

IN THE SUPREME COURT OF NEVADA

Electronically Filed
Dec 29 2015 08:47 a.m.

Sup. Ct. No. 68973 Tracie K. Lindeman
Clerk of Supreme Court
Dist. Ct No.: A-12-661726-C
Dept. No. XXVIII

-----X
NEVADA YELLOW CAB
CORPORATION, NEVADA
CHECKER CAB CORPORATION,
NEVADA STAR CAB
CORPORATION,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT of the State of Nevada, in
and For the County of Clarki, and
THE HONORABLE RONALD J.
ISRAEL, District Judge,

Respondents,

AND

CHRISTOPHER THOMAS and
CHRISTOPHER CRAIG,

Real Parties in Interest

APPENDIX TO
RESPONDENTS' BRIEF

Leon Greenberg, NSB 8094
A Professional Corporation
2965 S. Jones Boulevard - Suite E-3
Las Vegas, Nevada 89146
Telephone (702) 383-6085
Fax: 702-385-1827

Attorney for Real Parties in Interest

Index

Description	Bates No.
Docket for <i>Murray v. A Cab et al.</i> , Case No. A-12-669926-C, District Court , Clark County	1
Memorandum of Agreement	2-3
Letter to Neal Golden from Office of the Labor Commissioner dated June 4, 2013	4
Letter to Neal Golden from Office of the Labor Commissioner dated January 15, 2013	5
Newsletter by Littler Mendelson, November 2006 issue	6-9
Declaration of Parker “Sam” Moffitt dated December 21, 2015	10-13
Order of Reversal and Remand in <i>Gilmore v. Desert Cab, Inc.</i> , Case No. 62905, Nevada Supreme Court	14-15
Answering Brief by Respondent Desert Cab in <i>Gilmore v. Desert Cab</i> , Case No. 62905, Nevada Supreme Court	16-31
Opinion NO. 2005-04 of the Office of the Attorney General of the State of Nevada dated March 2, 2005	32-42
Decision and Order <i>Murray v. A Cab et al.</i> , Case No. A-12-669926- C, District Court, Clark County	43-48

REGISTER OF ACTIONS
CASE NO. A-12-669926-C

Michael Murray, Plaintiff(s) vs. A Cab Taxi Service LLC, Defendant(s)

§
§
§
§
§
§

Case Type: **Other Civil Filing**
Subtype: **Other Civil Matters**
Date Filed: **10/08/2012**
Location: **Department 1**
Cross-Reference Case Number: **A669926**

PARTY INFORMATION

Defendant	A Cab LLC	Lead Attorneys Esther Rodriguez <i>Retained</i> 7023208400(W)
Defendant	A Cab Taxi Service LLC	
Defendant	Nady, Creighton J	Esther C. Rodriguez <i>Retained</i> 7023208400(W)
Plaintiff	Murray, Michael	Leon Greenberg <i>Retained</i> 7023836085(W)
Plaintiff	Reno, Michael	Leon Greenberg <i>Retained</i> 7023836085(W)

EVENTS & ORDERS OF THE COURT

01/17/2013	Motion to Dismiss (9:00 AM) (Judicial Officer Cory, Kenneth) <i>Defendant's Motion to Dismiss Complaint</i>
	Minutes 01/17/2013 9:00 AM 01/17/2013 9:00 AM - Statements by the Court as to reasoning by Judge Jones and amendment to the Constitution. Ms. Rodriguez argued as to NRS 608.250. Mr. Greenberg referred to the first sentence in the Constitution and argued the term of employee. Statements by the Court. Mr. Greenberg argued the Court is bound by the Constitution. Ms. Rodriguez argued Judge Jones did take notice the amendment made no reference to NRS 608.250. Further arguments by counsel. COURT STATED FINDINGS and ORDERED, Motion DENIED. Mr. Greenberg to prepare the Order.
	Parties Present Return to Register of Actions

MEMORANDUM OF AGREEMENT

This Memorandum Of Agreement is made and entered into by and between **ABC Union Cab Company, Inc., Ace Cab, Inc., Vegas-Western Cab, Inc. A-N.L.V. Cab Company** and Virgin Valley Cab Company, hereinafter collectively referred to as the Employers, and the **United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial And Service Workers International Union (USW) AFL-CIO, CLC**, hereinafter referred to as the Union.

WHEREAS, the Employers and the Union are parties to and bound by a collective bargaining agreement for the period September 11, 2006 to September 11, 2009 covering all taxicab drivers of the Employers who are represented by the Union; and

WHEREAS, during the course of the 2006 negotiations which resulted in the collective bargaining agreement referenced above, , the Employers and the Union engaged in good faith bargaining regarding, in addition to other articles, Article 34 – Compensation For Services and Article 30 – Health and Welfare, which negotiations resulted in an increase in wages and benefits for the taxicab drivers employed by the Employers; and

WHEREAS, at the time of the referenced negotiations, all taxicab drivers of the Employers were specifically exempt from the minimum wage laws of the State of Nevada, pursuant to the provisions of Nevada Revised Statutes (N.R.S.) 608.250(2)(e); and

WHEREAS, the Employers and the Union, in negotiating the 2006 provisions of Article 34 – Compensation For Services and Article 30 – Health and Welfare and other relevant provisions of their collective bargaining agreement, contemplated and intended that any Nevada minimum wage law would not be applicable to the taxicab drivers covered by the collective bargaining agreement;

NOW, THEREFORE, the Employers and the Union hereby agree

1. That, pursuant to the terms of their current collective bargaining agreement covering the period September 11, 2006 to September 11, 2009, all taxicab drivers of the Employers covered by that Agreement are to be compensated for all hours of work performed in accordance with the provisions of Article 34 – Compensation For Services, Article 31 – Annual Bonus, Article 17 – Vacations, and Article 30 – Health

and Welfare and any other relevant specific provisions of their collective bargaining agreement and the level of compensation is not to be affected or modified in any way by any law of the State of Nevada establishing a minimum wage.

2. In accordance with the terms of the 2006-2009 collective bargaining agreement, the Employers and the Union agree to and do explicitly waive all of the provisions of Section 16 of Article 15 of the Nevada Constitution, pursuant to and in accordance with the provisions of Section 16(B) of Article 15 of the Nevada Constitution.
3. The provisions of this Memorandum Of Agreement are part of and hereby incorporated into the collective bargaining agreement between the Employers and the Union as though they were set forth therein.

DATED: April 23, 2008

AGREED:

ABC UNION CAB COMPANY, INC.,
ACE CAB, INC., VEGAS-WESTERN
CAB, INC., A-N.L.V. CAB COMPANY

AGREED:

UNITED STEEL, PAPER AND
FORESTRY, RUBBER
MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION AFL-CIO,
CLC,

By: Kevin A. Chapman

Its: Attorney

Date: 4/23/08

By: Samuel S. S. S.

Its: INT. STAFF REP.

Date: 4/23/08

BRIAN SANDOVAL
Governor

BRUCE BRESLOW
Director

THORAN TOWLER
Labor Commissioner

STATE OF NEVADA



Department of Business & Industry
OFFICE OF THE LABOR COMMISSIONER

<http://www.LaborCommissioner.com>

REPLY TO:

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

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

June 4, 2013

NEAL GOLDEN
8316 DORADO BAY CT
LAS VEGAS, NV 89128

Reference: Your claim filed on 8/25/2010 against SUN CAB INC. DBA NELLIS CAB COMPANY

This letter is in reference to your claim filed against Sun Cab Inc. dba Nellis Cab Company. As discussed previously, your claim has been placed on hold, pending the outcome of the federal court decision regarding the exemptions from the minimum wage requirements. As soon as I have additional information for you, I will notify you. If you have an e-mail address, please let me know and I can send you communication via e-mail.

Thank you for your patience and cooperation.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lupe Martinez".

Lupe Martinez
Compliance/Audit Investigator II
Office of the Labor Commissioner
lmartinez@laborcommissioner.com
702-486-0833

BRIAN SANDOVAL
Governor

BRUCE BRESLOW
Director

Thoran Towler
Labor Commissioner

STATE OF NEVADA



Department of Business & Industry
OFFICE OF THE LABOR COMMISSIONER

<http://www.LaborCommissioner.com>

REPLY TO:

- OFFICE OF THE LABOR COMMISSIONER
555 E. WASHINGTON AVENUE, SUITE 4100
LAS VEGAS, NEVADA 89101
PHONE (702) 486-2650
FAX (702) 486-2660
- OFFICE OF THE LABOR COMMISSIONER
675 FAIRVIEW DRIVE, SUITE 226
CARSON CITY, NEVADA 89701
PHONE (775) 687-4850
FAX (775) 687-6409

January 15, 2013

NEAL GOLDEN
8316 DORADO BAY CT
LAS VEGAS, NV 89128

Reference: Your claim filed on 8/25/2010 against SUN CAB INC DBA NELLIS CAB COMPANY

This letter is in reference to your claim filed against SUN CAB INC DBA NELLIS CAB COMPANY. As indicated previously, there was an amendment to the Constitution of the State of Nevada. The amendment removed all exemptions to minimum wage provisions listed in NRS 608.250, according to the Nevada Attorney General. However, a federal court case is considering whether exemptions from minimum wage requirements as listed in NRS 608.250 are still valid.

Based on the above, your wage claim has been placed on indefinite hold pending the outcome of the court decision. A final ruling has not been made yet. In the meantime, please update our office with any changes to your mailing address or telephone number. As soon as I have additional information for you I will contact you by mail.

Sincerely,

A handwritten signature in black ink, appearing to read "Lupe Martinez".

Lupe Martinez
Compliance/Audit Investigator II
Office of the Labor Commissioner
lmartinez@laborcommissioner.com
702-486-0833

in this issue:

NOVEMBER 2006

Nevada voters overwhelmingly approved a constitutional amendment to raise the state minimum wage above the current federal minimum wage. Employers have only until November 28, 2006 to implement a new two-tiered minimum wage.

The Nevada Constitutional Minimum Wage

By Rick D. Roskelley

Introduction

On November 7, 2006, the voters of six states passed ballot initiatives to raise the state minimum wage above the current federal minimum wage of \$5.15 an hour. These states include Arizona, Colorado, Ohio, Missouri, Montana and Nevada. The Nevada initiative, entitled "Raise the Minimum Wage for Working Nevadans Act," was presented as an amendment to the Nevada Constitution and listed on the ballot as Question 6.

Nevada voters overwhelmingly approved Question 6, by a margin of 69% in favor to 31% opposed. The initiative, previously approved in the election of 2004, was presented to the voters a second time in 2006 in accordance with state law requiring voters to pass constitutional amendments in two consecutive general elections. Question 6 amends the Nevada Constitution to provide a minimum wage that must be paid by all employers employing employees in this state. The Amendment effectively sets the Nevada minimum wage at least \$1 higher than the federal minimum wage. The new minimum wage becomes effective November 28, 2006.

In general, the Nevada minimum wage amendment raises the minimum wage from \$5.15 per hour to \$6.15 per hour. The Amendment, however, is unique in that it permits employers who offer employees a qualified health insurance plan to pay a minimum wage at the former rate of \$5.15 per hour. This two-tiered approach, as well as existing daily overtime requirements, present challenges to proper application of Nevada's new minimum wage laws.

Nevada employers now have a very short

period to examine their current payroll practices and determine what changes need to be implemented to assure compliance with the new minimum wage requirements. To assist in this process, we have provided the following answers to common questions regarding the new minimum wage requirements.

Answers to Common Questions

When does the new minimum wage become effective?

Article 15, section 16 of the Nevada Constitution ("Amendment"), or the minimum wage law, becomes effective November 28, 2006.

Under what circumstances must we pay a minimum wage of \$6.15 per hour?

The Amendment establishes a two-tiered minimum wage system for Nevada. Employers who provide health benefits as defined by the Amendment are required to pay employees a minimum wage of \$5.15 per hour. Employers who do not provide qualified health benefits must pay a minimum wage of at least \$6.15 per hour.

What constitutes health benefits under the Amendment?

To constitute qualifying health benefits, a health plan has to provide coverage for the employee and the employee's dependents. In addition, the cost to the employee of participating in the plan offered by the employer cannot exceed 10% of the employee's gross taxable income.

What if the health plan requires a waiting period before employees are eligible to

receive health insurance?

The Amendment does not specifically address this issue. The Amendment simply defines “offering health benefits” as making health insurance available to the employee and the employee’s dependents at a total cost to the employee for premiums of not more than 10% of his or her gross taxable income.

During informal discussions, the office of the Labor Commissioner has expressed the opinion that employers could pay the minimum wage of \$5.15 an hour during a bona fide waiting period specified in the health plan offered employees. It is important to stress, however, that the Nevada Labor Commissioner has yet to provide formal guidance on this subject. Further, as is noted below, the Amendment creates a private right of action allowing an employee to sue the employer directly in state court for violation of the Amendment. A court will not be bound by the Labor Commissioner’s interpretations of the Nevada Constitution. Consequently, we urge caution in determining which minimum wage to pay during introductory or waiting periods. Our recommendation for the present is to pay a minimum wage of \$6.15 per hour until such time as the employee is eligible to receive health insurance.

What happens if an employee declines coverage?

This issue is also not specifically addressed in the Amendment. However, the Amendment requires only that an employer offer health benefits to the employee. Offering health benefits is defined as making health insurance available to the employee and the employee’s dependents at a total cost to the employee for premiums of not more than 10% of his or her gross taxable income. Consequently, if an employer offers an employee health benefits that meet the coverage and the premium requirements, the employer’s obligations should be met. The Labor Commissioner has informally confirmed the position that the Amendment requires only that the employer offer qualified health coverage and that the employee’s declining such coverage does not obligate the employer to pay the higher minimum wage. Once again, an employer should proceed with caution in determining which minimum wage to pay. The employer

should watch for official guidance and clarification on this issue from the Nevada Labor Commissioner.

What if an employee drops below the required number of working hours to remain eligible for coverage?

Once again, the Amendment does not address this issue. However, if an employee is ineligible to participate in health benefits of his or her employer, arguably the employer has not “offered” health benefits as required by the Amendment. Consequently, the best practice would be to monitor employees’ eligibility for health benefits and to pay the increased minimum wage of \$6.15 an hour for any work week in which the employee is not eligible for coverage.

If an employer offers the employee the choice between two or more health plans, do all of the choices need to meet the 10% test for the employer to be able pay the \$5.15 minimum wage?

Probably not. Although the Amendment does not specifically address this scenario, the fact that one of the options offered to the employee meets the requirement that the employee contribution be 10% or less of his or her gross taxable income appears to be sufficient. The Amendment only requires that the employer offer health benefits to the employee and his or her dependents at a total cost to the employee of 10% or less of his or her gross taxable income. It does not mandate that the particular plan selected by the employee meet the 10% test. The Labor Commissioner has confirmed informally that it is the position of his office that an employer may pay the \$5.15 minimum wage as long as one of the choices offered to the employee meets the 10% test regardless of the actual option selected by the employee. Once again, however, the employer should watch for official guidance and clarification on this issue from the Nevada Labor Commissioner.

What is the period of time an employer must use to determine the gross taxable income for purposes of determining if the employer has offered qualified health benefits?

Offering health benefits is defined in the Amendment as making health benefits available to the employee and the employee’s

dependents at a total cost to the employee of not more than 10% of his or her gross taxable income. The Amendment does not discuss the period of time that must be taken into account in determining if the 10% ceiling has been surpassed. At this point, we have received no formal guidance from the Labor Commissioner on the issue. Because health premium contributions are generally made on a pay period basis, the best practice would appear to be to measure the employee contribution for health benefits against the gross taxable wages for the pay period.

May an employer count tips or gratuities toward payment of the minimum wage?

No. The amendment specifically provides that tips and gratuities received by employees cannot be credited or offset against the minimum wage.

May an employer count commissions and similar compensation toward payment of the minimum wage?

Yes. Nevada law defines wages to include commissions owed the employee. It also defines wages as any amount that an employer agrees to pay an employee for the time the employee has worked, computed in proportion to time. To the extent employee compensation is a commission or is paid for time worked, it may be credited toward payment of the minimum wage.

What effect does the amendment have on daily overtime under Nevada law?

The effect of the Amendment on daily overtime is not certain at this point as the Labor Commissioner and the Attorney General have taken differing positions on the issue.

The Labor Commissioner has publicly taken the position that employees who are offered qualifying health benefits will be entitled to daily overtime if they make \$7.725 or less per hour. He has also stated the employees who are not offered a qualifying plan must be paid overtime on a daily basis if their hourly rate is less than \$9.225 per hour.

That advice, however, conflicts with an official Opinion of the Nevada Attorney General issued March 2, 2005. The Nevada overtime law is found in Nevada Revised Statutes (NRS) section 608.018. Currently, Nevada

imposes an overtime obligation for more than 8 hours work in a day for an employee whose regular wage rate is less than 1 1/2 times the minimum rate prescribed pursuant to NRS section 608.250. The minimum wage set in NRS section 608.250 is the same as the federal minimum wage, currently \$5.15 an hour. In his March 2, 2005 opinion, the Attorney General concluded that the passage of Question 6 would not effect the triggering of or exemption from daily overtime under Nevada law. He concluded that employees who make at least 1 1/2 times the minimum rate set pursuant to NRS section 608.250 (which mirrors the federal minimum) would continue to be exempt from daily overtime in Nevada. This would mean that daily overtime would not be required for employees making at least \$7.73 an hour.

Are certain employees exempt from the new minimum wage law?

The Amendment increases the number of employees who are entitled to be paid minimum wage. The only exemption allowed under the new Amendment is for employees who are under the age of eighteen and are employed by nonprofit organizations for after-school or summer employment or employed as trainees for a period not longer than 90 days.

No other employees qualify for the exemption. This will make it necessary for Nevada employers to track the hours of a much broader number of employees, including salaried employees who are exempt from overtime but not the new minimum wage.

Employers that have employees who were previously exempt from the minimum wage will need to make the necessary payroll adjustments. Domestic service employees, outside salespersons, agricultural employees, taxicab and limousine drivers, and casual baby sitters will no longer be exempt from the minimum wage. In addition, the special minimum wage for severely handicapped persons with certificates issued by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation are not included among the exemptions identified in the Amendment.

Are there automatic increases built into the minimum wage?

Yes. The Amendment provides that the minimum wage will automatically 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 is to 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%.

How can we find out about subsequent increases to the minimum wage?

The Governor or a State agency designated by the Governor will publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. This 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 the bulletin, but lack of notice shall not excuse noncompliance with this section.

Are we required to provide employees notice of increases to the minimum wage?

Yes. Employers must provide written notification of the rate adjustments to each employee and make the necessary payroll adjustments by July 1 following the publication of the bulletin.

May an employee agree to earn less than the minimum wage?

No. The Amendment may not be waived by agreement between an individual employee and employer. The only exception to this rule is in the case of a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in the 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 the Amendment.

The non-waiver provision of the Amendment will also make it more difficult to informally resolve disputes with employee over payment

of the minimum wage. Because an employee cannot waive his or her rights, a settlement agreement and release may not be binding on the employee.

What protections are offered to employees that complain about non-compliance with the Amendment?

The Amendment prohibits employers from discharging, reducing the compensation of or otherwise discriminating against any employee for using any civil remedies to enforce his or her rights under the Amendment. An employee claiming violation of the Amendment may bring an action against his or her employer in the courts of this State to enforce the provisions of the Amendment. An employee successfully prosecuting a suit under the Amendment is entitled to all remedies available under the law or in equity appropriate to remedy any violation, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce his or her rights under the Amendment shall be awarded his or her reasonable attorney's fees and costs.

Conclusion

The Amendment and interpretation of the new minimum wage requirements raise numerous questions, many of which will need to be resolved by the implementation of new regulations or statutes and maybe even resort to the courts.

It is currently anticipated that the Legislative Counsel will issue an opinion regarding the interaction of the Amendment and existing minimum wage and overtime statutes. It is also anticipated that the Labor Commissioner will issue formal guidance and regulations on implementation of the minimum wage. Until that happens, employers in Nevada will need to proceed with caution and carefully consider their course of action in complying with the Amendment.

All employers, however, should take the following steps to ensure compliance with the minimum wage:

1. Conduct an audit of all hourly employees to ascertain any potential issues of non-compliance with the two-tiered minimum wage. Employees who earn less than

\$6.15 an hour should either have their pay raised to \$6.15 an hour, or they must be provided with health insurance that meets the minimum coverage and cost requirements.

2. Review the salaries and hours worked of all salaried employees considered exempt under the Fair Labor Standards Act to determine if any arguably make less than the new minimum wage during any workweek. Remember, salaried exempt employees are not exempt from the new minimum wage.
3. Review the methods of tracking hours of all employees to ascertain that all hours worked are properly accounted for.
4. Implement, where necessary, procedures for tracking the hours worked of salaried employees. Remember, salaried exempt employees are not exempt from the new minimum wage. The employer will be required to demonstrate compliance with minimum wage requirements for even the traditionally exempt employees. Time records is one way to do this.
5. Review your compliance decisions with and responses to the new minimum wage with your labor counsel.

Rick D. Roskelley is a Shareholder in Littler Mendelson's Las Vegas office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Roskelley at rroskelley@littler.com.

1
2 LEON GREENBERG, ESQ., SBN 8094
3 DANA SNIEGOCKI, ESQ., SBN 11715
4 Leon Greenberg Professional Corporation
5 2965 South Jones Blvd- Suite E3
6 Las Vegas, Nevada 89146
7 (702) 383-6085
8 (702) 385-1827(fax)
9 leongreenberg@overtimelaw.com
10 dana@overtimelaw.com

11 Attorneys for Plaintiffs

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DISTRICT COURT
CLARK COUNTY, NEVADA

CHRISTOPHER THOMAS, and)	Case No.: A-12-661726-C
CHRISTOPHER CRAIG,)	
Individually and on behalf of)	Dept.: XXVIII
others similarly situated,)	
Plaintiffs,)	
vs.)	
NEVADA YELLOW CAB)	
CORPORATION, NEVADA CHECKER)	
CAB CORPORATION, and NEVADA)	
STAR CAB CORPORATION,)	
Defendants.)	

Parker "Sam" Moffitt, hereby affirms under penalty of perjury
that:

1. I am currently the chief shop steward for the taxi drivers
employed by Nevada Yellow Cab Corporation, Nevada Checker Cab
Corporation and Nevada Star Cab Corporation ("Yellow Checker Star"
or "YCS") in this case. Those taxi driver employees are represented
by the Industrial Technical and Professional Employees union, Local
4873 ("ITPE"), of which I am a member and which has appointed me to

1 my position as chief shop steward for those employees. The ITPE
2 has been the certified labor union representing the taxi driver
3 employees of YCS from before 2006 and through the current date.
4 During that time it has been a party to a series of collective
5 bargaining agreements ("CBA's") with YCS governing the employment of
6 all of the YCS taxi drivers with the current CBA having been entered
7 into in 2013 and expiring in July of 2017. I have been intimately
8 involved with the negotiations between the ITPE and YCS in respect
9 to the CBA's that have been agreed upon since 2005. As a member of
10 the bargaining committee of the ITPE for the YCS taxi drivers I
11 attended almost all of the meetings held with the representatives of
12 YCS in connection with those CBA negotiations since 2005 and I am
13 one of the signatories for the ITPE of both the 2008 and 2013 CBA
14 with YCS.

15 2. Since 2006, when Section 16, Article 15 was added to the
16 Nevada Constitution to grant minimum wage rights to employees, YCS
17 has repeatedly requested that the ITPE agree to waive those minimum
18 wage rights in its CBA for the YCS taxi drivers. Those requests by
19 YCS began no later than 2008 when a new CBA was being negotiated. I
20 know that for a fact because I was present at negotiating meetings
21 with YCS where that request was presented to the ITPE by YCS.

22 3. The ITPE refused the 2008 request by YCS that it agree to a
23 CBA that would waive the minimum wage rights of Section 16, Article
24 15 of the Nevada Constitution. The ITPE had no interest in
25 negotiating away that right and did not propose any concessions from
26 YCS be granted in exchange for such a waiver. A new CBA was agreed
27 upon by YCS and the membership of the ITPE in 2008 that did not
28 include any waiver of those minimum wage rights. When the

1 subsequent CBA negotiations began in 2012 one of the negotiating
2 request of YCS was, again, that the ITPE agree to a CBA that waived
3 the minimum wage rights of Section 16, Article 15 of the Nevada
4 Constitution.

5 4. The CBA negotiations between YCS and the ITPE in 2012 were
6 very acrimonious and unsuccessful. The ITPE called a strike which
7 lasted for 60 days in 2013 before a new CBA was negotiated and
8 agreed upon. That new CBA also did not waive the minimum wage
9 rights of the YCS taxi drivers under Section 16, Article 15 of the
10 Nevada Constitution. The ITPE never proposed to YCS waiving those
11 rights as a trade off for other concessions from YCS at anytime
12 during the negotiations leading up to the 2013 CBA.

13 5. The ITPE, as directed by its members, the YCS taxi drivers,
14 fought to preserve the rights of the YCS taxi drivers to minimum
15 wages, which came into existence with the amendment of the Nevada
16 Constitution in 2006 to add Section 16, Article 15. That position
17 by the ITPE was different from that taken by the other union
18 representing Las Vegas area taxi drivers, the United Steel Workers
19 (the "USW"), which acceded to taxi company employers requests for
20 such a waiver in the USW CBA's starting in 2008.

21 6. The fight that the ITPE members, the YCS taxi drivers,
22 have engaged in to preserve their minimum wage rights under Section
23 16, Article 15 of the Nevada Constitution, and not waive them in
24 their CBA, has been costly. The 2013 strike called by the ITPE
25 imposed a significant hardship on the ITPE and YCS taxi drivers and
26 their families who lost a large amount of wages while on such a
27 lengthy strike. If the YCS taxi drivers had agreed to waive those
28 minimum wage rights in the 2013 CBA negotiations it would have been

1 easier to secure a new CBA, either without any strike or through a
2 shorter strike. Presumably the ITPE in exchange for waiving those
3 rights could have secured other valuable CBA terms from YCS that
4 would have benefitted the YCS taxi drivers. Instead of securing
5 such other valuable CBA terms for the benefit of the YCS taxi
6 drivers the ITPE, at the behest of its members, the YCS taxi
7 drivers, negotiated to have their CBA preserve the minimum wage
8 rights of the YCS taxi drivers.

9

10 I have read the foregoing and affirm the same is true and correct.

11

12 Affirmed this 21st day December 2015

13

14

15

16

17

18

19

20

21

22

23

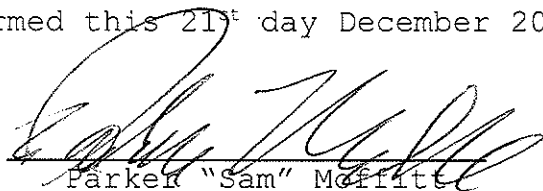
24

25

26

27

28



Parker "Sam" Moffitt

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARBARA GILMORE, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Appellant,
vs.
DESERT CAB, INC.,
Respondent.

No. 62905

FILED

APR 16 2015

THADIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order dismissing a class action for minimum wages. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

The Minimum Wage Amendment to the Nevada Constitution, Nev. Const. art. 15, § 16, implicitly repealed NRS 608.250(2)(e)'s exception for taxicab drivers. *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. ___, 327 P.3d 518 (2014). Therefore, appellant taxicab driver stated a viable claim for minimum wages, and we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for further proceedings.¹

[Signature]

, J.

Saitta

[Signature]

, J.

Gibbons

[Signature]

, J.

Pickering

¹We have considered the parties' arguments on appeal, and we decline to further address them.

cc: Hon. Douglas W. Herndon, District Judge
Leon Greenberg Professional Corporation
Moran Law Firm, LLC
Eighth District Court Clerk

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

2 BARBARA GILMORE,
3 Individually and on behalf of others
4 similarly situated,

5 Appellant,

6 vs.

7 DESERT CAB, INC.,

8 Respondent.
9
10
11
12

Electronically Filed
Dec 01 2014 04:09 p.m.
No. 62905
Tracie K. Lindeman
Clerk of Supreme Court

District Court Case No.: A-12-668502-C

13 **RESPONDENT, DESERT CAB, INC.'S ANSWERING BRIEF**
14
15
16

17 /s/Jeffery A. Bendavid

18 **JEFFERY A. BENDAVID, ESQ.**

19 Nevada Bar No. 6220

20 **MORAN BRANDON BENDAVID MORAN**

21 630 South 4th Street

22 Las Vegas, Nevada 89101

23 (702) 384-8424

24 *Attorney for Respondent*
25
26
27
28

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

2 BARBARA GILMORE,
3 Individually and on behalf of others
4 similarly situated,

5 Appellant,

6 vs.

7 DESERT CAB, INC.,

8 Respondent.

Supreme Court Case No.: 62905

11
12 **RESPONDENT, DESERT CAB, INC.'S NRAP 26.1 DISCLOSURE**

13 The undersigned counsel of record certifies that the following are persons
14 and entities as described in *NRAP26.1(a)*, and must be disclosed. These
15 representations are made in order that the Justices of this Court may evaluate
16 possible disqualification or recusal.

- 17 1. Parent corporations – No such corporation.
18 2. Publicly held company owning 10% of Respondent's stock – No such
19 corporation.
20 3. Respondent's Law Firm – Moran Brandon Bendavid Moran
21 4. Pseudonym – None

22 /s/Jeffery A. Bendavid

23 **JEFFERY A. BENDAVID, ESQ.**

24 Nevada Bar No. 6220

25 **MORAN BRANDON BENDAVID MORAN**

26 630 South 4th Street

27 Las Vegas, Nevada 89101

28 (702) 384-8424

Attorney for Respondent

TABLE OF CONTENTS

Table of Authorities	iii
I. Jurisdictional Statement	1
II. Issues Presented	1
III. Combined Statement of the Case and Facts	1
IV. Standard of Review	4
V. Summary of the Argument	4
VI. Argument	7
A. The District Court's Decision Is Not Identical and Need Not Be Reversed In Light of This Court's Opinion in <i>Thomas v. Nevada Yellow Cab</i> <i>Corporation</i>	7
B. Appellant Is Precluded by Nevada Law from Seeking an "Advisement" From the Court and From Arguing That the Holding in <i>Thomas v. Nevada Yellow Cab</i> <i>Corporation</i> Is Not Limited to Conduct Taking Place After June 26, 2014.....	11
C. The Nevada's Supreme Court Decision in <i>Thomas v.</i> <i>Nevada Yellow Cab Corporation</i> Expressly Limits Conduct Taking Place After June 26, 2014.....	17
VII. Conclusion	27
VIII. Certificate of Compliance	

TABLE OF AUTHORITIES

I. Cases:

1. Edwards v. Emperor's Garden Restaurant,
122 Nev. 317, 330, n.38, 130 P.3d 1280, 1288, n.38 (2006)..... 13
2. Hansen v. Harrah's,
100 Nev. 60, 62-65, 675 P.2d 394, 396-98 (1984) 21-27
3. Heidt v. Heidt,
108 Nev. 1009, 1011, 842 P.2d 723, 725(1992)..... 12
4. Kahn v. Morse & Mowbray,
121 Nev. 464, 480, n.24, 117 P.3d 227, 238, n.24 (2005) 12
5. Mengelkamp v. List,
88 Nev. 542, 545-46, 501 P.2d 1032, 1034 (1972)7-9
6. Peot v. Peot,
92 Nev. 338, 390, 551 P.2d 242, 244 (1976)12
7. Pack v. LaTourette, 128 Nev. Adv. Rep. 25 * 5-6,
2773d 1246, 1248 (May 31, 2012)4
8. Thomas v. Nevada Yellow Cab Corporation,
130 Nev. Adv. Op. 52 *2-9, 327 P.3d 518, 519-22
(June 26, 2014) 4-12, 15-26
9. State of Washington v. Bagley,
114 v. 788, 792, 963 P.2d 498, 501 (1998)..... 12
10. United States v. Jackson,
480 F.3d 1014, 1019 (9th Cir. 2007) 20

II. Nevada Constitution:

1. Article 15, Section 162, 7, 15

1 **III. Nevada Revised Statutes:**

2

3 1. NRS 218.0108

4 2. NRS 608.0202, 10

5 3. NRS 608.0302, 10

6 4. NRS 608.0402, 10

7 5. NRS 608.2503, 19

8

9

10 **IV. Nevada Rules of Appellate Procedure:**

11 1. NRAP 3(A)(a)3

12 2. NRAP 28(a)(9)13

13 3. NRAP 303

14

15

16 **V. Nevada Rules of Civil Procedure:**

17 1. N.R.C.P. 12(b)(5) 3

18

19

20

21

22

23

24

25

26

27

28

1 **C. The Nevada's Supreme Court Decision in *Thomas v. Nevada Yellow***
2 ***Cab Corporation* Expressly Limits Conduct Taking Place After June**
3 **26, 2014.**

4 Notwithstanding the above and in the event that this Court elects to consider
5 Appellant's self-concocted "Second" Issue on Appeal, Appellant does not
6 demonstrate the absence of an issue of retroactivity as concluded in Appellant's
7 Opening Brief.⁷⁴ Specifically, Appellant first contends in her Opening Brief that
8 this matter does not present "any retroactive application of law" since Nevada's
9 Minimum Wage Amendment became effective on November 28, 2006, or the
10 date that the Nevada Supreme Court canvassed the votes.⁷⁵ Therefore, Appellant
11 incorrectly concludes that no issue remains regarding the retroactive application
12 of the Court's decision in *Thomas*, which impliedly repealed *NRS 608.250*.⁷⁶

13 As is the case with Appellant's entire argument on this issue, neither *Thomas*
14 nor this matter ever raised the issue or challenged in any way the effective date of
15 Nevada's Minimum Wage Amendment.⁷⁷ More importantly, the Court in
16 *Thomas* considered only a single issue - whether Nevada's Minimum Wage

17
18
19
20
21
22
23
24
25

⁷⁴ See Appellant's Opening Brief at 6.

26 ⁷⁵ See *Id.*

27 ⁷⁶ See *Id.*

28 ⁷⁷ See 130 Nev. Adv. Op. 52. See generally, also, Respondent's Appendix at 1-13.

1 Amendment repealed the taxi drivers exception as provided in *NRS*
2 *608.250(2)(e)*.⁷⁸

3 Contrary to Appellant's Opening Brief, the Court in *Thomas* expressly
4 recognized the simultaneous existence of Nevada's Minimum Wage Amendment
5 and the prior enacted exception for taxi drivers to Nevada minimum wage laws as
6 expressed in *NRS 608.250(2)(e)*.⁷⁹ Thus, prior to the Court's decision in *Thomas*,
7 employers of taxicab drivers were lawfully permitted not to pay Nevada's
8 minimum wage pursuant to *NRS 608.250(2)(e)*.
9
10
11

12 Only the Court's analysis in *Thomas* determined that these two (2) laws could
13 no longer coexist (*i.e.*, be harmonized), since Nevada's Minimum Wage
14 Amendment failed to identify taxicab drivers as a specific exception to the new
15 definition of "employee" prescribed by Nevada's Minimum Wage Amendment.⁸⁰
16 Therefore, the Court held that *NRS 608.250(2)(e)* was "irreconcilably repugnant"
17 to Nevada's Minimum Wage Amendment.⁸¹ Consequently, this Court in *Thomas*
18 held that the constitutional supremacy of Nevada's Minimum Wage Amendment
19 required the implied repeal of *NRS 608.250(2)(e)* and therefore, Nevada's
20
21
22
23
24
25

26 ⁷⁸ See, *130 Adv. Op. 52 at *3-6*.

27 ⁷⁹ See *Id.*

28 ⁸⁰ See *Id. at *9*.

⁸¹ *Id. at *6*.

1 Minimum Wage Amendment “supersedes and supplants” the taxi drivers
2 exception provided by *NRS 608.250(2)(e)*.⁸²

3
4 Never did this Court in *Thomas* declare that *NRS 608.250(2)(e)* did not exist
5 prior to or because of Nevada’s Minimum Wage Amendment.⁸³ Never did this
6 Court in *Thomas* declare that implied repeal of *NRS 608.250(2)(e)* retroactively
7 applied to the effective date of Nevada’s Minimum Wage Amendment.⁸⁴

8
9 Instead, the implied repeal of *NRS 608.250(2)(e)* was accomplished only by
10 the Nevada’s Supreme Court holding in *Thomas* and not by the effectuation of
11 Nevada’s Minimum Wage Amendment.⁸⁵ As such, both existed side by side until
12 *Thomas*, wherein the Court held that Nevada’s Minimum Wage Amendment
13 impliedly repealed *NRS 608.250(2)(e)*.⁸⁶

14
15
16 The Court’s use of the present tense in *Thomas* in two (2) distinct instances
17 cements the reality that the implied repeal of *NRS 608.250(2)(e)* was never
18 intended to occur from the effective date of Nevada’s Minimum Wage
19 Amendment. First, in determining that *NRS 608.250(2)(e)* was “irreconcilably
20 repugnant” to Nevada’s Minimum Wage Amendment, the Court expressly stated
21
22
23
24

25 ⁸² *Id. at* *9.

26 ⁸³ *Id. at* *6-9.

27 ⁸⁴ *See Id.*

28 ⁸⁵ *Id. at* *9 (“*supersedes and supplants the taxicab drivers exception set out in NRS 608.250(2)*”).

⁸⁶ *See Id.*

1 in *Thomas* that *NRS 608.250(2)(e)* “is impliedly repealed.”⁸⁷ In other words, the
2 Court, using the present tense statement “is impliedly repealed,” appropriately
3 concluded and declared that going forward from its decision in *Thomas*, *NRS*
4 *608.250(2)(e)* could no longer be used by employers of taxi drivers to avoid
5 paying Nevada’s minimum wage.⁸⁸ Any other ruling would unjustly penalize an
6 entire industry and possibly lead to calamitous results for some of the cab
7 companies.
8

9
10 Had the Court, which it was free to do, made use of the past tense statement,
11 “was impliedly repealed,” then the Court would have indicated that it deemed
12 *NRS 608.250(2)(e)* repealed as of the effective date of Nevada’s Minimum Wage
13 Amendment. The Court in *Thomas* made no such past tense statement.⁸⁹
14
15

16 Second, the Court in *Thomas* declared, “the Minimum Wage Amendment, by
17 enumerating specific exceptions that do not include taxi drivers, supersedes and
18 supplants the taxicab driver exception set out in *NRS 608.250(2)*.”⁹⁰ Again, the
19 Court in *Thomas* made use of the present tense plainly indicating that Nevada’s
20 Minimum Wage Amendment, prospectively from *Thomas*, “supersedes and
21
22
23
24

25 ⁸⁷ *Id.* at *6.

26 ⁸⁸ *See Id.* *See also, e.g., United States v. Jackson*, 480 F.3d 1014, 1019 (9th Cir.
27 2007) (use of verb tense is significant) (“words used in the present tense
include the future as well as the present”) (citations and quotations omitted).

28 ⁸⁹ *See Id.*

⁹⁰ *Id.* at *9. (Emphasis Added).

1 supplants” *NRS 608.250(2)*.⁹¹ As before, the Court in *Thomas* had the ability to
2 make use of the past tense, “superseded and supplanted,” and elected instead to
3 make use of the present tense.⁹²
4

5 Appellant’s Opening Brief makes no argument regarding the Court’s use of
6 the present tense in *Thomas*.⁹³ Nonetheless, the *Thomas* Court’s election to make
7 use of the present tense plainly demonstrates the Court’s intention only to hold
8 *Thomas* and the implied repeal of *NRS 608.250(2)(e)* effective prospectively from
9 the Court’s decision rendered on July 26, 2014.⁹⁴ As such, the effective date of
10 Nevada’s Minimum Wage Amendment does not determine in any way the
11 Court’s implied repeal of *NRS 608.250(2)(e)* pursuant to *Thomas* or the date for
12 determining when the employers of taxi drivers were required to pay Nevada’s
13 minimum wage.
14
15
16
17

18 In addition, Appellant’s reliance on the Court’s decision in *Hansen v.*
19 *Harrah’s* has no merit and the actual application of *Hansen* supports the
20 prospective application only from the date of the Court’s decision in *Thomas*.
21 Appellant’s Opening Brief declares that *Hansen* somehow “illustrates the
22 complete fallaciousness of the claim that *Thomas* has no application” to conduct
23
24
25

26 ⁹¹ *See Id.*

27 ⁹² *Id.*

28 ⁹³ *See generally, Appellant’s Opening Brief.*

⁹⁴ *See supra.*

1 that occurred prior thereto”⁹⁵ However, the Court’s decision in *Hansen* is
2 distinguishable and in fact supportive of such a claim. In *Hansen*, the Court first
3 considered “whether Nevada should adopt the public policy exception to the at-
4 will employment rule recognizing as a proper cause of action retaliatory discharge
5 for filing a workmen’s compensation claim.”⁹⁶ As an exception to Nevada’s
6 common law at-will employment rule, the Court in *Hansen* adopted, as a common
7 law claim in tort, a claim for retaliatory discharge for an injured person’s
8 wrongful discharge in response to that injured person’s filing of a worker’s
9 compensation claim.⁹⁷

10 Unlike *Hansen*, neither *Thomas* nor this matter is concerned with the
11 application of Nevada’s common law at-will employment rules or any other
12 common law rules or claims.⁹⁸ Further, *Hansen*, unlike *Thomas*, never concerned
13 itself with the application of a decision by the Nevada Supreme Court implicitly
14 repealing a Nevada statute.⁹⁹ Instead, the Court in *Hansen* made use of its
15 exclusive power to create a common law claim in tort to support Nevada’s public
16 policy of protecting injured workers.¹⁰⁰ Accordingly, the Court’s decision in
17
18
19
20
21
22
23
24

25 ⁹⁵ *Id.* at *8.

26 ⁹⁶ *Hansen v. Harrah’s*, 100 Nev. 60, 62, 675 P.2d 394, 396 (1984).

27 ⁹⁷ *See Id.* at 64-65.

28 ⁹⁸ *See generally*, 130 Nev. Adv. Op. 52, and Appellant’s Opening Brief at 8-9.

⁹⁹ *See*, 100 Nev. at 63-65.

¹⁰⁰ *See Id.* at 64-65.

1 *Hansen* to create a new common law claim in tort for retaliatory discharge has no
2 application or influence on the application of the Court's decision in *Thomas*
3 implicitly repealing *NRS 608.250* because of Nevada's Minimum Wage
4 Amendment.
5

6 Appellant also contends that the Court in *Hansen* "imposed a current liability"
7 on the employer in *Hansen* based on that employer's "prior conduct" even though
8 the employers in *Hansen* had no advance notice of the newly created common
9 law claim for retaliatory discharge.¹⁰¹ Appellant's declaration actually is contrary
10 to the Court's decision in *Hansen*.
11
12

13 First, the Court in *Hansen* never imposed any liability on any party.¹⁰²
14 Instead, the Court in *Hansen*, after creating an entirely new common law claim in
15 tort, specifically remanded the matter to the District Court without imposing any
16 liability whatsoever on any party.¹⁰³
17
18

19 Second, the Court in *Hansen* expressly considered whether punitive damages
20 were available to a party who prevails on the newly created claim for retaliatory
21 discharge.¹⁰⁴ In *Hansen*, the Court found that punitive damages were available to
22
23
24
25

26 ¹⁰¹ *Appellant's Opening Brief at 8-9.*

27 ¹⁰² *See, 100 Nev. at 65.*

28 ¹⁰³ *See Id.*

¹⁰⁴ *See Id.*

1 a party prevailing on such a claim, but not in that case.¹⁰⁵ Although not discussed
2 in Appellant's Opening Brief, the Court in *Hansen* specifically found that the
3 imposition of punitive damages "would be unfair" since the Court determined it
4 was impossible for employers to know beforehand that their conduct was now,
5 because of *Hansen*, actionable in Nevada.¹⁰⁶ The Court in *Hansen* therefore
6 determined that these same unknowing employers could not be punished for such
7 conduct.¹⁰⁷ As such, the Court in *Hansen* expressly held that if the employees in
8 *Hansen* prevailed in trial, they still were prohibited from obtaining an award of
9 punitive damages against their employers.¹⁰⁸

13 It is the Court's analysis of the "Second" Issue in *Hansen* that actually
14 supports the prospective application of *Thomas* only from the date of decision.
15 Like the employers in *Hansen*, Respondent, as an employer of Appellant, a
16 taxicab driver, had no knowledge prior to *Thomas* that its reliance on the taxicab
17 driver exception set out in *NRS 6082.250(2)(e)* to not pay minimum wage was no
18 longer valid.¹⁰⁹ Appellant's Opening Brief declares that Respondent had such

25 ¹⁰⁵ *See Id.*

26 ¹⁰⁶ *Id.*

27 ¹⁰⁷ *See Id.*

28 ¹⁰⁸ *See Id.*

¹⁰⁹ *See supra.*

1 “knowledge,” but fails to reference any facts or allegations demonstrating such
2 alleged knowledge.¹¹⁰

3 Like the employers in *Hansen*, Respondent had no possibility of knowing that
4 that taxicab driver exception to Nevada’s minimum wage laws was going to be
5 found years later, “irreconcilably repugnant” because of this Court’s decision in
6 *Thomas*.¹¹¹ To date, four (4) sessions and five (5) special sessions of Nevada’s
7 Legislature convened and closed since the 2006 enactment of Nevada’s Minimum
8 Wage Amendment.¹¹² None of those sessions enacted any law repealing *NRS*
9 *608.250* or recognized the possible conflict or “irreconcilable repugnancy” of this
10 statute in light of the passage and enactment of Nevada’s Minimum Wage
11 Amendment.
12
13
14
15

16 Further, Nevada’s Labor Commissioner, until this Court’s decision in *Thomas*,
17 identified, recognized, and enforced all of the exceptions to Nevada’s minimum
18 wage laws as set forth in *NRS 608.250*. Finally, as recognized in Appellant’s
19 Opening Brief, at least six other District Courts, and in one instance, the United
20 States District Court for Nevada, previous to *Thomas*, held that the taxicab driver
21 exception provided by *NRS 608.250* remained enforceable despite Nevada’s
22
23
24
25
26

27 ¹¹⁰ See Appellant’s Opening Brief at 6-7.

28 ¹¹¹ See *supra*.

¹¹² 74th through 77th Sessions and 23rd through 27th Special Sessions.

1 Minimum Wage Amendment.¹¹³ In other words, every branch of Nevada's
2 government recognized for nearly eight (8) years after the passage and enactment
3 of Nevada's Minimum Wage Amendment that employers of taxi drivers were still
4 exempt from paying Nevada's minimum wage. As such, it was impossible for
5 Respondent, as an employer of taxi drivers such as Appellant, to have any
6 knowledge that their alleged failure to pay Nevada's minimum was somehow
7 unlawful and actionable prior to this Court's decision in *Thomas*.¹¹⁴
8

9
10 As a result, the retroactive application of the Court's decision in *Thomas*, as
11 in *Hansen*, would be completely unjust and unfair to Respondent since it was
12 impossible for Respondent to know that *NRS 608.250(2)(e)* was "irreconcilably
13 repugnant" to Nevada's Minimum Wage Amendment.¹¹⁵ Such "irreconcilable
14 repugnancy" only arose by operation of this Court's decision *Thomas*.
15

16
17 Consequently, applying *Thomas* retroactively against Respondent, as argued
18 for by Appellant, would unjustly punish Respondent in the same manner as the
19 employers in *Hansen*. Therefore, as in *Hansen*, the Court's decision in *Thomas*
20 should not apply to Respondent so that Respondent would not be unfairly
21 punished by the Court's implied repeal of *NRS 608.250(2)(e)*.¹¹⁶
22
23
24
25

26 ¹¹³ See Appellant's Opening Brief at 4-5.

27 ¹¹⁴ Accord, *Hansen*, 100 Nev. at 65.

28 ¹¹⁵ See *Id.*

¹¹⁶ See *Id.*

1 Thus, the Court's decision in *Hansen* fails to support Appellant's argument on
2 appeal. Further, the Court's determination in *Hansen* that it would be unfair to
3 employers to be subject to punitive damages where they had no prior indication
4 that their conduct was actionable, demonstrates the Court's willingness to
5 consider the effect of its decision on those parties, who like Respondent had
6 engaged in lawful business practices until the Court's decision to repeal.¹¹⁷
7

8 **VII. CONCLUSION**

10 Pursuant to the arguments provided above, the District Court did not error
11 in any way by granting Respondent's Motion to Dismiss Appellant's Complaint.
12 Appellant failed to provide any arguments or assignments of error on appeal that
13 concern Respondent's actual Motion to Dismiss.
14

16 Based upon the foregoing, Respondent respectfully requests that this
17 Honorable Court uphold the District Court's Order Granting Respondent's
18 Motion to Dismiss Appellant's Complaint.
19

20 DATED this 1st day of December, 2014.

21 /s/Jeffery A. Bendavid

22 **JEFFERY A. BENDAVID, ESQ.**

23 Nevada Bar No. 6220

24 **MORAN BRANDON BENDAVID MORAN**

25 630 South 4th Street

26 Las Vegas, Nevada 89101

27 (702) 384-8424

Attorney for Respondent

28 ¹¹⁷ *See Id.*



3 of 10 DOCUMENTS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEVADA

OPINION No. 2005-04

2005 Nev. AG LEXIS 4

March 2, 2005

SYLLABUS:

[*1]

BALLOTS; LABOR COMMISSIONER; WAGES: Notwithstanding the conclusion that the proposed amendment would effect an implied repeal of the provisions for calculation of the minimum wage and minimum wage entitlement found in *NRS 608.250*, the statutory exclusions from overtime compensation and the provisions of *NRS 608.250* relied upon in *NRS 608.018*, would stand as enacted for purposes of the overtime compensation law.

REQUESTBY:

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

OPINIONBY:

BRIAN SANDOVAL, Attorney General; PATRICIA PALM GASPARINO, Deputy Attorney General, Civil Division

OPINION:

As the Nevada Labor Commissioner, you are requesting an opinion regarding the potential effect of the amendment to the Nevada Constitution as proposed by the initiative placing Question No. 6, "Raise the Minimum Wage for Working Nevadans Act," on the 2004 General Election Ballot. Your questions concern the consequences of such an amendment upon Nevada's existing statutory framework for minimum [*2] wage and overtime compensation benefits. Notwithstanding the recent introduction of Assembly Bill 87 in the current session of the Nevada Legislature, the issues and conclusions of this opinion should be shared with appropriate legislative committees for consideration of prudent anticipatory statutory amendments to current laws that will be impacted by any passage of Question No. 6 amending the Nevada Constitution.

GENERAL BACKGROUND INFORMATION

Currently under *NRS 608.250*, certain employees in private employment are entitled to minimum wages at a rate to be established by the Nevada Labor Commissioner in accordance with federal law. Nevada's overtime compensation statute, *NRS 608.018*, incorporates select provisions of the minimum wage law at *NRS 608.250* to delineate which employees are excluded from entitlement to statutory overtime compensation. Complimenting these Nevada laws, the Fair Labor Standards Act of 1938, as amended (FLSA), at 29 U.S.C.A. § 201 *et seq.*, sets forth the minimum wage and overtime compensation benefits [*3] required by federal law. n1 Under the FLSA, the general minimum wage rate is set at \$ 5.15 per hour. 29 U.S.C.A. § 206(a)(1) (1998). In accordance therewith, the Nevada Labor Commissioner has also set Nevada's general minimum wage rate at \$ 5.15 per hour. *NAC 608.110(1)*.

n1 Although states remain free to enact their own laws governing minimum wages and overtime benefits, compliance with state legislation will not excuse noncompliance with the FLSA. 29 U.S.C.A. § 218(a) (1998); *Alaska Int'l Indus., Inc. v. Musarra*, 602 P.2d 1240, 1246 (Alaska 1979).

Ballot Question No. 6, which is aimed at raising Nevada's minimum wage rate, stemmed from an initiative petition. See Nev. Const. art. 19, § 2 (reserving to the people the power to propose, by initiative petition, amendments to the constitution, and to enact or reject them at the polls); *Garvin v. Ninth Judicial Dist. Court ex rel. County of Douglas*, 118 Nev. 749, 751, 59 P.3d 1180, 1181 (2002) [*4] (discussing the initiative power). The initiative proposes to amend Article 15 of the Nevada Constitution to add the following section addressing minimum wages:

*Sec. 16. Payment of minimum compensation to employees. 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 [*5] 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 [*6] 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 [*7] but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period of not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.*

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

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

A majority of Nevada voters voting on Question No. 6 in the 2004 general election approved the proposed constitutional amendment. However, before the proposed amendment can become effective, the Secretary of State must resubmit the question for its approval by the voters in the 2006 general election. [*8] If a majority of the 2006 general election voters also approve the proposed amendment, it will become part of the Nevada Constitution upon certification of the election results. Nev. Const. art. 19 § 2(4); NRS 295.035.

QUESTION ONE

Would the provisions of NRS 608.250 through NRS 608.290 be voided by the successful passage of the proposed amendment?

ANALYSIS

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

A constitutional [*9] amendment, ratified subsequent to the enactment of a statute, is controlling on any point covered in the amendment. *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373, 378 (1882). Further, ratification of a constitutional amendment will render void any existing law that is in conflict with the amendment. Op. Nev. Att'y Gen. 08 (May 19, 1908); see also 16 AM. JUR. 2d Constitutional Law § 68 (1979) (if there is a conflict between a statute and a subsequently adopted constitutional provision, the statute must give way). We now consider the relevant statutory provisions in turn.

NRS 608.250

Responsibility for Wage Calculation

NRS 608.250 governs the minimum wage for private employment and provides as follows:

1. Except as otherwise provided in this section, the Labor Commissioner shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees in private employment within the State. The Labor Commissioner shall prescribe increases in the minimum wage in accordance with those prescribed by [*10] federal law, unless he determines that those increases are contrary to the public interest.

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

(a) Casual babysitters,

(b) Domestic service employees who reside in the household where they work.

(c) Outside salespersons whose earnings are based on commissions.

(d) Employees engaged in an agricultural pursuit for an employer who did not use more than 500 man-days of agricultural labor in any calendar quarter of the preceding calendar year.

(e) Taxicab and limousine drivers.

(f) Severely handicapped persons whose disabilities have diminished their productive capacity in a specific job and who are specified in certificates issued by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation.

3. It is unlawful for any person to employ, cause to be employed or permit to be employed, or to contract with, cause to be contracted with or permit to be contracted with, any person for a wage less than that established by the Labor Commissioner pursuant to the provisions of this section.

This statute's provisions for calculation of the minimum wage and the responsibility therefor are completely covered by and conflict [*11] with the corresponding provisions of the proposed amendment. First, like *NRS 608.250*, the proposed amendment provides a comprehensive minimum wage calculation method which is applicable to private employment. *See Proposed Amendment, § 16(A),(C)* (setting forth a minimum wage calculation applicable to "any . . . entity that may employ individuals or enter into contracts of employment").

Second, obvious conflict is revealed when comparing the competing methods of wage calculation. Specifically, *NRS 608.250(1)* requires that the Labor Commissioner, "in accordance with federal law, establish . . . the minimum wage" and "prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless he determines that those increases are contrary to the public interest." By the terms of these provisions, the minimum wage rate cannot be higher than the federal minimum wage rate (which is currently \$ 5.15 per hour). However, the proposed amendment sets the minimum wage rate at either \$ 5.15 or \$ 6.15 per hour, depending upon whether an employer provides sufficient health benefits. The proposed [*12] amendment also vests the Governor or a state agency designated by him with the responsibility of publishing adjustments to the minimum wage and requires those adjustments to be based upon increases in the federal minimum wage or increases in the Consumer Price Index not to exceed 3% per year, whichever is greater. *See Proposed Amendment, § 16(A)*.

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

Exclusions Based on Employee Type

Also apparent from a comparison of the proposed amendment and statute is the disagreement on the issue of which

employees are entitled to minimum wages. *NRS 608.250(2)* sets forth various exclusions from the statutory minimum wage entitlement for certain types of employees, *i.e.*, casual babysitters, domestic service employees who reside in the household where they work, etc. However, *NRS 608.250* [*13] does not provide any exclusion which is based on an employee's age, n2 the nonprofit status of an employer, or training periods of employment. In contrast, the proposed amendment does not exclude from its minimum wage coverage the types of employees listed at *NRS 608.250(2)*, except to the extent that those types of employees may also be "under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days." Proposed Amendment, § 16(C) (defining "employee" for coverage purposes to exclude certain employees under age eighteen).

n2 Previously, *NRS 608.250* expressly allowed for a minimum wage for minors that was eighty-five percent of the minimum wage for adults; however, the pertinent statutory language was deleted in 2001 when the statute was amended to allow the Labor Commissioner to establish prevailing wages in accordance with federal law. *See* 2001 Nev. Stat., ch. 90, § 9, at 564-65. Cf. *NAC 608.110(2)* (setting forth a lesser minimum wage for employees under age eighteen).

[*14]

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

NRS 608.260

Civil Court Remedies for Evasion of Minimum Wage Laws

Each competing minimum wage scheme provides a complete [*15] civil court remedy for evasion of its requirements. *See NRS 608.260* (stating, in part, "The employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage."); *compare* Proposed Amendment, § 16(B) (an employee may bring an action against his employer in the courts of this state and shall be entitled to all appropriate remedies available under the law or in equity, including back pay, damages, reinstatement or injunctive relief, and if prevailing, shall be entitled to reasonable attorney's fees and costs). As the proposed amendment has completely covered the topic of a civil court remedy, providing for even greater relief, its remedy would supplant and repeal by implication the existing civil remedy provision at *NRS 608.260*.

NRS 608.270(1) and NRS 608.290(2)

Administrative Enforcement of Minimum Wage Laws

NRS 608.270(1)(a) states that the "Labor Commissioner shall . . . administer and enforce the provisions of *NRS 608.250* [*16] ." In addition, *NRS 608.290(2)* provides with regard to violations of *NRS 608.250* that "in addition to any other remedy or penalty, the Labor Commissioner may impose against the person an administrative penalty of not more than \$ 5,000 for each such violation." The presumptive partial repeal of *NRS 608.250* notwithstanding, legal authority suggests that the proposed amendment would serve to modify these statutes as necessary to effectuate their continued use in enforcing the new minimum wage law.

The proposed amendment is silent with respect to the administrative enforcement authority of the Labor Commissioner and his imposition of administrative sanctions. Where, as here, "express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute, unless there is such inconsistency or repugnancy [between the laws] as to preclude the presumption, or the [new law] revises the whole subject-matter of the former. [Citations omitted.]" *Ronnow v. City of Las Vegas*, 57 Nev. 332, 365, 65 P.2d 133, 145 (1937). [*17] [Text altered.] The statutes in question here are consistent with the basic provisions of the proposed amendment.

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

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

The intent behind the administrative enforcement provisions at *NRS 608.270(1)(a)* and *NRS 608.290(2)*, *i.e.*, that the Labor Commissioner shall enforce the state's [*19] minimum wage law, is likely to prevail despite the specific references to *NRS 608.250* in *NRS 608.270(1)(a)* and *NRS 608.290*. *McKay*, 102 Nev. at 650, 730 P.2d at 443 (the intent behind a law will prevail over the literal sense of the words used in the law). However, given the specific references to *NRS 608.250* in *NRS 608.270(1)(a)* and *NRS 608.290*, it is conceivable that a court of law could find the Legislature intended the existing enforcement statutes apply only to the minimum wage as calculated under *NRS 608.250*, and not recognize the amendment to the Nevada Constitution as merely augmenting the statutes establishing the Labor Commissioner's pre-amendment administrative enforcement authority. If so, the intent behind existing statutes would be upset by allowing them to stand as enforcement tools for the new law, and the statutes should be treated as repealed. [*20] *See City and County of San Francisco v. County of San Mateo*, 896 P.2d 181, 195 (Cal. 1995) (Mosk, J., concurring) (existing statutes must be treated as repealed if the intent behind them would be thwarted by allowing them to stand in the face of a constitutional amendment). On the other hand, the more likely and appropriate conclusion is that the proposed amendment would modify these enforcement statutes to allow for the Labor Commissioner's enforcement of the new minimum wage law. *Cf. Perry v. Consolidated Special Tax Sch. Dist. No. 4*, 103 So. 639, 642 (Fla. 1925) (recognizing that previous statutory provisions, as modified by constitutional amendment, are sufficient to effectuate new constitutional provisions so that new provisions may be enforced even though they are not contained in or contemplated by present statutes).

NRS 608.270(1)(a), (2), NRS 608.280, and NRS 608.290(1)

Criminal Enforcement of Minimum Wage Laws

NRS 608.270(1)(a) and (2) establish that the district attorneys will prosecute [*21] violations of *NRS 608.250* and, for the willful failure to do so, will be subject to a misdemeanor conviction and removal from office. In addition, *NRS 608.280* requires the Attorney General to prosecute willful violations of *NRS 608.270*. Finally, *NRS 608.290(1)* also

makes the violation "of *NRS 608.250* or any regulation adopted pursuant thereto" a misdemeanor. For the same reasons given in the preceding section of this opinion (addressing the proposed amendment's effect upon the Labor Commissioner's administrative enforcement authority), it is also likely that a court would find that the proposed amendment only modifies, rather than repeals, the existing criminal enforcement statutes. In short, by enacting these criminal statutes the Legislature plainly intended that criminal sanctions would be used as a tool to enforce the state minimum wage law. Although, as with the provisions discussed in the preceding section, it is possible that a court could determine that the Legislature's intent [*22] is ambiguous with respect to application of the criminal enforcement statutes to the new minimum wage law. After considering this risk, the reasonable and fair conclusion is that the legislative intent behind the existing provisions is consistent with using these provisions to enforce the new minimum wage law. The criminal enforcement statutes are also consistent with the proposed amendment's apparent purpose of strengthening an employee's ability to collect minimum wages. The people, by presumption, were aware of the law's provisions when voting in favor of the proposed amendment. *See Op. Nev. Att'y Gen. 153* (December 21, 1934). As both the initiative and the proposed amendment are silent as to repeal of the criminal enforcement provisions, these provisions are likely to survive as modified to effectuate their continued use as an enforcement tool for the new minimum wage law. *See Ronnow v. City of Las Vegas, 57 Nev. at 332, 365, 65 P.2d 133, 145 (1937).*

CONCLUSION TO QUESTION ONE

If the proposed constitutional amendment is approved at the 2006 general election as established by certified election results, it would supplant and [*23] repeal by implication the wage calculation and coverage provisions of *NRS 608.250* and the civil remedy of *NRS 608.260*. *NRS 608.270(1)* and *NRS 608.290(2)* would likely be found to have been modified as necessary to effectuate the Labor Commissioner's enforcement of the new minimum wage. The criminal enforcement provisions of *NRS 608.270(1)(b)* and (2), *NRS 608.280*, and *NRS 608.290(1)* also would likewise be found to be modified to allow for their continued use in enforcing the new minimum wage law.

QUESTION TWO

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

ANALYSIS

As discussed in response to Question One above, the proposed amendment does not contain any of the exceptions to coverage currently set forth at *NRS 608.250(2)* [*24]. The only exception under the proposed amendment is for employees who are "under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days." Proposed Amendment, § 16(C) (defining "employee" for coverage purposes to exclude certain employees under age eighteen). In light of this, the exclusions under *NRS 608.250* are repugnant to the proposed amendment, the plain wording of which requires payment of the minimum wage regardless of whether an employee is currently excluded under *NRS 608.250(2)*. Consequently, the proposed amendment would effect an implied repeal of the exclusions set forth at *NRS 608.250* from minimum wage coverage.

CONCLUSION TO QUESTION TWO

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

QUESTION [*25] THREE

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

Commissioner?

ANALYSIS

Your question alludes to the language of *NRS 607.160(1)(a)(2)*, which states, "The Labor Commissioner . . . shall enforce all labor laws of the State of Nevada . . . the enforcement of which is not specifically and exclusively vested in any other officer, board or commission." As discussed in response to Question One above, the provisions of *NRS 607.160* and *NRS 607.170*, as well as the provisions under *NRS 608.270(1)(a)* and *NRS 608.290(2)*, demonstrate the Legislature's intent that the Labor Commissioner enforce Nevada's minimum wage law, even as amended or supplanted by the instant initiative. Therefore, the proposed amendment would likely only modify the existing statutes as needed for such enforcement. The proposed amendment's civil remedy [*26] at section 16(B) would supplant the existing statutory civil remedy at *NRS 608.260*, but this would have no additional affect on the existing statutes providing for the Labor Commissioner's enforcement jurisdiction in other areas.

Moreover, section 16(B) of the proposed amendment provides, in relevant part, that an employee "may bring an action against his or her employer in the courts of this State to enforce the provisions of this section." [Emphasis added.] The use of the word "may" in this context indicates that the remedy is intended to be permissive and it does not indicate exclusivity of the remedy. *D'Angelo v. Gardner*, 107 Nev. 704, 721 n.11, 819 P.2d 206, 217 n.11 (1991); *Ewing v. Fahey*, 86 Nev. 604, 608, 472 P.2d 347, 350 (1970). Indeed, the analogous provision currently set forth in *NRS 608.260* states that an "employee may . . . bring a civil action," and this remedy coexists with other statutes providing for enforcement by the Labor Commissioner. Thus the proposed amendment's civil remedy at section [*27] 16(B) does not specifically and exclusively vest authority elsewhere or divest the Labor Commissioner of all of his jurisdiction.

CONCLUSION TO QUESTION THREE

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

QUESTION FOUR

Would preemption of *NRS 608.250* have any effect on the statutory exclusions from entitlement to overtime compensation set forth in *NRS 608.018*?

ANALYSIS

The overtime compensation statute, *NRS 608.018*, should not be affected by the proposed amendment, even though it partially relies on *NRS 608.250*.

NRS 608.018 provides, in relevant part:

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

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

(b) More than 8 hours in [*28] any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.

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

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

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

....

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

....

(k) Drivers of taxicabs or limousines;

(l) Agricultural employees; n3

n3 The provisions of *NRS 608.018* do not refer to, rely on, or parallel the provisions of *NRS 608.250* and would not be affected by the repeal of the *NRS 608.250* scheme for minimum wage. Furthermore, it should be noted that *NRS 608.180* -- *608.195* provide for civil and criminal enforcement and remedies for violations of *NRS 608.018*. This enforcement scheme is unrelated to the topic of minimum wage and would likewise remain unaffected by the proposed amendment.

[*29]

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

The exclusions at *NRS 608.250(2)(d)* (for employees "engaged in agricultural pursuit for an employer who did not use more than 500 man-days of agricultural labor") and in *NRS 608.250(2)(e)* (for "taxicab and limousine drivers") are also subsumed in other corresponding statutory exclusions from overtime compensation. In particular, *NRS 608.018(k)* [*30] and (l) set forth exclusions which are at least as broad as those at *NRS 608.250(2)(d)* and (e) and which do not depend on or refer to *NRS 608.250*. Accordingly, any question as to the continuing validity of *NRS 608.250(2)* cannot affect the lack of entitlement to statutory overtime compensation for taxicab and limousine drivers or for agricultural employees.

On the whole, the exclusions from statutory overtime coverage, as incorporated from *NRS 608.250(2)*, are complimentary to the exclusions under the FLSA's overtime compensation provisions. n4 Hence, it is apparent that the Legislature intended to enact state overtime compensation law that was generally consistent with federal law on the same topic and to exclude from statutory overtime compensation the types of employees identified at *NRS 608.250(2)*. This intent should be respected regardless of changes in the law on the distinct subject matter of minimum wages.

n4 See, e.g., 29 U.S.C.A. § 213(a)(1) (1998) (addressing outside salespersons); 29 U.S.C.A. § 213(a)(6) (1998) (addressing employees employed in agriculture); 29 U.S.C.A. §§ 213(a)(7), 214(c) (1998) (addressing handicapped workers); 29 U.S.C.A. § 213(a)(15) (1998) (addressing casual babysitters and those engaged in domestic service).

[*31]

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

In contrast, the exclusions from statutory overtime entitlement set forth at *NRS 608.018(2)(b)* and (d) rely on the calculation of the minimum wage under *NRS 608.250*. Subsection (2)(b) expressly does so, excluding from overtime compensation "employees [*32] who receive compensation for employment *at a rate not less than one and one-half times the minimum rate prescribed pursuant to NRS 608.250.*" [Emphasis added.] Subsection 2(d) excludes "salesmen earning commissions in a retail business *if their regular rate is more than one and one-half times the minimum wage, and more than one-half their compensation comes from commissions.*" [Emphasis added.]

The apparent intent behind *NRS 608.018(2)(b)* and (d) was to exclude from overtime compensation employees and certain salesmen who earned as a regular rate at least one and one-half times the minimum rate set by the Labor Commissioner -- a rate that is limited by the rate provided by federal law. *See NRS 608.250(1)*. In enacting *NRS 608.018(2)(b)* and (d), the Legislature could not have anticipated that overtime compensation would be required even though an employee earned more than one and one-half times the rate under federal law and *NRS 608.250*. Incorporation of the wage calculation at [*33] *NRS 608.250* into *NRS 608.018* reflects the Legislature's determination as to the proper balance of state interests. Amending or supplanting *NRS 608.018(2)(b)* or (d) with the higher minimum wage rate of the proposed amendment would prove more costly for employers and would frustrate the apparent intent of the Legislature to tie this variable in the overtime calculation to the federal minimum wage. n5 For this reason, and even more so because the proposed amendment is not concerned with overtime compensation, it would not effect a repeal or modification of these overtime compensation exclusions linked to *NRS 608.250*.

n5 For example, the current minimum wage rate is \$ 5.15 per hour. This rate multiplied by one and one-half equals \$ 7.73 per hour. Thus under *NRS 608.018(2)(b)* and (d), statutory overtime compensation is required until an employee or salesman with sufficient commissions earns at least \$ 7.73 per hour. Under the proposed amendment, assuming no adequate insurance is provided, the minimum wage would be initially set at \$ 6.15 per hour. This rate multiplied by one and one-half equals \$ 9.23 per hour. If the calculation from the proposed amendment were incorporated into *NRS 608.018(2)(b)* and (d), then an employee would be entitled to statutory overtime compensation until he earned \$ 9.23 per hour.

[*34]

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

CONCLUSION TO QUESTION FOUR

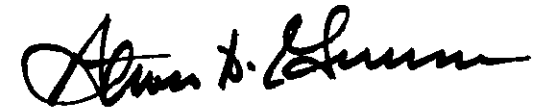
Notwithstanding the conclusion that the proposed amendment would effect an implied repeal of the provisions for calculation of the minimum wage and minimum wage entitlement found in *NRS 608.250*, the statutory exclusions from overtime compensation and the provisions of *NRS 608.250* relied upon in *NRS 608.018*, would [*35] stand as enacted for purposes of the overtime compensation law.

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative LawAgency RulemakingRule Application & InterpretationGeneral

OverviewGovernmentsLegislationExpirations, Repeals & SuspensionsGovernmentsLegislationInitiative & Referendum



CLERK OF THE COURT

1 **DECN**

2 LEON GREENBERG, ESQ., SBN 8094
3 DANA SNIEGOCKI, ESQ., SBN 11715
4 Leon Greenberg Professional Corporation
5 2965 South Jones Blvd- Suite E4
6 Las Vegas, Nevada 89146
7 (702) 383-6085
8 (702) 385-1827(fax)
9 leongreenberg@overtimelaw.com
10 dana@overtimelaw.com
11 Attorneys for Plaintiffs

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 MICHAEL MURRAY, and MICHAEL)	Case No.: A-12-669926-C
15 RENO, Individually and on)	
16 behalf of others similarly)	Dept.: I
17 situated,)	
18 Plaintiffs,)	
19 vs.)	DECISION AND ORDER
20 A CAB TAXI SERVICE LLC, and A)	
21 CAB, LLC,)	
22 Defendants.)	

23 This matter having come before the Court on the defendants'
24 motion to dismiss plaintiffs' complaint¹ pursuant to NRCP Rules
25 12(b)(1) and 12(b)(5), such motion having come before the Court for
26 oral argument on January 17, 2012, with Esther C. Rodriguez, Esq.,
27 arguing on behalf of the defendants and Leon Greenberg, Esq.,
28 arguing on behalf of the plaintiffs, and after due consideration of
the arguments, briefs and papers submitted by counsel for the
parties, and the record of these proceedings;

¹ The Complaint served in this case indicated the first named plaintiff as Michael Murphy although the Court's docket indicates his name is Michael Murray which is such person's correct name. Defendants do not concede that the caption of this order is proper.

1 **THE COURT FINDS:**

2 **Summary of Plaintiffs' Claims and the Parties' Dispute**

3 Plaintiffs allege they were formerly employed by defendants as
4 taxi cab drivers. They allege when they were so employed the
5 defendants were obligated to pay them a minimum wage as provided for
6 under Nevada's Constitution Article 15, Section 16 ("Section 16").
7 They further allege they were not paid such minimum wage. As a
8 result, they allege they are entitled to damages and other
9 relief as provided for by Section 16 and certain penalties
10 pursuant to NRS § 608.040. Defendants claim Section 16 does not
11 confer any right to a minimum wage upon taxi drivers and moves
12 to dismiss on that basis.

13 **Discussion**

14 The Court's decision ultimately rests upon the supremacy
15 of Nevada's Constitution in all matters of law not otherwise
16 controlled by federal law or the United States Constitution.
17 The very first sentence of Section 16, in paragraph "A,"
18 provides:

19 Each employer shall pay a wage to each employee of not
20 less than the hourly rates set forth in this section.

21 This language is clear, direct and unambiguous.

22 Accordingly, the Court's inquiry is limited to determining
23 whether the parties are "employer" and "employee" for the
24 purposes of Section 16. Defendants assert Section 16 was
25 intended only to raise the minimum wage and not disturb the
26 exemptions to Nevada's minimum wage requirements in Nevada
27 Revised Statutes 608.250(2). In resolving such assertion the
28 starting point for the Court must, of course, be the language

1 of Section 16 itself. In Section 16, paragraph "C," the
2 following definition of "employee" is provided:

3 As used in this section, "employee" means any person who
4 is employed by an employer as defined herein but does not
5 include an employee who is under eighteen (18) years of
6 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.

7 Again, this language is clear, direct and unambiguous.
8 Through such language Section 16 extends its minimum wage
9 requirements to all employees except those set forth in paragraph
10 "C." Such paragraph "C" does not include taxi drivers among the
11 employees excluded from the reach of Section 16.

12 Defendants argue that Section 16 makes no mention of the
13 exemptions in Nevada Revised Statutes 608.250(2) and implied repeal
14 occurs only when there is irreconcilable repugnancy between the two
15 laws compelling the conclusion that the later enactment necessarily
16 repeals the earlier. They further argue where express terms of
17 repeal are not used, the presumption is always against an intention
18 to impliedly repeal an earlier statute. In support of these
19 contentions they cite *Washington v. State*, 30 P.3d 1134, 1170 (Sup
20 Ct. Nev. 2001), *Mengelkamp v. List*, 501 P.2d 1032, 1034 (Sup. Ct.
21 Nev. 1972), and the authorities discussed therein. Accordingly, in
22 defendants' view, this Court must find that the two laws can exist
23 and be read in harmony; and Section 16 did not supplant the
24 exemptions specified in Nevada Revised Statute 608.250(2).

25 Unfortunately for defendants, the foregoing clear and
26 unambiguous language of Section 16, paragraph "A," and the clear and
27 unambiguous language of paragraph "C" setting forth who is an
28 "employee" for the purposes of Section 16, renders the Court unable

1 to conduct the intent analysis urged by defendants and reach the
2 disposition they desire.

3 An examination of the intent or purpose behind a constitutional
4 provision is only proper when ambiguity exists in the language of
5 the provision. If there is no ambiguity the provision must be
6 applied in accordance with its plain meaning. See, *Halverson v.*
7 *Miller* 186 P.3d 893, 897 (Nev. Sup. Ct. 2008); *Nevadans for Nevada*
8 *v. Beers*, 142 P.3d 339, 347 (Nev. Sup. Ct. 2006); and *Rogers v.*
9 *Heller*, 18 P.3d 1034, 1038, n. 17 (Nev. Sup. Ct. 2001). The Court
10 discerns no ambiguity in the language of Section 16 and none has
11 been brought to its attention by defendants. Under such
12 circumstances, for the Court to engage in an analysis of the intent
13 behind Section 16, and by doing so override its express, clear, and
14 unambiguous language, would be antithetical to our system of
15 constitutional law. The people of the State of Nevada, through the
16 democratic process, have made Section 16 the supreme law of the
17 State of Nevada by placing its provisions in Nevada's Constitution.
18 This Court is duty bound to enforce Section 16 and its clear
19 language.

20 The provisions of NRS 608.250(2) make no mention of Section 16
21 and speak only of providing an exemption to the requirements set
22 forth in NRS 608.250(1). Nor does Section 16 grant the legislature
23 the power to modify any of its requirements. Section 16, being a
24 constitutional provision not subject to legislative modification,
25 must displace any conflicting statute. Accordingly, the provisions
26 of NRS 608.250 are not controlling upon plaintiffs' claims brought
27 under Section 16.

28 In reaching its decision, the Court acknowledges it has been

1 advised of the contrary conclusion rendered in the opinion issued by
2 United States District Court Judge Jones in *Lucas v. Bell*
3 *Transportation*, 2009 U.S. Dist. LEXIS 72549, (D. Nev. June 23, 2009).
4 It has also been made aware that the holding of *Lucas* has been
5 adopted by two of the judges of this Court.² With all due respect
6 to its judicial brethren, this Court must decline to follow *Lucas*
7 which this Court believes has not appropriately recognized, and
8 respected, the clear language and primacy of Section 16.

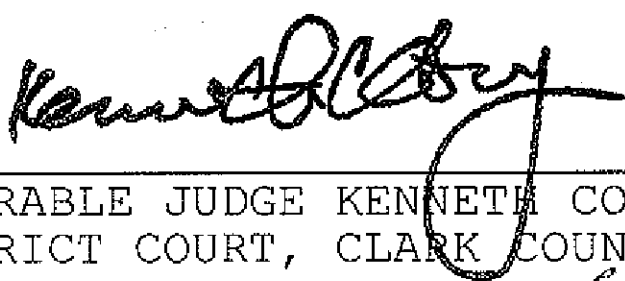
9 The Court realizes application of Section 16 to the defendants,
10 and its industry, represents a significant change for how such
11 employers must conduct business. The Court is effectuating such
12 change because it is required to do so, it passes no judgment on the
13 wisdom of such change. [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 **Conclusion**

19 Defendants' motion to dismiss pursuant to NRCP Rules 12(b)(1)
20 and 12(b)(5) is denied.

21
22 IT IS SO ORDERED this 8 day of Feb, 2013

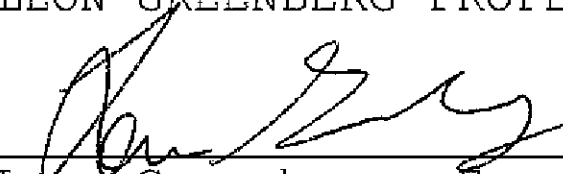
23 
24
25 HONORABLE JUDGE KENNETH CORY
26 DISTRICT COURT, CLARK COUNTY
27 ER

28 ² See, *Thomas v. Nevada Yellow Cab*, A-12-661726-C, August 30,
2012 and *Gilmore v. Desert Cab*, A-12-668502-C.

1 Submitted by:

2 LEON GREENBERG PROFESSIONAL CORP.

3

4 
Leon Greenberg, Esq.

Nevada Bar No. 8094

5 2965 S. Jones Boulevard - Ste. E-4

Las Vegas, NV 89146

6 Tel (702) 383-6085

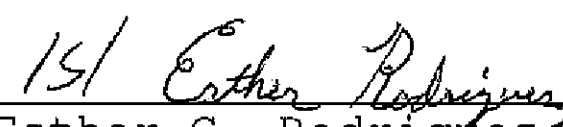
Attorney for the Plaintiffs

7

Approved as to Form:

8

9


Esther C. Rodriguez Esq.

Nevada Bar No. 6473

10 1061 Park Run Drive - Suite 150

11 Las Vegas, Nevada, 89145

Tel (702) 320-8400

12 Attorney for the Defendants

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

CERTIFICATE OF MAILING

The undersigned certifies that on December 28, 2015, she served the within:

RESPONDENTS' ANSWER AND
APPENDIX TO WRIT OF MANDAMUS

by court electronic service to

Marc C. Gordon, Esq.
Yellow Checker Star Transportation Co. Legal Dept.
5225 W. Post Road
Las Vegas, NV 89118

and

by depositing the same in the U.S. mail, first class postage, prepaid, addressed as follows:

The Honorable Ronald J. Israel
Regional Justice Center
Department 28
200 Lewis Avenue
Las Vegas, Nevada 89155

/s/Sydney Saucier

Sydney Saucier