in the text of the amendment suggests an intent to discriminate between tipped and non-tipped employees when applying the premium cost cap. The text of the amendment strongly suggests otherwise by providing a straight proportional cost cap of 10 percent and basing that cost cap on an employee's gross taxable income. The result of the Labor Commissioner's regulations is that health insurance must be just as affordable for non-tipped employees as it is for tipped employees – 10 percent of the employee's gross taxable income.

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IV. CONCLUSION

The Labor Commissioner is entitled to summary judgment because Plaintiff cannot show that the challenged regulations clearly conflict with the minimum wage amendment. The regulations do not conflict at all with the amendment and are faithful to both the text of the amendment and the bargain that is inherent in the amendment.

The terms "offer" and "provide" clearly have the same meaning as used in the amendment. That meaning is the meaning the Labor Commissioner has recognized in NAC 608.100 and NAC 608.102(2) as making health insurance available. Any different reading of the amendment cannot be reconciled with the mandate to give meaning to each word and phrase of the amendment.

NAC 608.104 does not conflict with the amendment by looking to federal tax law and the Form W-2 to supply the amount of gross taxable income because this approach is faithful to each word in the constitutional text. This does include tips as taxable income, but this is simply a result of the language used in the amendment to base the 10 percent cost cap on the "the employee's gross taxable income from the employer." When crafting regulations the Labor Commissioner is not at liberty to ignore the gross taxable income requirement.

The end result is that Plaintiff cannot meet his considerable burden of proof in this case and consequently the Labor Commissioner is entitled to summary judgment.

DATED this 27 day of July, 2015

ADAM PAUL LAXALT
ATTORNEY GENERAL

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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 27 day of July, 2015.

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Attorney General

By: _____
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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 28th day of July, 2015 I served the foregoing DEFENDANTS" REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT by serving a copy via U.S. Mail, first-class, postage-paid, as follows:

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INDEX TO EXHIBITS

Exhibit No.	Description	No. of pages
9	Order in *McLaughlin v. Deli Planet, Inc.*, Eighth District Court Case No. A-14-703656-C	6
10	Affidavit of Labor Commissioner Chief Compliance Officer	1

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Exhibit 9

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DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER MCLAUGHLIN, an individual, on behalf of himself and all similarly situated individuals, Plaintiff, vs. DELI PLANET, INC., a Nevada limited liability company, d/b/a/ JASON'S DELI, and DOES 1 through 100, Inclusive Defendant.	) CASE NO.: A-14-703656-C) DEPT NO.: XXXI

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

Defendant's Motion to Dismiss First Amended Class Action Complaint having come on regularly for hearing on March 3, 2015 at 9:30 a.m. in Department XXXI of the above-entitled Court, the Honorable Joanna Kishner presiding, Plaintiff being represented by Bradley Schrager, Esq. and Daniel Bravo, Esq., and Defendant being

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represented by Anthony B. Golden, Esq., the Court having considered the briefs of the parties, the arguments of counsel and otherwise being fully advised in the premises and good cause appearing therefor finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On December 17, 2014, Plaintiff filed his First Amended Class Action Complaint ("Amended Complaint"). The Amended Complaint contained one claim for relief. That claim was an alleged violation of Nevada Constitutional Article XV, Section 16 (the "Minimum Wage Amendment"). According to Plaintiff, Defendant violated the Minimum Wage Amendment by paying him less than $8.25 per hour despite Defendant not offering Plaintiff a qualifying health insurance plan. As alleged by Plaintiff, Defendant's health insurance plan was not "comprehensive in its coverage" for Defendant to qualify to pay anything less than the higher-tier minimum wage rate. Plaintiff is not maintaining that the premiums he paid for any health insurance exceeded 10 percent of his gross taxable income from Defendant.

2. On January 29, 2015, Defendant filed its Motion to Dismiss. Plaintiff filed his Opposition to the Motion to Dismiss on February 18, 2015, and Defendant filed its Reply in Support of Motion to Dismiss on February 24, 2015. A hearing on the Motion to Dismiss was then held on March 3, 2015.

3. In its Motion and as argued at the hearing, Defendant maintained that the Amended Complaint should be dismissed because it only challenged the quality of Defendant's health insurance and not the cost of such insurance. According to Defendant, the Nevada Supreme Court in *Thomas v. Yellow Cab Corp.*, 130 Nev. Adv. Op. No. 52 at p. 8, 327 P.3d 518 (2014) requires the Court to apply the clear textual meaning of the Minimum Wage Amendment. Because the Minimum Wage Amendment defines health benefits as "making 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", Defendant took the position that the Minimum Wage Amendment does not require its health plan to

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cover certain categories of health care expenses in order for Defendant to pay the lower minimum wage rate. Based upon a strict reading of the Minimum Wage Amendment, Defendant argued the Minimum Wage Amendment only addresses the cost and not quality of health insurance necessary to pay less than the $8.25 per hour.

4. Defendant further argued that, in order for Plaintiff to challenge the quality of its health plan, Plaintiff must first seek relief with the Nevada Labor Commissioner. As advanced by Defendant, the Nevada Labor Commissioner promulgated NAC 608.102 to address the type of health care expenses that employers' health insurance plans must cover to allow employers to pay the lower minimum wage rate. Although Defendant recognizes that the Minimum Wage Amendment created a private right of action for violations of the amendment, Defendant maintained that Plaintiff cannot rely upon that private right of action to challenge NAC 608.102. Relying on *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96 (2008), Defendant asserted that the Court should not imply a private cause of action when one is not expressly provided and that the Nevada Labor Commissioner is best tasked to interpret and enforce her regulations. As articulated by Defendant, if complaints addressing the quality requirement are not first brought before the Nevada Labor Commissioner, multiple judges throughout Nevada would have to decide on a case by case basis when a particular health plan meets the minimum coverage requirement to pay the lower minimum wage rate. This would render NAC 608.102 irrelevant.

5. In its Opposition, Plaintiff took the position that Defendant's health plan is "junk insurance" and, therefore, does not satisfy the requirements of the Minimum Wage Amendment. Plaintiff also argued that the Minimum Wage Amendment contains a broad and express right of access to Nevada courts for remedial enforcement. Plaintiff also asked the Court to determine the intent of the drafters' of the Minimum Wage Amendment regarding the remedy and enforcement provisions contained in the Minimum Wage Amendment. According to Plaintiff, the drafters never intended for plaintiffs to first have to resolve quality of coverage issues with the Nevada Labor

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Commissioner. Plaintiff further stated that *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96 (2008) does not apply because that case "is about whether and how Nevada courts should imply private rights of action in statutes where no express right is evident." Unlike *Baldonado*, Plaintiff maintained that his right of action is manifested in the Minimum Wage Amendment.

6. At the hearing, Plaintiff raised a new argument. Specifically, Plaintiff claimed that the Minimum Wage Amendment defines "health benefits" as offering "health insurance." As such, Plaintiff argued that the Minimum Wage Amendment goes from a general representation to a more specific requirement. Because the Minimum Wage Amendment requires "health insurance", Plaintiff claimed that Defendant's alleged "junk insurance" does not satisfy the requirements of the Minimum Wage Amendment to pay less than $8.25 per hour. Plaintiff also argued that nothing in the Minimum Wage Amendment "carves out for the Labor Commissioner" a claim based upon the quality of insurance offered by an employer.

CONCLUSIONS OF LAW

1. *Thomas v. Yellow Cab Corp.*, 130 Nev. Adv. Op. No. 52 at p. 8, 327 P.3d 518 (2014) requires the Court to apply the clear textual meaning of the Minimum Wage Amendment. In doing so, the Court should consider what the Minimum Wage Amendment actually states and not what the drafters who drafted the language in or the voters who voted for the Minimum Wage Amendment might have intended.

2. The Minimum Wage Amendment requires employers like Defendant to offer health benefits as described in the Minimum Wage Amendment in order to pay employees less than the higher minimum wage rate.

3. The Minimum Wage Amendment defines offering health benefits as "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." The Minimum

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Las Vegas, Nevada 89169

Wage Amendment does not address the quality of insurance that Defendant must offer to pay lower minimum wage rate.

4. The Labor Commissioner created NAC 608.102 to fill the gap regarding what is not covered by the Minimum Wage Amendment. That administrative code – titled "Minimum wage: Qualification to pay lower rate to employee offered health insurance" – specifically addresses what categories of health care expenses an employer must cover in order to pay the lower minimum wage rate. Unlike NAC 608.102, the Minimum Wage Amendment addresses the premium cost and not coverage requirements.

5. Plaintiff is not challenging the premium costs he paid for Defendant's health insurance and has not alleged that such costs exceeded 10 percent of his gross taxable income from Defendant. Instead, Plaintiff is only claiming that Defendant's health insurance did not provide sufficient coverage to pay less than the higher minimum wage rate. Such a claim, however, is not a claim for violation of the Minimum Wage Amendment. It is in reality a violation of the interpretation by the Labor Commissioner under the governing regulations and clearly falls within the scope of the Labor Commissioner to interpret and to provide remedies.

6. Because Plaintiff's claim is fundamentally an alleged violation of the administrative code, there is no private right of action for the specific claim contained in the Amended Complaint. Plaintiff must first seek recourse with the Labor Commissioner. Such a finding is in line with *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96 (2008).

7. Any findings of fact that are really conclusions of law shall be considered as such and any conclusions of law that are really findings of fact shall be considered as such.

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FISHER & PHILLIPS LLP
3800 Howard Hughes Parkway, Suite 950
Las Vegas, Nevada 89169

ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss is granted and that Plaintiff's Amended Complaint shall be dismissed with prejudice.

DATED this 19th day of March 2015.

JOANNA S. KISHNER
DISTRICT COURT JUDGE

Approved as to Form and Content:

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

Bradley Schrager, Esq.
3556 E. Russell Road, 2nd Floor
Las Vegas, NV 89120
Attorneys for Plaintiff

Submitted by:

FISHER & PHILLIPS LLP

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Anthony B. Golden, Esq.
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Las Vegas, NV 89169
Attorneys for Defendant

FISHER & PHILLIPS LLP
3800 Howard Hughes Parkway, Suite 950
Las Vegas, Nevada 89169

Exhibit 10

AFFIDAVIT OF THE NEVADA LABOR COMMISSIONER CHIEF OF ENFORCEMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, LLETA BROWN, do hereby declare that:

1. I am Chief Compliance Officer for the State of Nevada, Office of the Labor Commissioner.
2. I am familiar with the operations and activities of the Office of the Labor Commissioner.
3. I am familiar with the litigation involving the Office of the Labor Commissioner.
4. The Office of the Labor Commissioner is not a party to the case of *Diaz et. al v. MDC Restaurants*, Eighth District Court Case No. A-14-701533-C.
5. The Office of the Labor Commissioner is not a party to the case of *McLaughlin et. al v. Deli Planet, Inc.*, Eighth District Court Case No. A-14-703656-C.

FURTHER AFFIANT SAYETH NAUGHT

LLETA BROWN

SUBSCRIBED AND SWORN to before
Me this 21st day of July, 2015

Carrie Foley
Notary Public

CARRIE FOLEY
Notary Public State of Nevada
No. 00-65515-1
My Appt. Exp. Oct. 26, 2016

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

DECISION AND ORDER, COMPRISING FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

On April 30, 2015, Plaintiff Cody C. Hancock ("Plaintiff"), pursuant to N.R.S. 233B.110, filed a complaint for declaratory relief against Defendants the State of Nevada *ex rel.* Office of the Nevada Labor Commissioner, the Office Of The Nevada Labor Commissioner, and Shannon Chambers, in her official capacity as the Nevada Labor Commissioner (collectively, "Defendants"), seeking to invalidate two administrative regulations—N.A.C. 608.100(1) and N.A.C. 608.104(2)—purporting to implement article XV, section 16 of the Nevada Constitution (the

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

seeking to invalidate two administrative regulations—N.A.C. 608.100(1) and N.A.C. 608.104(2)—purporting to implement article XV, section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or the "Amendment"). Plaintiff also sought to enjoin the Defendants from enforcing the challenged regulations.

On or about June 25, 2014, Defendants filed a motion to dismiss. After a brief stay of proceedings for the parties to consider resolution through a renewed rulemaking process, Defendants' motion to dismiss was withdrawn by stipulation of the parties, entered March 30, 2015, in which the parties also agreed to permit Plaintiff to amend the complaint, and to seek to resolve this action by respective motions for summary judgment. The parties agreed that no discovery was necessary in this case, and that the determinative issues were matters of law.

On or about June 11, 2015, Defendants filed their Motion for Summary Judgment on Plaintiff's claims for declaratory relief. On or about June 12, 2015, Plaintiff filed his Motion for Summary Judgment on Plaintiff's claims for declaratory relief. Subsequently, each party responded in opposition to the other parties' motion, and replied in support of their own. Plaintiff had previously asked the Nevada Labor Commissioner to pass upon the validity of the challenged regulations, and the Court finds that all prerequisites under N.R.S. 233B.110 have been satisfied sufficient for the Court to enter orders resolving this matter.

The Court, having considered the pleadings and being fully advised, now finds and orders as follows:

As an initial matter, summary judgment under N.R.C.P. 56(a) is "appropriate and shall be rendered forthwith when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (internal quotations omitted). Further, in deciding a challenge to administrative regulations pursuant to N.R.S. 233B.110, "[t]he court shall declare the [challenged] regulation invalid if it finds that it violates constitutional or statutory provisions or exceeds the statutory authority of the agency." N.R.S. 223B.110. The burden is upon Plaintiff to demonstrate that the challenged regulations violate the Minimum Wage Amendment.

The Minimum Wage Amendment was enacted by a vote of the people by ballot initiative at the 2006 General Election, and became effective on November 28, 2006. It is a remedial act, and will be liberally construed to ensure the intended benefit for the intended beneficiaries. *See, e.g., Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494, 496, 915 P.2d 288, 289 (1996); *see also Terry v. Sapphire Gentlemen's Club*, __ Nev. __, 336 P.2d 951, 954 (2014).

Here, in order to determine whether the challenged regulations conflict with or violate the Minimum Wage Amendment, the Court will first determine the meaning of the pertinent textual portions of the Amendment. Courts review an administrative agency's interpretation of a statute of constitutional provision *de novo*, and may do so with no deference to the agency's interpretations. *United States v. State Engineer*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001) ("An administrative agency's interpretation of a regulation or statute does not control if an alternate reading is compelled by the plain language of the provision."); *Bacher v. State Engineer*, 122 Nev. 1110, 1118, 146 P.3d 793, 798 (2006) ("The district court may decide purely legal questions without deference to an agency's determination.").

The Minimum Wage Amendment raised the minimum hourly wage in Nevada, but also established a two-tier wage system by which an employer may pay employees, currently, $8.25 per hour, or pay down to $7.25 per hour if the employer provides qualifying health insurance benefits, to the employee and all of his or her dependents, at a certain capped premium cost to employee.

Section A of the Minimum Wage Amendment provides:

> 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.

Nev. Const. art. XV, § 16(A).

N.A.C. 608.104(2) states, in pertinent part:

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.

N.A.C. 608.100(1) states, in pertinent part:

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.

N.A.C. 608.104(2) Is Invalid

Plaintiff contends that N.A.C. 608.104(2) unlawfully permits employers to figure in tips and gratuities furnished by customers and the general public when establishing the maximum allowable premium cost to the employee of qualifying health insurance. He argues that "10% of the employee's gross taxable income from the employer" can only mean compensation and wages paid by the employer to the employee, and excludes tips earned by the employee.

Defendants argue that the term "gross taxable income" directed the Labor Commissioner to interpret the entire provision as meaning all income derived from working for the employer, whether as direct wages or as tips and gratuities, because Nevada has no state income tax and state law contains no definition of "gross taxable income." Therefore, the State argues, resort to federal tax law is appropriate, and because tips and gratuities earned by the employee constitute, for him or her, gross taxable income upon which federal taxes must be paid. In that regard, Defendants contend that N.A.C. 608.104(2)'s definition of "income attributable to the employer" best

implements the language of the Amendment.

The Court finds the text of the Minimum Wage Amendment which N.A.C. 608.104(2) purports to implement—"10% of the employee's gross taxable income from the employer"—to be unambiguous. As the Court reads the plain language of the constitutional provision, it indicates that the term "10% of the employee's gross taxable income" is limited to such income that comes "from the employer," as opposed to gross taxable income that emanates from any other source, including from tips and gratuities provided by an employer's customers. "[T]he language of a statute should be given its plain meaning unless doing so violates the spirit of the act ... [thus] when a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." *University and Community College System of Nevada v. Nevadans for Sound Government,* 120 Nev. 712, 731, 100 P.3d 179, 193 (2004).

There are no particular difficulties in determining an employee's gross taxable income that comes *from the employer*, as this figure must be reported to the United States Internal Revenue Service as part of the employee's tax information, including on his or her annual W-2 form, along with the employee's income from tips and gratuities. The Court further presumes that employers are aware of, or can easily compute, how much they pay out of their business revenue to each employee, this being a major portion of the business's expenses for which records are surely maintained by the employer.

The Court does note that N.A.C. 608.104(2)'s inclusion of "bonuses or other compensation" presents no constitutional problem under the Amendment, as long as the income in question comes "from the employer."

The Court understands Defendants' interpretation of this portion of the Amendment, and in support of the administrative regulation purporting to implement and enforce it, to emphasize the phrase "gross taxable income" in isolation, at the expense of a full reading giving meaning to the qualifying term "from the employer." As Defendants note in their briefing, "[i]n expounding a constitutional provision, such constructions should be employed as will prevent any clause, sentence or word from being superfluous, void or insignificant." *Youngs v. Hall,* 9 Nev. 212 (1874). To arrive at Defendants' preferred interpretation of the Amendment, however, the Court

would have to first find the provision ambiguous, and then engage in an act of interpretation in order to agree that the phrase "gross taxable income" modifies the term "from the employer," rather than the other way around. In that formulation, "gross taxable income from the employer" is rendered as "gross taxable income earned but for employment by the employer," or, "gross taxable income earned as a result of having worked for the employer," and "from the employer" is rendered more or less insignificant to the provision. This is, indeed, what N.A.C. 608.104(2) attempts to indicate when it designates "gross taxable income attributable to the employer" as the measure of the Amendment's ten-percent employee premium cost cap calculation. The Court disagrees, and instead finds the constitutional language plain on its face.

But even if the Court were to find the pertinent portion of the Amendment to be ambiguous, its context, reason, and public policy would still support the conclusion that tips and gratuities should not be included in the calculation of allowable employee premium costs when an employer seeks to qualify to pay below the upper-tier minimum hourly wage. The drafters of the Amendment expressly excluded tips and gratuities from the calculation of the minimum hourly wage ("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."), and gave no other indication that tips and gratuities should be allowed as a form of credit against the cost of the health insurance benefits the Minimum Wage Amendment was designed to encourage employers to provide employees in exchange for the privilege of paying a lower hourly wage rate. Further, as Plaintiff points out, the effect of permitting inclusion of tips and gratuities is to increase, in some cases precipitously, the cost of health insurance benefits to employees, a result that is not supported by the policy and function of the Amendment generally.

Defendants argue that permitting tips and gratuities in the premium calculations for tipped employees eliminates an advantage for those employees that non-tipped employees do not enjoy. It is not strictly within the province of the Nevada Labor Commissioner, however, to make such policy choices in place of the Legislature, or the people acting in their legislative capacity. Her charge is to enforce and implement the labor laws of this State as written. N.R.S. 607.160(1). In any event, and apart from the Amendment's express treatment of the issue, Nevada has prohibited

administrative regulation. *See* N.R.S. 608.160.

The Court finds that N.A.C. 608.104(2), insofar as it permits employers to include tips and gratuities furnished by the customers of the employer in the calculation of income against which in measured the Minimum Wage Amendment's ten percent income cap on allowable health insurance premium costs, violates the Nevada Constitution and therefore exceeds the Nevada Labor Commissioner's authority to promulgate administrative regulations. The Court determines the regulation in question to be invalid, and will further enjoin Defendants from enforcing N.A.C. 608.104(2) for the reasons stated herein.

N.A.C. 608.100(1) Is Invalid

Plaintiff argues that, in order to qualify for the privilege of paying less than the upper-tier hourly minimum wage, an employer must actually provide qualifying health insurance, rather than merely offer it. He contends that, read as a whole and giving all parts of the Amendment meaning and function, the basic scheme of the provision is to propose for both employers and employees a set of choices, a bargain: an employer can pay down to $7.25 per hour, currently, but the employee must receive something in return, qualified health insurance. A mere offer of health insurance—which the employee has not played a role in selecting and may not meet the needs of an employee and his or her family for any number of reasons—permits the employer to receive the benefit of the Minimum Wage Amendment, but can leave the employee with less pay and no insurance provided by the employer.

In support of this interpretation, Plaintiff suggests that "provide" and "offering," as used in the Amendment, are not synonyms, but rather that the basic command of the constitutional provision (in order to pay less than the upper-tier wage level) is to *provide* health benefits, and that the succeeding sentence that begins with the term "offering" only dictates certain requirements of the benefits that must be offered as a step in their provision to employees paid at the lower wage rate.

Defendants argue that "provide" and "offering" are synonymous, and that an employer need only make available qualified health insurance in order to pay below the upper-tier wage level, whether the employee accepts the benefit or not. Defendants argue that the usage, by the

Amendment's drafters, of "offering" and "making available" in the sentence succeeding those employing "provide" modifies and defines "provide" to mean merely "offering" of health insurance.

A further argument by Defendants is that the benefit of the bargain inherent in the Amendment is the offer itself, having employer-selected health insurance made available to the employee, and that interpreting the Amendment to require that employees accept the benefit in order for an employer to pay below the upper-tier minimum wage denies the value of the Minimum Wage Amendment to the employer. They deny that "provide" is the command, or mandate, of the Minimum Wage Amendment where qualification for paying the lesser wage amount is concerned.

The Court finds that the Minimum Wage Amendment requires that employees actually receive qualified health insurance in order for the employer to pay, currently, down to $7.25 per hour to those employees. Otherwise, the purposes and benefits of the Amendment are thwarted, and employees (the obvious beneficiaries of the Amendment) who reject insurance plans offered by their employer would receive neither the low-cost health insurance envisioned by the Minimum Wage Amendment, nor the raise in wages its passaged promised, $7.25 per hour already being the federal minimum wage rate that every employer in Nevada must pay their employees anyway. The amendment language does not support this interpretation.

The Court agrees with Plaintiff's argument that "provide" and "offering" are not synonymous, and that the drafters included both terms, intentionally, to signify different concepts. "[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 170 (2012). It is also instructive that the drafters used "provide," a verb, and "offering," a gerund, ostensibly to make a distinction between their functions as parts of speech within the text of the Amendment. The Amendment easily could have stated that "[t]he rate shall be X dollars per hour worked, if the employer **offers** health benefits as described herein, or X dollars per hour if the employer does not **offer** such benefits." It did not so state. Instead, it required that the employer "provide" qualified health insurance if it wished to take advantage of the lower wage rate. The Court agrees with Plaintiff, furthermore, that

the overall definitional weight of the verb phrase "to provide" lends credence to his interpretation that it means to furnish, or to supply, rather than merely to make available, especially when the overall context and scheme of the Minimum Wage Amendment is taken into consideration.

The distinction the parties here draw between "provide" and "offering" is no small matter. Allowing employers merely to offer health insurance plans rather than provide, furnish, and supply them, alters significantly the function of this remedial constitutional provision. The fundamental operation of the Minimum Wage Amendment, fairly construed, demands that employees not be left with none of the benefits of its enactment, whether they be the higher wage rate or the promised low-cost health insurance for themselves and their families.

Because N.A.C. 608.100(1) impermissibly allows employers only to offer health insurance benefits, but does not take into account whether the employee accepts those benefits when determining how and when the employer may pay below the upper-tier minimum wage rate, it violates the Nevada Constitution and therefore exceeds the Nevada Labor Commissioner's authority to promulgate administrative regulations. The Court determines the regulation in question to be invalid, and will further enjoin Defendants from enforcing N.A.C. 608.104(2) for the reasons stated herein.

IT IS HEREBY ORDERED, therefore, and for good cause appearing, that Plaintiff's Motion for Summary Judgment is **GRANTED** and the Defendant's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that N.A.C. 608.104(2) is declared invalid and of no effect, for the reasons stated herein;.

IT IS FURTHER ORDERED that N.A.C. 608.100(1) is declared invalid and of no effect, for the reasons stated herein;

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IT IS FURTHER ORDERED that Defendants are enjoined from enforcing the challenged regulations.

IT IS SO ORDERED this 12 day of August, 2015.

James Ellsworth
DISTRICT COURT JUDGE

Submitted by:

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
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Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
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3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Attorneys for Plaintiffs

/s/ Bradley S. Schrager
Bradley S. Schrager, Esq.

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Email: dbravo@wrslawyers.com
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 THORAN TOWLER, Nevada Labor Commissioner, in his official capacity,

Defendants.

CASE NO: **14 OC 00080 1B**

DEPT. NO: **II**

NOTICE OF ENTRY OF ORDER

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NOTICE OF ENTRY OF ORDER

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that a **DECISION AND ORDER, COMPRISING FINDINGS OF FACT AND CONCLUSIONS OF LAW** was filed with the First Judicial District Court on the 14th day of August, 2015, a true and correct copy of which is attached hereto as **Exhibit 1**.

Dated this 17th day of August, 2015.

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: _____

DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
DANIEL BRAVO, ESQ.
Nevada State Bar No. 13078
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
(702) 341-5200
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2015, a true and correct copy of the **NOTICE OF ENTRY OF ORDER** was served by depositing a true copy of the same for mailing, in the U.S. Mail, postage pre-paid, at Las Vegas, Nevada, said envelope addressed to:

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

By _____
Dannielle R. Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

EXHIBIT 1

EXHIBIT 1

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

DECISION AND ORDER, COMPRISING FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

On April 30, 2015, Plaintiff Cody C. Hancock ("Plaintiff"), pursuant to N.R.S. 233B.110, filed a complaint for declaratory relief against Defendants the State of Nevada *ex rel.* Office of the Nevada Labor Commissioner, the Office Of The Nevada Labor Commissioner, and Shannon Chambers, in her official capacity as the Nevada Labor Commissioner (collectively, "Defendants"), seeking to invalidate two administrative regulations—N.A.C. 608.100(1) and N.A.C. 608.104(2)—purporting to implement article XV, section 16 of the Nevada Constitution (the

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The Court, having considered the pleadings and being fully advised, now finds and orders as follows:

As an initial matter, summary judgment under N.R.C.P. 56(a) is "appropriate and shall be rendered forthwith when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (internal quotations omitted). Further, in deciding a challenge to administrative regulations pursuant to N.R.S. 233B.110, "[t]he court shall declare the [challenged] regulation invalid if it finds that it violates constitutional or statutory provisions or exceeds the statutory authority of the agency." N.R.S. 223B.110. The burden is upon Plaintiff to demonstrate that the challenged regulations violate the Minimum Wage Amendment.

The Minimum Wage Amendment was enacted by a vote of the people by ballot initiative at the 2006 General Election, and became effective on November 28, 2006. It is a remedial act, and will be liberally construed to ensure the intended benefit for the intended beneficiaries. *See, e.g., Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494, 496, 915 P.2d 288, 289 (1996); *see also Terry v. Sapphire Gentlemen's Club*, __ Nev. __, 336 P.2d 951, 954 (2014).

Here, in order to determine whether the challenged regulations conflict with or violate the Minimum Wage Amendment, the Court will first determine the meaning of the pertinent textual portions of the Amendment. Courts review an administrative agency's interpretation of a statute of constitutional provision *de novo*, and may do so with no deference to the agency's interpretations. *United States v. State Engineer*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001) ("An administrative agency's interpretation of a regulation or statute does not control if an alternate reading is compelled by the plain language of the provision."); *Bacher v. State Engineer*, 122 Nev. 1110, 1118, 146 P.3d 793, 798 (2006) ("The district court may decide purely legal questions without deference to an agency's determination.").

The Minimum Wage Amendment raised the minimum hourly wage in Nevada, but also established a two-tier wage system by which an employer may pay employees, currently, $8.25 per hour, or pay down to $7.25 per hour if the employer provides qualifying health insurance benefits, to the employee and all of his or her dependents, at a certain capped premium cost to employee.

Section A of the Minimum Wage Amendment provides:

> 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.

Nev. Const. art. XV, § 16(A).

N.A.C. 608.104(2) states, in pertinent part:

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.

N.A.C. 608.100(1) states, in pertinent part:

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.

N.A.C. 608.104(2) Is Invalid

Plaintiff contends that N.A.C. 608.104(2) unlawfully permits employers to figure in tips and gratuities furnished by customers and the general public when establishing the maximum allowable premium cost to the employee of qualifying health insurance. He argues that "10% of the employee's gross taxable income from the employer" can only mean compensation and wages paid by the employer to the employee, and excludes tips earned by the employee.

Defendants argue that the term "gross taxable income" directed the Labor Commissioner to interpret the entire provision as meaning all income derived from working for the employer, whether as direct wages or as tips and gratuities, because Nevada has no state income tax and state law contains no definition of "gross taxable income." Therefore, the State argues, resort to federal tax law is appropriate, and because tips and gratuities earned by the employee constitute, for him or her, gross taxable income upon which federal taxes must be paid. In that regard, Defendants contend that N.A.C. 608.104(2)'s definition of "income attributable to the employer" best

implements the language of the Amendment.

The Court finds the text of the Minimum Wage Amendment which N.A.C. 608.104(2) purports to implement—"10% of the employee's gross taxable income from the employer"—to be unambiguous. As the Court reads the plain language of the constitutional provision, it indicates that the term "10% of the employee's gross taxable income" is limited to such income that comes "from the employer," as opposed to gross taxable income that emanates from any other source, including from tips and gratuities provided by an employer's customers. "[T]he language of a statute should be given its plain meaning unless doing so violates the spirit of the act ... [thus] when a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." *University and Community College System of Nevada v. Nevadans for Sound Government,* 120 Nev. 712, 731, 100 P.3d 179, 193 (2004).

There are no particular difficulties in determining an employee's gross taxable income that comes *from the employer*, as this figure must be reported to the United States Internal Revenue Service as part of the employee's tax information, including on his or her annual W-2 form, along with the employee's income from tips and gratuities. The Court further presumes that employers are aware of, or can easily compute, how much they pay out of their business revenue to each employee, this being a major portion of the business's expenses for which records are surely maintained by the employer.

The Court does note that N.A.C. 608.104(2)'s inclusion of "bonuses or other compensation" presents no constitutional problem under the Amendment, as long as the income in question comes "from the employer."

The Court understands Defendants' interpretation of this portion of the Amendment, and in support of the administrative regulation purporting to implement and enforce it, to emphasize the phrase "gross taxable income" in isolation, at the expense of a full reading giving meaning to the qualifying term "from the employer." As Defendants note in their briefing, "[i]n expounding a constitutional provision, such constructions should be employed as will prevent any clause, sentence or word from being superfluous, void or insignificant." *Youngs v. Hall,* 9 Nev. 212 (1874). To arrive at Defendants' preferred interpretation of the Amendment, however, the Court

would have to first find the provision ambiguous, and then engage in an act of interpretation in order to agree that the phrase "gross taxable income" modifies the term "from the employer," rather than the other way around. In that formulation, "gross taxable income from the employer" is rendered as "gross taxable income earned but for employment by the employer," or, "gross taxable income earned as a result of having worked for the employer," and "from the employer" is rendered more or less insignificant to the provision. This is, indeed, what N.A.C. 608.104(2) attempts to indicate when it designates "gross taxable income attributable to the employer" as the measure of the Amendment's ten-percent employee premium cost cap calculation. The Court disagrees, and instead finds the constitutional language plain on its face.

But even if the Court were to find the pertinent portion of the Amendment to be ambiguous, its context, reason, and public policy would still support the conclusion that tips and gratuities should not be included in the calculation of allowable employee premium costs when an employer seeks to qualify to pay below the upper-tier minimum hourly wage. The drafters of the Amendment expressly excluded tips and gratuities from the calculation of the minimum hourly wage ("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."), and gave no other indication that tips and gratuities should be allowed as a form of credit against the cost of the health insurance benefits the Minimum Wage Amendment was designed to encourage employers to provide employees in exchange for the privilege of paying a lower hourly wage rate. Further, as Plaintiff points out, the effect of permitting inclusion of tips and gratuities is to increase, in some cases precipitously, the cost of health insurance benefits to employees, a result that is not supported by the policy and function of the Amendment generally.

Defendants argue that permitting tips and gratuities in the premium calculations for tipped employees eliminates an advantage for those employees that non-tipped employees do not enjoy. It is not strictly within the province of the Nevada Labor Commissioner, however, to make such policy choices in place of the Legislature, or the people acting in their legislative capacity. Her charge is to enforce and implement the labor laws of this State as written. N.R.S. 607.160(1). In any event, and apart from the Amendment's express treatment of the issue, Nevada has prohibited

administrative regulation. *See* N.R.S. 608.160.

The Court finds that N.A.C. 608.104(2), insofar as it permits employers to include tips and gratuities furnished by the customers of the employer in the calculation of income against which in measured the Minimum Wage Amendment's ten percent income cap on allowable health insurance premium costs, violates the Nevada Constitution and therefore exceeds the Nevada Labor Commissioner's authority to promulgate administrative regulations. The Court determines the regulation in question to be invalid, and will further enjoin Defendants from enforcing N.A.C. 608.104(2) for the reasons stated herein.

N.A.C. 608.100(1) Is Invalid

Plaintiff argues that, in order to qualify for the privilege of paying less than the upper-tier hourly minimum wage, an employer must actually provide qualifying health insurance, rather than merely offer it. He contends that, read as a whole and giving all parts of the Amendment meaning and function, the basic scheme of the provision is to propose for both employers and employees a set of choices, a bargain: an employer can pay down to $7.25 per hour, currently, but the employee must receive something in return, qualified health insurance. A mere offer of health insurance—which the employee has not played a role in selecting and may not meet the needs of an employee and his or her family for any number of reasons—permits the employer to receive the benefit of the Minimum Wage Amendment, but can leave the employee with less pay and no insurance provided by the employer.

In support of this interpretation, Plaintiff suggests that "provide" and "offering," as used in the Amendment, are not synonyms, but rather that the basic command of the constitutional provision (in order to pay less than the upper-tier wage level) is to *provide* health benefits, and that the succeeding sentence that begins with the term "offering" only dictates certain requirements of the benefits that must be offered as a step in their provision to employees paid at the lower wage rate.

Defendants argue that "provide" and "offering" are synonymous, and that an employer need only make available qualified health insurance in order to pay below the upper-tier wage level, whether the employee accepts the benefit or not. Defendants argue that the usage, by the

Amendment's drafters, of "offering" and "making available" in the sentence succeeding those employing "provide" modifies and defines "provide" to mean merely "offering" of health insurance.

A further argument by Defendants is that the benefit of the bargain inherent in the Amendment is the offer itself, having employer-selected health insurance made available to the employee, and that interpreting the Amendment to require that employees accept the benefit in order for an employer to pay below the upper-tier minimum wage denies the value of the Minimum Wage Amendment to the employer. They deny that "provide" is the command, or mandate, of the Minimum Wage Amendment where qualification for paying the lesser wage amount is concerned.

The Court finds that the Minimum Wage Amendment requires that employees actually receive qualified health insurance in order for the employer to pay, currently, down to $7.25 per hour to those employees. Otherwise, the purposes and benefits of the Amendment are thwarted, and employees (the obvious beneficiaries of the Amendment) who reject insurance plans offered by their employer would receive neither the low-cost health insurance envisioned by the Minimum Wage Amendment, nor the raise in wages its passaged promised, $7.25 per hour already being the federal minimum wage rate that every employer in Nevada must pay their employees anyway. The amendment language does not support this interpretation.

The Court agrees with Plaintiff's argument that "provide" and "offering" are not synonymous, and that the drafters included both terms, intentionally, to signify different concepts. "[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 170 (2012). It is also instructive that the drafters used "provide," a verb, and "offering," a gerund, ostensibly to make a distinction between their functions as parts of speech within the text of the Amendment. The Amendment easily could have stated that "[t]he rate shall be X dollars per hour worked, if the employer **offers** health benefits as described herein, or X dollars per hour if the employer does not **offer** such benefits." It did not so state. Instead, it required that the employer "provide" qualified health insurance if it wished to take advantage of the lower wage rate. The Court agrees with Plaintiff, furthermore, that

the overall definitional weight of the verb phrase "to provide" lends credence to his interpretation that it means to furnish, or to supply, rather than merely to make available, especially when the overall context and scheme of the Minimum Wage Amendment is taken into consideration.

The distinction the parties here draw between "provide" and "offering" is no small matter. Allowing employers merely to offer health insurance plans rather than provide, furnish, and supply them, alters significantly the function of this remedial constitutional provision. The fundamental operation of the Minimum Wage Amendment, fairly construed, demands that employees not be left with none of the benefits of its enactment, whether they be the higher wage rate or the promised low-cost health insurance for themselves and their families.

Because N.A.C. 608.100(1) impermissibly allows employers only to offer health insurance benefits, but does not take into account whether the employee accepts those benefits when determining how and when the employer may pay below the upper-tier minimum wage rate, it violates the Nevada Constitution and therefore exceeds the Nevada Labor Commissioner's authority to promulgate administrative regulations. The Court determines the regulation in question to be invalid, and will further enjoin Defendants from enforcing N.A.C. 608.104(2) for the reasons stated herein.

IT IS HEREBY ORDERED, therefore, and for good cause appearing, that Plaintiff's Motion for Summary Judgment is **GRANTED** and the Defendant's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that N.A.C. 608.104(2) is declared invalid and of no effect, for the reasons stated herein;.

IT IS FURTHER ORDERED that N.A.C. 608.100(1) is declared invalid and of no effect, for the reasons stated herein;

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IT IS FURTHER ORDERED that Defendants are enjoined from enforcing the challenged regulations.

IT IS SO ORDERED this 12 day of August, 2015.

James Ellsworth
DISTRICT COURT JUDGE

Submitted by:

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

CODY C. HANCOCK, an individual,

Plaintiff,

vs.

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

Defendants.

Case No.: 14 OC 00080 1B

Dept. No.: 2

NOTICE OF APPEAL

TO: CODY C. HANCOCK, Plaintiff; and

TO: WOLF, RIKIN, SHAPIRO, SCHULMAN & RABKIN, counsel of record for Plaintiff.

Notice is hereby given that the STATE OF NEVADA ex rel. THE OFFICE OF THE LABOR COMMISSIONER; THE OFFICE OF THE LABOR COMMISSIONER and SHANNON CHAMBERS in her official capacity as Labor Commissioner of Nevada, Defendants above-named, hereby

. . . . .

appeal to the Supreme Court of the State of Nevada from the attached "Decision and Order Comprising Findings of Fact and Conclusions of Law" entered in this action on August 14, 2015.

DATED this 26 day of August, 2015.

ADAM PAUL LAXALT
Attorney General

By: _____

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(702) 486-3326
Attorneys for Appellants State of Nevada, Ex rel. Office of the Labor Commissioner; Office of the Labor Commissioner and Shannon Chambers

Attorney General's Office
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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 28 day of August, 2015.

ADAM PAUL LAXALT
Attorney General

By: _____
Scott Davis, #10019
Deputy Attorney General
Attorneys for the State of Nevada ex rel
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Office of the Labor Commissioner and
Shannon Chambers

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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 31st day of August, 2015 I served the foregoing NOTICE OF APPEAL by serving a copy via U.S. Mail, first-class, postage-paid, as follows:

Don Springmeyer, Esq.
Bradley Schrager, Esq.
Daniel Bravo, Esq.
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3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120
Attorneys for Plaintiff

_____
An Employee of the Attorney General's Office

EXHIBIT 1

DECISION AND ORDER

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

DECISION AND ORDER, COMPRISING FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

On April 30, 2015, Plaintiff Cody C. Hancock ("Plaintiff"), pursuant to N.R.S. 233B.110, filed a complaint for declaratory relief against Defendants the State of Nevada *ex rel.* Office of the Nevada Labor Commissioner, the Office Of The Nevada Labor Commissioner, and Shannon Chambers, in her official capacity as the Nevada Labor Commissioner (collectively, "Defendants"), seeking to invalidate two administrative regulations—N.A.C. 608.100(1) and N.A.C. 608.104(2)—purporting to implement article XV, section 16 of the Nevada Constitution (the

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

seeking to invalidate two administrative regulations—N.A.C. 608.100(1) and N.A.C. 608.104(2)—purporting to implement article XV, section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or the "Amendment"). Plaintiff also sought to enjoin the Defendants from enforcing the challenged regulations.

On or about June 25, 2014, Defendants filed a motion to dismiss. After a brief stay of proceedings for the parties to consider resolution through a renewed rulemaking process, Defendants' motion to dismiss was withdrawn by stipulation of the parties, entered March 30, 2015, in which the parties also agreed to permit Plaintiff to amend the complaint, and to seek to resolve this action by respective motions for summary judgment. The parties agreed that no discovery was necessary in this case, and that the determinative issues were matters of law.

On or about June 11, 2015, Defendants filed their Motion for Summary Judgment on Plaintiff's claims for declaratory relief. On or about June 12, 2015, Plaintiff filed his Motion for Summary Judgment on Plaintiff's claims for declaratory relief. Subsequently, each party responded in opposition to the other parties' motion, and replied in support of their own. Plaintiff had previously asked the Nevada Labor Commissioner to pass upon the validity of the challenged regulations, and the Court finds that all prerequisites under N.R.S. 233B.110 have been satisfied sufficient for the Court to enter orders resolving this matter.

The Court, having considered the pleadings and being fully advised, now finds and orders as follows:

As an initial matter, summary judgment under N.R.C.P. 56(a) is "appropriate and shall be rendered forthwith when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (internal quotations omitted). Further, in deciding a challenge to administrative regulations pursuant to N.R.S. 233B.110, "[t]he court shall declare the [challenged] regulation invalid if it finds that it violates constitutional or statutory provisions or exceeds the statutory authority of the agency." N.R.S. 223B.110. The burden is upon Plaintiff to demonstrate that the challenged regulations violate the Minimum Wage Amendment.

The Minimum Wage Amendment was enacted by a vote of the people by ballot initiative at the 2006 General Election, and became effective on November 28, 2006. It is a remedial act, and will be liberally construed to ensure the intended benefit for the intended beneficiaries. *See, e.g., Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494, 496, 915 P.2d 288, 289 (1996); *see also Terry v. Sapphire Gentlemen's Club*, __ Nev. __, 336 P.2d 951, 954 (2014).

Here, in order to determine whether the challenged regulations conflict with or violate the Minimum Wage Amendment, the Court will first determine the meaning of the pertinent textual portions of the Amendment. Courts review an administrative agency's interpretation of a statute of constitutional provision *de novo*, and may do so with no deference to the agency's interpretations. *United States v. State Engineer*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001) ("An administrative agency's interpretation of a regulation or statute does not control if an alternate reading is compelled by the plain language of the provision."); *Bacher v. State Engineer*, 122 Nev. 1110, 1118, 146 P.3d 793, 798 (2006) ("The district court may decide purely legal questions without deference to an agency's determination.").

The Minimum Wage Amendment raised the minimum hourly wage in Nevada, but also established a two-tier wage system by which an employer may pay employees, currently, $8.25 per hour, or pay down to $7.25 per hour if the employer provides qualifying health insurance benefits, to the employee and all of his or her dependents, at a certain capped premium cost to employee.

Section A of the Minimum Wage Amendment provides:

> 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.

Nev. Const. art. XV, § 16(A).

N.A.C. 608.104(2) states, in pertinent part:

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.

N.A.C. 608.100(1) states, in pertinent part:

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.

N.A.C. 608.104(2) Is Invalid

Plaintiff contends that N.A.C. 608.104(2) unlawfully permits employers to figure in tips and gratuities furnished by customers and the general public when establishing the maximum allowable premium cost to the employee of qualifying health insurance. He argues that "10% of the employee's gross taxable income from the employer" can only mean compensation and wages paid by the employer to the employee, and excludes tips earned by the employee.

Defendants argue that the term "gross taxable income" directed the Labor Commissioner to interpret the entire provision as meaning all income derived from working for the employer, whether as direct wages or as tips and gratuities, because Nevada has no state income tax and state law contains no definition of "gross taxable income." Therefore, the State argues, resort to federal tax law is appropriate, and because tips and gratuities earned by the employee constitute, for him or her, gross taxable income upon which federal taxes must be paid. In that regard, Defendants contend that N.A.C. 608.104(2)'s definition of "income attributable to the employer" best

implements the language of the Amendment.

The Court finds the text of the Minimum Wage Amendment which N.A.C. 608.104(2) purports to implement—"10% of the employee's gross taxable income from the employer"—to be unambiguous. As the Court reads the plain language of the constitutional provision, it indicates that the term "10% of the employee's gross taxable income" is limited to such income that comes "from the employer," as opposed to gross taxable income that emanates from any other source, including from tips and gratuities provided by an employer's customers. "[T]he language of a statute should be given its plain meaning unless doing so violates the spirit of the act ... [thus] when a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." *University and Community College System of Nevada v. Nevadans for Sound Government,* 120 Nev. 712, 731, 100 P.3d 179, 193 (2004).

There are no particular difficulties in determining an employee's gross taxable income that comes *from the employer*, as this figure must be reported to the United States Internal Revenue Service as part of the employee's tax information, including on his or her annual W-2 form, along with the employee's income from tips and gratuities. The Court further presumes that employers are aware of, or can easily compute, how much they pay out of their business revenue to each employee, this being a major portion of the business's expenses for which records are surely maintained by the employer.

The Court does note that N.A.C. 608.104(2)'s inclusion of "bonuses or other compensation" presents no constitutional problem under the Amendment, as long as the income in question comes "from the employer."

The Court understands Defendants' interpretation of this portion of the Amendment, and in support of the administrative regulation purporting to implement and enforce it, to emphasize the phrase "gross taxable income" in isolation, at the expense of a full reading giving meaning to the qualifying term "from the employer." As Defendants note in their briefing, "[i]n expounding a constitutional provision, such constructions should be employed as will prevent any clause, sentence or word from being superfluous, void or insignificant." *Youngs v. Hall,* 9 Nev. 212 (1874). To arrive at Defendants' preferred interpretation of the Amendment, however, the Court

administrative regulation. *See* N.R.S. 608.160.

The Court finds that N.A.C. 608.104(2), insofar as it permits employers to include tips and gratuities furnished by the customers of the employer in the calculation of income against which in measured the Minimum Wage Amendment's ten percent income cap on allowable health insurance premium costs, violates the Nevada Constitution and therefore exceeds the Nevada Labor Commissioner's authority to promulgate administrative regulations. The Court determines the regulation in question to be invalid, and will further enjoin Defendants from enforcing N.A.C. 608.104(2) for the reasons stated herein.

N.A.C. 608.100(1) Is Invalid

Plaintiff argues that, in order to qualify for the privilege of paying less than the upper-tier hourly minimum wage, an employer must actually provide qualifying health insurance, rather than merely offer it. He contends that, read as a whole and giving all parts of the Amendment meaning and function, the basic scheme of the provision is to propose for both employers and employees a set of choices, a bargain: an employer can pay down to $7.25 per hour, currently, but the employee must receive something in return, qualified health insurance. A mere offer of health insurance—which the employee has not played a role in selecting and may not meet the needs of an employee and his or her family for any number of reasons—permits the employer to receive the benefit of the Minimum Wage Amendment, but can leave the employee with less pay and no insurance provided by the employer.

In support of this interpretation, Plaintiff suggests that "provide" and "offering," as used in the Amendment, are not synonyms, but rather that the basic command of the constitutional provision (in order to pay less than the upper-tier wage level) is to *provide* health benefits, and that the succeeding sentence that begins with the term "offering" only dictates certain requirements of the benefits that must be offered as a step in their provision to employees paid at the lower wage rate.

Defendants argue that "provide" and "offering" are synonymous, and that an employer need only make available qualified health insurance in order to pay below the upper-tier wage level, whether the employee accepts the benefit or not. Defendants argue that the usage, by the

administrative regulation. *See* N.R.S. 608.160.

The Court finds that N.A.C. 608.104(2), insofar as it permits employers to include tips and gratuities furnished by the customers of the employer in the calculation of income against which in measured the Minimum Wage Amendment's ten percent income cap on allowable health insurance premium costs, violates the Nevada Constitution and therefore exceeds the Nevada Labor Commissioner's authority to promulgate administrative regulations. The Court determines the regulation in question to be invalid, and will further enjoin Defendants from enforcing N.A.C. 608.104(2) for the reasons stated herein.

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Plaintiff argues that, in order to qualify for the privilege of paying less than the upper-tier hourly minimum wage, an employer must actually provide qualifying health insurance, rather than merely offer it. He contends that, read as a whole and giving all parts of the Amendment meaning and function, the basic scheme of the provision is to propose for both employers and employees a set of choices, a bargain: an employer can pay down to $7.25 per hour, currently, but the employee must receive something in return, qualified health insurance. A mere offer of health insurance—which the employee has not played a role in selecting and may not meet the needs of an employee and his or her family for any number of reasons—permits the employer to receive the benefit of the Minimum Wage Amendment, but can leave the employee with less pay and no insurance provided by the employer.

In support of this interpretation, Plaintiff suggests that "provide" and "offering," as used in the Amendment, are not synonyms, but rather that the basic command of the constitutional provision (in order to pay less than the upper-tier wage level) is to *provide* health benefits, and that the succeeding sentence that begins with the term "offering" only dictates certain requirements of the benefits that must be offered as a step in their provision to employees paid at the lower wage rate.

Defendants argue that "provide" and "offering" are synonymous, and that an employer need only make available qualified health insurance in order to pay below the upper-tier wage level, whether the employee accepts the benefit or not. Defendants argue that the usage, by the

Amendment's drafters, of "offering" and "making available" in the sentence succeeding those employing "provide" modifies and defines "provide" to mean merely "offering" of health insurance.

A further argument by Defendants is that the benefit of the bargain inherent in the Amendment is the offer itself, having employer-selected health insurance made available to the employee, and that interpreting the Amendment to require that employees accept the benefit in order for an employer to pay below the upper-tier minimum wage denies the value of the Minimum Wage Amendment to the employer. They deny that "provide" is the command, or mandate, of the Minimum Wage Amendment where qualification for paying the lesser wage amount is concerned.

The Court finds that the Minimum Wage Amendment requires that employees actually receive qualified health insurance in order for the employer to pay, currently, down to $7.25 per hour to those employees. Otherwise, the purposes and benefits of the Amendment are thwarted, and employees (the obvious beneficiaries of the Amendment) who reject insurance plans offered by their employer would receive neither the low-cost health insurance envisioned by the Minimum Wage Amendment, nor the raise in wages its passaged promised, $7.25 per hour already being the federal minimum wage rate that every employer in Nevada must pay their employees anyway. The amendment language does not support this interpretation.

The Court agrees with Plaintiff's argument that "provide" and "offering" are not synonymous, and that the drafters included both terms, intentionally, to signify different concepts. "[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 170 (2012). It is also instructive that the drafters used "provide," a verb, and "offering," a gerund, ostensibly to make a distinction between their functions as parts of speech within the text of the Amendment. The Amendment easily could have stated that "[t]he rate shall be X dollars per hour worked, if the employer **offers** health benefits as described herein, or X dollars per hour if the employer does not **offer** such benefits." It did not so state. Instead, it required that the employer "provide" qualified health insurance if it wished to take advantage of the lower wage rate. The Court agrees with Plaintiff, furthermore, that

the overall definitional weight of the verb phrase "to provide" lends credence to his interpretation that it means to furnish, or to supply, rather than merely to make available, especially when the overall context and scheme of the Minimum Wage Amendment is taken into consideration.

The distinction the parties here draw between "provide" and "offering" is no small matter. Allowing employers merely to offer health insurance plans rather than provide, furnish, and supply them, alters significantly the function of this remedial constitutional provision. The fundamental operation of the Minimum Wage Amendment, fairly construed, demands that employees not be left with none of the benefits of its enactment, whether they be the higher wage rate or the promised low-cost health insurance for themselves and their families.

Because N.A.C. 608.100(1) impermissibly allows employers only to offer health insurance benefits, but does not take into account whether the employee accepts those benefits when determining how and when the employer may pay below the upper-tier minimum wage rate, it violates the Nevada Constitution and therefore exceeds the Nevada Labor Commissioner's authority to promulgate administrative regulations. The Court determines the regulation in question to be invalid, and will further enjoin Defendants from enforcing N.A.C. 608.104(2) for the reasons stated herein.

IT IS HEREBY ORDERED, therefore, and for good cause appearing, that Plaintiff's Motion for Summary Judgment is **GRANTED** and the Defendant's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that N.A.C. 608.104(2) is declared invalid and of no effect, for the reasons stated herein;.

IT IS FURTHER ORDERED that N.A.C. 608.100(1) is declared invalid and of no effect, for the reasons stated herein;

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IT IS FURTHER ORDERED that Defendants are enjoined from enforcing the challenged regulations.

IT IS SO ORDERED this 12 day of August, 2015.

James Ellsworth
DISTRICT COURT JUDGE

Submitted by:

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
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Attorneys for Plaintiffs

/s/ Bradley S. Schrager
Bradley S. Schrager, Esq.

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

CODY C. HANCOCK, an individual,

Plaintiff,

vs.

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

Defendants.

Case No.: 14 OC 00080 1B

Dept. No.: 2

ORDER GRANTING DEFENDANTS' MOTION TO STAY ORDER PENDING APPEAL

Defendants State of Nevada *ex rel.* the 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 referred to as "Labor Commissioner)" have moved this Court to stay enforcement of its order pending appeal. Plaintiff has opposed the motion.

"In deciding whether to issue a stay, [a district] court generally considers the following factors: (1) Whether the object of the appeal or writ petition will be defeated if the stay is denied; (2) Whether appellant/petitioner will suffer irreparable or serious injury if the stay is denied; (3) Whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) Whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition." *Hansen v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 116 Nev.

650, 657, 6 P.3d 982, 986 (2000). Under the factor considering a likelihood of success on the merits, a stay may be warranted if there is "...a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Id.*. at 659, 6 P.3d at 987. No one factor is dispositive when it comes to granting a stay, however "...if one or two factors are especially strong, they may counterbalance other weak factors." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

The Court has weighed these factors and finds that the requested stay is appropriate in this case. The Court's order affects how the Labor Commissioner approaches the minimum wage calculation in her enforcement proceedings. These enforcement proceedings are actions taken in the public interest and will necessarily concern persons who are not parties to this matter. These proceedings should be allowed to continue unimpeded until the Nevada Supreme Court has given finality to the issues raised in this case. This implicates the first two factors of under *Hansen*, as weighing in favor of staying the order pending appeal. Conversely there is no indication that Plaintiff will suffer an irreparable injury if a stay is granted.

The Court recognizes that a serious legal question is involved in this case as it involves the interpretation of a constitutional provision with ramifications affecting persons throughout the State. While the final interpretation of the amendment is a judicial question, the constitutional interpretation of the legislative and executive departments is entitled to some weight in the analysis. *e.g. State v. Glenn*, 18 Nev. 34, 44, 1 P. 186, 190-191 (1883). Further, as the Court's order will affect non-parties pursuing wage claims through the Labor Commissioner's administrative process, the equities weigh in favor of staying the order while the appeal remains pending.

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Based upon the foregoing, and good cause appearing therefore:

IT IS HEREBY ORDERED that Defendants' motion to stay the order pending appeal is Granted.

October 9, 2015

JAMES E. WILSON JR.
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

The undersigned, an employee of the First Judicial District Court, hereby certifies that on the 12 day of October, 2015, I mailed a true and correct copy of the foregoing Order to:

Scott Davis, DAG
555 E. Washington Ave, Ste 3900
Las Vegas, NV 89101

Don Springmeyer, Esq.
3556 E. Russell Road, 2nd Floor
Las Vegas, NV 89120

Gina Winder
Judicial Assistant

data, quarterly if not. I think we will probably work on quarterly adjustments.

MR. MCCRACKEN:

The interesting issues are the ones set forth in regulation section 4, subsection 2. I think b-4, shows you how difficult this is to implement. What do you do with somebody who is just hired; how do you know exactly when they are hired whether they qualify or they don't? I think the theory would be to offer health insurance and they may qualify. You can either do a quick calculation day by day or you can try and use two pay periods and extrapolate into the 10-percent test and see. If you do not do it, then I think there is probably—you pay them at $5.15, but if they didn't qualify and you probably have to look back and correct it over some time. Those are the kind of difficulties that are in this.

The constitutional language is very simple but those kinds of implementations are right on point in the middle of this reg. Again, we are working on them, and I want to compliment the people that have—at least the staff and the Labor Commission Office who have been working a lot of nights to make sure this is in play. The things that aren't really evident are the kind of implications of the minimum wage and its impact into overtime. We're functionally now going to have a two-tiered overtime system based on what rate of pay you're at. That is going to be difficult for businesses. Those are things that we will get done once we have gotten the basic rules and try to figure out exactly how we do it and make sure it is done correctly. Everyone on the committee knows there are federal laws that applies to this. We have to follow them as well. We appreciate the fact —there has not been a double system built where employers are trying to implement, based on two sets of standards, both federal and state to the greatest extent possible. We have tried to minimize that.

MR. MCMULLEN:

I would just like to clarify one thing for the record, or at least make sure it is on the record. I think we talked about one side of the accumulative CPI adjustments. There are two sides and I want to make sure my understanding is incorrect that we make sure that at least I am corrected. Mr. McCracken talked about the issue of banking the CPI and I think that is correct. Of course, you would implement that in 3-percent increments until you get there. The interesting thing about what we are going to be doing with—in reality here a $2.10 increase in the minimum wage will effectively be the equivalent of about—currently based on a $5.15 base of 40.78-percent increase in the CPI. If I read what it says to me is that we will go through a number of years and under that calculation we would be somewhere between the 13th and 14th year where you would finally exceed the accumulative increase in the CPI. The adjustment for that 14th or 15th year, depending on when it hits, would then have the additional increment up to the 3 percent of that year and then the CPI would start to kick in. I think that does a couple of things; it shows you the order of magnitude of the federal increase as it relates to this constitutional amendment, but also we want to make sure we are implementing it correctly. In fact, until you cumulatively go over that 40 percent, whatever it correctly calculates out to be, I would not trust my math. It wouldn't be until that year, wherever that happens, 13 or 14 years down the road here that the CPI accumulative starts to have impact and raise our basic State rate.

Second of all, I think we need to make sure your staff clarifies Mr. McCracken's statement about how it would be implemented on the April report and the July implementation. I think that is extremely reasonable, very practical and I just want to make sure that in fact the effect comports with our obligations under federal law in terms of an increase in the federal law which I think that is a question we would have no matter what we are doing on regulations, which can be a difficulty we may have to accommodate, if in fact, we find out it can't be implemented the way it was testified to today. There are a ton of issues in this, but the great part is the process is still ongoing and the workshops

have been great. The dialogue and the drafting of language and the reiterative process of that have been great. We still have a whole month to finalize things and to adjust them correctly. I do agree with Mr. McCracken, getting the word out though is extremely important. We are trying to do that with our members because it is huge. Even though it is just a few employees affected, in terms of percentage of workforce for these employers that have to deal with it, it is a lot of practicality and burden. We appreciate the interest in doing it as efficiently and cost-effectively for those small businesses. I thank you and would be happy to answer any questions.

LEAH LIPSCOMB (Retail Association of Nevada):

I will be very brief and simply echo the remarks and concerns of Mr. Ostrovsky and Mr. McMullen. We would like to ensure that the regulation language be clear and simple as to minimize the paperwork and ease the implementation process for our members and their employees. The Retail Association has also participated in the workshop process of the Labor Commissioner and at this point we would just like to express our desire to continue working with Commissioner Tanchek as we move forward to further clarify and refine the language. Thank you.

CHAIR TOWNSEND:
Mr. McMullen, I am looking at a chart we developed and if the passage of the federal minimum wage, I think it is 70 cents, 70 cents, 70 cents. Based on our calculations, that is about a 36-plus percent, those 70 cents.

MR. MCMULLEN:
"I could be wrong again."

CHAIR TOWNSEND:
I just happen to have it in front of me.

MR. MCMULLEN:
"I do believe that the calculation is as simple as dividing 70 cents in the first increase by $5.15 so that I think comes out I think to 13.6."

CHAIR TOWNSEND:
That means12 percent is the next one and 10.7 is next.

MR. MCMULLEN:
"I get 2.10 off a base of $5.15. That is the only difference in my—"

CHAIR TOWNSEND:
I understand your point is that preliminary increase outstrips the CPI.

MR. MCMULLEN:
"I would say I don't want to argue with your people, but again the constitution is very clear. It is the percentage increase over $5.15. It is not the percentage increase over $5.15 as adjusted up and then adjusted up and adjusted up."

CHAIR TOWNSEND:
So you are probably closer to right.

MR. MCMULLEN:
"I don't know, but again, that again I liked Mr. Tanchek's statement that I would not rely on him or me for your math."

CHAIR TOWNSEND:
Let us find someone we can rely on.

MICHAEL D. PENNINGTON (Public Policy Director, Reno-Sparks Chamber of Commerce):

> You have had a lot of wise experts in very proficient fields come before you and go through a lot of the technical issues relative to this. I had came prepared to address three primary bullet issues, one with regards to getting the information out to employers so that way they are aware of the issues. We've had had the pleasure to work with Commissioner Tanchek since November. He has been very responsive to the Chamber in helping us. We have been able to get those emergency regs out and work with them, as well as get quick-fax and any information he has been able to provide to us so we could provide to our members. He has been very responsive, but I would if there is anything that the legislature can do to ensure that Mr. Tanchek has those resources and tools to help

organizations and help employers out. That would be something that we think would be advisable. I received many calls in late November, early December about where do we go from here and he was responsive, but I know he is very short-staffed and very limited and so we're trying to do what we can to help him out and get that information. The discussion earlier relative to the federal and the State that was an issue that we have been discussing. We appreciate the passionate concerns Senator Hardy and the Chairman have brought to the table relative to that this morning. We think that is very important.

MR. PENNINGTON:

The third bullet point that I wanted to address this morning which kind of goes off the reservation a little bit for the scope of this Committee but I think the Committee members might be concerned. I know Senator Heck would be serving on the Health Care Committee is the provisions relative to the health care coverage. I think it is important for us to work for solutions in trying to see if we can get some of Nevada's uninsured insured, a lot of those people come in the small business area. Last week I was in a meeting and I think an individual had told me that Washoe County specifically their estimated numbers are 70,000 relative to how many people that need some good coverage in the Reno-Sparks area. There is going to be some proposals that I think the interim Committee on Health Care worked on between the last session to maybe look at some pilot programs, some innovative solutions to come forth to provide coverage. Groups in Washoe County are seeing if they can't find a way to get 10,000 of those 70,000 uninsured on the insured rolls. I think that will go to some extent of minimizing some of the impacts of the issues that we talked about today as well as improving the quality of life for, you know, employees. Members I represent would like to provide that coverage. So, I know this Committee does have some concerns on that. I know that down the road, working with the Insurance Commissioner as well that would be an issue that has purview within this jurisdiction here today. Beyond that, those are my remarks and I appreciate the time to appear this morning.

CHAIR TOWNSEND:
As you know, Senator Heck is a member of Senate Committee on Human Resources and Education and at a time that will work for him I am sure he will brief us on what they are working on. On the flip-side of that, I believe Senator Schneider and I are the two members from the Senate Committee on Taxation. We are working on some additional changes on that payroll issue relative to health care. It could be very helpful to our small-to medium-size people. We are trying to figure it out with the budget committees because you know they—whatever the tax committee gives them they always want just a little bit more than that. We know for a fact that the more we can encourage small-to medium-sized employers to cover people, the less fiscal responsibility we have on the other end of the spectrum, particularly in the emergency room and lost days, lost time, etc. So we are trying to work on it. Any creative ideas that Human Resources can come up with I think we are going to be very enthused to hear.

MR. PENNINGTON:
"Senator, I appreciate the invitation and I will look forward to working with each and all of you during the session on those issues and more."

CHAIR TOWNSEND:
Does anyone else want to testify on the regulation that Mr. Tanchek has put out; provide something additionally informative? We are trying to get the Legislative Counsel Bureau, and particularly Brian Davie in southern Nevada has been remarkable in trying to get more rooms in southern Nevada so people can hear what is going on. We are trying on a regular basis make sure the three committees that meet in the Senate at each time slot can teleconference. I know we are trying to work with the Assembly to give them as many slots as we can for the hearings. Any time something happens in Judiciary that is of great interest to the State, we are just working through some normal bills and are trying to give them the slots. We are trying to work together so more Nevadans can take advantage.

CHAIR TOWNSEND:
Are there any other questions? The meeting of the Senate Committee on Commerce and Labor is officially adjourned at 9:43 a.m.

RESPECTFULLY SUBMITTED:

_____
Gloria Gaillard-Powell,
Committee Secretary

APPROVED BY:

_____
Senator Randolph J. Townsend, Chair

DATE:_____

EXHIBIT 8

EXHIBIT 8

Discussion of the Impacts of the New Minimum Wage Law

Senate Commerce and Labor Committee
February 8, 2007

Michael Tanchek
State Labor Commissioner

www.laborcommissioner.com

INTRODUCTION

At the general election in November of 2006, the voters passed Question 6, a Constitutional Amendment governing minimum wages for all employees in Nevada. The amendment became effective on November 28, 2006 when the State Supreme Court certified the election.

With the amendment going into effect so quickly, my office was inundated with requests from employers, employees, trade associations, law firms, and the press; all seeking to find out what it all meant. After consultation with the Governor's office and the Attorney General, I held a public information workshop and we drafted some emergency regulations to give at least some guidance. The emergency regulations were, at best, a stop gap measure and left a lot of issues unresolved.

At the present time, I have started the temporary rulemaking process. A copy of the proposed temporary regulations is attached. There is some procedural overlap between my rulemaking and any action the Legislature may undertake. Because of the statutory time requirements for rulemaking, this was unavoidable. As the Legislature moves forward in addressing these issues, they will be deleted from the proposed regulations.

The proposed regulations do not answer all of the questions. However, they do deal with the major areas where clarification appears to

be the most needed. I hope that the Legislature will find the work that we have done so far to be useful.

I also want to take a moment to publicly thank the two hundred or so people who participated in the public workshops that we held last month. The quality of the participation was excellent with a lot of good ideas and solutions being generated by the participants.

TEXT OF THE AMENDMENT

Sec. 16. Payment of minimum compensation to employees. [Effective November 28, 2006, if the proposed amendment is approved and ratified by the voters at the 2006 General Election.]

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.

Section A is the most substantive part of the amendment. It deals with several issues including:

1. The requirement for all employers to pay and the entitlement for all employees to receive at least one of the minimum wages.
2. It establishes two minimum wage rates. A basic rate of $6.15 per hour and an alternative rate of $5.15 per hour for employees who receive health benefits.
3. The requirement that the rates be adjusted to reflect changes in both the federal minimum wage and the Cost of Living.
4. It prohibits offsetting the minimum wage with tips and gratuities received by the employees.

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.

Section B deals with what could be described as some of the legal issues in the amendment. Section B deals with several issues including:

1. The prohibition against waiving the requirements by private agreement between employers and their employees.
2. An exception that permits non-compliance with the amendment if the matter is clearly addressed in a collective bargaining agreement.
3. The creation of a private right of action for employees who wish to take their employers to court.
4. A prohibition against retaliatory action against an employee for exercising his rights under the amendment.

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 labiality company, trust, association, or other entity that may employ individuals or enter into contracts of employment.

Section C is the definitional section and contains the definition of employee and employer.

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.

Section D contains the severability provisions of the amendment to preserve the balance of the language should the Court declare any portion invalid.

ISSUES

1. To whom does the minimum wage apply?

   The amendment says "Each employer shall pay a wage to each employee..." The language is clear and straightforward. The starting point is: If you are an employer you have to pay each of your employees the minimum wage. The analysis doesn't stop there, however, because you have to look at the language in Section C to determine who is an employer and who is an employee.

   Employer is broadly defined, specifically listing individuals and a variety of organizations as being employers. In addition, there is a catch-all phrase "...or other entity that may employ individuals."

   An employee is "...any person who is employed by an employer..." There are some exceptions that I will discuss further on.

2. Does the amendment extend to state and local government employees?

   The Labor Commissioner's jurisdiction relative to the minimum wage is limited to the private sector. I cannot address this question authoritatively. However, I have been assisting state and local governments with their analysis.

   Under NRS 608.011, the term employer "...includes every person having control or custody of any employment, place of employment or any employee." NRS 0.039 defines a person and specifically says "[T]he term does not include a government, governmental agency or political subdivision of a government." The result is that under Chapter 608 state and local governments are not included, but the same thing cannot be said under the terms of the amendment because it uses the term "entity" rather than "person" in defining employers.

3. Are there any exemptions or exceptions to the minimum wage?

   Yes. While the amendment does not specifically use the words exception or exemption it provides for them by excluding certain classes of people from the definition of employee. These classes are:

a. everyone under the age of 18,
b. those who are employed by a non-profit organization for after school or summer employment, and
c. "trainees," but only for a maximum of 90 days.

In addition, Section B also provides for an exemption where it states "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."

4. What is the status of the exemptions that were provided for in NRS 608.250(2)?

NRS 608.250(2) provided for six specific exemptions to the statutory minimum wage law. These were:

(a) Casual babysitters.
(b) Domestic service employees who reside in the household where they work.
(c) Outside salespersons whose earnings are based on commissions.
(d) Employees engaged in an agricultural pursuit for an employer who did not use more than 500 man-days of agricultural labor in any calendar quarter of the preceding calendar year.
(e) Taxicab and limousine drivers.
(f) Severely handicapped persons whose disabilities have diminished their productive capacity in a specific job and who are specified in certificates issued by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation.

The general rule is that if a provision of a statute conflicts with a constitutional provision, the statute must give way. The exemptions in 608.250 are statutory and are not included among the exemptions allowed by the amendment. Unless they fit within one of the constitutional exemptions, employees listed in the statute are no longer exempt.

5. How do health benefits fit into the process?

We have two minimum wages, $5.15 and $6.15. The simplest way to approach it is to assume that, initially, all employers have to use the $6.15 rate. Then, if they make insurance available to the employees that meets the requirements of the amendment, they can pay less than $6.15.

The amendment sets out three requirements for the health benefits:

a) Health insurance must be made "...available to the employee..."
b) The insurance must be "...for the employee and the employee's dependents..."
c) The "...total cost to the employee for premiums..." cannot be "...more than 10 percent of the employee's gross taxable income from the employer."

In order to qualify to use the lower rate, the employer must meet all three requirements. If any one of the requirements is not met, the employer must pay the higher rate. This is the major area of confusion over the amendment.

6. Do these requirements have to be met for all employees in order for an employer to use the lower rate?

The amendment imposes an affirmative duty on the employer to make the health benefits available if the employer wants to utilize the lower rate. The multitude of types of health benefits available as well as the wide range of variations within the individual benefit plans themselves results in an incredible number of possible outcomes.

Initially, I took the approach that it was a "yes" or "no" proposition. Either the employer meets all of the criteria or the employer doesn't. If they do, they do they can use the lower rate. If not, they must use the upper. This was referred to as the "employer specific" approach. As a result of the public workshops, the currently recommended approach is what we call "employee specific." The employer looks at each employee individually and determines on a case-by-case basis which minimum wage applies.

7. What is health insurance?

That is a very good question. The amendment doesn't say what it is, just that the employer has to offer it in order to take advantage of the lower rate. As pointed out earlier, there are all sorts of different kinds of health benefits that are available. Think of group health, HMO's, PPO's, self-funded plans, cost reimbursement plans, and the list goes on.

You have to be careful with this question because it is really easy to get bogged down in the complexity insurance. I have insurance companies sending me copies of their insurance policies wanting to know whether or not the plan complies with the amendment. I don't have the time, the expertise, or the staff to get into that level of detail. The preferred approach is to set understandable standards so the employers and employees can draw their own conclusions.

With the help of the Insurance Division, I was able to cobble together some language for the emergency regulation. I didn't like my solution then and I still don't like it. Fortunately, we have come with what seems to a pretty good approach since those early struggles.

The current approach is to adopt the standard used in the business tax provisions of NRS 363A and 363B. This has several advantages. We didn't need to "reinvent the wheel." It is a standard that is already in existence and with which employers are familiar. Employers know whether their insurance meets the standard. Since it is statutory, there is a legislative history behind it. Finally, we were able to get a good consensus for that approach from business and the drafters of the amendment. In addition, we included ERISA plans and Taft-Hartley plans. Those types of plans are rooted in pre-emptive federal law, are regulated, and cover some types of plans not covered under our statutes.

8. What if an employee doesn't want the health insurance?

The amendment only requires the employer to make qualifying insurance available to the employee. If the employer offers the insurance and the employee declines, the employer has met the requirement and can pay the lower rate to that employee.

9. What about waiting periods and eligibility?

Even if employers have qualifying health insurance available, not all employees can receive it when they first start work. There are two main reasons for this. Either the employer has a business policy not to make it available to all employees or else there is a waiting period in the policy itself.

If it is the employer's policy, for example they don't offer benefits to probationary, temporary, or part-time employees, then the employer is not making the policy available and would have to pay that employee the higher rate.

On the other hand, if the policy has a built-in restriction, such as a waiting period. If the health insurance has been made available to the employee, then the employer has met the requirement and can pay the lower rate. Waiting periods vary. We are considering six months as the outer limit.

In some cases, there could be a restriction in the plan that disqualifies the employee from coverage altogether. In that event, the employer would be obligated to pay the higher rate to that employee.

10. How is the "10% of the employee's gross taxable income" determined?

Nevada does not have a personal income tax. As a result, an employee's gross taxable income is not tracked for state purposes. The common denominator for all Nevada employees, however, is the gross taxable income that is reported to the Internal Revenue Service. That is the recommended income figure to use.

The problem with using gross taxable income is that it is generally not known until the end of the tax year when employees are given their W-2 forms. Currently, we consider three methods to calculate the 10% figure as being a reasonable approximation:

a) If the employer issued a W-2 in the prior year, they can use that figure.

b) If the employer did not issue a W-2 in the prior year, but has reported quarterly information, they can use that figure.

c) If the employer doesn't have any historical information, they can make an annualized calculation based on the information they do have.

11. How much can the insurance premium be?

For minimum wage purposes, there is no requirement as to the cost of the insurance premium. It depends on the policy because there are a lot of variables that go into the premium. It is easy to get sidetracked on this issue. It is important to stay focused on the fact the only purpose that the 10% figure serves is to determine which minimum wage rate the employer has to use.

12. How do tips figure into the 10% calculation?

In the amendment it states: "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." As a result, there has been some confusion regarding how tips fit into the calculation.

There is a difference between the "wage rates" and "gross taxable income." The wage rates are the $5.15 and $6.15 rates established in the amendment. The employer cannot use tips to offset the requirement to pay the minimum wage. Nevada and five other states do not allow employers to offset the minimum wage with tips. This language reflects a continuation of that policy. The employer must pay the required minimum in addition to any tips that might be earned. The federal government and most other states do allow a deduction to be made.

The gross taxable income as reported to the IRS includes tips, commissions, and other types of payments to employees that are generally considered taxable. As stated above, the only purpose for the 10% number is to determine which minimum wage to use as a base wage rate.

13. How does the federal minimum wage fit in and how is the cost of living adjustment calculated?

I have requested an Attorney General's Opinion on this issue. I won't have a good answer until I get the opinion.

14. Can an employer and employee agree to something other than the minimum wage?

No. The terms of the amendment cannot be waived by agreement between an employer and employee.

15. How do collective bargaining agreements affect the minimum wages?

All of the minimum wage requirements can be waived in a bona fide collective bargaining agreement. However, the terms and conditions of the waiver must be explicit, clear, and unambiguous.

16. Who enforces the new law?

There are two options. First of all, the Labor Commissioner can enforce the law on behalf of an employee consistent with the statutory authority in NRS 607 and 608. As an alternative, an employee can file a court action against the employer on his or her own. This is an either/or choice.

17. What effect does the amendment have on overtime?

NRS 608.018(1) states:

1. An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate less than 1 1/2 times the minimum rate prescribed pursuant to NRS 608.250 works:
(a) More than 40 hours in any scheduled week of work; or
(b) More than 8 hours in any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.

This is Nevada's daily overtime statute. Employees who are paid less than 1½ times the minimum wage are entitled to be paid overtime whenever they work more than eight hours in a workday. Prior to passage of the amendment, the minimum wage rate was pegged at the federal rate of $5.15 per hour. Consequently, the daily overtime rate

was set at $7.725 per hour. Any employee paid less than that amount was entitled to daily overtime.

I estimate that there were about 162,000 workers statewide in the class of workers entitled to daily overtime before the amendment was passed. (The actual number is probably lower because many employers used a starting hourly wage above $7.73 in order to avoid dealing with the daily overtime calculation in addition to the more familiar weekly overtime requirement.) As a result of the amendment, the daily overtime rate ceiling increased to 1½ times $6.15 per hour or $9.225 per hour. This correlates to approximately 260,000 workers potentially eligible for daily overtime, an increase of 100,000.

From an enforcement standpoint, this is probably the biggest impact from the amendment. Historically, minimum wage problems have been extremely rare. Even though the legal requirements may be more complex under the amendment, I don't expect compliance to be much of a problem once the requirements are known.

Daily overtime is a different story and constitutes a significant portion of our existing caseload. The reason is fairly simple. Most employers and employees are familiar with the requirement to pay overtime anytime a non-exempt employee works more than 40 hours in a workweek. We get our share of claims for weekly overtime, but it is not what I would characterize as a major problem.

On the other hand, I am constantly amazed by the number of employers who don't know they are supposed to pay daily overtime and the number of employees who don't know they are supposed to receive it, even though Nevada's daily overtime requirement has been on the books for over 30 years. The most common problem we have found in this regard is that while most payroll software includes a computation for weekly overtime, they don't include a daily overtime component

Going forward, enforcement will be complicated by an increased number of employers who will have to pay daily overtime who did not have to consider it previously, the increased number of potential claimants, and the confusion of dealing with three different overtime

rates rather than two. In addition, calculating back wages will be complicated by any annual adjustments that may occur in the minimum wage with the concurrent adjustment in the daily overtime thresholds.

PROPOSED REGULATION OF THE LABOR COMMISSIONER
LCB File No. T004-07
February 2, 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 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 wavier 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.]

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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

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Hearing Date: August 11, 2015
Hearing Time: 1:30 p.m.

Plaintiff CODY C. HANCOCK ("Plaintiff"), by and through his attorneys of record, here responds to Defendants' Motion for Summary Judgment, pursuant to N.R.C.P. 56. This response is based on the Memorandum of Points and Authorities below, all papers and exhibits on file herein[1], and any oral argument this Court sees fit to allow at hearing on this matter.

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[1] *See* Declaration of Bradley Schrager, Esq., attached as **Exhibit 1.**

MEMORANDUM OF POINTS AND AUTHORITIES

Understanding that the particular form of briefing this matter has taken—three briefs from each side, six in all—is likely to become wearisome and repetitive, and that certain arguments that respond to Defendants' positions are already set out in his original motion, Plaintiff here incorporates his Motion for Summary Judgment [filed June 12, 2015] and confines himself, succinctly, to responding directly to Defendants' arguments previously left unaddressed. With a further reply brief still to be submitted by each side, it is presumed all arguments necessary for the Court to make its determinations will be before it by the close of filings.

I. ARGUMENT

A. *"Gross taxable income from the employer"*

Defendants pledge faith to the text of article XV, section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or the "Amendment"), but the defense of N.A.C. 608.104's inclusion of tips in the calculation of allowable premium costs to minimum wage employees seems instead to be one long, over-analytical journey around the plain words of the provision. At what point is the Commissioner required to confront the meaning of the phrase "from the employer"? Instead, the Commissioner truncates the phrase "gross taxable income from the employer" in order to focus solely upon "gross taxable income," a subtraction from the text that the Commissioner then asserts triggers resort to federal tax law to ground the agency's interpretation. But there is nothing in Nevada or federal law that commands such a reading. There is no reference to such a reading in the Amendment itself; clearly it takes an act of interpretation to construct such a triggering and such resort. The fact that Nevada has no income tax does not mean that the phrase "gross taxable income from the employer" is somehow unintelligible in this state; that the federal government, rather than the State of Nevada, is doing the taxing on an employee's income earned in Nevada should have no bearing of an interpretation of the constitutional text. Again, as argued in Plaintiff's Motion, the creation of the concept in N.A.C. 608.102(3) of "gross taxable income of the employee attributable to the employer" finds no support in the Amendment itself, and establishes, unlawfully, a type of "but-for employment with the employer" standard that does not withstand textual scrutiny.

The Commissioner maintains in her brief, referencing N.A.C 608.104, that "the principal method of determining whether the amendment's 10% threshold in met is by looking to an employee's IRS Form W-2 for the preceding year[.]" Defs.' Mot. for S.J. at 11. Further, this is all judged to be an "unavoidable consequence" with "no viable alternative," because Nevada has no state income tax, and therefore "gross taxable income from the employer" must mean "gross taxable income of the employee attributable to the employer, or all taxable income derived from working for an employer," whether the income came from the employer or from the general public as tips. *Id.* This does not make a tremendous amount of sense, and appears to over-complicate the constitutional text in support of a post-hoc defense of the challenged regulation.

It also leads Plaintiff to believe that Defendants do not have much occasion to study examples of tipped employees' W-2s. For reference, therefore, Plaintiff here attaches, as **Exhibit 2**, a copy of one such form (not Mr. Hancock's, but a real example from one of the cases listed in footnote 4 of Plaintiff's Motion for Summary Judgment, at 5, properly redacted and offered for exemplary purposes; *see* **Exhibit 1**, Schrager Decl., ¶ 2).

Look closely at **Exhibit 2**. It belongs to a tipped employee ("Employee Z"), a Nevada restaurant server much like Mr. Hancock, and stems from the 2014 tax year.

- In **Box 1**—the middle column, counter-intuitively—shows Employee Z's total 2014 "Wages, tips, other comp:" $15,979.16 (and note that the IRS described those two, "wages" and "tips," separately, even if taken together they constitute total taxable income).
- In **Box 3**, just below Box 1 in the middle column, gives Employee Z's "Social Security wages," which are the wages gained directly *from the employer*: $6,746.66.
- In **Box 7**, one finds Employee Z's income derived from tips and gratuities in 2014: $9,232.50.

If you add Boxes 3 and 7—wages and tips—you get Employee Z's total gross income of $15,979.16. Only Box 3, however, shows income paid to the employee solely by the employer. The Commissioner's reading of the Amendment points to Box 1—total income while working for the employer, no matter what the source—as the necessary amount for calculating the 10% threshold for premium costs of health insurance under the Minimum Wage Amendment. Plaintiff's reading

points instead to Box 3—total wages paid by the employer.

If an employer is to look at the employee's W-2 to figure the base amount from which to calculate the allowable premium cost of insurance for payment of the sub-minimum wage—which the Commissioner in her motion says employers are to do—why look at one box and not the other? Any employer looking at the form has both amounts readily displayed and available. Which box, which figure, best comports with the direction of the Minimum Wage Amendment? The Commissioner's interpretation (Box 1) attends only to the "gross taxable income" portion of the Amendment's text. Plaintiff's interpretation (Box 3) has the virtue of giving meaning to all the words in the constitutional text, "gross taxable income *from the employer.*" As the Commissioner notes, courts are to give constructions that "prevent any clause, sentence, or word from being superfluous, void, or insignificant." Defs.' Mot. for S.J. at 12 (citing *Youngs v. Hall*, 9 Nev. 212, 222 (1874)). The Commissioner's regulation does not appear to achieve that standard in this respect.

The Commissioner then asserts that even if Plaintiff has a point, her interpretation should stand because it is a "permissible policy choice because it does not conflict with the actual text" of the Amendment. *Id.* at 13. But, in the first instance, the Commissioner is not charged with making these sorts of policy choices, especially not choices that contravene the text—or the policy—of a constitutional provision enacted by the people acting in their legislative capacity. And the interpretation does, in fact, conflict with the actual text, as demonstrated. This is not a six-of-one, half-dozen-of-the-other situation; there is no *Chevron*-type agency deference owed here. *See State Div. of Ins. v. State Farm Mutual Automobile Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000) (" ... a court will not hesitate to declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency or is otherwise arbitrary and capricious[.]").

Look again at **Exhibit 2**, the sample W-2. Under the Commissioner's interpretation of the Amendment, Employee Z could be charged $1,597.92 annually, or $133.16 per month, in health insurance premiums, and the employer could still ostensibly qualify to pay Employee Z the sub-minimum hourly wage. Under Plaintiff's rendering, those premium costs would be capped at

$674.67 per year, or $56.22 a month. The difference equates to a 137% increase in allowable monthly insurance premiums for Employee Z. And let us not forget that this entire analysis is undertaken by employers in order to pay, currently, down to $7.25 per hour rather than $8.25—itself a 12.2 % reduction in the employee's pay. There is no scenario where a policy choice with such negative impact upon the intended beneficiaries of the Minimum Wage Amendment—Nevada's working poor—is permissible in the face of what is an improper reading of the text of the state constitution.

No one is arguing that tips and gratuities given to employees are not taxable income under the Internal Revenue Code. Those amounts are, however, merely a subset of an employee's gross taxable income, which the IRS helpfully breaks out on employee tax information. They are a subset that the Amendment excludes, plainly, from allowable premium calculations, if an employer is going to pay below the upper-tier minimum hourly wage. The Amendment could have stated "gross taxable income of the employee" or "all income received while employed by the employer;" it did not. It states "gross taxable income from the employer," and it is that figure—easily obtained and ascertainable—upon which the Amendment commands that calculation be made.

Lastly, the Commissioner notes that the challenged regulations do not create a tip credit against the minimum wage. True enough, if immaterial. The analogy of the tip credit was offered to demonstrate that Nevada does not, and never has, permitted employers to claim tips earned by employers as a benefit to themselves in fulfilling their responsibilities under state labor laws. *See* Pl.'s Mot. for S.J. at 19-20. Nevada employers do not figure tips earned by employees into payroll taxes, either. Here, however, the Commissioner's regulation allows employers to use tips to avoid a fundamental responsibility under the Minimum Wage Amendment. The way the Amendment is written, with its hard 10% cap on premium costs to employees paid less than the full minimum wage, employers were intended to have to make up for any premium cost overruns for the insurance coverage they provided in order to pay the sub-minimum wage. As shown above in the premium comparison examples of Employee Z, one can readily see the benefit to the employer—and detriment to the Employee Z—that accrues by including tips in the allowable premium calculation. If, for example, a particular policy cost $1,200 annually in premiums, under the

Commissioner's interpretation the employer has no subsidy obligations and Employee Z must pay for all of the premiums herself. Under Plaintiff's view, for the privilege of paying her less than the full $8.25 per hour, the employer would necessarily have to make up for approximately $525 in overcharges under the Amendment. This was the set of choices the Amendment was supposed to place before employers and employees: employees get to make choices regarding accepting or rejecting health insurance and the required level of their minimum wage; employers get to choose whether paying employees up to a dollar less per hour made economic sense knowing that participation by employees in health benefits plans may incur employer costs due to premium caps. The regulation regarding inclusion of tips in premium calculations, however, skews the workings of the Amendment, and is not in keeping with its text or policy. N.A.C. 608.104(2) should be declared invalid.

B. *"Provide" vs. "Offer"*

As stated just above, the choices offered the minimum wage employee by the Amendment were—or were supposed to be—real ones, between health insurance coverage or the full minimum wage, between providing health insurance coverage or paying the full rate to workers. The Commissioner disputes this reading of the Amendment directly in her brief. Arguing that if "an employee voluntarily declines ... health insurance then an employer is deemed to have satisfied the condition" for paying below the upper-tier minimum hourly wage. Defs.' Mot. for S.J. at 8. "Plaintiff's claim," the Commissioner continues, "would radically alter this approach and would condition the lawful rate not upon the employer's actions ... but instead upon the employee's actions and his or her choice to accept an offer of insurance." *Id.* at 8-9.

This line of thinking reveals the fundamentally different visions of the meaning of the Amendment between the parties. The Commissioner sees the Amendment as solely focused on employer conduct. Plaintiff sees it as a remedial act of the people whose intent was to raise the minimum wage and encourage provision of health insurance to low-paid workers in Nevada. As outlined above, and in his original brief, Plaintiff argues that there was a bargain, a set of choices by both employees and employers, inherent in the Minimum Wage Amendment.

Think of it this way: if all an employer has to do is "offer" benefits in order to pay 12.2%

less in wages to an employee, why would any employer ever pay the full $8.25? The upper-tier would be rendered illusory. Especially given the fact that the employee has no input into what type or quality of insurance is being offered by the employer, a wily employer could (and this absolutely occurs, as evidenced by the pleadings in all the cases noted in footnote 4 of Plaintiff's Motion) arrange to offer benefits the employee is unlikely to accept. Employers could target their hiring from populations unlikely to want to accept their insurance—those under 26 and covered by parents' policies or spouses on their partner's insurance. Employees may simply think the particular policies on offer by the employer are junk plans, like limited-benefits plans or hospital indemnity plans that provide worthless coverage more likely to drive sick employees to bankruptcy than to get them well. This sort of gaming of the Amendment cannot be in line with its meaning, and the Commissioner ought to be regulating in ways that prevent rather than facilitate that sort of abuse.

The structure, text, and meaning of the Minimum Wage Amendment insist that the lower-tier wage level have some meaning, that employees receive something for their loss of a dollar per hour worked. In the Commissioner's interpretation, employers always get the benefit of the bargain—a significantly lower wage bill. What do employees get? The answer, following the Commissioner's logic, is they get nothing tangible, merely the opportunity to accept whatever benefit plan the employer has arranged for. Employees like Plaintiff are paying 12.2% of their wages and getting nothing in return. If, as the Commissioner states in her Motion, the Amendment "was presented to voters principally as an increase in the state minimum wage, with a built-in adjustment mechanism to ensure that the state minimum wage remained at a higher rate than the federal minimum wage," how can a regulation that guts that stated intent and policy be valid? *See* Defs.' Mot. for S.J. at 4. The federal minimum wage currently is $7.25 per hour, meaning that any employee whose employer has figured out the friendly wage loophole that N.A.C. 608.100(1) furnishes get no raise at all above the federal rate.

Furthermore, the Commissioner points to the ballot materials that came with the 2004 and 2006 initiative that became the Amendment, which noted that "living expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada's working families." *Id.* at 4. That is

as true today as it was a decade ago, and yet the Commissioner's interpretations allow employers merely to "offer" rather than "provide" health insurance, and take a dollar off of wages every hour. That means an employee who does not accept the employer's benefits—perhaps because of substandard coverage, for example—is left with less money in his or her pocket as wages, but still needs (either because of the Affordable Care Act or out of common sense and desire for wellness and peace of mind) to procure health insurance. In short, none of the Commissioner's policy understandings appear to be matched by the regulations that purport to implement the Amendment, and instead do it very little credit.

As for the text of the Amendment, which is really the thrust of the Commissioner's approach, Plaintiff has addressed most of these arguments in his original Motion and will not belabor those further, except to note three things for the Court. *See* Pl.'s Mot. for S.J. at 9-12.

First, the Commissioner states that her "regulations read the terms 'offer' and 'provide' as synonymous. But those terms are not synonyms. If the original motions provided then usual "battle of the dictionaries" over these terms, let us extend it for a moment to a battle of the thesauruses. Roget's Thesaurus lists 54 synonyms for "provide;" none of them are "offer."[2] More importantly, however, is the basic rule of construction that "[w]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." *Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051, 1057 (2014) (quoting Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 170 (2012)). "Provide" and "offer" are not synonyms, therefore, neither in the everyday sense of those words nor in the sense that is to be employed when court's engage in constitutional or statutory construction. The drafters of the Amendment could very well have used "offer" in each instance in

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[2] Add, administer, afford, arrange, bring, cater, contribute, equip, furnish, give, grant, hand over, implement, keep, lend, maintain, prepare, present, produce, serve, transfer, yield, accommodate, bestow, care, dispense, favor, feather, feed, fit, heel, impart, indulge, line, minister, outfit, procure, proffer, provision, ration, ready, render, replenish, stake, stock, store, sustain, fit out, fix up, fix up with, look after, stock up, take care of, turn out.

See http://www.thesaurus.com/browse/provide?s=t (accessed on July 9, 2015).

its text; they did not, and insisting that they mean the same thing, especially where the difference between them has (much like the tip inclusion issue) such a negative impact upon the intended beneficiaries of the Minimum Wage Amendment is just not sustainable.

Second, the Commissioner argues that the Amendment does not make sense if "provide" and "offer" are not accepted as synonymous. This is not accurate. The text reads:

> 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.

Nev. Const. art. XV, §16(A) (emphasis supplied). The command of the constitutional provision is that the employer must provide health benefits as described therein in order to pay an employee at the lower-tier wage rate; that much is clear. The next sentence, however, does not operate to define that command. An employer may, in the process of providing benefits to employees, offer one, three, or a dozen different types of health insurance options. But it must provide that insurance in order to gain the lower-tier wage privilege. "Offering" the insurance is a predicate act to complying with the command of the Amendment, which is to "provide" it; one must provide *health benefits*, but to do so there must be an offering of *health insurance* of a certain type and at a certain limited cost. The appearance of "provide" and "offering" in the provision quoted above neither renders the passages difficult to interpret, nor determines that the two must be read synonymously, in conflict with normal; rules of construction. There is, as demonstrated, a perfectly natural manner of reading the passages that comports with Plaintiff's interpretation and effects the meaning and remedial import of the Amendment generally.

Third, and last, just about two weeks ago, in the matter of *Diaz, et al. v. MDC Restaurants LLC, et al.*, Eighth Judicial District Court, Case No. A701633 (noted in footnote 4 of Plaintiff's Motion as an ongoing matter touching upon issues under the Amendment), the district court determined that:

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> The language of the Nevada Minimum Wage Amendment is unambiguous: An employer must actually provide, supply, or furnish qualifying health insurance to an employee as a precondition to paying that employee the lower-tier hourly minimum wage in the sum of $7.25 per hour. Merely offering health insurance coverage is insufficient.[3]

The district court in that matter was not asked to invalidate the Commissioner's regulations; it arose as part of a liability determination, on motion for partial summary judgment, regarding a food server's claims that she was underpaid the lawful minimum wage where she had declined what she considered to be substandard health benefits, and her employer nonetheless proceeded to pay her at the rate of $7.25 per hour. The district court granted the motion, as detailed in **Exhibit 3**. It is presented here for the information of the Court.

II. CONCLUSION

For the foregoing reasons, and for those contained in the incorporated Motion for Summary Judgment filed by Plaintiff on June 12, 2015, Plaintiff requests that the challenged regulations of the Commissioner be ruled invalid and of no effect, and that Defendants be enjoined from their further enforcement.

DATED this 10th day of July, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: _____

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[3] *See* **Exhibit 3**, an accurate copy of the Minute Order, dated July 1, 2015, issued in the Eighth Judicial District Court, Case No. A701633. When the entered order comes available, Plaintiff will file it with this Court with a request for judicial notice, in aid of the Court's deliberations.

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 10th day of July, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2015, a true and correct copy of **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** was placed in an envelope, postage prepaid, addressed as stated below, in the basket for 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.

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

Exhibit 1

Exhibit 1

DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
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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

DECLARATION OF BRADLEY SCHRAGER, ESQ. IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

DECLARATION OF BRADLEY SCHRAGER, ESQ.

I, Bradley Schrager, Esq., under penalty of perjury, declare as follows:

1. I am an attorney with the law firm Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, duly admitted to practice law in the state of Nevada, and counsel for Plaintiff in the above-captioned action. I make this declaration of personal, firsthand knowledge and, if called and sworn as a witness, I could and would testify competently thereto. I have personal knowledge of the facts stated herein and submit this Declaration in support of Plaintiff's Response to Defendants' Motion for Summary Judgment.

2. Attached, as **Exhibit 2**, is a true and accurate copy of a W-2 from a plaintiff in one of the cases listed in footnote 4 of Plaintiff's Motion for Summary Judgment, which is properly

redacted and offered for exemplary purposes. The plaintiff whose W-2 is provided is a food server at a Nevada casual dining restaurant not unlike Mr. Hancock's, and was paid the lower-tier minimum wage of $7.25 per hour by her employer during 2014.

3. Attached, as **Exhibit 3**, is a true and accurate copy of a Minute Order, dated July 1, 2015, issued by the Eighth Judicial District Court in the matter of *Diaz, et al. v. MDC Restaurants LLC, et al.*, Case No. A701633.

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

DATED this 10th day of July, 2015.

By: _____
BRADLEY SCHRAGER, ESQ.

Exhibit 2

Exhibit 2

REDACTED

[redacted]

500

[redacted]

OMB No. 1545-0008

Form W-2 Wage and Tax Statement 2014

c Employer's name, address and ZIP code: 500 [redacted]	1 Wages, tips, other comp: 15,979.16	2 Federal income tax withheld: 58.84
	3 Social security wages: 6,746.66	4 Social security tax withheld: 990.71
	5 Medicare wages and tips: 15,979.16	6 Medicare tax withheld: 231.70
e Employee's name, address and ZIP code: [redacted]	7 Social security tips: 9,232.50	8 Allocated tips
	9 Advance EIC payment	10 Dependent care benefits
	11 Nonqualified plans	12a Code: See inst. for box 12
	13 Statutory Employee / Retirement Plan / Third-Party Sick Pay	14 Other
	b Employer ID number: [redacted]	12b - 12d Codes
	c Employee's social security number: [redacted]	

15 State	Employer's state ID no.	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

Copy B to be filed with employee's FEDERAL Tax Return.

Form W-2 Wage and Tax Statement 2014

c Employer's name, address and ZIP code: 500 [redacted]	1 Wages, tips, other comp: 15,979.16	2 Federal income tax withheld: 58.84
	3 Social security wages: 6,746.66	4 Social security tax withheld: 990.71
	5 Medicare wages and tips: 15,979.16	6 Medicare tax withheld: 231.70
e Employee's name, address and ZIP code: [redacted]	7 Social security tips: 9,232.50	8 Allocated tips
	9 Advance EIC payment	10 Dependent care benefits
	11 Nonqualified plans	12a Code: See inst. for box 12
	13 Statutory Employee / Retirement Plan / Third-Party Sick Pay	14 Other
	b Employer ID number: [redacted]	12b - 12d Codes
	c Employee's social security number: [redacted]	

15 State	Employer's state ID no.	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

Copy C for EMPLOYEE'S RECORDS. (See Notice to Employee).

Form W-2 Wage and Tax Statement 2014

c Employer's name, address and ZIP code: 500 [redacted]	1 Wages, tips, other comp: 15,979.16	2 Federal income tax withheld: 58.84
	3 Social security wages: 6,746.66	4 Social security tax withheld: 990.71
	5 Medicare wages and tips: 15,979.16	6 Medicare tax withheld: 231.70
e Employee's name, address and ZIP code: [redacted]	7 Social security tips: 9,232.50	8 Allocated tips
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	11 Nonqualified plans	12a Code: See inst. for box 12
	13 Statutory Employee / Retirement Plan / Third-Party Sick Pay	14 Other
	b Employer ID number: [redacted]	12b - 12d Codes
	c Employee's social security number: [redacted]	

15 State	Employer's state ID no.	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

Form W-2 Wage and Tax Statement 2014

c Employer's name, address and ZIP code: 500 [redacted]	1 Wages, tips, other comp: 15,979.16	2 Federal income tax withheld: 58.84
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	9 Advance EIC payment	10 Dependent care benefits
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	13 Statutory Employee / Retirement Plan / Third-Party Sick Pay	14 Other
	b Employer ID number: [redacted]	12b - 12d Codes
	c Employee's social security number: [redacted]	

15 State	Employer's state ID no.	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

[redacted]

Exhibit 3

Exhibit 3

A-14-701633-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	July 01, 2015

A-14-701633-C	Paulette Diaz, Plaintiff(s) vs. MDC Restaurants LLC, Defendant(s)

July 01, 2015	1:30 PM	**Minute Order: Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz s First Claim for Relief**

HEARD BY: Williams, Timothy C. COURTROOM: RJC Courtroom 12D

COURT CLERK: Lorna Shell

PARTIES PRESENT: None

JOURNAL ENTRIES

- After review and consideration of the record, the points and authorities on file herein, and oral argument of counsel, COURT ORDERED, Plaintiffs' Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief GRANTED as follows:

The language of the Nevada Minimum Wage Amendment is unambiguous: An employer must actually provide, supply, or furnish qualifying health insurance to an employee as a precondition to paying that employee the lower-tier hourly minimum wage in the sum of $7.25 per hour. Merely offering health insurance coverage is insufficient. As a result, COURT ORDERED, Plaintiffs' Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief GRANTED; Counsel for the prevailing party shall prepare the appropriate Order in accordance with this Minute Order and the record on file herein. This is to be submitted to adverse counsel for review and approval and/or submission of a competing Order or objections, prior to submitting to the Court for review and signature.

CLERK'S NOTE: A copy of this minute order was placed in the attorney folder(s) of: Kathryn Blakey, Esq. (Littler Mendelson) and Daniel Bravo, Esq. (Wolf, R,S,S & R LLP). /ls 7-1-15

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

CODY C. HANCOCK, an individual,

Plaintiff,

vs.

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

Defendants.

Case No.: 14 OC 00080 1B

Dept. No.: 2

OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants 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 Nevada Labor Commissioner (collectively "Labor Commissioner"), by and through counsel of record ADAM PAUL LAXALT, Attorney General of the State of Nevada, and Scott Davis, Deputy Attorney General and hereby oppose Plaintiff Cody Hancock's motion for summary judgment. This opposition is based upon the provisions

of NRCP 56, the attached memorandum of points and authorities, and any oral argument that the Court may entertain at a hearing on said motion.

DATED this 13 day of July, 2015

ADAM PAUL LAXALT
Attorney General

By: _____
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Shannon Chambers

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POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Cody Hancock is not entitled to summary judgment because he does not meet his exceptional burden to show that the challenged provisions of the Nevada Administrative Code conflict with the minimum wage amendment.

Plaintiff fails to make this showing because Plaintiff's arguments each ask the Court to disregard or minimize portions of the constitutional text in order to emphasize other textual language that is more favorable to the Plaintiff. But in doing so Plaintiff only sets up a false dilemma as a harmonious construction of the amendment is possible, and is in fact achieved through the Labor Commissioner's administrative regulations. For this reason, Plaintiff fails to show any conflict with the constitutional text.

Plaintiff does not show that NAC 608.100 conflicts with the amendment by using the term "offer." Both the terms "offer" and "provide" are terms that are lifted from text of the amendment itself, but regardless of the preferred term the substantive meaning is the same in

either case – that health insurance must be made available to the employee in order to qualify to pay the lower-tiered wage rate as defined by the amendment. Because the term "offer" is taken from the amendment itself, and because the administrative regulations specify the meaning of this term as making health insurance available, there is no conflict between NAC 608.100 and the amendment.

Plaintiff also fails to show a conflict between the amendment and NAC 608.104 because Plaintiff does not adequately account for the fact that the amendment requires that the 10 percent cap on premium costs be based upon "gross taxable income." Plaintiff's approach to construing this requirement would either require this Court to ignore the amendment's "gross taxable income" language or else leave it to this Court to provide for a new measure of taxable income untethered to federal income tax law or state tax law. Neither is a viable option. In contrast, the Labor Commissioner's construction of the "gross taxable income from the employer" clause achieves a harmonious construction of the entire phrase by deferring to federal tax law to determine the employee's gross taxable income.

Plaintiff is not entitled to summary judgment because in both of his contentions he fails to show any actual conflict between the minimum wage amendment and the administrative regulations. As Plaintiff cannot meet his considerable burden to demonstrate a conflict between the amendment and the regulations, the Court should deny Plaintiff's motion for summary judgment.

II. THE ISSUES IN THIS CASE ARISE UNDER THE EXCEPTION TO THE MINIMUM WAGE AMENDMENT'S GENERAL RULE

Plaintiff argues that the primary feature and purpose of the minimum wage amendment was to raise the minimum wage in Nevada. This argument is correct as far as it goes. The main thrust of the minimum wage amendment was indeed to provide for a higher minimum wage as the general rule. (See Plaintiff's Exhibit 3, 2006 Ballot Question). However, as a secondary feature, the minimum wage amendment also allows for a second and lower-tier

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wage rate that creates an exception to the regular minimum wage rate. It is with the details of this exception, rather than the general rule, that this lawsuit is concerned.

The basic parameters of this exception are spelled out in the text of the minimum wage amendment itself, and the regulations adopted by the Labor Commissioner are faithful to the amendment because the regulations are based upon the amendment's textual language. In this case, Plaintiff selectively emphasizes the textual language favorable to his position, while largely disregarding the amendment's textual language that undermines his arguments. The Labor Commissioner's regulations are faithful to the entirety of the amendment's text, and thus the Court should deny Plaintiff's motion for summary judgment.

III. LEGAL ARGUMENT

A. Plaintiff Must Overcome An Exceptionally High Burden In Order to Obtain Summary Judgment

The applicable analytical rules that guide the Court's review of the regulations in this case require that the Court must presume the regulations to be valid, and must place upon Mr. Hancock the full burden to make a clear showing of their invalidity. *Ottenheimer v. Real Estate Div. of Nevada Dep't of Commerce*, 97 Nev. 314, 315, 629 P.2d 1203, 1205 (1981). Any doubt as to the validity of the regulations must be resolved in favor of the Labor Commissioner and in favor of finding that the regulations are valid and permissible. *Koscot Interplanetary, Inc. v. Draney*, 90 Nev. 450, 456, 530 P.2d 108, 112 (1974).

There is no genuine issue of material fact in this case, but Plaintiff's motion for summary judgment should still be denied because it does not make the clear showing of invalidity that is necessary in order for him to carry his burden of proof. He is thus not entitled to judgment as a matter of law. *See* NRCP 56(c).

B. The Labor Commissioner's Regulatory Authority

While Plaintiff is correct to state that administrative regulations cannot conflict with the constitution, and must give way if there truly is such a conflict, Plaintiff is incorrect to claim that the Labor Commissioner has no authority to construe the law she is charged with enforcing.

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Courts do indeed have the final authority to construe statutes and constitutional provisions, but that that does not preclude other branches of government, including an administrative agency, from doing so. *e.g. Office of the Labor Commissioner v. Granite Construction Co.*, 118 Nev. 83, 40 P.3d 423 (2002) (deferring to the Labor Commissioner's interpretation of Nevada's prevailing wage statutes).

The Nevada Supreme Court has long recognized that an administrative agency that is "...charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action." *Clark Cnty. Sch. Dist. v. Local Gov't Emp. Mgmt. Relations Bd.*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974); *see also Int'l Game Tech., Inc. v. Second Judicial Dist. Court of Nevada*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006) (recognizing that administrative agencies have the authority to interpret statutes and citing various cases). When an agency does so, a court that reviews the agency's construction should presume the agency's interpretation to be correct. *See United States v. State Engineer*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001). Interpretive administrative regulations are one recognized device for an agency to construe the law. *See County of Clark v. LB Props., Inc.*, 129 Nev. ___, 315 P.3d 294, 296 (Adv. Op. 96, 2013) (explaining the difference between interpretative regulations and legislative regulations). When administrative regulations are codified into the Nevada Administrative Code, they have the force of law. NRS 233B.040(1).

Not only are the Labor Commissioner's regulations appropriate to fill in the administrative details of the amendment, they are in fact a legal necessity. Just two months before Nevadans voted to finally approve the amendment in 2006 the Nevada Supreme Court issued an opinion in *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 141 P.3d 1235 (2006). In *Heller*, the Nevada Supreme Court held that an initiative petition to amend the state constitution may only include general policy, and may not include the administrative details of that policy. *Id.*, 122 Nev. at 914-915, 141 P.3d 1248-1249. As the minimum wage amendment was adopted through this same initiative process it could not, as a

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matter of law, spell out all the administrative details necessary for the implementation of its policy.

The preceding year, in 2005, the Attorney General's Office had opined that the Labor Commissioner's enforcement authority under NRS 608.270 and NRS 706.160(1)(a) would likely extend to enforcement of the minimum wage amendment. Op Nev. Att'y Gen. No. 2005-04 (March 2, 2005) (cited with approval in *Thomas v. Yellow Cab Corp.*, 130 Nev. ___ 327 P.3d 518, 521, n. 2. (Adv. Op. 52, 2014)). NRS 706.160(1)(b) specifically grants rulemaking authority to the Labor Commissioner to carry out the duties specified in subsection (1)(a). Thus, it follows that the Labor Commissioner has regulatory authority to fill in the administrative details that are necessitated by the amendment, but which the amendment itself may not lawfully provide.

After the amendment was passed, the need to provide administrative interpretation of the amendment was so dire that Governor Guinn endorsed emergency rulemaking by the Labor Commissioner to do so. (Exhibit 1). It was in this environment that the Labor Commissioner identified a need to provide clarification to the amendment by administrative regulation and then exercised the lawful authority to do so. The Labor Commissioner's regulations are plainly within her regulatory authority.

C. The Terms "Offer" and "Provide" Should Be Read Synonymously

1. <u>The Terms Offer and Provide As Used in the Constitutional Text</u>

In arguing that the Court must make a distinction between the terms "offer" and "provide" Plaintiff's argument is premised on a false dilemma that the Court should reject. The actual text of the amendment does not support construing the term "offer" differently than the term "provide," because the amendment in fact uses both the terms "offer" and "provide" interchangeably.[1]

[1] Since the amendment arose entirely through the initiative process it was not reviewed for internal consistency before it was placed on the ballot. In 2007 the Legislature altered the initiative process to provide for such a review and for technical suggestions to be made by the Legislative Counsel Bureau. Act of June 13, 2007, ch. 476, § 24(b) 2007 Nev. Stat. 2543. Thus, the minimum wage amendment was one of the last initiative petitions that did not first undergo a linguistic review for internal consistency by the Legislative Counsel Bureau. This

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The amendment states in relevant part:

> 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.
>
> Nev. Const. art 15 § 16(A).

The Labor Commissioner has always read the terms "offer" and "provide" synonymously, and as implicating the definitional requirement that health insurance must be "made available" to the employee in order to claim the exception provided by the lower-tier wage rate. An analysis of the amendment's textual language supports the Labor Commissioner's position.

The context and surrounding language is an aid to interpreting a disputed provision of law. *Gold Ridge Partners v. Sierra Pac. Power Co.*, 128 Nev. ___, 285 P.3d 1059, 1063 (Adv. Op. 47, 2012). In this case, the term "provide" is part of a larger clause that reads "...if the employer provides health benefits as described herein." The tag of "as described herein" is a plain indicator that the description of health benefits that is to then follow will apply to the employer's option to "provide" health insurance. But the language that follows speaks of "offering health benefits" and defines an acceptable offer of insurance as "making the insurance available to the employee and employee's dependents." Nev. Const. art 15 § 16(A).

"In expounding a constitutional provision, such constructions should be employed as will prevent any clause, sentence or word from being superfluous, void or insignificant." *Youngs v. Hall*, 9 Nev. 212, 222 (1874). The insuperable difficulty with Plaintiff's argument is that, if it is accepted, it would force this Court to reject this long-held bedrock of constitutional interpretation. If the clause that reads "[o]ffering health benefits within the meaning of this

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accounts for the fact that amendment uses both terms and tends to indicate that the terms "offer" and "provide" should be read as interchangeable.

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section shall consist of making health insurance available to the employee for the employee and the employee's dependents..." is to have any meaning, then it must define the directive for an employer to "provide" those same benefits in order to claim the lower-tier exception to the general minimum wage rate.

Plaintiff's motion addresses this language but offers no cogent argument for reading the constitutional text any other way. Plaintiff argues that the sentence defining an offer of health benefits does not provide the command of the amendment, which is true.[2] However, as Plaintiff correctly acknowledges, this sentence that defines "offering health benefits" informs the preceding sentence, which calibrates the correct wage rate based upon whether the employer "provides" qualifying insurance. This approach however is only consistent with the directive reflected in the administrative regulations to make insurance available. NAC 608.102(2).

Plaintiff's argument is even self-defeating as to Plaintiff's second contention in this lawsuit. The 10 percent cost cap on health insurance premiums is a feature of the same sentence that defines "offering health benefits". If "provide" truly means something other than the offering of health benefits defined in the succeeding sentence of the amendment then the 10 percent cost cap does attach at all, as that provision is specifically tied to an "offer" of insurance. The better approach is to accept that "offer" and "provide" are synonymous for purposes of the minimum wage amendment.

Whether the preferred term is "offer" or "provide," it does not affect the substantive requirement defined in the amendment. That substantive standard is that health insurance must be made available to the employee and the employee's dependents. As the amendment provides for the definition of this term, it is this constitutional definition, and not a selective

[2] Plaintiff however is not correct in asserting that the command of the amendment is to provide health insurance. The command of the amendment is for an employer to pay its employees at least the required minimum wage. As explained above the main thrust of the amendment was to raise the minimum wage and the language concerning the provision of health insurance treats only the exception to the general rule that raised the minimum wage. Thus, the language to "provide" health insurance is not the command of the amendment.

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dictionary definition that must control. *State, Dep't of Bus. & Indus. v. Check City*, 130 Nev. ___, 337 P.3d 755 (Adv. Op. 90, 2014).

2. The Administrative Regulations Do Not Conflict with the Amendment

NAC 608.100 is consistent with the constitutional standard because it determines the correct wage rate based upon whether or not qualified health insurance is offered, *i.e.* made available to the employee. NAC 608.102 informs the requirements of NAC 608.100. NAC 608.102(1). This regulation unambiguously states that in order for an employer to qualify to pay the lower tier wage, "[t]he health insurance plan must be made available to the employee and any dependents of the employee." NAC 608.102(2) (emphasis added). Thus, whether or not one prefers the term "offer" or "provide" the substantive requirement is the same in either case. It is the same requirement defined in the text of the amendment - the requirement that the health insurance must be "made available." Nev. Const. art 15 § 16(A).

The Labor Commissioner has steadfastly maintained this same position since the amendment was adopted in 2006. Contrary to Plaintiff's assertion, the Labor Commissioner has never vacillated on this requirement. The Labor Commissioner's emergency regulations did state in section 2 of those regulations that the lower tier was "from $5.15 to $6.14 per hour for employers who provide qualified health insurance benefits." (Plaintiff's Exhibit 4, § 2). However those same emergency regulations elsewhere clearly specified what was meant by this language. In section 5 of the same emergency regulations the Labor Commissioner listed the criteria for an employer to qualify for the lower tier. The first criterion under this section was that health insurance "must be made available to the employee and the employee's dependents." (Plaintiff's Exhibit 4 § 5). Thus, from the very outset the Labor Commissioner's regulations maintain the same substantive standard that health insurance must be "made available" in order to qualify to pay the lower tier.

This same "made available" language was then included in the temporary regulations, (Plaintiff's Exhibit 5, § 4(1)) and is included today in the permanent regulations at NAC 608.102(2). Thus, the emergency regulations do not reflect any different understanding of the

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amendment than do the current regulations. The standard in 2006 under the emergency regulations for an employer to claim the lower-tier exception was to make health insurance available and the standard today for an employer to claim the lower-tier exception is to make health insurance available. The Court should therefore disregard Plaintiff's attempts to impugn the integrity of the rulemaking process by insinuating that lobbying somehow led to a change in the substantive standard.

Plaintiff's references to other agencies and to other contemporary publications discussing the amendment do not show a clear conflict with the constitutional language. As recognized by the declaration of emergency endorsed by Governor Guinn, (Exhibit 1) there was a great deal of confusion in the aftermath of the amendment's approval in 2006. But the Governor's office and the Nevada Legislature[3] each looked to the Labor Commissioner to address and remedy that confusion. When the Labor Commissioner did so a consistent standard emerged – the standard that health insurance must be "made available" to the employee and employees dependents. This standard that can fairly be read under either the term "offer" or "provide." As the Labor Commissioner has statutory authority to adopt the regulations in question, and thus provide a definitive answer that carries with it the weight of law, *see* NRS 233B.040(1), it is the Labor Commissioner's regulations that are dispositive.

Plaintiff's motion fails to make a clear showing that the administrative regulations conflict with the minimum wage amendment. Instead the administrative regulations are based on the text of the amendment and substantively require that health insurance be made available to the employee in order for an employer to claim the lower-tiered minimum wage. Because the amendment itself supplies the controlling standard of "making health insurance available," Plaintiff is not entitled to summary judgment on this point.

///

[3] The Administrative Procedures Act requires that permanent regulations must be reviewed and approved by a committee of legislators before they may be finally codified. NRS 233B.067. Further legislative consent to the Labor Commissioner's interpretation may be inferred by the fact that the Legislature has not since taken any action to disturb the Labor Commissioner's regulatory provisions. *See Hughes Properties, Inc. v. State*, 100 Nev. 295, 680 P.2d 970 (1984).

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D. The Inclusion of Tips to Determine an Employee's Gross Taxable Income Does Not Conflict with the Amendment

Plaintiff's second contention is that NAC 608.104's inclusion of tips and gratuities as taxable income, consistent with federal income tax law, is defective. On this point as well, Plaintiff fails to show any conflict between the regulations and the minimum wage amendment.

1. The Practical Implications of NAC 608.104(2) Eliminate the Disproportionate Impact that Plaintiff Seeks to Create in this Case

Plaintiff's motion offers the example of "Employee A" to demonstrate the perceived inequality between the premium rates between an employee who makes only $7.25 per hour without tips and one who makes $7.25 per hour with tips. (Plaintiff's Motion, p. 18). Plaintiff concludes that in this example the tipped employee's cost for insurance premiums is 2.4 times the cost of the premiums for a non-tipped employee. Plaintiff's calculations appear to be accurate on this score. However, when tips are factored in, the tipped employee in this example also makes approximately 2.4 times the income of the non-tipped employee.

Plaintiff's proposed application of the minimum wage amendment would create rather than remedy a disparity between tipped employees and non-tipped employees, despite the fact that both tipped and non-tipped employees must be paid the same base wage rate. Put another way, if Employee A from Plaintiff's same example is a non-tipped employee and earns the same $435.00 per pay period, the premium rate for health insurance benefits should be no more than $43.50 per pay period, which is 10 percent of the employees taxable earnings and a net benefit of $391.50 in favor the employee. Continuing with Plaintiff's hypothetical, if that same employee is a tipped employee that earns $1,035.00 per pay period (including tips), but is under the same cost-cap of $43.50 proposed by the Plaintiff, this amount would be only 4.2 percent of the employee's taxable earnings with the net benefit to the employee of $991.50. Clearly such a rule would disparately favor tipped employees over non-tipped employees.

Whether or not tipped employees should receive this benefit over non-tipped employees is a question of policy, and one that is answered by the minimum wage

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amendment itself. The amendment specifies that the cost cap on premiums must be based upon the same percentage of the employee's "gross taxable income" in either case. Nev. Const. art. 15 § 16(A).

The practical implication of the Labor Commissioner's rule is to clarify that this disparity is eliminated. Regardless of whether an employee's income is the base wage rate alone, or is base wages plus tips, the cost of insurance is based upon the same percentage in each case. Both tipped and non-tipped employees fall under the same 10 percent rule.

2. NAC 608.104 Does Not Conflict with the Amendment

Plaintiff argues that the inclusion of tips and gratuities in determining an employee's income level violates the amendment. But as stated above, the amendment requires that the measure of income relative to the cost of a health insurance premium is to be based upon the "gross taxable income from the employer." Nev. Const. art. 15, § 16(A).

There are two possible ways to construe this "gross taxable income from the employer" language. Either this language (1) means the amount of gross taxable income that is attributable to the employer that is easily ascertainable under existing tax law; or (2) means the creation of an entirely new standard that bases income tax only upon base wages and excludes tips. The Labor Commissioner has interpreted the minimum wage amendment to mean the former, and Plaintiff advocates for the latter in this case. In order to prevail in this motion for summary judgment, Plaintiff must not only show that the latter construction is permissible; he must show that the former construction adopted by the Labor Commissioner is impermissible.

3. Plaintiff's Argument is Untenable In Light of the Amendment's "gross taxable income" Language

The chief difficulty in Plaintiff's argument is the fact that, at least for tipped employees, the employee's gross taxable income is not measured by base-wages-minus-tips under existing income tax law. Plaintiff's proposed base-wages-minus-tips construction might fairly be read as consistent with the snippet of "income from an employer," but as a matter of law

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cannot be read to be consistent with the full phrase "gross taxable income from the employer." Unfortunately for Plaintiff's position, the amendment does include the "gross taxable income" requirement. This means that in order to give effect to Plaintiff's position, either the "gross taxable income" language from the amendment must be discarded or else a new definition of "gross taxable income" must be propounded. Both approaches are problematic.

a. *The Court Should Not Disregard the "Gross Taxable Income" Requirement*

As with Plaintiff's preceding argument, Plaintiff again advocates for an approach on this issue that would require the Court to disregard a portion of the constitutional text. The Court should not cast aside the amendment's "gross taxable income" language. To do so would run afoul of a fundamental canon of constitutional interpretation – the aforementioned canon that every provision in the constitution must be afforded meaning if possible. *State ex rel. Herr v. Laxalt*, 84 Nev. 382, 441 P.2d 687 (1968). Yet, this is what Plaintiff is again asking the Court to do in this case.

Plaintiff's argument places a hyper-emphasis on the "from the employer" portion of the amendment's sentence, while disregarding the portion of that same sentence that refers to "gross taxable income." Plaintiff only addresses the "gross taxable income" requirement indirectly by collaterally attacking a Labor Commissioner declaratory order on the grounds that the declaratory order did not sufficiently focus on the "from the employer" portion of the sentence. But a collateral attack on a separate order is an inadequate substitute for meeting the Plaintiff's burden in this case to show that the regulation clearly conflicts with the amendment.

Plaintiff's only other argument on this issue is to emphasize his own understanding of voters' intent over the actual text of the amendment. But this argument is foreclosed by *Thomas v. Yellow Cab Corp.* in which the Nevada Supreme Court rejected that same approach. *See Thomas*, 130 Nev. __, 327 P.3d at 522 (stating "[t]o seek the intent of the provision's drafters or to attempt to aggregate the intentions of Nevada's voters into some

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abstract general purpose underlying the Amendment, contrary to the intent expressed by the provision's clear textual meaning, is not the proper way to perform constitutional interpretation.") (internal citations omitted).

Simply disregarding the amendment's "gross taxable income" requirement is not a viable approach.

b. The Court Should Not Create a New Measurement of Income Tax

As the Court cannot simply ignore the "gross taxable income" requirement, the other avenue for the Court adopt Plaintiff's base-wages-minus-tips proposal is to create an entirely new measure of income tax that deems only an employee's base wages, minus tips, to be counted as the "gross taxable income from the employer." This approach is problematic because, as set forth below, base-wages-minus-tips is not an accurate measure of gross taxable income under federal tax law, and no other provision of state law even purports to measure an employee's income tax. Nev. Const. art. 10 §1(9).

Creating a new measure of state income tax, even if it were permissible under the state constitution, is not a judicial function. Moreover, as neither any legislative body nor any executive branch agency has adopted a standard that excludes tips from an employee's gross taxable income apart from the Internal Revenue Code, the task would fall to this Court to erect such a measure of an employee's income tax. This difficulty is further compounded by the fact that if the Court were to follow Plaintiff's invitation, any such decision must be based solely upon the amendment's phrase "gross taxable income from the employer." But this reveals yet another problematic entanglement against Supreme Court precedent. As stated above, the amendment itself was adopted through the initiative process. Under *Heller*, this means that the amendment, properly considered, cannot include administrative details and must include but a single subject. *Heller*, 122 Nev. at 908-917, 141 P.3d at 1243-1251. If this Court were to construe the language of "gross taxable income from the employer" as creating a new way to calculate income tax on the basis of base-wages-minus-tips, it would unnecessarily create a

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conflict with *Heller* by construing the amendment as providing for administrative details and encompassing more than a single subject.

Thus, simply creating a new measure of income tax by way of constitutional interpretation in this case is not a viable other either.

As the Court should neither disregard the "gross taxable income" language nor construe it to create a new measure of employee income tax separate from the Internal Revenue Code, the Court should reject Plaintiff's argument that the amendment's measure of "gross taxable income from the employer" means base-wages-minus-tips and deny Plaintiff's motion for summary judgment.

c. The Labor Commissioner's Regulation Harmonizes the Entire Clause

Similar to the preceding argument, the notion that the Court must emphasize the "from the employer" language at the expense of the "gross taxable income" language sets up a false dilemma. A construction of the amendment that gives a harmonious effect to the entire phrase "gross taxable income from the employer" is achievable. It is the construction that has been adopted by the Labor Commissioner in NAC 608.104. That construction interprets the amendment's language as meaning income to the employee that is taxable and is "attributable to the employer" under federal income tax law. NAC 608.104(2).

In this litigation, the Labor Commissioner has emphasized the "gross taxable income" language specified in the amendment. But the Labor Commissioner's construction does not do so at the expense of the entire constitutional text because the Labor Commissioner merely defers to the Internal Revenue Code to supply the measure of "gross taxable income from the employer."

Under the Internal Revenue Code, income taxes are collected on an employee's "wages." 26 U.S.C. § 3402(a)(1). The term "wages" is defined as "...all remuneration (other than fees paid to a public official) for services performed by an employee for his employer..." 26 U.S.C. § 3401(a) (ellipsis in original). An "employer" under this tax code is defined as

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"...the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person..." 26 U.S.C. § 3401(d). Tips are specifically included as "wages" pursuant to 26 U.S.C. § 3401(f); *see also* 26 C.F.R. § 31.3401(f)-1.[4] Under 26 U.S.C. § 3402(a)(1), an employer is required to make a withholding for the employee's income tax from its payment of "wages" to an employee. Under 26 U.S.C. § 3403 it is the employer that is liable for the income tax, including, as appropriate, taxes upon tipped income.

The amendment itself does not state that the 10 percent cost cap must be measured against "gross taxable income that is paid to the employee by the employer." The amendment instead uses the more pliable language "gross taxable income from the employer." Thus, construction of this phrase as meaning income "attributable to the employer," even if not directly paid by the employer, is permissible under the amendment. As outlined above in the Internal Revenue Code, tips are income attributable to the employer in the sense that they are deemed "wages" and hence "remuneration for services performed by an employee for his employer." 26 U.S.C. § 3401(a). In this light, because tips are generated by an employee's service to his employer, they are income "attributable to the employer" even if the actual source of a tip is the end-user. This does not create a clear conflict with the minimum wage amendment. Hence, the Labor Commissioner's construction achieves a harmonious reading of the entire phrase "gross taxable income from the employer."

From this point, the Labor Commissioner's regulations then simply specify a relatively straightforward way to determine the employee's gross taxable income attributable to the employer – by looking to the readily available Form W-2, or if not available, by projecting the amount of taxable income attributable to the employer via mathematical formulae. NAC 608.104(1).

[4] The Internal Revenue Code does contain some detailed rules for counting tips as "wages" for which an employer is liable for the income tax. *See e.g.* 26 C.F.R.§ 3402(k)-1; 26 C.F.R. § 31.3401(a)(16)-1. However, it is not necessary to address each of these nuanced rules because NAC 608.104 defers to federal law *in toto* to determine taxable income.

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Another plausible construction of the phrase "gross taxable income from the employer" is to interpret the term "from the employer" as clarifying that the measure of taxable income should not be based upon other sources of income apart from the employment with a given employer. Thus, for example, in the case of an employee that works multiple jobs and has multiple sources of income from multiple employers the amendment's "from the employer" language would mean that each employer can individually rely upon its own bookkeeping and the income earned by the employee with that same employer, as opposed to asking employers to attempt to determine an employee's total taxable income from multiple sources. The Labor Commissioner's regulations do not conflict with this interpretation of the meaning of "from the employer."

d. Including Tips As Income Is Limited to Satisfying the Amendment's "gross taxable income" Requirement

Nothing in the foregoing approach authorizes or sanctions an understanding that an employer may credit tips towards its obligations to actually pay an employee the required minimum wage. The Labor Commissioner fully agrees with Plaintiff that Nevada wage and hour laws, including the minimum wage amendment itself, clearly prohibit an employer from doing so. Nev. Const. art. 15, § 16(A); *see also Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 176 P.3d 271 (2008). The administrative regulations do not change this requirement. Rather, the inclusion of tips applies only in the very limited circumstance to quantitatively establish the measure of an employee's "gross taxable income" pursuant to the express language in the minimum wage amendment, and as necessary to establish the applicable minimum wage tier. Outside of this limited context, NAC 608.104(2)'s inclusion of tips as gross taxable income does not apply.

Plaintiff correctly states the standard that the voters who approved the minimum wage amendment are presumed to know the state of the law in existence at the time they voted. This only reinforces the conclusion that NAC 608.104 is proper because tax law then, as now, generally includes tips and gratuities as an employee's taxable income, as set forth above.

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The text of the amendment as approved by the voters included the "gross taxable income" language.

The Labor Commissioner agrees with Plaintiff that the stated policy of the minimum wage amendment was to benefit Nevadans by raising the minimum wage for the state's lowest-paid workers. However as was recognized in *Thomas v. Yellow Cab*, the amendment's policy does not create a license to disregard the actual text of the amendment. The actual text of the amendment refers to "gross taxable income" and NAC 608.104 is consistent with this language.

IV. CONCLUSION

Plaintiff does not make the required showing that the challenged administrative regulations clearly conflict with the minimum wage amendment.

As set forth above, the term "offer" is based upon the amendment's text that defines an adequate offer of health benefits. Consistent with that same textual definition, the substantive meaning is that an employer must make health insurance benefits available to its employees, regardless of whether the preferred terminology is "offer" or "provide."

Plaintiff does not show that NAC 608.104 clearly conflicts with the amendment because the amendment itself refers to "gross taxable income" and the regulation merely refers to the Internal Revenue Code to establish gross taxable income. Plaintiff's reading of the minimum wage amendment would require the Court to either disregard the "gross taxable income" language or else create a new device to measure taxable income that is not based upon the Internal Revenue Code. NAC 608.104 offers a better approach that harmonizes the entire clause that refers to "gross taxable income from the employer."

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As Plaintiff fails to make the required showing that the regulations create a clear conflict with the minimum wage amendment, the Court should deny Plaintiff's motion for summary judgment.

DATED this 13 day of July, 2015

ADAM PAUL LAXALT
ATTORNEY GENERAL

By: _____

Scott Davis, #10019
Deputy Attorney General
555 E. Washington Avenue, Suite 3900
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Attorneys for State of Nevada *ex rel*
Office of the Labor Commissioner;
Office of the Labor Commissioner; and
Shannon Chambers

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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 13 day of July, 2015.

ADAM PAUL LAXALT
Attorney General

By: _____
Scott Davis, # 10019
Deputy Attorney General
Attorneys for the State of Nevada ex rel
Office of the Labor Commissioner;
Office of the Labor Commissioner and
Shannon Chambers

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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 13th day of July, 2015 I served the foregoing OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT 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

INDEX TO EXHIBITS

Exhibit No.	Description	No. of pages
1	Statement and Declaration in Support of Emergency Rulemaking	4

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KENNY C. GUINN
Governor

SYDNEY H. WICKLIFFE, C.P.A.
Director

MICHAEL TANCHEK
State Labor Commissioner

STATE OF NEVADA

REPLY TO:

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555 E. WASHINGTON AVENUE, SUITE 4100
LAS VEGAS, NEVADA 89101
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☐ OFFICE OF THE LABOR COMMISSIONER
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DEPARTMENT OF BUSINESS AND INDUSTRY

OFFICE OF THE LABOR COMMISSIONER

http://www.LaborCommissioner.com

December 11, 2006

Honorable Kenny Guinn
Governor
Capitol Building
Carson City, Nevada 89701

Re: Request for Emergency Minimum Wage Regulations

Dear Governor Guinn,

I am requesting your approval of the attached emergency regulations concerning the recently adopted Constitutional amendment changing Nevada's minimum wage laws.

The amendment goes beyond a simple one-dollar increase in the wage rate and we are being flooded with requests for interpretive guidance from employers and employees. Among the more common issues we are addressing are the nature of the insurance requirements, the effect on overtime, and the effect on previously exempt employees. Many employers are at risk for questions for which they currently have no formal answers. Originally, we dealt with inquiries through a "frequently asked questions" link on our website, but this has quickly proven inadequate and legally tenuous.

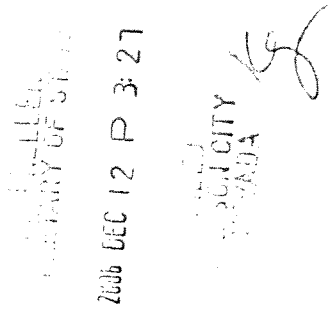
Emergency regulations take effect after approval by the Governor and filing with the Secretary of State and expire after 120 days; early to mid-April of 2007. I already have a temporary rulemaking in its early stages and would merge these regulations into that process, so a "temporary" regulation would be in place when the emergency regulations expire. The temporary regulations would expire on November 1, 2007, but I would begin permanent rulemaking shortly after July 1.

Adopting the emergency regulations for the short-term can provide a small element of certainty for employers and employees. If you have any additional questions, please call me at (775) 684-8188.

Sincerely,

Michael Tanchek
Labor Commissioner

SECRETARY OF STATE
FILING DATA



For Filing
Administrative Regulations

Agency:
Office of the Labor Commissioner
Department of Business and Industry

FOR EMERGENCY
REGULATIONS ONLY

Effective date December 12, 2006

Expiration date April 11, 2006

Governor's signature

Classification: ☐ PROPOSED : ☐ ADOPTED BY AGENCY : X EMERGENCY

Brief description of action Adopt regulations related to various provisions in the recently adopted Article 15, Section 16 of the Constitution of Nevada concerning the minimum wage rates to be paid to workers in the State of Nevada.

Authority citation other than 233B: Article 15, Section 16 of the Constitution of Nevada; NRS 607.160(1)(b), NRS 608.270, NRS 608.018.

Notice dates: N/A

Date of Adoption by Agency: December 12, 2006

Adoption Hearing: N/A

Hearing dates: N/A

Adoption Hearing: N/A

Written Statement of Emergency in Support of Emergency Regulations

The Nevada Labor Commissioner has determined that an emergency exists sufficient to warrant the enactment of emergency regulations pertaining to the enforcement of the recently adopted Constitutional amendment governing the minimum wage to be paid workers in the State of Nevada as set forth in Article 15, Section 16 of the Constitution of Nevada. The reasons for the Commissioner's determination are as follows:

-Pursuant to NRS 607.160, "The Labor Commissioner...[S]hall enforce all labor laws of the State of Nevada...[T]he enforcement of which is not specifically and exclusively vested in any other officer, board or commission." Prior to the enactment of the amendment, the Labor Commissioner was charged with enforcing Nevada's minimum laws as set forth in NRS 608.250-290, inclusive.

-The statutory scheme established a single minimum wage rate that was designed to mirror and follow the federal minimum wage rate as set forth in the federal Fair Labor Standards Act, currently $5.15 per hour.

-The amendment significantly alters the existing minimum wage law by establishing two minimum wages ($5.15 and $6.15 per hour) which are dependent upon whether or not employers make "health insurance" available to their employee's and their dependents, eliminates certain previous exemptions to the minimum wage, creates new classes of workers who are not considered employees for the purposes of the minimum wage, and will require an adjustment to the rates to be published by the Governor by April 1, 2007.

-The amendment impacts the requirements of NRS 608.018 which requires the payment of overtime to employees whose wage rate is less than one and one half times the minimum wage as set forth in NRS 608.250. With the minimum wage now being established as a Constitutional provision rather than as a regulation pursuant to a statute, this has resulted in two different daily overtime rates.

-The emergency regulations set forth the rules of general applicability by which the Labor Commissioner will interpret and enforce the provisions of the new Constitutional provisions. These rules are necessary to provide guidance to employers that will enable them to comply with their new legal obligations.

-The Labor Commissioner is currently involved in the early stages of temporary rulemaking related to other provisions of NAC Chapter 608. These emergency regulations will be included in that rulemaking allowing for additional public workshops and hearings that will help ensure further

analysis and refining of the emergency regulations. Given the short-term nature of the emergency regulations, the temporary rule should be in effect prior to the expiration date of the emergency regulations. A third rulemaking would take place between July 1, 2007 and November 1, 2007 in order to adopt permanent regulations. Because the Constitutional provisions went into effect so shortly after the election, there was insufficient time to engage in the temporary rulemaking process.

December 12, 2006.

MICHAEL TANCHEK
Labor Commissioner, State of Nevada

I, Governor Kenny C. Guinn, endorse the Labor Commissioner Michael Tanchek's statement of emergency.

December ___, 2006.

KENNY C. GUINN
Governor

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Attorneys for Defendants State of Nevada ex rel. Office of the Labor Commissioner, Office of the Labor Commissioner and Shannon Chambers

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

CODY C. HANCOCK, an individual,

Plaintiff,

vs.

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

Defendants.

Case No.: 14 OC 00080 1B

Dept. No.: 2

MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants 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 Nevada Labor Commissioner (collectively "Labor Commissioner"), by and through counsel of record ADAM PAUL LAXALT, Attorney General of the State of Nevada, and Scott Davis, Deputy Attorney General and hereby move this Court for entry of summary judgment in favor of Defendants. This motion is based upon the

provisions of NRCP 56, the attached memorandum of points and authorities, and any oral argument that the Court may entertain at a hearing on said motion.

DATED this 04 day of June, 2015

ADAM PAUL LAXALT
Attorney General

By: _____

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POINTS AND AUTHORITIES

I. INTRODUCTION

The administrative regulations challenged by Plaintiff in this case are not constitutionally defective. The regulations do not conflict with Nevada's constitutional minimum wage amendment because the regulations themselves are textually grounded in the very language of the amendment. The regulations' contribution to the overall wage structure established by the minimum wage amendment is only to provide clarity and to fill in the gaps left by the amendment.

The minimum wage amendment contains an allowance for employers to pay a lower-tiered wage when the employer makes health insurance available to its employees, provided that other criteria are met as well. The Labor Commissioner's regulations provide an answer to the question of "what is an acceptable offer of insurance?" The regulations thus clarify the circumstances in which the employer's offer of insurance is acceptable to satisfy the conditions of the amendment.

The minimum wage amendment also includes a criterion that an offer of insurance cannot charge premiums that exceed 10% of the employee's gross taxable income from the employer. Again, the Labor Commissioner's regulations contribute clarity to this requirement by identifying taxable income as determined by the Internal Revenue Code, which is the only income tax scheme applicable to Nevada employees, and specifying the formulae to use in order to calculate whether an employer has indeed met the amendment's 10% threshold in different situations.

The clarity provided by the Labor Commissioner's regulations benefit both Nevada workers and Nevada employers by establishing a clear framework in which both workers and employers can determine which of the two wage rates established by the minimum wage amendment will apply in any given situation.

Because these regulations clarify the minimum wage amendment by filling in the gaps of the amendment's requirements and are themselves grounded in the actual text of the amendment, they do not conflict with the amendment. Therefore the regulations are not constitutionally infirm and the Labor Commissioner is entitled to summary judgment.

II. NEVADA'S MINIMUM WAGE AMENDMENT

A. The Minimum Wage Amendment is Proposed and Approved by the Voters

In Nevada, minimum wage is a constitutional matter. The Nevada Constitution establishes a two-tiered system of minimum wage. Nev. Const. art. 15 § 16. This minimum wage amendment was adopted into the Nevada Constitution following approval by voters in the 2004 and 2006 general elections.

Prior to the 2006 approval of the minimum wage amendment, Nevada's minimum wage scheme was a statutory matter. NRS 608.250-.290. Under this system the Labor Commissioner was tasked with setting and regulating the minimum wage "in accordance with federal law." NRS 608.250. The Labor Commissioner was also tasked with administering and enforcing the minimum wage system. NRS 608.270(1). After the amendment was passed, the Governor looked to the Labor Commissioner's office and charged it as the agency responsible

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for publishing an annual bulletin to adjust the wage rate pursuant to the constitutional amendment. (Exhibit 1). Currently that wage rate is $7.25 per hour for employees to whom qualifying health benefits have been made available by the employer, and $8.25 per hour for all other employees. (Exhibit 2).

The minimum wage amendment was adopted entirely through the initiative petition process, *see* Nev. Const. art. 19 § 2, rather than through the more traditional process for amending the state constitution in which constitutional amendments originate in the legislature. *See Thomas v. Nevada Yellow Cab Corp.*, 130 Nev.___ , 327 P.3d 518, 520 (Adv. Op. 52) (2014) (explaining the background of the minimum wage amendment). As the minimum wage amendment bypassed the legislature entirely there is no legislative history available for this particular amendment.

The minimum wage amendment, which is formally known as "the Raise the Minimum Wage for Working Nevadans Act," was presented to the voters principally as an increase in the state minimum wage, with a built-in adjustment mechanism to ensure that the state minimum wage remained at a higher rate than the federal minimum wage.[1] (Exhibit 3, 4). The ballot question summary for this amendment does not refer to or discuss the two-tiered structure of the minimum wage system or to the language concerning health benefits, except that section 2 of the measure included a finding that "living expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada's working families." (Exhibit 3, 4). The amendment became effective upon approval following the 2006 general election.

B. The Need to Clarify the Amendment by Interpretive Regulations

Even before the voters approved the amendment in 2006, the Labor Commissioner's office had already received confirmation that its pre-existing authority to administer and enforce minimum wage laws under NRS 608.270(1)(a) would likely continue under the newly-adopted minimum wage amendment. Op. Nev. Att'y Gen. 2005-04 (March 2, 2005).

[1] The Fair Labor Standards Act expressly allows for states to set minimum wage rates higher than the federal minimum wage. 29 U.S.C. § 218(a).

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The move away from a single minimum wage to a two-tiered minimum wage system immediately after the November 2006 election created a great deal of confusion concerning how to implement the minimum wage amendment and how to ascertain which of the two tiers was applicable in different situations. Prompted by this rampant confusion Governor Kenny Guinn approved emergency rulemaking by the Labor Commissioner[2] in order to immediately provide clarity regarding an employer's obligations under the new minimum wage amendment. *See* NRS 233B.0613; (Exhibit 5). This declaration recognized that emergency regulation was necessary "...to provide guidance to employers that will enable them to comply with their new legal obligations." (Exhibit 5). Those emergency regulations established the same basic framework as the current permanent regulations. (Exhibit 6).

As emergency regulations expire by law within 120 days, the Labor Commissioner set about converting the emergency regulations to temporary regulations[3] and then finally to the current permanent regulations that Plaintiff now challenges.

After the 2006 adoption of the minimum wage amendment, and while temporary rulemaking was ongoing, Labor Commissioner Michael Tanchek testified before the Senate Commerce and Labor Committee to discuss the impacts of the newly adopted minimum wage amendment. See Minutes of Senate Committee on Commerce and Labor, 74th Leg. (Feb. 8, 2007). (A copy of these minutes is attached as Exhibit 7). Commissioner Tanchek provided the committee with an exhibit that details many of the questions that surfaced after the amendment was adopted. (Exhibit 8). According to Commissioner Tanchek, the major area of confusion was over how the health benefits provision of the amendment fit into the process. (Exhibit 8, p. 8 of 17).

[2] Pursuant to NRS 607.160(1)(a) the Labor Commissioner has authority to enforce all labor laws of the state, unless another agency has been specifically vested with enforcement authority. The Labor Commissioner is also vested with the authority to promulgate regulations in aid of the agency's enforcement authority. NRS 607.160(1)(b).

[3] An administrative agency's adoption of regulations as temporary rather than permanent is dictated by the timing of the regulations. NRS 233B.063(3).

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Some of the specific questions that arose, as pertaining to this case, were questions such as "what if an employee doesn't want the health insurance?" and "How is the '10% of an employee's gross taxable income' determined?" (Exhibit 8). The regulations now challenged by Mr. Hancock in this case were adopted by the Labor Commissioner in order to answer these questions.

III. LEGAL ARGUMENT

A. Applicable Legal Standard

1. Plaintiff Bears the Burden to Make A Clear Showing of Invalidity

"[T]he law cannot be declared unconstitutional unless it be clearly, palpably, and plainly in conflict with some of the provisions of the Constitution. This is a rule recognized by all the Courts, and probably has never been questioned." *Gibson v. Mason*, 5 Nev. 283, 299 (1869).

The regulations challenged by Plaintiff Cody Hancock in this case have the force of law. NRS 233B.040(1)(a). The same presumptions and standards applicable to constitutional challenges to a statute also apply with equal force to a constitutional challenge to administrative regulations. 16A Am. Jur. 2d Constitutional Law § 167.

When considering a facial constitutional challenge such as this then, the Court must presume the regulations are valid and must place the burden to show otherwise entirely on the Plaintiff. *Universal Elec., Inc. v. State ex rel. Office of Labor Commissioner*, 109 Nev. 127, 129, 847 P.2d 1372, 1374 (1993) (quoting *List v. Whisler*, 99 Nev. 133, 137, 660 P.2d 104, 106 (1983)). In order to meet his burden, Mr. Hancock must make a "clear showing" of invalidity. *Id.*

When attempting to meet this burden, Mr. Hancock cannot rely upon an abstract assignment of purpose or general intent underlying the minimum wage amendment. *Yellow Cab Corp.*, 130 Nev. at __, 327 P.3d at 522. Instead, the touchstone of the Court's analysis in this case should be the text of the amendment itself. *Id.*

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2. Standard for Summary Judgment

Under NRCP 56, summary judgment should be granted by the Court when the pleadings and evidence before the Court demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

Summary judgment is especially appropriate in cases such as this that raise a facial constitutional challenge because such challenges concern questions of law and do not hinge on factual determinations. *See Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 508, 217 P.3d 546, 551 (2009). The allegations made in Plaintiff's second amended complaint turn entirely upon the relation between the challenged administrative regulations and the minimum wage amendment. As the complaint presents a pure question of law, the Labor Commissioner submits that there is no material question of fact at issue in this case that might preclude entry of summary judgment. The applicable question then is whether the Labor Commissioner is entitled to judgment as a matter of law.

Because the administrative regulations at issue in this suit do not clearly conflict with the minimum wage amendment, and Mr. Hancock cannot meet his considerable burden to show otherwise, the Labor Commissioner is entitled to summary judgment at this time.

B. The Labor Commissioner's Regulations That Clarify When an Employer May Pay the Lower-Tiered Wage Do Not Conflict with the Minimum Wage Amendment

Plaintiff's First Claim for Relief, as stated in the second amended complaint, challenges the validity of NAC 608.100(1), and more specifically the provision of this regulation that states an employer may pay the lower-tiered wage if it offers qualified health insurance to an employee. 2nd Am. Comp. ¶ 26-34, 45-48; *see also* NAC 608.100(1)(a) (specifying the minimum wage rate that applies "[i]f an employee is offered qualified health insurance"). Mr. Hancock alleges that an employee must actually receive the health insurance in order for an employer to lawfully pay the lower tiered wage. The Labor Commissioner's regulation,

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however, is constitutionally acceptable and does not conflict with the amendment because the regulation is based upon the text of the minimum wage amendment.

The Nevada Constitution at article 15, section 16 provides in relevant part:

> The [minimum wage] 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.
>
> (emphasis added).

In order to implement this section and clarify the conditions in which the lower wage rate may lawfully be applied, the Nevada Labor Commissioner has adopted NAC 608.100, NAC 608.102 and NAC 608.106. These regulations identify the conditions that an employer must meet in order to lawfully qualify to pay the lower tier minimum wage. These conditions include that an employer must offer a health insurance plan to its employees, specifies the minimum conditions of a qualifying health insurance plan, and specifies that the health benefits must be made available to the employee and any dependents of an employee. NAC 608.102(1) and (2). NAC 608.106 further allows for an employee to voluntarily decline an offer of health insurance and includes an important employee protection provision that prohibits an employer from making a declination of health benefits a requirement for employment. In other words, if an employee declines health insurance that declination must truly be the employee's choice.

Thus, the upshot of these regulations is that where an employer offers qualifying health insurance to its employees and their dependents but the employee voluntarily declines that health insurance then an employer is deemed to have satisfied the condition specified in the minimum wage amendment of "making health insurance available." Plaintiff's claim would radically alter this approach and would condition the lawful wage rate not upon the employer's

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actions, and whether the employer makes qualifying health insurance available to its employees, but instead upon the employee's actions and his or her choice to accept an offer of insurance.

NAC 608.100 does not conflict with the minimum wage amendment because the standard of making health insurance available as an acceptable offer of insurance is taken directly from the text of the amendment itself. The minimum wage amendment holds that if an employer provides qualifying health benefits then the employer may lawfully pay the lower-tiered wage. Nev. Const. art. 15 § 16(A). The amendment then immediately defines "offering health benefits" as "making health insurance available to the employee and the employee's dependents." *Id.* The Labor Commissioner's regulations mirror this make-health-insurance-available language. NAC 608.102(2) ("[t]he health insurance plan must be made available to the employee and any dependents of the employee.").

In effect the Labor Commissioner's regulations read the terms "offer" and "provide" as synonymous, when used in the first two sentences of the minimum wage amendment. This does not conflict with the minimum wage amendment because the amendment itself provides a definition to the phrase "offering health benefits." Nev. Const. art. 15 § 16(A). That definition can only plausibly refer to an employer providing health benefits in the preceding sentence of the amendment because the word "offer" does not appear anywhere else in the amendment. If the phrase "offering health benefits" does not refer to the preceding sentence in the amendment, then the entire definition of "offering health benefits" is reduced to a bizarre superfluidity – a definition of a non-existent term. The better interpretation of the amendment is that which the Labor Commissioner has consistently followed, and which the legislature has approved,[4] which treats "offer" and "provide" as synonyms.

This approach is also consistent with the ordinary language used in the amendment, as the ordinary meaning of the word "provide" means "to make something available." *See*

[4] NRS 233B.067 requires permanent regulations such as NAC 608.100 to be reviewed and approved by the Legislative Commission before they become effective.

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Webster's II New College Dictionary, 912 (3rd ed. 2005) (defining "provide" as "to make available").

The text of the amendment does not suggest any different reading of the term "provide" other than "making health insurance available to the employees and their dependents" according the amendment's own definition.

NAC 608.100, and the attendant regulations that establish the specifics for a qualifying offer of health benefits, are not constitutionally defective because the foundational premise of those regulations that an employer may qualify to pay the lower-tiered wage if it makes qualifying health insurance available to its employees is rooted in the very text of the amendment. In this there is no conflict with the constitution and the Labor Commissioner is entitled to judgment that these regulations are lawful under the minimum wage amendment.

C. The Regulations That Specify Gross Taxable Income From the Employer Is Determined By Internal Revenue Code Do Not Conflict with the Minimum Wage Amendment

One of the conditions for an offer of health insurance to be a qualifying offer under the amendment is that it be affordable to the employee.

The minimum wage amendment itself supplies the basic metrics with which to measure affordability of health insurance: "...a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer." Nev. Const. art. 15 § 16(A).

1. <u>It is Within the Language of the Amendment to Look to Federal Tax Law to Supply the Measure of Income Tax</u>

The reference to an "employee's gross taxable income" must, out of necessity, refer to taxable income under federal tax law as any measure of income tax at the state level that could be used to satisfy this metric is a legal impossibility. Nev. Const. art. 10, § 1(9). ("No income tax shall be levied upon the wages or personal income of natural persons").

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As there is no legal standard to measure gross taxable income on employees provided for at the state level, there is simply no viable alternative to measuring an "employee's gross taxable income" than to look to federal tax law. NAC 608.102(3) clarifies this unavoidable consequence by directly stating that an "employee's gross taxable income from the employer" is based upon the income tax as measured by Internal Revenue Code. NAC 608.102(3).

NAC 608.104 further expounds on this measurement requirement and clarifies how an employer is to calculate the cost requirements of the minimum wage amendment's 10% threshold. The principal method for determining whether the amendment's 10% threshold is met is by looking to an employee's IRS Form W-2 for the preceding year and using that form to supply the quantitative sum of the employee's gross taxable income that is then divided into the projected share of the employee premiums. NAC 608.104(1)(a). Subsections (b) through (d) of NAC 608.104 provide the formulae for an employer to use to calculate the 10% threshold in those cases where a Form W-2 is not available.

In this case, Plaintiff contends that the reference to the Internal Revenue Code in NAC 608.102(3) and the ensuing consequence that most tips and gratuities count as gross taxable income[5] from the employer, NAC 608.104(2), is in violation of the minimum wage amendment. But including tips and gratuities as taxable income is a consequence of federal tax law. *e.g. Killoran v. Commissioner of Internal Revenue*, 709 F.2d 31, 32 (9th Cir. 1983); 26 C.F.R. § 1.61-2. In turn, the use of federal tax law as a baseline to determine whether the cost of health insurance exceeds 10% of the employee's gross taxable income is a consequence of the minimum wage amendment's language to look to "the employee's gross taxable income from the employer." Mr. Hancock's claim is untenable, and the Labor Commissioner is consequently entitled to summary judgment, because Hancock's claim can only be maintained if the word "taxable" is read out of the amendment entirely.

[5] The Internal Revenue Code contains detailed rules for including tips as taxable income. 26 U.S.C. § 3101 imposes an income tax on an employee's wages received by an individual with respect to employment, and 26 U.S.C. § 3121(a)(12)(B) defines wages to include tips when the monthly total of tips is $20 or more. 26 U.S.C. § 3102 requires an employer to collect the income tax. In some cases the amount of tips that count as taxable income may be based upon an estimate. See 26 U.S.C. § 3102(c).

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"In expounding a constitutional provision, such constructions should be employed as will prevent any clause, sentence or word from being superfluous, void or insignificant." *Youngs v. Hall*, 9 Nev. 212, 222 (1874). The reference to an employee's "gross taxable income" is plainly included in the text of the minimum wage amendment and the Labor Commissioner is not at liberty to disregard this constitutional language. The only applicable income tax system on Nevada employees is the Internal Revenue Code. Thus, not only is it permissible to look to the Internal Revenue Code to measure employee income, it is in fact the only possibility that can supply a baseline to determine "gross taxable income" under the minimum wage amendment.

2. The Labor Commissioner's Regulations Are Limited to the 10% Threshold Calculation and Do Not Permit an Employer to Credit Tips or Gratuities Towards its Obligation to Pay the Correct Wage Rate

Nothing in the amendment itself leads to a different conclusion. The only language in the minimum wage amendment itself that speaks to tips states that "[t]ips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section." Nev. Const. art. 15, § 16(A). The Labor Commissioner's regulations do not offend this section because they only permit tips to be counted as income for the limited purpose of determining "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." NAC 608.104(1).

The specific language in this regulation limits its application only to the 10% threshold calculation provided in NAC 608.104. *See* NAC 608.104(2). Once the correct wage rate is established, an employer is then obligated to pay that full wage to its employees. NAC 608.104, by its terms, does not apply to the actual payment of wages. Nothing in the regulatory language in Chapter 608 permits an employer to apply tips and gratuities towards its obligation to actually pay the correct minimum wage. *See* NRS 608.160(1)(b).

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3. Even if A Different Measure of Gross Taxable Income From the Employer Were Possible, the Labor Commissioner's Regulations Are Still Permissible

Even if another alternative to measure "gross taxable income from the employer" could possibly be promulgated, the Labor Commissioner's determination to simply look to federal tax law and the amount reported by the employer as income on the Form W-2 would still be a permissible policy choice because it does not conflict with the actual text of the minimum wage amendment. Further, any other attempt at the state level to erect a new definition or measure of "gross taxable income from the employer" would only invite a new set of constitutional challenges under the income tax prohibition of Nev. Const. art. 10, § 1(9). Thus, the decision to look only to federal law to supply the measure of "gross taxable income from the employer" is within the language of the constitution. The Labor Commissioner is entitled to summary judgment against this claim as well.

D. The Labor Commissioner is Entitled to Summary Judgment Against Plaintiff's Third Claim for Relief As Well

The Third Claim for Relief seeks injunctive relief to prevent the Labor Commissioner from enforcing the challenged regulations. An injunction may be an appropriate remedy incidental to a declaratory relief, but such relief is contingent upon the merits of the allegations supporting it. *See Lamb v. Doe*, 92 Nev. 550, 551, 554 P.2d 732, 733 (1976) (explaining that injunctive relief is inappropriate when there is no justiciable controversy with the named defendant). As the Labor Commissioner is entitled to summary judgment on Plaintiff's underlying claims for declaratory relief, summary judgment is likewise appropriate for Plaintiff's stated Third Claim for Relief.

IV. CONCLUSION

The Labor Commissioner is entitled to summary judgment because this case presents a pure question of law, and Mr. Hancock cannot overcome his considerable burden to show that the challenged regulations clearly conflict with the minimum wage amendment. Mr.

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Hancock cannot meet this burden because the challenged regulations are grounded in the actual text of the minimum wage amendment.

The amendment itself defines an offer of health benefits as "making health insurance available" and the Labor Commissioner's regulations are premised upon this language.

The amendment itself also specifies that a qualifying offer of health insurance may not exceed "a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer." The Labor Commissioner's regulations clarify this provision, and give effect to the "taxable income" language by specifying that an employee's income tax is measured by the Internal Revenue Code.

Ultimately, there is no conflict between the challenged administrative regulations and the minimum wage amendment, and the Court should enter summary judgment in favor of the Labor Commissioner.

DATED this 04 day of June, 2015

ADAM PAUL LAXALT
ATTORNEY GENERAL

BY: _____

SCOTT DAVIS, #10019
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Office of the Labor Commissioner;
Office of the Labor Commissioner; and
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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 04 day of June, 2015.

ADAM PAUL LAXALT
Attorney General

By: _____
Scott Davis, # 10019
Deputy Attorney General
Attorneys for the State of Nevada ex rel
Office of the Labor Commissioner;
Office of the Labor Commissioner and
Shannon Chambers

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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 11th day of June, 2015 I served the foregoing MOTION FOR SUMMARY JUDGMENT 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

INDEX TO EXHIBITS

Exhibit No.	Description	No. of pages
1	Designation by Governor Gibbons	1
2	2015 Minimum Wage Bulletin	1
3	Excerpt from 2004 Ballot Guide Pertaining to Question 6 (Raise the Minimum Wage for Working Nevadans Act)	10
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5	Statement and Declaration in Support of Emergency Rulemaking	4
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EXHIBIT 1

EXHIBIT 1

JIM GIBBONS
GOVERNOR

One Hundred One North Carson Street
Carson City, Nevada 89701
Office: (775) 684-5670
Fax No.: (775) 684-5683

Office of the Governor

March 28, 2007

Michael Tanchek
Labor Commissioner
675 Fairview Drive, Suite
Carson City, Nevada 89701-5474

RE: Agency Designation

Dear Mr. Tanchek,

Pursuant to the Nevada Constitution Article 15, Section 16, I hereby designate the Department of Business and Industry, Office of Labor Commission as the agency designated to determine any adjustments to the minimum wage and to publish a bulletin by April 1 of each year announcing the adjusted minimum wage rates, which shall take effect the following July 1.

Sincerely,

JIM GIBBONS
Governor

JAG/kc

EXHIBIT 2

EXHIBIT 2

BRIAN SANDOVAL
Governor

BRUCE BRESLOW
Director

SHANNON CHAMBERS
Labor Commissioner

STATE OF NEVADA

REPLY TO:

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

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

STATE OF NEVADA
MINIMUM WAGE
2015 ANNUAL BULLETIN

POSTED APRIL 1, 2015

PURSUANT TO ARTICLE 15, SECTION 16(A) OF THE CONSTITUTION OF THE STATE OF NEVADA, THE GOVERNOR HEREBY ANNOUNCES THAT THE FOLLOWING MINIMUM WAGE RATES SHALL APPLY TO ALL EMPLOYEES IN THE STATE OF NEVADA UNLESS OTHERWISE EXEMPTED. THESE RATES ARE EFFECTIVE AS OF JULY 1, 2015.

FOR EMPLOYEES TO WHOM QUALIFIYING HEALTH BENEFITS HAVE BEEN MADE AVAILABLE BY THE EMPLOYER:

NO LESS THAN $7.25 PER HOUR

FOR ALL OTHER EMPLOYEES:

NO LESS THAN $8.25 PER HOUR

Copies may also be obtained from the Labor Commissioner's Offices at

675 Fairview Drive, Suite 226
Carson City, Nevada 89701
(775) 687-4850

or

555 East Washington, Suite 4100
Las Vegas, Nevada 89101
(702) 486-2650

EXHIBIT 3

EXHIBIT 3

State of Nevada

Statewide Ballot Questions

2004

To Appear on the November 2, 2004 General Election Ballot

Issued by
Dean Heller
Secretary of State

DEAN HELLER
Secretary of State

RENEE L. PARKER
Chief Deputy Secretary of State

PAMELA A. RUCKEL
Deputy Secretary for Southern Nevada

STATE OF NEVADA

OFFICE OF THE
SECRETARY OF STATE

CHARLES E. MOORE
Securities Administrator

SCOTT W. ANDERSON
Deputy Secretary for Commercial Recordings

RONDA L. MOORE
Deputy Secretary for Elections

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 2004 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 2004 General Election Ballot, there are eight statewide questions. Ballot Question Numbers 7 and 8 appear on the ballot through the actions of the Nevada State Legislature. Ballot Question Numbers 1 through 6 qualified for this year's ballot through the initiative petition process.

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,

Dean Heller

DEAN HELLER
Secretary of State

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2004
STATEWIDE BALLOT QUESTIONS
SUMMARY

Question #	Title	Originated	If passed in 2004
1	Education First	Initiative Petition	Will Go Onto The 2006 General Election Ballot
2	Improve Nevada Public School Funding to the National Average	Initiative Petition	Will Go Onto The 2006 General Election Ballot
3	Keep Our Doctors in Nevada	Initiative Petition	Becomes Law
4	The Insurance Rate Reduction and Reform Act	Initiative Petition	Will Go Onto The 2006 General Election Ballot
5	Stop Frivolous Lawsuits and Protect Your Legal Rights Act	Initiative Petition	Will Go Onto The 2006 General Election Ballot
6	Raise the Minimum Wage for Working Nevadans	Initiative Petition	Will Go Onto The 2006 General Election Ballot
7	Repeals an Obsolete Provision Concerning Those Permitted to Vote	Legislature AJR #3 of the 71st Session	Becomes Law
8	Sales and Use Tax of 1955	Legislature AB 514 of the 72nd Session Including Note To Voters	Becomes effective January 1, 2006

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.....☑ 545,490
No.....☐ 252,162

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 Nevadan'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.

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."

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.

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.

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 [deleted material] is material being deleted.

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

Section 1. Title.

This Measure shall be know 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 is 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 form $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

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

KIM A. HUYS
Chief Deputy Secretary of State

PAMELA A. RUCKEL
Deputy Secretary for Southern Nevada

STATE OF NEVADA

OFFICE OF THE
SECRETARY OF STATE

CHARLES E. MOORE
Securities Administrator

SCOTT W. ANDERSON
Deputy Secretary for Commercial Recordings

ELLICK C. HSU
Deputy Secretary for Elections

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,

Dean Heller

DEAN HELLER
Secretary of State

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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 73rd Session Including Note To Voters	Becomes effective January 1, 2007

9	Board of Regents	Legislature AJR 11 of the 72nd Session	Becomes effective January 1, 2008
10	Legislators Call Special Session	Legislature AJR 13 of the 72nd Session	Becomes effective upon canvass
11	Legislators Paid Every Day of Session	Legislature SJR 11 of the 72nd 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.....	☑	395,367
No.....	☐	180,085

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 Nevadan'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 [omitted material] is material to be omitted.

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

Section 1. Title.

This Measure shall be know 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 is 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 form $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 5

EXHIBIT 5

KENNY C. GUINN
Governor

SYDNEY H. WICKLIFFE, C.P.A.
Director

MICHAEL TANCHEK
State Labor Commissioner

STATE OF NEVADA

REPLY TO:

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FAX: (702) 486-2660

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DEPARTMENT OF BUSINESS AND INDUSTRY

OFFICE OF THE LABOR COMMISSIONER

http://www.LaborCommissioner.com

December 11, 2006

Honorable Kenny Guinn
Governor
Capitol Building
Carson City, Nevada 89701

Re: Request for Emergency Minimum Wage Regulations

Dear Governor Guinn,

I am requesting your approval of the attached emergency regulations concerning the recently adopted Constitutional amendment changing Nevada's minimum wage laws.

The amendment goes beyond a simple one-dollar increase in the wage rate and we are being flooded with requests for interpretive guidance from employers and employees. Among the more common issues we are addressing are the nature of the insurance requirements, the effect on overtime, and the effect on previously exempt employees. Many employers are at risk for questions for which they currently have no formal answers. Originally, we dealt with inquiries through a "frequently asked questions" link on our website, but this has quickly proven inadequate and legally tenuous.

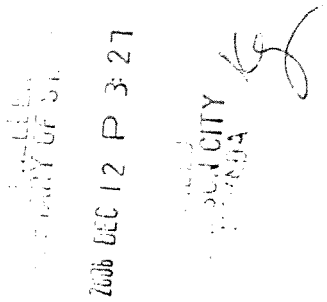
Emergency regulations take effect after approval by the Governor and filing with the Secretary of State and expire after 120 days; early to mid-April of 2007. I already have a temporary rulemaking in its early stages and would merge these regulations into that process, so a "temporary" regulation would be in place when the emergency regulations expire. The temporary regulations would expire on November 1, 2007, but I would begin permanent rulemaking shortly after July 1.

Adopting the emergency regulations for the short-term can provide a small element of certainty for employers and employees. If you have any additional questions, please call me at (775) 684-8188.

Sincerely,

Michael Tanchek
Labor Commissioner

SECRETARY OF STATE
FILING DATA



For Filing
Administrative Regulations

Agency:
Office of the Labor Commissioner
Department of Business and Industry

FOR EMERGENCY
REGULATIONS ONLY

Effective date December 12, 2006

Expiration date April 11, 2006

Governor's signature

Classification: ☐ PROPOSED : ☐ ADOPTED BY AGENCY : X EMERGENCY

Brief description of action Adopt regulations related to various provisions in the recently adopted Article 15, Section 16 of the Constitution of Nevada concerning the minimum wage rates to be paid to workers in the State of Nevada.

Authority citation other than 233B: Article 15, Section 16 of the Constitution of Nevada; NRS 607.160(1)(b), NRS 608.270, NRS 608.018.

Notice dates: N/A

Date of Adoption by Agency: December 12, 2006

Adoption Hearing: N/A

Hearing dates: N/A

Adoption Hearing: N/A

Written Statement of Emergency in Support of Emergency Regulations

The Nevada Labor Commissioner has determined that an emergency exists sufficient to warrant the enactment of emergency regulations pertaining to the enforcement of the recently adopted Constitutional amendment governing the minimum wage to be paid workers in the State of Nevada as set forth in Article 15, Section 16 of the Constitution of Nevada. The reasons for the Commissioner's determination are as follows:

-Pursuant to NRS 607.160, "The Labor Commissioner...[S]hall enforce all labor laws of the State of Nevada...[T]he enforcement of which is not specifically and exclusively vested in any other officer, board or commission." Prior to the enactment of the amendment, the Labor Commissioner was charged with enforcing Nevada's minimum laws as set forth in NRS 608.250-290, inclusive.

-The statutory scheme established a single minimum wage rate that was designed to mirror and follow the federal minimum wage rate as set forth in the federal Fair Labor Standards Act, currently $5.15 per hour.

-The amendment significantly alters the existing minimum wage law by establishing two minimum wages ($5.15 and $6.15 per hour) which are dependent upon whether or not employers make "health insurance" available to their employee's and their dependents, eliminates certain previous exemptions to the minimum wage, creates new classes of workers who are not considered employees for the purposes of the minimum wage, and will require an adjustment to the rates to be published by the Governor by April 1, 2007.

-The amendment impacts the requirements of NRS 608.018 which requires the payment of overtime to employees whose wage rate is less than one and one half times the minimum wage as set forth in NRS 608.250. With the minimum wage now being established as a Constitutional provision rather than as a regulation pursuant to a statute, this has resulted in two different daily overtime rates.

-The emergency regulations set forth the rules of general applicability by which the Labor Commissioner will interpret and enforce the provisions of the new Constitutional provisions. These rules are necessary to provide guidance to employers that will enable them to comply with their new legal obligations.

-The Labor Commissioner is currently involved in the early stages of temporary rulemaking related to other provisions of NAC Chapter 608. These emergency regulations will be included in that rulemaking allowing for additional public workshops and hearings that will help ensure further

analysis and refining of the emergency regulations. Given the short-term nature of the emergency regulations, the temporary rule should be in effect prior to the expiration date of the emergency regulations. A third rulemaking would take place between July 1, 2007 and November 1, 2007 in order to adopt permanent regulations. Because the Constitutional provisions went into effect so shortly after the election, there was insufficient time to engage in the temporary rulemaking process.

December 12, 2006.

MICHAEL TANCHEK
Labor Commissioner, State of Nevada

I, Governor Kenny C. Guinn, endorse the Labor Commissioner Michael Tanchek's statement of emergency.

December ___, 2006.

KENNY C. GUINN
Governor

EXHIBIT 6

EXHIBIT 6

EMERGENCY REGULATIONS OF THE LABOR COMMISSIONER
CHAPTER 608 OF THE NEVADA ADMINISTRATIVE CODE
DECEMBER 12, 2006
LCB FILE _____

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, and NRS 233B.0613.

Section 1. Chapter 608 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 10, 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. Definition of minimum wage tiers.

A. The lower tier is from $5.15 to $6.14 per hour for employers who provide qualified health insurance benefits.
B. The upper tier is $6.15 per hour for employers who do not provide qualified health benefits.
C. An employer must pay the upper tier rate unless the employer qualifies for the lower tier rate.

Sec.3. The minimum wage shall be adjusted annually.

A. These rates will be adjusted annually to include increases in the federal minimum wage or if greater 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 on or before April 1 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 or by the cost of living adjustment, whichever is greater.

Sec. 4. Applicability of Minimum Wage.

A. The minimum wage applies to all employees in Nevada.
B. The only exceptions to the minimum wage are
   1. Persons under the age of 18;
   2. Persons employed by a nonprofit organization for after school or summer employment; or
   3. Persons employed as trainees for a period not longer than ninety (90) days.
C. There is no distinction between full-time, permanent, part-time, probationary, or temporary employees.

Sec. 5. In order to qualify for the lower minimum wage tier an employer must comply with all of the following:

A. Qualified health insurance coverage must be made available to the employee and the employee's dependents; and

B. The employee's share of the cost of the premium cannot exceed 10% of the employee's gross taxable income as defined under the Internal Revenue Code;

C. Insures human beings against bodily injury, disablement or death by accident or accidental means, or the expense thereof, or against disablement or expense resulting from sickness, and every insurance appertaining thereto, together with provisions operating to safeguard contracts of health insurance against lapse in the event of strike or layoff due to labor disputes; and

D. Complies with the requirements of NRS 608.1555 through 608.1576, inclusive.

Sec.6. Qualified 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 plan established under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, except that medical discount plans as defined by NRS 695H.050 does not qualify as health insurance.

Sec.7 For the purposes of determining whether or not the premium exceeds 10% of gross taxable income, an employer may use the historical gross taxable income as previously reported to the Internal Revenue Service, but may not rely on information that precedes the previous tax year or the employer may base the 10% of gross taxable income on actual income and premiums paid.

Sec. 8. 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 wavier of coverage. Declining coverage may not be a term or condition of employment.

Sec. 9. If an employer offers qualified health insurance, but as the result of the employer's decision, the employee is not eligible to receive the coverage provided by the employer or there is a delay before the coverage can become effective that is not the result of a term or condition of the insurance plan, 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. 10. 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 employer is qualified.

INFORMATIONAL STATEMENT FOR EMERGENCY REGULATIONS AS REQUIRED BY ADMINISTRATIVE PROCEDURES ACT, NRS 233B.066
LCB FILE _____

The following statement is submitted for the emergency regulations pertaining to Nevada Administrative Code chapter 293, in accordance with NRS 233B.066(2).

1. The estimated economic effect of the adopted regulation on the business which it is to regulate and on the public. These must be stated separately, and each case must include:

(a) Both adverse and beneficial effects; and
(b) Both immediate and long-term effects.

These emergency regulations do not have any economic effect on any business or on the public. The economic impact of the underlying Constitutional amendment may be substantial, but is unknown at this time.

2. The estimated cost to the agency for enforcement of the proposed regulation.

No additional cost is anticipated to enforce these emergency regulations. These regulations clarify the enforcement position of the Office of the Labor Commissioner related to implementing the new Constitutional provisions. There could be ultimately be a significant additional cost to the agency to implement the terms of the amendment itself, however.

3. A description of any regulations of the 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.

The emergency regulations do not duplicate or overlap any other state or government agency regulations.

4. If the regulation includes provisions which are more stringent than a federal regulation which regulates the same activity, a summary of those provisions.

Because the Constitutional provisions establish a minimum wage law that is much more stringent than the parallel federal provisions, all of the regulations are necessarily more stringent than the federal laws regulating minimum wage. The exception is to the exempted classes of employees who are no longer subject to the state minimum wage law and would fall strictly under the jurisdiction of the US Department of Labor relative to the minimum wage.

5. If the regulation establishes a new fee or increases an existing fee, a statement indicating the total annual amount the agency expects to collect and the manner in which the money will be used.

The emergency regulations do not establish a new fee or increase an existing fee.

EXHIBIT 7

EXHIBIT 7

MINUTES OF THE
SENATE COMMITTEE ON COMMERCE AND LABOR

Seventy-fourth Session
February 8, 2007

The Senate Committee on Commerce and Labor was called to order by Chair Randolph J. Townsend at 8:03 a.m. on Thursday, February 8, 2007, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Randolph J. Townsend, Chair
Senator Warren B. Hardy II, Vice Chair
Senator Joseph J. Heck
Senator Michael A. Schneider

COMMITTEE MEMBERS ABSENT:

Senator Maggie Carlton (Excused)

STAFF MEMBERS PRESENT:

Laura Adler, Committee Secretary
Duncan Burke, Intern to Senator Townsend
Kelly S. Gregory, Committee Policy Analyst
Wil Keane, Committee Counsel
Scott Young, Committee Policy Analyst
Gloria Gaillard-Powell, Committee Secretary

OTHERS PRESENT:

Michael Tanchek, Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry
Ed Guthrie, Executive Director, Opportunity Village

Richard G. McCracken, Attorney at Law, McCracken, Stemerman and Holsberry
Jim Greely, Progressive Choice
Robert A. Ostrovsky, Nevada Resort Association
Samuel P. McMullen, Nevada Restaurant Association; Retail Association of Nevada; Las Vegas Chamber of Commerce
Lea Lipscomb, Retail Association of Nevada
Michael D. Pennington, Public Policy Director, Reno-Sparks Chamber of Commerce

CHAIR TOWNSEND:
The hearing on issues pertaining to the minimum wage is opened. This is a unique issue because there is not much flexibility. Those who testify today after Mr. Tanchek are to be put "on the record." Today will not be a debate and the wage amounts are set.

MICHAEL TANCHEK (Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry):
The constitutional amendment on the minimum wage was passed and certified in November 2006. It will go into effect on November 28, 2006.

We are the State enforcement agency for these types of issues and have been inundated with calls and questions from people seeking information. After consultation with Governor Guinn's office and the Office of the Attorney General (OAG), emergency regulations were drafted to deal with the issues.

I have presented a written testimony and explanation for the constitutional amendment (Exhibit C, original is on file in the Research Library). The constitutional amendment has four basic parts. Section A establishes the requirement for all employers to pay the minimum wage to employees. It establishes two minimum wage rates for Nevada. Currently, they are $5.15 and $6.15 per hour depending on whether insurance benefits are provided. There is a requirement that the rates be adjusted to reflect changes in the federal minimum wage and the cost-of-living wage. The amendment prohibits offsetting the minimum wage with tips and gratuities received by employees.

Section B deals with the legal issues of the amendment. This section prohibits waiving any of the legal requirements between an employer and an employee. There is an exception that permits the minimum wage issue be dealt with in collective bargaining agreements. It creates a private right-of-action for

employees. Individuals need not go through the Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry, to enforce their rights under the amendment. They can go into court on their own. It also prohibits retaliatory action against an employee for exercising his rights under the amendment.

Section C contains the definitions of employee and employer.

Section D contains the severability provisions of the amendment to preserve the balance of the language, should the court rule any portion invalid. If any part of this amendment is deemed invalid, it does not affect the remaining portions.

Please refer to Exhibit C for issues and questions.

The last section of the handout covers the proposed regulations of the Labor Commissioner. Many of the regulations are amendable by statutes. The provisions are set for a hearing on March 5, 2007.

SENATOR HARDY:
The point of confusion is the annual-adjustment concept and how it will be handled.

MR. TANCHEK:
The cost-of-living adjustment and increases in the federal minimum wage are the two areas for which we are seeking legal advice. If the federal government raises the minimum wage, the question is when does it impact the minimum wage in our State?

SENATOR HARDY:
This should be pursued aggressively to get a definitive answer for employers, or the employers will be in violation of the Nevada State Constitution or the federal law.

MR. TANCHEK:
The opinion has been drafted and is in the review stage. The adjustment has to be made in April and will need to be resolved quickly.

CHAIR TOWNSEND:
Mr. Keane, will the Legislative Counsel Bureau (LCB) rule on the issue posed by Senator Hardy?

Mr. Tanchek, do you think our only dealings will be with the consumer price index (CPI)? When the minimum wage becomes effective and if it does not correspond to the Nevada Constitution, do you have a concern about the State of Nevada's responsibility?

MR. TANCHEK:
There could be some issues for example; if we make a cost-of-living wage adjustment less than the 70-cent jump in the federal minimum wage, there could be a problem. We could see a situation where our minimum wage is actually lower than the federal minimum wage. This is one of the issues before the Attorney General. The key is how we will make the calculations.

CHAIR TOWNSEND:
When the employer pays the employee is the most important issue. What happens if the CPI adjustment is negative, or if we have a recession or depression?

MR. TANCHEK:
Those questions are part of what we asked the OAG for a resolution.

CHAIR TOWNSEND:
Section 4, middle of subsection 1, Exhibit C, of the proposed regulation of the Labor Commissioner, "when an employer contracts for," this is a concern. This is okay if it is a private company because they contract, but is not okay if it is a self-funded plan. The same section a couple of lines down states, "required to complete the coverage which is applicable to all similarly situated employees within this class, unless the waiting period exceeds 120 days" and section 8 speaks about "no more than six months." Both sections seem to have inconsistencies. I want to make sure these issues are on the list for clarification. Contact the OAG to make sure they are working closely with the LCB on the regulatory process.

ED GUTHRIE (Executive Director, Opportunity Village):

Opportunity Village is a training center similar to 14 other community training centers (CTC) throughout the State of Nevada. Some of our colleagues in southern Nevada are the Easter Seals of Southern Nevada and up north, High Sierra Industries and Washoe Association for Retarded Citizens that you are familiar with. All of us provide similar types of services. At Opportunity Village, we provide services to approximately 200 people in a community-based contract and about 450 people in center-based contracts. We are the largest CTC in the State of Nevada. We are certified by the Division of Mental Health and Developmental Services. Other CTCs might be certified by the Department of Employment, Training and Rehabilitation through the Bureau of Services for the Blind and Visually Impaired or through the Bureau of Vocational Rehabilitation. There are multiple avenues for individuals to be certified. The services that are provided at these CTCs are primarily rehabilitative and therapeutic in nature. They are not really an industrial type of model; not a model that people would use to—make money. They are here to provide training and services for individuals with severe disabilities. There is also not the normal employer-employee relationship between one of these centers and the people they serve.

People are assigned to those centers by a department in the State. They are usually subsidized by a department of the State. There is not the normal ability to hire and fire. If one of the people we serve were to reach over and slap a fellow service recipient or one of our staff, we would not have the ability to fire that individual. We would design a behavior plan; we would work with the individual and make sure things like that do not happen. As opposed to our staff, if one of my staff reached over and slapped one of their fellow staff members or one of the people that we served, they probably would not have a job by that afternoon. We simply would not allow that.

MR. GUTHRIE:

That is just one example of—we were very concerned, in the initial readings of the constitutional amendment it said all employees were subject to the new minimum wage law. We had been providing services under the State Labor Regulations. Those regulations had recognized the Fair Labor Standards Act (FLSA) and specifically section 14, subsection c of the FLSA. The FLSA recognizes some people with very severe disabilities do not have the ability to produce at a level that would allow them to receive minimum wage. They are offered a special minimum wage through the FLSA section 14, subsection c. That is what we have done for 20 to 30 years; since section 14, subsection c has existed.—what we were looking at, and what we thought we were facing, was the problem of having literally thousands of people throughout the State of Nevada lose the ability to have vocational rehabilitation and employment training services taken away from them because of the new constitutional amendment and the new regulations. In our concern, we contacted a number of people, including the Assembly Speaker, Barbara Buckley. Barbara Buckley, in turn, contacted Richard McCracken who helped to develop the initiative for us. Mr. McCracken and I discussed potential language that would say the people we serve, since the services we provide are primarily rehabilitative and therapeutic in nature, and since we do not have the normal employer-employee relationship, those individuals are not therefore employees, they are in another class. If they are not employees, they are not covered by the constitutional amendment or the wage. Mr. McCracken can speak to the language he developed. I circulated that through the 15 CTCs in the State of Nevada. They are all happy with the language which I think is exceptional, because finding an agreement between those 15 CTCs is like herding cats. I think Mr. McCracken has done an exceptional job.

CHAIR TOWNSEND:
Do we have copies of the language?

MR. GUTHRIE:

We can provide a copy of that language. That language is going to be in a bill that is sponsored by Speaker Buckley so we are able to deal with the issue and go on from there.

CHAIR TOWNSEND:
I hope nobody sues you.

MR. GUTHRIE:

Yes. We need this entered into the regulations; try and have it in law and then we are going to go back. I am not necessarily praying that nobody sues me because I think there is enough background in what we have done. When and if a lawsuit occurs, we feel there is a comfortable risk in going to court with this lawsuit. Some of the people we serve have multiple challenges; they have mental health challenges, as well as other challenges, and I fully expect to get sued one day. It is not a question of if; it is a question of when. That is why we are trying to structure this in such a way that we have the best defense we possibly can against the lawsuit.

CHAIR TOWNSEND:
I have served on the Washoe Association for Retarded Citizens Board since 1972. You are associated with a remarkable organization and I appreciate all you do on behalf of that organization.

RICHARD MCCRACKEN (Attorney at Law; McCracken, Stemerman, and Holsberry):

Let me address Mr. Guthrie's point. It has been very enjoyable working with him in solving this. The solution was really quite evident because his clients and those of the other 15 CTCs were never regarded as employees by any body of law. The Internal Revenue Service does not regard them as employees; there is no withholding and no employment taxes for them. The National Labor Relations Board does not regard them as employees. They can't be organized by unions. We are talking about a problem that was easily resolved by making clear what already has been true for all

the time these workshops have been in existence. No body of government has regarded them as employees.

CHAIR TOWNSEND:
If one of the clients is injured while working in a shop, how do we cover the injury?

MR. MCCRACKEN:

I don't know the answer whether they are covered by workers' compensation law in Nevada. My suspicion would be no to that. I would imagine the injuries are being covered by the agencies under whose authority they work.

MR. GUTHRIE:

Under our workers' compensation policy, we cover volunteers; we cover all different kinds of people in addition to employees of the agency, and I am assuming they are covered under the same provisions that allow us to cover volunteers. If someone gets injured at the Magical Forest, we have 75 volunteers a night assisting us. Inevitably during the 38 nights of the Magical Forest, one of the volunteers gets injured. It is going to happen and is not a question of if, but a question of when it is going to happen. We have always used our workers' compensation policy and the coverage from that, to take care of the medical expenses of that volunteer.

CHAIR TOWNSEND:
The committee working with Mr. McCracken needs the Legislative Counsel Bureau's opinion. We need to make sure all 15 of the organizations understand they are not considered employees, but still will be covered under the workers' compensation policy.

MR. MCCRACKEN:

Senator, we anticipated the potential for unintended effects of this, so the amendment to the definition of employee in NRS 608 that we drafted only refers to minimum wages. It does not have an

effect on any other part of the code. I will be able to provide the draft this afternoon to all members of this Committee. Senator Hardy asked about how the adjustments work, and I can at least tell how I think they should work. The consumer price index adjustments are called adjustments. They increase over federal minimum wage and it is called an adjustment too. Finally, in that first section of the amendment, adjustments generally incorporate both CPI adjustments and adjustments to the federal minimum wage. They are determined as of April 1, announced and then go into effect the following July 1. The purpose of that structure is to make sure everyone has time to adjust to the increased cost that will be visited by the increase. Congress makes laws and amends laws on a regular basis. I don't think even if we know what the minimum wage is going to be after April 1, it is an adjustment that is incorporated into the April 1 announcement. I think it only gets incorporated when it is in effect. If the federal minimum wage this year were to increase before April 1, it would be incorporated into the adjustment and announced as of that date.

If Congress passes a bill and the President signs it, providing for an increase, it would go into effect sometime later in 2007, after April 1. I do not believe that is in effect and therefore not something that should be incorporated into the April 1 announcement. I believe that is a bright line. I also believe that is what the amendment, fairly read, means. It will enable everyone to not be surprised. I think the idea that if the federal minimum wage increased at a particular date in the middle of the year, not before April 1, all of a sudden it would be a jump up in the State minimum wage and not at all consistent with the structure of this. Again, the structure is to have an announcement April 1, then give everyone three months' time to adjust to the fact this is going to be part of their budget.

MR. MCCRACKEN:

On the question Senator Townsend raised about whether the CPI adjustments could be negative, I think the answer is no. The amendment refers only to an increase in the CPI. The increase due to the CPI is cumulative over a baseline of December 31, 2004.

That is specified. The way the CPI works is that it is actually an index number. The base year for the CPI we use now is 1982, it was 100. If you see a CPI number it will be something like 190.3. That is actually the index number as of the end of 2004. That is the baseline for this amendment. We can look to see what the CPI index was at the end of 2006. That is a computation that already has been made. It is simply a matter of comparing that index number to the end of 2004 baseline and determining what percentage increase that is. At the end of 2006, the increase is slightly over 6 percent not for one year but cumulative since the end of 2004. There is a CPI cap of 3 percent. That means that even though there has been a 6-percent increase in the 2 years since the end of 2004, the maximum CPI increase that could be announced as of April 1 is 3 percent, which is a few pennies above each of these rates. That is what it will be if Congress does not put in effect a new rate before then.

CHAIR TOWNSEND:
Mr. McCracken, do you read it as accumulative from 2004 to 2008; making it 12 percent?

MR. MCCRACKEN:

Yes. In effect, there is a carryover and the unused portion increases bank for the future. If we end up with inflation like we did in the latter 1970s with 12- to 13-percent inflation, the CPI adjustment will still be capped at 3 percent and there may be a bank that runs out for many years after that.

One other thing I would like to say which I had not planned on saying, but I had coffee this morning over at Comma Coffee. I entered into a debate with June about this amendment. It was not the start of the morning I had anticipated, but it taught me something very important. She had been told that she had to increase the wages of all of her employees to $6.15. Someone called her and told her she had to do that. Being the person she is, she went ahead and put those increases into effect, even for her 15-year-old employee. Nobody told her. She did not know until this morning that under 18s are totally exempt from this obligation. It

was not really welcome news to her. It brought home to me was that even though many of us who are interested in this have gone to the workshops that Mr. Tanchek has organized which have been very beneficial, very constructive and had a lot of consensus evolve out of them. They have been great. It is only those of us who have been involved, who really know.

MR. MCCRACKEN:

One of the things that need to be done as quickly as possible is to endorse the statement you made about the need for speed here. We need to get out to the employer community, especially the small business community, the ones most likely to be paying low wages, that there are exemptions. Some of the basic parts of the structure here, including the exemption for people who are under 18, is the 90-day trainee exemption. The knowledge has to be distributed out to the community very rapidly. That is one of the things I hope to work on with Commissioner Tanchek to do, pending the resolution of some of these more esoteric issues. Let's get the basics out to the employer so they do not make mistakes and do not underpay or do not overpay.

SENATOR HECK:
Is the CPI index from December to December? Is the measurement from December 2004 to December 2006? It would be 5.7 percent from December to December versus 6.3 percent annually.

MR. MCCRACKEN:
"It would be—what I calculated it came to a little bit above 6 percent. But that is using the annual change It is whatever the percentage increase is from December 31, 2004, to the present."

CHAIR TOWNSEND:
The committee received an e-mail/fax (Exhibit D) from the Ruby Mountain Resource Center. They wanted to make sure their remarks were entered for the record.

JIM GREELY (Progressive Choices):
"The group that I am here with today were just wondering if we were going to be able to see the language before it is presented."

CHAIR TOWNSEND:
I have been assured by Mr. Guthrie that it has been sent to you.

ROBERT A. OSTROVSKY (Nevada Resort Association):

> Just skipping what I was going to say about the regulation, and going to the issues relative to the testimony you have taken here regarding Opportunity Village and associated-type providers of services, I do have a concern about workers' compensation in CTCs. I would urge this committee to make sure we have a definition in 616 and 617 which is adequate to capture those people, because the insurers have to take a hard line on third parties and independent contractors that are usually not covered. Volunteers that show up for the other events are covered under specific language in the statute which talks about volunteers. I don't believe these people are volunteers. If they are not employees, then we have to make sure there is a definition they fit into. I think everyone wants these people's status not to change from what it is today, because of this amendment I would be happy to work on it. I would be very careful about the language. I do not know who the insurers are, but there are a bunch of insurers like—I do represent one of those insurers who have been around Nevada forever, as the old State fund. There are insurers who buy their policy from some insurer out in New York, Georgia or Hartford, Connecticut, who take a vastly different view of the world than we do here in Nevada. We need to make sure the language is there. I will volunteer to help and take a look. I am sure we will look at that.

CHAIR TOWNSEND:
There is no intent by the proposers. I just need to make sure there is no gap for those folks. The tragedy is if you have to litigate a workers' compensation case the claimant who might legitimately been injured on the job and deserves compensation, he is now in a fight with an insurance company, and he is not getting help.

MR. OSTROVSKY:

Most of the concerns that I had, have been addressed. I would just like to be "on the record" to state there are concerns. I did participate in the workshop process that the commissioner held. I appreciate the commissioner's efforts to try to respond to the needs of the employer community that I represent. We didn't go back and look at the current emergency regulations, the regulation has a lot of substantive change from what the emergency regulation says today. I support the effort to get this worked out as quickly as possible. I would like to go on record to show I do have concerns about the definition of annual adjustment in section 2, sub 4. I think how that turns out could make a potential significant difference on what ways will be paid, this year and next year but also what could be paid in 2015 and 2020; assuming this is on the books for a long time. It is a constitutional matter. The accumulative effects and how they will be applied have consequences way out in the outer years. We want to make sure the definition is adequate. I understand that the Labor Commissioner has punted and said; well we will just use the language in the Constitution until they can get better direction from the OAG. The sooner we get that, the better. I also would like to resolve the issue of the waiting period. I think, Senator Townsend, you raised the issue of the inconsistency between section 4 and section 8. I think I have supported six months and others have supported other time periods and we will be raising the issue again at the hearing. Hopefully, we will be able to resolve this so employers know what—and we will be raising that issue again at the hearing—the standard waiting period is, and pay the lower tier during the waiting period as long as they meet all the other qualifications of offering insurance. Other than that, I am quite satisfied with what the Commissioner has done to define what an insurance policy is and to define some of the other issues that are out there. I look forward to working with the Commissioner on March 5, to try to resolve the issues we just talked about that are unresolved. The Commissioner agrees these have yet to be resolved. Those are the comments I would like to have "on the record."

SAMUEL P. MCMULLEN (Nevada Restaurant Association; Retail Association of Nevada; Las Vegas Chamber of Commerce):

I would like to echo that this has actually been a very good process in a lot of ways. We have had some very difficult things to implement after the constitutional amendment was passed and of course as everyone knows, immediately effective. I agree with Mr. McCracken, the process we have gone through has resolved issues. I think there are still some wrinkles that need to be straightened out as we go through this next month before the final reg, at least the temporary regulation, excuse me I should use the correct term. I really wanted to say I think the process has been good. Labor Commissioner Tanchek and his staff really need to be complimented for a lot of hard work. I also appreciated the involvement of other people myself, like Mr. McCracken, who have given good interpretations of what they mean, what they wrote, and the clarity of that. I would say it is important for this Committee to understand that even though there has not been testimony to them today, there has been an awful lot of issues that were out there that have been resolved.

You have heard about some of them, the definitions of insurance, the application when someone comes on before the insurance is actually "effective" for an individual but offered. The test of course is offering it; trying to reduce some of the roller coasters, but more importantly, from our point of view, trying to reduce the cost and the difficulty of implementing this and making sure there is as much as possible some practical rule of reason in how this works. I think Mr. McCracken was sort of the commercially reasonable —would like also to compliment him for really good thought on things that would implement this more practically. I also think there has been a lot of progress made on this regulation. We will be able to tell the employers for instance they—as Mr. Tanchek said today they don't have to do this every pay period. You could effectively say that gross taxable income is arguably defined every pay period. It could in some cases make you crazy and say it is defined every day. You have to do the test to find out whether you are paying people correctly or not. By doing it this way, I think we have allowed that to be stretched out and done annually, if you have the

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

CODY C. HANCOCK,

Respondent.

Supreme Court No. 68770

District Court Case No.: 14 OC 00080 1B

JOINT APPENDIX

VOLUME II of II

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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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Stipulation and Proposed Order to Set Briefing Schedule, filed May 26, 2015	I	JA0136-JA0138
Plaintiff's Motion for Summary Judgment, dated June 11, 2015	I	JA0139-JA0244
Motion for Summary Judgment, filed June 12, 2015	II	JA0245-JA0337
Plaintiff's Response to Defendant's Motion for Summary Judgment, dated July 10, 2015	II	JA0338-JA0356
Opposition to Plaintiff's Motion for Summary Judgment, filed July 14, 2015	II	JA0357-JA0381
Errata to Opposition to Plaintiff's Motion for Summary Judgment, filed July 27, 2015	II	JA0382-JA0384
Defendants' Reply in Support of Motion for Summary Judgment, filed July 31, 2015	II	JA0385-JA0406
Decision and Order, Comprising Findings of Fact and Conclusions of Law, filed August 14, 2015	II	JA0407-JA0416
Notice of Entry of Order, filed August 18, 2015	II	JA0417-JA0430
Notice of Appeal, filed September 4, 2015	II	JA0431-JA0444
Order Granting Defendants' Motion to Stay Order Pending Appeal, filed October 12, 2015	II	JA0445-JA0448

DATED this 30th day of November, 2015.

ADAM PAUL LAXALT
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 30th day of November, 2015, I served a copy of the foregoing JOINT APPENDIX, by mailing a true and correct copy to the following:

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